



LUND UNIVERSITY

The Standard of Proof at the ICJ

On Evidentiary Standards and Judicial Decision-Making at the International Court of Justice

Bills, Amanda

2025

Document Version:

Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (APA):

Bills, A. (2025). *The Standard of Proof at the ICJ: On Evidentiary Standards and Judicial Decision-Making at the International Court of Justice*. [Doctoral Thesis (monograph), Faculty of Law]. Lunds universitet, Media-Tryck .

Total number of authors:

1

Creative Commons License:

CC BY-NC

General rights

Unless other specific re-use rights are stated the following general rights apply:

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Read more about Creative commons licenses: <https://creativecommons.org/licenses/>

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

The Standard of Proof at the ICJ

On Evidentiary Standards and Judicial Decision-Making at the International Court of Justice

AMANDA BILLS
FACULTY OF LAW | LUND UNIVERSITY



The Standard of Proof at the ICJ

On Evidentiary Standards and Judicial Decision-Making at the International Court of Justice

Amanda Bills



LUND
UNIVERSITY

DOCTORAL DISSERTATION

Doctoral dissertation for the degree of Doctor of Philosophy (PhD) at the Faculty of Law at Lund University to be publicly defended on 25 September 2025 at 10.00 in Pufendorfsalen, Faculty of Law, Lilla Gråbrödersgatan 3C, 222 22, Lund

Faculty Opponent

Professor Eric de Brabandere

Organization: LUND UNIVERSITY

Document name: Doctoral Thesis

Date of issue: 2025-09-25

Author(s): Amanda Bills

Sponsoring organization:

Title and subtitle: The Standard of Proof at the ICJ: On Evidentiary Standards and Judicial Decision-Making at the International Court of Justice

Abstract: The standard of proof at the International Court of Justice (ICJ) is a central, yet underexplored, aspect of its judicial decision-making. Although central in shaping both fact-establishment and judicial outcomes, the articulation and application of the standard of proof by the Court are marked by inconsistency and a lack of transparent justification. This inconsistency is often linked to an assumed 'flexibility' in the Court's evidentiary regime, the nature and extent of which have not been clearly delineated. This thesis combines doctrinal legal research with quantitative and qualitative analyses of the evidentiary and decisional practices of the ICJ. It draws on a general concept of proof and a theory of bounded discretionary power, alongside a doctrinal analysis of sources of international law relevant to the ICJ's procedural framework, to construct a conceptual framework for the standard of proof. The empirical component maps how the ICJ articulates and applies standards of proof through a quantitative review of judicial practice and in-depth qualitative analysis of selected case studies. These case studies examine the Court's application of 'conclusive' and 'fully conclusive' standards of proof in cases involving grave allegations, contrasted with the flexible and context-dependent requirement of 'sufficient' evidence standard in other types of cases. The thesis finds that the Court's determination of the standard of proof is flexible and contextually adaptive, yet bounded by legal and institutional constraints. This evidentiary approach is shaped primarily by sensitivity to the interests and preferences of states appearing as parties before the Court, balancing sovereignty protection, reputational risks, and the imperative of legitimate and fair dispute settlement. Judicial restraint predominates in high-stakes cases to safeguard state interests, while a degree of judicial pragmatism allows for greater flexibility in disputes involving less sensitive state interests. This dynamic is captured in the 'open-close' model proposed by this thesis, which frames the Court's discretion as expansive and flexible in its capacity to consider a broad range of legal, procedural, and normative factors ('open'), yet one that remains bounded by a set of institutional constraints, state interests, and political sensitivities that limit its evidentiary decision-making ('close'). This thesis offers a systematic framework clarifying the previously opaque evidentiary reasoning of the ICJ's flexible yet bounded approach to the standard of proof, enabling more informed and critical engagement with its establishment of facts and broader evidentiary decision-making.

Key words: International Court of Justice (ICJ), standard of proof, international procedural law, international adjudication, judicial decision-making

Language: English

Number of pages: 301

ISBN: 978-91-8104-642-7 (print)

978-91-8104-643-4 (electronic)

Recipient's notes

Price

Security classification

I, the undersigned, being the copyright owner of the abstract of the above-mentioned dissertation, hereby grant to all reference sources permission to publish and disseminate the abstract of the above-mentioned dissertation.

Signature

Date 2025-08-12

The Standard of Proof at the ICJ

On Evidentiary Standards and Judicial Decision-Making at the International Court of Justice

Amanda Bills



LUND
UNIVERSITY

Cover photo by Susan Wilkinson / Unsplash

Copyright pp 1-301 Amanda Bills

Faculty of Law

Department of Law

ISBN 978-91-8104-642-7 (print)

ISBN 978-91-8104-643-4 (electronic)

Printed in Sweden by Media-Tryck, Lund University

Lund 2025



Media-Tryck is a Nordic Swan Ecolabel certified provider of printed material. Read more about our environmental work at www.mediatryck.lu.se

MADE IN SWEDEN 

Table of Contents

- Acknowledgements 8
- Abbreviations 10
- 1. Introduction 11**
 - 1.1 Setting the Scene 11
 - 1.2 Research Problem and Questions 18
 - 1.3 Methodological and Theoretical Framework 20
 - 1.3.1 Doctrinal Analysis of Evidentiary Considerations 21
 - 1.3.2 Analysis of Judicial Practice 27
 - 1.4 Contribution of the Research 32
 - 1.4.1 State of the Art 32
 - 1.4.2 Scholarly Intervention 40
 - 1.5 Delimitations 41
 - 1.6 Terminological Clarifications 43
 - 1.7 Outline 45
- 2. The Standard of Proof in Adjudication 49**
 - 2.1 Introduction 49
 - 2.2 The Function of the Standard of Proof 50
 - 2.3 The Components of Proof 54
 - 2.3.1 Burden of Proof 54
 - 2.3.2 Admission of Evidence 56
 - 2.3.3 Evaluation of Evidence 57
 - 2.3.4 Standard of Proof 59
 - 2.4 The Determination of the Standard of Proof 68
 - 2.4.1 General Considerations 68
 - 2.4.2 Risk Allocation and Error Minimisation 70
 - 2.4.3 Interests of Judicial Policy and Procedural Equity 73
 - 2.5 Conclusion 77

3. The Evidentiary Regime of the ICJ	79
3.1 Introduction.....	79
3.2 The Functions of the Court	80
3.2.1 The Function of the Court as a Judicial Body.....	80
3.2.2 The Function of the Court as a Principal UN Organ.....	84
3.2.3 The Function of the Court as a Systemic Actor	89
3.3 The Legal Framework for Evidence	93
3.3.1 The ICJ Statute	93
3.3.2 Customary International Law and General Principles	99
3.3.3 Principles of Evidence from Judicial Practice.....	101
3.4 The Determination of the Standard of Proof.....	109
3.4.1 General Considerations	110
3.4.2 Risk Allocation and Gravity of Disputes	111
3.4.3 Judicial Policy, Procedural Values, and the Institutional Role of the Court.....	114
3.5 Conclusion	117
4. Discretionary Power in the Evidentiary Regime of the ICJ.....	121
4.1 Introduction.....	121
4.2 The Concept of Discretionary Power.....	123
4.3 Discretion in International Legal Decision-Making	128
4.3.1 Judicial Discretion before International Courts	129
4.3.2 Limits of Judicial Discretion before International Courts	132
4.4 Discretion in the ICJ Evidentiary Regime	135
4.4.1 Sources of Discretionary Power	135
4.4.2 Distinguishing Judicial Discretion from Inherent Powers	137
4.4.3 Limits of Discretionary Power	140
4.5 Conclusion	146
5. ‘Fully Conclusive’ and ‘Conclusive’ Evidence for Grave Charges ...	149
5.1 Introduction.....	149
5.2 The <i>Corfu Channel</i> Case: ‘Charges of Exceptional Gravity’	152
5.3 Use of Force Cases: ‘Conclusive’ Evidence	157
5.3.1 <i>Nicaragua</i> : ‘Clear and Convincing’ Evidence	158
5.3.2 <i>Oil Platforms</i> : ‘Conclusive’ Evidence	165
5.3.3 <i>Armed Activities</i> : ‘Convincing’ Evidence	170
5.3.4 Synthesis.....	178
5.4 Genocide Cases: ‘Fully Conclusive’ Evidence.....	179

5.4.1 <i>Bosnia Genocide</i> : ‘Fully Conclusive’ Evidence	180
5.4.2 <i>Croatia Genocide</i> : Reaffirming the ‘Fully Conclusive’ Standard of Proof	189
5.4.3 Synthesis.....	194
5.5 Conclusion	196
6. ‘Sufficient’ Evidence in State Responsibility and Boundary Delimitation Disputes	199
6.1 Introduction.....	199
6.2 Attribution of State Responsibility: ‘Convincing’ Evidence	201
6.2.1 ‘Sufficiency’ as the Evidentiary Threshold.....	201
6.2.2 ‘Convincing’ Evidence as the Standard of Proof.....	209
6.2.3 Synthesis.....	215
6.3 Boundary Delimitation Disputes: Selecting the Evidentially Most Plausible Option.....	216
6.3.1 ‘Sufficiency’ as the Evidentiary Threshold.....	216
6.3.2 Heightened Standard of Proof in Boundary Delimitation Disputes: ‘Convincing’ and ‘Compelling’ Evidence	224
6.3.3 Synthesis.....	228
6.4 Conclusion	229
7. Conclusions	233
7.1 Considerations in Determining the Standard of Proof: An ‘Open- Close’ Model of Evidentiary Decision-Making.....	233
7.2 Judicial Pragmatism and Restraint in the Application of the Standard of Proof	238
7.3 Concluding Remarks.....	241
Bibliography.....	245
Appendix: Evidentiary Standards in ICJ Contentious Cases.....	279

Acknowledgements

This thesis has been shaped by the generosity and support of many colleagues, friends, and mentors over the past five years. First and foremost, I wish to thank my supervisors, Lena Wahlberg and Britta Sjöstedt. It is difficult to capture in words five years of collaboration from research proposal to finished book. They have witnessed every stage of this journey, academic as well as personal, and have been a constant source of support, encouragement, and mentorship.

I am grateful to the colleagues who offered feedback throughout the different stages of writing this thesis. Gleider Hernández generously read and engaged with my work during my Final Seminar, with insightful feedback that helped me find the missing pieces of the puzzle needed to complete this thesis. Sanja Bogojević and Valentin Jeutner reviewed and provided thoughtful feedback during my Mid Seminar, which helped me shape the direction of the project at its midway point. Their constructive feedback has been invaluable in guiding and refining the development of this thesis.

Many thanks to the Grotius Centre at Leiden University for hosting me during my LERU research stay from April to May 2023, coordinated by Professor Joe Powderly. This visit provided valuable opportunities to connect and exchange ideas with a vibrant community of scholars and fellow doctoral students, whose collegiality greatly enriched my time in Leiden. Just across the Öresund Bridge, I would like to thank the iCourts Centre at the University of Copenhagen for welcoming me as a visiting researcher in June 2024. I extend particular thanks to Professor Mikael Rask Madsen for supporting this visit, and to the researchers and fellow visiting scholars at iCourts who made my stay both enjoyable and intellectually rewarding.

Forskriftstiftelsen Theodor Adelswärds Minne generously provided funding that enabled my research visit to Leiden. I am also grateful to the Erik and Gurli Hultengren Foundation for Philosophy at Lund University for financial support that made it possible for me to attend both The Hague Academy Winter Courses and later the iCourts Summer PhD School in Copenhagen.

The community of doctoral students at the Faculty of Law in Lund has played an important role throughout my doctoral journey. It has been a privilege to research and write alongside such a diverse group of scholars and to be part of such an open and friendly work environment over the past five years. As part of this, I am grateful to the Research School and its two successive directors of studies that I have been fortunate to learn from and work alongside, namely, Markus Gunneflo and later Richard Croneberg.

Throughout this process, I have benefited from discussions with colleagues who have provided constructive feedback on the different dimensions of this project. I wish to thank Jessica Almqvist, Christian Dahlman, Daria Davitti, Eduardo Gill-Pedro, Torvald Larsson, Ulf Linderfalk, Yana Litins'ka, and Anna Nilsson. For their friendship during this journey, and the occasional distraction from thesis work, I would like to thank Laurianne Allezard, Nicole Citeroni, Evan Collins, Geske Hvid, Amanda Kron, Marika Mäkinen, Pablo Pastor Vidal, Mathilda Tarandi, Will Thackray, Björg Valgeirsdóttir, and Anna Zemskova. I am also grateful to the colleagues within the faculty for their encouragement, in particular, Matilda Bergström, Sara Bergström-Halbauer, Sarah de Heer, Johan Hermansson, Anastasiya Kotova, Anny Matamoros, Mahesh Menon, and Sigrid Nikka.

Completing this thesis would not have been possible without the support of the Faculty's administrative and technical staff. I thank Helena Josefsson and Amir Majidzadeh Heravi for administrative support, and Tony Alexandersson for his assistance with all practical matters. I am grateful to the excellent librarians at the Faculty, especially Gunilla Wiklund for tracking down some of the more obscure books that I needed for this project and for arranging the occasional film licence for the Law & Cinema Group.

I am deeply grateful to friends and family for their support on this journey. In particular, I would like to thank my friend Jasmin Öykü Özdemir who has been a steady presence throughout many, if not most, stages of work on this thesis, offering words of wisdom on topics mostly unrelated to evidentiary standards before international courts – wisdom that was nonetheless always welcome and unexpectedly useful in completing this project.

Finally, I would like to thank my opponent, Professor Eric de Brabandere, as well as the distinguished members of the Examination Committee – Associate Professor Marie Jacobsson, Professor Mark Klamberg, and Professor *emeritus* Marcelo Kohen – for their time and engagement with this work.

Amanda Bills

Lund, 12 August 2025

Abbreviations

ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICFST	International Convention for the Suppression of the Financing of Terrorism
ICJ	International Court of Justice
ICTY	International Tribunal for the Former Yugoslavia
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
PCIJ	Permanent Court of International Justice
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
WTO	World Trade Organisation

1. Introduction

1.1 Setting the Scene

Fact-establishment is fundamental in adjudication. Judicial bodies are tasked with reconstructing past events based on a limited, and often fragmented or contested, evidential record. This process entails more than a neutral assembly of facts and is shaped not only by legal and procedural frameworks, but by the interpretative choices of the adjudicator. Central to this process are rules that govern the assessment of evidence, shaping how facts are established and interpreted to enable judicial decision-making. Fact-finding has particular significance in international judicial proceedings. Judicial determinations of fact shape not only the resolution of a dispute, but also the broader legal, political, and historical understandings of state conduct.¹ These findings often resonate beyond the confines of dispute settlement, with an influence on international legal discourse and affecting how international courts and tribunals are perceived by states and other international actors.

At the International Court of Justice (ICJ), several recent cases underscore the centrality of fact-finding and narrative construction to international judicial proceedings. In the now-pending case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*,² even the Court's *prima facie* establishment of facts in decisions for the indication of provisional measures has attracted significant

¹ See, for example, Ana Luísa Bernardino, 'The Discursive Construction of Facts in International Adjudication' (2020) 11 *Journal of International Dispute Settlement* 175, 188–189, who discusses the nature of judicial fact-finding and that international judicial bodies 'inevitably' contribute to narrative construction as '[j]udges are, after all storytellers'.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Application Instituting Proceedings and Request for the Indication of Provisional Measures) [2023] <<https://www.icj-cij.org/case/192>> accessed 25 June 2025.

media and public attention.³ The complex and politically sensitive background to the case has driven this attention, given the ongoing armed conflict between Israel and Hamas. In this context, Israel's military operations on the Gaza Strip have caused a large-scale humanitarian crisis, with reverberations across the international community. At the core of the dispute at the Court are allegations that Israel's conduct in the Gaza Strip amounts to acts of genocide within the meaning of the Genocide Convention,⁴ considered a charge of exceptional gravity in international law.⁵ In relation to the allegations, both the legal characterisation and the very existence of certain facts are fiercely contested. Despite the overwhelming evidence of Israel's conduct in the Gaza Strip, whether the Court will characterise the events as genocide remains to be seen. However, Israel's counsel argued that South Africa's narrative was 'completely divorced from the facts and circumstances', warning that 'calling something a genocide again and again does not make it true' and moreover that '[f]acts matter and truth should matter'.⁶ This statement underscores the

³ The first Order indicating provisional measures was reported as a 'ruling' on the genocidal acts despite being decided on a *prima facie* basis. See Stephanie van den Berg, Bassam Masoud, and Nidal Al-Mughrabi, 'World Court stops short of Gaza ceasefire order for Israel' *Reuters* (27 January 2024) <<https://www.reuters.com/world/middle-east/israel-braces-world-court-ruling-focuses-attack-south-gaza-2024-01-26/>> accessed 24 June 2025, noting the Court had ordered Israel 'to take all measures within its power to prevent its troops from committing genocide'; and 'ICJ rules Israel must prevent acts of genocide in Gaza : Key takeaways' *Al-Jazeera* (26 January 2024) <<https://aje.io/387ro5>> accessed 24 June 2025, underscoring the decision as a 'ruling' in the title of their coverage. On the indication of provisional measures, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Indication of Provisional Measures: Order of 26 January 2024) [2024] ICJ Rep 3.

⁴ *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (hereafter 'Genocide Convention').

⁵ The notion of grave charges, or 'charges of exceptional gravity', for evidentiary purposes was articulated in the first contentious case decided at merits, namely, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Judgment) [1949] ICJ Rep 4, p. 17, where the Court pointed to the lack of 'conclusive' evidence in view of the allegations and further underscored that '[a] charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here'. This understanding has been affirmed also in relation to allegations of genocide, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, at para. 209. These cases are examined in further detail in *Chapter 5*.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Oral Proceedings, 17 May 2024) [2023] <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240517-ora-01-00->

contested and interpretive nature of fact-establishment in international adjudication, where competing narratives are advanced within a politically charged context.

The pending case between South Africa and Israel underscores how, in complex and sensitive disputes, determinations of fact may be foundational to the construction of legal meaning but also to the creation of judicial narratives. Other cases before the Court, though generally less publicised, illustrate a similar dynamic, whether involving alleged violations of instruments of collective concern to the international community,⁷ or advisory proceedings addressing sensitive and contested situations.⁸ As these cases demonstrate, fact-finding and evidence assessment at the Court can carry implications far beyond the immediate context of dispute settlement.

In this context, the standard of proof functions as a benchmark for judicial decision-making against which evidence is evaluated to determine whether a

bi.pdf> accessed 7 July 2025, at para. 4. For an overview of the context of the oral proceedings, see ‘Israel refutes South Africa’s accusations at UN world court’ *UN News* (17 May 2024) <<https://news.un.org/en/story/2024/05/1149916>> accessed 7 July 2025.

⁷ This includes several recent cases under the Genocide Convention (n 4) namely, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Pending) General List No 178, instituted 11 November 2019 <<https://www.icj-cij.org/case/178>> accessed 18 November 2024; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Pending) General List No 182, instituted 26 February 2022 <<https://www.icj-cij.org/case/182>> accessed 18 November 2024; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Pending), instituted 29 December 2023 <<https://www.icj-cij.org/case/192>> accessed 18 November 2024. Similarly, in March 2025, Sudan filed an application against the United Arab Emirates for alleged violations of the Genocide Convention (n 4) though the Court dismissed the Application shortly thereafter by an Order of 5 May 2025. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Sudan v. United Arab Emirates)* (Application Instituting Proceedings) [2025] <<https://www.icj-cij.org/case/197>> accessed 7 July 2025. See also Yusra Suedi and Justine Bendel, ‘The Recent Genocide Cases and Public Interest Litigation: A Complicated Relationship’ (2024) *EJIL: Talk!* <<https://www.ejiltalk.org/the-recent-genocide-cases-and-public-interest-litigation-a-complicated-relationship/>> accessed 7 July 2025. See also Helen Duffy and Giulia Pinzauti, ‘Genocide and Armed Conflict before the International Court of Justice’ [2024] *Questions of International Law* 77.

⁸ The most recent Advisory Opinions issued by the Court include, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) [2024] <<https://www.icj-cij.org/case/186/advisory-opinions>> accessed 7 July 2025; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

fact has been sufficiently established.⁹ An example illustrating the decisive role of the standard of proof may have for the outcome of judicial proceedings is the Court's judgment in the *Bosnia Genocide* case, which raised issues similar to those once again confronting the Court in respect of Israel's conduct on the Gaza Strip. Despite the significant volumes of evidence, the Court eventually concluded that Serbia could not be held directly responsible for the genocide at Srebrenica.¹⁰ While media reports declared that the Court had 'cleared' Serbia of the crimes at Srebrenica,¹¹ the judgment in reality merely found that the evidence presented by Bosnia and Herzegovina fell short of the 'fully conclusive' standard of proof articulated by the Court for the allegations.¹²

While the Court's use of a high standard of proof for genocide meant Serbia could not be held responsible for such a grave breach of international law, it also raised the bar for enforcing the Genocide Convention.¹³ The findings of the Court in the *Bosnia Genocide* case contrast with those of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which had concluded that the events at Srebrenica constituted genocide for the purposes of holding individual perpetrators criminally responsible for those acts.¹⁴ While both

⁹ On the function of the standard of proof as a decisional threshold, see *Chapter 2.2*.

¹⁰ *Bosnia Genocide* (n 5) para. 471.

¹¹ See, for example, the BBC 'Court clears Serbia of genocide', *BBC News* (26 February 2007), <<http://news.bbc.co.uk/1/hi/world/europe/6395791.stm>> accessed 18 November 2024. The United Nation's (UN) own reporting mirrors this language, also referring to the 'acquittal' of Serbia for the Crimes at Srebrenica, 'UN World Court acquits Serbia of genocide in Bosnia; finds it guilty of inaction' *UN News* (26 February 2007) <<https://news.un.org/en/story/2007/02/210142>> accessed 18 November 2024.

¹² *Bosnia Genocide* (n 5) paras. 209-210. In the same judgment, see para. 293, where the Court cites a passage from a previous judgment of the ICTY underscoring the 'stigma' attached to a finding of responsibility for genocide.

¹³ It invites questions about the feasibility of evidence production in inter-state proceedings, particularly in cases involving particularly serious allegations where there is rarely a cross-border element allowing the applicant access to evidence which may be located within the territory of the respondent. See, for example, Amanda Bills, 'Revisiting the Standard of Proof for Charges of Exceptional Gravity before the International Court of Justice' [2023] *Max Planck Yearbook of United Nations Law Online* 1, 142.

¹⁴ The Tribunal convicted several individuals of genocide committed at Srebrenica. See, for example, *Prosecutor v Radislav Krstić* (Judgment) ICTY-98-33-A (19 April 2004), which marked the Tribunal's first conviction for genocide; *Prosecutor v Vujadin Popović and Ljubiša Beara* (Judgment) ICTY-05-88-A (30 January 2015); *Prosecutor v Zdravko Tolimir* (Judgment) ICTY-05-88/2-A (8 April 2015); and *Prosecutor v Ratko Mladić* (Judgment) ICTY-09-92-A (8 June 2021).

institutions recognised the gravity of the allegations, the cautious approach of the ICJ led to a markedly different legal narrative, one that distanced Serbia as a state from direct responsibility for genocide.¹⁵ This divergence highlights how the standard of proof shapes judicial outcomes and influences how historical events are legally framed and publicly understood.

Despite the significance of evidentiary determinations in international judicial proceedings, central questions of evidence and proof remain underdeveloped in this context. The evidentiary regime of the Court is largely unregulated, with no more than a cursory framework governing matters of evidence.¹⁶ Questions of evidence and fact-finding have not featured very prominently in much of the Court's judgments, instead remaining peripheral to the substantive issues. As noted by scholarly commentators, the judicial practice of the Court appears to prioritise the resolution of the legal rather than factual questions.¹⁷ This tendency reflects an assumption that the litigating parties are best placed to not only present, but also determine the facts, and that the Court, out of deference to state consent, should refrain from assessing facts which are not directly contested by the parties.¹⁸ Consequently, the law of evidence before the Court has yet to be comprehensively elaborated, in its foundational elements as well as in its subsequent elaboration in judicial practice.¹⁹

¹⁵ On evidence and the construction of judicial narratives at the ICTY, see, for example, Luigi Prospero and Aldo Zammit Borda, 'A Partial View of History - ICTY Judgments as "Judicial Truths"' in Carsten Stahn and others (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia - A Multidisciplinary Approach* (Oxford University Press 2020) 183–187 and 189–190. On international criminal tribunals and historical narratives, see also Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge University Press 2011).

¹⁶ See, for example, Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (2016) 2–4.

¹⁷ Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 185–187.

¹⁸ See, for example, Benzinger, 'Evidentiary Issues' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 1377, para. 5, highlighting that the Court may be unable to consider facts which are not disputed by the parties. See also Foster (n 17) 185–187, underscoring the limited nature of the Court's judicial function in view of resolving questions of law as opposed to questions of fact.

¹⁹ This is particularly the case when compared to national legal frameworks for evidence, and the subsequent scholarly commentary. See further Dale A Nance, *The Burdens of Proof:*

The effects of the limited nature of the Court's evidentiary regime are more pronounced as the Court increasingly confronts disputes involving complex facts. Evidentiary considerations have recently taken on greater importance in judicial proceedings before the Court, reflecting a shift in how international judicial bodies as well as states parties engage with facts and in the context of international adjudication. These developments align with the general trend in international adjudication beyond the Court towards a more evidence-intensive model of dispute settlement.²⁰

The standard of proof is one of the least clarified, and perhaps least articulated, aspects of the Court's evidentiary regime.²¹ The Court often refrains from stating what standard of proof it is applying and provides little explanation for its approaches to the treatment of evidence in each case. While judicial practice suggests that the Court has consistently relied on some form of evidentiary threshold in reaching its decisions,²² it neither articulates this threshold, nor provides a rationale justifying its adoption. As such, no more than tentative conclusions have been drawn as to the stringency of the standard of proof applied or the rationale for its adoption.²³ This lack of transparency has drawn criticism for creating uncertainty among litigating parties.²⁴ It raises questions

Discriminatory Power, Weight of Evidence, and Tenacity of Belief (Cambridge University Press 2016) 295–297, underscoring the relatively underdeveloped and undertheorized evidentiary regime of the ICJ.

²⁰ International Law Commission (ILC), 'Report on the Work of the Sixty-Ninth Session of the International Law Commission' (2017), A/72/10, Annex B, 'Evidence before International Courts and Tribunals, paras. 4-5, in which a member of the ILC described this turn towards facts as a 'transformation' of the judicial function of international tribunals.

²¹ Caroline E Foster, 'Burden of Proof in International Courts and Tribunals' (2010) 29 *Australian Yearbook of International Law* 27, 59 ff., that '[i]f the burden of proof seems complicated in international litigation, the standard of proof is even more so', and a question 'on which judicial power remains more problematically unguided'.

²² Riddell and Plant (n 16) 132–136. See also Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 97–101.

²³ For an overview of the considerations that the Court appears to take into account in the process of determining the standard of proof, see Katherine Del Mar, 'The International Court of Justice and Standards of Proof' in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2013) 98–101.

²⁴ See *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Separate Opinion of Judge Higgins) [1996] ICJ Rep 847, paras. 30-39, where Judge Higgins criticised the lack of a clearly articulated standard of proof. Moreover, for a general critique of the lack of formalised rules of evidence before international courts, see Charles N Brower, 'Evidence

about how the Court balances competing interests in its determination of the standard of proof, particularly when a dispute involves serious violations of international law or particularly contentious factual issues.²⁵

The lack of clearly defined standards of proof reflects the considerable degree of freedom, or a scope of ‘flexibility’, afforded to the Court in its evidentiary decision-making.²⁶ While this freedom provides the Court with the necessary latitude to ascertain the facts of a case,²⁷ it has arguably also contributed to opacity in its evidentiary reasoning. Despite developments in judicial practice, the nature and extent of the Court’s ‘flexibility’ remain difficult to discern.

As dispute settlement becomes increasingly fact-intensive, understanding the Court’s approaches to evidentiary decision-making is essential. The standard of proof is emblematic of the broader challenges raised by these developments and expresses a range of interests at the intersection of fact-finding, the judicial function of international courts, and the political dimensions of international dispute settlement. Because interests of this nature intersect with legal and political narratives and underscore the fundamental role of peaceful dispute settlement within the international legal system, the standard of proof emerges as a critical, yet still underexplored, component of the Court’s procedural law. These aspects form the point of departure for the present thesis, which explores the rationale underlying the Court’s determination of the standard of proof.

before International Tribunals: The Need for Some Standard Rules’ (1994) 28 *International Lawyer* (ABA) 47.

²⁵ For instance, in *Bosnia Genocide* (n 5) the Court’s high standard of proof appeared to reflect particularly significant state interests, prioritising caution in attributing state responsibility. Arguing in favour of this strict approach, see Marko Milanović, ‘State Responsibility for Genocide’ (2006) 17 *European Journal of International Law* 553, 593–596.

²⁶ Riddell and Plant (n 16) 410–411, describing the Court’s ‘unfettered’ discretion in evidentiary decision-making. On the Court’s ‘flexible’ approach to the standard of proof, see also Gian Maria Farnelli, ‘Consistency in the ICJ’s Approach to the Standard of Proof: An Appraisal of the Court’s Flexibility’ (2022) 21 *Law & Practice of International Courts & Tribunals* 98.

²⁷ This is intended to allow for a particularly wide scope of decision-making unhindered by technical rules of evidence. See further *Durward V Sandifer*, *Evidence before International Tribunals* (Rev ed, University Press of Virginia 1975) 22, remarking that ‘[t]echnicalities are taboo’ in the evidentiary regimes of international courts and tribunals.

1.2 Research Problem and Questions

This thesis examines the standard of proof before the ICJ. It explores the use of, as well as justifications for, a differentiated standard of proof across cases, focusing on the interests and broader considerations that underpin this system of adjudication and which guide the Court's approach to the determination of that standard. While existing scholarship has identified the main strands of evidentiary standards applied by the Court, and acknowledged their variability, much less attention has been devoted to identifying the rationale informing the use of a particular standard of proof in each case.

While there is no identifiable default standard of proof in proceedings before the Court, judicial practice nonetheless indicates that a threshold of evidence is consistently applied, even if implicitly.²⁸ Judicial practice has been described as indicative of a variable, or graded, standard of proof that shifts according to the specific circumstances of each case.²⁹ This is aligned with the notion of the Court's scope of freedom, or flexibility, in evidentiary decision-making, which is often invoked to explain the apparent variation and lack of clarity as to the applicable standard of proof.³⁰ However, few scholarly contributions have examined the nature of the Court's 'flexible' decision-making in evidentiary matters.³¹ While some tentatively identify the circumstances that justify the application of a more or less stringent standard of proof, most do not offer a more comprehensive and systematic investigation, analysis, and explanation

²⁸ Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer-Verlag 2010) 750–751, highlighting that this judicial practice resembles the Civil Law tradition of not articulating the standard of proof and instead emphasising the need for the subjective belief of the individual judge.

²⁹ On the 'graded' standard of proof, see further Benzing (n 18) 1404, para 111. For an overview of the different expressions employed by the Court to describe the standard of proof, see also Riddell and Plant (n 16) 126–129; and Del Mar (n 23) 98–101. From a comparative point of view on the use of different expressions for the standard of proof across international jurisdictions, see also Brown (n 22) 97–101.

³⁰ Riddell and Plant (n 16) 410–411, on the Court's 'unfettered' scope of discretion in evidentiary decision-making. See also the discussion in *Chapter 4.1*.

³¹ Benzing (n 18) 1404, para 111. See Riddell and Plant (n 16) 132, suggesting that the Court adjusts the standard of proof considering the subject-matter of the case, and that this process of determination is inherently flexible. Generally, see also Farnelli (n 26).

of the process by which the Court determines the standard of proof, and the rationale that has justified the adoption of that standard in each case.³²

This thesis understands the standard of proof as a decisional threshold in the context of adjudication, which is further shaped by its distinct institutional and procedural context. Given the considerable freedom afforded to the Court in evidentiary matters, this is a matter of understanding the nature as well as the extent, of its decision-making. This thesis therefore focuses on the rationale for the use of a differentiated standard of proof in international adjudication.

Considering the foregoing, the examination undertaken in the present thesis is guided by the following overarching research question:

What is the role of the standard of proof at the ICJ, and how does it reflect the legal and systemic considerations of international adjudication?

This research question recognises standards of proof as decisional thresholds which form part of judicial decision-making. It focuses on two central aspects relating to the standard of proof at the ICJ. First, it involves identifying the considerations that are relevant to guide the Court's decision-making in its determination of the standard of proof. This also entails examining the nature and scope of the Court's discretion in evidentiary decision-making. Second, it requires understanding the role of the standard of proof in the judicial practice of the Court, considering the identified considerations. Reflecting each of these dimensions, the following sub questions further guide the examination:

1. What considerations within the evidentiary regime of the ICJ are relevant to guide its determination of the standard of proof?

This sub question considers the relevant considerations for the determination of the standard of proof as situated within the ICJ's evidentiary regime. It asks about the considerations that are legally relevant to inform the determination of the standard of proof, drawing on the nature and specific features of the Court's evidentiary framework. The examination and analysis are centred on the considerations that arise within the legal structure and reasoning of the Court, rather than any external or political influences. It addresses the legal foundations and procedural logic that guide how the Court determines evidentiary thresholds, thereby also clarifying the basis and limits of its judicial

³² For the considerations justifying a differentiated standard of proof, see *Del Mar* (n 23) 98–101, which links the Court's use of particular standards of proof to the subject-matter of the dispute and the procedural phase of the case. See also *Riddell and Plant* (n 16) 132–136.

discretion. The sub question thus considers foundational questions relating to the standard of proof as a decisional threshold in international adjudication, considering the conceptual basis for this threshold.

The second sub question shifts the emphasis from foundational questions to the role of the standard of proof in the ICJ's judicial practice. Drawing on the response to the first research question, it focuses on how the considerations that were identified as legally relevant are reflected in judicial practice. For these reasons, this sub question asks the following:

2. How is the standard of proof applied by the ICJ in its judicial practice, and how does this reflect the considerations relevant to its determination within its evidentiary regime?

This sub question is concerned with the ICJ's articulation and application of the standard of proof in its judicial practice. It explores how the standard is expressed, or merely implied, in judicial reasoning, even when not explicitly articulated, and considers contextual factors shaping its use. In doing so, the analysis seeks to examine how the considerations identified as legally relevant in response to the first sub-question are reflected in, or shape, the Court's decision-making in evidentiary matters. Examining how these considerations are reflected as a matter of judicial practice is critical for understanding the normative significance of the Court's evidentiary decision-making.

Different methodological approaches are required to address these research questions. The first sub-question will be approached doctrinally, focusing on the ICJ's evidentiary regime and nature of its decision-making in evidentiary matters, while the second will combine quantitative overview with qualitative analysis of judicial practice. A more detailed discussion of the methodology for each of these research questions follows in the next section.

1.3 Methodological and Theoretical Framework

This thesis draws on a combination of doctrinal and empirical methods of legal research to respond to the overarching research question and the associated sub questions. The doctrinal method is employed to analyse the conceptual and procedural framework for evidentiary matters before the Court, considering not only the formal legal regulation but also the context in which it operates. A quantitative overview and qualitative analysis are undertaken in respect of

judicial practice, focusing on the articulation and application of the standard of proof across the Court's jurisprudence.

1.3.1 Doctrinal Analysis of Evidentiary Considerations

The doctrinal analysis undertaken in this thesis addresses the first research question, which concerns the identification of considerations relevant for the determination of the standard of proof at the ICJ. Building on an understanding of the standard of proof as a procedural element embedded within the system of adjudication, the thesis examines the conceptual foundations of the Court's evidentiary regime. This involves an analysis the legal framework governing evidentiary matters as well as the broader role of evidence and proof within the international judicial function entrusted to the Court, with particular attention to the 'flexible' nature of its evidentiary decision-making.

The present thesis adopts a doctrinal method of legal research, engaging with primary sources of law to establish, clarify, and systematise valid law.³³ This method adopts an internal perspective on the law, and is traditionally premised on the assumption that law forms a coherent system that can be reconstructed through the study of recognised sources.³⁴ Given that the doctrinal method is largely confined to the existing and recognised sources of law, its usefulness is more limited for examining the evidentiary regime of the Court due to the absence of legal regulation and silence of the formal sources of law for evidentiary issues.³⁵ To examine the evidentiary regime of the Court, the thesis therefore adopts what might be described as an 'open' doctrinal method. This approach begins with an examination of the recognised sources of law. Further, it incorporates broader theoretical and empirical perspectives to analyse the Court's evidentiary framework and judicial practice not only in terms of their internal doctrinal coherence but also in light of the social purposes and institutional in which they operate.³⁶ As the relevant sources of procedural law

³³ Terry Hutchinson, 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* (2nd edn, Routledge 2017) 9–10.

³⁴ Aleksander Peczenik, 'A Theory of Legal Doctrine' [2001] *Ratio Juris* 32, 76–80.

³⁵ Riddell and Plant (n 16) 23, describing the legal framework for evidence as 'light and malleable', with no more than cursory rules governing formalities. See also *Chapter 3.3*.

³⁶ This approach recognises that legal doctrine is shaped not only by internal legal logic, but by broader institutional and normative contexts of law. See, for example, Pauline Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on

at the Court provide limited guidance on evidentiary matters, principles and concepts from national evidence law and evidence theory are employed to elaborate the conceptual foundations, while a theory of discretionary power is employed to understand the nature of the Court's evidentiary decision-making within the applicable legal framework.

The doctrinal analysis in this thesis proceeds in three parts. *First*, it identifies the general considerations relevant for the determination of the standard of proof in adjudication. *Second*, it examines the procedural and evidentiary regime of the Court. *Third*, it applies a theory of discretionary power to evaluate the nature and extent of the Court's decision-making in evidentiary matters. Taken together, these parts of the doctrinal analysis provide the conceptual framework that responds to the first research question.

The *first part* of the doctrinal analysis identifies the general considerations that are relevant to the determination of the standard of proof. This analysis draws on the notion of the standard of proof as developed in national legal systems and identifies the conceptual basis relevant to its articulation and application in adjudication. While acknowledging that conceptual divides exist between national legal systems, this approach provides analytical tools for identifying and engaging with functionally equivalent concepts in the context of the Court. It draws on secondary sources in national procedural law evidence, alongside theoretical and philosophical works, to provide a foundation for those concepts within the ICJ's evidentiary regime. This examination combines a theoretical inquiry into the concept of legal proof with a comparative analysis of national rules of evidence. Judicial reasoning under conditions of factual uncertainty raises comparable conceptual challenges across legal systems, making such perspectives relevant to understanding the Court's evidentiary regime, while acknowledging the need to adapt them to the international context. In this respect, the thesis draws on theoretical approaches to evidence law developed within Nordic civil procedural law and legal theory. This tradition not only offers a well-developed scholarly discourse on evidentiary reasoning but also occupies a conceptual middle ground between the Common Law's formalised rules of evidence and standards of proof, and the Civil Law's unregulated emphasis on free evaluation of evidence and judicial conviction.³⁷ The hybrid

Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart 2011) 87–88 and 90–91.

³⁷ Among the Nordic countries, the scholarly discourse on evidence in a civil procedural context is comparatively well-developed in Sweden, justifying the emphasis on these materials. See

nature of Nordic procedural law mirrors the ICJ's evidentiary regime, which similarly combines elements of both legal traditions.³⁸ While this convergence is likely merely coincidental, the Nordic perspective provides conceptual tools for analysing the Court's approach to legal proof.

This conceptual framework clarifies how the standard of proof functions across adjudicative systems and how it is to be understood within the specific context of the Court. By identifying commonalities in the functional core of the standard of proof as a decisional criterion, it provides analytical tools to situate and interpret corresponding concepts within the Court's evidentiary regime. Rather than imposing external models, this thesis uses national evidence law as a source of conceptual insight, developing a framework responsive to the Court's distinct legal, procedural, and institutional context.

The *second part* of the doctrinal analysis proceeds by examining the Court's procedural framework and evidentiary regime. It focuses on identifying the formal legal basis for evidentiary matters by examining the existing sources of law and considers the nature of the judicial function entrusted to the Court. The starting point for this examination is the sources reflected in Article 38(1) of the ICJ Statute.³⁹ Article 38(1) of the ICJ Statute is regarded as an authoritative statement of the applicable sources of international law, even if it is primarily referred to in relation to substantive areas of law.⁴⁰ However, international law

further Magne Strandberg, *Beviskrav i Sivile Saker: En Bevisteoretisk Studie Av Den Norske Beviskravslærens Forutsetninger* (Fagbokforlaget 2012) 83 ff.

³⁸ This may be the consequence of the 'universalist' ambition of the drafters, attempting to be inclusive of a range of domestic legal backgrounds. See, for example, Riddell and Plant (n 16) 11, suggesting that this may not have resulted in a framework incorporating 'the best of both worlds', but rather 'an incoherent analysis of incompatible influences'. See also Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice' (1999) 1 *International Law FORUM Du Droit International* 202, 202.

³⁹ Article 38(1) of the *Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (hereafter 'ICJ Statute'), which provides that the sources applied by the Court include 'a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law'. See also Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2012).

⁴⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 2010) 18.

does not make a sharp distinction between substantive or procedural law. The sources in Article 38(1) of the ICJ Statute are generally understood to apply in respect of the procedural law of international judicial bodies.⁴¹ This extends to questions of evidence and proof, though it remains unclear which sources of law govern the evidentiary regimes of international courts and tribunals.⁴²

As the constitutive instrument of the Court, the ICJ Statute is the main source of procedural law.⁴³ The Court's authority under Article 30 of the ICJ Statute to frame additional rules of procedure means that derived sources of procedural law, primarily the 1978 Rules of Court, which codify the Court's internal procedural framework, may also be relevant.⁴⁴ Given the integration of the ICJ Statute into the UN Charter,⁴⁵ the Court's judicial function is embedded within the broader framework of the overarching purposes and principles of the UN, as a consequence of the Court's status as a principal organ of the UN.⁴⁶ While the UN Charter does not regulate procedural or evidentiary matters, it provides context for understanding the nature and objectives of the Court's functions, particularly in contributing to peaceful settlement.⁴⁷ Accordingly, UN Charter-based law is relevant primarily for situating the Court within the wider international legal order rather than as a direct source.

The status of customary international law and general principles of law, as defined in Article 38(1) of the ICJ Statute, remains uncertain within the context of the Court's procedural law. As procedural rules are shaped and applied by international institutions rather than state practice, customary international law

⁴¹ Brown (n 22) 36–37. See also the discussion in Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (4th ed, M Nijhoff Publishers 2006) 1023, in respect of that international law makes 'no sharp distinction' between substantive and adjective law.

⁴² Benzing (n 18) 1374, para 6. Generally, see also Chittharanjan Felix Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005) 21–22 and 26.

⁴³ On the role of the ICJ Statute (n 39) as a source of the Court's procedural law, see further Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 77–80.

⁴⁴ Rules of Court of the International Court of Justice (adopted 28 July 1978) <<https://www.icj-cij.org/en/documents/rules>> accessed 17 July 2025 (hereafter '1978 Rules of Court').

⁴⁵ *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (hereafter 'UN Charter').

⁴⁶ Article 7 of the UN Charter (n 45). Additionally, Article 92 of the UN Charter provides that the ICJ is 'the principal judicial organ' of the organisation and that its Statute is an 'integral part' of the UN Charter. This provision is mirrored in Article 1 of the ICJ Statute (n 39).

⁴⁷ Article 2(3), and further Chapter VI, of the UN Charter (n 45). The Court is an institutionalised mechanism facilitating states' fulfilment of the obligation of peaceful settlement.

offers limited guidance for examining the Court's evidentiary regime.⁴⁸ The existence and content of general principles relevant to evidentiary matters is similarly complex, particularly if viewed in relation to the *general principles of law* as a formal source of international law under Article 38(1)(c) of the ICJ Statute. The origin of such principles is unclear, whether they derive primarily from procedural norms commonly found across domestic legal systems, from the shared practices of international courts and tribunals, or even a combination of both.⁴⁹ The distinction between customary international law and the general principles often blurs in the context of procedural law, where neither source has been clearly articulated or consistently applied in judicial practice.⁵⁰ It is therefore difficult to rely on such sources in procedural matters, informing the cautious approach taken in the present thesis.

Given these difficulties in the sources of procedural law directly governing matters of evidence at the Court, the examination draws extensively on secondary sources and doctrine to elaborate the Court's evidentiary regime. This includes, *inter alia*, the analysis of the relevant *travaux préparatoires* to the ICJ Statute provisions, which provide valuable context for interpreting the applicable procedural framework at the Court. The judgments from the Court are also examined, focusing on its reasoning and references to evidentiary principles, particularly relating to the standard of proof. Scholarly works and international institutional procedural law are employed as subsidiary means to interpret and understand the evolving evidentiary practices of the Court.

⁴⁸ On the status of customary international law as a source for procedural law before the Court, see Rosenne (n 41) 1027–1028; Hugo Thirlway, 'Procedural Law and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 2009) 79; and Brown (n 22) 89–90.

⁴⁹ International courts and tribunals, including the ICJ, have been reluctant to base their decisions on general principles within the meaning of Article 38(1)(c) of the ICJ Statute (n 39). See ILC, 'Report of the Work of the Sixty-Ninth Session' (n 20), Annex A, 'General Principles of Law', paras. 12–18; and Amerasinghe (n 42) 24–26; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer Law International 1996) 6; and Bin Cheng, *General Principles of Law: As Applied by International Courts and Tribunals*; with a Forew. by Georg Schwarzenberger (Grotius 1987) 302 ff.

⁵⁰ On the sources of law relevant to the Court's evidentiary regime, see further *Chapter 3.3*.

Finally, the *third part* of the doctrinal analysis draws on a theory of discretion to explore the nature and scope of the Court's evidentiary decision-making.⁵¹ Given the limited legal regulation of evidence and the freedom afforded to the Court, discretionary power is operationalised as a theoretical 'scaffolding' to understand decision-making in this area.⁵² This reliance on discretionary power in international adjudication is not uncontroversial, as international judicial bodies derive both their substantive and procedural authority from the state consent. This increases the importance of understanding the boundaries of legitimate judicial discretion and the types of considerations the Court may rely on in the absence of clearly defined legal rules.⁵³ While the Court's discretion allows for significant flexibility in managing evidentiary matters, it is necessarily constrained by considerations such as fairness, due process, and institutional legitimacy.

Drawing on a theory of discretion allows for a contextualised account of the Court's decision-making within this space, while emphasising that judicial discretion is exercised within, and not beyond, the boundaries of the applicable legal framework.⁵⁴ While remaining doctrinal in its foundation, this part of the study engages with theoretical insights that fall outside the immediate scope of the sources of law, viewing discretion as the power to exercise legal judgment in the application of vague, incomplete, or absent legal norms. This clarifies both the breadth and the limits of the Court's freedom in evidentiary matters, accounting for the balance it strikes between flexibility and legal constraint.

These three parts of the doctrinal analysis address the first sub-question of this thesis, which relates to the considerations that are relevant to guide the ICJ's determination of the standard of proof. The conceptual framework established through this analysis thus clarifies key ideas about questions of evidence and proof in international adjudication, while the examination of the evidentiary

⁵¹ For a description of discretionary power, see Denis James Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 2011) 1 and 8. See also HLA Hart, *The Concept of Law* (3rd edition, Oxford university press 2012) 124–136.

⁵² See the discussion in *Chapter 4*.

⁵³ Christopher A Ford, 'Judicial Discretion and International Jurisprudence: Article 38(1)(c) and "General Principles of Law"' (1994) 5 *Duke Journal of Comparative & International Law* 35, 59–60. On the exercise of discretionary power by international courts and tribunals, and the relationship of such power to state sovereignty and its 'bounded' nature, see further Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2004) 45 *Virginia Journal of International Law* 656–658.

⁵⁴ Compare to Brown (n 22) 90, who understands the Court's freedom in decision-making as an 'inherent power'. On discretion vis-à-vis inherent powers, see *Chapter 4.4.2*.

regime of the Court sheds light on the applicable procedural sources as well as evidentiary practices.⁵⁵ Judicial discretion further contributes to understanding the nature, scope, and boundaries of the Court’s evidentiary decision-making.⁵⁶ This provides the relevant theoretical foundation for the case studies, which shift the attention from theory to the judicial practice of the Court and how this reflects the identified considerations.

1.3.2 Analysis of Judicial Practice

The second sub-question examines how the Court articulates and applies the standard of proof in judicial practice. The thesis undertakes an analysis of the judicial decisions of the Court. It is empirical, rather than doctrinal, in the sense that it does not treat judicial decisions as authoritative sources of law but as materials through which to examine and evaluate how the Court approaches the standard of proof across its jurisprudence. The examination uses a two-step approach. First, it quantitatively maps how the standard of proof is expressed across the Court’s jurisprudence. Second, it undertakes a qualitative analysis of selected cases to understand the Court’s treatment of evidentiary thresholds. The methodology for these steps is elaborated in the following subsections.

1.3.2.1 Quantitative Overview

The first step of the analysis of judicial practice involves a systematic review of the judicial practice of the ICJ. This review began with all cases listed on the ICJ’s official website, examined in their original order of appearance, issued up to and including 25 June 2025.⁵⁷ The initial analysis focused on identifying both explicit and implicit references to the standard of proof within the Court’s reasoning, through a manual, case-by-case review of judicial texts, searching for utterances and expressions which articulate a standard of proof or suggest the application of some form of evidentiary threshold. Those references were considered within the broader legal, procedural, and factual context of each decision. The search targeted key terms and expressions, such as ‘evidence’ and ‘proof’, alone or taken alongside judicial reasoning, and

⁵⁵ For an outline of the concept and function of a standard of proof in adjudication, see *Chapter 2*. On the standard of proof within the evidentiary regime of the ICJ, see further *Chapter 3*.

⁵⁶ The Court’s scope of discretion in evidentiary matters is discussed in *Chapter 4*.

⁵⁷ The full list of cases, general approach, and dataset are provided in the *Appendix: Evidentiary Standards in ICJ Contentious Cases*.

qualifiers relating to the quality of evidence, including descriptive terms including ‘sufficient’, ‘convincing’, or ‘persuasive’.

Although contentious cases and advisory opinions were initially reviewed, the analysis focused only on contentious cases. Advisory opinions contain few explicit references to thresholds of evidence, or other types of expressions, and are decided under a different procedural and institutional conditions. Advisory opinions were thus excluded from the analysis.⁵⁸

The relevant materials were collected and systematised in chronological order, with the full set of cases included in the *Appendix: Evidentiary Standards in ICJ Contentious Cases*. The categorisation of these materials was based on the Court’s treatment of evidentiary standards in the judgments, using the following groups to guide the initial examination:

1. Headings explicitly addressing the standard of proof.
2. Explicit references to a standard of proof.
3. Rationale explaining the use of a standard of proof.
4. General or implicit expressions indicating the application of a standard of proof, or threshold of evidence.
5. No discernible reference to a standard of proof-

A quantitative overview was carried out to understand the Court’s articulation of standards of proof, or use of other types of expressions indicating a threshold of evidence.⁵⁹ At present, there are 147 contentious cases listed on the ICJ’s official website, of which 75 are Judgments on the merits. The analysis focuses on these 75 cases. The initial quantitative overview reveals a considerable variation in judicial practice. The Court has employed specific headings under which it directly addresses the standard of proof, in no more than 3 cases.⁶⁰ These headings overlap to some extent with cases containing more explicit references to the standard of proof. However, there are few explicit references

⁵⁸ See further the *Appendix: Evidentiary Standards in ICJ Contentious Cases*.

⁵⁹ This initial mapping of the Court’s judicial practice can be described as a simplified method of descriptive statistics, for the purposes of quantifying the frequency of certain approaches to, or expressions of, some form of threshold of evidence. On this approach, see, for example, Oliver Ibe, *Fundamentals of Applied Probability and Random Processes* (Academic Press 2014) 253 ff.

⁶⁰ Noting that the Court has relatively recently introduced headings in its judgments, reflecting a formatting choice not as such indicative of a distinct approach to evidence. For example, the judgment in *Bosnia Genocide* (n 5), includes a table of contents and a specific heading entitled ‘V. Questions of Proof’, at paras. 202-203.

to a defined standard of proof, with only 4 references appearing throughout all Judgments issued on the merits.⁶¹ The Court has provided a rationale for using a particular threshold or approach, in a total of 5 cases.

The most common approach taken by the Court is to use different expressions that function as descriptors of some threshold of evidence, without formally designating a specific standard of proof. Such expressions appear in a total of 41 judgments. A typical reference is whether the evidence is ‘sufficient’ as proof of a factual allegation,⁶² though further variations may also appear either singularly or in conjunction with the ‘sufficiency’ of evidence.⁶³ While these expressions are indicative of some sort of threshold of evidence, they do not define the stringency of the evidentiary requirement or the rationale justifying its adoption in each case. In a total of 31 cases, there is no discernible reference to any standard of proof or threshold of evidence. This indicates that in many cases, the Court does not explicitly engage with evidentiary thresholds, leaving the standard of proof either unstated or implicit within the broader reasoning.

1.3.2.2 *Qualitative Analysis*

The second step consists of a qualitative examination of a selected subset of cases identified through the initial quantitative analysis.⁶⁴ The case studies were subsequently selected based on the Court’s explicit or implicit references to evidentiary thresholds, ensuring that the qualitative analysis focuses on judgments where these concepts meaningfully have meaningfully informed the Court’s reasoning and decision-making. The present sub section outlines the selection criteria and approach to these case studies, while the case studies are examined in further detail in Chapters 5 and 6.

The selected case studies fall into two main groups which are distinguished by the nature and extent of the Court’s engagement with evidentiary thresholds. The first, smaller group comprises cases which see explicit references to the standard of proof, often overlapping with cases in which the Court offers a rationale for the use of a particular evidentiary threshold or employs specific

⁶¹ For an example, see *Bosnia Genocide* (n 5) paras. 209-210.

⁶² Compare to *Brown* (n 22) 101, that ‘sufficient’ evidence is a distinct standard of proof.

⁶³ This includes expressions referring to whether the evidence is ‘persuasive’, as well as that it ‘establishes’, ‘shows’ or ‘suggests’. See further in the *Appendix: Evidentiary Standards in ICJ Contentious Cases*.

⁶⁴ The initial quantitative mapping and analysis is described in *Section 1.3.2.1*. It is based on the dataset as provided in the *Appendix: Evidentiary Standards in ICJ Contentious Cases*.

headings. This includes the four cases with explicit references to the standard of proof, which concern attribution of state responsibility for serious violations defined as ‘grave’ for evidentiary purposes.⁶⁵ The second, larger group features cases where the Court uses other expressions suggesting a standard of proof, most commonly references to whether the evidence is ‘sufficient’, sometimes accompanied by a rationale or explicit standard. Most of these cases fall into thematic categories, which reflect the structure of this case study: 20 cases involving state responsibility and 31 relating to boundary delimitation.⁶⁶

The qualitative analysis then examines the selected case studies considering the considerations, or factors, that were identified as legally relevant in response to the first sub question.⁶⁷ The analysis proceeds by interpreting the terms used by the Court to either indicate the existence of a defined standard of proof or imply a threshold of evidence. The analysis of each case study begins by identifying and categorising the terms the Court uses to describe evidentiary thresholds within the selected case studies. The first group, though limited in number, features explicit references to evidentiary standards, using terms such as ‘conclusive’ and ‘fully conclusive’ evidence. Given the clarity with which the Court engages with evidentiary issues within this group, and the limited number of cases, these judgments are examined individually.⁶⁸ The second, larger group focuses on the use of the term ‘sufficient’, alongside references to ‘convincing’ evidence, and is organised thematically to understand the Court’s articulation of evidentiary thresholds across a broader range of contexts.⁶⁹

The analysis then examines relevant contextual factors, including the legal and political circumstances surrounding each case, through a close reading of the Court’s judicial reasoning. These factors focus on the legal considerations that were identified as relevant to the determination of the standard of proof,

⁶⁵ This corresponds to the category of cases which involve an explicit reference to the standard of proof, which overlap with the Court’s explicit headings. See the case study in *Chapter 5*.

⁶⁶ Both categories are examined as part of the same case study, given similar approach taken by the Court. The other possible categories of case law are either more limited in numbers, or in the scope of legal and factual issues addressed. On the Court’s reference to the need for ‘sufficient’ evidence, see the case study in *Chapter 6*.

⁶⁷ This corresponds to the first research question, as explained in *Chapter 1.2*. The methodology employed to identify the relevant considerations within the evidentiary regime of the Court is explained in *Chapter 1.3.1*.

⁶⁸ See *Chapter 5*.

⁶⁹ See *Chapter 6*.

including the nature of allegations, the difficulty of proving particular facts, the consequences for the parties involved, and other elements in the judicial reasoning and the context in which the case was brought to the Court. While the Court's decisions are publicly accessible, its internal decision-making processes in view of evidence assessment are inaccessible based on judgments alone. The text of the judgments represents what the Court chooses to communicate to the parties and, to some extent, the broader international community, and do not present a comprehensive record of its evidentiary reasoning in each case. The use of certain terms, such as 'beyond reasonable doubt,' may carry different meaning in the context of a judgment from the Court and do not necessarily correspond to their conventional usage in other legal contexts, such as the criminal standard of proof in domestic law.⁷⁰ This underscores the interpretative nature of the analysis, which seeks to understand the Court's reasoning within its broader contextual and doctrinal framework.

While the analysis of the case studies necessarily relies on the Court's publicly articulated reasoning, it is anchored in a broader contextual understanding of decision-making and evidentiary considerations. By combining close textual analysis with attention to legal, procedural, and contextual factors, the study seeks to interpret the Court's approach to standards of proof within clear analytical boundaries. It acknowledges the inherent limitations of relying solely on judicial language and integrates terminological observations with contextual insights to establish plausible interpretations of evidentiary thresholds in practice. This involves the assessment of whether variations in terminology reflect meaningful differences in the Court's approach or situational shifts in usage, considering how terms function to articulate explicit standards or evaluate competing evidence. This layered method ensures that conclusions about the Court's standards of proof rest on a transparent, nuanced, and comprehensive evaluation of both language and legal context.

⁷⁰ For example, while the European Court of Human Rights (ECtHR) uses the phrase 'beyond reasonable doubt,' this does not imply that a criminal standard of proof is applied. In *Blokhin v Russia*, App No 47152/06 (ECtHR, 23 March 2016), at para. 139, the ECtHR clarified that '[i]n assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt"'. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilty or civil liability, but on Contracting States' responsibility under the Convention', and, specifically, that 'the level of persuasion necessary for reaching a particular conclusion and, in this connection, this distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake'.

1.4 Contribution of the Research

This thesis addresses the standard of proof at the ICJ. It focuses on the rationale for the Court's use of, and justifications for, a differentiated standard of proof, and how this reflects broader legal and systemic considerations. The present thesis contributes to the scholarly discourse by addressing foundational questions of evidence and proof in international adjudication, which have so far remained largely unarticulated. This section maps the current state of the art for the purposes of situating the main scholarly intervention of this thesis.

1.4.1 State of the Art

Despite the importance of rules of evidence for adjudication before the Court, the topic has received little sustained scholarly attention. This reflects a general tendency in international adjudication, where judicial practice and scholarship tend to prioritise questions of substantive law over procedural and evidentiary dimensions of dispute settlement.⁷¹ The 'international law of evidence' has remained relatively underdeveloped. In the earlier development of international courts and tribunals, this prompted the description of the field as an empty, or uncharted, field of international legal scholarship:

The realm of the procedure of international tribunals is the Antarctica of international law. A few explorers have skirted about its shores; others have surveyed portions of it with more or less thoroughness. Not until its little known territory has been conquered, region by region, will it be possible for future scholars to draw a complete and revealing map of the entire continent.⁷²

While more recent developments have brought greater attention to evidentiary issues in international adjudication, the initial characterisation of the field as an uncharted continent retains some relevance. The scholarly engagement with questions of evidence and proof at the Court is mostly reactive, responding to developments in judicial practice rather than undertaking more systematic or theoretical studies to clarify foundational principles. This has resulted in a

⁷¹ See, for example, Foster (n 17) 185–187.

⁷² AH Feller, *The Mexican Claims Commission, 1923-1934* (Macmillan Co 1935) vii; as cited in Kazazi and Shifman, 'Evidence before International Tribunals - Introduction' (1999) 1 *International Law FORUM du droit international* 193, 193.

relatively fragmented scholarly landscape, which often relies on analogies to domestic law to interpret judicial developments in international adjudication.

International courts and tribunals have rarely emphasised evidentiary matters in their judicial practice,⁷³ unless prompted to do so by the direct disagreement between the parties as to the existence of a fact or the treatment of some aspect of evidence.⁷⁴ Much of this approach to evidence in judicial practice appears to rest on assumptions about the nature of the international judicial function as concerned primarily with the application of law, as opposed to exhaustive fact-finding.⁷⁵ This reflects the view that the litigating parties, as sovereign states which must consent to the exercise of international jurisdiction, are best placed to determine the facts relevant to the judicial proceedings.⁷⁶ The treatment of evidence is largely influenced to by the party-driven structure of international adjudication, which, while formally adversarial, reflects a more restrained and cooperative dynamic shaped by the consensual nature of dispute settlement.⁷⁷

A recent shift in the nature of international dispute settlement toward more fact-intensive and procedurally complex cases, but increasing adjudication of politically sensitive disputes, has necessitated greater attention to evidentiary matters in the judicial practice of international courts and tribunals.⁷⁸ Drawing on early seminal works such as Sandifer's *Evidence before International Tribunals*,⁷⁹ a comprehensive account of the evidentiary practices of various

⁷³ See, in particular, Sandifer (n 27) 3–4 and 22, who underscores that international courts and tribunals have been largely 'intolerant' of any restrictive rules of evidence and are consequently 'preoccupied with getting at the facts'.

⁷⁴ The Court's approach to fact-finding has been described as 'reactive', rather than proactive. On this point, see James Gerard Devaney, *Fact-Finding before the International Court of Justice* (Cambridge University Press 2016) 30–35 and ff.

⁷⁵ Foster (n 17) 185–187.

⁷⁶ Benzing (n 18) 1377, para 5.

⁷⁷ Kolb (n 43) 942–943, that the peaceful settlement of disputes 'requires to a considerable extent the cooperation of the litigating parties as a basis', and that this flows from the basic principle of affording a fair trial under the influence of another principle of international law requiring good faith, particularly in placing all the material facts before the tribunal.

⁷⁸ On the changing nature of the judicial function of international courts and tribunals, see further ILC, 'Report of the Work of the Sixty-Ninth Session' (n 20), Annex B, Evidence before International Courts and Tribunals, paras. 4–5.

⁷⁹ Sandifer (n 27).

international tribunals,⁸⁰ more recent scholarship has further explored the central questions of evidence and proof before international tribunals. These include works of a general scope, including Kazazi's *Burden of Proof and Related Issues*,⁸¹ and Amerasinghe's *Evidence in International Litigation*,⁸² which broadly consider the principles of evidence relevant before international courts and tribunals. Only a small portion of these works specifically address the standard of proof, and when they do, their treatment of that question tends to be relatively limited. Consistent with Sandifer's earlier observations on the continuity of some notion of 'flexibility' in the evidentiary practices across international jurisdictions,⁸³ these works underscore the 'flexible' application of the standard of proof and do not provide a more detailed or systematic analysis of the rationale justifying its adoption in each case.

Significant scholarly contributions have addressed issues of evidence within specific areas of international law, or in the context of specialised international courts. These include, *inter alia*, various international criminal tribunals,⁸⁴ international arbitration and arbitral tribunals,⁸⁵ international human rights

⁸⁰ Sandifer (n 27) 457–458, noting the continuity of international judicial practice in taking a 'flexible' approach to evidentiary matters, both at the volume's initial publication in 1939 as and at the time of its update in 1975.

⁸¹ Kazazi (n 49).

⁸² Amerasinghe (n 42).

⁸³ Sandifer (n 27) 457–458.

⁸⁴ See, for example, Gideon Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility' (2001) 12 *Criminal Law Forum* 41; John Hocking and others (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Brill | Nijhoff 2001); Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers 2002); Nancy Amoury Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010); Karim AA Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010); Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff Publishers 2013); Artur Appazov, *Expert Evidence and International Criminal Justice* (1st ed. 2016, Springer International Publishing: Imprint: Springer 2016); and Yvonne McDermott, *Proving International Crimes* (Oxford University Press 2024).

⁸⁵ See, for example, Kabir AN Duggal and Wendy W Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* (Brill 2018); and Frédéric Gilles Sourgens, Kabir AN Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (First edition, Oxford University Press 2018); R Pietrowski, 'Evidence in International Arbitration' (2006) 22 *Arbitration International* 373.

adjudication,⁸⁶ particularly in view of regional human rights courts,⁸⁷ World Trade Organisation (WTO) dispute settlement,⁸⁸ as well as the judicial practice of *ad hoc* or specialised tribunals.⁸⁹ These contributions provide insights into various evidentiary issues within their respective adjudicative contexts, but their focus on judicial practice or specific frameworks limits the possibility of drawing general conclusions as to the foundational questions of evidence.

A smaller subset of scholarly work has adopted a comparative approach to evidentiary questions before international courts and tribunals, with a view to identify commonalities across the judicial practice of international courts and tribunals. Among the most significant of these contributions are Benzing's *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in*

⁸⁶ See, for example, BG Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (M Nijhoff Publishers ; Distributors for the US and Canada, Kluwer Boston 1982); Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International 1998); and Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016).

⁸⁷ See, for example, Alberto Bovino, 'Evidential Issues before the Inter-American Court of Human Rights' (2005) 2 SUR *International Journal on Human Rights* 57; Alvaro Paul, 'An Overview of the Inter-American Court's Evaluation of Evidence' in Yves Haeck, Oswaldo Ruiz-Chiriboga and Clara Burbano (eds.), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015); Alvaro Paul, 'In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights' (2012) 55 *Revista Instituto Interamericano de Derechos Humanos* 57; Philip Leach, Costas Paraskeva and Gordana Uzelac, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 *Netherlands Quarterly of Human Rights* 41; and Françoise Tulkens, 'La preuve devant la Cour européenne des droits de l'homme: Commentaire du rapport de H Tigroudja' in Helene Ruiz-Fabri and JM Sorel (eds), *La preuve devant les juridictions internationales* (Pedone 2007).

⁸⁸ See, for example, Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2010); Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement - Who Bears the Burden' (1998) 1 *Journal of International Economic Law* 227; and Sir Arthur Watts, 'Burden of Proof, and Evidence before the ICJ' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000).

⁸⁹ There is a significant body of scholarly work relating to the procedural law of the Iran-United States Claims Tribunals. See, for example, George H Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon 1996); and Charles Nelson Brower and Jason D Brueschke, *The Iran-United States Claims Tribunal* (M Nijhoff Publishers ; Sold and distributed in the USA and Canada by Kluwer Law International 1998).

zwischenstaatlichen Streitigkeiten,⁹⁰ which offers a systematic analysis of the law of evidence across different international courts and tribunals, as well as Brown's *A Common Law of International Adjudication*,⁹¹ taking a similar approach but also suggesting the emergence of a set of collectively developed principles of procedure as a 'common law' of international adjudication. These works observe a common preference among international courts and tribunals for adaptable and ultimately flexible procedures over rigid formalism, a point which has been echoed also by other scholars in more limited contexts.⁹²

Within the broader landscape of international adjudication, the ICJ has served as a focal point of the otherwise limited scholarly attention to evidentiary issues in international adjudication. One of the most comprehensive studies dedicated to the Court's evidentiary regime is Riddell and Plant's *Evidence before the International Court of Justice*,⁹³ which examines the principles of evidence at the Court by drawing from its judicial practice. Other contributions provide thematic contributions relating to specialised, scientific, or technical fields of the Court's evidentiary and fact-finding practices,⁹⁴ or in response to developments in jurisprudence.⁹⁵ There is also a significant body of scholarly work relating to fact-finding more generally, a closely related field, often in the context of the increasing use of technical or scientific evidence, experts,

⁹⁰ Benzing (n 28).

⁹¹ Brown (n 22).

⁹² Kazazi and Shifman (n 72) 193, highlighting that the system of international procedure, despite variations between judicial bodies, is 'largely harmonious' in its basic principles and fundamentals, especially in being characterised by 'its flexibility, its freedom from the technical rules of evidence normally applied in municipal law, and by the freedom in evaluation of evidence in an effort to ascertain the truth'.

⁹³ Riddell and Plant (n 16).

⁹⁴ See, for example, Makane Moise Mbengue, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 53; Foster (n 17); Guillaume Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?' (2015) 6 *Journal of International Dispute Settlement* 578; Lc Lima, 'The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case' (2015) 6 *Journal of International Dispute Settlement* 621; Giorgio Gaja, 'Assessing Expert Evidence in the ICJ' (2016) 15 *Law & Practice of International Courts and Tribunals* 409; and Joan E. Donoghue, 'Expert Scientific Evidence in a Broader Context' (2018) 9 *Journal of International Dispute Settlement* 379.

⁹⁵ Milanović (n 25); Andrea Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment' (2007) 5 *Journal of International Criminal Justice* 889; and James A Green, 'The Oil Platforms Case: An Error in Judgment' (2004) 9 *Journal of Conflict and Security Law* 357.

and witnesses before the Court.⁹⁶ Much of the existing scholarship highlights concerns about the Court's wide scope of discretion in evidentiary matters given the relative lack of legal regulation, raising further questions about legal certainty, transparency, and predictability.⁹⁷ A common conclusion of this scholarship is that while flexibility is central to the Court's approach to evidence, the complexity and increasingly fact-intensive nature of dispute settlement suggest a need for the Court to take steps to either clarify or formalise these aspects of its evidentiary regime.

While the standard of proof has been addressed in the general context of the Court's evidentiary regime and principles derived from its judicial practice, it has not yet been the subject of any comprehensive study.⁹⁸ The standard of proof is rarely addressed as a stand-alone topic and, even when it is discussed, the emphasis tends to be on judicial practice rather than foundational principles underpinning its determination.⁹⁹ These tendencies are mirrored in the broader scholarship on the standard of proof in international adjudication.¹⁰⁰ As such, the existing research highlights the Court's apparent reluctance to articulate a clear standard of proof, opting instead to preserve flexibility in evidentiary decision-making by refraining from formalising the standard of proof.¹⁰¹ In this respect, studies have discussed the Court's use of standards of proof in relation

⁹⁶ See, for example, Devaney (n 74); Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford Univ Press 2014); Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 *The Law & Practice of International Courts and Tribunals* 119; Thomas M Franck, 'Fact-Finding in the I.C.J.' in Richard B Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992); Charles N Brower, 'The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence' in Richard B Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992); and Richard B Bilder, 'The Fact/Law Distinction in International Adjudication' in Richard B Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992).

⁹⁷ For a critical view, see Brower (n 24).

⁹⁸ Riddell and Plant (n 16) 123–137; and Benzing (n 28) 504–548.

⁹⁹ Del Mar (n 23).

¹⁰⁰ Benzing (n 28) 504–548; Brown (n 22) 97–101; Amerasinghe (n 42) 232–261; and Kazazi (n 49) 323–365.

¹⁰¹ Riddell and Plant (n 16) 136, who highlight that the Court 'fully appreciates the importance of the matter' of judicial fact-finding and adjusts the level of proof required in each case.

to specific categories of case law, particularly in view of serious allegations, where the question of the applicable threshold of evidence was contentious.¹⁰²

The Court's judicial practice in view the standard of proof has been described as indeterminate and difficult to interpret,¹⁰³ remaining essentially 'in a state of flux'.¹⁰⁴ Scholarly works have drawn on a relatively limited body of judicial practice to identify the main strands of the standards of proof applied by the Court, often focusing on the language used in those judgments. These studies have focused on identifying and categorising the terms used by the Court to express different standards of proof but have not connected these formulations to the underlying legal principles and rationale that inform those expressions. This means that much of the scholarly commentary is descriptive rather than explanatory and limited in terms of drawing more generalisable conclusions as to the applicable standard of proof. Nonetheless, this body of scholarship provides important insights into the types of thresholds the Court appears to invoke and therefore serves as a starting point for further analysis.

¹⁰² These include disputes involving claims relating to the use of force, typically in the context of self-defence, where the main contributions include Mary Ellen O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 *Proceedings of the Annual Meeting (American Society of International Law)* 44; James A Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 *International and Comparative Law Quarterly* 163; Green (n 95); Highet, 'Evidence, the Court, and the Nicaragua Case' (1987) 81 *The American Journal of International Law* 1; and Paul S Reichler, 'The Impact of the Nicaragua Case on Matters of Evidence and Fact-Finding' (2012) 25 *Leiden Journal of International Law* 149. The category of cases relating to 'grave charges' also includes the invocation of state responsibility for allegations of genocide under the Genocide Convention (n 4), where some of the main scholarly contributions include Milanović (n 25); Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669; Gattini (n 95); and A Gattini and G Cortesi, 'Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case' (2015) 28 *Leiden Journal of International Law* 899.

¹⁰³ On the difficulty of 'making sense' of the Court's judicial practice, see *Del Mar* (n 23) 98–101, suggesting that the difficulties in 'making sense' of the Court's evidentiary practices are particularly pronounced in respect of the standard of proof; *Riddell and Plant* (n 16) 129, that the Court's judicial practice 'reveals no distinctions in the circumstances of their use, and it appears that the Court in fact uses them indiscriminately to describe a fact or argument which they consider to have been proven'; and; *Kolb* (n 43) 944–945, describing the Court's judicial practice as 'very diverse'.

¹⁰⁴ *Benzing* (n 28) 750–751.

While the precise categorisation of the different expressions for the standard of proof varies between accounts,¹⁰⁵ several possible standards of proof have been identified in the Court's judicial practice. It suggests that the standards of proof range from a lower *prima facie*,¹⁰⁶ emphasising the likelihood of an event having taken place, similar to a 'balance of probabilities' standard of proof,¹⁰⁷ to a higher standard of proof requiring either 'convincing' or 'fully convincing' evidence.¹⁰⁸ While a reserved approach only recognises a default 'convincing' standard of proof, alongside a 'conclusive' evidence for serious charges,¹⁰⁹ others have proposed a broader spectrum of possible standards of proof.¹¹⁰

¹⁰⁵ See Riddell and Plant (n 16) 132–136, who identify three categories of standards of proof, including the 'balance of probabilities', 'clear and convincing evidence', and 'fully conclusive evidence'. For an alternative categorisation of the Court's judicial practice, see also Brown (n 22) 97–101, identifying five standards of proof used by international courts and tribunals, including a *prima facie* standard of proof, a standard of proof akin to the 'balance of probabilities', and higher standards of proof at 'proof in a convincing manner' and 'beyond a reasonable doubt'. As a fifth possible standard of proof, Brown also considers that the Court's reference to the need for 'sufficient' evidence is a standard of proof in its own right.

¹⁰⁶ Kolb (n 43) 944, suggesting that the Court has accepted *prima facie* evidence for the indication of provisional measures in the incidental phase of the proceedings. See also Kazazi (n 49) 326 ff., who uses the term *prima facie* evidence to describe instances in which the evidence was 'insufficient' to meet the required threshold of evidence.

¹⁰⁷ See, for example, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgment) [2021] ICJ Rep 206, in which the Court referred to a standard of proof that appeared akin to that of 'balance of probabilities', suggesting a low threshold of evidence.

¹⁰⁸ The cases requiring this heightened standard of proof involve claims of a serious nature, so-called 'charges of exceptional gravity'. The cases in this category relate to the use of force, such as *Corfu Channel* (n 5); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] ICJ Rep 14; *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ Rep 161; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Rep 168. This category also includes cases involving the invocation of state responsibility for violations of the Genocide Convention (n 4), including *Bosnia Genocide* (n 5), and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgment) [2015] ICJ Rep 3. On these cases, see Del Mar (n 23) 99–100.

¹⁰⁹ Under this view, there is a 'default' or regular standard of proof, most likely at 'convincing' evidence, but perhaps at times more akin to 'balance of probabilities', on one hand, and a strict standard of proof at 'conclusive' evidence for grave charges, on the other. See also Benzing (n 18) 1371, paras. 108–109.

¹¹⁰ Brown (n 22) 97–101, proposing five possible standards of proof: *prima facie* evidence for situations where the evidence may be difficult to obtain, or for provisional measures; 'beyond reasonable doubt' for grave charges; 'proof in a convincing manner'; 'preponderance of the evidence'; and 'sufficient' evidence.

Some organise those standards into clusters consisting of low, intermediate, and heightened thresholds, reflecting the nature and gravity of the dispute, as well as other factors.¹¹¹ Beyond these specific expressions, it has also been observed that the Court will often merely refer to the ‘sufficiency’ of evidence without clarifying the required threshold of evidence in the case before it.¹¹²

The state of the art suggests the following. First, the rationale underpinning the Court’s use of a differentiated standard of proof remains underexplored and has yet to be examined in a comprehensive or systematic manner. Departing from a general understanding of the expressions the Court uses for the standard of proof, it becomes clear that the core challenge does not lie in terminology alone, but rather in the lack of clarity about the relative stringency of those expressions, the process by which the Court determines the standard of proof, and the rationale underpinning judicial practice. While the existing scholarship has provided descriptive insights based on an analysis of judicial reasoning, it does not offer a coherent or unified conceptual framework allowing for further generalisable or systematic examination of the Court’s approaches the standard of proof in judicial practice. Second, the theoretical foundations of the Court’s evidentiary regime remain largely unexamined. Given the plausible assumption that the standard of proof reflects the complex interplay of considerations, including the nature, objectives, and context of adjudication, this is essential to develop an understanding of the environment in which such thresholds are applied. At present, the Court’s discretion is often characterised simply as a scope of ‘flexibility,’ but the precise nature, scope, and limits of this flexibility in evidentiary decision-making remain largely unexplored.

1.4.2 Scholarly Intervention

The first contribution of the present thesis to existing scholarship is theoretical. The thesis offers a systematic account of the evidentiary regime of the Court, with particular attention to the standard of proof and the Court’s discretionary power in evidentiary decision-making within its procedural framework. By drawing on insights from general evidence theory on evidentiary reasoning,

¹¹¹ Riddell and Plant (n 16) 133–136, who propose three clusters of standards of proof based on judicial practice, as shown by the lower standard of proof in boundary delimitation disputes; the intermediate standard of proof in cases involving the attribution of state responsibility; and a stricter standard of proof for grave charges. See Foster (n 17) 227, proposing three clusters as including proof ‘beyond reasonable doubt’, for grave charges; ‘conclusive proof’, as an intermediate standard of proof; and ‘on the balance of probabilities’ as a lower standard.

¹¹² See Brown (n 22) 101, who designates ‘sufficiency’ as a distinct standard of proof.

the thesis provides a conceptual framework for understanding how evidentiary standards are determined and applied in the Court's judicial practice. This framework seeks to move beyond merely descriptive accounts to open the 'black box' of evidentiary reasoning by identifying the core considerations, whether this is explicit or implicit, that guide the Court's evidentiary decision-making. By reconstructing the Court's evidentiary regime and articulating the interests and features that shape it, the thesis provides a robust theoretical foundation for understanding evidentiary reasoning at the international level. The analysis thereby contributes not only to the scholarship on the ICJ itself but to the broader field of international procedural law and adjudication.

The thesis also makes an analytical and jurisprudential contribution to existing scholarship. It clarifies the considerations that guide the Court's decision-making in respect of the standard of proof, an essential but under-theorised aspect of its factual assessments. The thesis sheds light on the frequently invoked yet rarely explained notion of 'flexibility' in procedural decision-making. Rather than treating this flexibility as an impenetrable feature of the Court's evidentiary regime and practice, the thesis develops a conceptual framework that identifies the scope of the Court's authority and the constraints that shape it. In Chapter 7, the thesis brings these elements together in what is described as an 'open-close' model of evidentiary decision-making, capturing the balance the Court strikes between judicial pragmatism and constraint in its evidentiary decision-making.

The clarification of the Court's judicial practice has practical significance for those seeking to understand or engage with the ICJ's jurisprudence. As interstate disputes become increasingly fact-intensive and politically sensitive, the demand for transparent and predictable standards is more significant. By lifting the lid on the 'black box' of the Court's evidentiary reasoning, the thesis offers a more structured understanding of how evidentiary thresholds are articulated and applied in international judicial practice. While the framework does not claim that the Court is, or indeed will be, consistent in its use of evidentiary standards, it provides conceptual tools to critically evaluate future judgments.

1.5 Delimitations

There are two main delimitations. Firstly, the thesis focuses on the evidentiary regime and judicial practice of the ICJ. As such, it does not adopt a broader or comparative approach. Secondly, the thesis concentrates on the use of, and

justifications for, the standard of proof in the judicial proceedings at the Court, excluding a more detailed consideration of other aspects of evidence.

The topic under consideration relates to the standard of proof in the context of the distinct legal, procedural, and institutional characteristics of the evidentiary regime of the Court. The approach can be described as contextual, examining not only the use of the standard of proof but also the broader circumstances in which it is applied. This justifies the emphasis on the ICJ as the central object of inquiry. As the principal judicial organ of the UN, an organisation with near-universal membership, the Court occupies a unique position of authority and legitimacy as a judicial body and systemic actor in the international system. The general scope of the Court's jurisdiction offers the breadth to analyse standards of proof across a range of legal, procedural, and substantive contexts.

The emphasis on the ICJ excludes substantive engagement with the procedural law or practices of other international judicial bodies, or in-depth comparisons. Comparative approaches have proven valuable in identifying key features and commonalities across international jurisdictions.¹¹³ The present analysis will draw on comparisons to other international judicial bodies where necessary to elaborate certain aspects of evidence before the Court, but without adopting a more explicitly comparative approach. This balances contextual depth with the recognition of broader trends in international adjudication, allowing a focused analysis that situates the ICJ's practices in a wider landscape.

Another significant delimitation is the emphasis on the standard of proof as a stand-alone issue. The standard of proof is understood here as the decisional threshold used to determine whether the evidence presented is sufficient to serve as proof of a factual allegation.¹¹⁴ It directly shapes judicial outcomes, and the stringency of this threshold reflects a balance between competing interests in adjudication and can be understood as emblematic of the tensions that arise from the Court's flexible evidentiary regime. This is particularly significant as disputes between states become increasingly complex and fact intensive. This excludes detailed consideration of other aspects of evidence, including issues related to which of the parties will bear the burden of proof, the evaluation of evidence, forms and methods of proof, and broader questions

¹¹³ See Brown (n 22); and Benzing (n 28).

¹¹⁴ There is terminological variation in this area, with some legal systems considering that the 'burden' and 'standard' of proof represent different sides of the same coin and use the term 'burden of proof' to describe both the party with the onus of proving their allegations, and the benchmark against which the evidence they submit is assessed. On this use of 'burden of proof', see Louis Kaplow, 'Burden of Proof' (2011) 121 *Yale Law Journal* 738, 741.

relating to fact-finding, from the general scope of the examination. While the different elements of proof are closely interrelated and influence each other during the judicial process, the rationale guiding decision-making in each area is premised on considerations distinct from those underpinning the standard of proof. The thesis will consider other aspects of evidence insofar as they contribute to clarifying the Court's approach to determining the standard of proof. It remains cognisant of the interactions between the standard of proof and other evidentiary principles, maintaining a specific focus on the former.

1.6 Terminological Clarifications

As noted throughout this chapter, there is no well-developed 'international law of evidence'. This is reflected in the inconsistent, or imprecise, terminology in this area both in judicial practice and scholarly commentary. This is further compounded by the frequent borrowing of terms from domestic legal contexts, as well as analogies to national procedural law, especially in studies that have attempted to identify distinct standards of proof in judgments from the Court. For these reasons, a few terminological clarifications are necessary.

As a central concept for the present thesis, the term *standard of proof* is used to refer to the relevant decisional threshold that determines when evidence is sufficient to establish a factual allegation. Consistent with the use of terms in the Court's judgments, the present thesis makes a conceptual distinction between the 'standard of proof' and the 'burden of proof'. To illustrate, in *Bosnia Genocide*, the Court held that '[a]ccordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the *burden* or *onus of proof*, the *standard of proof*, and the *methods of proof*', before proceeding to the *evaluation* of the evidence'.¹¹⁵ The standard of proof should therefore be understood as distinct from, though closely related to, other aspects of evidence including which of the parties will bear the burden of proving their claims, the process of assigning probative weight to evidence submitted by the parties, as well as the forms and methods of proof.¹¹⁶

¹¹⁵ *Bosnia Genocide* (n 5) paras. 202-203 (emphasis added).

¹¹⁶ For general definitions of the standard of proof, see Hock Lai Ho, 'The Legal Concept of Evidence', *The Stanford Encyclopaedia of Philosophy* (Winter 2021 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/win2021/entries/evidence-legal/>>.

The use of terms and conceptual separation between different components of proof is not universal, neither in scholarly discourse nor judicial practice. The precise meaning of the use of certain terms is not only culturally embedded but may vary between scholarly commentators. The Court may itself contribute to this lack of clarity, as individual judges draw on their own education, training, and legal experience from domestic systems, alongside varying linguistic backgrounds, in their approaches to evidence. Accordingly, this may result in expressions that echo the terms used in national settings without necessarily carrying the same meaning from a conceptual standpoint in a judgment from the Court. Without explicit clarification of such terms, this risks conceptual confusion, as similar terminology may obscure divergent legal concepts. A degree of caution must therefore be exercised in interpreting terminology in this field. This also underscores the importance of identifying not only the terminology but also the underlying contextual factors which are relevant to the Court's judicial practice. Further complicating matters, the procedural law of the Court is influenced by several different legal traditions, and perhaps most significantly by Civil Law approaches in matters of evidence and procedure. The use of English as one of the two working languages of the Court creates similarities between the use of terms in the Court's judgments, on one hand, and Common Law systems, on the other. This can be misleading, as English-language versions of judgments or pleadings may use terms that appear familiar to readers trained in Common Law traditions, even though those terms may reflect different procedural or evidentiary concepts.¹¹⁷ This is the case for the standard of proof, where the conceptual divides between legal systems in the articulation of that standard are particularly pronounced.¹¹⁸ As the present thesis is written in English and relies on English-language materials from the Court, it uses the terminology that is most consistent with that of the Court while remaining cognisant of the possible overlap with national usage and the interpretive caution this demands.

¹¹⁷ On English-language version of documents, and the associated tendency to rely on analogies to domestic law, see further Rosenne (n 41) 1026; and Del Mar (n 23) 100.

¹¹⁸ On the function of legal proof, see *Chapter 2.2*. See also *Chapter 2.3.4*, which discusses the different conceptualisations of the standard of proof.

1.7 Outline

The first research question is addressed in Chapters 2 to 4, which construct a conceptual framework for the standard of proof at the Court. These chapters collectively establish the necessary theoretical and institutional foundations to understand the considerations that guide the determination of the standard of proof. This framework culminates in what is termed an ‘open-close’ model of evidentiary decision-making, which captures the dynamic balance the Court strikes between broad judicial discretion (‘open’), and the legal, procedural, and institutional constraints that limit decision-making (‘close’).

Following the present introduction, Chapter 2 explores the role of the standard of proof as a decisional threshold in adjudication. It demonstrates that the standard of proof is not just a technical evidentiary tool, but a key mechanism for managing inevitable factual uncertainty in judicial decision-making. This foundation guides the subsequent analysis of the Court’s evidentiary regime and practice, showing how the standard shapes judicial reasoning in context.

Chapter 3 turns its attention to the evidentiary regime of the ICJ. Adopting a contextualised approach that acknowledges the embeddedness of the standard of proof as a decisional threshold in adjudication, the chapter turns to explore the multifaceted judicial function of the Court. As is highlighted, the Court is not only a judicial body, but a significant actor within the broader institutional setting in which it carries out its functions. The chapter proceeds to set out the legal framework for evidence at the Court, emphasising the lack of prescriptive rules of evidence and the resulting scope of freedom afforded to the Court in its evidentiary decision-making. This freedom, frequently described merely as a scope of ‘flexibility’, allows the Court to determine its approach to matters of evidence on a case-by-case basis. At the same time, the Court’s freedom in evidentiary matters is limited by its foundational reliance on state consent, which binds it to the factual narratives and submissions presented by the parties, restricting its ability to independently investigate or impose findings. This dynamic between judicial flexibility and deference to the parties thus defines much of the Court’s evidentiary regime.

Building on the findings in the two previous chapters, Chapter 4 examines the nature of the freedom afforded to the Court in evidentiary decision-making and conceptualising it as an exercise of discretion. While judicial discretion enables bodies such as the Court to make decisions even in the absence of binding legal rules or standards, this power is not unlimited. The Court’s judicial discretion is essentially ‘bounded’, meaning it is constrained by an interplay of legal

norms, institutional design, and normative and political considerations. One of the central dimensions of the bounded nature of the Court's discretion is its deference to states and their interests, fundamentally shaping its approach to evidentiary decision-making.

Chapters 5 and 6 shift focus from theory to judicial practice by examining the standard of proof in the judicial practice of the Court. This corresponds to the second research question, drawing on the conceptual framework and set of considerations developed earlier to analyse case studies.

Chapter 5 considers the Court's requirement of a standard of proof at 'conclusive' or 'fully conclusive' evidence in cases relating to the attribution of state responsibility for grave charges. It is one of few relatively consistent and well-articulated areas of the Court's judicial practice, even if the threshold and definition of 'grave' allegations remain unclear. While often treated as a single, high standard of proof, the chapter proposes a distinction between 'conclusive' and 'fully conclusive' evidence as distinct standards of proof. As discussed throughout the chapter, the stringency of the standard appears to be justified by the significant state interests that are implicated by particularly grave charges. The slight variation between 'conclusive' and 'fully conclusive' evidence within this category of cases reflects different degrees of judicial pragmatism and restraint, where higher stakes for the litigating parties result in a much more pronounced judicial restraint.

Chapter 6 is a case study of the Court's requirement of 'sufficient' evidence. It adopts a thematic rather than case-specific approach to examine the Court's judicial practice. In doing so, it considers two categories of the Court's judicial practice, which include the attribution of state responsibility for charges not classified as 'grave' for evidentiary purposes, on one hand, and territorial and maritime boundary delimitation disputes, on the other. While 'sufficient' evidence in the context of the attribution of state responsibility reflects a stringent standard of proof at 'convincing' evidence, the same expression in territorial and maritime boundary delimitation corresponds to a lower evidentiary threshold, one that is possibly akin to the 'balance of probabilities'. It shows that the 'sufficiency' of evidence is an intentionally ambiguous standard proof, the application of which is context-dependent depending on the nature of the dispute. This highlights the Court's pragmatism in the articulation and application of the standard of proof, reflecting a different balance of stakes compared to its approach to cases involving more serious allegations.

Finally, Chapter 7 offers concluding remarks. It demonstrates that the standard of proof at the Court is shaped by a context-sensitive balancing of legal,

procedural, and institutional considerations, resulting in a flexible yet bounded approach. This synthesis is captured in the ‘open-close’ model of evidentiary decision-making, which illustrates how the Court exercises broad judicial discretion (‘open’) while simultaneously operating within defined legal, procedural, and institutional constraints (‘close’). The highlights the dynamic tensions the Court navigates between pragmatism and restraint, openness, and limitation, in shaping the standard of proof as the decisional threshold.

2. The Standard of Proof in Adjudication

2.1 Introduction

This chapter explores the function of the standard of proof in adjudication. It examines how the standard of proof interacts with other elements of evidence, highlighting its importance in managing factual uncertainty and allocating the risk of error between the litigating parties. Imposing a decisional threshold, the standard of proof is central for the determination of whether the evidence meets the necessary criteria for a judicial decision. The determination of the standard of proof reflects a balance of several different types of considerations. These include, *inter alia*, the tolerable level of factual uncertainty and acceptable risk of error in the judicial outcome, but also broader judicial policy goals as well as institutional and normative interests of the legal system in question.¹¹⁹ These considerations guide how the standard is articulated and applied, contributing to structuring judicial decision-making in response to factual uncertainty.

Considering the foregoing, the chapter provides a general understanding of the concept of legal proof and the process for determining the standard of proof in adjudication. While the justifications for the use of a particular standard of proof are context-dependent, many of the central considerations are shared across legal systems.¹²⁰ Moreover, they reflect similar interests. In criminal proceedings, for example, the gravity of the allegations and imbalance of

¹¹⁹ Alex Stein, *Foundations of Evidence Law* (Oxford University Press 2005) 133–134, who underscores that the determination of the standard of proof reflects the distribution of the risk of error associated with the outcome of the judicial proceedings; and Kaplow (n 114) 741, emphasising that the standard of proof should be determined to advance 'social' interests in adjudication.

¹²⁰ Despite conceptual differences between legal systems in respect of the standard of proof, the outcomes of judicial proceedings do not appear to differ in terms of the evidential support required for a judgment. See further Mark Schweizer, 'The Civil Standard of Proof - What Is It, Actually?' (2016) 20 *International Journal of Evidence & Proof* 217, 230–231.

power between the parties generally warrants a higher standard of proof at ‘beyond reasonable doubt’. By contrast, in civil cases, where the parties are considered equal, the standard of proof is normally lower and the presence of circumstances – such as difficulties in obtaining the necessary evidence – may justify adjustments in the required degree of certainty in a particular case.¹²¹

The understanding of the standard of proof set out in this chapter provides a foundation on which to examine the equivalent issues in relation to the ICJ.¹²² Following the present introduction, it proceeds in Chapter 2.2 by considering the function of the standard of proof as a decisional threshold to manage factual uncertainty in adjudication. Chapter 2.3 continues by examining the standard of proof as one of several components of proof that jointly structure the judicial response to factual uncertainty, each reflecting institutional and normative priorities of different legal systems and traditions. The components of proof examined in this section include the burden of proof, questions relating to the admission of evidence, the evaluation of evidence, and finally, the standard of proof in terms of sufficiency and evidential weight. The considerations justifying the use of a differentiated standard of proof are examined in Chapter 2.4 focusing on three main categories: first, considerations of a general nature; second, error cost minimisation under a decision-theoretic model of reasoning; and third, broader considerations relating to judicial policy and institutional interests, and value-based concerns. Finally, Chapter 2.5 concludes.

2.2 The Function of the Standard of Proof

All forms of decision-making involve factual uncertainty.¹²³ A decision-maker must consider that they have sufficient support in, or be sufficiently convinced by, the available information to be able to reach a decision even if there is a lingering uncertainty as to the facts. This means that some type of benchmark, or standard of proof, appears in a range of contexts. This includes, for example, regulatory and administrative standards employed by government agencies or

¹²¹ *Chapter 2.3.4*. On the circumstances justifying the determination of a particular standard of proof, see the discussion in *Chapter 2.4*.

¹²² As discussed in *Chapter 1.4.1*, there is no well-developed ‘international law of evidence’. On the ICJ, see further Nance (n 19) 295–297.

¹²³ On the factual uncertainty that arises in judicial decision-making, see Stein (n 119) 34–36.

official institutions,¹²⁴ or investigative standards of proof in fact-finding contexts to provide the relevant decisional threshold indicating at what point a fact is considered established.¹²⁵ Standards of proof are also used in scientific and medical contexts to indicate the existence of sufficient information as a basis for decision-making.¹²⁶ While the use of a standard of proof in scientific contexts is intended to support the drawing of sound inferences, in judicial settings the requirement serves as a basis for applying the law and reflects additional considerations, such as the seriousness of incorrect judgments.¹²⁷ As such, the use of a particular standard of proof, whether it is explicit or merely implied, depends on the specific context and objectives of decision-making.

In judicial contexts, the standard of proof is the necessary degree of evidentiary support required by a judicial body to establish a claim.¹²⁸ Adjudication is a

¹²⁴ This includes diverse areas of law, including, for instance, tax decisions, the assessment of migration claims and/or the credibility of asylum claims, competition law enforcement, and so on, where the evidence assessment is a prominent feature of the decision-making process. Generally, see Caroline Nordklint, *Bevisrättens Tillämpning i Skatteprocessen* (Jure 2019); Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (M Nijhoff Publishers 2005); and *The Standard and Burden of Proof in Competition Law Cases* (OECD Roundtables on Competition Policy Papers No. 318, OECD 2024) 7-13.

¹²⁵ The 'standards of proof' used by international fact-finding bodies in respect of human rights violations mirror the traditionally accepted standards of proof used in municipal law. See further T Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 *Journal of Conflict and Security Law* 105, 114; BG Ramcharan, 'Evidence', *International law and fact-finding in the field of human rights* (M Nijhoff Publishers ; Distributors for the US and Canada, Kluwer Boston 1982) 77-78, who notes that most fact-finding bodies appear to rely on a standard of proof similar to that of the 'preponderance of the evidence'; and Thomas M Franck and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74 *American Journal of International Law* 308, 309-310.

¹²⁶ See, for example, Lara Khoury, *Uncertain Causation in Medical Liability* (Hart Pub 2006) 4-6. On a similar topic, see also generally Richard Goldberg, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (Hart 1999).

¹²⁷ On the distinction between legal and scientific standards of proof, see Lena Wahlberg, *Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations* (Media-tryck 2010) 17-19; and Susan Haack, 'Truth and Justice, Inquiry and Advocacy, Science and Law' (2004) 17 *Ratio Juris* 14, 108.

¹²⁸ Kaplow (n 114) 741. The matter of the 'standard of proof' is occasionally discussed under the heading of 'burden of proof', or 'burdens of persuasion', which encompasses other components of proof. On this aspect, see further Ronald J Allen and Alex Stein, 'Evidence, Probability, and the Burden of Proof' (2013) 55 *Arizona Law Review* 557, 558. On the varying terminology and conceptual confusion in this area, see further Giovanni Tuzet, 'Evidence Assessment and Standards of Proof: A Messy Issue' [2021] *Quaestio facti. Revista internacional sobre razonamiento probatorio* 88-90.

distinct decision-making context characterised by the exigencies of the judicial function, which delimit how factual uncertainty may be addressed.¹²⁹ The fundamental task of a judicial body is to resolve disputes by applying valid law to the facts, and judges must determine the facts of a case based on an evidential record that may be incomplete, contested, or ambiguous. As scholars have observed, judicial facts can only be established to a degree of probability and are necessarily approximations rather than absolute certainties.¹³⁰ This is reflected in the rationale for rules of evidence, which are intended to facilitate judicial decision-making in view of factual uncertainty.¹³¹ Underpinning rules of evidence is the idea that evidence assessment should ascertain the facts in a version that is as close as possible to the truth while remaining within the legal, institutional, and procedural limits of the judicial function.¹³² This builds on the assumption that the aim of the judicial process is to maximise the accuracy of judgments and, to this end, strive to establish the ‘truth’ of disputed factual propositions to apply valid law as accurately as possible.¹³³

The pursuit of judicial truths operates within a framework that acknowledges the limits of factual certainty in adjudication. While truth remains an important objective, it competes with other interests within the judicial process.¹³⁴ In this respect, the rules of evidence contribute to balancing those interests. Such rules may be understood as allocating the risks of error between the parties,¹³⁵ or uphold other procedural, institutional, and policy objectives that promote

¹²⁹ Nance (n 19) 1–3; and Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (Cambridge University Press 2014) 1.

¹³⁰ Mike Redmayne, ‘The Structure of Evidence Law’ (2006) 26 *Oxford Journal of Legal Studies* 805, 805, who makes the point that, in the context of adjudication, ‘[t]he best fact-finders can do, then, is to assess the probability of liability.’

¹³¹ Stein (n 119) 96.

¹³² Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press 2008) 52–53; and Haack (n 129) 16–23.

¹³³ This is rooted in the Rationalist Tradition, which emphasises the ‘rectitude of decision’ as a core objective of the judicial process. See further Terence Anderson, David A Schum and William L Twining, *Analysis of Evidence* (2nd ed., Cambridge University Press 2005) 79; Peter Murphy (ed), *Evidence, Proof, and Facts: A Book of Sources* (Oxford University Press 2003) 71–73; and Redmayne (n 130) 807.

¹³⁴ Anderson, Schum and Twining (n 133) 74 and 78, underscoring that the description of a system of adjudication as ‘rational’ is not necessarily an accurate reflection of reality but reflects the aspirations of that system.

¹³⁵ Stein (n 119) 219–221, who considers that the allocation of the risk of error is one of the chief concerns of the rules of evidence in adjudication.

broader interests of fairness, efficiency, as well as judicial economy in a legal system.¹³⁶ In this context, the standard of proof represents a decisional criterion. It does not require the complete establishment of the truth of factual events but rather the establishment of facts to varying degrees of certainty, that is, approximations of the truth. The standard of proof operates alongside the other components of proof, such as the burden of proof, indicating the point at which the evidence can support the establishment of a particular fact,¹³⁷ while also the tolerable level of factual uncertainty in decision-making.¹³⁸

The function of the standard of proof is similar across adjudicative contexts. However, legal systems adopt different approaches to the standard of proof.¹³⁹ On one hand, the level of certainty required of the evidence may be expressed through a standard of proof in probabilistic terms, referring to the likelihood that a particular fact has occurred.¹⁴⁰ On the other hand, it may refer to personal conviction of the judge, reflecting the subjective belief instilled in them by evidence that the alleged facts are true.¹⁴¹ Despite these variations in the precise

¹³⁶ Noting that there is disagreement over the priority of rectitude of decision when it conflicts with values such as state security, family protection, or procedural fairness. Other evaluation criteria, such as speed, cost, fairness, and public confidence, may come into play, and their relative importance is debated. See Anderson, Schum and Twining (n 133) 83–85.

¹³⁷ Generally, see Kaplow (n 114) 741; and, in a Nordic context, Strandberg (n 37) 17.

¹³⁸ Stein (n 119) 133–134, that the stronger the evidence a court or tribunal requires, the lower of a risk is it willing to accept that the judgement is substantively incorrect.

¹³⁹ The conceptual divide between the Common Law and Civil Law legal systems is the subject of significant debate. See, in particular, Clermont and Sherwin, ‘A Comparative View of Standards of Proof’ (2002) 50 *The American Journal of Comparative Law* 243, which presents a general critique of Civil Law’s requirement of ‘full conviction’ as the standard of proof, juxtaposed against Common Law’s use of probabilistic thresholds. See also the response, Taruffo, ‘Rethinking the Standards of Proof’ (2003) 51 *The American Journal of Comparative Law* 659, rebutting Clermont and Sherwin’s arguments. For a comparative overview of standards of proof, see Tuzet (n 128) 92–104.

¹⁴⁰ On probabilities in the context of the standard of proof, see Redmayne, ‘Standards of Proof in Civil Litigation’ (1999) 62 *The Modern Law Review* 167, 167–174; and Allen and Stein (n 128) 565–567. For an overview of the use of standards of proof at varying degrees of likelihood, albeit in the context of surveying the standard of proof in the United States in a comparative study, see Clermont and Sherwin, (n 139) 251–252, who describe the standard of proof as ranging from what *probably* has happened, to what *highly probably* or *almost certainly* has happened.

¹⁴¹ Christoph Engel, ‘Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law’ (2009) 33 *Vermont Law Review* 435, 440–441; and Mirjan Damaška, ‘Free Proof and Its Detractors’

expression of the standard of proof, the use of such as threshold responds to a shared functional concern to facilitate decision-making despite uncertainty as to the facts.¹⁴² It also implies that judicial decision-making inevitably requires some notion of a standard of proof.

2.3 The Components of Proof

Although the standard of proof establishes the relevant decisional criterion for judicial decision-making, it is only one of several components of proof that structure the response to factual uncertainty in adjudication. A judicial body must identify which of the parties bears responsibility for substantiating their allegations, assess if the evidence submitted by the parties is admissible, assign probative value to evidence, and determine whether the evidence meets the required threshold of evidence.¹⁴³ These determinations are informed by a complex interplay of considerations, including the allocation of risk and error, institutional and procedural interests, and normative values such as fairness and truth-seeking. How these factors influence evidentiary reasoning varies depending on the legal and procedural context. These considerations are reflected in the components of proof: the *burden of proof*, the *admissibility of evidence*, the *evaluation of evidence*, and the *standard of proof*.

2.3.1 Burden of Proof

The *burden of proof* determines which party bears the burden of substantiating a particular allegation of fact. If that party fails to produce sufficient evidence to substantiate their claims, the adjudicator may decide in favour of the other party.¹⁴⁴ The allocation of the burden of proof can therefore be decisive for the judicial outcome, alongside the other components of proof.

(1995) 43 *American Journal of Comparative Law* 343, 346–347. On the different approaches to the standard of proof, see further *Chapter 2.3.4.1*.

¹⁴² Generally, see Redmayne (n 140), 195, who considers the conceptual underpinnings, and expressive role, of the standard of proof as a response to factual uncertainty in adjudication.

¹⁴³ For an overview, see Nance (n 19) 2–5; and, in a Nordic context, Strandberg (n 37) 17–18.

¹⁴⁴ The term *burden of proof* is used here in the sense described. The term is occasionally used to refer not only to which of the parties must substantiate their claims but also if the evidence submitted meets the required threshold of the evidence. See Kaplow (n 114) 741.

The burden of proof will generally rest on the party making an assertion. This constitutes the general principle for the allocation of the burden of proof, often expressed through the Latin Maxim *actori incumbit onus probandi*, which is widely recognised in legal systems at both national and international levels.¹⁴⁵ However, exceptions to the general principle exist. The burden of proof might become subject to reversal in certain circumstances, for example, where it is significantly easier for the other party to obtain evidence, or in disputes where specific procedural rules dictate a different allocation of the burden of proof.¹⁴⁶ In civil cases, the party initiating proceedings will in most cases bear the initial burden of having to substantiate their allegations, at risk of an unfavourable judgment.¹⁴⁷ By contrast, in criminal cases, the burden of proof rests primarily on the prosecution. This reflects the presumption of innocence in criminal procedure, which functions as a procedural safeguard requiring that the defendant is treated as innocent until proven guilty to a standard of proof beyond reasonable doubt.¹⁴⁸

The burden of proof plays a central role in allocating the risks associated with factual uncertainty in the judicial process, as well as those of an unfavourable outcome.¹⁴⁹ The legal system thereby determines which of the parties will bear the consequences if the evidence is insufficient. This reflects a distribution of risk shaped not only by the balance of power between the parties but also by normative judgments about which party it is most acceptable to burden with the risk of error attached to factual uncertainty. In terms of the distribution of risk, in civil cases, this results in a relatively balanced distribution, as both parties may bear certain procedural risks but the claimant carries responsibility

¹⁴⁵ The general principle means that the onus of proof rests on the party that has brought a claim, or that has made an assertion during judicial proceedings. As an example of its widespread recognition, it is held as a general principle of law applicable before international courts and tribunals. See Amerasinghe (n 42) 61–62; and Cheng (n 49) 326–335.

¹⁴⁶ Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991) 120–121.

¹⁴⁷ See, for example, Redmayne (n 130) 805, underscoring the presumption of equality between the parties in civil proceedings.

¹⁴⁸ The placement of the burden of proof in criminal cases is linked to the procedural rights of the individual and, more broadly, the presumption of innocence. See *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, Article 6 (hereafter ECHR), which relates to the right of a fair trial.

¹⁴⁹ On the burden of proof and the allocation of the risk of error attached to factual uncertainty, see further Stein (n 119) 219–221.

for having to prove their claim.¹⁵⁰ In contrast, the approach in criminal cases imposes a heavier burden on the prosecution, reflecting the asymmetry of power between the parties and the grave potential consequences for the defendant should an error occur.¹⁵¹

2.3.2 Admission of Evidence

Following the allocation of the burden of proof, the judicial body must also determine whether the evidence submitted by the parties is admissible. This is a matter of whether it can be received by the judicial body and thereby admitted as part of the evidential record. The admissibility of evidence is assessed in relation to the individual pieces of evidence and if they satisfy the criteria to be evaluated by the judicial body.¹⁵² The admission of evidence is not regulated by a uniform set of legal principles. Admissibility criteria vary considerably across legal systems and reflect differences in legal and procedural traditions. A significant factor in shaping such criteria is whether fact-finding relies on professional judges, or amateur triers of fact. This distinction in the nature of the judicial process matters because different types of fact-finders require varying levels of guidance and instruction in the evaluation of factual claims. In this respect, systems that rely on amateur triers of fact often impose stricter admissibility requirements to help direct and constrain the evaluation process, whereas systems with professional judges tend to grant greater discretion not only in the admission but also in the subsequent assessment of evidence.¹⁵³

The admission of evidence in Common Law jurisdictions is subject to detailed legal regulation, reflecting the use of lay juries and the adversarial nature of judicial proceedings.¹⁵⁴ Rules of evidence restrict the admission of evidence and thereby guide lay juries in their evaluation of evidence. These include, for example, exclusionary rules of evidence, as well as other technical standards

¹⁵⁰ Stein (n 119) 219–225.

¹⁵¹ *ibid* 178–183.

¹⁵² Questions relating to the admissibility of evidence arise most frequently in Common Law legal systems, given the regulated approach adopted in these jurisdictions. For an overview, see, for example, Charles T McCormick and others, *McCormick on Evidence* (Robert P Mosteller ed, Eighth edition, West Academic Publishing 2020) §§ 51–60 at 145–172. On the notion of free proof, and, consequently, the free admission of evidence, with a comparative approach, see Damaška (n 141) 343–348.

¹⁵³ Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press 2008) 54.

¹⁵⁴ Clermont and Sherwin (n 139) 255–258.

of authentication that limit the admission of evidence to the court. These rules mean that evidence may be rejected even where it contains credible information, preventing juries from deciding according to what they believe or know to be true.¹⁵⁵

In contrast to this more heavily regulated approach, Civil Law jurisdictions do not impose rules of admissibility but instead operate under the principle of the free admission of evidence. This is explained using professional judges in these legal systems, as opposed to lay juries, who are assumed to require less guidance in evaluating evidence.¹⁵⁶ Consequently, there is no regulation on what types of evidence may be admitted, or what evidence the court may consider in its evaluation of evidence. Under the principle of free admission, all forms of evidence are in principle admissible.¹⁵⁷ While all forms of evidence may in principle be admitted to the court, this does not automatically imply it will carry probative weight in evaluation.¹⁵⁸ The court has a broad discretion in determining the weight of admitted evidence under the principle of the free evaluation, which is discussed in the next subsection.

2.3.3 Evaluation of Evidence

The *evaluation of evidence* is the process by which the judicial body assigns probative weight to evidence, namely, assessing the strength of all evidence presented against the standard of proof as a benchmark for decision-making. The process of evaluation varies between legal system, reflecting not only the prior regulation of the admission of evidence, but rules assigning probative value to specific types or quantities of evidence.¹⁵⁹

¹⁵⁵ For a critical view on the enforcement of exclusionary rules of evidence, see further Damaška (n 141) 348–352.

¹⁵⁶ *ibid* 343–348, on the distinctions between Common Law and Civil Law approaches to the admission of evidence.

¹⁵⁷ In a Nordic context, see, for example, Christian Diesen and Magne Strandberg, *Bevisprövning i Tvistemål: Teori Och Praktik* (Upplaga 1, Norstedts Juridik 2012) 117–119.

¹⁵⁸ On the principle of free admission, as it is understood and applied in Nordic legal systems, see Per Olof Ekelöf, Torleif Bylund and Robert Boman, *Rättegång IV. Fjärde häftet* (1992) (6th edn, Norstedts juridik 1992) 26–27; Diesen and Strandberg (n 157) 38–57 and 117–119; Christian Dahlman, *Beviskraft: metod för bevisvärdering i brottmål* (2018) 59–60; and Roberth Nordh, *Bevisrätt C: bevisvärdering*. (2019) 34–37.

¹⁵⁹ For a comparative overview of the evaluation of evidence, see Damaška (n 141) 343–348.

The evaluation of evidence in Common Law systems takes place using juries as well as judges. Although the evidence has been filtered through the rules governing admission of evidence, there is no formalised system for the process of evaluation. The trier of fact is afforded a degree of discretion in assessing the body of evidence and may be further guided to some extent by legal instructions.¹⁶⁰ While the evaluation process is rules-bound regarding the initial admissibility, it allows for subjective assessment of probative value.¹⁶¹

The approach in Civil Law legal systems differs as it does not involve the legal regulation in the admission of evidence, operating instead under the principle of the free evaluation. This allows judges a broad discretion in the assessment of evidence. The principle developed as part of the historical shift away from the system of ‘legal proof’, which assigned fixed probative value to specific classes of evidence.¹⁶² Under the older model, discretion was more limited, and the outcome of a case would depend on whether the evidence met these formal requirements. The subsequent shift towards free proof, and free evaluation, was grounded in the idea that judges should be able to evaluate evidence based on their logic and experience.¹⁶³ The principles of the free admission and free evaluation of evidence result in a broader range of evidence being assessed by

¹⁶⁰ The evaluation of evidence is subject to judicial instruction, which do not prescribe strict criteria for the assessment of the probative value of evidence but instead guide the jurors in weighing evidence. In respect of England and Wales, see Judicial College, *Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (Judicial College, 2024) <<https://www.judiciary.uk/wp-content/uploads/2024/09/Crown-Court-Compendium-Part-I-July-2024.pdf>> accessed 14 April 2025; in respect of the United States, see US Court of Appeals for the Ninth Circuit, *Manual of Model Criminal Jury Instructions* (2022), Instruction 1.7, <https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2024_11.pdf> accessed 14 April 2025; and, in respect of Canada, see Canadian Judicial Council, *Model Jury Instructions*, <<https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en>> accessed 14 April 2025.

¹⁶¹ For example, in respect of criminal cases, see Crown Court Compendium (n 160), chapter 3, paras. 3-1 to 3-5; and US Court of Appeals Model Criminal Jury Instructions (n 160), Instruction 3.5 (‘Proof Beyond a Reasonable Doubt’). For the equivalent approach to civil cases, see, for example, Judicial College, *The Civil Bench Book* (2023), chapter 7 (‘Burden and Standard of Proof’) <<https://www.judiciary.uk/publications/civil-bench-book/>> accessed 14 April 2025.

¹⁶² Damaška (n 141) 344–346, that legal and political shifts in Continental Europe in the aftermath of the French Revolution saw the gradual removal of legal restraints in the evaluation of evidence in favour of the concept of free proof.

¹⁶³ Clermont and Sherwin (n 139) 248–251, though their analysis is limited to French law.

a professional judge, without few legal constraints.¹⁶⁴ This means that the judge is not bound by fixed legal rules that assign specific weight to different types of evidence. Instead, the judge exercises considerable discretion to determine the probative value of each piece of evidence based on its relevance, credibility, and coherence within the context of the case. While this assessment involves personal judgment, it does not necessarily require the judge to hold a personal conviction that the alleged facts are true.¹⁶⁵ Rather, the judge exercises discretion in assigning probative value and determining the point at which the evidence is sufficient to establish a factual allegation.¹⁶⁶

2.3.4 Standard of Proof

Following the evaluation of the evidence, the standard of proof provides the benchmark that indicates the point when the evidence is sufficient to establish a factual allegation.¹⁶⁷ As discussed, it indicates the level of certainty required of the evidence in respect of a particular allegation of fact.¹⁶⁸ A verdict will only be given in favour of the side bearing the burden of proof if, following the evaluation of evidence, the fact-finder considers that the applicable standard of proof has been met. While the standard of proof is often described as merely the benchmark for the evaluation of evidence, it is perhaps better understood as a tool that guides the judicial reasoning, structuring the assessment of factual claims.¹⁶⁹ The standard of proof can be conceptualised as having two dimensions. The first is *sufficiency*, which is a threshold-based understanding of the standard of proof. It is a measure of the weight of the whole body of evidence and whether it meets the required threshold of

¹⁶⁴ Damaška (n 141) 345–347.

¹⁶⁵ The standard of proof is expressed in terms of the personal conviction of the judge. For an overview of Continental European approaches, see Tuzet (n 128) 95–104.

¹⁶⁶ Some legal systems applying the principle of free evaluation of evidence nevertheless regulate the process in practice. In Sweden, a ‘hybrid’ Civil Law system within the Nordic tradition, the procedural framework imposes no formal restrictions on evidence evaluation. However, parameters developed in Supreme Court judgments have indirectly influenced how lower courts assess evidence. See further Diesen and Strandberg (n 157) 38–57.; and Dahlman (n 158) 59–60; Nordh (n 158) 34–37.

¹⁶⁷ Kaplow (n 114) 741. See also Strandberg (n 37) 17.

¹⁶⁸ Redmayne (n 140) 167; and Strandberg (n 37) 17, linking the standard of proof to the level of certainty required for a decision. See also Stein (n 119) 133–134; and Ho (n 132) 173.

¹⁶⁹ Tuzet (n 128) 90–91 and 104–109.

certainty.¹⁷⁰ The second is the notion of evidential *weight*, which concerns how convincingly the evidence supports a particular factual conclusion.¹⁷¹ While *sufficiency* addresses whether the evidence meets the required formal threshold, evidential *weight* instead concerns how comprehensively the body of evidence supports a particular factual conclusion. These dimensions are explored in the following subsections.

2.3.4.1 *Sufficiency of Evidence*

Evidence must be sufficiently strong to meet the standard of proof. The notion of sufficiency of evidence is an essentially threshold-based understanding that establishes the required degree of certainty in a proposition of fact. It is based on an assessment of the whole body of evidence presented by the parties and may be expressed as a probabilistic expression considering the likelihood that a particular fact has taken place, or in terms of the belief, or degree of personal conviction, of the judge.

Under the probabilistic understanding of the notion of sufficiency, the standard of proof expresses the likelihood that the factual propositions are true.¹⁷² It is reflected in the approach to standards of proof in Common Law systems, which apply a standard of proof that varies in degrees of probability. While the judge is afforded a degree of discretion in assessing the sufficiency of the evidence, that assessment takes place against the standard of proof as a predefined threshold of evidence.¹⁷³ This approach builds on the idea that legal rules should regulate the judicial fact-finding, a concept that emerged historically to guide amateur triers of fact such as lay judges and juries in the assessment of evidence.¹⁷⁴ Imposing regulation to shape the analysis of evidence in judicial

¹⁷⁰ For an overview of the notion of *sufficiency* of evidence, see Dahlman (n 158) 142–148.

¹⁷¹ On the *weight* of evidence, see Nance (n 19) 113 and 149. See also Stein (n 119) 91–106; and Dahlman (n 158) 148–161.

¹⁷² Redmayne (n 140) 167–173. See also Kaplan, ‘Decision Theory and the Factfinding Process’ (1968) 20 *Stanford Law Review* 1065, 1071, who develops a decision theoretic framework for the standard of proof that focuses on the disutilities associated with incorrect judgments.

¹⁷³ Redmayne (n 130) 175–179. For an overview, in a comparative context, see Clermont and Sherwin (n 139) 245–247 and 251–253.

¹⁷⁴ Damaška (n 141) 343. More generally, see Clermont and Sherwin (n 139) 256–257, who suggest that the modern institution of the civil jury in Common Law legal systems appears to have been ‘especially effective in catalysing the common law’s progress towards probabilistic standards of proof’.

proceedings, probability theory influenced the development of the treatment of proof in these legal systems.¹⁷⁵

A differentiated standard of proof is applied in Common Law legal systems. It includes the ‘preponderance of the evidence’, or alternatively the ‘balance of probabilities’ standard across most civil cases, meaning that the party with the burden of proof must only succeed in making their claim more probable than not.¹⁷⁶ This standard is clearly probabilistic in its expression and is satisfied once the evidence reaches a greater probability of 50 %.¹⁷⁷ A far more stringent standard of proof at ‘beyond reasonable doubt’ is applied in criminal cases. It places an emphasis on the personal belief of the judge that there is no remaining substantial doubt as to the guilt of the defendant.¹⁷⁸ While it is more difficult to quantify in probabilistic terms, it is understood as requiring near-certainty as to the facts.¹⁷⁹ Between the usual civil and criminal standards of proof, the United States applies the intermediate standard ‘clear and convincing’ evidence in civil cases involving more serious issues.¹⁸⁰ While this intermediate standard is not widely recognised in other Common Law legal

¹⁷⁵ Clermont and Sherwin (n 139) 255–256, who argue that while Continental European legal systems shifted toward free proof and judicial conviction, Anglo-Saxon systems maintained ongoing interactions with probability theory. See Redmayne (n 130) 807, discussing the role of evidentiary rules in promoting this goal.

¹⁷⁶ As succinctly stated by Lord Denning in *Miller v Ministry of Pensions* [1947] 2 All ER 372, at 374, the civil standard can be explained in terms of that ‘[i]f the evidence is such that the tribunal can say “we think it more probable than not” then the burden is discharged, but if the probabilities are equal it is not’.

¹⁷⁷ See further Redmayne (n 140) 167–173.

¹⁷⁸ Schweizer (n 120) 219–220, underscoring that the reference to ‘reasonable’ doubt refers to doubt that is based on reason and not purely speculation, as merely possible doubt does not prevent a finding against the defendant in a criminal case.

¹⁷⁹ The criminal standard is often assumed to require a certainty of around 90–95 %, with some commentators suggesting it may be as high as 98 %. See also Ho (n 116); Engel (n 141) 443–446; and Schweizer (n 120) 219.

¹⁸⁰ Although civil cases in Common Law jurisdictions do not carry criminal convictions, certain cases with serious outcomes, such as child abuse claims, the loss of civil liberties, and so on, may require a more stringent standard of proof due to the significant consequences for the individuals involved. See further Redmayne (n 140) 184–194.

systems, other systems have opted for a flexible application of the standard of proof in similar civil cases.¹⁸¹

Under the qualitative and belief-based understanding of sufficiency, Civil Law systems emphasise the personal conviction of the judge.¹⁸² The emphasis is not on formal criteria or quantified, mathematical probabilities, but rather whether the judge is inwardly convinced that the alleged facts can be taken as true for judicial purposes.¹⁸³ As an evidentiary requirement it relies on internal processes of the judge to determine whether the evidence establishes the facts in a manner that aligns with their personal experience and expertise.¹⁸⁴ This standard of proof emphasises subjective belief, encouraging adjudicators to rely on ordinary cognitive processes in assessing propositions of fact.¹⁸⁵

While Civil Law systems share a similar approach to the standard of proof in their emphasis on the personal conviction, there is a degree of variation in the use of evidentiary thresholds across these legal systems. In France, there is no codified standard of proof.¹⁸⁶ However, both civil and criminal cases are

¹⁸¹ See, for example, the judgment of new Zealand's Supreme Court, *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, [102], which emphasised that the flexible application of the civil standard of proof does not mean that the degree of probability changes, but that it 'accommodates serious allegations through the natural tendency to require stronger evidence' to meet the balance of probabilities standard.

¹⁸² For an overview of the requirement in Civil Law systems, see Schweizer (n 120) 220; Engel (n 141) 435; and Mirjan R Damaška, *Evaluation of Evidence: Pre-Modern and Modern Approaches* (Cambridge university press 2019) 258–259.

¹⁸³ In terms of the expression of a threshold of evidence, some Civil Law jurisdictions impose a requirement of *l'intime conviction*. See Engel (n 141) 435; and Schweizer (n 120) 220.

¹⁸⁴ Taruffo (n 139) 667, describing this as 'the intimate conviction of the judge is sort of a black box that is left to the personal conscience of the judge, while the judgment is expressed using the rhetoric of "certainty" and "truth" notwithstanding the fact that the judge is not required to explain the reasons supporting her conclusion'.

¹⁸⁵ Engel (n 141), 440–441, describing this as a test built on 'ethos, experience, and intuition'. See also Damaška (n 141) 344–347; and Redmayne (n 140) 174–184; and Schweizer (n 120) 220–230.

¹⁸⁶ The French standard of proof is described as *la degré de la preuve*, loosely translating to the 'degree of proof'. There is no explicit standard beyond 'free proof' of legal facts. See Articles 9, 10, 179, 198 and 213 of French Code of Civil Procedure, *Code de procédure civile* <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716/> accessed 14 April 2025. See also Articles 1381, 1359 and 1371 of the French Civil Code, *Code civil* <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/> accessed 14 April 2025.

widely understood to apply a standard of proof based on *intime conviction*.¹⁸⁷ This requirement is somewhat explicit in criminal law,¹⁸⁸ where the Code of Criminal Procedure refers to a judge's conviction informed by conscience, reason, and silent reflection.¹⁸⁹ However, it is unarticulated in civil cases.¹⁹⁰

Other Civil Law jurisdictions reflect variations of this model. Spain adopts a similar distinction between different types of proceedings. In civil cases, judges are required to evaluate evidence under *reglas de la sana critica*, 'rules of sound criticism',¹⁹¹ which emphasise a rational, contextual assessment.¹⁹² While the law in criminal cases refers to the judge's conscience,¹⁹³ the criminal standard of proof has in judicial practice been articulated as a requirement akin to 'beyond reasonable doubt'.¹⁹⁴ In Italy, there is no defined standard of proof

¹⁸⁷ Clermont and Sherwin (n 139) 250.

¹⁸⁸ Tuzet (n 128) 97–98, underscoring that the 'standard' of *intime conviction* is not necessarily understood as a standard of proof, but rather conceptualised to assess the evidence and to decide. This represents a distinction between an 'entirely subjective' standard of proof, on one hand, and a 'system of evidence evaluation', on the other.

¹⁸⁹ Article 353 of the French Code of Criminal Procedure, *Code de procédure pénale* <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154> accessed 14 April 2025, that '[la loi] leur prescrit de s'interroger eux-mêmes, dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs : « Avez-vous une intime conviction ? »'. See also Article 427 of the same Code, on mixed courts.

¹⁹⁰ See Tuzet (n 128) 97; and Engel (n 141) 440–441.

¹⁹¹ The 'rules of sound criticism'. On expert testimony and witnesses, see Articles 348 and 376 of the Spanish Code of Civil Procedure, *Ley de Enjuiciamiento Civil* (BOE-A-2000-323) <<https://www.boe.es/buscar/act.php?id=BOE-A-2000-323>> accessed 14 April 2025.

¹⁹² Tuzet (n 128) 99, highlighting that a similar approach is reflected in Spanish-speaking countries throughout Latin America.

¹⁹³ Article 741(1) of the Spanish Code of Criminal Procedure, *Ley de Enjuiciamiento Criminal* (BOE-A-1882-6036) <<https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036>> accessed 14 April 2025.

¹⁹⁴ In the original Spanish, this is described as *más allá de toda duda razonable*. While not codified in Spanish law, this formulation has been affirmed by the Spanish Supreme Court, which has argued that this standard of proof is rooted in the presumption of innocence as enshrined in the Spanish Constitution. The Spanish Supreme Court (Tribunal Supremo) has referenced this standard in different judgments, reinforcing that criminal convictions require a high degree of evidentiary certainty. See STS 771/2024 (Spanish Supreme Court, Criminal Chamber, 13 September 2024) ECLI:ES:TS:2024:4451; STS 291/2024 (Spanish Supreme Court, Criminal Chamber, 21 March 2024) ECLI:ES:TS:2024:1961; and STS 136/2022 (Spanish Supreme Court, Criminal Chamber, 17 February 2022) ECLI:ES:TS:2022:680.

in civil cases beyond a requirement that the assessment of the evidence is based on ‘prudent assessment’,¹⁹⁵ and the criminal standard of proof is understood as requiring evidence ‘beyond reasonable doubt’.¹⁹⁶ Finally, German law does not prescribe a formal standard of proof in either civil or criminal proceedings, but emphasises the principles of free assessment and free conviction. In civil cases, the Code of Civil Procedure refers only to the requirement that any initial doubts must be overcome for a fact to be considered proven.¹⁹⁷ While this formulation resembles the idea of proof beyond reasonable doubt, it does not adopt that terminology, thereby allowing greater discretion in how judges assess whether doubts have been sufficiently resolved.¹⁹⁸

Moreover, there are Civil Law systems that occupy a middle-ground between the typical Common Law and Civil Law approaches, incorporating structured or quasi-probabilistic reasoning alongside predetermined standards of proof. These include the Nordic Civil Law systems, which take a ‘hybrid’ approach. While the precise procedural traditions differ,¹⁹⁹ these systems generally apply a high criminal standard of ‘beyond reasonable doubt’ in criminal cases,²⁰⁰

¹⁹⁵ Article 116 of the Italian Code of Civil Procedure, *Codice di Procedura Civile* <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1940-10-28;1443>> accessed 14 April 2025.

¹⁹⁶ Article 533 of the Italian Code of Criminal Procedure, *Codice di Procedura Penale* <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1988-09-22;447>> accessed 14 April 2025, which specifies a requirement of ‘beyond reasonable doubt’ for criminal cases. See also Article 192, which requires judges to explain their methods and results.

¹⁹⁷ § 286(1) of the German Code of Civil Procedure, *Zivilprozessordnung* <<https://www.gesetze-im-internet.de/zpo>> accessed 14 April 2025, that ‘[i]he court shall decide at its discretion, by taking into account the entire substance of the hearings and the result of any evidence taken, whether an allegation regarding the facts should be regarded as true or untrue’.

¹⁹⁸ Tuzet (n 128) 99–100.

¹⁹⁹ For an overview of Norwegian, Danish, and Swedish approaches to evidence and the standard of proof, see Strandberg (n 37) 83–113.

²⁰⁰ The Swedish Supreme Court has articulated a standard of proof as ‘ställt utom rimligt tvivel’, meaning that the evidence establishes the defendant’s guilt beyond reasonable doubt, in NJA 1980 s. 725. See further Dahlman (n 158) 133–134.

alongside a lower, less defined standard of proof in civil cases,²⁰¹ which may be adjusted depending on the nature of the case.²⁰²

The described articulations of the standard of proof reflect a conceptual divide between probabilistic models, which constrain judicial discretion,²⁰³ on the one hand, and approaches grounded in the judge's personal conviction,²⁰⁴ on the other hand. Yet this dichotomy is often overstated. In judicial practice, both Common Law and Civil Law systems incorporate a mix of formal regulation and subjective assessment in evidentiary reasoning.²⁰⁵ Empirical research has further indicated that these conceptual differences do not result in significant disparities in judicial outcomes.²⁰⁶ Rather than representing fundamentally incompatible approaches, they should be understood as different expressions of evidentiary sufficiency shaped by distinct legal and procedural traditions.

2.3.4.2 *Weight of Evidence*

The weight of evidence refers to how comprehensively the evidential record supports a particular conclusion as to a proposition of fact.²⁰⁷ The concept builds on the following notion of evidential weight elaborated by Keynes:

As the relevant evidence at our disposal increases, the magnitude of the probability of the argument may either decrease or increase, according as the new knowledge strengthens the unfavourable or the favourable evidence; but something seems to have increased in either case, - we have a more substantial basis upon which to rest our conclusion. I express this by saying that an

²⁰¹ The standard of proof in Swedish civil procedure is generally defined as that the evidence means a factual proposition made during the judicial proceedings is 'styrkt', which refers to whether the evidence is sufficiently probative to support a factual conclusion. See further Diesen and Strandberg (n 157) 300–301 and 301–312.

²⁰² Swedish courts have exceptionally applied a lower civil standard of proof, requiring that the evidence makes a particular factual proposition 'sannolik'. See NJA 1993 s. 764, explaining the use of the default and exceptional standards of proof in civil cases. See also Diesen and Strandberg (n 157) 300–301; and Lars Heuman, *Bevisbörda Och Beviskrav i Tvistemål* (Andra upplagan, Norstedts Juridik 2022) 57 and 95–97.

²⁰³ Engel (n 141) 435; and, in respect of Common Law standards of proof, see Clermont and Sherwin (n 139) 243–246.

²⁰⁴ For an overview of Continental European Civil Law legal systems, see Schweizer (n 120) 220; Engel (n 141) 435; and Damaška, *Evaluation of Evidence* (n 182) 258–259.

²⁰⁵ See, for example, Engel (n 141) 436.

²⁰⁶ Schweizer (n 120) 230–231.

²⁰⁷ Nance (n 19) 113 and 149. See also Stein (n 119) 91–106.

accession of new evidence increases the weight of an argument. New evidence will sometimes decrease the probability of an argument, but it will always increase its “weight”.²⁰⁸

This notion of evidential weight describes the amount of evidence and whether the evidential record presented at trial as a whole is sufficient proof of a factual allegation.²⁰⁹ It posits that decisions under conditions of factual uncertainty should account not only for the probability that a hypothesis can be taken as true, conditional on the existing body of evidence, but also for how extensively that hypothesis is supported by evidence available to a judicial body.²¹⁰ The notion of evidential weight thus distinguishes between the probability that a particular factual proposition is true, on one hand, and the degree of evidentiary support for that proposition, on the other.²¹¹

Subsequent scholarly accounts have further refined this notion of evidential weight to also encompass dimensions such as the evidential completeness of the record, as well as the resilience or robustness of the evidence.²¹² In this view, evidential weight refers not merely to the quantity of evidence presented, but to how comprehensively the evidentiary record captures the relevant facts. A body of evidence may thus be considered weightier than a less complete record if it addresses a broader range of considerations or fills key gaps, even where individual items of evidence are not particularly strong.²¹³ Evidential weight in this sense contrasts with strength, which denotes the probative force and persuasiveness of individual pieces of evidence.

A complementary perspective instead evidence understands evidential weight in terms of the strength of support it provides for a hypothesis, and the risk that

²⁰⁸ John Maynard Keynes, *A Treatise on Probability* (Macmillan 1921) 71.

²⁰⁹ For a discussion on evidential weight, see further Dahlman (n 158) 149, with examples on the practical application on this notion of evidential weight from Swedish law.

²¹⁰ *ibid* 151.

²¹¹ Jonathan Cohen, ‘The Role of Evidential Weight in Criminal Proof’ (1986) 66 *Boston University Law Review* 635, 641–642, suggesting that while the weight of evidence may be high, the mathematical probability can still be low (for example, if a large amount of evidence has been adduced by the prosecution to incriminate the defendant, but the defence has a strong alibi). The state of the evidence may establish a sufficient degree of probability that is high enough to cross the threshold for the standard of proof but lack adequate weight.

²¹² Christian Dahlman and Anders Nordgaard, ‘Information Economics in the Criminal Standard of Proof’ (2023) 21 *Law, Probability and Risk* 137.

²¹³ See Nance (n 19) 113 and 149; and further Stein (n 119) 91–106.

this support could be undermined or altered if new information is introduced into the case.²¹⁴ While a case may initially appear strong, for example, if it is based on consistent witness testimony, its weight would be lower if that testimony could be easily discredited by additional evidence. As such, the more complete the evidence is, the lower the risk that the evidentiary situation will change because of any additional information.²¹⁵ This sensitivity to new or additional information being adduced to a case has been described as *resilience* or *robustness*, as a measurement of the stability of the evidential record.²¹⁶

In this respect, the *resilience* of the evidence can be understood as a measure of the stability of the weight of a probability assessment when the underlying informational base is altered or supplemented.²¹⁷ The notion of *robustness* also describes the susceptibility of the body of evidence to the arrival of new information.²¹⁸ That evidence is *robust*, or *resilient*, to the extent that new or additional information does not change the probability assessment, or weight, of the existing evidence. The severity of the charges or stakes in a case directly impacts the quantity, or weight, as well as the quality, or strength, of evidence

²¹⁴ This has been described as an *epistemic risk*. See Peter Gärdenfors and Nils-Eric Sahlin, 'Unreliable Probabilities, Risk Taking and Decision Making' in Peter Gärdenfors and Nils-Eric Sahlin (eds), *Decision, Probability, and Utility: Selected Readings* (Cambridge University Press 1988) 362; Nils-Eric Sahlin, 'On Higher Order Beliefs' in Jacques-Paul Dubusc (ed), *Philosophy of Probability* (Kluwer Academic 1993) 19; and Nils-Eric Sahlin and Johannes Persson, 'Epistemic Risk: The Significance of Knowing What One Does Not Know' in Berndt Brehmer and Nils-Eric Sahlin (eds), *Future Risks and Management* (Kluwer 1994) 53 ff.

²¹⁵ Ronald Allen and Craig R Callen, 'The Juridical Management of Factual Uncertainty' (2003) 7 *International Journal of Evidence & Proof* 1, emphasising the dynamic nature of evidentiary assessment, where the robustness of the evidence is constantly subject to change based on the potential for new or conflicting information.

²¹⁶ While the term *resilience* is used in Anglo-Saxon contexts, Nordic law instead understands this notion as the *robustness* of the evidence. On *resilience*, see Stein (n 119) 48. On robustness, see Per Olof Ekelöf, 'Bevisvärde' [1988] *Filosofisk tidskrift* 1, 13; Strandberg (n 37) 515. For a general overview of these concepts, see also Dahlman (n 158) 153.

²¹⁷ Stein (n 119) 48. See also Dahlman (n 158) 152–161; and Strandberg (n 37) 542–545.

²¹⁸ Ekelöf (n 216) 13, who considers that the evidence is robust if 'det inte finns någon ytterligare bevisning som kan påverka bevisvärdet' (that there is no additional evidence that can affect the weight of the evidence); and Strandberg (n 37) 542, who describes this as 'fravaer av skjörhet overfor ny relevant informasjon' (lack of sensitivity to new relevant information). See also Lars Heuman, *Bevisbörda Och Beviskrav i Tvistemål* (Norstedts juridik 2005) 60.

required for a decision, with a higher requirement in the context of criminal cases where the evidence must be sufficiently robust to meet that threshold.²¹⁹

2.4 The Determination of the Standard of Proof

Different explanatory frameworks offer distinct justifications for the process of determining the standard of proof. These explanatory frameworks reflect the interests at stake in the use of a standard of proof, whether it is understood as a fixed evidentiary threshold or as the degree of personal conviction required of the judge.²²⁰ These considerations extend beyond the justification for the use of a particular standard as such to also include the allocation of the burden of proof, which forms part of the broader evidentiary structure. It includes, *inter alia*, the presumption of innocence in criminal law, or practical concerns about access to evidence influence how the burden is distributed and, by extension, how high the evidentiary threshold is set. While legal systems differ in their approaches to the standard of proof, the central considerations that shape the determination of the standard tend to converge across jurisdictions. However, different explanatory models prioritise these interests in different ways.

2.4.1 General Considerations

Legal systems diverge in how they conceptualise proof.²²¹ A significant aspect is the extent to which judges are afforded with discretion in articulating the standard of proof, or deciding if that threshold is met. The considerations that justify the use of a particular standard of proof are largely similar across legal systems. However, these shared concerns manifest differently depending on the nature, context, and stakes of the dispute.

One key consideration influencing the standard of proof relates to the nature and subject-matter of the dispute, which justifies a more stringent standard, particularly regarding the gravity of the allegations or the severity of the

²¹⁹ Stein (n 119) 48 In a Nordic context, see Strandberg (n 37) 515–518 and 606–609.

²²⁰ The term ‘determination’ is used here to refer to the process by which a judge, or trier of fact, establishes that the evidence submitted by the party with the burden of proof has met the prerequisite threshold of the evidence, or the point at which the judge will consider themselves to be sufficiently convinced that the alleged facts are true.

²²¹ For a comparative overview, see Tuzet (n 128) 92–104.

consequences attached to a finding of liability.²²² This is reflected not only in the high standard of proof required for a criminal conviction across most, if not all, jurisdictions, but in the application of a more stringent standard of proof in civil cases that involve more serious issues. In both instances, the use of a more demanding standard of proof reflects a balance of the competing interests of the parties and prioritising the protection of the party that is most exposed to burdensome consequences.²²³

Beyond the nature of the dispute, considerations relating to the judicial process itself also play an important role in shaping the applicable standard of proof. General procedural interests may justify modifications to the standard. Where it is particularly burdensome for a party to obtain the necessary evidence – such as when that party must prove long and complex chains of events, establish a causal link, or furnish proof of intent – the use of a more lenient standard of proof may be justified by the circumstances of the case.²²⁴ A judge may in such cases be afforded with some degree of discretion to adjust the standard of proof to ensure that the proceedings remain fair and equitable. While procedural considerations concern the judicial process, other interests of a broader policy nature may similarly require adjustments in the standard of proof.²²⁵ Such adjustments require the judge to exercise discretion, but they are often grounded more in policy-based reasoning than in firmly established legal or procedural principles. For instance, such adjustments may involve applying a more lenient standard of proof to facilitate the enforcement of substantive

²²² On the use of a differentiated standard of proof, see Redmayne (n 140) 174–176; Clermont and Sherwin (n 139) 251; and Schweizer (n 120) 218–219.

²²³ Heuman (n 218) 90–91.

²²⁴ *ibid* 76–77. See also Khoury (n 126) 4–6.

²²⁵ This might include interests of public safety, the efficiency of the functioning of the legal system, and the protection of societal values. See further Kaplow (n 114) 745 and 815–819; and Redmayne (n 140) 175–179. For an overview of such interests in the context of Swedish civil procedural law, see Heuman (n 218) 63–64; and Diesen and Strandberg (n 157) 36–38.

law,²²⁶ or a more demanding one to ensure the stability of legal relationships between civil parties by protecting pre-existing legal positions.²²⁷

2.4.2 Risk Allocation and Error Minimisation

The standard of proof serves not only as a measure of the certainty required of evidence but also as a tool to manage the risk of judicial error.²²⁸ This means that the standard of proof may be understood as not only indicating the level of certainty required of the evidence but also the tolerable level of factual uncertainty while still forming the basis of a judicial decision.²²⁹ Decision theory offers a framework for determining the standard of proof that weighs the consequences of error against the benefits, or ‘utilities’, of correct decisions.²³⁰ It can be used to explain the need for a stringent standard of proof in criminal cases, responding to the gravity of the allegations and asymmetry of error costs,²³¹ and the more lenient standard of proof applied in civil cases, reflecting the relative balance of error costs between the parties.²³²

Under the decision theoretic framework, the degrees of belief vary on a scale from 0 to 1. While a person who has a degree of belief of 0.1 in a proposition believes that the proposition is very unlikely to be true, a degree of belief at

²²⁶ Heuman (n 218) 78–86. See also Diesen and Strandberg (n 157) 30–31, who highlight that without substantive legal rules, evidence law becomes meaningless, but without evidence law, substantive law becomes ineffective (in the original Swedish: '[u]tan materiella rättsregler blir därmed bevisrätten *meningslös*, men utan bevisrätten blir den materiella rätten *verkningslös*'). On similar considerations relating to the need to regulate substantive conduct, Nance (n 19) 64.

²²⁷ Heuman (n 218) 91.

²²⁸ The application of rules of evidence means that one of the parties will bear a greater risk of error associated with the outcome of the proceedings. See Engel (n 141) 437–444. On the distribution of the risk of error, see also Kaplow (n 114) 741; and, perhaps more generally, see Stein (n 119) 133–134.

²²⁹ See, for example, Redmayne (n 140) 167; Stein (n 119) 133–134; and Kaplan (n 172) 1071.

²³⁰ Compare to Kaplan (n 172) considering the disutilities associated with incorrect judgments. On the comparison of disutilities in decision-making, see further Jonathan Baron, *Thinking and Deciding* (Fifth edition, Cambridge University Press 2023) 229–234.

²³¹ Under a probabilistic understanding of the standard of proof, more serious allegations require a higher degree of probability because it is less likely that those events took place. See, for example, Kaplan (n 172) 1071–1073.

²³² Generally, see Diesen and Strandberg (n 157) 36–38; and Heuman (n 218) 63–64.

0.99 indicates that they believe the proposition to almost certainly be true.²³³ Different degrees of belief carry different risks of error in terms of the judicial outcome. A decision-theoretic calculus thus evaluates the expected utility of decisions based on risks and compares the utilities of correct judgments.²³⁴

The use of standards of proof in adjudication has been justified in terms of the need to avoid certain kinds of errors in adjudication,²³⁵ aligning the evidentiary threshold with the comparative costs of judicial error and the benefits of accurate adjudication.²³⁶ This is aligned with the alternative approach to the use of the decision theoretic framework, which focuses on a comparison of the disutilities of incorrect judgments by considering how negative consequences can be avoided through by applying of rules of procedure.²³⁷

The application of the standard of proof forms part of the rules of evidence that allocate the particular risk of error that is associated with factual uncertainty between the parties.²³⁸ The civil standard of proof, which in Common Law systems is often expressed as requiring the ‘preponderance of the evidence’,²³⁹ is typically located at the 0.5 probability threshold, requiring that one version of events be more likely than the other for a verdict in its favour.²⁴⁰ This reflects a symmetrical allocation of the burdens between the parties, corresponding to a balance of power where neither party bears a greater risk of an erroneous outcome than the other. This balanced approach is intended to ensure that error costs are equally distributed between the parties, so that neither side is more

²³³ For an overview, see Redmayne (n 140) 168.

²³⁴ The risk of error refers to the outcome of judicial proceedings, particularly the consequences of erroneous outcomes. The distribution of the risk of error reflects the overall context of the judicial proceedings, including any relevant interests or objectives that may be present. See Kaplow (n 114) 741.

²³⁵ Kaplan (n 172) 1071.

²³⁶ On this application, see Schweizer (n 120) 220.

²³⁷ Kaplan (n 172) 1071, noting that ‘the problem is more easily phrased in terms of avoiding certain consequences than in terms of achieving others’.

²³⁸ Redmayne (n 140) 171–174. Generally, on the notion of risk allocation, see Stein (n 119) 133–134.

²³⁹ Alternatively, it may be expressed as the ‘balance of probabilities’, which more accurately reflects the probabilistic nature of this standard of proof. The precise formulation varies depending on the legal and procedural traditions of the legal system in which it is used.

²⁴⁰ See, for example, Redmayne (n 140) 167–173.

affected by an incorrect outcome compared to the other.²⁴¹ Unlike in criminal cases, where the risk of error engages fundamental moral rights, the rights at stake in civil proceedings typically concern legal entitlements such as claims for damages. Framing the civil standard in terms of expected utility or risk minimisation is therefore more normatively acceptable. The legitimacy of the use of that standard lies not in protecting moral innocence, but in equitably balancing the risks of error between parties.²⁴² Applying the 0.5 threshold serves a pragmatic function, as it seeks to minimise the long-term risk of error in judicial outcomes, promoting fairness by equally distributing the burden of proof and the attendant risks of incorrect decisions between litigants.²⁴³

While the civil standard reflects a balance of risk between parties, the criminal standard embodies fundamentally different concerns. The criminal standard at ‘beyond reasonable doubt’ is considered require a degree of belief of around 0.9 or 0.95, or even 0.98.²⁴⁴ This requirement of near-certainty as to the facts is intended to minimise the risk of error consisting of the wrongful conviction of an innocent defendant.²⁴⁵ The expected error costs are thereby minimised if the standard of proof is set well above the 0.5 rule required in civil cases, reflecting the gravity of the consequences attached to a wrongful conviction.²⁴⁶ By placing the burden of proof primarily on the prosecution and setting the threshold well above the 0.5 rule used in civil cases, the expected error costs are minimised in light of the gravity of criminal punishment. This reasoning is encapsulated in Blackstone’s Ratio, which weighs the relative social costs of wrongful conviction against wrongful acquittal, famously stating that it is better ‘that ten guilty persons escape than one innocent suffer’.²⁴⁷

The decision theoretic approach is relevant not only to legal systems that adopt probabilistic understandings of proof but can also be seen reflected, albeit more

²⁴¹ Schweizer (n 120) 219, describing civil cases as the ‘paradigm for symmetrical error costs’.

²⁴² Redmayne (n 140) 169–170.

²⁴³ *ibid* 169–170 and 174.

²⁴⁴ Engel (n 141) 443–446; and Schweizer (n 120) 219. See also further Ho (n 116), suggesting that commentators often assume a value of 0.9 or 0.95.

²⁴⁵ See, for example, Redmayne (n 140) 169.

²⁴⁶ Schweizer (n 120) 220.

²⁴⁷ William Blackstone, *Commentaries on the Laws of England*, vol Book the first (Third edition, Printed for John Exshaw, Henry Saunders, Boulter Grierson, and James Williams 1769) 352.

implicitly, in systems emphasising the personal conviction of the judge.²⁴⁸ The use of a differentiated standard of proof is less formalised in such systems, but generally reflects the civil-criminal distinction.²⁴⁹ Empirical evidence suggests that judges calibrate the degree of personal conviction they require based on the stakes and interests at issue.²⁵⁰ Rather than strictly adhering to abstract decision-theoretic models, these variations emerge from judicial habits, traditions, and practical experience, and from doctrinal interpretations within the legal system. Consequently, the standards of proof in these systems tend to reflect pragmatic considerations and contextual factors as much as, if not more than, formal principles of risk allocation.

Drawing on this understanding of risk allocation, the gravity of the allegations and potential severity of the consequences of liability justify a more stringent standard of proof. The comparison of disutilities highlights the greater harm associated with wrongful convictions compared to wrongful acquittals, or the balance of risk and lesser weight of the interests at stake in civil cases.²⁵¹ The more severe consequences, the greater the disutilities of an incorrect judgment.

2.4.3 Interests of Judicial Policy and Procedural Equity

In addition to general considerations and the interest of risk allocation, broader considerations can influence the determination of the standard of proof. These include judicial policy objectives, concerns related to procedural fairness, and fundamental values that underpin the justice system. In this respect, Nordic

²⁴⁸ In Nordic law, in the context of Swedish civil procedure, see Heuman (n 218) 90–91 and 91–93, who considers that the potential severity of the consequences of a judgment (*konsekvensteorier*) as well as the gravity of the allegation (*ansvarsgrundande handlingen*) are circumstances which may justify a more stringent evidentiary requirement. The use of a more stringent civil standard of proof is not generally recognised, however. Generally, see Ekelöf, Bylund and Boman (n 158); Gustav Lindkvist, *Utredningsskyldighet, Bevisbörda Och Beviskrav i Förvaltningsprocessen* (Upplaga 1, Norstedts juridik 2018); Bengt Lindell, *Bevis- Och Rättstillämpning - En Samtidig Verksamhet: En Bok Om Tvivel Och Val Av Beslutsalternativ i Mer Komplicerade Fall* (Upplaga 1:1, Norstedts Juridik 2024); and Per Olof Bolding, *Bevisbörda Och Beviskrav* (Juridiska föreningen i Lund: Distribution, Akademibokhandeln i Lund 1983).

²⁴⁹ Heuman (n 218) 63–68.

²⁵⁰ See, for example, Schweizer (n 120) 220, pointing to limited exceptions in Swiss and German law, where allegations that are notoriously difficult to prove – such as cases of medical malpractice or theft of an uninsured item – have seen adjustments in the required standard of proof to a more lenient standard of proof.

²⁵¹ Redmayne (n 140) 174–176.

legal systems provide important insights for understanding the broader interests informing the determination of the standards of proof. Accordingly, the analysis in the following subsections draws on Nordic legal scholarship in its discussion of those interests beyond the decision-theoretic framework.²⁵²

2.4.3.1 Judicial Policy

The determination of a standard of proof involves a normative decision about who should bear the burden of uncertainty in judicial decisions, reflecting the core interests which are prioritised by the legal system.²⁵³ While decision theory explains the standard of proof in terms of individual risk and the allocation of error costs,²⁵⁴ it does not fully account for the broader policy interests that may also have an influence how evidentiary thresholds are set.²⁵⁵ Broader policy considerations, such as those relating to regulatory goals, enforcement priorities, and institutional efficiency, may contribute to shaping the determination of the standard of proof by prompting courts to lower the standard in regulatory cases to promote public welfare, while applying a higher threshold in fundamental rights cases to prevent wrongful decisions.²⁵⁶

Building on this, policy-oriented approaches have also framed the standard of proof as a judicial tool to regulate the conduct of potential litigants.²⁵⁷ From this perspective, additional policy considerations shape what risk of error is

²⁵² These systems can thus be described as a 'hybrid' between Common Law and Civil Law legal systems, combining formalised standards of proof with a judicial discretion in determining their application.

²⁵³ See, for example, Redmayne (n 140) 195, who considers the 'symbolic' or 'expressive' role of the standard of proof, and the social costs of erroneous factual determinations in adjudication.

²⁵⁴ Stein (n 119) 133–134.

²⁵⁵ Kaplow (n 114); and Louis Kaplow, 'On the Optimal Burden of Proof' (2011) 119 *Journal of Political Economy* 1104.

²⁵⁶ As considerations of this nature draw not only from theoretical frameworks but also from doctrinal and practical perspectives, they are not as systematically theorised as those relating to risk allocation and error costs addressed within the decision theoretic framework. See Kaplow (n 114) 745, who considers that '[c]ivil and criminal law underlie social order, playing an essential role in facilitating economic activity, ensuring public safety, and otherwise promoting social welfare', and that the decision criteria for adjudication should thus be 'grounded in explicit analysis that attends to the consequences of legal outcomes: correct and mistaken imposition of liability as well as proper and erroneous exoneration'.

²⁵⁷ This view sees the standard of proof for the regulation of *ex ante* conduct, with adjustments to generate optimal deterrence as an incentive for potential litigants. See Nance (n 19) 64.

deemed tolerable and thereby influences the calculation of error costs. It highlights interests such as deterrence, the importance of the substantive norm underlying the dispute settlement, and broader systemic integrity objectives, linking the standard of proof directly to norm enforcement and judicial policy goals.²⁵⁸ This approach to policy interests in the determination of the standard of proof assumes that potential litigants consider evidentiary thresholds in shaping their conduct, presuming a level of awareness and rational calculation that does not accurately reflect how individuals behave in anticipation of legal sanction.²⁵⁹ It thereby shifts focus away from adjudication as a forum for resolving disputes under uncertainty, and toward a view of adjudication as a mechanism for *ex ante* behavioural control of potential litigants.

The standard of proof may also be influenced by the perceived function and importance of the underlying substantive rule, reflecting a ‘social’ interest of the legal order. This stems from a policy interest of the legal system itself, rather than a decision-theoretic calculus, framing the evidentiary threshold in terms of the importance of enforcing norms that serve broader societal or legal order interests. The standard of proof thus becomes a tool for prioritising social or systemic values as part of the legal system’s overarching objectives.²⁶⁰

This highlights two key categories of policy-oriented interests that influence the determination of the standard of proof. First, interests relating to judicial economy and dispute settlement emphasise systemic efficiency, cost management, and the expediency of adjudication. Second, broader ‘social’ interests concern the enforcement of substantive legal norms and the regulation of potential litigants’ behaviour. Conversely, more stringent standards may be justified in cases involving severe consequences or where safeguarding fundamental legal norms demand a heightened degree of protection. These considerations demonstrate how the standard of proof operates not only as an evidentiary threshold but also as a policy instrument within the legal system.

2.4.3.2 *Procedural Equity*

Values are also central in the determination of the standard of proof, especially regarding epistemic and truth-seeking aims.²⁶¹ The standard of proof emerges not merely a procedural formality but also a tool to balance competing values

²⁵⁸ Kaplow (n 114) 814 ff.

²⁵⁹ Nance (n 19) 64–65.

²⁶⁰ Heuman (n 218) 68.

²⁶¹ Ho (n 132) 52–53; and Haack (n 129) 16–23.

such as fairness, accuracy, and rights protection. In this respect, the rules of evidence are designed to promote the accurate determination of facts, and the approach to the standard of proof may at times prioritise the pursuit of factual truth over other considerations such as error costs or the protection of litigants' rights. Accordingly, the standard of proof may be adjusted depending on the judicial body's capacity to establish reliable factual conclusions, with an emphasis on the likelihood and quality of the available evidence.²⁶² Where it is especially difficult to secure a robust evidentiary foundation, courts may lower the standard of proof to facilitate just and effective decision-making.²⁶³ These adaptations reflect concerns of equality, legitimacy, and efficiency. Lowering the standard of proof in such cases can ensure fair access to justice, promote the legitimacy of decisions, and enable efficient adjudication even in the absence of sufficiently reliable evidence.

In addition to evidentiary considerations, broader normative and value-driven considerations may also contribute to shaping the standard of proof, especially through a lens of fairness, justice, and the overall administration of justice. These considerations may justify adopting differentiated standards of proof or varying degrees of judicial conviction depending on the interests involved. For example, concerns about fairness and equality, such as disparities in parties' access to evidence, may support the use of a more lenient standard where establishing a sound evidentiary foundation is challenging.²⁶⁴ By contrast, the need to preserve legal certainty and stability, particularly in disputes involving significant property or contractual interests, may call for a more stringent standard to prevent unwarranted disruption of pre-existing legal relationships when there is some persistent element of factual uncertainty.²⁶⁵

²⁶² Heuman (n 218) 88–90; and Nance (n 19) 73–84.

²⁶³ Heuman (n 218) 77–78, highlighting cases where the circumstances make it difficult for one, or both, of the parties to secure reliable evidence, such as agreements; 79–84, establishing causal links; 84–85, establishing the nature and extent of legal injury; 86–86, establishing ownership and property rights; and 86–88, establishing economic relationships.

²⁶⁴ *ibid* 76–88.

²⁶⁵ *ibid* 91.

2.5 Conclusion

The standard of proof sets the threshold that allows courts to make decisions amid inevitable factual uncertainty. This uncertainty is not incidental but a fundamental aspect of judicial fact-finding, where decisions rely on incomplete or contested evidence. The standard of proof thus offers a structured way to determine when a factual claim is sufficiently supported to form the basis of a judgment. As judicial decision-making occurs within varied institutional and procedural contexts shaped by distinct legal traditions, the formulation and application of the standard of proof ultimately depend on the setting in which it operates. Courts must balance competing interests, including the rights and expectations of the parties, procedural fairness, institutional legitimacy, and the broader administration of justice. While the standard of proof reflects a shared functional goal of resolving disputes amid factual uncertainty, its application varies according to each legal system's understanding of proof.

While the standard of proof is central role in addressing factual uncertainty in adjudication, it is only one element within a broader evidentiary framework. Judicial fact-finding also depends on related components such as the allocation of the burden of proof, rules governing evidence admissibility, and the evaluation of evidence, balancing legal, procedural, and institutional interests. Although the burden of proof is typically assigned to the party asserting a claim for reasons of procedural efficiency, in criminal proceedings it carries additional normative significance, reflecting power asymmetries and the imperative to protect the defendant's rights. Moreover, rules on evidence admissibility and assessment differ markedly between formalistic and discretionary legal systems: formalistic systems limit judicial discretion through predefined legal criteria, whereas discretionary systems grant judges broader latitude in evaluating evidence. These distinctions embody contrasting conceptions of legal proof, shaping how factual uncertainty is managed and determining when a claim is sufficiently established to support a decision.

In this context, the standard of proof is more than a technical threshold; it embodies the legal, moral, and institutional priorities of the legal system. Multiple interests influence its determination, which may vary depending on the nature of the dispute and the system's broader goals. First, cases involving severe consequences – such as reputational, legal, or financial harm – often demand a higher standard, a principle central to criminal law and certain high-stakes civil matters. Second, judicial policy considerations, including the promotion of legal norms, deterrence of misconduct, and preservation of institutional legitimacy, also contribute to shaping the standard. Finally,

interests relating to the judicial process – such as fairness, integrity, and practical feasibility – may also justify adjustments in the standard of proof, particularly where evidence is particularly difficult to obtain, for example, in proving intent or causation.

Different explanatory frameworks may provide justifications for these considerations. Decision-theoretic approaches prioritise managing judicial error, holding that more severe consequences require higher evidentiary thresholds. Policy-oriented perspectives emphasise systemic goals, including judicial economy and regulatory enforcement, which may support either stricter or more lenient standards depending on context. Value-based approaches connect the standard to principles such as fairness and equality, guiding courts toward legitimate and just decision-making. Together, these approaches illustrate that the standard of proof is not merely procedural formality but a reflection of broader legal, moral, and institutional priorities, balancing competing interests to achieve fair and effective outcomes. Understanding the standard of proof as a dynamic, context-sensitive, and inherently value-laden decisional threshold allows for a more nuanced understanding of evidentiary reasoning.

3. The Evidentiary Regime of the ICJ

3.1 Introduction

This chapter situates the concept of proof in the evidentiary regime of the ICJ. Drawing on the understanding of the rules of evidence as context-dependent, it examines how the concept of proof is shaped by the nature of the Court's judicial function, its institutional context, and its role as a systemic actor in international law. As both a dispute settlement organ reliant on state consent and the principal judicial organ of the UN, the Court operates within a complex institutional setting that informs evidentiary decision-making. Its multifaceted role imposes expectations that extend well beyond the immediate interests of the litigating states, encompassing responsibilities toward the UN as a wider international organisation and toward the international community. These systemic and institutional considerations form part of the background against which the Court determines its approaches to questions of evidence and proof, including the determination of the standard of proof.

The evidentiary regime of the Court is sparse and relatively underdeveloped compared to its national counterparts but is considered to allow the Court to respond to factual uncertainty in international adjudication. The Court is afforded with a considerable freedom, or flexibility, in evidentiary matters that allows it to determine its treatment of evidence on a case-by-case basis.²⁶⁶ In the absence of prescriptive rules of evidence under the ICJ Statute, its approach may reflect a balance of multiple interests relating to the sovereign equality of the litigating states, institutional legitimacy, and systemic considerations in light of its normative authority in the international legal order. The concept of proof remains flexible within this evidentiary framework, accommodating the

²⁶⁶ Riddell and Plant (n 16) 410–411. See also Benzing (n 18) 1373, para 5, describing the Court's evidentiary regime as 'rather fragmentary'.

constraints of state consent and broader demands of judicial policy.²⁶⁷ The Court's decision-making in evidentiary matters thus emerges as dynamic and context-dependent, features that invite further questions about the nature and extent of its discretion in this area of its procedural law.

Following this introduction, Chapter 3.2 considers the functions entrusted to the Court. These include its core function as a judicial body entrusted with the peaceful settlement of disputes, its distinct role as the principal judicial organ of the UN, and as a systemic actor within the broader international legal order. Chapter 3.3 examines the legal framework for evidence before the Court, and the role of evidence and proof in judicial proceedings. It considers the Court's fragmented and often ambiguous evidentiary regime through an examination of the sources of law governing evidence. Chapter 3.4 develops the concept of the proof in the context of the Court's evidentiary regime, examining both the general considerations and other factors that shape its determination. Finally, Chapter 3.5 offers concluding remarks.

3.2 The Functions of the Court

The functions entrusted to the Court can be described as multifaceted. The core function is exclusively judicial in nature and consists of the resolution of interstate disputes. While the Court is an independent judicial body, the exercise of its judicial function is embedded within, and fundamentally shaped by, the UN institutional framework. This entails responsibilities to the organisation as well as towards its wider membership. Additionally, the Court performs a systemic role in the international legal order, contributing to coherence, stability, and development of international law. These functions are examined to clarify the considerations that the Court balances in carrying out its mandate, and how its procedural law is shaped by broader institutional and systemic interests.²⁶⁸

3.2.1 The Function of the Court as a Judicial Body

The primary function of the Court is exclusively judicial in nature, consisting of the settlement of legal disputes between states by applying established rules

²⁶⁷ On 'flexibility' in the Court's evidentiary regime, see generally Farnelli (n 26).

²⁶⁸ See, for example, Riddell and Plant (n 16) 45.

of international law.²⁶⁹ In this respect, Article 38(1) of the ICJ Statute provides the legal mandate under which the Court operates, namely, that it shall decide disputes submitted to it ‘in accordance with international law’ through the application of international conventions, customary international law, general principles law, and as subsidiary means, judicial decisions and the writings of publicists. The provision not only defines the judicial responsibility of the Court, but also establishes the sources of law that the Court must apply for the performance of its functions.²⁷⁰ The Court’s judicial mandate thus operates as both guidance and constraint, as it enables the Court to interpret and apply international law, while also confining its judicial function to the recognised sources of law set out in Article 38(1). This section proceeds to explore key elements of the Court’s judicial function, including the nature and limits of its jurisdiction, the legal characterisation of disputes, and procedural aspects.

The jurisdiction of the Court is not inherent but must be conferred upon it by state consent. This requirement not only conditions the exercise of its judicial function but also constitutes its principal institutional limitation, underscoring the essentially voluntary nature of the Court’s jurisdiction.²⁷¹ As a two-fold criterion, it requires that states have both generally accepted the jurisdiction of the Court and consented to its exercise in relation to a specific dispute.²⁷² The general acceptance of the Court’s jurisdiction typically derives from a state’s membership in the UN, with automatic party status to the ICJ Statute.²⁷³ This

²⁶⁹ Article 36(1) of the ICJ Statute (n 39), which provides that ‘[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force’.

²⁷⁰ *Bosnia Genocide* (n 5) para. 116, where the Court held that its ‘function, according to Article 38 of its Statute, is to “decide”, that is, to bring to an end, “such disputes as are submitted to it’’. Similarly, see also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Declaration of President Yusuf) [2018] ICJ Rep 566, para. 6.

²⁷¹ See, for example, Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press, Incorporated 2014) 48–50, discussing the requirement of state consent and its constraining effect on the Court’s exercise of jurisdiction. See also Hersch Lauterpacht, *The Development of International Law by the International Court of Justice* (Stevens & Sons 1958) 75–77 and 91–95; and Edward McWhinney, *The World Court and the Contemporary International Law-Making Process* (Sijthoff & Noordhoff 1979) 63.

²⁷² This two-fold criterion follows from Article 35(1) of the ICJ Statute (n 39), alongside Article 93(1) of the UN Charter (n 45), in respect of the general consent to the Court’s jurisdiction, as well as Articles 36 and 37 of the ICJ Statute, for the requirement of specific consent.

²⁷³ Article 93(1) UN Charter (n 45) provides that all member states of the UN are *ipso facto* parties to the ICJ Statute (n 39). This is mirrored in Article 35(1) of the ICJ Statute (n 39), which provides that ‘[t]he Court shall be open to the states parties to the present Statute’.

general acceptance does not itself confer jurisdiction in a specific case, as the Court may only exercise its judicial function where the states concerned have consented to its jurisdiction over the particular dispute. Such consent may be conferred either by agreement between the parties,²⁷⁴ or through a unilateral declaration accepting jurisdiction in respect of future disputes.²⁷⁵ In certain circumstances, the Court has inferred consent through the principle of *forum prorogatum*, whereby a state's conduct after the initiation of proceedings may amount to an acceptance of jurisdiction.²⁷⁶ The consent requirement imposes a structural constraint on the Court's ability to hear contentious cases and may impose limitations on its jurisdiction *ratione materiae* or *ratione temporis*.²⁷⁷ Jurisdiction conferred through compromissory clauses or special agreements is typically shaped by the scope and conditions of the instrument under which the dispute is brought, while optional clause declarations may include further reservations to restrict the Court's jurisdiction.²⁷⁸

Alongside the requirement of state consent, the existence of a legal dispute is a fundamental condition for the Court's jurisdiction. To define the existence of a dispute, the Court has held that the essential element is that 'the claim of one party [is] positively opposed by the other'.²⁷⁹ A dispute may be defined as legal if it involves a genuine conflict of legal interests or views arising in relation to

²⁷⁴ Under Article 36(1) ICJ Statute (n 39), the Court has jurisdiction for all cases 'which the parties refer to it' as well as in 'matters specially provided for... in *treaties* or *conventions* in force' (emphasis added). This includes special agreements relating to a dispute, or the use of compromissory clauses in a treaty conferring jurisdiction to the Court for disputes under that instrument. Under Article 37 of the Statute this is also the case for consent given in a treaty conferring jurisdiction to the PCIJ, if such a treaty is still in force, highlighting the close institutional ties between these successive permanent international courts.

²⁷⁵ This declaration is known as an *optional clause*. Article 36(2) ICJ Statute (n 39) provides that '[t]he states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes [...]'.
²⁷⁶ Under the doctrine of *forum prorogatum*, consent can be considered given as a matter of the positive conduct of a state, if no other form of consent has been given to dispute settlement in a specific case. The principle has been codified in Article 38(5) of the 1978 Rules of Court (n 44). The doctrine was initially elaborated in *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (Jurisdiction) [1924] PCIJ Series A No 2, p. 34.

²⁷⁷ Rosenne (n 41) 549–558.

²⁷⁸ Kolb (n 43) 214–215 and 297–300.

²⁷⁹ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, p. 328.

a concrete situation between the parties.²⁸⁰ Legal disputes frequently involve political interests, whether between the parties themselves or in respect of the wider international community, especially when recourse to the Court serves strategic purposes within limited jurisdictional clauses.²⁸¹ This includes, for example, disputes arising against a background of armed conflict or other on-going tensions between states.²⁸² Although disputes may encompass interests not of a strictly legal nature, such as those arising from broader geopolitical tensions or on-going conflicts, the mere presence of political elements thus do not preclude judicial settlement by the Court if the underlying dispute remains legal in nature. While the Court makes no formal distinction between legal and political disputes, it understands a legal dispute as a ‘disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’.²⁸³ The Court must exercise caution to ensure that the dispute falls within the jurisdictional parameters defined by state consent, preserving judicial integrity and legitimacy. These jurisdictional constraints shape not only the Court’s access but also how proceedings unfold, reflecting the foundational role of consent in structuring the Court’s judicial function.

Following the initial establishment of the Court’s jurisdiction, the procedure unfolds in a written followed by an oral phase. The written phase consists of the submission of memorials and counter-memorials, and, where applicable, replies and rejoinders, in which the parties set out their legal arguments and

²⁸⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras. 57 and 60. See also *Northern Cameroons (Cameroon v. United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15, para. 29; *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554, paras. 45-49; and *Nuclear Tests (Australia v. France; New Zealand v. France)* (Judgment) [1974] ICJ Rep 253, para. 59.

²⁸¹ Joan E. Donoghue, ‘Speech of H.E. Judge Joan E. Donoghue, President of the International Court of Justice, at the 73rd session of the International Law Commission’ (Speech, 1 June 2022) <<https://www.icj-cij.org/node/106189>> accessed 23 November 2024, addressing this as a general trend in the use of the Court’s jurisdiction, warranting caution in the assessment of the jurisdictional basis of a case. An example is the recent case brought by Ukraine against Russia in the immediate aftermath of Russia’s large-scale invasion, which related to allegations of genocide under the Genocide Convention (n 4) but may have served strategic purposes. See also *Allegations of Genocide* (n 7).

²⁸² Generally, see *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJ Rep 3; and *Armed Activities* (n 108) para. 26.

²⁸³ *Mavrommatis Palestine Concessions* (n 276) p. 19, that a ‘legal’ dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’.

the supporting factual and evidentiary material.²⁸⁴ The oral phase that follows involves public hearings where agents, counsel, and advocates present their arguments before the Court and may respond to questions from the bench.²⁸⁵

The proceedings before the Court follow an adversarial model of adjudication, meaning the parties are responsible for initiating the dispute and for clarifying the legal and factual questions at stake.²⁸⁶ While the Court generally refrains from interfering in the conduct of the written phase,²⁸⁷ it relies heavily on the active cooperation of the parties to define the scope of the dispute and to ensure the adequate production of evidence.²⁸⁸ A central feature of this adversarial structure is the equality of the litigating parties, which guarantees that each party is afforded the same opportunity to submit and present legal arguments and evidence. This equality is consequently reflected in a series of procedural safeguards, including the right to be heard, equal access to submit written pleadings and evidence, and equal opportunity to participate in oral hearings.²⁸⁹

3.2.2 The Function of the Court as a Principal UN Organ

The Court exercises its judicial function within the institutional framework of the UN as its principal judicial organ. As such, it is not merely a court of justice but forms an integral part of the wider international organisation.²⁹⁰ While it operates as an independent judicial body, the Court's role in the UN framework

²⁸⁴ See further Articles 43(1) and (2) of the ICJ Statute (n 39); and Articles 44-54 of the 1978 Rules of Court (n 44).

²⁸⁵ These hearings also allow for clarification of points raised in the written pleadings. Articles 43(1) and (2) of the ICJ Statute (n 39), and Articles 44-54 of the 1978 Rules of Court (n 44). See further Rosenne (n 41) 1283–1292.

²⁸⁶ Articles 43(1) and (2) of the ICJ Statute (n 39), and Articles 44-54 of the 1978 Rules of Court (n 44). See also Kolb (n 43) 942–943; and Valencia-Ospina (n 38).

²⁸⁷ In this respect, see further *Practice Directions* (adopted 31 October 2001) <<https://www.icj-cij.org/practice-directions>> accessed 24 July 2025, aiming to draw the parties' attention to the need for the written pleadings 'to bring out clearly the submissions and arguments of the part, which is filing the proceedings' (Practice Direction II), and calling for restraint in view of excessively long written pleadings (Practice Direction III).

²⁸⁸ Kolb (n 43) 942–943, that the peaceful settlement of international disputes by 'requires to a considerable extent the cooperation of the litigating parties as a basis'.

²⁸⁹ Rosenne (n 41) 1048–1052.

²⁹⁰ This is directly provided for by Article 92 of the UN Charter (n 45). See also Article 7(1), which indicates the Court's status as one of the principal organs of the UN.

entails the expectation that its decision-making contributes to advancing the organisation's purposes and objectives.²⁹¹ This institutional role is formalised by Article 92 of the UN Charter, which designates the Court as the principal judicial organ and mandates that it functions in accordance with the ICJ Statute as an integral part of the UN Charter.²⁹² Complementing the formal status of the Court, Article 93(1) of the UN Charter provides that membership in the UN means a state is *ipso facto* party to the ICJ Statute and is considered as having generally accepted the jurisdiction of the Court, reinforcing the jurisdictional reach of the Court within the international community.²⁹³ The relationship of the Court to the wider UN organisation reflects the decision during the drafting of the UN Charter and ICJ Statute to situate the Court within the institutional functioning of the UN, drawing on the relationship between the League of Nations and the Permanent Court of International Justice (PCIJ) as its predecessors, and to establish an automatic and formal link between the UN and the Court.²⁹⁴ This institutional embedding affirms the Court's status within the UN system and frames its judicial function and authority as essential to the maintenance of international law under the UN Charter framework.

Although the Court is an independent judicial body, its embeddedness within the UN system entails a general expectation of institutional cooperation with the other principal organs of the wider UN organisation.²⁹⁵ This cooperation is formalised and functional. For example, under Article 94(2) of the UN Charter, a party to a dispute may bring non-compliance with a Court judgment to the attention of the Security Council (UNSC), which may then decide upon measures to give effect to the judgment.²⁹⁶ The Court also engages directly

²⁹¹ Rosenne (n 41) 102–105, describing the Court's essentially dual nature as 'a court of justice responsible only to the law, and an integral part of a wider international organisation'.

²⁹² See Article 92 of the UN Charter (n 45). This provision is mirrored by Article 1 of the ICJ Statute (n 39), which designates that the Court as the 'principal judicial organ' of the UN.

²⁹³ Rosenne (n 41) 102, who describes the integration of the ICJ Statute (n 39) into the UN Charter (n 45) as constituting a formal element (i.e. creating the institutional link between the two), and the status of all UN member states as *ipso facto* parties to the ICJ Statute as the relevant substantive element.

²⁹⁴ Kolb (n 43) 59, highlighting that this relationship was more clearly established in the UN Charter (n 45) and ICJ Statute (n 39), compared to what existed previously between the League of Nations and the PCIJ.

²⁹⁵ Riddell and Plant (n 16) 12–13.

²⁹⁶ Article 94(2) of the UN Charter (n 45). The provision has not been used in actual practice, though Nicaragua made a request to the UNSC to enforce the *Nicaragua* (n 108) judgment

with other UN organs through its advisory jurisdiction. Under Article 96(1) of the UN Charter, the General Assembly (UNGA), UNSC, and other UN organs and specialised agencies with authorisation, may request advisory opinions on ‘any legal question’.²⁹⁷ These structural connections underscore the Court’s broader role as not only a forum for inter-state dispute settlement but also as a contributor to the legal guidance and institutional coherence of the UN system.

As the principal judicial organ of the UN, the Court’s exercise of its judicial function is conditioned by the objectives of the UN Charter.²⁹⁸ The Court has itself underscored this relationship, noting that the provisions of its Statute must be interpreted in context and ‘bearing in mind the general scheme of the Charter and the Statute’.²⁹⁹ The purposes of the UN, articulated in Article 1(1) of the Charter, centre on the maintenance of international peace and security and the preservation peaceful relations between states.³⁰⁰ These objectives are part of the broader institutional environment in which the Court operates and inform its approach to the resolution of legal disputes under international law.

The Court’s contribution can be framed in terms of its role as a mechanism for the peaceful settlement of disputes. This objective is expressed in Article 2(3) of the UN Charter as an obligation on UN member states.³⁰¹ It operates as the corollary to the general prohibition on the use of force under the subsequent Article 2(4) of the UN Charter.³⁰² The link between the peaceful settlement of

in 1986. However, the United States subsequently vetoed the draft resolution calling for the full and immediate compliance with the Court’s judgment in 1986.

²⁹⁷ Article 96(1) of the UN Charter (n 45) provides that ‘[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question’, and Article 96(2) that ‘[o]ther [UN] organs’ or specialized agencies may be authorized by the General Assembly’.

²⁹⁸ See, for example, Riddell and Plant (n 16) 45.

²⁹⁹ See *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 127, p. 142.

³⁰⁰ Article 1(1) of the UN Charter (n 45) provides that one of the purposes of the UN is ‘[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’.

³⁰¹ Article 2(3) of the UN Charter (n 45). The principle of peaceful settlement of dispute is crystallised as a principle of customary international law, see *Nicaragua* (n 108) para. 290.

³⁰² Article 2(4) of the UN Charter (n 45).

disputes and the prevention or cessation of armed conflict has been explicitly drawn in a series of UNGA resolutions. In Resolution 40/9, the UNGA issued a solemn appeal to states in conflict to cease armed action and to settle their disputes through negotiations, and to all states to resolve tensions and disputes by political means.³⁰³ The connection was developed in several subsequent UN resolutions, mainly from the UNGA, such as the *Declaration on the Prevention and Removal of Disputes*,³⁰⁴ *Declaration on the Enhancement of the Principle of Refraining from the Threat or Use of Force*,³⁰⁵ *An Agenda for Peace*,³⁰⁶ and the *Millennium Declaration*.³⁰⁷ Against this background, the Court serves as a judicial mechanism for the implementation of the principle of peaceful dispute settlement, through which states may resolve their differences.

As an obligation of conduct, the obligation of peaceful settlement under Article 2(3) of the UN Charter refers primarily to the means of dispute resolution and is an obligation of conduct in the sense that it does not impose a positive obligation on states to resolve their disputes.³⁰⁸ To fulfil their obligation of peaceful settlement, states must act in good faith and strive to arrive at an ‘early and just’ settlement of their disputes, and to abstain from conduct which might

³⁰³ UNGA Res. 40/9 (8 November 1985) UN Doc. A/RES/40/9.

³⁰⁴ *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*, UNGA Res. 43/51 (5 December 1988) UN Doc. A/RES/43/51,

³⁰⁵ *Declaration on the Enhancement of the Principle of Refraining from the Threat or Use of Force in International Relations*, UNGA Res. 42/22 (18 November 1987) UN Doc. A/RES/42/22.

³⁰⁶ *An Agenda for Peace: Preventative Diplomacy and Related Matters*, UNGA Res. 47/120 (18 December 1992) UN Doc. A/RES/47/120.

³⁰⁷ During the Millennium Summit, heads of state and heads of government reaffirmed their dedication to the ‘resolution of disputes by peaceful means and in conformity with the principles of justice and international law’, see *Millennium Declaration*, UNGA Res. 55/2 (8 September 2000) UN Doc. A/RES/55/2, paras. 4 and 9. See also the subsequent resolutions on the same topic, namely, UNGA Res. 57/26 (19 November 2002) UN Doc. A/RES/57/26; UNGA Res. 57/337 (3 July 2003) UN Doc. A/RES/57/337.

³⁰⁸ Kolb (n 43) 11–14, noting the relative weakness of the obligation as one essentially limited to conduct. See also David D Caron and Christian Tomuschat, ‘Article 2, Para. 3 UN Charter’ in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 127, para 15; and Alain Pellet, ‘Peaceful Settlement of International Disputes’, *Max Planck Encyclopaedia of International Law (MPEPIL)* (Oxford University Press 2013) para 16. See also *Legality of the Threat or Use of Nuclear Weapons* (n 280) para. 99, where the Court considered the legal importance of the obligation resulting from commitment of the parties to negotiate in good faith a nuclear disarmament ‘goes beyond that of a mere obligation of conduct’.

aggravate or extend the dispute. The scope of the obligation has been clarified in several resolutions, including the *Friendly Relations Declaration*,³⁰⁹ and later in the *Manila Declaration*.³¹⁰ While states freely choose the means of peaceful settlement, Chapter VI of the UN Charter provides a general framework for implementing the obligation.³¹¹ Article 33 outlines a non-exhaustive list of the means of both diplomatic and judicial means of dispute settlement.³¹² Articles 34-38 further specify the role of the UN organs, particularly the UNSC and UNGA, and the institutional mechanisms available to states.³¹³ These provisions reflect the integrated and institutionalised nature of the obligation. Within this framework, the Court thus functions as one of the institutional mechanisms for peaceful settlement, which complements the political responsibilities of other UN organs.³¹⁴ As such, its role extends beyond resolving specific disputes to giving juridical form to the UN Charter's broader commitments to maintaining peace through law.

The Court may be understood as exercising a 'private' alongside a 'public' function. The former refers to its role in the judicial settlement of disputes, and the latter its contribution to the broader objectives of the UN Charter and the maintenance of international peace and security.³¹⁵ The Court has increasingly adjudicated disputes that directly implicate issues relating to international peace and security,³¹⁶ including those involving armed conflict or the legal

³⁰⁹ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV) (24 October 1970) UN Doc. A/RES/2625(XXV).

³¹⁰ *Manila Declaration on the Peaceful Settlement of International Disputes*, UNGA Res. 37/10 (15 November 1982) UN Doc. A/RES/37/10, para. I (10), which elaborates on the contents of the principle and invites UNMS to 'make full use of the provisions of the Charter of the United Nations, including the procedures and means provided for therein, particularly Chapter VI, concerning the peaceful settlement of disputes', and underscores that states should also negotiate meaningfully to settle disputes.

³¹¹ Chapter VI of the UN Charter (n 45).

³¹² Article 33 of the UN Charter (n 45).

³¹³ Articles 34-38 of the UN Charter (n 45).

³¹⁴ Kolb (n 43) 60-61.

³¹⁵ Brown (n 22) 74-75.

³¹⁶ Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law* (Brill Nijhoff 2017) 119-120 ff. See also Gentian Zyberi, 'The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through*

status of contested territories.³¹⁷ Additionally, through its advisory jurisdiction, the Court offers legal clarification to UN organs and specialised agencies, thereby shaping the interpretation and development of international law. In this sense, the Court's role extends beyond merely dispute settlement to encompass several institutional functions within the UN framework. As such, the Court is not merely a judicial body but also has an institutional and community-oriented role within the UN framework.³¹⁸

The Court's integration into the UN system and its orientation toward the overarching objective of peaceful settlement of disputes have shaped its understanding of its judicial function and role as both an international court and a principal UN organ.³¹⁹ This embeddedness conditions the Court's activities not only by imposing certain institutional and normative constraints but also by expanding its interpretive discretion. The Court thus positions itself as a central actor in the international legal system, one whose influence extends beyond bilateral dispute resolution to the international community.

3.2.3 The Function of the Court as a Systemic Actor

Described as an 'apex' international judicial body,³²⁰ the Court is recognised as a central actor in the development and clarification of international law. In

International Law (Oxford University Press 2015) 343–346, suggesting that, from an institutional point of view, the Court's primary function lies in securing peace through the application of the law, as part of its specialised judicial function.

³¹⁷ For example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403; and *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory* (n 8).

³¹⁸ Rosenne (n 41) 103 and 106–107, arguing that this is not merely a symbolic question but one that hinges on the objectives of the UN and the limitations imposed by the UN Charter (n 45) on the activities of the UN organs, which apply generally to the Court's activities. See also Kolb (n 43) 60–61, referring to this as a 'community' orientation of the Court's judicial function; and Riddell and Plant (n 16) 45.

³¹⁹ Riddell and Plant (n 16) 12–13.

³²⁰ Gleider Hernandez, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 *The British Yearbook of International Law* 13, 15. See further Sir Robert Jennings, 'Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly' (1994) 88 *American Journal of International Law* 421, 424.

exercising its judicial function, the Court addresses ambiguities, fills perceived gaps in the law, and reinforces coherence in the international legal system.³²¹ While its decisions are only binding on the parties to the dispute,³²² judgments are widely regarded as authoritative statements with broader significance.³²³

The Court occupies a central role for the clarification and consolidation of the substance and normative content of international law,³²⁴ contributing by lending authority to the rules it enunciates and applies in its judgments.³²⁵ Despite the authority of its judgments, the Court does not possess a formal law-making mandate.³²⁶ Law-making may be described as the process by which the Court through reasoned judgments clarify vague or contested norms, addresses legal gaps, or reconciles principles through authoritative interpretation.³²⁷ By interpreting a principle or rule, and bestowing it with authoritative weight, the Court not only identified the applicable law but, through repeated application,

³²¹ Thomas Buergenthal, 'Lawmaking by the ICJ and Other International Courts' (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 403, 403, who describes the Court's engagement with international law as a process of 'normative accretion', meaning that the law is not created with legislative processes, but rather in a more modest, incremental fashion, clarifying ambiguities and resolving perceived gaps in the law.

³²² Articles 38 and 59 of the ICJ Statute (n 39).

³²³ Higgins (n 40) 202, considering the wider repercussions of the Court's judgments not only in the legal sphere, but also the political.

³²⁴ On the Court as an 'agent' for the progressive development of international law, see Hersch Lauterpacht, *The Development of International Law by the International Court* (Unveränd Nachdr der Ausg von 1982, Cambridge Univ Press 2010) 5.

³²⁵ This is illustrated in the Court's articulation of the criteria for customary international law in *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, paras. 73-74; its recognition of *erga omnes* obligations in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)* (Judgment) [1970] ICJ Rep 3, paras. 33-34; and its contribution to the evolving legal framework on nuclear weapons in its advisory opinion on their legality in *Legality of the Threat or Use of Nuclear Weapons* (n 280) paras. 95-97.

³²⁶ Robert Y Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1, 3, that 'the principle that judges are not empowered to make new law is a basic principle within the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation. For otherwise the judges lose their one ultimate source of authority'.

³²⁷ See the discussion in *Chapter 4*.

contributes to its crystallisation and development.³²⁸ This process means that the Court ‘creates’ law incrementally through its case law, elaborating general principles and contributing to standard-setting over time.³²⁹ An element of law-making is thus arguably inherent in the Court’s judicial function, a dimension that is pronounced given its special status within the international legal system.

Building on this foundational role in law development, the Court’s approach to its own jurisprudence underscores its influence within the international legal order. In this respect, the Court has consistently acknowledged the persuasive authority of its own judgments by relying on prior judgments as a matter of judicial practice.³³⁰ This reliance on precedent signals what the Court regards as authoritative statements of international law and lends its decisions substantive legal weight, situating them within the ‘architecture’ of the international legal system.³³¹ The continuity and reinforcement of principles across cases give the Court’s judgments a standard-setting character, extending its influence beyond the context of specific disputes.³³²

The Court’s role as an ‘agent’ for the progressive development of international law has been recognised at the institutional level. Its judgments are frequently cited by other UN organs,³³³ underscoring the importance of the judicial decisions of the Court as a source for the clarification of international legal norms. Through such recognition, the Court’s interpretations are integrated into broader normative frameworks, reinforcing its function not only as a dispute settler but as a central contributor to the development of international law. This recognition of the Court’s role as a systemic actor has been

³²⁸ Gleider Hernandez, ‘International Judicial Lawmaking’ in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 201–202.

³²⁹ While the Court is not a law-creating or legislative body, its judgments are still expected to contribute to the progressive development of international law, influencing legal standards and expectations. See, for example, Couvreur (n 316) 264–267.

³³⁰ Vaughan Lowe, ‘The Function of Litigation in International Society’ (2012) 61 *International and Comparative Law Quarterly* 209, 214.

³³¹ Lauterpacht (n 324) 21.

³³² Christopher G Weeramantry, ‘Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law’ (1997) 10 *Leiden Journal of International Law* 308, 320.

³³³ See, for example, UNGA Res. 171 (II) (14 November 1947) UN Doc. A/519, underscoring in a preambular paragraph that ‘it is... of paramount importance that the Court should be utilised to the greatest practical extent in the progressive development of international law.

understood as suggesting a law-making potential of its judgments, even in the absence of any formal legislative mandate.³³⁴

The Court's interpretation of legal norms has been treated as authoritative by other actors within the international legal system, reinforcing the influence of its jurisprudence.³³⁵ Once handed down, the Court's decisions create normative expectations for actors, including states.³³⁶ This adjudicative reasoning has contributed to shaping the legal arguments of other actors, which have also relied on the Court's judgments for their argumentation, reinforcing the influence and authority of the Court within the international community.³³⁷ As a matter of this process, the Court contributes to legal discourse by creating norms and expectations that extend beyond the immediate case, thereby helping to build the 'architecture' of international law through the clarification of legal principles.³³⁸ The Court's role thereby extends beyond the resolution of individual disputes and positions it as a systemic actor within the international legal system. The Court's role contributes to the stability of the international legal system by ensuring consistent legal reasoning and adhering to established principles. This continuity and predictability are significant for the functioning of international law. Judicial decisions not only resolve disputes but also shape normative expectations, helping to stabilise and legitimise the authority of international law.³³⁹

³³⁴ Gleider Hernandez, 'The International Court of Justice as a Law-Creative Actor' in Achilles Skordas and Lisa Mardikian (eds), *Research Handbook on the International Court of Justice* (Edward Elgar Publishing 2025) 64–66.

³³⁵ Hernandez, 'International Judicial Lawmaking' (n 328) 207, that the Court's judgments enjoy a 'noteworthy' authority in the international legal system.

³³⁶ On normative expectations of actors in the international community in relying on judgments from the Court, see Christian J Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ As An Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 784; and Weeramantry (n 332) 311 and 321.

³³⁷ José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005) 554, that it 'shapes what counts as a proper argument and invites its participants to think and speak in the same way'; as cited in Hernandez, 'The International Court of Justice as a Law-Creative Actor' (n 334) 65.

³³⁸ See, for example, Lowe (n 330) 214; and Lauterpacht (n 324) 21.

³³⁹ Armin Von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49, 50 and 56. See also Armin Von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012) 986.

Understanding the Court not only as a judicial organ but also as a systemic actor underscores its role in navigating, stabilising, and communicating within the international legal system. The Court's judgments are directed primarily at the litigating parties but may also persuade a broader audience consisting of other states, international institutions, scholars, and the broader international community, ensuring its legitimacy and reinforcing its normative authority in the international legal system.

3.3 The Legal Framework for Evidence

The evidentiary regime of the Court is marked not only by the lack of detailed legal regulation, but by ambiguity in the sources of law governing questions of evidence and proof. Questions of evidence and proof have not traditionally been the focal point of judicial proceedings at the Court. This is evident across much of the judicial practice of the Court, in which it has often avoided making detailed or complex factual assessments and limited its fact-finding to what is strictly necessary to resolve the dispute.³⁴⁰ The Court's emphasis on resolving legal rather than factual questions reflects its institutional design, anchored in state consent and a strongly adversarial judicial process, where states are considered best placed to determine facts.³⁴¹ This approach is mirrored in the Court's non-prescriptive and flexible legal framework for evidence. These issues are explored in the following subsections through an examination of the sources of the rules of evidence and principles derived from judicial practice.

3.3.1 The ICJ Statute

The ICJ Statute is the main source for rules of procedure,³⁴² but only provides facultative rules governing the formalities associated with the production and

³⁴⁰ The Court appears to understand its role as focused on legal issues, with a more passive role in view of fact-finding. See, for example, *Western Sahara* (n 317) para. 138, in which the Court stated that it has '...a passive role. The parties put forward the facts and submit the evidence that they consider favourable to their claim, and the Court takes them into consideration when making its decision. That is perfectly logical, because the purpose of the judgment is to decide between the parties'.

³⁴¹ Foster (n 17) 185–187.

³⁴² Brown (n 22) 87.

taking of evidence.³⁴³ This sparse legal framework for evidence reflects the limited role envisioned for the Court in judicial fact-finding and the reliance on parties to define the nature, scope, and contents of the dispute.³⁴⁴ It appears to reflect a deliberate choice during the drafting process to maintain ambiguity and non-prescription, preserving flexibility in evidentiary decision-making.³⁴⁵ Accordingly, several provisions of the ICJ Statute are similar, if not identical, to those found in the Statute of the PCIJ, reflecting a historical continuity between international courts as regards matters of evidence.³⁴⁶ Other international courts have adopted a similar approach in their legal frameworks, emphasising the need for a wide scope of action in respect of questions of evidence and proof.³⁴⁷ For instance, the Statute of the International Tribunal for the Law of the Sea (ITLOS) mirrors the provisions of the ICJ Statute by providing the Tribunal with a rule-making authority under Article 16, as well as the power to issue procedural orders under Article 27.³⁴⁸ Similarly, the Dispute Settlement Understanding (DSU) applied in the WTO framework provides limited guidance beyond Article 13(1) which allows panels to seek out additional information and technical advice, and Article 13(2) which permits them to consult experts and obtain information from any relevant

³⁴³ Riddell and Plant (n 16) 23, describing this as a 'light and malleable' framework for evidence that allows the Court to adjust its treatment of the evidence. See also Brown (n 22) 86–88.

³⁴⁴ See Foster (n 17) 185–187; Kazazi and Shifman (n 72) 193; and Sandifer (n 27) 8–9.

³⁴⁵ Valencia-Ospina (n 38) 202.

³⁴⁶ Rosenne (n 41) 1028–1029.

³⁴⁷ The constitutive instruments of other international courts and tribunals have drawn on both the ICJ Statute (n 39) and *Statute of the Permanent Court of International Justice* (adopted 16 December 1920, entered into force 16 September 1921) 6 LNTS 379 as a basis for the elaboration of their own legal frameworks. A similar structure can be observed in investor-state arbitration. See, for example, Articles 43 and 44 of *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID) (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, which allow tribunals to request evidence and conduct site visits, and to decide procedural matters not expressly addressed. Though ICSID is not a forum for inter-state disputes, its procedural architecture reflects the influence of the statutes of the ICJ (n 39) and PCIJ. See further Brown (n 22) 84 and 87–89, who describes the 'general lack of prescription' in the rules of evidence of international courts and tribunals; and Amerasinghe (n 42) 47–48, pointing out that there are 'no extensive rules of evidence' before any international court or tribunal, in stark contrast to the comparatively technical rules of evidence which may be found at national levels.

³⁴⁸ *Statute of the International Tribunal for the Law of the Sea (ITLOS Statute), Annex VI of the United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 561.

source, with discretion to establish additional rules of procedure.³⁴⁹ The continuity between the PCIJ and ICJ is evident in the drafting of the ICJ Statute, which involved an article-by-article revision of the PCIJ Statute and preserved many of its central provisions on evidence with little amendment.³⁵⁰ The ICJ Statute thus saw a considerable number of provisions being carried over verbatim from the PCIJ Statute.³⁵¹ Significantly, many of these provisions originated in earlier legal frameworks, particularly The Hague Conventions on the Peaceful Settlement of Disputes.³⁵²

The adoption of the UN Charter and ICJ Statute at San Francisco in 1945 largely maintained the provisions from the PCIJ Statute, without substantive discussion,³⁵³ reflecting continuity in freedom in judicial fact-finding before international courts as expressed through open-ended rules of evidence. These rules have been understood to reflect ambitions to create a hybrid ‘universalist’ procedural model, combining features of both Common Law and Civil Law traditions to support a broadly accessible and flexible evidentiary regime.³⁵⁴ While the absence of prescriptive rules of evidence in the ICJ Statute mirrors the notion of free proof applied in Civil Law jurisdictions,³⁵⁵ elements such as

³⁴⁹ *Dispute Settlement Understanding (DSU), Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (hereafter WTO DSU).

³⁵⁰ For an overview, see, for example, Brown (n 22) 87.

³⁵¹ The draft proposed by the Committee was adopted without substantial amendment, and the Informal Inter-Allied Committee of 1944, in their report about procedure, did not go into detail but instead simply held that their [...] main conclusion is that the procedure of the Court would best be left to be settled by the Court itself by the Rules of Court’. See Report of the Committee of Jurists for the Establishment of a Permanent Court of International Justice, *United Nations Conference on International Organization: Documents* (Vol. XIV, 1945) Annex 4, Articles 49-51.

³⁵² *Convention for the Pacific Settlement of International Disputes* (Hague Peace Conference 1899) 32 Stat 2025 (entered into force 4 September 1900); and *Convention for the Pacific Settlement of International Disputes* (Hague Peace Conference 1907) 1 Bevans 240 (entered into force 26 January 1910)

³⁵³ UN Conference on International Organization, Committee 1, ‘Report of Committee 1 on the International Court of Justice’ (UN Doc 264 IV/1/18, 12 May 1945), which shows that these provisions were adopted ‘unanimously... without discussion’.

³⁵⁴ Riddell and Plant (n 16) 11, arguing that it is not clear whether this approach has resulted in an inclusive approach, or if it is merely ‘an incoherent synthesis of incompatible influences’ and not ‘the best of both worlds’. See also Valencia-Ospina (n 38) 202.

³⁵⁵ Valencia-Ospina (n 38) 203–204. See also the discussion in *Chapter 2.3.4*.

the admission of oral testimony and the use of affidavits are more typical of Common Law procedure.³⁵⁶

The relevant provisions governing questions of evidence and proof are found in Chapter III of the ICJ Statute and express, *inter alia*, the facultative powers of the Court alongside the basic procedural rights of the parties.³⁵⁷ Chapter III includes general provisions on evidence in the oral and written stages of the judicial proceedings,³⁵⁸ the Court's competence to make orders relating to the conduct of the case,³⁵⁹ its obligations in non-appearance cases,³⁶⁰ and a handful of provisions in Chapter III of the Statute which regulate the formalities connected with the production and the taking of the evidence. The provisions of the ICJ Statute that govern evidence can be grouped into three main clusters: those articulating the Court's general procedural powers, in Article 48; those relating to fact-finding mechanisms, which are found in Articles 50-52; and the special regime in non-appearance cases, in Article 53.

The general competence of the Court to make decisions relating to the conduct of judicial proceedings is found in Article 48 of the ICJ Statute, including any arrangements 'connected with the taking of evidence'.³⁶¹ The provision allows the Court to issue procedural rulings necessary for the management of the case,

³⁵⁶ Keith Highet, 'Evidence and Proof of Facts' in Lori Fisler Damrosch (ed.) *The International Court of Justice at a Crossroads* (Transnational Pub 1987) 357; Sandifer (n 27) 198. See also *Chapter 2.3.4*.

³⁵⁷ Chapter III of the ICJ Statute (n 39).

³⁵⁸ Article 43(2) of the ICJ Statute (n 39), suggesting that 'papers and documents in support' form part of the written proceedings; and Article 43(5), that the oral proceedings consist of hearings involving witnesses, experts, agents, counsels, and advocates.

³⁵⁹ Article 48 of the ICJ Statute (n 39), providing the Court with a general set of powers to make orders as to the conduct of the case, deciding the form and time in which each party must conclude its arguments, and making all arrangements connected with the production and taking of the evidence.

³⁶⁰ Article 53 of the ICJ Statute (n 39), that when one of the parties does not appear before the Court, or fails to defend its case, the other party may still call upon the Court to decide in favour of its claim. However, Article 53(3) provides that before doing so, the Court 'must... 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'.

³⁶¹ Under Article 48 of the ICJ Statute (n 39), it is provided that '[t]he Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence'.

for instance, setting time limits and similar logistical decisions.³⁶² While not an evidentiary rule in and by itself, Article 48 provides a basis for the Court's wide procedural discretion, which underpins many of its evidentiary choices and powers. As such, the provision reflects the Court's procedural powers to make decisions as necessary for the performance of its functions.³⁶³

Under Chapter III of the ICJ Statute, the Court is also afforded with facultative powers of fact-finding that allow it to seek out information not provided by the parties, providing an opportunity to correct the situation where the evidentiary record is deficient. It can request the parties to produce evidence, or provide explanations,³⁶⁴ and may in that processes call on witnesses to give testimony before the Court,³⁶⁵ or entrust to an individual, body, bureau, commission, or other organisation to carry out an enquiry or give an expert opinion.³⁶⁶ Despite the availability of facultative powers of judicial fact-finding, the Court has been reluctant to make active use of them, even when explicitly requested by the parties.³⁶⁷ In the *Bosnia Genocide* case, for example, the Court did not uphold Bosnia and Herzegovina's appeal for it to request unredacted versions of military documents, given that it already had 'extensive documentation' available to it, of which it had made 'ample' use.³⁶⁸

It not only lacks the power to compel disclosure but generally refrains from further inquiry where facts are uncontested, often viewing itself as precluded

³⁶² See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Judgment) [2001] ICJ Rep 40, para. 40, in which the authenticity of a large quantity of documents had been called into question, requiring the Court to draw on Article 48 of the ICJ Statute (n 39) to issue orders for the conduct of the case.

³⁶³ On the Court's inherent powers in evidentiary matters, see Brown (n 22) 58–60.

³⁶⁴ Article 49 of the ICJ Statute (n 39), which provides that the Court may call upon the agents to produce 'any document' or to 'supply any explanations', making a formal note of any party's refusal to do so, allowing the Court to draw so-called adverse inferences. See also Article 62 of the 1978 Rules of Court (n 44).

³⁶⁵ See Article 51 of the ICJ Statute (n 39), and further Articles 62(2) and 68 of the 1978 Rules of Court (n 44).

³⁶⁶ Under Article 50 of the ICJ Statute (n 39) the Court may entrust to any individual, body, bureau, commission, or other organisation that it may select, 'with the task of carrying out an enquiry or giving an expert opinion'.

³⁶⁷ Devaney (n 74) 39–41.

³⁶⁸ *Bosnia Genocide* (n 5) para. 206.

from investigating such matters.³⁶⁹ This restrained approach reflects structural limitations as well as the Court's understanding of its limited role in fact-established, where it relies to a significant extent on the parties' submissions and cooperation to establish the evidentiary record.³⁷⁰ As a result, a significant burden falls on the litigating parties, particularly in cases involving sensitive or inaccessible material.

The only other explicit mention of 'evidence' can be found in Article 53 of the Statute, which provides that the Court is under a requirement to 'satisfy itself' that a claim is 'well founded in fact and in law' in cases where one of the parties is absent from the judicial proceedings.³⁷¹ This implies that some threshold of evidence is required for the Court to make such a determination. Moreover, the non-appearance of a litigating party before the Court sharpens the requirements on the Court to ensure respect for the equality of the parties and prompts it to take a more active role in fact-finding, and to provide more detailed reasoning in its judgment to explain its treatment of the evidence in a particular case.³⁷² In *Nicaragua*, for instance, the non-appearance of the United States triggered the application of Article 53 and led the Court to carefully set out its approach to the establishment of the facts, including its treatment of evidence.³⁷³

Beyond the Court's fact-finding capabilities and the general provisions relating to evidence under the ICJ Statute, the Court is generally empowered to adopt additional rules of procedure.³⁷⁴ These rules, which are norms of a delegated character, provide the Court with flexibility to elaborate on its otherwise rigid procedural framework, allowing it to better address the needs of the judicial proceedings,³⁷⁵ or to supplement and amplify the existing provisions.³⁷⁶ The Court has refrained from adopting any more detailed rules of evidence or fact-

³⁶⁹ See *Benzing* (n 18) 1377, para 5, highlighting that the Court may be unable to investigate facts which are not disputed between the parties.

³⁷⁰ *Kolb* (n 43) 942–943. See also *Teitelbaum* (n 96) 122–123.

³⁷¹ Article 53(2) of the ICJ Statute (n 39).

³⁷² *Valencia-Ospina* (n 38) 203–204.

³⁷³ See the discussion on the *Nicaragua* (n 108) case in *Chapter 5.3.1*.

³⁷⁴ Article 30(1) of the ICJ Statute (n 39). See also *Rosenne* (n 41) 1028–1030, who notes that, in respect of the 1978 Rules of Court (n 44), that the hierarchy is the same as that applying before other principal organs of the UN, which are more often than not empowered to lay down additional rules to those found in the UN Charter.

³⁷⁵ *Kolb* (n 43) 97.

³⁷⁶ *Brown* (n 22) 88–89.

finding, or from further clarifying the existing legal framework.³⁷⁷ The 1978 Rules of Court, while clarifying some of the formalities relating to the taking of evidence, do not provide more detailed rules of evidence.³⁷⁸ The open-ended language in the Rules of Court suggests that the Court may have intentionally left them incomplete to avoid imposing excessive rigidity into its procedural framework, preserving flexibility to adjust its approaches in each case.³⁷⁹

3.3.2 Customary International Law and General Principles

The lack of detailed provisions on evidence in the ICJ Statute has given rise to questions regarding the Court's ability to rely on other sources of law in respect of its evidentiary decision-making.³⁸⁰ There is, however, broad agreement that the Court possesses the general competence to fill gaps in its procedural law where this is necessary for it to carry out its functions, even without explicit authorisation in the ICJ Statute as its constitutive instrument.³⁸¹ In this respect, the Court may also draw on other sources of international law. Although it is more frequently invoked in relation to substantive matters of international law, the sources found in Article 38(1) of the ICJ Statute are in principle applicable also in matters of procedure. This includes customary international law and general principles.³⁸² However, their practical relevance remains unsettled.³⁸³

Customary international law is theoretically relevant as a source for the Court's procedural law in evidentiary matters,³⁸⁴ though the Court has never expressly relied on it in judicial practice.³⁸⁵ This limited engagement is largely due to the

³⁷⁷ Riddell and Plant (n 16) 14–15.

³⁷⁸ Rules 37, 41, 44 and 45 of the 1978 Rules of Court (n 44).

³⁷⁹ Rosenne (n 41) 1031, that '[i]t sometimes appears that the Rules have been left deliberately incomplete - for example those relating to preliminary objections or advisory proceedings - presumably to avoid too much rigidity, although as judicial experience increases, more detailed codes of procedure are being introduced into the Rules of Court'.

³⁸⁰ Amerasinghe (n 42) 26.

³⁸¹ This may be understood either as an exercise of discretion, or in terms of the Court's 'inherent powers'. On the latter, see Brown (n 22) 85 and 90. See also *Chapter 4.4.2*.

³⁸² Amerasinghe (n 42) 26. See also Thirlway (n 48).

³⁸³ Benzing (n 18) 1374, para 6. See also Amerasinghe (n 42) 21–22.

³⁸⁴ Rosenne (n 41) 1027–1028; Thirlway (n 48) 78; and, more generally in view of international courts and tribunals, Brown (n 22) 89–90.

³⁸⁵ Amerasinghe (n 42) 26.

difficulty of identifying clear rules of customary international law in matters of procedure. Unlike substantive rules, procedural norms often lack consistent state practice and *opinio juris*, as they evolve within the institutional practices of international courts rather than through direct state conduct. The boundaries of procedural customary international law are uncertain, which may explain the Court's reluctance to invoke such rules in its judicial practice.³⁸⁶

General principles of law are a potential source for rules of evidence and have, unlike customary international law, been explicitly invoked by the Court in its judicial practice.³⁸⁷ These principles are derived from national legal systems and typically reflect commonalities which are shared between them or have emerged from the judicial practice of international courts and tribunals.³⁸⁸ This includes broad and generally accepted principles of procedural law, such as the right of each party to be heard (*audi alteram partem*) or that the party making an assertion bears the burden of proof (*actori incumbit probatio*).³⁸⁹

In practice, however, the Court has only occasionally invoked such general principles in procedural matters.³⁹⁰ In *Nicaragua*, for instance, the Court referred to the 'general principles of the judicial process' when delimiting the time-frame of the factual situation that had given rise to the dispute,³⁹¹ and 'general principles of judicial procedure' in applying the principle of the free evaluation of evidence.³⁹² Similarly, in the *Land, Island and Maritime Frontier Dispute*, the Court explicitly invoked 'general principles of procedural law' to support its approach to the assessment of evidence.³⁹³ Even where not determinative, general principles may serve to articulate the Court's reasoning

³⁸⁶ Rosenne (n 41) 1027–1028. See also Brown (n 22) 89–90.

³⁸⁷ Article 38(1)(c) of the ICJ Statute (n 39).

³⁸⁸ On general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute (n 39), see Cheng (n 49) 302 ff.; Amerasinghe (n 42) 24–26; and Kazazi (n 49) 6.

³⁸⁹ Brown (n 22) 89–90, with further references to case law.

³⁹⁰ Kazazi (n 49) 6. On the status of general principles, see Cheng (n 49) 302 ff.

³⁹¹ *Nicaragua* (n 108) para. 58.

³⁹² *ibid* para. 60.

³⁹³ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment of 11 September 1992) <<https://www.icj-cij.org/case/75>> accessed 7 August 2025, paras. 135-136, referring to 'general principles of procedural law'.

or to justify established practice.³⁹⁴ The limited frequency of such references underscore the challenges of relying on general principles in evidentiary matters. The divergent approaches of international courts to matters of evidence, coupled with a lack of uniformity in evidentiary rules among national systems, have made it difficult to identify the general principles that would apply before the Court within the meaning of Article 38(1)(c) of the ICJ Statute.³⁹⁵ Beyond generally accepted principles of evidence, such as those relating to the burden of proof, the general principles offer limited guidance as a source of law for matters of evidence. For example, the standard of proof remains deeply contested, with significant conceptual variation across national legal systems.³⁹⁶ This makes it difficult to distil a general principle that could dictate what evidentiary standard the Court should adopt in each case, or to articulate a consistent rationale justifying its adoption.³⁹⁷

3.3.3 Principles of Evidence from Judicial Practice

The legal framework for evidence before the Court has left most of the central questions of evidence unregulated. As dispute settlement before the Court has increasingly required the Court's engagement with questions of evidence and proof,³⁹⁸ precedent has emerged as an important, albeit informal, source of law shaping the Court's approaches to evidence. The Court has frequently relied on its own judgments in its application of central principles of evidence, emphasising consistency in its approaches to the treatment of evidence.³⁹⁹ For instance, in *Croatia Genocide*, the Court adhered to the same standard of proof as it applied in the earlier *Bosnia Genocide* case, emphasising that it would not be justified to depart from its prior approach given the similarities between the

³⁹⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Dissenting Opinion of Judge Ago) [1984] ICJ Rep 115, para. 2, referring to 'international procedural law'.

³⁹⁵ Benzing (n 18) 1374, para 6, pointing to the widely divergent approaches taken in national systems in evidentiary matters, even for the most basic principles, which has prevented the establishment of a clear set of common rules or even commonalities which would be capable of constituting 'general principles' of law.

³⁹⁶ On the standard of proof, see *Chapter 2.3.4*.

³⁹⁷ Brown (n 22) 83–85, on general aspects, and 97–101, on the standard of proof.

³⁹⁸ ILC, 'Report of the Work of the Sixty-Ninth Session' (n 20), Annex B, 'Evidence before International Courts and Tribunals, paras. 4-5, describing a 'transformation' of the judicial function of international courts and tribunal.

³⁹⁹ Riddell and Plant (n 16) 31. See also Brown (n 22) 89–90.

two cases.⁴⁰⁰ Although the Court is not formally bound by its jurisprudence, its judicial practice carries normative weight. The following subsections explore the principles of evidence elaborated by the Court in its judicial practice in respect of the allocation of the burden of proof, the admission of evidence, the evaluation of evidence, and the standard of proof.

3.3.3.1 *Burden of Proof*

The Court has consistently applied the general principle for the allocation of the burden of proof,⁴⁰¹ meaning that the party making an assertion during the course of the judicial proceedings will be responsible for substantiating it.⁴⁰² As such, the burden of proof will initially rest with the applicant in cases where there is a formal relationship of applicant and respondent.⁴⁰³ However, the Court may adjust or shift the burden of proof during proceedings to address subsequent assertions, particularly where the initial allocation of the burden would be unreasonable or impractical in the context of the specific case.⁴⁰⁴ In this respect, the Court has applied the general principle in a flexible manner and allocated the burden of proof to the actor making the assertion, regardless of whether they are the applicant or the respondent.⁴⁰⁵ This reflects a need to avoid making judicial proceedings overly dependent on the procedural position of each party, favouring a flexible application of the general principle.⁴⁰⁶

The Court's flexible approach to the allocation of the burden of proof is evident in its jurisprudence, particularly in cases where rigid adherence to the formal procedural positions of the parties would have impeded effective adjudication. In *Temple of Preah Vihear*, where a formal relationship between Cambodia as applicant and Thailand as respondent, the Court underscored that the burden

⁴⁰⁰ *Croatia Genocide* (n 108) paras. 177-179.

⁴⁰¹ *Brown* (n 22) 89–90, that this is a general principle under Article 38(1) of the Statute.

⁴⁰² *Valencia-Ospina* (n 38) 203. See also *Amerasinghe* (n 42) 61–62 and 75–78, suggesting that the principle is so widely applied it must be considered an established principle of international procedural law.

⁴⁰³ Under the general principle, the burden of proof rests with the party making an assertion and typically the plaintiff. On the burden of proof, see further *Chapter 2.3.1*.

⁴⁰⁴ *Rosenne* (n 41) 1040–1042. See, for example, *Nicaragua* (n 108) para. 101; and *Frontier Dispute (Burkina Faso/Mali)* (n 280) para. 65.

⁴⁰⁵ *Brown* (n 22) 95–97; and *Amerasinghe* (n 42) 75–78. See also *Riddell* (n 96) 858–859, who describes the Court's allocation of the burden of proof as pragmatic, rather than dogmatic.

⁴⁰⁶ *Kolb* (n 43) 932, who considers that this reflects one of the 'requirements of the proper administration of justice'.

of proof would rest with the party advancing a contention.⁴⁰⁷ The distinction between applicant and respondent is less clear-cut in cases brought jointly by the parties under a special agreement, requiring a pragmatic allocation of the burden of proof. In *Minquiers and Ecrehos*, for example, France and the United Kingdom both claimed sovereignty over the same group of islets and rocks. The Court thus held that each party must ‘prove its alleged title and the facts upon which it relies’,⁴⁰⁸ distributing the burden of proof equally between the parties.

In addition to the procedural positions of the parties, the Court also appears to consider broader factors in allocating the burden of proof, such as the legal issues, the context of dispute settlement, alongside normative criteria.⁴⁰⁹ These considerations include identifying who has invoked the judicial process, who stands to benefit from altering the legal status quo, and who is best positioned to substantiate key claims.⁴¹⁰ This approach aligns with analogous practices in domestic legal systems, where courts may shift or adjust the burden of proof to ensure fairness in light of the circumstances of each case.⁴¹¹ It also suggests a contextualised and pragmatic approach to the allocation of the burden of proof, one that is ultimately concerned with balancing the requirements of dispute settlement with practicalities of the case.⁴¹² As such, rather than relying rigidly on procedural roles, the Court emphasises the sound administration of justice and the effective resolution of disputes in line with the overarching objective of the peaceful settlement of international disputes.

⁴⁰⁷ *Temple of Preah Vihear (Cambodia v. Thailand)* (Judgment) [1962] ICJ Rep 6, pp. 15-16.

⁴⁰⁸ *Minquiers and Ecrehos (France/United Kingdom)* (Judgment) [1952] ICJ Rep 47, p. 47, that special agreement conferring jurisdiction to the Court was ‘without prejudice to any question on the burden of proof’, leaving the matter to the Court’s discretion.

⁴⁰⁹ Generally, see Valencia-Ospina (n 38) 203; and Rosenne (n 41) 1043–1044.

⁴¹⁰ Amerasinghe (n 42) 67–72, considering that flexibility in the application of the general principle for the burden of proof has not led to the corruption of the principle or the disregard of the principle.

⁴¹¹ See the discussion on the burden of proof in *Chapter 2.3.1*.

⁴¹² Kolb (n 43) 931–932.

3.3.3.2 *Admission of Evidence*

In the absence of formal rules on admissibility,⁴¹³ the Court is generally held to apply the principle of the free admission of evidence.⁴¹⁴ This allows the parties to submit any material that they consider relevant, regardless of its form or source. As questions of admissibility are rarely contested in judicial practice, the Court has not developed a distinct doctrine for this area.⁴¹⁵ This explains the limited judicial engagement with questions of admissibility in judicial practice. The emphasis instead falls on the evaluation process and the probative weight assigned to each piece of evidence.⁴¹⁶ In the instances that the Court has considered the authenticity and reliability of the materials submitted to it, the issues have been framed in terms of the probative value of that material rather than its admissibility.⁴¹⁷

3.3.3.3 *Evaluation of Evidence*

As the corollary to the principle of the free admission of evidence, the Court is understood to apply the principle of the free evaluation.⁴¹⁸ While the parties are free to submit any evidence in support of their claims, the Court has equally wide latitude in the subsequent process of evaluation.⁴¹⁹ Its approach is broadly aligned with that of Civil Law systems, where professional judges, rather than lay juries, assess the evidence and therefore do not rely on exclusionary rules or other formal filters governing the admissibility of evidence. This contrasts with the formalised evidentiary frameworks found in Common Law systems, where evaluation typically occurs through juries or judges after the evidence

⁴¹³ This follows the legal framework for evidence in Chapter III of the ICJ Statute (n 39).

⁴¹⁴ Kolb (n 43) 930–931. See also generally Amerasinghe (n 42) 185–188.

⁴¹⁵ Generally, see Brown (n 22) 90–92. On the forms of evidence in international adjudication, see also VS Mani, *International Adjudication: Procedural Aspects* (Nijhoff 1980) 215–238.

⁴¹⁶ Rosenne (n 41) 1048, who highlights that the parties typically focus on attacking the weight or relevance of the evidence that has been submitted by the other party, rather than questioning its admissibility.

⁴¹⁷ In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (n 362) p. 40, the Court considered issues of this nature in relation to the large volumes of fraudulent or falsified evidence that had been submitted by both parties. See also the discussion of this case in W Michael Reisman and Christina Parajon Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law* (Cambridge University Press 2014) 163–192.

⁴¹⁸ Brown (n 22) 90–92. See Valencia-Ospina (n 38) 204; and Amerasinghe (n 42) 185–188.

⁴¹⁹ See the discussion in *Nicaragua* (n 108) para. 60.

has already been filtered by rules of admission.⁴²⁰ This means that the Court freely determines the probative value of evidence in each case and considers the total evidentiary record to identify the relevant facts, assess their probative value, and to draw the appropriate conclusions.⁴²¹

The Court has emphasised its active role in evaluating the evidence and has asserted its responsibility to make its own determinations of fact.⁴²² It has also commented on its application of the principle of free evaluation, indicating that its judicial task consists in categorising the evidence and assigning probative value accordingly.⁴²³ In this respect, the Court underscored in the *Nicaragua* case that ‘within the limits of its Statute, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proven’.⁴²⁴ The parameters for the Court’s evaluation of evidence have gradually emerged through its judicial practice, providing guidance on how it assesses evidence under the principle of free evaluation.⁴²⁵

In its judicial practice, the Court has weighed evidence in light of both the nature of the claims before it and the specific characteristics of the evidence submitted.⁴²⁶ In addition to assessing the general relevance of a given piece of evidence,⁴²⁷ the Court has considered factors such as its source, reliability, and

⁴²⁰ On the admission and evaluation of evidence, see *Chapters 2.3.2 and 2.3.3*.

⁴²¹ Kolb (n 43) 930, that ‘[t]he principle of the free assessment of evidence is thus given full rein’ and is only limited by the general prohibition against arbitrary action. On the absence of any formal rules for the evaluation of evidence, see Brown (n 22) 90–92; Amerasinghe (n 42) 185–188; and Cheng (n 49) 303.

⁴²² See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 168. This approach is consistent with earlier cases. See, for example, *Armed Activities* (n 108) paras. 58–59; *Nicaragua* (n 108) para. 50; and *United States Diplomatic and Consular Staff in Tehran* (n 282) para. 3.

⁴²³ Brown (n 22) 90–92.

⁴²⁴ *Nicaragua* (n 108) para. 60.

⁴²⁵ These principles have emerged in a piecemeal manner due to the Court’s reluctance to articulate precise criteria for the process of evaluation, consistent with the principle of the free evaluation of evidence. See further Riddell and Plant (n 16) 186. On the principles for the evaluation of evidence elaborated in the *Nicaragua* case, see Reichler (n 102).

⁴²⁶ Teitelbaum (n 96) 124–125.

⁴²⁷ *Nicaragua* (n 108) para. 57; and *Bosnia Genocide* (n 5) para. 202. See also Rosenne (n 41) 1043–1044. Moreover, it has been remarked that the probative value of evidence will be linked to the rules in issue, Teitelbaum (n 96) 124–125.

neutrality.⁴²⁸ It has attached particular weight to independent or disinterested sources, notably giving more credence to statements made against interest by high-level officials, while treating self-serving declarations with caution.⁴²⁹ It has also favoured evidence demonstrating first-hand or contemporaneous knowledge – such as testimony from disinterested witnesses – over hearsay, opinion, or press reports.⁴³⁰ Materials emanating from a single source or which have been prepared specifically for the proceedings have been treated with caution unless corroborated.⁴³¹ The Court has also emphasised on procedural integrity, giving special attention to evidence tested through a process of formal examination or cross-examination.⁴³²

Across different cases and forms of evidence, the Court has shown a consistent preference for documentary evidence,⁴³³ relying only in limited circumstances on facts considered to be matters of public knowledge or subject to judicial notice. In the case relating to *United States Diplomatic and Consular Staff in Tehran*, for instance, the Court held that '[t]he essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press' and that the information available was 'wholly consistent and concordant as to the main facts and circumstances of the case'.⁴³⁴ It has addressed the probative value of findings from other judicial or quasi-judicial bodies,⁴³⁵ and of evidence produced by third parties such as experts or official entities, by scrutinising the soundness of the process or methodology by which the material was prepared.⁴³⁶ In the *Bosnia Genocide* case, for example, the Court held that it 'should in principle accept as highly persuasive relevant findings of fact made by the [ICTY] at trial' and that 'any evaluation by the [ICTY] based on facts found for instance about the existence

⁴²⁸ *Benzing* (n 28) 751. The Court has also considered the independence of the evidence from the party seeking to rely on it, its temporal proximity to the alleged events, and the procedure by which it was submitted to the Court. See further *Devaney* (n 74) 50.

⁴²⁹ *Nicaragua* (n 108) para. 60; and *Armed Activities* (n 108) para. 61.

⁴³⁰ *Nicaragua* (n 108) para. 62; *Armed Activities* (n 108) para. 61; and *Bosnia Genocide* (n 5) para. 213.

⁴³¹ *Armed Activities* (n 108) para. 61; and *Bosnia Genocide* (n 5) para. 213.

⁴³² *Armed Activities* (n 108) para. 61.

⁴³³ *Valencia-Ospina* (n 38) 204.

⁴³⁴ *United States Diplomatic and Consular Staff in Tehran* (n 282) para. 62.

⁴³⁵ *Armed Activities* (n 108) para. 59.

⁴³⁶ *Benzing* (n 18) 1405, paras. 113-114.

of the required intent, is also entitled to due weight'.⁴³⁷ Particular weight has been attached to documentation generated within the UN system, such as the factual determinations made by principal organs such as the UNGA or UNSC, where the Court has underscored that such evidence carries *prima facie* weight in light of the institutional context in which it exercises its judicial function.⁴³⁸

3.3.3.4 Standard of Proof

The Court is rarely explicit about the standard of proof it has applied in a given case.⁴³⁹ Judicial practice is particularly fragmented in respect of the applicable standard of proof, with a range of expressions suggesting different thresholds of evidence.⁴⁴⁰ The precise standards of proof, and the rationale justifying the adoption of a particular standard, remain unclear.⁴⁴¹ Despite these ambiguities in judicial practice, patterns and recurring formulations can be discerned.

The Court has used expressions such as 'on the balance of probabilities',⁴⁴² as an expression indicating a relatively low standard of proof, as well as 'beyond reasonable doubt',⁴⁴³ to describe an apparently higher standard of proof. Other

⁴³⁷ *Bosnia Genocide* (n 5) para. 223,

⁴³⁸ On the weight of evidence emanating from other branches of the UN system, see generally K Del Mar, 'Weight of Evidence Generated through Intra-Institutional Fact-Finding before the International Court of Justice' (2011) 2 *Journal of International Dispute Settlement* 393.

⁴³⁹ Benzing (n 28) 750–751, describing the standard of proof at the Court as remaining 'in a state of flux'. See also Valencia-Ospina (n 38) 203–204; and Kazazi (n 49) 323.

⁴⁴⁰ Del Mar (n 23) 98–101.

⁴⁴¹ Benzing (n 18) 1404, para 111.

⁴⁴² *United States Diplomatic and Consular Staff in Tehran* (n 282) para. 57, 'on the basis of a balance of evidence'; *Land, Island and Maritime Frontier Dispute* (n 393) para. 248, 'on a balance of probabilities'; and *Nicaragua* (n 108) para. 158, 'consistent with the probabilities'.

⁴⁴³ *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Separate Opinion of Judge Kooijmans) [1996] ICJ Rep 246, para. 56; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Dissenting Opinion of Judge *ad hoc* Ajibola) [2002] ICJ Rep 538, para. 194; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Separate Opinion of Judge Kooijmans) [2001] ICJ Rep 225, paras. 157, 195, 268, 324, 327 and 369; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Separate Opinion of Judge Torres-Bernandez) [1992], paras. 110 and 198; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice) [1962] ICJ Rep 465, pp. 474 and 511; *Certain Norwegian Loans (France v. Norway)* (Separate Opinion of Judge Lauterpacht) [1957] ICJ Rep 34, p. 58; *Temple of Preah Vihear*

formulations have included ‘proof to the Court’s satisfaction’,⁴⁴⁴ ‘with a high degree of probability’,⁴⁴⁵ standards requiring some degree of ‘certainty’,⁴⁴⁶ and ‘conclusive’ evidence’.⁴⁴⁷ Moreover, the Court often refrains from explicitly stating the applicable standard, at times referring simply to the ‘sufficiency’ of the evidence.⁴⁴⁸ This suggests the use of a flexible, variable standard of proof that emphasises the judge’s overall conviction rather than a fixed probabilistic or formulaic test. As such, the Court’s approach appears to occupy a middle ground between the Civil Law tradition’s emphasis on the judge’s personal conviction and the Common Law’s probabilistic and differentiated standards of proof.⁴⁴⁹ While there are indications that the Court’s default standard may resemble a ‘clear and convincing’ level, located somewhere between the civil standard of ‘balance of probabilities’ and the criminal ‘beyond reasonable doubt’, it has not been formalised in its jurisprudence.⁴⁵⁰

The variable standard of proof in judicial proceedings before the Court mirrors the approaches of other international courts and tribunals,⁴⁵¹ which similarly apply standards such as ‘beyond reasonable doubt’ to the ‘preponderance of the evidence’.⁴⁵² In addition, intermediate standards of proof such as ‘proof in

(n 407) pp. 55 and 58; and *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)* (Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender) [1959] ICJ Rep 156, p. 162.

⁴⁴⁴ See, for example, *Armed Activities* (n 108) paras. 62, 71 and 106.

⁴⁴⁵ *Land, Island and Maritime Frontier Dispute* (n 393) para. 155.

⁴⁴⁶ *Oil Platforms* (Separate Opinion of Judge Kooijmans) (n 443) para. 63; *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, para. 120; and *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, para. 99.

⁴⁴⁷ *Bosnia Genocide* (n 5) paras. 208-209.

⁴⁴⁸ Brown (n 22) 98–101, considering ‘sufficiency’ as a distinct standard of proof.

⁴⁴⁹ See the discussion in *Chapter 2.3.4*.

⁴⁵⁰ Benzing (n 28) 750–751.

⁴⁵¹ Amerasinghe (n 42) 231–235. See also *Velázquez Rodríguez v. Honduras* (Inter-American Court of Human Rights, 29 July 1988) Series C No 4, para. 127, on that international tribunals have ‘always avoided a rigid rule regarding the amount of proof necessary to support the judgment’.

⁴⁵² Brown (n 22) 98; Amerasinghe (n 42) 235–239; and Kazazi (n 49) 344 ff.

a convincing manner',⁴⁵³ and *prima facie* standards are also used for certain aspects of the judicial proceedings.⁴⁵⁴

3.4 The Determination of the Standard of Proof

The Court's judicial practice suggests it has relatively consistently required a standard of proof, or threshold of evidence.⁴⁵⁵ While this standard has not been formalised under the Court's legal framework, it appears in practice as flexible, taking into account the context and stakes of each case.⁴⁵⁶ Drawing on judicial practice, scholarly interventions have tentatively identified the multifaceted and context-dependent factors that influence the Court's determination of the standard of proof.⁴⁵⁷ These include factors such as the nature of the dispute, the substantive rule in issue, the specific function exercised by the Court, and the broader circumstances surrounding the case.⁴⁵⁸ The justifications for the use of a particular standard of proof at the Court can be understood through several complementary frameworks, considering not only the evidentiary threshold itself but also how the allocation of risk, considerations of judicial policy, and broader procedural values influence evidentiary thresholds.⁴⁵⁹ This section explores these dimensions of the Court's evidentiary regime: the conceptual foundations of proof and how they relate to certainty and persuasion; the role of risk allocation in view of the nature and gravity of allegations before the Court; and the impact of judicial policy and procedural fairness in shaping standards to respect legitimacy, fairness, and state consent.

⁴⁵³ Amerasinghe (n 42) 232–235, that the possibility of an additional standard of proof at 'beyond reasonable doubt' and 'preponderance of the evidence'.

⁴⁵⁴ Kazazi (n 49) 326 ff., describing it as the lowest degree of sufficient evidence applied by international courts and tribunals only in certain circumstances; and Brown (n 22) 98.

⁴⁵⁵ As discussed in *Chapter 3.3.3.4*.

⁴⁵⁶ Foster (n 21) 61–62, that 'it is clear that the standards of proof have altered depending on the nature of the issues' and that 'there may be some justification for this'.

⁴⁵⁷ See Del Mar (n 23) 98–101; Riddell and Plant (n 16) 132–136; and Brown (n 22) 97–101.

⁴⁵⁸ Del Mar (n 23) 98–101.

⁴⁵⁹ See the discussion in *Chapter 2.4*.

3.4.1 General Considerations

The standard of proof is not formalised under the Court's legal framework but appears in judicial practice as a flexible and ultimately malleable threshold. In contrast to domestic legal systems, the ICJ does not articulate a general theory of evidence or operate under any systematic doctrine of proof. Evidentiary reasoning is not typically the subject of detailed judicial analysis and has not been comprehensively developed by the Court. Rather, questions of proof tend to emerge incidentally in the jurisprudence of the Court.⁴⁶⁰

Adjudication will inevitably involve some degree of uncertainty as to the facts of a case. Judges cannot directly ascertain past events and must evaluate evidence in an effort to approximate the truth of the events.⁴⁶¹ The standard of proof provides a functional response to this uncertainty, functioning as a decisional criterion determining when an allegation will be considered established.⁴⁶² The Court responds to a rather considerable problem of factual uncertainty, as the establishment of a sufficient evidentiary record is complicated by factors such as the remoteness in time and place of relevant events, limited access to evidence located within the territory of uncooperative states or third parties, and the politically sensitive nature of disputes.⁴⁶³ These issues are compounded by a set of structural and procedural limitations, including the sparse legal framework for evidence, the absence of any compulsory fact-finding powers, and reliance on the parties to define the disputes and submit the necessary evidence in support of their claims.⁴⁶⁴

The applicable evidentiary framework has contributed to a relatively passive approach, where the Court may conceptualise its role as focused on resolving the legal rather than factual questions.⁴⁶⁵ The concept of proof at the Court is thus deliberately flexible, shaped by the context of judicial proceedings and

⁴⁶⁰ See the discussion in *Chapter 2*. See also Nance (n 19) 295–297, discussing the lack of any notion of evidential weight before the ICJ, and the underdeveloped nature of its evidentiary regime from a theoretical standpoint.

⁴⁶¹ On these aspects of the standard of proof, see further Stein (n 119) 34–36; and Redmayne (n 130) 805.

⁴⁶² Generally, see *Chapter 2.2*.

⁴⁶³ *Nicaragua* (n 108) paras. 57–58, in which the Court noted the difficulties for the parties to obtain evidence of events which had taken place covertly, years earlier, and in inaccessible locations. See also *Armed Activities* (n 108) para. 176, on similar challenges in access.

⁴⁶⁴ *Benzing* (n 18) 1373, para 5.

⁴⁶⁵ *Foster* (n 17) 185–187.

broad discretion in judicial fact-finding.⁴⁶⁶ The reliance on free admission and evaluation of evidence indicates an emphasis on the judges' conviction in assessing factual claims, leaving the determination of the 'sufficiency' of evidence largely to judicial discretion.⁴⁶⁷ This allows the Court to tailor the evidentiary threshold according to the factual and legal circumstances of each case, prioritising the relevance and weight of evidence over a rigid or otherwise formalistic standard of proof.⁴⁶⁸ Importantly, this discretion extends not only to assessing whether the threshold is met but also to adapting the standard of proof itself to suit the particular nature and stakes of a dispute. This reflects a balancing of competing interests, including protecting the interests of the litigating states, accommodating procedural difficulties, and promoting the equitable resolution of disputes.

Given the Court's primary role as a dispute settlement forum, proof functions less as a mechanism to establish facts and more as a tool to support reasoned legal conclusions. As such, the Court has not articulated a uniform standard of proof but applies a context-dependent and fluid evidentiary threshold tailored to the complexity and stakes of each case.⁴⁶⁹ This understanding of the standard of proof before the Court sets the stage for examining contextual factors that influence its application, and the justifications for adopting standards in specific cases. While broad themes such as risk allocation, judicial policy, and value-driven considerations remain central, their manifestation in judicial practice reflects the priorities of the Court's functions, including the gravity and nature of the dispute, the judicial role the Court assumes in each case, and the on-going need to balance institutional legitimacy with state sovereignty.

3.4.2 Risk Allocation and Gravity of Disputes

The determination of the standard of proof in adjudication is fundamentally connected to the allocation of risk between the parties. Legal systems adjust evidentiary thresholds to reflect the gravity of allegations and the relative costs of judicial error, applying stricter standards where the risk of wrongful

⁴⁶⁶ Riddell and Plant (n 16) 23.

⁴⁶⁷ For a discussion on the exercise of judicial discretion in evidentiary decision-making, see *Chapter 4*. Compare to the notion of 'inherent powers', as discussed by Brown (n 22) 90.

⁴⁶⁸ Nance (n 19) 295–297, who discusses the absence of any concept of evidential weight in the Court's standard of proof.

⁴⁶⁹ Generally, see Farnelli (n 26).

condemnation outweighs that of unredressed harm.⁴⁷⁰ The logic of this risk allocation remains relevant also in respect of the Court, though it operates in a distinct normative and institutional context. At the Court, the notion of risk extends beyond material or remedial outcomes to encompass the political, reputational, and diplomatic consequences attached to adverse findings, especially in cases involving serious allegations. While traditional models, such as those drawn from decision theory, focus on quantifying the disutilities of error,⁴⁷¹ the stakes in international adjudication do not lend themselves as easily to formal balancing. The cost of error may involve the destabilisation of interstate relations, the erosion of sovereign equality, or reputational damage with long-term geopolitical effects.⁴⁷² These broader consequences may justify a more restrained evidentiary approach in certain legal contexts, particularly where a finding of responsibility carries heavy symbolic or legal weight.⁴⁷³ At the same time, the Court must safeguard its institutional legitimacy by avoiding evidentiary thresholds so demanding that they risk insulating states from responsibility. This balancing act is linked to the gravity of the allegations, with more serious claims requiring stricter standards of proof. The Court operationalises this through a flexible approach that adjusts the standard of proof according to the nature and stakes.

Among factors influencing the Court's determination of the standard of proof, both the nature and gravity of the dispute are significant. Gravity appears to correlate with a more demanding standard of proof,⁴⁷⁴ as seen in the Court's use of expressions such as 'beyond reasonable doubt',⁴⁷⁵ or the requirement of

⁴⁷⁰ On this aspect of the determination of the standard of proof, see Stein (n 119) 132–134. See also the discussion in *Chapter 2.4.2*.

⁴⁷¹ Kaplan (n 172) 1065; and Baron (n 230) 229–234. See also *Chapter 2.4.2*.

⁴⁷² This reflects the political dimensions of international dispute settlement, particularly the role of judicial mechanisms such as the ICJ in maintaining international stability and managing inter-state relations. See Rosenne (n 41) 161–169 and 1–9, emphasising the Court's function not only as a legal forum but also as a means of contributing to the peaceful settlement of disputes within the broader political context of international relations.

⁴⁷³ On the notion of 'judicial caution' at the Court, see Lauterpacht (n 271) 75–77.

⁴⁷⁴ The principle was articulated in view of 'charges of exceptional gravity' in *Corfu Channel* (n 5) p. 17. It was more clearly delineated in *Bosnia Genocide* (n 5) paras. 209–210.

⁴⁷⁵ *Oil Platforms* (Separate Opinion of Judge Kooijmans) (n 443) para. 56; *Land and Maritime Boundary between Cameroon and Nigeria* (Dissenting Opinion of Judge *ad hoc* Ajibola) (n 443) para. 194; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Separate Opinion of Judge Kooijmans) (n 443) paras. 157, 195, 268, 324, 327 and 369;

‘conclusive’ evidence in cases involving particularly serious allegations.⁴⁷⁶ This aligns the standard of proof with the severity of consequences attached to a finding of responsibility by the Court, reflecting a degree of sensitivity to the consequences of error in such cases. It also relates closely to the principles of risk allocation, as the character of the dispute may directly implicate the legal, political, and reputational interests of states appearing as litigating parties.⁴⁷⁷ These stakes may be seen to warrant a cautious approach, and that the greater the potential cost of error, the stricter the evidentiary threshold required. The *Bosnia Genocide* case exemplifies this approach, where the Court required ‘fully conclusive’ evidence to establish the commission of acts of genocide,⁴⁷⁸ while applying a lower threshold of ‘high level of certainty’ to the omissions to prevent or punish genocide.⁴⁷⁹ This differentiation illustrates how the Court may adjust the standard of proof to reflect the relative gravity of the claims and the corresponding risks of judicial error.

This variability also affects how the Court articulates its evidentiary reasoning, reflecting sensitivity to both the political and symbolic stakes of a dispute. By aligning the standard of proof with the nature of the allegations and the interests of the parties, the Court balances legal and political considerations and reaffirms its dependence on state consent and the centrality of sovereignty in its judicial function. The Court’s standard of proof functions as both a legal and political tool, shaped by the gravity of the dispute and the broader consequences of judicial error. By applying stricter thresholds in cases involving serious allegations, the Court reinforces its legitimacy, protects state sovereignty, and balances procedural integrity with the need to maintain state consent and institutional authority.

Land, Island and Maritime Frontier Dispute (Separate Opinion of Judge Torres-Bernandez) (n 443) paras. 110 and 198; *South West Africa* (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice) (n 443) pp. 474 and 511; *Certain Norwegian Loans* (Separate Opinion of Judge Lauterpacht) (n 443) p. 58; *Temple of Preah Vihear* (n 407) pp. 55 and 58; and *Aerial Incident* (Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender) (n 443) p. 162.

⁴⁷⁶ *Bosnia Genocide* (n 5) paras. 208-209.

⁴⁷⁷ See, for example, *Del Mar* (n 23) 106–108.

⁴⁷⁸ *Bosnia Genocide* (n 5) para. 209.

⁴⁷⁹ *ibid* para. 210.

3.4.3 Judicial Policy, Procedural Values, and the Institutional Role of the Court

The standard of proof before the Court may also reflect broader judicial policy objectives, institutional priorities, and values. Such considerations can shape the standard of proof beyond the interests of risk allocation under a decision-theoretic model of justification. The following subsections considers how these interests of judicial policy and the international judicial function, on one hand, and procedural equity relating to values and normative considerations, on the other, may contribute to influencing the determination of the standard of proof.

3.4.3.1 *Judicial Policy and the Function of the Court*

Judicial policy considerations encompass the broader institutional objectives and practical necessities that shape evidentiary standards, including interests of systemic efficiency, procedural economy, and regulatory aims.⁴⁸⁰ At the Court, these considerations may involve balancing efficient dispute resolution with the need to uphold state sovereignty, safeguard institutional legitimacy, and maintain stability in international relations. The Court's determination of the standard of proof reflects normative decisions about who should bear the burden of uncertainty, extending beyond decision-theoretic risk allocation to include broader policy goals such as protecting fundamental legal norms, promoting systemic integrity, and regulating state behaviour.⁴⁸¹

Building on these considerations, the standard of proof may vary depending on the function exercised by the Court in each case, alongside the nature of the dispute and the procedural phase.⁴⁸² At the provisional measures stage, the Court applies a lower evidentiary threshold focused on plausibility, refraining from definitive findings on the merits. By contrast, at the merits stage, where conclusive determinations must be reached, the evidentiary threshold is raised to reflect the gravity of the task and the potential consequences for the parties involved. Thus, the Court's adjustments in the standard of proof demonstrate its responsiveness to the case's needs, balancing the seriousness of allegations with the specific judicial function entrusted. This practice aligns with the

⁴⁸⁰ See the discussion in *Chapter 2.4.3.1*.

⁴⁸¹ Compare to Kaplow (n 114) 745, arguing, albeit in a national context, that legal systems underpin social order and welfare, so that criteria applied in the context of adjudication should be based on an analysis of the consequences of decisions.

⁴⁸² See, for example, Riddell and Plant (n 16) 133–136.

understanding that evidentiary rules not only allocate the risk of error but also serve broader judicial policy interests.⁴⁸³

The Court has required a relatively low standard of proof in cases where it is asked to decide between competing claims.⁴⁸⁴ This is clear in disputes relating to boundary delimitation or contested sovereignty over territory, where the task entrusted to the Court is to determine which of the claims is most evidentially plausible. In such contexts, the Court has lowered the evidentiary threshold, enabling the Court to reach a compromise or stake out a middle-ground rather than making a definitive finding of wrongful conduct or exclusive entitlement in favour of one party. In *Maritime Delimitation in the Black Sea*, the Court compromised and determined that the boundary fell in between the respective lines claimed by the parties, without clearly enunciating a standard of proof.⁴⁸⁵ Similarly, in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, the Court staked out a middle-ground between the claims of the parties and did not require any specific standard of proof.⁴⁸⁶

Building on the Court's role in adjusting evidentiary standards according to its function, a clear distinction emerges between cases where the Court resolves competing claims by assessing plausibility and those where it must make definitive legal determinations about state responsibility. In the latter, the Court adopts a more stringent standard of proof due to the heightened stakes and need to conclusively establish facts.⁴⁸⁷ In such cases, the Court is required to make a definitive finding of fact to resolve competing claims, where only one version of events can ultimately be upheld.⁴⁸⁸ This may heighten the contentious nature of the proceedings, as the outcome will affirm one narrative over another, carrying more significant implications for the wrongdoing state. The distinction between the Court's different functions was also made clear in

⁴⁸³ See *Chapter 2.4.3.1*.

⁴⁸⁴ *Del Mar* (n 23) 98–101.

⁴⁸⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep 61, para. 219.

⁴⁸⁶ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12, para. 300.

⁴⁸⁷ *Del Mar* (n 23) 98–101.

⁴⁸⁸ See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Separate Opinion of Judge Keith) [2010] ICJ Rep 121, para. 8; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Joint Dissenting opinion of Judges Al-Khasawneh and Simma) [2010] ICJ Rep 108, para. 5.

Land and Maritime Boundary between Cameroon and Nigeria, where the Court was requested not only to make declarations regarding the delimitation of disputed territory but also to determine a question related to the establishment of state responsibility, for which it required different standards of proof in reflection of the different functions.⁴⁸⁹

The Court's adjustment of evidentiary thresholds, depending on whether it is tasked with settling competing claims or determining state responsibility, demonstrates this dual orientation. When acting as a mediator or adjudicator of overlapping entitlements, the Court maintains a lower standard of proof to facilitate peaceful settlement and enable compromise. Conversely, when its role involves legal evaluation or attributing responsibility, higher evidentiary standards reflect both the significant political consequences of error and the Court's institutional preference for caution and precision in affirming breaches of international law. These policy-sensitive calibrations reveal how evidentiary rules function as part of the Court's toolkit for managing factual uncertainty and fulfilling its diverse judicial functions. In this way, the standard of proof operates not only as a procedural safeguard but also to advance the institutional objectives of the Court across different contexts.

3.4.3.2 Values, Legitimacy, and Normative Considerations

The standard of proof is shaped not only by evidentiary considerations but also by the underlying values the legal system seeks to uphold, including fairness, legitimacy, and respect for fundamental rights. In this respect, it functions as a tool with which to balance competing values in adjudication such as truth-seeking, procedural equality, and the protection of the parties' interests.⁴⁹⁰ At the Court, these considerations may lead evidentiary thresholds to be adjusted based on the Court's capacity to establish the facts, with lower standards when evidence is scarce.⁴⁹¹ For instance, fairness and equality, such as disparities in states' ability to present evidence, may justify the use of a more lenient threshold, while preserving legal certainty and stability, such as in disputes involving sovereign rights or territory, may require the use of a more stringent

⁴⁸⁹ Del Mar (n 23) 104–106.

⁴⁹⁰ See the discussion in *Chapter 2.4.3.2*.

⁴⁹¹ See, for example, Heuman (n 218) 88–90. See also Nance (n 19) 73–84, discussing the capacity of a judicial body to establish reliable factual conclusions as an interest potentially relevant to the determination of the standard of proof.

standard of proof.⁴⁹² As an essentially consent-based judicial body, the Court's authority depends on states perceiving its procedures and evidentiary standards as fair, impartial, and respectful of sovereignty. If the standard of proof is seen as disproportionate or politically biased, it risks undermining state trust and the Court's overall legitimacy.⁴⁹³ Institutional legitimacy thereby functions as a justification for and a product of the Court's evidentiary choices. For grave allegations, the Court imposes stringent evidentiary thresholds to protect the reputational and legal interests of respondent states, reinforcing the perceived integrity and legitimacy of its judgments.

3.5 Conclusion

The evidentiary regime of the Court reflects and adapts to its multifaceted role and judicial function, not only as a forum for inter-state dispute settlement but also as the principal judicial organ of a broader international organisation and a systemic actor within international law. While the Court's primary function is to resolve disputes between states, it also contributes to the interpretation and development of international law, serving both 'private' adjudicative functions and broader 'public' responsibilities in its capacity as a principal UN organ. This role contributes to the understanding of the standard of proof by explaining why the Court may approach evidentiary issues with a view not only to the facts of the case but also to its own legitimacy, the political implications of judgment, and the expectations of the international community. In evidentiary matters, the Court must therefore balance the procedural rights of the litigants with systemic interests, including legal stability, fairness, and institutional legitimacy.

To accommodate this diversity of interests, the Court operates within a sparse and non-prescriptive legal framework for evidence. This grants the Court

⁴⁹² Heuman (n 218) 76–78, on fairness and access to evidence, and further 91, on the need to preserve legal certainty and not disrupt existing legal relationships. See also Thomas M Franck, *Fairness in International Law and Institutions* (Reprinted, Oxford Univ Press 2002) 316–319 and 335–340, considering elements of procedural fairness in view of the rules of evidence and the establishment of 'complex facts'.

⁴⁹³ Nienke Grossman, 'Solomonic Judgments and the Legitimacy of the International Court of Justice' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2019) 45–53, on the legitimacy of the Court and the notion of 'delegated authority'; and Thomas M Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705.

considerable discretion in determining the standard of proof in each case.⁴⁹⁴ The Court approaches the concept of a standard of proof as a flexible tool in its legal reasoning, shaped by state consent and its broader institutional and role as a systemic actor in the international legal system. The determination of the standard of proof is influenced by a wide range of institutional, legal, and policy considerations, which are embedded within the specific decision-making context of the Court. As such, the Court adjusts the standard of proof to reflect the nature of the dispute, the gravity of the allegations, and the function it exercises in each case. These factors may be linked to the broader interests of the Court's functions, including those relating to state sovereignty, institutional legitimacy, and judicial policy. While the Court exercises its discretion pragmatically and contextually, it has also resulted in some opacity in judicial reasoning and inconsistency in jurisprudence, particularly in view of terms such as 'conclusive evidence' or 'high level of certainty'. This discretion, while necessary given the Court's complex role, poses challenges for transparency and predictability, potentially undermining the legitimacy and confidence the Court seeks to uphold through its evidentiary standards.

Given the Court's wide discretion in determining the standard of proof, several key considerations shape how this discretion is exercised in practice. The Court may raise the standard of proof to protect state interests, especially in cases involving more serious allegations that could have significant political or reputational consequences for the wrongdoing state. For example, the Court has required 'conclusive' and 'fully conclusive' evidence in view of 'charges of exceptional gravity'.⁴⁹⁵ This cautious approach reflects deference to states' interests. Beyond this, the Court must ensure the legitimacy of its judgments, which depends on applying standards perceived as fair and consistent. In sensitive cases, this may result in a higher standard of proof. Conversely, in other instances, the Court may adopt a more flexible standard of proof to accommodate considerations of judicial efficiency. In this sense, the Court's exercise of jurisdiction is tied to maintaining credibility and legitimacy, as both a policy interest and a matter of risk allocation. Judicial policy also shapes the standard of proof, balancing systemic efficiency with consistency. This flexibility may justify a lower standard in certain types of cases, or in view of certain kinds of interests, to promote efficient dispute resolution.

⁴⁹⁴ Riddell and Plant (n 16) 410–411, describing this as 'virtually unfettered' discretionary power.

⁴⁹⁵ See, for example, *Bosnia Genocide* (n 5) para. 209.

The evidentiary regime of the Court illustrates the dynamic interactions of institutional mandates, state consent, and flexibility in procedural decision-making in shaping the use of, and justifications for, evidentiary thresholds. Fundamentally, the Court exercises its freedom in evidentiary decision-making by determining which interests or considerations to emphasise in each case, deciding which to prioritise based on the specific circumstances. The extent to which the Court can legitimately exercise that freedom, effectively a scope of discretionary power, remains relatively unexplored.

4. Discretionary Power in the Evidentiary Regime of the ICJ

4.1 Introduction

Despite the pervasiveness of some notion of freedom in the Court's evidentiary regime, it remains relatively unexplored.⁴⁹⁶ It is often framed as a necessary aspect of the Court's evidentiary decision-making, allowing the Court to adopt adjust its treatment of evidence to the circumstances of each case. This freedom is intended to facilitate judicial fact-finding and enable dispute settlement on substantive rather than procedural grounds.⁴⁹⁷ However, the nature and extent of that freedom in the Court's evidentiary decision-making remain unclear.

The freedom afforded to the Court in its evidentiary decision-making should not be understood as a term of art but rather as a descriptor for the evidentiary practices of the Court in the absence of a detailed legal framework. The open-ended and prescriptive rules of evidence are arguably designed to preserve a degree of openness and flexibility in the Court's treatment of the evidence.⁴⁹⁸ While the notion of 'freedom' implies the general absence of legal constraint, 'flexibility' instead suggests the existence of decision-making capacity within given parameters.⁴⁹⁹ Accordingly, the term 'flexibility' will be used throughout this chapter to describe this feature of the Court's evidentiary decision-making, reflecting the narrow procedural setting in which the Court's evidentiary

⁴⁹⁶ Benzing (n 18) 1402, para 103. This freedom has formed the point of departure for much of the scholarly discourse relating to the evidentiary regime of the Court, as well as other international courts and tribunals. See further Kazazi and Shifman (n 72) 193.

⁴⁹⁷ Sandifer (n 27) 4.

⁴⁹⁸ Riddell and Plant (n 16) 410–411.

⁴⁹⁹ See, for example, Farnelli (n 26) 120, who uses the term 'flexibility' to describe the Court's approach to determining the standard of proof.

regime operates.⁵⁰⁰ This flexibility has traditionally been justified by the nature of international adjudication, where state sovereignty and the specific context of each dispute have been held to require a considerable degree of freedom in the treatment of evidence.⁵⁰¹ While flexibility has typically been justified as a mechanism allowing the Court to safeguard state interests in the process of dispute settlement, the increasingly fact-intensive nature of inter-state disputes suggest that those justifications are no longer in existence.⁵⁰² The evolving demands of international dispute settlement underscore the need for a more structured and transparent understanding of how the Court exercises flexibility in evidentiary decision-making. As a central feature of the Court's evidentiary regime, the notion of flexibility warrants further clarification.

Considering the foregoing, the present chapter examines the freedom of the Court in evidentiary decision-making and conceptualises it as an exercise of judicial discretion. Discretion is understood here as the authority of the Court to choose among several permissible options in the absence of clear legal rules.⁵⁰³ In evidentiary matters, this scope of discretionary power is most clearly manifested in the Court's freedom to determine how to assess evidence and to determine the relevant benchmarks for its evaluation.⁵⁰⁴ This discretion, however, is not unfettered, but shaped by a series of constraints and the Court's responsiveness to state interests. Understanding the Court's freedom in these terms allows for a more precise account of the nature and extent of its 'flexible' evidentiary decision-making, and this chapter advances the debate by framing that freedom as an exercise of discretionary power. This discretion operates within a deliberately open-ended evidentiary regime, shaped by state interests, concerns of due process, and the overarching objective of peaceful settlement. These aspects form the starting point for the analysis throughout this chapter.

Following the present introduction, Chapter 4.2 outlines the general concept of discretionary power in legal decision-making. This is followed in Chapter 4.3 by an examination of that concept in international legal decision-making,

⁵⁰⁰ See the discussion on the Court's evidentiary regime in *Chapter 3.3*.

⁵⁰¹ Amerasinghe (n 42) 47; and Kazazi and Shifman (n 72) 193.

⁵⁰² Riddell and Plant (n 16) 412–413, who also consider that 'in continuing to adhere rigidly to the idea, the Court is potentially damaging its reputation for judicial integrity'. See also ILC, 'Report of the Work of the Sixty-Ninth Session' (n 20), Annex B, 'Evidence before International Courts and Tribunals', paras. 4-5, highlighting the 'transformation' of the international judicial function.

⁵⁰³ See Hart (n 51) 124–136.

⁵⁰⁴ See the discussion on the Court's evidentiary regime in *Chapter 3.3*.

identifying the structural conditions and limitations on the exercise of judicial discretion by international courts. Chapter 4.4 situates judicial discretion in the evidentiary regime of the ICJ, framing its ‘flexibility’ in evidentiary decision-making as an exercise of discretionary power subject to legal, institutional, as well as normative and political constraints. Finally, Chapter 4.5 concludes.

4.2 The Concept of Discretionary Power

Discretion is a general feature of legal decision-making. It can be described as the right or ability vested in an actor – for example, a judge, administrative official, or enforcement body – to choose between different courses of action in a decision-making situation.⁵⁰⁵ A scope of discretionary power arises in situations where the applicable legal rules are unclear, incomplete, or silent to cover a situation, requiring the decision-maker to interpret existing standards or to establish their own to resolve the case.⁵⁰⁶

Discretion is not exercised in a vacuum but is held to exist where the relevant legal framework confers, either explicitly or implicitly, the authority to decide within a range of legally permissible options for the performance of their functions.⁵⁰⁷ This conferral of power forms part of the institutional assignment given to the decision-maker and empowers them to make decisions within a defined area of power.⁵⁰⁸ It may be explicit, where legal rules directly provide a scope of discretion to the decision-maker. For instance, a judge may exercise discretion in applying variable standards such as ‘due care’ in civil negligence cases, or in sentencing decisions where a range is provided based on specific

⁵⁰⁵ Galligan (n 51) 7. This reflects the general definition of the term ‘discretion’. See, ‘Discretion’, *Cambridge English Dictionary* <<https://dictionary.cambridge.org/dictionary/english/discretion>> accessed 22 January 2024. See also ‘Discretion’, *Merriam-Webster English Dictionary* <<https://www.merriam-webster.com/dictionary/discretion>> accessed 22 January 2024, which defines the term as referring to ‘individual choice or judgment’, ‘the power of free decision or latitude of choice within certain legal bounds’, and ‘the ability to make responsible decisions’.

⁵⁰⁶ Hart (n 51) 124–136.

⁵⁰⁷ HLA Hart, ‘Discretion’ (2013) 127 *Harvard Law Review* 652, 656–657, that, in a legal context, ‘we are considering [the use of discretion] by officials who are holding responsible public office’.

⁵⁰⁸ Galligan (n 51) 21–22.

circumstances of the crime.⁵⁰⁹ Conferral of discretionary power may also be implicit, such as where the decision-maker is tasked with the interpretation of loose or open-textured legal standards, or assessing the relative importance of conflicting legal standards.⁵¹⁰ Discretion can therefore be understood both as a legal capacity and a functional necessity that enables decision-makers to adapt general legal rules to the particularities of individual cases.

Discretion, an element of official power, must be exercised within the bounds of conferred authority.⁵¹¹ This means that the scope of discretionary decision-making is necessarily limited, ensuring that discretion is exercised in a manner that is legitimate and accountable, rather than arbitrary or overreaching. The exercise of discretionary power is clearly distinct from personal choice, as it requires the decision-maker to have 'good judgment' in choosing between different courses of action.⁵¹² For instance, while discretion permits a judge to choose a sentence within a legally defined range or a prosecutor to decide whether to pursue charges, it does not allow decisions based purely on personal preference or external pressures.⁵¹³ The exercise of discretionary power is further constrained by the specific legal and institutional context in which it is conferred. Constraints may therefore be derived from the rule or norm delegating authority, including express terms that guide or limit decision-making. Additionally, they may arise from the instructions given to the decision-maker, policy considerations, administrative practice, as well as broader normative principles.⁵¹⁴ Alongside the general requirement of 'good judgment', these constraints define the boundaries of discretionary power and shape the criteria for its exercise within a structured legal framework.

The exercise of discretion by judicial bodies raises distinct questions about the extent to which a judge can engage in their creative, law-making functions when confronted with ambiguous or indeterminate legal rules. Thus, a scope of judicial discretion arises where the applicable legal framework is ambiguous or open-textured, requiring the judge to determine how broad legal standards

⁵⁰⁹ Hart (n 507) 661–663.

⁵¹⁰ *ibid* 661.

⁵¹¹ Galligan (n 51) 1 and 21–22.

⁵¹² *ibid* 1 and 8, on the notion of 'good judgment'.

⁵¹³ Hart (n 507) 656–657, that decision-makers are expected to 'choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide remedy if they do indulge their whim'.

⁵¹⁴ On these constraints, see Galligan (n 51) 30–33.

should apply to specific cases,⁵¹⁵ or where no binding legal rules exist, thereby leaving it to the judge to determine the appropriate course of action.⁵¹⁶ While the need for discretionary power may be inevitable in judicial decision-making due to the inherent vagueness of legal standards,⁵¹⁷ the nature and extent of that power are a matter of contention.⁵¹⁸ This reveals a tension between the ideal of judicial restraint, and the necessity of judicial creativity in resolving gaps and ambiguities within the legal framework.

On the one hand, it has been widely asserted that some ‘open texture’⁵¹⁹ at the borderlines of legal rules is inevitable in the context of legal decision-making, requiring legal decision-makers to engage their creative or law-making functions when situations arise that are not explicitly covered by the legal rules.⁵²⁰ According to Hart’s understanding of judicial discretion, there are ‘hard cases’ where legal rules either ‘run out’ or are indeterminate, leaving gaps.⁵²¹ While there is a ‘core of settled meaning’ for many rules,⁵²² ‘hard cases’ arise when a rule is too vague or unclear to be applied directly.⁵²³ In such situations, the judge must exercise discretion, effectively creating new law to resolve the case. As the judge is not merely applying existing law but choosing how to extend it and actively shaping its application, this process is

⁵¹⁵ Galligan (n 51) 37–39. This includes, for example, procedural decisions relating to evidence, the allocation of the costs of litigation, sentencing decisions, and other areas where rules exist, but must be made determinate and applicable in the specific case.

⁵¹⁶ Aharon Barak, *Judicial Discretion* (Yale University Press 1989) 7–8. See also Ford (n 53) 44–46.

⁵¹⁷ Galligan (n 51) 1, that '[t]he vagaries of language, the diversity of circumstances, and the indeterminacy of official purposes' are 'considerations which guarantee discretion some continuing place in the legal order and make its elimination an impossible dream'.

⁵¹⁸ This debate are captured by the divide between Hart’s and Dworkin’s understandings of judicial discretion. For an overview, see Bernard S Jackson, ‘Hart et Dworkin sur le pouvoir discrétionnaire : points de vue sémiotiques’ (1989) 34 *Archives de philosophie du droit* 243, 245; and Kent Greenawalt, ‘Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges’ (1975) 75 *Columbia Law Review* 359.

⁵¹⁹ Hart (n 51) 128–129.

⁵²⁰ Greenawalt (n 518) 359.

⁵²¹ Hart (n 51) 134–136 and 147.

⁵²² *ibid* 128, distinguishing between the idea of a 'core of settledness' and a 'penumbra of uncertainty' in legal rules.

⁵²³ *ibid* 124–136.

like legislative activity.⁵²⁴ On the other hand, the alternative view, as championed by Dworkin, holds that even in cases where the rules do not provide clear guidance, a legal decision-maker cannot resort to discretion to create new law. The judge must instead resolve the case by applying existing 'principles', which are embedded within the legal system.⁵²⁵ Dworkin thus rejected Hart's view of judicial discretion as too expansive and undermining the ideal of legal obligation. According to Dworkin, the correct answer to legal disputes is always discoverable, even if not explicitly stated in legal rules.⁵²⁶ Legal reasoning, in this view, incorporates the moral and political principles that best justify the legal practice of a community,⁵²⁷ thereby ensuring that even unclear cases are resolved through principled and consistent interpretation.⁵²⁸

A central point in the debate between Hart and Dworkin on judicial discretion is whether there are meaningful constraints on judicial decision-making, and what form these constraints should take. Dworkin critiques Hart's view by rejecting the idea of unchecked judicial discretion and that judges are always constrained by moral and legal principles, which guide them toward the correct answer. Discretion, in this view, is not a matter of free choice but is disciplined by the integrity of the legal system, which judges must interpret coherently.⁵²⁹ By contrast, Hart acknowledges that judicial discretion is necessary when the legal rules are unclear but still insists that it is far from unconstrained.⁵³⁰ Hart frames discretion as 'interstitial legislation', confined to filling gaps in the law, but not creating new law. Discretion represents a necessary mechanism for maintaining the integrity and coherence of the legal system.⁵³¹ Moreover, Hart emphasises that discretion operates within the bounds of precedent, which forms part of the legal system's rule of recognition. Precedent limits discretion by providing settled interpretations that judges are generally bound to follow,

⁵²⁴ See further Hart (n 51) 126–128 and 135–136.

⁵²⁵ Ronald Dworkin, 'Judicial Discretion' (1963) 60 *The Journal of Philosophy* 624.

⁵²⁶ Ronald Dworkin, *Taking Rights Seriously* (Harvard Univ Press 2001) 105–162, arguing that even in indeterminate 'penumbral' zones, a right answer is discoverable through principled interpretation, and that this does not constitute judge-made law.

⁵²⁷ *ibid* 29–64, introducing the distinction between principles and rules, showing why 'hard cases' cannot be left to judicial discretion but must be decided by appeal to principles.

⁵²⁸ *ibid* 223–248.

⁵²⁹ *ibid* 226–227.

⁵³⁰ Hart (n 51) 272.

⁵³¹ *ibid* 272–276, responding to Dworkin's criticism in a *postscript*.

thereby preserving legal stability and coherence. Only in ‘hard cases’, where precedent is ambiguous or conflicting, may judges extend or modify the law.⁵³²

Building on Hart’s institutional perspective, Raz has further emphasised that legal authority itself constrains judicial discretion by providing exclusionary reasons that ensure judges’ decisions uphold the law’s authoritative function rather than personal moral views.⁵³³ Some critics have challenged whether constraints on judicial discretion function meaningfully in practice. Legal realists, for example, have argued that decisions often reflect judges’ personal biases, political views, or social context, rather than strict adherence to legal norms. For them, the notion that judges are consistently guided by established legal principles is unrealistic, as discretion is often exercised in ways that reflect personal or extra-legal factors.⁵³⁴ Critical legal perspectives further contend that judicial discretion is not neutral but embedded within ideological and institutional structures, which serve to legitimise dominant interests and reproduce systemic power under the guise of neutrality.⁵³⁵ These approaches depict discretion not as unchecked power but as a constrained mechanism that sustains legal consistency while allowing pragmatic responses to indeterminate cases. This perspective offers an approach to judicial discretion that respects both the integrity of the legal system and the need to decide cases.

⁵³² Hart (n 51) 135.

⁵³³ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon press 1990) 1–8 and 193–201.

⁵³⁴ Generally, see Jerome Frank, *Law & the Modern Mind* (Routledge 2017) 32–42.

⁵³⁵ For a foundational critique of the supposed neutrality of adjudication, see Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (1. paperback ed, Harvard Univ Press 1998) 133 ff. and 236 ff., exploring how interpretive choices reflect ideological commitments, and further 236 ff., arguing that adjudication enforces dominant institutional structures by masking power as legal neutrality. See also the proceduralist critique of judicial neutrality and a vision of constraints grounded in representation and institutional legitimacy in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Nachdr, Harvard Univ Press 1980) 73 ff. and 103 ff., articulating how judicial intervention is justified only to protect democratic processes and guard against systemic bias.

4.3 Discretion in International Legal Decision-Making

Discretionary power is arguably central also to international legal decision-making.⁵³⁶ The characteristics of the international legal system mean that any scope of decision-making beyond what is explicitly conferred and agreed upon by states is contentious, creating tensions between state sovereignty and the need for some scope of discretion to enable effective legal decision-making.⁵³⁷ Despite these tensions, states have nonetheless entrusted a significant number of functions to international organisations, and explicitly vested them with the power to make decisions on a discretionary basis.⁵³⁸ This is reflected in various provisions within the constitutive instruments of international organisations, including the power to establish subsidiary organs as necessary to carry out their functions,⁵³⁹ discretion to grant membership or observer status,⁵⁴⁰ and the authority of international courts to lay down additional rules of procedure.⁵⁴¹ In this respect, the exercise of discretion by international courts is particularly contentious due to the constrained nature of judicial authority in international law, which emphasises dispute settlement over law-making, and concern that discretion may lead courts to shaping law beyond the scope of their mandates. The following subsections examine the nature and scope of judicial discretion before international courts, and the limits that might constrain its exercise.

⁵³⁶ Derek Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes' (1983-II) 180 *Recueil des Cours de l'Académie de Droit International* 169, p. 198, who considers discretion 'a general quality' of the judicial function of international courts.

⁵³⁷ Ford (n 53) 59–60.

⁵³⁸ Ulf Linderfalk, 'The Exercise of Discretion in International Law – Why Constraining Criteria Have a Proper Place in the Analysis of Legal Decision-Making' (2021) 62 *German Yearbook of International Law* 407, 407–409, noting that such power may be conferred through treaties, customary international law, or defined in the decisions adopted by international organisations.

⁵³⁹ This includes, notably, Article 7 of the UN Charter (n 45), which empowers the principal organs of the UN to establish subsidiary organs. See further Articles 22 and 43, in respect of the UNGA and UNSC. Similar provisions exist in the constitutive instruments of other international organisations.

⁵⁴⁰ See, for example, Articles 4-5 of the UN Charter (n 45), providing that the UNSC and UNGA have discretion in deciding on the admission of new member states or observer states.

⁵⁴¹ See, for example, Article 30 of the ICJ Statute (n 39), that '[t]he Court shall frame rules for carrying out its functions' and that 'it shall lay down rules of procedure'.

4.3.1 Judicial Discretion before International Courts

Discretion is an inherent feature of the judicial function of international courts, as they inevitably require some degree of flexibility to fulfil their mandates.⁵⁴² Discretionary power may be conferred by the constitutive instruments of international courts as a residual law-making capacity, forming an integral part of the intended design of a treaty regime.⁵⁴³ Instances of the explicit conferral of some scope of discretionary power may be found in procedural matters, where the constitutive instruments of international courts leave certain details to the decision-making of the court. It includes, *inter alia*, the power to frame additional rules of procedure,⁵⁴⁴ and a general empowerment to make decisions for the management of the judicial proceedings.⁵⁴⁵ The exercise of judicial discretion by international courts, where such powers have not been explicitly conferred under their constitutive instruments, raises questions about the extent to which such judicial bodies may engage in law-making activities to fill gaps or resolve ambiguities in the legal framework.⁵⁴⁶ While claims of discretionary power remain contentious before international courts, they may be functionally unavoidable when the relevant legal norms are incomplete or indeterminate.⁵⁴⁷

International courts have often been reluctant to admit the existence of any scope of discretionary power beyond the instances of explicit conferral in their constitutive instruments,⁵⁴⁸ drawing a sharp line between their judicial function

⁵⁴² Bowett (n 536) p. 198. See also Mohammed Bedjaoui, 'L'opportunité Dans Les Décisions de La Cour Internationale de Justice' in Laurence Boisson De Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Brill 2001) 563, who considers that expediency is the *jardin secret* of the international judicial function, as inextricably linked to it as the shadow to an individual.

⁵⁴³ Ginsburg (n 53) 641–642, discussing judicial lawmaking as a form of 'delegated legislation'.

⁵⁴⁴ See, for example, Article 30 of the ICJ Statute (n 39). Similarly, Article 16 of the ITLOS Statute (n 348), and Article 12(1) of the WTO DSU (n 349).

⁵⁴⁵ See, for example, Article 48 of the ICJ Statute (n 39); and Articles 12 and 13 of the WTO DSU (n 349). See also Article 64 of *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

⁵⁴⁶ Ford (n 53) 55–56.

⁵⁴⁷ This also raises the question whether international courts can avoid exercising some degree of discretionary power, especially when facing legal uncertainty and the risk of *non liquet*. On judicial discretion before international courts, see further Ford (n 53) 59–60.

⁵⁴⁸ Ginsburg (n 53) 635–640.

and judicial law-making.⁵⁴⁹ This reluctance stems from a principle of attributed powers, which holds that international organisations, including judicial bodies, may only exercise the powers handed to them at the time of their creation or subsequently. For instance, in its Advisory Opinion relating to *Legality of the Use of Nuclear Weapons in Armed Conflict*, the Court held that international organisations operate under the ‘principle of speciality’, meaning that they can only exercise powers explicitly granted to them by their member States, which are defined by the specific common interests those States assign to the organisation.⁵⁵⁰ This judicial self-limitation is reinforced by Article 38(1)(d) of the ICJ Statute, which designates judicial decisions as a subsidiary means for determining the law, underscoring that international courts do not create law, but merely identify and apply it.⁵⁵¹ Despite this formal reluctance, the practical demands of judicial decision-making have led international courts to exercise some degree of discretion, even where not explicitly conferred by their constitutive instruments.⁵⁵²

As a matter of judicial practice, international courts have occasionally relied on a scope of implied discretionary power. This has involved the exercise of procedural or interpretative discretion when the constitutive instruments do not provide clear guidance, leaving certain matters silent, ambiguous, or open to interpretation. Such discretionary power becomes especially visible when international courts engage with broad, open-textured legal standards, including concepts such as those relating to due diligence, necessity, or

⁵⁴⁹ There is neither an expectation nor a formal legal basis for international courts to ‘create’ law or to fill gaps in ambiguous legal provisions. See Ford (n 53) 59–60; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge University Press 2014) 21; and Ginsburg (n 53) 635–640; For a critical view of the narrowly construed international judicial function, see further Von Bogdandy and Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers’ (n 339) 3–4.

⁵⁵⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para. 25.

⁵⁵¹ See Article 38(1) of the ICJ Statute (n 39), which identifies sources of international law for the Court to apply, including judicial decisions as subsidiary means for the determination of rules of law. This reflects the idea that international courts do not create law through their jurisprudence but rather identify and apply existing legal norms. See also *Chapter 1.3.1*.

⁵⁵² Compare to *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p. 12, where the Court explicitly recognised that international organisations, established through means of state consent, possess the implied powers that are necessary for the performance of their functions, even when this is not expressly provided for under their constitutive instruments.

reasonable compensation.⁵⁵³ While formally an exercise in legal interpretation, these instances entail ‘interstitial’ law-making, as repeated judicial engagement gradually shapes the normative content of loose standards and principles.⁵⁵⁴ Although authority may be conferred through the constitutive instruments or rules of procedure, international courts have relied on an implied scope of discretionary power in procedural matters such as the setting of time limits, granting extensions, or determining joinders.⁵⁵⁵ An implied discretionary power also exists in the selection and application of remedies,⁵⁵⁶ and other types of judicial determinations, such as deciding the content of provisional measures,⁵⁵⁷ where a general authority is granted but the details are left to the court’s decision-making in each case. While this exercise of discretionary power appears to expand judicial roles, they underscore the tension between international courts’ need for flexibility in decision-making and their formal mandates. It has also been noted that the authority of a court is linked to the level of discretion it may exercise,⁵⁵⁸ and that unconsidered or excessive use of discretionary power risks undermining both the authority and legitimacy of the judicial body.⁵⁵⁹

The exercise of discretionary power is arguably a functional necessity of the international judicial function, enabling courts to resolve disputes despite legal indeterminacy or gaps in the applicable framework. If such discretion is both

⁵⁵³ See, for example, *Pulp Mills on the River Uruguay* (n 422) paras. 197-198, on due diligence; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, paras. 49 ff., on necessity.

⁵⁵⁴ On the notion of ‘interstitial legislation’, see Hart (n 51) 124–136.

⁵⁵⁵ See, for example, Article 31 of the 1978 Rules of Court (n 44).

⁵⁵⁶ The WTO Appellate Body has shaped compliance measures without precise guidance. See *US—Certain EC Products* (Appellate Body Report) [2001] WT/DS165/AB/R, para. 92, and the associated compliance proceedings. The ECtHR has developed the concept of ‘just satisfaction’ under Article 41 ECHR (n 148) largely as a matter of case law. See, for example, *Papamichalopoulos and Others v. Greece*, App No 14556/89 (ECtHR, 24 May 1995) para. 36; and *Scordino v. Italy*, App No 36813/97 (ECtHR, 29 March 2006) para. 258.

⁵⁵⁷ On the indication of provisional measures, see Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005) 159–187.

⁵⁵⁸ Armin Von Bogdandy and Ingo Venzke, ‘On the Democratic Legitimation of International Judicial Lawmaking’ in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012) 573.

⁵⁵⁹ Fuad Zarbiyev, ‘Saying Credibly What the Law Is: On Marks of Authority in International Law’ (2018) 9 *Journal of International Dispute Settlement* 291, 294; Ginsburg (n 53) 656.

necessary and embedded in international adjudicative practice, it is essential to define the conditions for its legitimate exercise and the limits that constrain it.

4.3.2 Limits of Judicial Discretion before International Courts

If some scope of discretionary power is functionally embedded in the judicial activity of international courts, its legitimate exercise depends on the existence of identifiable limits.⁵⁶⁰ Discretion does not imply an unbounded authority but operates within a framework where choices must remain consistent with the notion of good judgment and the institutional function of the judicial body.⁵⁶¹ However, there is no uniform set of norms from which limitations on discretion can be derived in international legal decision-making.⁵⁶² Instead, constraining criteria emerge from the specific terms of power, or instructions, given to the decision-maker.⁵⁶³ This reflects state consent in delegating authority while simultaneously imposing limits on its exercise.⁵⁶⁴ Limitations on the exercise of discretionary power ensure that it remains aligned with the broader goals of the international adjudication, preventing judicial overreach and preserving the legitimacy of the decision-making process.⁵⁶⁵

Most constraining criteria are not explicitly provided by the terms of power or instruction but have been identified based on reconstructions of practice.⁵⁶⁶ In this respect, several doctrines and principles that shape judicial discretion in international legal decision-making define these criteria. These include, *inter alia*, the doctrine of the abuse of rights, the principle of good faith, the prohibition of arbitrary conduct, the principles of reasonableness, consistency and predictability, and the principle of proportionality.⁵⁶⁷ Constraining criteria may be motivated for a range of reasons but are often grounded in a degree of deference to the interests of states as the main ‘legislators’ and source of legal authority. For instance, the abuse of rights doctrine operates ensures that states

⁵⁶⁰ Ford (n 53) 35–36.

⁵⁶¹ Hart (n 51) 272.

⁵⁶² Linderfalk (n 538) 428.

⁵⁶³ See, for example, Galligan (n 51) 30–33.

⁵⁶⁴ Linderfalk (n 538) 416–418.

⁵⁶⁵ Ford (n 53) 35–36.

⁵⁶⁶ *ibid.* See also Linderfalk (n 538) 410–411.

⁵⁶⁷ Linderfalk (n 538) 416–422.

cannot use legal processes to undermine the rights or interests of others, reflecting the importance of maintaining stability and fairness within the legal system.⁵⁶⁸ Similarly, the principle of proportionality limits judicial decision-making to prevent decisions that are excessive in relation to state interests.⁵⁶⁹

International courts exercise discretionary power in an institutional space that is more clearly delineated than in other decision-making contexts, since state consent provides the legal foundation for jurisdiction while also defining the parameters and substance of dispute settlement.⁵⁷⁰ The relevant boundaries on discretionary power in international adjudication may therefore be formal and treaty-based – such as rules of procedure or jurisdictional limits – structural and linked to institutional design, or informal and grounded in state practice.⁵⁷¹ Examples of such constraints include reputational considerations, where courts may avoid rulings that risk undermining their credibility with states, state reactions to judgments, such as withdrawal from compulsory jurisdiction,⁵⁷² or

⁵⁶⁸ On the abuse of rights, see E De Brabandere, “‘Good Faith’, ‘Abuse of Process’ and the Initiation of Investment Treaty Claims” (2012) 3 *Journal of International Dispute Settlement* 609, 609; Matthias Lippold, ‘The Interpretation of UN Security Council Resolutions between Regional and General International Law: What Role for General Principles?’ in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019) 149; and Ulf Linderfalk, ‘Treaty Abuse—Why Criticism of the Doctrine Is Unfounded’ (2018) 9 *Journal of International Dispute Settlement* 254, 254.

⁵⁶⁹ On proportionality, see, for example, Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (1st ed, Oxford University Press 2012) 180–190; Sebastián López Escarcena, *Indirect Expropriation in International Law* (Elgar 2014) 60; Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press 2009) 145–146; and Andreas Kulick, *Global Public Interest in International Investment Law* (First paperback ed 2014, Cambridge Univ Press 2014) 169.

⁵⁷⁰ Compare to F Zarbiyev, ‘Judicial Activism in International Law--A Conceptual Framework for Analysis’ (2012) 3 *Journal of International Dispute Settlement* 247.

⁵⁷¹ Ginsburg (n 53) 656–658, discussing informal constraints on judicial discretion, such as reputational sanctions and the risk of non-compliance, arguing that international courts may strategically limit their law-making to avoid undermining their credibility with states and triggering consequences such as the withdrawal of state consent or non-compliance with judicial outcomes.

⁵⁷² *ibid* 658–659, on the withdrawal of state consent, describing it as a form of ‘exit’ and the ‘ultimate’ constraint that is unavailable in domestic systems, and draws on the optional clause to the ICJ’s jurisdiction as an example of the possibility of states simply exiting the jurisdiction of the Court in the event of an adverse decision.

non-compliance,⁵⁷³ and concerns over institutional legitimacy, given that a court's authority is shaped by the political environment and states' willingness to accept its decisions.⁵⁷⁴ The precise operation of these constraints is context-dependent, shaped by the interaction of formal mandates, state practice, and institutional dynamics, which influence the scope and exercise of discretion.

The essential limitation on judicial discretion exercised by international courts is state sovereignty, which underpins and conditions the court's jurisdictional authority. This reliance on state consent constrains judicial power and shapes an interdependent law-making dynamic in which legal developments must align with the interests and preferences of states, which reflects the 'bounded discretion' of international courts.⁵⁷⁵ Significantly, bounded discretion arises not only from the formal legal limits imposed by the criterion of state consent but also from informal constraints linked to the courts' need to maintain their legitimacy and continued state support.

As international courts are positioned within a broader legal, political, as well as institutional system, their authority is conditioned by institutional design, political context, and the interests and preferences of sovereign states, which prevents them from functioning as fully autonomous actors.⁵⁷⁶ This form of bounded judicial discretion manifests in strategic judicial restraint, especially in politically sensitive cases. For example, in the *Nicaragua* case, the Court exercised considerable caution in determining how to fulfil the procedural obligations set out in Article 53 of its Statute, reflecting the interests of the absent respondent party, the United States, despite its non-appearance.⁵⁷⁷ Such examples demonstrate how the exercise of judicial discretion is shaped by the reciprocal interactions between jurisdictional limits, institutional constraints, and the imperative of legitimacy within the international system.

⁵⁷³ Ginsburg (n 53) 659–665, on non-compliance, describing this in terms of 'voice' as a situation when states, who may be unwilling or unable to exit the jurisdiction of an international court, instead communicate their displeasure to the court by ignoring a decision, seeking to overrule it, or choosing to attack the court.

⁵⁷⁴ *ibid* 665–668, considering that states may also seek to control an international court through budgetary decisions, and similar measures.

⁵⁷⁵ *ibid* 633–634. See also Ford (n 53) 59–60; and Darcy (n 549).

⁵⁷⁶ Ginsburg (n 53) 656.

⁵⁷⁷ See *Nicaragua* (n 108) para. 31. See also the discussion of this case in *Chapter 5.3.1*.

4.4 Discretion in the ICJ Evidentiary Regime

The exercise of judicial discretion in evidentiary matters remains relatively unexplored in international adjudication, despite its centrality to procedural law and practical significance in shaping the establishment of facts. The sparse legal framework for evidence requires the ICJ to resolve most of the central questions of evidence and proof – such as the allocation of the burden of proof, the parameters for the evaluation of evidence, and, in particular, determining the standard of proof – according to the circumstances of each case.⁵⁷⁸ These procedural decisions engage discretionary judgment by requiring the Court to concretise open-textured principles of evidence on a case-by-case basis. This creates a procedural space where judicial discretion is both necessary and inherent, shaped by the legal framework and functional demands of dispute settlement. Discretionary power thus offers a conceptual lens through which to understand not only the nature of the Court’s evidentiary decision-making but also the limits of its discretion in applying the central principles of evidence.

4.4.1 Sources of Discretionary Power

The Court’s discretionary power is both explicitly conferred under the legal framework for evidence and implied as a matter of functional necessity for the exercise of its judicial function. While the ICJ Statute and other principles of procedure provide a foundation for the Court’s evidentiary decision-making, they also leave substantial gaps which require an exercise of judicial discretion. This reflects a deliberately flexible design that enables the Court to establish the facts without the constraint of rigid rules of evidence.⁵⁷⁹

As an explicit source of discretionary power, the ICJ Statute confers significant discretionary authority on the Court through a series of provisions that together establish both procedural autonomy and evidentiary latitude. Article 30 of the Statute authorises the Court to frame its own Rules, effectively granting it institutional autonomy to shape the evidentiary framework in the absence of codified rules.⁵⁸⁰ Article 48 of the Statute further empowers the Court to ‘make orders for the conduct of the case’, a formulation that leaves considerable room

⁵⁷⁸ See the discussion in *Chapter 3.3*.

⁵⁷⁹ Riddell and Plant (n 16) 410–411, on the Court’s ‘unfettered’ discretion.

⁵⁸⁰ Article 30(1) of the ICJ Statute (n 39); and Rules 50–61 of the 1978 Rules of Court (n 44). See also Rosenne (n 41) 1065.

for discretion in managing the evidentiary aspects of proceedings.⁵⁸¹ These provisions are supplemented by Chapter III of the Statute, which outlines a set of facultative, or discretionary, powers relating to requests for the production of documents, seeking clarifications, appointing experts, or determining the structure and scope of oral proceedings.⁵⁸² These provisions deliberately leave significant room for the Court's decision-making, providing a degree of autonomy to define how standards should apply in each case.⁵⁸³ The scope of discretionary power explicitly afforded to the Court ensures that it retains the procedural flexibility afforded to it, allowing it manage diverse and complex factual records, and to preserve institutional adaptability.⁵⁸⁴

A significant part of the Court's discretion in evidentiary matters has not been explicitly conferred but is implied as a matter of functional necessity. This is the case for many of the central questions of evidence and proof, including general aspects such as the allocation of the burden of proof and evidentiary threshold, but broadly for the determination of the admissibility of evidence, the assessment of evidence, and drawing inferences.⁵⁸⁵ The Court's implied discretion is evident in cases involving complex or contested facts. In *Whaling in the Antarctic*, which concerned Australia's challenge to Japan's whaling activities, the Court adjusted its treatment of evidence to accommodate the highly technical nature of scientific material submitted as evidence.⁵⁸⁶ In the case *Qatar v. Bahrain*, which involved voluminous documentary material in a territorial dispute, the Court was required to assess the admissibility and probative value of a large set of documents, including some alleged to be fraudulent, an exercise demanding cautious and context-sensitive judgment in the absence of codified evidentiary rules.⁵⁸⁷ Similarly, in *Bosnia Genocide*, which concerned allegations of genocide, the Court exercised its implied discretion in its evaluation of evidence and determination of the standard of proof, as the legal framework did not provide guidance on evidentiary

⁵⁸¹ Article 48 of the ICJ Statute (n 39). See also Rosenne (n 41) 1330–1331.

⁵⁸² Chapter III of the ICJ Statute (n 39). See further Articles 49–52.

⁵⁸³ Compare Galligan (n 51) 45.

⁵⁸⁴ Kolb (n 43) 820–823.

⁵⁸⁵ See, for example, Brown (n 22) 86–88 and 90, on the notion of 'inherent' powers.

⁵⁸⁶ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226.

⁵⁸⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (n 362).

thresholds and required the Court to establish its own criteria.⁵⁸⁸ These examples illustrate how the Court's implicit discretionary power operates as a mechanism for navigating evidentiary ambiguity in the absence of express legal regulation.

The Court has thus been left to navigate open-textured standards that are presumed to exist, but never fully articulated, and tailor its approaches to each case.⁵⁸⁹ It has effectively developed practice-based principles through its case law, often in response to increasingly fact-intensive and complex disputes, as a response to the needs of the dispute and the litigating parties.⁵⁹⁰ While the Court is not under any formal obligation to articulate any such standards, it has gradually given them content through decision-making. This implies a resort to a scope of discretionary power in evidentiary decision-making, arising from the lack of clear regulation and the assumption of flexibility in adapting to the specific circumstances of each case. This delegation of discretion arguably forms part of the Court's institutional design,⁵⁹¹ allowing it to maintain fairness and efficiency while respecting the bounds of authority, in line with the need to preserve judicial legitimacy and adapt to the evolving nature of disputes.

4.4.2 Distinguishing Judicial Discretion from Inherent Powers

The Court has generally interpreted its procedural powers as encompassing evidentiary matters, even in the absence of explicit provisions to that effect.⁵⁹² While discretionary power offers one conceptual framework for understanding the Court's authority in evidentiary matters in the absence of clear legal rules, it has also been characterised as an exercise of the Court's 'inherent powers'.⁵⁹³ Discretion and inherent powers are closely related, yet distinct, concepts that describe judicial authority in the absence of binding legal rules or principles. While the exercise of discretion implies a bounded choice within a legal

⁵⁸⁸ *Bosnia Genocide* (n 5) paras. 209-210. See also the discussion in *Chapter 5.4.1*.

⁵⁸⁹ *Ford* (n 53) 44-46.

⁵⁹⁰ See *Del Mar* (n 23) 98-101.

⁵⁹¹ See, for example, Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225.

⁵⁹² *Brown* (n 22) 90; discussing JC Witenberg, '*Onus probandi*' devant les juridictions arbitrales (Pédone 1951).

⁵⁹³ *Brown* (n 22) 58-60; and further C Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 *British Yearbook of International Law* 195.

framework,⁵⁹⁴ inherent powers instead suggest a foundational competence that arises from the nature of the Court's judicial function.⁵⁹⁵ The distinction is significant because it frames the Court's authority either as grounded in the consent-based limits of its jurisdiction, or as flowing more expansively from the very nature of its judicial function and institutional role. This conceptual framing shapes how the Court's evidentiary role is understood, and the extent to which it is seen as constrained by, or independent from, legal rules.

Inherent powers constitute a form of judicial authority not explicitly articulated in the applicable legal or procedural framework but are nonetheless recognised as essential to the Court's effective functioning. These powers, often relating to procedural matters, are functionally justified as necessary for the Court to perform its judicial role even if there are gaps in the procedural framework, thereby ensuring the sound administration of justice.⁵⁹⁶ The resort to inherent powers is typically limited to procedural necessities, serving to safeguard the integrity and fairness of the judicial process absent explicit legal rules.⁵⁹⁷

The Court has invoked inherent powers in several areas of its procedural law. It has, *inter alia*, claimed the power to determine the extent of its jurisdiction under the *compétence de la compétence* principle,⁵⁹⁸ framing its own rules of procedure as well as making procedural orders,⁵⁹⁹ applying estoppel principles to prevent the parties from changing or contradicting their positions,⁶⁰⁰ or the power to order provisional measures where there is a risk of imminent harm or

⁵⁹⁴ Hart (n 507) 661–663. On the concept of discretionary power, see also the discussion in *Chapter 4.2*.

⁵⁹⁵ Brown (n 22) 58–60.

⁵⁹⁶ *ibid* 66–71.

⁵⁹⁷ Generally, see Brown (n 593).

⁵⁹⁸ The principle of *compétence de la compétence*, which is recognised as an inherent power of international courts, holds that a court may determine the extent of its own jurisdiction even in the absence of an express provision. See, for example, *Nottebohm (Liechtenstein v. Guatemala)* (Preliminary Objections) [1953] ICJ Rep 111, pp. 119-120; and *Nuclear Tests* (n 280) para. 23.

⁵⁹⁹ International courts are still considered to possess powers to frame rules of this nature 'as a necessary incident of their judicial functions'. See Brown (n 22) 63.

⁶⁰⁰ Estoppel may be invoked by the Court when a party's conduct has led the other party to reasonably rely on that conduct, preventing them from changing positions mid-case.

prejudice to a party before a final judgment is reached.⁶⁰¹ The Court also possesses a power of management of the judicial proceedings,⁶⁰² including the decision to hear preliminary objections regarding questions of jurisdiction and admissibility separately from the merits,⁶⁰³ and reformulating the submission of the applicants.⁶⁰⁴ While these examples reflect the Court's reliance on inherent powers within its judicial function, they are typically invoked in the absence of explicit rules and for narrowly defined procedural purposes, distinguishing them from the broader concept of judicial discretion.

The central distinction between the concepts of judicial discretion and inherent powers lies in the justificatory basis and function of the authority. On one hand, discretionary powers are conferred on the Court either explicitly through its constitutive instruments or implicitly when the legal framework provides options or standards requiring evaluative judgment. These powers reflect a degree of choice between legally permissible outcomes, and their exercise is typically guided by legal norms, procedural rules, or principles such as reasonableness or proportionality. On the other hand, inherent powers are not conferred by the legal framework, even implicitly, but arise from the Court's need to preserve the integrity of the judicial process and ensure the sound administration of justice. Rather than a choice between legal alternatives, inherent powers enable the Court to act where the legal framework is silent, but judicial intervention is necessary to uphold the integrity of the proceedings. These situations may arise in view of the management of proceedings, addressing procedural abuses, or protecting the judicial function. While discretion operates within the scope of conferred legal authority, inherent powers justify the exercise of authority in the absence of such conferral.

While both inherent powers and judicial discretion describe how the Court may act in the absence of clear legal rules, they differ significantly in their legal

⁶⁰¹ The Court's powers to indicate provisional measures is considered to form part of its inherent jurisdiction, allowing the Court to act where the circumstances require urgent intervention. It is further stated in Article 41 of the ICJ Statute (n 39) and Article 75 of the 1978 Rules of Court (n 44). See also Rosenne (n 557) 85–91, on the jurisdiction of the Court to order provisional measures; and, more generally, Hugo Thirlway, 'The Jurisdiction of Provisional Measures by the International Court of Justice' in Rudolf Bernhardt (ed), *Interim measures indicated by international courts*, vol 117 (Springer 1994) 1–36.

⁶⁰² Brown (n 22) 65.

⁶⁰³ In *Mavrommatis Palestine Concessions* (n 276), the PCIJ was confronted with objections as to its jurisdiction, for which the PCIJ Statute (n 347) and Rules provided no guidance.

⁶⁰⁴ Brown (n 22) 64.

basis and institutional consequences. Inherent powers derive from the necessity of preserving the judicial function and have been invoked in domains such as jurisdiction and the indication of provisional measures, where procedural integrity or institutional viability is at stake. Judicial discretion, by contrast, rests on authority conferred, explicitly or implicitly, by the Court's constitutive instruments, and reflects a bounded space that is constrained by the principle of state consent. This distinction becomes particularly salient in the evidentiary context, where the legal framework offers limited procedural guidance and the Court's decision-making involves navigating ambiguity. Characterising evidentiary choices as an exercise of discretion, rather than as inherent powers, situates the Court's authority firmly within the consent-based structure of its Statute. It reinforces the Court's legitimacy and ensures that necessary flexibility in evidentiary matters remains procedurally anchored and normatively contained.

4.4.3 Limits of Discretionary Power

The understanding of the Court's flexibility in evidentiary decision-making as an exercise of discretion assumes the existence of boundaries for its exercise.⁶⁰⁵ Discretionary power in international adjudication is shaped by 'constraining criteria',⁶⁰⁶ which can be understood as legal standards demanding coherence, consistency, and justified reasoning. Drawing on the account of constraining criteria as legal standards that shape discretionary decision-making, three main sources of constraint on the Court's discretion in evidentiary matters can be identified: legal, institutional, as well as normative and political. These sources of constraining criteria are explored in the following subsections.

4.4.3.1 *Legal Constraints*

Legal constraints operate as internal standards that shape the Court's discretion in evidentiary matters.⁶⁰⁷ These correspond to the formal doctrinal limits that arise from, and are embedded in, the Court's legal framework and function as

⁶⁰⁵ Linderfalk (n 538) 425–428. See further Hart (n 51) 272–276; and Raz (n 533) 210–237. See also the discussion in *Chapter 4.2*.

⁶⁰⁶ Linderfalk (n 538) 407, introducing the concept of 'constraining criteria' as internal to the interpretive practices of international law, tied to coherence and the justificatory structure of legal argument.

⁶⁰⁷ *ibid.*

internally derived safeguards that limit its discretionary decision-making.⁶⁰⁸ Constraints of this nature include interpretative and procedural principles such as good faith, objectivity, reasonableness, and proportionality, which guide the assessment of evidence and procedural conduct.⁶⁰⁹ While these principles are intended to constrain discretion, their practical application may vary and leave room for interpretive flexibility. In evidentiary matters, such constraints manifest through procedural rules, principles of evidence developed through judicial practice, and general principles guiding the judicial process. These elements define the boundaries of the Court's evidentiary discretion.

The legal constraints are grounded in the Court's foundational instruments. In this respect, Article 36 of the ICJ Statute limits the Court's authority to assess the facts by confining it to disputes within the scope of jurisdiction, and Article 38 requires the Court to draw on recognised sources of international law which carry interpretative and procedural expectations that influence the assessment of evidence. For example, in *Corfu Channel*, the Court invoked 'elementary considerations of humanity' and the duty of states to not withhold relevant information,⁶¹⁰ linking evidentiary discretion to interpretive obligations. The procedural rules established in Chapter III of the Statute, alongside the 1978 Rules of Court, provide concrete constraints on the Court's evidentiary discretion. These include admissibility requirements, timelines for submission, and obligations to provide reasoned decisions that limit judicial discretion in evidentiary matters. For instance, in *Bosnia Genocide*, the Court upheld strict standards of admissibility and maintained deadlines for evidentiary submissions,⁶¹¹ further underscoring how procedural rules limit discretion.

Foundational principles of procedural fairness also serve as legal constraints, which reflect foundational principles of the judicial process and ensure that the exercise of discretion remains consistent, transparent, and accountable.⁶¹² For instance, the equality of the parties is a fundamental principle of the judicial process that requires the Court to treat all litigating states equally throughout

⁶⁰⁸ On the limits of judicial discretion, see Galligan (n 51) 30–33.

⁶⁰⁹ Linderfalk (n 538) 411–414, noting that these are often embedded in treaty interpretation, or standards of review developed as a matter of judicial practice.

⁶¹⁰ *Corfu Channel* (n 5) pp. 17–18.

⁶¹¹ *Bosnia Genocide* (n 5) paras. 171–178.

⁶¹² See, for example, Filippo Fontanelli and Paolo Busco, 'The Function of Procedural Justice in International Adjudication' (2016) 15 *The Law & Practice of International Courts and Tribunals* 1, 1.

the proceedings.⁶¹³ It constrains judicial discretion by mandating that, despite potential power imbalances, the Court must ensure no party is given undue advantage. In *Nicaragua*, this principle was operationalised using symmetrical time limits and identical opportunities to submit evidence and to respond to opposing submissions.⁶¹⁴ Moreover, fairness mandates consistent and transparent application of evidentiary standards.⁶¹⁵ This limits the Court's judicial discretion by mandating reasoned explanations for decisions about evidence assessment. In *Armed Activities*, the Court justified its evidentiary reasoning by expressly appealing to fairness and balance between the parties.⁶¹⁶ As such, the Court exercises its discretion to uphold fairness and preserve legitimacy by guaranteeing equal opportunities in the proceedings.⁶¹⁷

Finally, the principles of legal certainty and transparency further constrain the Court's exercise of discretion in evidentiary matters. Legal certainty demands consistency in the application of established evidentiary rules and precedent, limiting the scope for arbitrary or unpredictable judgments.⁶¹⁸ Transparency, in turn, requires the Court to provide clear, reasoned explanations for its evidentiary decisions, reinforcing both procedural fairness and institutional accountability.⁶¹⁹ The need for the Court to justify its methodology for fact-finding, as in *Bosnia Genocide*,⁶²⁰ and earlier in *Nicaragua*,⁶²¹ thus reinforces procedural fairness and institutional accountability.

4.4.3.2 Institutional Constraints

The Court's evidentiary discretion is further shaped by constraints arising from its institutional design. The institutional constraints encompass jurisdictional limitations imposed by the central requirement of state consent, corresponding

⁶¹³ Rosenne (n 41) 1048–1052.

⁶¹⁴ *Nicaragua* (n 108) para. 13, and the procedural orders issued in that case.

⁶¹⁵ See, for example, Rosenne (n 41) 1032–1035; and Cheng (n 49) 290–294.

⁶¹⁶ *Armed Activities* (n 108) paras. 54–57.

⁶¹⁷ *Bosnia Genocide* (n 5) para. 160, on sovereign equality and the notion of procedural fairness. See also Higgins (n 40) 148–150, on the importance of equal procedural rights.

⁶¹⁸ On legal certainty as a principle in international adjudication, see further Jean D'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford Univ Press 2013) 207–210.

⁶¹⁹ On transparency and reasoning in international judicial decisions, see Shany (n 591).

⁶²⁰ *Bosnia Genocide* (n 5) paras. 209–241.

⁶²¹ *Nicaragua* (n 108) para. 60.

broadly to structural boundaries of delegated authority that are set by the terms of power.⁶²² In this context, the fundamental constraint on the Court's exercise of discretion stems from the consent-based nature of its jurisdiction, which not only defines but imposes limits its decision-making authority.⁶²³ The emphasis on state consent and sovereignty acts as a primary constraint by delineating the boundaries of authority delegated to the Court, limiting both the scope of its jurisdiction and exercise of discretion. It restricts the Court's fact-finding powers by denying it the possibility of any compulsory investigatory authority.⁶²⁴ This means that the Court depends on the cooperation and consent of the litigating states to gather evidence.⁶²⁵

As a matter of judicial practice, the consent-based limitation in the institutional design of the Court has arguably led to self-restraint and a limited engagement with disputed factual claims.⁶²⁶ This reflects a bounded discretionary power shaped by state consent as a central feature of international adjudication, and an institutional understanding that the Court's authority to engage with evidentiary matters is confined by the jurisdiction conferred upon it.⁶²⁷ It may also be taken to reflect a deeper structural conservatism, shaped by the nature of the Court's role in the international legal system and internalised beliefs about its limited law-making capacity.⁶²⁸

As one of the principal judicial organs of the UN, the Court's judicial function is embedded within a complex political and institutional environment that imposes additional, and at times informal, constraints on its discretion. Beyond the jurisdictional limits defined by state consent, thus, the Court's discretion is

⁶²² Ginsburg (n 53) 635–638.

⁶²³ Riddell and Plant (n 16) 2–4.

⁶²⁴ Article 50 of the ICJ Statute (n 39) permits the Court to appoint experts or commissions for fact-finding, but the exercise of such powers is facultative and subject to party consent. While the Court may initiate inquiries within its procedural framework, it lacks coercive authority to compel evidence or cooperation, reflecting its respect for state sovereignty.

⁶²⁵ Makane Moïse Mbengue, 'Scientific Fact-Finding at the International Court of Justice: An Appraisal in the Aftermath of the Whaling Case' (2016) 29 *Leiden Journal of International Law* 529.

⁶²⁶ Compare to the discussion in Devaney (n 74) 30–31.

⁶²⁷ Shany (n 591) 147–152. See further Nienke Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 355.

⁶²⁸ Sir Franklin Berman KCMG QC, 'The International Court of Justice as an "Agent" of Legal Development?' in Christian J Tams and James Sloan (eds), *Development of International Law by the ICJ* (Oxford University Press 2013) 11–12.

further shaped by its institutional embeddedness within the broader UN system and the political-legal environment in which it operates. This context provides an external source of constraint grounded in the Court's role in the peaceful settlement of disputes, reinforcing expectations that the Court remain within the bounds of its judicial function to maintain legitimacy and avoid political overreach.⁶²⁹ This may translate into a cautious approach to the exercise of discretionary powers, particularly in politically sensitive disputes. For example, in cases involving the attribution of state responsibility, the Court appears to adopt a more cautious approach than in cases that do not raise such issues, suggesting that matters of state responsibility carry greater political sensitivity.⁶³⁰ Such restraint reflects an understanding that assertiveness in evidentiary matters could risk undermining the Court's perceived impartiality or intruding on areas reserved for the political discretion of states.

4.4.3.3 Normative and Political Constraints

The Court's discretionary power in evidentiary matters is also influenced, albeit more subtly, by its broader legal and political surroundings. Normative constraints may be derived from the shared principles, values, and expectations that shape the Court's self-conception as a judicial actor in the international legal order.⁶³¹ These include judicial restraint, respect for state sovereignty, and the preservation of legitimacy through procedural fairness and neutrality. Political constraints, by contrast, emerge from the external environment and reflect the realities of competing state interests, political considerations, and the Court's structural dependence on state compliance and cooperation.

The convergence of normative and political constraints on the Court's exercise of discretionary power is captured by the notion of 'bounded' discretion.⁶³² The concept reflects that the Court's decision-making is shaped not only by formal legal and institutional boundaries, but also by external expectations and strategic considerations that narrow the range of legitimate choices.⁶³³ While the Court retains formal autonomy in the interpretation and application of evidentiary standards, its discretion is bounded by its embeddedness in a legal

⁶²⁹ See, for example, Ginsburg (n 53) 665–668, discussing the 'strategic' limits of judicial law-making through the lens of 'exit', 'voice', and 'control'. See also Ford (n 53) 84–86.

⁶³⁰ See, for example, Del Mar (n 23) 98–101.

⁶³¹ See the discussion in *Chapter 3.2*.

⁶³² Ginsburg (n 53) 656.

⁶³³ *ibid* 656–658 and 658–668, on the informal constraints that limit the exercise of discretion.

and political system that rewards caution and penalises overreach. These informal constraints are not explicitly codified but are internalised through the Court's jurisprudence and institutional self-image.⁶³⁴

The boundedness of the Court's discretion may translate into a cautious and restrained engagement with disputed facts, particularly in cases involving complex or politically sensitive issues. In both *Whaling in the Antarctic* and *Pulp Mills on the River Uruguay*, for example, the Court evaluated specialised scientific and technical evidence while emphasising procedural fairness and its reliance on expert assessments. It also remained attuned to broader political sensitivities, signalling a balancing act between judicial authority and external constraints. This dynamic is particularly evident in cases involving high-stakes or sensitive subject matter. In *Bosnia Genocide*, the Court confirmed that genocide had occurred but refrained from making expansive findings on genocidal intent, demonstrating awareness of the political and reputational implications of assertive factual determinations.⁶³⁵ Similarly, in *Nicaragua*, the Court exercised restraint in its evaluation of evidence of US involvement in Nicaragua, balancing factual assessment with concerns of compliance and diplomatic repercussions.⁶³⁶

The notion of bounded discretion helps illuminate how the Court navigates the tension between legal judgment and political constraint. In evidentiary matters, discretionary choices are not made in a vacuum but are calibrated to preserve institutional legitimacy, avoid political backlash, and maintain the appearance of neutrality. This form of judicial risk management enables the Court to exercise restraint in politically sensitive contexts without explicitly invoking political considerations. However, the reliance on bounded discretion also narrows the range of plausible legal outcomes and may inhibit the Court's capacity to provide normative clarity or accountability in contentious disputes. In this sense, evidentiary discretion becomes a site where legal indeterminacy, institutional vulnerability, and strategic adjudication converge, underscoring the need to examine how discretion is used as a matter of judicial practice.

⁶³⁴ See, for example, Grossman (n 493) 45–53.

⁶³⁵ *Bosnia Genocide* (n 5) para. 293, in which the Court underscored, *inter alia*, the 'high stigma' attached to a finding of genocide even at the inter-state level.

⁶³⁶ On the evaluation of evidence, see *Nicaragua* (n 108) para. 60. The non-appearance of the United States as the respondent led the Court to carefully explain its approaches to evidence.

4.5 Conclusion

Despite characterisations of the Court's freedom, or flexibility, in evidentiary matters as 'virtually unfettered',⁶³⁷ its authority in evidentiary decision-making – particularly regarding the determination of the standard of proof – reflects a form of discretionary power that is constrained by the legal, institutional, and political context in which the Court operates. This discretionary power is not merely a consequence of ambiguity and silence in the Court's legal instruments but is a fundamental feature of its institutional and procedural design. It reflects the necessity for flexibility in evidentiary decision-making while implying the presence of meaningful constraints that guide and limit its exercise.

The discretionary power afforded to the Court in evidentiary decision-making is conditioned by legal norms, institutional design, and the broader normative context in which the Court operates as a set of 'constraining criteria' on its exercise of discretionary power.⁶³⁸ As with other forms of judicial discretion, the Court's authority entails judicial choice, which is ultimately conditioned by expectations of coherence, justification, and restraint. Understanding this discretion as essentially 'bounded'⁶³⁹ underscores the complex interplay of formal rules and informal pressures that govern how the Court determines its treatment of evidence. This discretionary power directly informs the Court's determination of the standard of proof, which is not fixed by doctrine but is a flexible tool shaped by the Court's institutional role, the nature of the dispute, and the political stakes involved. This dynamic explains the variability and context-sensitivity observed in the Court's jurisprudence, including the use of terms like 'conclusive evidence' and 'high level of certainty'.⁶⁴⁰

A set of constraints contribute to shaping the Court's exercise of discretion in evidentiary matters, which span legal, institutional, and broader normative-political dimensions. Legal constraints arise primarily from procedural rules, interpretative principles, and internal safeguards embedded within the Court's legal framework. These promote consistency, fairness, and reasoned justification while accommodating interpretative flexibility in complex evidentiary contexts. Institutional constraints, particularly the requirement of state consent and the Court's embeddedness within the UN system, temper

⁶³⁷ See, for example, Riddell and Plant (n 16) 410–411.

⁶³⁸ Linderfalk (n 538).

⁶³⁹ Ginsburg (n 53) 633–634.

⁶⁴⁰ See, for example, the case study in *Chapter 5*.

judicial assertiveness and encourage caution to preserve legitimacy and the Court's role in the peaceful settlement of disputes. Normative and political constraints further limit discretionary power by prompting the Court to moderate its engagement with factual claims to safeguard legitimacy and avoid reputational risks. These constraints collectively shape not only the Court's broader discretionary exercise but also its determination of the appropriate standard of proof in each case, mediating how rigorously evidence must be assessed given legal, institutional, and normative-political considerations.

The Court's exercise of discretionary power in evidentiary matters reflects its dual role as both a dispute-settling body and an institutional actor balancing the competing interests of the international community. This duality grants the Court a scope of discretion while simultaneously imposing limits on its legitimate exercise. Consequently, the Court tends to adopt a cautious, context-sensitive approach to evidence, avoiding expansion beyond what is necessary to resolve the dispute. The applicable standard of proof emerges from a pragmatic balancing of legal, institutional, normative, and political constraints. These constraints interact with the facts, stakes, and political sensitivities of the case at hand, with their relative influence shifting accordingly. The applicable standard of proof emerges from this pragmatic balancing of legal, institutional, normative, and political constraints rather than rigid formulas, allowing the Court to calibrate evidentiary thresholds to the specific demands of each dispute. The concept of bounded discretion encapsulates this convergence of legal, institutional, and normative and political constraints on discretionary power. In this context, the Court may be reasonably expected to defer largely to the interests, preferences, and expectations of sovereign states in its exercise of discretionary power.

This analysis has demonstrated that while evidentiary discretion – particularly its exercise in the determination of the standard of proof – is essential to the Court's decision-making but is fundamentally constrained by its institutional mandate, the requirement of state consent, and the broader legal and normative context. It highlights the Court's dynamic and context-sensitive approach to evidentiary thresholds, moving beyond rigid or formulaic interpretations. These foundational insights provide a critical framework for examining how evidentiary discretion operates as a matter of judicial practice.

5. ‘Fully Conclusive’ and ‘Conclusive’ Evidence for Grave Charges

5.1 Introduction

This chapter examines the Court’s practice of aligning the standard of proof with the gravity of the charge. Building on the general framework in earlier chapters, the chapter turns to the Court’s judicial practice and undertakes a case study of the Court’s approach to the determination of the standard of proof in cases involving ‘grave’ charges. The Court has required either ‘conclusive’ or ‘fully conclusive’ evidence for more serious allegations. It has elaborated this approach in a relatively limited number of cases, across two categories: in four cases relating to the use of force,⁶⁴¹ and further in two cases involving charges under the Genocide Convention.⁶⁴² These cases reflect a differentiated standard of proof, which is shaped not only by the seriousness of the charge but also by the wider legal and political ramifications of a finding of responsibility.

The Court has not yet clarified what types of charges it considers ‘grave’ for evidentiary purposes, even though it has relatively consistently required a stringent standard of proof in cases involving more serious allegations. In each of the cases where the Court has taken this approach, the allegations in question have involved breaches of preemptory norms of international law. In the *Corfu Channel* case, for instance, the Court highlighted the seriousness of minelaying and the resulting damage to warships.⁶⁴³ In the string of cases relating to the use of force – *Nicaragua*, *Oil Platforms*, and *Armed Activities* – the gravity of

⁶⁴¹ As discussed in *Chapter 5.3*.

⁶⁴² As discussed in *Chapter 5.4*.

⁶⁴³ *Corfu Channel* (n 5) p. 17, that ‘[a] charge of such exceptional gravity against a State would require a degree of certainty which has not been reached here’.

the allegations is implied through detailed descriptions of the alleged violations and the Court's cautious treatment of evidence.⁶⁴⁴ In the *Bosnia Genocide* and *Croatia Genocide* cases, the Court explicitly acknowledged the gravity of the allegations – both through its evidentiary reasoning and its characterisation of the charges as exceptionally severe – while drawing parallels to the evidentiary standards applied in international criminal proceedings.⁶⁴⁵

It has been suggested that the notion of 'grave' charges broadly corresponds to the concept of 'serious' breaches of international law which is been elaborated in the law of state responsibility.⁶⁴⁶ To meet the threshold of seriousness under this framework, the breach must pertain to an obligation under a peremptory norm of international law and involve a gross or systematic failure by a state to fulfil that obligation.⁶⁴⁷ While acts of genocide arguably always meet this threshold, a minor incident involving force would not necessarily qualify as 'serious' because it does not fulfil the 'gross' and 'systematic' requirements.⁶⁴⁸ The characterisation of a breach as 'serious' not only triggers specific legal consequences for the wrongdoing state, but a set of collective obligations for the international community, including those of non-recognition, non-assistance, and co-operation.⁶⁴⁹ In this respect, the Court's designation of a 'grave' charge for evidentiary purposes can be understood as a means of justifying a more stringent standard of proof, particularly where the allegation would entail severe legal or political consequences for the respondent state. Heightening the standard in such cases serves to protect states from these consequences unless there is sufficient evidence, though the judicial practice

⁶⁴⁴ Green (n 102) 168–174; and, more generally, O'Connell (n 102). See also the discussion on the Court's jurisprudence relating to the use of force in *Chapter 5.3*.

⁶⁴⁵ See, for example, *Bosnia Genocide* (n 5) para. 293, where the Court underscored the 'stigma' attached to a finding of responsibility for genocide by citing a passage from a prior judgment of the ICTY, relating to the establishment of individual criminal responsibility.

⁶⁴⁶ *Del Mar* (n 23) 107, who underscores that the notion of gravity, for evidentiary purposes, closely corresponds to, but does not completely mirror, the legal test for 'serious breaches of peremptory norm' as elaborated in Article 41 of ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/76/10, Chapter IV, Section E, Item 1 (hereafter ARSIWA).

⁶⁴⁷ Article 40 ARSIWA (n 646).

⁶⁴⁸ See, for example, Paolo Gaeta, 'The Character of the Breach' in James Crawford and others (eds), *The law of international responsibility* (Oxford University Press 2010) 425–426.

⁶⁴⁹ Article 41 ARSIWA (n 646).

of the Court suggests that gravity is one of several interests relevant for the determination of the standard of proof.

While the Court's approach to the standard of proof in cases involving 'grave' charges is generally understood as consistent, a closer look at judicial practice reveals that there is variation both in the terminology used to articulate the evidentiary threshold, and in the stringency of the standard. This suggests that even within this category of cases, the Court adjusts the standard of proof that reflects a wider range of interests in each case. In cases under the Genocide Convention, the court has required 'fully conclusive' evidence for allegations concerning the commission of genocide, and the lower threshold of 'evidence at 'a high degree of certainty' for failure to prevent or punish acts of genocide.⁶⁵⁰ By contrast, in cases relating to the use of force, the Court has used less explicit language when characterising the gravity of the allegations, articulating a standard of proof at 'conclusive', and occasionally 'convincing', evidence.⁶⁵¹ This differentiation, while not formally recognised by the Court, indicates that the standard of proof is influenced not only by the gravity of the allegation, but by a wider set of contextual factors, including the normative status of the obligation and the potential severity of the consequences attached to a finding of responsibility.

The Court's references to both 'conclusive' and 'fully conclusive' evidence for the standard of proof are central to this chapter. While this category of cases is currently limited in scope,⁶⁵² the recent increase in cases involving allegations of similarly grave violations – many of them politically sensitive and factually contested⁶⁵³ – underscores the relevance of this area of judicial practice.⁶⁵⁴ This chapter undertakes a qualitative analysis of cases involving 'grave' charges, examining how the Court articulates and applies standards of proof in cases of this nature, and identifying the factors that shape its reasoning. While this chapter draws on the Court's explicit references to the standard of proof, these

⁶⁵⁰ *Bosnia Genocide* (n 5) paras. 209-210.

⁶⁵¹ Compare to *Green* (n 102) 172–174.

⁶⁵² See the discussion of the quantitative overview in *Chapter 1.3.2.1*. See also the *Appendix: Evidentiary Standards in ICJ Contentious Cases*.

⁶⁵³ As discussed in *Chapter 1.1*, this includes pending cases under the Genocide Convention (n 4). In these cases, notably the recent *South Africa v. Israel* (n 7), the disputes relate not only to the legal qualification but also to the existence of certain facts.

⁶⁵⁴ This appears to be a general trend in international adjudication. In respect of the ICJ, see the comments made in Speech of H.E. Judge Joan E. Donoghue, President of the International Court of Justice, at the 73rd session of the International Law Commission (n 281).

expressions are interpreted critically and in context. The discussion considers not only the language used in judgments, but also the procedural, legal, and institutional setting in which that language is embedded. It examines how the Court identifies a charge as ‘grave’ for evidentiary purposes, the standards applied in such cases, and how evidentiary discretion is exercised considering the relevant legal and political stakes.⁶⁵⁵

Chapter 5.2 traces the emergence of the Court’s approach to grave charges in the *Corfu Channel* case. This is followed in Chapter 5.3 by the first part of the case study, which considers the requirement of ‘conclusive’, or ‘convincing’ evidence, in cases involving allegations of the use of force. These cases include the *Nicaragua*, *Oil Platforms*, and *Armed Activities* cases. Chapter 5.4, the second part of the case study, considers the requirement of ‘fully conclusive’ evidence in cases brought under the Genocide Convention, namely, the *Bosnia Genocide* and *Croatia Genocide* cases. Finally, Chapter 5.5 concludes.

5.2 The *Corfu Channel* Case: ‘Charges of Exceptional Gravity’

The Court’s practice of aligning the standard of proof with the gravity of the charge was first articulated in the *Corfu Channel* case. As the first case decided by the Court on the merits in 1949, the *Corfu Channel* case marked a revival of the ‘world court’ as a forum for international dispute settlement following the wartime hiatus and the transition from the PCIJ to the newly established ICJ.⁶⁵⁶ The case not only signalled the emergence of the ICJ as a central forum for peaceful settlement, but also laid down a set of foundational principles of

⁶⁵⁵ See the methodological discussion in *Chapter 1.3.2.2*.

⁶⁵⁶ See, for example, Hector A Munro, ‘The Corfu Channel Case: Judgment on the Preliminary Objection’ (1947) 10 *The Modern Law Review* 363, 363, suggesting that the institution of judicial proceedings following the incidents in the Corfu Channel, as opposed to ‘anarchic reprisals, bombardments of the Albanian coast, and demands for indemnities’ signalled a change in international law in favour of third party judgment, ‘transforming a serious political embroilment into a legal issue, and incidentally giving a lesson in the way to stop war.’

international law in the post-war period. These included key developments in both substantive law and the procedural law of the Court.⁶⁵⁷

As a matter of substance, the *Corfu Channel* case related to a dispute between the United Kingdom and Albania following a series of incidents that took place in the Corfu Channel in 1946. On 15 May 1946, British warships passing the Corfu Channel came under fire from Albanian coastal fortifications, which prompted a diplomatic dispute over the right to innocent passage.⁶⁵⁸ Later, on 22 October 1946, three British warships again transited the Corfu Channel, with a view to testing the right of innocent passage, and struck mines, causing serious damage and the deaths and injuries of British naval personnel. Tensions escalated after the United Kingdom conducted a unilateral minesweeping and evidence-gathering operation in Albanian territorial waters on 13 November 1946, without Albania's consent.⁶⁵⁹ Following the UNSC recommendation for the immediate referral of the dispute to the ICJ,⁶⁶⁰ the United Kingdom instituted proceedings against Albania on 22 May 1947.⁶⁶¹ Although Albania initially protested the lack of any *compromis*, it eventually agreed to appear before the Court and a memorandum of understanding was subsequently concluded between the parties once the Court had affirmed its jurisdiction.⁶⁶² In its application, the United Kingdom thus alleged that Albania had incurred responsibility by failing to respect the right of innocent passage through an international strait, grounded in customary international law.⁶⁶³ It contended that the minefield encountered by its warships had been deliberately and

⁶⁵⁷ On the role of *Corfu Channel* case for the development of international law, see further MA Fitzmaurice, 'The Corfu Channel Case and the Development of International Law' in Nisuke Ando and others (eds), *Liber Amicorum Judge Shigeru Oda* (BRILL 2022) 119 ff.

⁶⁵⁸ For a description of the events, see Munro (n 656) 370–371.

⁶⁵⁹ *Corfu Channel* (n 5) pp. 12–13.

⁶⁶⁰ UNSC Res. 22 (9 April 1947) UN Doc. S/RES/22, which related to 'incidents in the Corfu Channel', recommending the immediate referral of the dispute to the ICJ.

⁶⁶¹ See the United Kingdom's application instituting proceedings at the Court, *Corfu Channel (United Kingdom v. Albania)* (Application Instituting Proceedings) [1947] <<https://www.icj-cij.org/case/1>> accessed 1 August 2025.

⁶⁶² *Corfu Channel (United Kingdom v. Albania)* (Preliminary Objections) [1948] ICJ Rep 15. For a contemporaneous discussion on the Court's judgment on preliminary objections and the scope of its jurisdiction, see also Harding F Bancroft and Eric Stein, 'The Corfu Channel Case: Judgment on the Preliminary Objection' (1949) 1 *Stanford Law Review* 646, 654–657.

⁶⁶³ *Corfu Channel* (n 5) pp. 10–11. While the United Kingdom had in its earlier submissions invoked 'general principles of humanity', alongside conventions concerning naval mines, it did not pursue these at the merits stage of the proceedings.

recently laid by Albania itself, or alternatively, by a third state acting with Albania's knowledge and complicity.⁶⁶⁴

In its judgment, the Court found that Albania had knowledge of the minefield and had failed to warn the United Kingdom of the danger, thereby breaching its obligations under international law. The judgment emphasised that this duty to warn was grounded not in any specific treaty, but rather in 'elementary considerations of humanity, even more exacting in peace than in war', and in the general obligation not to knowingly permit a state's own territory to be used for acts which may cause harm to other states.⁶⁶⁵ Ultimately, the Court held Albania responsible for the damage which had been caused by the explosion of mines and ordered it to pay compensation to the United Kingdom.⁶⁶⁶ The assessment of the evidence illustrates both the constraints and flexibility in the treatment of evidence, particularly in view of allegations that are serious both from a legal standpoint and given their political context.⁶⁶⁷

While the Court was able to establish on the evidence that the explosions had been caused by the minefield,⁶⁶⁸ it found that the United Kingdom had not provided evidence to support the contention that Albania had laid the mines.⁶⁶⁹ Considering the alternative claim, that the minefield had been laid with the connivance of Albania, the Court was not able to reach a firm conclusion and held that the origins of the minefield thus remained 'a matter for conjecture'.⁶⁷⁰ Although the United Kingdom had failed to prove that Albania itself had laid the mines, the Court held that the mine-laying could not have occurred without Albania's knowledge, given that the Corfu Channel was tightly monitored by Albania at the time.⁶⁷¹ Accordingly, the Court inferred that Albania had such knowledge based on circumstantial evidence and Albania's exclusive control

⁶⁶⁴ *Corfu Channel* (n 5) pp. 10-11.

⁶⁶⁵ *ibid* p. 22.

⁶⁶⁶ *ibid*.

⁶⁶⁷ Nasim Hasan Shah, 'Discovery by Intervention: The Right of a State to Seize Evidence Located within the Territory of the Respondent State' (1959) 53 *American Journal of International Law* 595, 610-612.

⁶⁶⁸ *Corfu Channel* (n 5) pp. 14-15.

⁶⁶⁹ *ibid* pp. 15-16.

⁶⁷⁰ *ibid* pp. 16-17.

⁶⁷¹ *ibid* p. 22. See also p. 19, where the Court notes, *inter alia*, that Albania had the intention of keeping 'a jealous watch on its territorial waters'.

over that part of the Corfu Channel.⁶⁷² It also emphasised that such inferences must constitute the only reasonable explanation consistent with the facts, especially where direct evidence is difficult to access.⁶⁷³

The Court's inference of Albania's knowledge, drawn from circumstantial evidence, highlights the challenges of proving serious allegations where direct proof is difficult to obtain. This framed the Court's articulation of the standard of proof as corresponding to the gravity of the allegation. It pointed to the lack of evidence in view of the allegations, and that the statements it had received in support of some of them could only be regarded as 'allegations falling short of conclusive evidence'.⁶⁷⁴ The Court proceeded to make clear that a stringent standard of proof applied to such allegations, specifically that '[a] charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here'.⁶⁷⁵ While signalling that 'charges of exceptional gravity' would demand a relatively high degree of certainty, the Court did not clearly specify the standard of proof applicable in the case before it.

The Court proceeded to balance the high standard of proof with considerations relating to access to evidence, acknowledging the practical difficulties a victim state may face in obtaining direct proof when evidence lies within the exclusive territorial control of another state. It allowed for a moderated approach and that '[a victim state] should be allowed a more liberal recourse to inferences of fact and circumstantial evidence'.⁶⁷⁶ Given the considerable difficulties for the parties in obtaining the necessary evidence, the Court thus permitted reliance on indirect and circumstantial evidence. It drew conclusions from inferences of fact, if they '[left] no room for reasonable doubt'.⁶⁷⁷ It relied heavily on the findings of a commission of naval experts, which had inspected the site of the explosions and established that they were caused by recently laid mines in a controlled waterway.⁶⁷⁸ This suggests that the 'high degree of certainty' required by the Court represented a stringent evidentiary threshold, reflecting

⁶⁷² *Corfu Channel* (n 5) p. 18, discussing circumstantial evidence and the exclusive territorial control of Albania over the territory where the evidence was located.

⁶⁷³ *ibid.*

⁶⁷⁴ *ibid* p 17.

⁶⁷⁵ *Ibid* p. 17.

⁶⁷⁶ *ibid* p. 18.

⁶⁷⁷ *ibid* pp. 18-20.

⁶⁷⁸ *ibid* pp. 20-23.

not only the seriousness of the allegations but also their status as claims against a State invoking the establishment of state responsibility.

The judgment marked the Court's endorsement of expert reports and reliance on circumstantial evidence, as well as the articulation of a high evidentiary threshold for inferential reasoning, insisting that any inference must be the only reasonable explanation consistent with the facts. As such, the Court's approach can be understood as balancing pragmatic flexibility in the treatment of evidence with the necessary caution in attributing state responsibility. This balance is especially significant in situations marked by asymmetry of access to evidence, where the Court engages in fact-finding under similar constraints. Thus, the seriousness of the allegations appeared to be decisive in the Court's use of a stringent standard of proof.⁶⁷⁹ In particular, it suggests a degree of caution in the establishment of facts for the attribution of international responsibility, emphasising both the gravity of the allegations and the legal and political implications of establishing responsibility. These aspects were highlighted by individual judges in dissenting and separate opinions as imparting a 'quasi-criminal' character to the allegations, distinguishing them from typical breaches of international obligations.⁶⁸⁰ This characterisation mirrors the later efforts to elaborate a regime of international responsibility for 'international crimes of State',⁶⁸¹ which was ultimately abandoned in favour of the current concept of 'serious breaches' of international law.⁶⁸²

The Court's approach in the *Corfu Channel* case exemplifies the emergence of a dual logic that continues to structure its evidentiary practice. On the one hand, a cautious standard of proof tied to the 'exceptional gravity' of allegations,

⁶⁷⁹ Similarly, see *Del Mar* (n 23) 98–101 and 106–108.

⁶⁸⁰ *Corfu Channel (United Kingdom v. Albania)* (Dissenting Opinion of Judge *ad hoc* Ečer [1949] ICJ Rep 115, pp. 115-116, suggesting that the accusations were of a 'definitely criminal character' and pointing out that 'the International Court is not a criminal court'.

⁶⁸¹ During its project on state responsibility, the ILC attempted to classify certain breaches of international law as 'international crimes of State', which was later abandoned due to the conceptual difficulties of understanding breaches of international law as 'crimes'. See Article 19, ILC, 'Draft Articles on State Responsibility for Internationally Wrongful Acts' (1996), UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2). On this, and closely related concepts, see also generally Giorgio Gaja, 'Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts' in Antonio Cassese and others (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 2011) 151 ff.

⁶⁸² See Articles 40-41 of ARSIWA (n 646), which avoid the language of criminal law but retain the special consequences attached to certain types of breaches.

and, on the other hand, a flexible approach to the application of that standard, acknowledging that the respondent state held exclusive control over certain materials. This tension reflects institutional priorities, such as distributing the risks associated with wrongful attribution of international responsibility in cases where reputational stakes are high, balanced against fairness-based pragmatism that demands evidentiary thresholds be feasible given the structural limitations in the Court's fact-finding. At the same time, the Court demonstrated flexibility by adjusting the stringent standard of proof to the specific circumstances of the case, acknowledging the practical difficulties in furnishing direct proof of facts and thereby allowing reliance on indirect and circumstantial evidence. This pragmatism likely reflects the Court's context-sensitive approach to the standard of proof. The Court's drawing of inferences from indirect or circumstantial evidence, despite formally maintaining a high standard of proof, signals a functional response to this dilemma, even if it was not fully articulated in *Corfu Channel*. While the case shaped the Court's approach to the standard of proof for grave charges, it left open when an allegation rises to the level of 'exceptional gravity' and how this more concretely affects the evidentiary threshold. This ambiguity introduced a degree of uncertainty that has influenced the Court's evidentiary reasoning in subsequent cases, as explored in the case studies that follow.

5.3 Use of Force Cases: 'Conclusive' Evidence

Following its articulation of a stringent standard of proof in the *Corfu Channel* case, the Court has adopted a less explicit approach in the series of subsequent cases relating to the use of force.⁶⁸³ In this category, there are three main cases where allegations involving the unlawful use of force, or self-defence claims, formed part of the principal claim or were otherwise central: *Nicaragua*, where the non-appearance of the United States led the Court to carefully set out its approach to matters of evidence, albeit without making the standard of proof explicit;⁶⁸⁴ *Oil Platforms*, in which the Court considered a self-defence claim within the limited framework of the alleged breach of a bilateral treaty, and held that the evidence was 'indicative' and 'highly suggestive', but not

⁶⁸³ On the lack of clarity in the Court's reasoning, see, for example, Green (n 102) 178–179.

⁶⁸⁴ *Nicaragua* (n 108). See the discussion in *Chapter 5.3.1*.

‘conclusive’ in view of the allegations;⁶⁸⁵ and, finally, *Armed Activities*, which required the Court to assess complex facts with the application of a standard of ‘convincing’ evidence alongside a lower, yet still unarticulated, threshold for alleged violations of human rights.⁶⁸⁶ These cases are examined in turn.

5.3.1 *Nicaragua*: ‘Clear and Convincing’ Evidence

In *Nicaragua*, the Court faced complex allegations of unlawful use of force and violations of sovereignty arising from the United States’ extensive support to armed military and paramilitary groups operating in and against Nicaragua.⁶⁸⁷ The Court’s assessment of the factual basis of the claims was further complicated by the political context surrounding the dispute, and the subsequent decision of the United States to withdraw from the proceedings.⁶⁸⁸ While the Court did not articulate a clearly identifiable standard of proof, its references to the evidence as ‘sufficient’, ‘conclusive’, or ‘convincing’ suggest the application of a relatively stringent standard of proof.

5.3.1.1 *Situating the Case*

The *Nicaragua* case arose against the backdrop of the activities of the *contras*, opponents of the then incumbent Sandinista government in Nicaragua, who in 1981 launched a guerrilla insurgency movement and which received different forms of support from the United States.⁶⁸⁹ The events unfolded within the geopolitical context of the Cold War, during which the United States actively backed anti-communist armed opposition movements across Central America and sought to destabilise the socialist Sandinista government.⁶⁹⁰ Moreover, the

⁶⁸⁵ *Oil Platforms* (n 108). See also the discussion in *Chapter 5.3.2*.

⁶⁸⁶ *Armed Activities* (n 108). See also the discussion in *Chapter 5.3.3*.

⁶⁸⁷ *Nicaragua* (n 108) para. 15. See further *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Application Instituting Proceedings) [1984] <<https://www.icj-cij.org/case/70>> accessed 4 August 2025.

⁶⁸⁸ *Nicaragua* (n 108) para. 57, in which the Court underscores that one of its ‘chief difficulties’ in the case was the determination of the facts relevant to the dispute.

⁶⁸⁹ *ibid* paras. 18-20.

⁶⁹⁰ See, for example, United States Department of State, ‘*Revolution Beyond Our Borders*’: *Sandinista Intervention in Central America*, Special Report No. 132 (September 1985), in which the United States justified its policies in Central America by alleging Nicaraguan interventionism in neighbouring countries, framing Nicaragua as a regional threat aligned with Soviet interests. The document had already been circulated within the UN.

case can be seen as part of a broader effort to address concerns over United States extraterritorial actions at a time when political or diplomatic avenues may have been limited or ineffective, highlighting the politically sensitive context in which the dispute was brought before the Court.⁶⁹¹ Nicaragua thus invoked the responsibility of the United States for its direct and indirect forms of support to military and paramilitary groups operating in and against Nicaragua. The allegations included US' support in the recruitment, training, arming, financing, and supporting the actions of those groups, as indirect forms of support, alongside several instances of direct intervention by United States state organs in Nicaragua's internal affairs. Nicaragua alleged multiple violations by the United States, including breaches of treaty and customary international law in view of the unlawful use of force, unlawful intervention in internal affairs, infringements on sovereignty, and violations of obligations under the UN Charter and regional agreements.⁶⁹²

One of the defining features of adjudication was the United States decision to terminate its acceptance of the Court's compulsory jurisdiction under Article 36(2) of the ICJ Statute,⁶⁹³ and to subsequently withdraw from the proceedings after the Court rejected its preliminary objections, resulting in the case continuing despite the absence of the United States. The United States' non-appearance required the Court to ensure that the claims were 'well founded' in fact and law, as mandated by Article 53 of the ICJ Statute for non-appearance cases.⁶⁹⁴ This may have prompted the Court to adopt a more explicit approach to evidentiary matters, requiring greater clarity and transparency in its judicial reasoning to maintain the legitimacy of the ensuing judgment. Without the adversarial testing of the evidence, the Court adopted a cautious approach to fact-finding and carefully justified its conclusions while avoiding a precise

⁶⁹¹ For a contemporaneous account of the political context in which the *Nicaragua* case was decided by the Court, see further Abram Chayes, 'Nicaragua, the United States, and the World Court' (1985) 85 *Columbia Law Review* 1445.

⁶⁹² *Nicaragua* (n 108) para. 15. According to Nicaragua's submissions, the United States had violated its express obligations under Article 2(4) of the UN Charter (n 45), as well as a string of obligations under other international instruments.

⁶⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction of the Court and Admissibility of the Application) [1984] ICJ Rep 392, paras. 52-64, where the Court found that the United States notice of termination would require six months' notice, and that the withdrawal of its acceptance of compulsory jurisdiction could not retroactively invalidate Nicaragua's earlier application.

⁶⁹⁴ Under Article 53 of the ICJ Statute (n 39), the Court may decide a case despite the absence of one of the parties, provided the claims are 'well founded in fact and law'.

articulation of the standard of proof. The combination of the case's complexity, political sensitivity, and the United States' absence further heightened the need for rigorous assessment of both the legal claims and the supporting evidence.⁶⁹⁵

At the merits stage of the proceedings, the Court was called upon to determine whether the United States' actions, including its support for the *contras*, and direct forms of intervention in Nicaragua, violated the prohibition of the use of force and the principle of non-intervention.⁶⁹⁶ The case raised several salient legal issues relating to, *inter alia*, whether a state can incur responsibility for breaches of the principles of the non-use of force and non-intervention through its support for armed opposition groups operating in and against the territory of another state, the standards for the attribution of conduct of such non-state actors to a state, and the applicability of customary international law principles relating to the non-use of force and non-intervention in proxy conflicts.

5.3.1.2 Evidence and Proof

The evidential aspects of the *Nicaragua* case were shaped not only by the complexity of the factual allegations, but also by the absence of the United States at the merits.⁶⁹⁷ Although the United States had been engaged in the written phase of the proceedings, its subsequent withdrawal left Nicaragua's claims unopposed during the oral proceedings.⁶⁹⁸ The Court underscored in this connection that the United States' absence meant that it would have to

⁶⁹⁵ The evidentiary challenges due to the non-appearance of the United States prompted debates as to the Court's capacity of handling politically sensitive, fact-intensive disputes, especially in the absence of one of the parties. See Lori Fisler Damrosch, 'The Impact of the *Nicaragua* Case on the Court and Its Role: Harmful, Helpful, or In Between?' (2012) 25 *Leiden Journal of International Law* 135, 111–115, highlighting concerns that the Court relied too heavily on Nicaragua's submissions without sufficiently rigorous scrutiny, risking perceptions of bias and undermining its credibility; and Highet (n 102) 8–13 and 15–18, offering a critical, United States-aligned view, arguing that the Court inadequately tested the evidence, accepted politicised or uncorroborated material, and applied inconsistent evidentiary standards, raising questions about judicial activism and requirements of the Court's impartiality in carrying out its judicial function. For a more measured take on the Court's approaches to evidence in the *Nicaragua* case, see Reichler (n 102).

⁶⁹⁶ *Nicaragua* (n 108) para. 15.

⁶⁹⁷ Reichler (n 102) 239.

⁶⁹⁸ *ibid* 239 and further 250–251, highlighting the challenges of fact-finding in this context and adjudicating a politically charged dispute, without the full participation of one party at the merits stage of the proceedings, raising general concerns as to the Court's ability of making factual findings in a fair and reliable manner consistent with the general principles of the judicial process.

‘satisfy itself’ that the claims were ‘well founded’ both in fact in law under Article 53 of the ICJ Statute, but otherwise applying the same degree of certainty as required in previous cases.⁶⁹⁹ The Court acknowledged that determining the facts presented one of the ‘chief difficulties’ of the case, citing the marked disagreement between the parties, the absence of the United States as the respondent, and the secretive nature of many of the alleged wrongful acts, significantly complicating the process of fact-finding and attribution of conduct.⁷⁰⁰ It also noted the on-going nature of the conflict in Central America, posing additional challenges for determining the temporal scope of its findings. Thus, the Court limited its determinations of facts to events that occurred prior to the close of the oral proceedings, excluding subsequent developments.⁷⁰¹

The evidential basis for Nicaragua’s claims consisted mainly of documentary materials, such as official reports, witness statements, maps, and reports by international organisations and non-governmental organisations (NGOs), and selected journalistic and academic sources.⁷⁰² In particular, Nicaragua relied on a series of public statements by United States officials and former members of the *contras* to demonstrate United States support for armed opposition groups and the United States’ own involvement through its state organs in the mining of Nicaraguan harbours.⁷⁰³ During its initial engagement in the judicial proceedings at the Court, the United States submitted materials including intelligence reports and regional security assessments, on the basis of which it argued that Nicaragua had interfered in the internal affairs of neighbouring states, framing its own actions as part of a collective self-defence strategy.⁷⁰⁴

The considerable difficulties in establishing the facts prompted the Court to articulate its evidentiary approach with particular care and to develop distinct criteria for evaluating the materials.⁷⁰⁵ These challenges were compounded by the covert nature of many of the acts, which precluded direct knowledge and

⁶⁹⁹ *Nicaragua* (n 108) para. 29.

⁷⁰⁰ *ibid* para. 57.

⁷⁰¹ *ibid* para. 58.

⁷⁰² *ibid* paras. 62-64.

⁷⁰³ *ibid* para. 64.

⁷⁰⁴ See, for example, *Hight* (n 102) 6–7.

⁷⁰⁵ *Nicaragua* (n 108) para. 59, in which the Court explains that it is bound by the rules of the ICJ Statute (n 39) and the 1978 Rules of Court (n 44), which are ‘devised to guarantee the sound administration of justice, while respecting the equality of the parties’. See further Reichler (n 102).

required the Court to draw inferences from the surrounding circumstances and available documentation.⁷⁰⁶ The Court underscored that it was bound by its own Statute and Rules relating to evidence, ‘provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties’, and noting its obligations under Article 53 to ‘employ whatever means necessary’ to satisfy itself that the claims were ‘well founded’ in both fact and in law.⁷⁰⁷ It thus emphasised its active role for the assessment of evidence and underscored the principle of free evaluation, that ‘within the limits of its Statute and Rules, [the Court] has freedom in estimating the value of the various elements of evidence’, while remaining guided by the general principles of judicial procedure.⁷⁰⁸ The Court stated that press reports and book excerpts would be treated with caution unless the facts were of public notoriety;⁷⁰⁹ that particular weight would be given to admissions against interest and to statements by state officials;⁷¹⁰ that greater credibility would be attributed to testimony from disinterested or neutral sources than to partisan accounts;⁷¹¹ and that oral and written witness statements would be subject to judicial scrutiny to compensate for the absence of cross-examination throughout the judicial proceedings.⁷¹² It also indicated that certain documents which had not formally submitted as evidence could be taken into account if they had been officially circulated within the UN. In particular, the Court considered the United States State Department’s 1985 Report *‘Revolution Beyond Our Borders’*, and noted that Nicaragua was aware of its contents, beyond its official circulation within both domestic and international settings.⁷¹³

Although the *contras* had received extensive support from the United States, following the assessment of the evidence the Court found that their actions could not be attributed to the United States for the purposes of establishing

⁷⁰⁶ *Nicaragua* (n 108) para. 57, where the Court pointed out the ‘secrecy in which some of the conduct attributed to one or other of the Parties has been carried on’, making it more difficult for the Court to establish the facts and determine their imputability.

⁷⁰⁷ *ibid* para. 59.

⁷⁰⁸ *ibid* para. 60.

⁷⁰⁹ *ibid* para. 63. On facts which are deemed part of public knowledge, see also the cited *United States Diplomatic and Consular Staff in Tehran* (n 282) para. 12.

⁷¹⁰ *Nicaragua* (n 108) para. 64.

⁷¹¹ Reichler (n 102) 244–248.

⁷¹² *Nicaragua* (n 108) paras. 65–66.

⁷¹³ *ibid* para. 73. See also *Revolution Beyond Our Borders* (n 690).

state responsibility. It rejected Nicaragua's claims that the United States had exercised overall control over the contras, emphasising that under the substantive law of state responsibility, mere significant participation was insufficient for attribution. The Court thus made clear that 'effective control' over specific military operations was the decisive threshold for holding a state responsible for the conduct of non-state actors.⁷¹⁴ Nonetheless, the Court was able to hold the United States directly responsible for the mining of Nicaraguan harbours through the Central Intelligence Agency, a state organ, as well as for specific *contra* operations involving direct participation of US agents.⁷¹⁵ It also rejected the United States' claims of collective self-defence, after finding that the mining, trade embargo, and propaganda violated international law.⁷¹⁶

While the Court was somewhat explicit in its approach to evaluating evidence, it did not articulate a formal standard of proof. It instead considered whether facts had been 'established' by the evidence,⁷¹⁷ and if that evidence could be considered 'sufficient' to serve as proof of those facts.⁷¹⁸ In this respect, the Court held that '[d]espite the large quantity of documentary evidence and testimony' submitted by both parties, it was not 'satisfied' on the available evidence that the United States had created the *contras* in Nicaragua.⁷¹⁹ The Court did not clearly articulate a standard of proof beyond the 'sufficiency' of evidence, and did not draw the line to 'insufficient' evidence in the case before it.⁷²⁰ The Court's reasoning in *Nicaragua* suggests the application of a relatively stringent standard of proof, one that is arguably consistent with the approach in the *Corfu Channel* case, approximating a requirement of 'clear and convincing' evidence.⁷²¹ For instance, in assessing a claim of the United States that its intervention was justified by an armed attack against one of Nicaragua's neighbouring states, the Court stated that it 'must attain some degree of

⁷¹⁴ *Nicaragua* (n 108) paras. 109-115, where the Court established that 'effective control' under Article 8 of ARSIWA (n 646) sets a high threshold for attribution, reflecting the exceptional nature of attribution of responsibility on that basis.

⁷¹⁵ *Nicaragua* (n 108) paras. 242-243.

⁷¹⁶ *ibid* para. 268.

⁷¹⁷ *ibid* paras. 80, 86, 92, 106-108, 111 and 118.

⁷¹⁸ *ibid* paras. 106, 108 and 110

⁷¹⁹ *ibid* para. 106.

⁷²⁰ The lack of clarity as to the standard of proof led to significant criticism. See, for example, Green (n 102) 178-179.

⁷²¹ See *ibid* 172. See also Highet (n 102) 40-41; and Brown (n 22) 100.

certainty' and ensure that 'the facts on which it is based are supported by convincing evidence'.⁷²² Moreover, it indicates that even when evaluating a counterargument that could shift the burden of proof to the respondent during the course of proceedings, the Court applied a high evidentiary threshold. Similarly, it pointed to the absence of 'clear' evidence regarding the degree of control exercised by the United States over the contras, reinforcing the stringency of the standard for attributing state responsibility.⁷²³

At the same time, the Court appeared to make adjustments in the application of the standard of proof by allowing recourse to inferences of fact, in this way acknowledging the difficulties Nicaragua faced in obtaining direct evidence of the involvement of the United States in the activities of the armed groups.⁷²⁴ However, this approach was insufficient to alleviate Nicaragua's evidentiary burden, given the Court's reliance on the stringent 'effective control' criterion with a demanding standard of proof, which resulted in the evidence being deemed 'insufficient'⁷²⁵ or 'inconclusive'⁷²⁶ to establish the effective control required for the attribution of conduct. Taken together, the Court's evaluation of the evidence and its emphasis on the need for facts to be supported by convincing evidence or to meet a threshold of certainty suggest that a high standard of proof was required. While the Court's approach reflected a degree of flexibility in practice, the articulation of the evidentiary threshold remained ambiguous. This indeterminacy was shaped by the gravity and complexity of the interests at stake, encompassing both state responsibility and the broader geopolitical context of the dispute. It is also a pattern that can be observed in subsequent cases, underscoring persistent uncertainty regarding the precise standard of proof applied in proceedings also involving 'grave' allegations.⁷²⁷

⁷²² *Nicaragua* (n 108) para. 29.

⁷²³ *ibid* para. 109.

⁷²⁴ *Hight* (n 102) 34–36. This approach is like that taken by in *Corfu Channel* (n 5), where the Court allowed adjustments to the otherwise high standard of proof. See further the discussion of the *Corfu Channel* judgment in *Chapter 5.2*.

⁷²⁵ *Nicaragua* (n 108) paras. 110, 115, 159–160 and 216.

⁷²⁶ *ibid* para. 138, that the Court 'cannot regard as conclusive'.

⁷²⁷ For an overview of these cases, see *Green* (n 102) 172–173.

5.3.2 *Oil Platforms*: ‘Conclusive’ Evidence

In the *Oil Platforms* case, the Court followed a largely similar approach to that it employed in *Nicaragua*. The case concerned alleged breaches of the bilateral 1955 Treaty of Amity between the United States and Iran.⁷²⁸ However, the Court also addressed questions relating to the right of self-defence, albeit indirectly, as the United States had invoked self-defence as a justification for the alleged actions which Iran claimed had violated the Treaty of Amity. Notably, the Court did not clarify what standard of proof it had applied in view of those claims.⁷²⁹ It merely held that the evidence was ‘indicative’, but not ‘sufficient’,⁷³⁰ and that it was ‘highly suggestive’, but not ‘conclusive’.⁷³¹

5.3.2.1 *Situating the Case*

The *Oil Platforms* case arose out of a dispute between Iran and the United States which resulted from two incidents in which US naval forces had attacked Iranian oil production facilities in the Persian Gulf.⁷³² The attacks occurred in 1987 and 1988 during the latter stages of the ‘Tanker War’, a sub-conflict within the broader Iran-Iraq War, amid regional instability and the United States’ broader strategic objective of securing freedom of navigation in the Persian Gulf. During the so-called ‘Tanker War’ between 1984 and 1988, the conflict between Iran and Iraq extended into the Persian Gulf, disrupting commercial navigation along this critical international shipping route. Both Iran and Iraq attacked vessels, including those of neutral states, which led to widespread damage and heightened tensions. The United States attributed several such incidents to Iran, which in turn accused Iraq. Several states, including the United States, responded by taking steps to ensure maritime security in the region.⁷³³ Despite being heard some years after the contested

⁷²⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Application Instituting Proceedings) [1992] <<https://www.icj-cij.org/case/90>> accessed 4 August 2025; and further *Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran* (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 93 (hereafter Treaty of Amity).

⁷²⁹ For a critique of the Court’s judgment in this case, see Green (n 95).

⁷³⁰ *Oil Platforms* (n 108) para. 61.

⁷³¹ *ibid* para. 71.

⁷³² *ibid* paras. 18-20.

⁷³³ On the general background to the dispute, see *Oil Platforms* (n 108) paras. 23-24.

events, the broader context of armed conflict amplified the significance of the Court's factual determinations.

The first of the attacks, which took place on 19 October 1987, destroyed the Reshadat oil platform and damaged another, interrupted oil production for several years. The second attack, on 18 April 1988, formed part of the broader United States' 'Operation Praying Mantis' and resulted in the destruction of additional oil platforms, including Resalat and Sirri.⁷³⁴ The United States justified both attacks as acts of self-defence. In respect of the first incident in 1987, it pointed to a missile strike on the *Sea Isle City*, a United States-flagged vessel docked in Kuwaiti waters, which injured six of its crew members and which the United States attributed to Iran.⁷³⁵ In respect of the second incident, four days before the second attack, the United States warship *Samuel B. Roberts* struck a mine in international waters near Bahrain, causing severe damage. The United States claimed that the mine had been laid by Iran, justifying its response as an act of self-defence.⁷³⁶ It also argued that a pattern of Iranian threats and hostile acts against United States interests constituted an 'armed attack' under the UN Charter, justifying its actions as self-defence.⁷³⁷

In its application to the Court, Iran held that the attacks on its oil platforms on 19 October 1987 and 18 April 1988 constituted a fundamental breach of the Treaty of Amity between the two states.⁷³⁸ In response, the United States filed a counterclaim seeking damages for a series of alleged Iranian attacks against vessels either flying the United States flag or purportedly owned by United States interests.⁷³⁹ In a decision rejecting the preliminary objections raised by the United States, the Court upheld its jurisdiction under Article X(1) of the Treaty of Amity.⁷⁴⁰ As the Court's jurisdiction rested on the compromissory clause of the Treaty of Amity, the Court's assessment of the case was substantively confined to the determination of whether the United States' actions breached the provisions of the Treaty, particularly the guarantee of

⁷³⁴ *Oil Platforms* (n 108) para. 25.

⁷³⁵ *ibid* para. 52.

⁷³⁶ *ibid* paras. 67-69.

⁷³⁷ *ibid* paras. 18, at (c), and 67, in reference to the United States' letter to the UNSC notifying of its recourse to armed force in self-defence.

⁷³⁸ *Oil Platforms* (n 108) paras. 18-20.

⁷³⁹ *ibid* paras. 18-20.

⁷⁴⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, paras. 53-55.

freedom of commerce and navigation,⁷⁴¹ rather than directly addressing the use of force under general international law. This shaped both the structure of the parties' legal arguments and the Court's approach.

Against this jurisdictional and general legal background to the case, the Court's task was to determine whether there had been a violation of the Treaty of Amity and to identify the appropriate legal consequences. While jurisdiction was substantively limited to the Treaty, both Iran's principal claim and the United States counterclaim related to allegations involving the unlawful use of force.⁷⁴² As such, the Court was required to indirectly assess the lawfulness of the military actions at issue through the Treaty's provisions, particularly the guarantee of freedom of commerce and navigation under Article X(1) and the 'essential security interests' exception under Article XX(1)(d). While the United States did not invoke self-defence as an independent legal claim, it advanced it as a justification for the alleged treaty breaches.⁷⁴³ The Court implicitly, and at times explicitly, engaged with broader legal standards related to the use of force and self-defence.

5.3.2.2 Evidence and Proof

In its determination of whether the United States actions could be justified under Article XX(1)(d) of the Treaty of Amity, which permits measures necessary to protect a state's 'essential security interests', the Court was effectively required to consider the lawfulness of the United States use of force.⁷⁴⁴ Although there was no dispute as to whether the oil platforms had been attacked, the central question was whether these actions could be excused as legitimate exercises of self-defence.⁷⁴⁵ To this end, the Court examined the factual background and sequence of events surrounding each incident, including the alleged threats and prior attacks attributed to Iran.⁷⁴⁶ Its assessment of the evidence and legal standards closely mirrored approaches adopted in earlier cases that addressed the use of force more directly, notably

⁷⁴¹ Article X (1) of the Treaty of Amity (n 728), providing that 'between the territories of the high contracting parties there shall be freedom of commerce and navigation'.

⁷⁴² *Oil Platforms* (n 108) paras. 18-20.

⁷⁴³ *ibid* paras. 21-22.

⁷⁴⁴ *ibid* paras. 40-41.

⁷⁴⁵ *ibid* para. 23.

⁷⁴⁶ *ibid* para. 50.

through detailed scrutiny of the factual circumstances underlying the claimed right of self-defence.⁷⁴⁷

In relation to the first attack on 19 October 1987, the Court considered the United States' claim that its actions were justified either as self-defence under international law, or as measures necessary to protect its essential security interests under Article XX(1)(d) of the Treaty of Amity.⁷⁴⁸ It considered the evidence submitted by both parties regarding a series of alleged Iranian attacks on United States-flagged vessels in the Persian Gulf, focusing on whether these incidents could be characterised as an 'armed attack' attributable to Iran. The Court did not articulate a clear standard of proof for assessing the claims, nor did it set out a detailed framework for weighing the submitted evidence. While it found the material presented by the United States to be 'indicative' of Iran's responsibility, it ultimately deemed that the evidence was 'not sufficient' as proof of the existence of an armed attack.⁷⁴⁹ In respect of the missile strike on the Sea Isle City in Kuwaiti waters, the Court concluded that responsibility could not be conclusively attributed to Iran, and that even if attribution were established, the incidents cited did not meet the threshold of gravity necessary to amount to an 'armed attack' within the meaning of the UN Charter.⁷⁵⁰ The Court's emphasis on the absence of 'persuasive' evidence in view of the allegations thus underscored its cautious, but arguably stringent, approach.⁷⁵¹

Turning to the second attack on 14 April 1988, the United States again invoked self-defence, this time in response to the mining of the *USS Samuel B. Roberts*, which it attributed to Iran.⁷⁵² The Court acknowledged that the United States actions were not isolated incidents but part of *Operation Praying Mantis*, a broader US naval campaign aimed at neutralising Iranian military threats in the Persian Gulf, including strikes on oil platforms alleged to have been used for military purposes.⁷⁵³ In its assessment of the United States claims, the Court found the evidence regarding Iran's responsibility for the minelaying to be

⁷⁴⁷ For an overview, see Green (n 102) 172–173.

⁷⁴⁸ *Oil Platforms* (n 108) para. 25 and 48-50.

⁷⁴⁹ *ibid* paras. 46-59.

⁷⁵⁰ *ibid* paras. 61-64.

⁷⁵¹ *ibid* para. 64.

⁷⁵² *ibid* paras. 65-66.

⁷⁵³ *ibid* paras. 68-69.

‘highly suggestive’, but ultimately ‘not conclusive’.⁷⁵⁴ The Court was similarly ‘not sufficiently convinced’ that the factual record substantiated the existence of an armed attack that would justify a right of self-defence, whether as a discrete incident or as part of a pattern of Iranian conduct.⁷⁵⁵ Even if such an armed attack had occurred, the Court held the United States’ response failed to meet the requirements of necessity and proportionality. The military function of the targeted oil platforms was not established, and the scale of the retaliation was deemed disproportionate.⁷⁵⁶ Thus, the Court rejected the applicability of the Treaty’s essential security exception and proceeded to examine the United States actions given the substantive obligations under the Treaty of Amity.

The Court concluded that the United States had failed to discharge the burden of proof required to substantiate a right of self-defence in respect of either of the two incidents. Turning to the question of United States’ responsibility for the attacks on the Iranian oil platforms, the Court did not find a breach of the provisions of the Treaty of Amity and did not uphold Iran’s contentions.⁷⁵⁷ As for the United States’ counterclaim, the Court found that the evidence did not establish that the alleged Iranian attacks had interfered with the maritime commerce that was protected under the Treaty of Amity, without articulating a formal threshold of evidence. It referred to certain facts forming part of the ‘public record’ and underscored that this factual context alone was not ‘sufficient’ to determine a breach of the Treaty.⁷⁵⁸

The applicable standard of proof was not clarified by the Court in its judgment, either in relation to the principal claim or the counterclaim. While it found that the United States had failed to provide sufficient evidence to establish a right of self-defence, the judgment did not articulate the evidentiary threshold applied in reaching that conclusion.⁷⁵⁹ This reflects broader concerns among

⁷⁵⁴ *Oil Platforms* (n 108) para. 71.

⁷⁵⁵ *ibid* para. 76.

⁷⁵⁶ *ibid* paras. 77-78.

⁷⁵⁷ *ibid* para. 100.

⁷⁵⁸ *ibid* paras. 123-124.

⁷⁵⁹ This lack of transparency drew criticism, among others, from Judge Higgins in a Separate Opinion, where she pointedly observed that the Court ‘should make clear... what standards of proof it requires to establish what sorts of facts’. See *Oil Platforms* (Separate Opinion of Judge Higgins) (n 24) para. 33.

commentators about the Court's failure to articulate a clear evidentiary threshold, particularly in cases involving the use of force.⁷⁶⁰

Although the dispute in *Oil Platforms* was formally framed in terms of a breach of the Treaty of Amity, the gravity of the underlying self-defence claim may have led the Court to apply a more exacting standard of proof. This stricter threshold appeared to govern its assessment of the United States' counterargument that the attacks were lawful acts of self-defence and thus consistent with its treaty obligations. The Court's cautious evidentiary approach illustrates how serious allegations, especially those implicating the use of force, can prompt the application of a more rigorous standard, even absent a formal claim of responsibility. While the counterclaim did not entail direct legal consequences for Iran, the Court's insistence on 'conclusive' evidence suggests a more demanding standard of proof than the balance of probabilities, aligning with its practice in *Nicaragua* and *Corfu Channel*.⁷⁶¹ It also raises questions about the allocation of the burden of proof, and whether the state invoking force is subject to a heightened or even reversed evidentiary burden. The case thus reflects a broader pattern in the Court's jurisprudence: as the legal and political gravity of a claim increases, so too does the evidentiary bar, even if the applicable standard is implicit.

5.3.3 *Armed Activities*: 'Convincing' Evidence

The *Armed Activities* case between the Democratic Republic of the Congo (DRC) and Uganda involved a series of allegations arising from Uganda's military intervention on the territory of the DRC.⁷⁶² The case was particularly complex due to the multifaceted legal issues involved, the protracted nature of the underlying armed conflict, and the broader geopolitical context which was marked by regional instabilities as well as military occupation. The Court explicitly acknowledged 'the complex and tragic situation [that had] long prevailed in the Great Lakes region', including the suffering of the local population and the wider regional instability with security implications for

⁷⁶⁰ See, for example, Green (n 95).

⁷⁶¹ Green (n 102) 172, who observed that both the *Nicaragua* and *Oil Platforms* judgments reflect a consistent approach to evidentiary issues, suggesting the use of a 'clear and convincing evidence' standard. See also the discussions in *Chapters 5.2 and 5.3.1*.

⁷⁶² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/116>> accessed 4 August 2025.

neighbouring states, emphasising that while ‘the factional conflicts within the DRC require a comprehensive settlement to the problems of the region’, its own role was confined to resolving the specific legal dispute before it.⁷⁶³ These factors significantly heightened the challenges faced by the Court in evaluating the facts and determining responsibility for the alleged violations.⁷⁶⁴ While the Court appeared to require ‘convincing’ evidence,⁷⁶⁵ it employed a range of expressions to describe that threshold, including whether the evidence was ‘weighty and convincing’,⁷⁶⁶ ‘persuasive’,⁷⁶⁷ or ‘sufficient’;⁷⁶⁸ as well as if there was ‘ample credible and persuasive’,⁷⁶⁹ or ‘conclusive’⁷⁷⁰ evidence.

5.3.3.1 *Situating the Case*

The background to the *Armed Activities* case concerned the armed conflict in the DRC between 1998 and 2003, which unfolded in the broader context of post-colonial instability in the Great Lakes region. The conflict had roots in regional instability dating back to the 1980s, including the presence of anti-government rebels in eastern Zaire – now the DRC – the spill-over effects of the 1994 Rwandan genocide, and the involvement of Rwanda and Uganda in supporting armed groups and political transitions across the region. Their subsequent falling out with the Congolese president, Laurent-Désiré Kabila, whom they had initially helped bring to power, triggered the Second Congo War in 1998. Although the parties agreed on a ceasefire at Lusaka in 1999, hostilities continued until 2003.⁷⁷¹

⁷⁶³ *Armed Activities* (n 108) para. 26.

⁷⁶⁴ See the discussion in Green (n 102) 178–179.

⁷⁶⁵ *Armed Activities* (n 108) para. 72, that ‘[t]he Court must first establish which relevant facts it regards as having been *convincingly established by the evidence*, and which thus fall for scrutiny by reference to the applicable rules of international law’ (emphasis added).

⁷⁶⁶ *ibid* para. 136.

⁷⁶⁷ *ibid* para. 209.

⁷⁶⁸ *ibid* paras. 213–214.

⁷⁶⁹ *ibid* para. 242.

⁷⁷⁰ *ibid* para. 303.

⁷⁷¹ *ibid* paras. 19–24.

Considering the destabilising effects of the conflict, with security implications for neighbouring states, the situation was addressed by the UNSC,⁷⁷² among other UN organs, expressing concern over the humanitarian impact of the conflict and called for its peaceful resolution. Although the UNSC repeatedly expressed concern of the impact of the conflict on regional stability and humanitarian conditions, it did not make a formal determination classifying the situation as a threat to international peace and security warranting further enforcement measures.⁷⁷³ This institutional engagement forms the backdrop to the *Armed Activities* case, which represented just one of several legal efforts to address the conflict through peaceful means. In 1999, the DRC filed several applications to the ICJ against Rwanda, Burundi, and Uganda, respectively. The proceedings against Rwanda and Burundi were discontinued in 2001,⁷⁷⁴ and a new application against Rwanda, filed in 2002, was dismissed by the Court in 2006 for lack of jurisdiction.⁷⁷⁵ The case between the DRC and Uganda was thus the only one to proceed to an assessment of the merits.⁷⁷⁶

The DRC argued that Uganda had incurred international responsibility through its unlawful military intervention on Congolese territory, including violations of its sovereignty and the illegal exploitation of natural resources.⁷⁷⁷ In its first submission, the DRC alleged that Uganda had committed an act of aggression by engaging in military and paramilitary activities against the DRC, including the occupation of its territory and the provision of military, logistical,

⁷⁷² See, for example, UNSC Res. 1258 (6 August 1999) UN Doc S/RES/1258 and UNSC Res. 1279 (30 November 1999) UN Doc S/RES/1279, which authorised the establishment of the UN Organisation Mission in the DRC (MONUC) to monitor the ceasefire and support peace efforts in the region.

⁷⁷³ See UNSC Res. 1291 (24 February 2000) UN Doc S/RES/1291 and UNSC Res. 1493 (28 July 2003) UN Doc S/RES/1493, which expanded the mandate of MONUC.

⁷⁷⁴ On these applications, see further *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/117>> accessed 4 August 2025; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)* (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/115>> accessed 4 August 2025. Both cases were subsequently discontinued by the Court in 2001.

⁷⁷⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, paras. 126-128.

⁷⁷⁶ These proceedings resulted in the 2005 judgment, *Armed Activities* (n 108), on the merits, and later *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Reparations) [2022] ICJ Rep 13, in respect of reparations.

⁷⁷⁷ *Armed Activities* (n 108) paras. 23-25.

economic, and financial support to irregular forces. These actions, it contended, violated the UN Charter, the Charter of the Organisation of African Unity, and customary international law, including the prohibitions on the use of force and on interference with the sovereignty, territorial integrity, and political independence of another state.⁷⁷⁸ In its second submission, the DRC claimed that Ugandan forces had carried out attacks against Congolese nationals, in breach of Uganda's obligations under international humanitarian law and international human rights law.⁷⁷⁹ The third submission concerned Uganda's alleged unlawful exploitation of natural resources during its military presence on Congolese territory, which the DRC argued constituted a further violation of its sovereignty and territorial integrity.⁷⁸⁰ Uganda had contested the allegations, maintaining that its military presence in the DRC was a lawful exercise of self-defence aimed at protecting its essential security interests in the face of cross-border threats.⁷⁸¹ In its counterclaim, Uganda accused the DRC of violating its international obligations by failing to prevent attacks against Ugandan diplomatic premises on Congolese soil, supporting rebel groups hostile to Uganda, and permitting violence against Ugandan nationals within its territory.⁷⁸² These claims formed the basis for Uganda's assertion of state responsibility on the part of the DRC.

The complexity of the dispute, alongside significant implications for regional stability and security, prompted the Court to acknowledge the broader political context surrounding the case. It recognised the 'complex and tragic situation [that had] long prevailed in the Great Lakes region', noting the widespread suffering of the local population and destabilising effects on the region, with negative security implications for Uganda and other neighbouring states. At the same time, the Court emphasised that its own role was limited to resolving the specific legal dispute before it, remaining mindful of the broader context but without overstepping its judicial mandate.⁷⁸³ This statement underscores the Court's careful balancing of the complex political and humanitarian realities with its strictly legal mandate, setting the tone for the challenges

⁷⁷⁸ *Armed Activities* (n 108) para. 28.

⁷⁷⁹ *ibid* para. 181.

⁷⁸⁰ *ibid* paras. 222-229.

⁷⁸¹ *ibid* paras. 78-85.

⁷⁸² *ibid* paras. 266-275, detailing allegations against the DRC regarding diplomatic premises, support for rebels, and attacks on Ugandan nationals and facilities.

⁷⁸³ *ibid* para. 26.

involved in assessing the factual basis of the claims within such a politically sensitive and multifaceted dispute.

5.3.3.2 Evidence and Proof

The evidentiary dimension of the case was shaped by overlapping allegations of serious international law violations and a vast, contested factual record. In addressing the first submission of the DRC, which concerned Uganda's alleged act of aggression, the Court had to determine whether the available evidence sufficiently established that Uganda had engaged in unlawful military action and provided support to armed groups operating on Congolese territory.⁷⁸⁴ In exercising its discretion in the assessment of evidence, the Court determined that it would not examine the overall factual situation across the DRC's vast territory but would instead confine its inquiry to the facts necessary to address the specific submission.⁷⁸⁵ It noted the rather extensive documentary materials submitted as evidence – including official documents from international organisations, state-issued reports, and third-party publications – and further emphasised that its role was limited to determining the relevance and probative value of those materials.⁷⁸⁶ The Court outlined its approach to the evaluation of evidence, emphasising a preference for contemporaneous materials from individuals with direct knowledge of the alleged events, rather than documents prepared specifically for the case or originating from a single source.⁷⁸⁷ It gave particular weight to statements against the interests of the state making them, consistently with the approach previously taken in *Nicaragua*.⁷⁸⁸ The Court also assigned greater probative value to evidence not been challenged by impartial observers, especially where it predated the initiation of the judicial proceedings, and further emphasised the importance of materials produced through the use of rigorous procedures, for instance, witness examination and cross-examination, citing the Porter Commission report as an example of reliable and uncontested evidence.⁷⁸⁹

Following its assessment of evidence in view of the DRC's first submission, the Court found that Uganda had violated the prohibition of the use of force by

⁷⁸⁴ *Armed Activities* (n 108) paras. 23-25.

⁷⁸⁵ *ibid* paras. 55-57.

⁷⁸⁶ *ibid* paras. 58-61.

⁷⁸⁷ *ibid* para. 61.

⁷⁸⁸ See the discussion in *Chapter 5.3.1*.

⁷⁸⁹ *Armed Activities* (n 108) para. 61.

launching military operations on Congolese territory,⁷⁹⁰ as well as the principle of non-intervention by providing military support to rebel groups operating within the DRC.⁷⁹¹ It further determined that the exercise of effective authority over parts of the territory of the DRC amounted to a belligerent occupation contrary to international law.⁷⁹² Uganda was consequently held responsible for the actions of these rebel groups to the extent of its support and control.⁷⁹³ In making these findings, however, the Court did not articulate a clear or formal standard of proof. It emphasised that the facts would have to be ‘convincingly established’ by the evidence,⁷⁹⁴ referring repeatedly to whether it found the submitted materials to be ‘convincing’.⁷⁹⁵ While the Court did not define what this entailed in terms of the stringency of the standard, the invocation of ‘convincing’ evidence implies a rigorous threshold. The term suggests that the evidence must carry sufficient weight to persuade the Court of the truth of the allegations with some degree of confidence, echoing formulations in various national legal systems.⁷⁹⁶ This formulation suggests that the Court exercised evidentiary caution given the seriousness of the allegations and the politically sensitive context. The requirement of ‘convincing’ evidence appears to set a flexible yet somewhat elevated standard of proof, demanding more than minimal or merely plausible proof, but likely falling short of absolute certainty.

Building on its approach to the first submission, the Court then turned to the second, which concerned the DRC’s allegations that Uganda had violated international humanitarian and human rights law through attacks on Congolese nationals.⁷⁹⁷ The DRC supported its second submission with evidence that included, *inter alia*, a 2004 report of the UN Organisation Mission in the DRC

⁷⁹⁰ *ibid* para. 179.

⁷⁹¹ *Armed Activities* (n 108) paras. 181-182 and 189.

⁷⁹² *ibid* paras. 198-200.

⁷⁹³ *ibid* para. 196.

⁷⁹⁴ *ibid* para. 72.

⁷⁹⁵ *ibid* paras. 136-137, where the Court made a reference to not finding the evidence ‘weighty and convincing’, and that it had not been able to ‘satisfy itself’ as to certain military intelligence documents.

⁷⁹⁶ This includes the emphasis on the inner conviction, or *conviction intime*, required across many Civil Law jurisdictions, as well as the use of a ‘clear and convincing’ standard of proof in civil cases involving more serious charges, as an intermediate standard of proof between ‘balance of probabilities’ typically applied, on the one hand, and ‘beyond reasonable doubt’ in criminal cases, on the other, in certain Common Law legal systems. See *Chapter 2.3.4*.

⁷⁹⁷ *Armed Activities* (n 108) para. 181.

(MONUC), reports from the UN Commission on Human Rights Special Rapporteur, and testimonies collected by Congolese and international NGOs.⁷⁹⁸ Uganda contested both the facts and the credibility of the evidence, arguing that the DRC failed to demonstrate Ugandan troops' involvement in alleged atrocities such as massacres, torture, and plunder.⁷⁹⁹

In view of the second submission, thus, the Court held that it found the written reports from credible sources to be 'sufficient' to show that Uganda's national military, the Uganda People's Defence Force (UPDF), was responsible for violations of both international humanitarian law and human rights law on the territory of the DRC.⁸⁰⁰ It also found 'sufficient evidence of a reliable quality' that the UPDF had failed to protect the civilian population and to distinguish between combatants and non-combatants during the conflict,⁸⁰¹ articulating requirement of 'persuasive' evidence in view of those claims.⁸⁰² Regarding the alleged violations of human rights law, the Court took a comparable approach, finding 'convincing' evidence that child soldiers were trained in UPDF camps and that the UPDF failed to prevent their recruitment in territories under its control.⁸⁰³ Considering the claims forming part of the second submission of the DRC, the Court found that there was 'credible evidence sufficient to conclude' that the UPDF was responsible for violations of human rights and humanitarian law in the occupied territories.⁸⁰⁴ However, the evidence was not 'sufficient' to demonstrate 'effective control' required to attribute the conduct to Uganda, leading it to dismiss the second submission in its entirety.⁸⁰⁵

In its assessment of the third submission of the DRC, that Uganda had illegally exploited natural resources, the Court appeared to apply a somewhat less stringent standard of 'sufficient' evidence.⁸⁰⁶ Similar to its approach with the first submission, the Court did not seek to examine the entire situation across the DRC but instead limited its inquiry to the facts necessary to determine

⁷⁹⁸ *Armed Activities* (n 108) para. 182.

⁷⁹⁹ *ibid* para. 191.

⁸⁰⁰ *ibid* paras. 207.

⁸⁰¹ *ibid* para. 208.

⁸⁰² *ibid* para. 209.

⁸⁰³ *ibid* para. 210.

⁸⁰⁴ *ibid* para. 211.

⁸⁰⁵ *ibid* paras. 213-214.

⁸⁰⁶ *ibid* paras. 222-227.

whether Ugandan forces or officials were involved in the unlawful exploitation of resources within the areas under their control.⁸⁰⁷ In view of the evidence, the Court held that it lacked ‘sufficient’ and ‘credible’ evidence relating to the existence of a government policy in Uganda that was aimed at the exploitation of natural resources.⁸⁰⁸ It nevertheless found ‘ample and persuasive’ evidence to conclude that officers and soldiers of the Ugandan army, including some of its most high-ranking officers, had been involved in the looting, plundering, and exploitation of the DRC’s natural resources, and that military authorities had not taken any measures to prevent or halt such conduct.⁸⁰⁹ As such, the Court attributed responsibility to Uganda for the actions of its armed forces and concluded that Uganda had violated international law through the unlawful exploitation of Congolese natural resources.

In respect of the counterclaim, concerning the DRC’s support for or toleration of hostile armed groups carrying out military operations as well as destabilising activities against Uganda from the territory of the DRC, the Court found that Uganda had not produced ‘sufficient’ or ‘conclusive’ evidence to demonstrate the involvement of the DRC in the activities of the armed groups, or that it had otherwise failed to fulfil its duty of vigilance. It further held that none of the evidence could ‘serve as a sound basis’ to reach a conclusion as to the alleged violations of international law, requiring ‘convincing’ evidence.⁸¹⁰ Uganda’s second counterclaim concerned alleged attacks by members of the DRC’s armed forces against the Ugandan embassy in Kinshasa in 1998.⁸¹¹ In this instance, the Court found ‘sufficient’ evidence that such attacks had occurred,⁸¹² and that Ugandan property had been removed from the premises, in violation of the DRC’s obligations under international law for the protection of diplomatic missions.⁸¹³

Across the principal claim and counterclaims, the Court adopted a flexible approach to the standard of proof. In assessing the DRC’s submission on

⁸⁰⁷ *Armed Activities* (n 108) para. 237.

⁸⁰⁸ *ibid* para. 242.

⁸⁰⁹ *ibid* para. 242.

⁸¹⁰ *ibid* paras. 298-299, that none of the evidence could ‘serve as a sound basis’ for the Court to reach a conclusion as to the alleged violations of international law, and para. 303, articulating a requirement of ‘conclusive’ evidence.

⁸¹¹ *Armed Activities* (n 108) para. 306.

⁸¹² *ibid* para. 334.

⁸¹³ *ibid* para. 342.

aggression and violations of sovereignty, it appeared to require a particularly high threshold of ‘convincing’ evidence, potentially reflecting the gravity and geopolitical stakes of the allegations. By contrast, claims involving violations of international humanitarian and human rights law, and unlawful exploitation of natural resources, were evaluated against context-sensitive thresholds which focused on the credibility and sufficiency of the evidence. While this pragmatic variation may reflect the evidentiary challenges and factual complexity of the case, the Court’s failure to clearly articulate its evidentiary standards risks undermining the consistency and transparency of its reasoning, an issue that resonates with its handling of other cases involving the use of force.

5.3.4 Synthesis

Although the Court has refrained from articulating a formal standard of proof across its jurisprudence relating to the use of force, it appears to consistently require a relatively demanding threshold. At the same time, the Court balances this demanding standard with practical flexibility, recognising the challenges of assessing evidence in complex and often politically sensitive disputes. As discussed throughout the present case study, the Court has used terms such as ‘conclusive’, ‘convincing’, and ‘persuasive’ evidence, indicating a standard that surpasses the typical civil preponderance of evidence. Notably, the use of ‘convincing’ suggests that the Court demanded more than mere plausibility, requiring evidence strong enough to persuade it with a meaningful degree of confidence. This places ‘convincing’ above a basic sufficiency threshold, reflecting a more demanding evidentiary requirement. Despite this, the Court deliberately avoided formalising the standard of proof, instead demonstrating evidentiary caution tailored to each case. In the *Armed Activities* case, for example, it appeared to apply a more flexible approach to the standard of proof in its assessment of violations of international human rights law, potentially signalling an ability to differentiate standards depending on the nature of the legal obligation and the circumstances of each case.

The stringent evidentiary threshold in the Court’s jurisprudence relating to the use of force appears to be closely linked to the gravity of the allegations and the significant consequences of finding state responsibility for unlawful force. This standard can be understood as a response to the seriousness of the charges and the considerable legal and symbolic weight of the Court’s determinations, reflecting an implicit risk management approach. The Court may apply greater caution to mitigate the potential for erroneous findings that might have substantial political and reputational implications for the state concerned. At

the same time, this caution in establishing responsibility for serious allegations demonstrates the Court's sensitivity to issues of state interests. Its reasoning also incorporates a degree of pragmatism, or flexibility, even if it is tempered to some degree by deference to state interests given the gravity of allegations, as shown by its readiness to infer facts and to assess evidence in a context-specific manner. This acknowledges both the structural limitations inherent in international adjudication, including the lack of compulsory investigative powers and dependence on the parties' cooperation, and the necessity for effective judicial functioning in politically sensitive disputes.

5.4 Genocide Cases: 'Fully Conclusive' Evidence

The Court has decided two cases on the merits addressing the question of state responsibility under the Genocide Convention: *Bosnia Genocide* and *Croatia Genocide*.⁸¹⁴ Compared to the previous cases involving grave charges, the Court's judgments in the Genocide cases demonstrate greater clarity and uniformity in articulating the standard of proof. This consistency reflects similarities not only in respect of the allegations but also the factual and legal contexts in which the disputes arose and came before the Court. These cases illustrate that the Court applies a differentiated standard of proof even within the category of cases involving grave charges, contradicting descriptions of this area of judicial practice as somewhat consistent. This suggests that while the gravity of the allegation is an important, and perhaps decisive, factor, it is not the sole consideration guiding the Court's determination of the standard of proof. It is evident in the contrast between the use of force cases,⁸¹⁵ and in the Court's differentiation between the different allegations under the Genocide Convention. On one hand, the Court has required 'fully conclusive' evidence for the attribution of responsibility for the commission of genocide, and, on the other hand, proof 'at a high level of certainty' for the failure to prevent and punish acts of genocide.⁸¹⁶

⁸¹⁴ *Bosnia Genocide* (n 5); and *Croatia Genocide* (n 108).

⁸¹⁵ See the discussion in *Chapter 5.3*.

⁸¹⁶ *Bosnia Genocide* (n 5) paras. 209-210.

5.4.1 *Bosnia Genocide*: ‘Fully Conclusive’ Evidence

The *Bosnia Genocide* case marked the first occasion on which a state invoked international responsibility for violations of the Genocide Convention.⁸¹⁷ The case was significant in its structure of argumentation, as the Court addressed not only the conventional obligations of states under the Genocide Convention to prevent and punish acts of genocide, but also whether a state could be held responsible for the commission of genocide through its intermediaries.

5.4.1.1 *Situating the Case*

The *Bosnia Genocide* case concerned events arising from the armed conflict that followed the breakup of the Federal Republic of Yugoslavia (FRY) in the early 1990s. Bosnia and Herzegovina, home to a large Muslim population, had declared independence in 1992, a move that was strongly opposed by many Bosnian Serbs, who had instead sought unification with Serbia. The conflict that followed was characterised by extensive violence and mass atrocities, and, notably, systematic campaigns of ethnic cleansing and the forcible removal of ethnic groups from contested territories.⁸¹⁸ On 20 March 1993, while atrocities were still on-going, Bosnia and Herzegovina brought a case to the Court.⁸¹⁹ It was one of several parallel efforts to respond to the unfolding situation. At the same time, the UNSC had already adopted a series of resolutions condemning the violence, calling for investigations into the grave breaches of international humanitarian law,⁸²⁰ and establishing a Commission of Experts.⁸²¹ In early 1993, the UNSC adopted a resolution expressing its intention to establish an *ad hoc* international criminal tribunal.⁸²² Shortly after the filing of the case at the ICJ, thus, the ICTY was formally established to deal with questions of individual criminal responsibility.⁸²³ This meant that the *Bosnia Genocide* case

⁸¹⁷ Milanović (n 25) 553–554, underscoring that the Bosnia Genocide judgment marked a ‘milestone in the development of international law: a sovereign State will for the first time in history be standing trial for genocide before the International Court of Justice’.

⁸¹⁸ On the background to the case, see *Bosnia Genocide* (n 5) paras. 88–99.

⁸¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (Application Instituting Proceedings) [1993] <<https://www.icj-cij.org/case/91>> accessed 4 August 2025.

⁸²⁰ UNSC Res. 771 (13 August 1992) UN Doc S/RES/771.

⁸²¹ UNSC Res. 780 (6 October 1992) UN Doc S/RES/780.

⁸²² UNSC Res. 808 (22 February 1993) UN Doc S/RES/808.

⁸²³ UNSC Res. 827 (25 May 1993) UN Doc S/RES/827.

was adjudicated by the Court against the backdrop of concurrent efforts to ensure accountability for atrocities committed during the conflict, influencing the assessment of the factual basis of these claims.

Bosnia and Herzegovina invoked Article IX of the Genocide Convention in its Application to the ICJ, alleging that Yugoslavia (then Serbia, Montenegro, and Macedonia) had breached the Convention by failing to prevent and punish genocide, and by committing genocide through its intermediaries.⁸²⁴ As the case relied solely on the compromissory clause in the Genocide Convention, the Court's jurisdiction was limited to allegations of genocide, thus excluding broader violations of humanitarian and human rights law. This framing shaped both the legal scope and the narrative constructed through the Court's factual assessment. Given that the case was brought to the Court against the backdrop of on-going conflict, Bosnia and Herzegovina also requested the indication of provisional measures to protect from acts of genocide that were unfolding in Serbia at the time of the institution of the judicial proceedings.⁸²⁵ Finding *prima facie* jurisdiction,⁸²⁶ the Court ordered both parties to refrain from any acts that might aggravate or extend the dispute, highlighting the 'grave risk of acts of genocide' in its decision.⁸²⁷ A second request for provisional measures followed in July 1993, partly addressing the impact of the UN arms embargo. While the Court declined to engage with the broader legal frameworks such as international humanitarian law given its limited scope of jurisdiction, it reaffirmed that Serbia had an obligation to prevent genocide, including through

⁸²⁴ *Bosnia Genocide* (n 5) paras. 64-65.

⁸²⁵ Bosnia's first request sought the immediate cessation of genocidal acts by Yugoslavia and its surrogates, which Yugoslavia countered with its own request in which it alleged that ethnic cleansing had been carried out against Serbs. See *Bosnia Genocide (Application Instituting Proceedings)* (n 859) para. 14(1).

⁸²⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Request for the Indication of Provisional Measures: Order of 8 April 1993) [1993] ICJ Rep 3, paras. 26 and 32, in which the Court held that Article IX 'appeared to afford a basis' for jurisdiction *ratione materiae* and *ratione personae* to the extent the dispute concerned obligations in the Genocide Convention (n 4).

⁸²⁷ *Bosnia Genocide (Provisional Measures Order of 8 April 1993)* (n 826) para. 45.

the exercise of control over actors under its influence,⁸²⁸ and rejected Serbia and Montenegro's preliminary objections.⁸²⁹

On the merits, the Court was tasked with a determination of whether Serbia and Montenegro could be held responsible for violations of the Genocide Convention, encompassing allegations relating not only to the failures to prevent and punish acts of genocide, but also the commission of genocide. These allegations, as well as the distinct legal and factual context of the case, set the case apart from conventional claims of state responsibility for breaches of treaty obligations. The allegations involved the unusual nature and gravity of invoking state responsibility for the commission of genocide. Given the quasi-criminal character of the claims, the case overlapped with the jurisdiction of the ICTY, which was already tasked with the establishment of individual criminal responsibility for substantially the same factual events.⁸³⁰

First, the case was marked by the exceptional gravity of the allegations. This is reflected in the nature of obligations under the Genocide Convention, which was established for the purpose of protecting the common interest among the international community to prevent acts of genocide, and to punish individuals or entities in respect of such acts.⁸³¹ The collective dimension of the Genocide Convention was emphasised in the ICJ's 1951 advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, where the Court underscored the 'humanitarian and civilising' purpose of the Convention and noted that, in such an instrument, states 'do not have any interests of their own' but merely 'a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the

⁸²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Further Requests for the Indication of Provisional Measures: Order of 13 September 1993) [1993] ICJ Rep 325.

⁸²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595, paras. 45-47.

⁸³⁰ *Bosnia Genocide* (n 5) para. 212, where the Court highlights the 'unusual feature' that many of the allegations had already been examined by the ICTY in this context.

⁸³¹ On common interests in international law, see further Bruno Simma, 'From Bilateralism to Community Interests in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 233-235; and Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 *European Journal of International Law* 387, 390-392.

convention'.⁸³² Given not only the collective nature of allegations under the Genocide Convention but that its provisions embody a peremptory norm of customary international law,⁸³³ the Convention carries profound legal, moral, and symbolic weight. These features may distinguish a breach of the Genocide Convention from the breach of an ordinary obligation.

As the first instance in which a state had invoked the responsibility of another for a violation of the Genocide Convention at the Court, the *Bosnia Genocide* case presented the Court with the complex task of interpreting and applying the obligations in the Genocide Convention. Bosnia and Herzegovina's claim that Serbia had directly committed genocide required the Court to interpret the Genocide Convention and address the question whether a state could incur direct responsibility for genocide, despite the Convention's text not explicitly providing for such state liability.⁸³⁴ Following an interpretation of the Genocide Convention, the Court concluded that the obligation to prevent genocide necessarily includes a prohibition on states themselves committing genocide.⁸³⁵ This extended the scope of state obligations under the Genocide Convention, confirming that states are directly prohibited from committing genocide, an obligation previously understood to apply only to individuals. This reasoning recognised the Convention's dual regimes of individual criminal and state responsibility and affirmed that states may bear direct responsibility also for the commission of genocide. In *Bosnia Genocide*, this required the Court to assess not only the existence of acts of genocide, but also the *dolus specialis*, meaning the special intent to destroy, in whole or in part, a protected group.⁸³⁶ The Court, whose primary function is the adjudication of inter-state disputes, would therefore be compelled to engage with mental elements more typical of criminal proceedings than inter-state disputes.⁸³⁷

⁸³² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, p. 23.

⁸³³ This highlights the overlap with between 'grave' charges for evidentiary purposes, on one hand, and 'serious breaches' of international law in the law of state responsibility, on the other. See, for example, Gaeta (n 648) 425–426.

⁸³⁴ *Bosnia Genocide* (n 5) para. 155.

⁸³⁵ *ibid* para. 166.

⁸³⁶ Florian Jeßberger, 'The Definition and the Elements of the Crime of Genocide' in Paolo Gaeta (ed), *The UN Genocide Convention: A Commentary* (2009) 105.

⁸³⁷ James Crawford, *State Responsibility: The General Part* (1. paperback ed, Cambridge Univ Press 2013) 219; Milanović (n 25) 56; and Milanović (n 102) 693.

Second, the case involved an institutional overlap with the jurisdiction of the ICTY, raising questions about how the Court would approach the assessment of facts that had already been examined by a criminal tribunal operating in the same factual context. The extension of state obligations under the Genocide Convention brought into focus the relationship between individual criminal and state responsibility for genocide,⁸³⁸ particularly as Serbia argued that the ICJ could not make determinations on genocide while proceedings concerning individual criminal responsibility were taken place before the ICTY.⁸³⁹ The Court rejected this argument, affirming that the Genocide Convention in reality establishes parallel regimes of individual criminal and state responsibility, such that the commission of genocide constitutes not only a crime under international law but also an internationally wrongful act for which a state may incur responsibility.⁸⁴⁰ The existence of parallel proceedings before the ICTY would therefore not preclude the Court from exercising jurisdiction in view of the establishment of state responsibility,⁸⁴¹ and a state may incur responsibility for genocide even in the absence of the conviction of an individual.⁸⁴² The Court recognised this duality as a ‘constant’ feature of international law, while also underscoring that this does not imply that the same standards of proof apply in both settings.⁸⁴³

⁸³⁸ Eric Wyler and Léon Castellanos-Jankiewicz, ‘Serious Breaches of Peremptory Norms’ in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of shared responsibility in international law: an appraisal of the state of the art* (Cambridge University Press 2014) 294–295.

⁸³⁹ *Bosnia Genocide* (n 5) paras. 180–182.

⁸⁴⁰ On this duality, and the debates as to whether a judicial body should require the same standard of proof for state responsibility as for individual criminal responsibility, see Milanović (n 25) 560; Gattini (n 95) 893–899; KJ Keith, ‘The International Court of Justice and Criminal Justice’ (2010) 59 *International and Comparative Law Quarterly* 895; Dermot Groome, ‘Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility’ (2007) 31 *Fordham International Law Journal* 911; and Peter Tzeng, ‘Proving Genocide: The High Standards of the International Court of Justice’ (2015) 40 *Yale Journal of International Law* 419.

⁸⁴¹ *Bosnia Genocide* (n 5) paras. 172–174.

⁸⁴² *ibid* para. 182.

⁸⁴³ *ibid* paras. 173 and 181–182. See also André Nollkaemper, ‘Concurrence between Individual Responsibility and State Responsibility in International Law’ (2003) 52 *International and Comparative Law Quarterly* 615, 615–640.

5.4.1.2 Evidence and Proof

The unusual nature of the allegations may have prompted the Court to adopt an unusually detailed approach to the treatment of evidence in its judgment in the *Bosnia Genocide* case. The Court began its judgment by offering a long, historical background to, and narrative of, the disintegration of the FRY and the armed conflict that followed.⁸⁴⁴ This contextualisation of the proceedings reflects not only the complexity of the claims but also foreshadows the Court's cautious approach to the evaluation of evidence and establishment of facts.

The parties disagreed not only on the nature and existence of facts, many of which were heavily contested, but also on the appropriate methodology for the Court's treatment of evidence.⁸⁴⁵ As the Court observed, the allegations in question '[covered] a very wide range of activity affecting many communities and individuals over an extensive area and over a long period' and drew upon 'many accounts, official and non-official, by many individuals and bodies', which the parties relied on in their both written and oral submissions.⁸⁴⁶ One of the central disputes between the parties as to matters of evidence concerned the allocation of the burden of proof, underscoring the challenges of securing direct proof of facts.⁸⁴⁷ Bosnia and Herzegovina argued that the difficulty it had encountered to obtain the necessary evidence warranted a reversal of the burden of proof, pointing specifically to Serbia and Montenegro's refusal to disclose unredacted versions of documents from its Supreme Defence Council by citing its interests of national security and military secrecy. Bosnia and Herzegovina, urging the Court to draw adverse inferences from this refusal, while arguing that genocidal intent could instead be inferred from a 'pattern of acts' that 'speaks for itself'.⁸⁴⁸ The Court, not acceding to this request, adhered to the general principle for the allocation of the burden of proof,⁸⁴⁹ and noted that Bosnia and Herzegovina had access to 'extensive documentation and other evidence', especially the public records of the ICTY, of which it had made

⁸⁴⁴ See further *Bosnia Genocide* (n 5) paras. 120-155.

⁸⁴⁵ *Bosnia Genocide* (n 5) para. 202, where the Court noted that, despite increasing agreement on certain points, many issues remained disputed between the parties.

⁸⁴⁶ *ibid* para. 202.

⁸⁴⁷ Similar evidentiary issues were raised in *Corfu Channel* (n 5) pp. 17-18, justifying the more lenient application of a stringent standard of proof.

⁸⁴⁸ *Bosnia Genocide* (n 5) paras. 204-207.

⁸⁴⁹ On the general principle *actori incumbit probatio*, see the discussion in *Chapter 2.3.1*.

‘very ample use’.⁸⁵⁰ The Court’s decision not to shift the burden of proof or to compel the production of evidence may have reflected a cautious approach that prioritised procedural formalism, where state interests limited its willingness to address practical challenges in dispute resolution.

The parties also disagreed on the applicable standard of proof. While Bosnia and Herzegovina held that the standard should align with a typical ‘civil’ standard of proof, given that the allegations concerned what it characterised as a mere breach of treaty obligation, Serbia argued that a more stringent standard – requiring proof to a ‘proper degree of certainty’ which would leave ‘no room for reasonable doubt’ – was necessary given the gravity of the claims, thereby advocating for a criminal-level threshold.⁸⁵¹ This disagreement highlights a deeper tension over the Court’s jurisdiction and the appropriate standard of proof in cases of exceptional gravity. Unlike prior judgments, the Court’s engagement reflects sensitivity to the parties’ arguments and the extraordinary nature of the allegations. Regarding the standard of proof, the Court reaffirmed its approach from the *Corfu Channel* case, holding that:

The Court has long recognized that *claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive* [...] The Court requires that it be *fully convinced* that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.⁸⁵²

This statement reinforces and nuances the Court’s prior approach, indicating an exacting evidentiary threshold that reflects the gravity of allegations of genocide. The articulation of the standard of proof at both ‘fully conclusive’ and ‘fully [convincing]’ evidence affirms the Court’s jurisprudence on the standard of proof in cases involving allegations of exceptional gravity.⁸⁵³ It also appears to elaborate on that jurisprudence, given that the *Corfu Channel* case required evidence at a ‘high degree of certainty’,⁸⁵⁴ and the *Nicaragua*, *Oil Platforms*, and *Armed Activities* cases a standard of proof at ‘conclusive’

⁸⁵⁰ *Bosnia Genocide* (n 5) para. 206.

⁸⁵¹ *ibid* para. 208.

⁸⁵² *ibid* para. 209 (*emphasis added*), citing *Corfu Channel* (n 5) p. 17.

⁸⁵³ See also *Corfu Channel* (n 5) p. 17, and the Court’s earlier judgments in cases relating to the use of force: *Nicaragua* (n 108); *Oil Platforms* (n 108); and *Armed Activities* (n 108).

⁸⁵⁴ *Corfu Channel* (n 5) p. 17.

or ‘convincing’ evidence. As such, the ‘fully conclusive’ requirement in the *Bosnia Genocide* case suggests what was likely a more exacting standard of proof given the gravity of the allegations. It signals that the Court demands not only convincing proof but a level of certainty that leaves no reasonable doubt, underscoring the seriousness of such claims.

The Court appeared to apply a somewhat lower standard of proof in relation to the obligations to prevent and to punish genocide, where it instead referred to the need for ‘proof at a high level of certainty appropriate to the seriousness of the allegation’.⁸⁵⁵ While it dealt with the standards of proof for the allegations separately, it did not clarify whether, or how, ‘proof at a high level of certainty’ may have differed from the standard of ‘fully conclusive’ evidence required for establishing the commission of genocide. The formulation suggests a comparatively lower threshold, likely reflecting the due diligence nature of these obligations, which focus on preventing and punishing genocide rather than directly attributing genocidal acts to the state.

Following its clarification of the applicable evidentiary thresholds, the Court laid the groundwork for its evaluation of evidence. The parties submitted extensive evidence from diverse sources, including international organisations, governments, NGOs, media, witnesses, and experts.⁸⁵⁶ While affirming its role to make its own determination of the facts relevant to the law, the Court also acknowledged the unusual circumstance that many allegations had already been examined by the ICTY.⁸⁵⁷ Accordingly, the Court held that it would accord significant weight to final ICTY trial and appeal judgments, given their procedural rigour and thorough evidentiary review, while treating other procedural materials with greater caution.⁸⁵⁸ The Court continued to establish a framework for assessing documentary and testimonial evidence centred on relevance, probative value, and context, rather than mere authenticity.⁸⁵⁹ It expressed a clear preference for contemporaneous, first-hand evidence and treated materials prepared specifically for the proceedings or sourced from single accounts with caution.⁸⁶⁰ This reflects a demand for a robust and reliable

⁸⁵⁵ *Bosnia Genocide* (n 5) para. 210.

⁸⁵⁶ *ibid* para. 211.

⁸⁵⁷ *ibid* para. 212.

⁸⁵⁸ *ibid* paras. 220-224

⁸⁵⁹ *ibid* paras. 228-230, on the source, method of production, and character of the material.

⁸⁶⁰ *ibid* paras. 213-214. This was largely consistent with the approach taken by the Court in *Nicaragua* (n 108) para. 64.

evidentiary foundation. By emphasising final ICTY judgments and applying a rigorous evidentiary standard, the Court signalled that it required more than a preponderance of evidence and that it sought proof that persuasively established the facts to a considerable degree of certainty commensurate with the gravity of the genocide allegations.

The Court ultimately rejected Bosnia and Herzegovina's allegation that Serbia had committed genocide, underscoring that specific intent to destroy a group, beyond patterns of violence or displacement, were not proven.⁸⁶¹ It appeared to apply a high evidentiary threshold, relying to a significant extent on the findings of the ICTY.⁸⁶² However, it found the evidence sufficient to establish Serbia's responsibility for failing to prevent and punish acts of genocide.⁸⁶³ It appeared to require a somewhat more lenient standard of proof, requiring a 'high degree of certainty' rather than 'fully conclusive' evidence. This suggests a degree of differentiation that may be dependent on the nature of the acts as constituting acts (commission of genocide), or omissions (failure to prevent and to punish acts of genocide).⁸⁶⁴ Although Serbia was not held responsible for the commission or complicity in the Srebrenica genocide, the Court underscored that its obligation to prevent genocide under Article I extended extraterritorially, requiring genuine efforts where the state has the capacity to influence events.⁸⁶⁵ The Court further found Serbia in breach of its obligation to comply with provisional measures by failing to arrest and transfer General Ratko Mladić to the ICTY, despite evidence of his presence in Serbia.⁸⁶⁶

The Court's cautious, yet rigorous, approach to the standard of proof and the establishment of responsibility for genocide reflects factors relating to the severity of allegations under the Genocide Convention, given their unusual gravity and quasi-criminal nature, the substantive overlap with the jurisdiction of the ICTY, characterisation of genocide as a 'crime' under international

⁸⁶¹ *Bosnia Genocide* (n 5) paras. 170-190, where the Court strictly defined the crime and made a distinction vis-à-vis that of ethnic cleansing.

⁸⁶² *Bosnia Genocide* (n 5) paras. 402-407.

⁸⁶³ *ibid* para. 425-450.

⁸⁶⁴ This was suggested by Del Mar (n 23) 108-115, noting the distinction in the Court's application of the standard of proof in view of acts, on one hand, and omissions, on the other. This potentially reflects a distinction also to the concept of 'serious breaches' of international law in the ARSIWA (n 646), as opposed to 'grave' charges for evidentiary purposes.

⁸⁶⁵ *Bosnia Genocide* (n 5) para. 430.

⁸⁶⁶ *ibid* paras. 448-449.

law,⁸⁶⁷ as well as the significant volumes of diverse materials submitted as evidence from a wide range of sources.⁸⁶⁸ This emphasis on the gravity of the allegations and, albeit indirectly, the severity of the potential legal, political, and reputational consequences attached to a finding suggests caution in respect of the interests of states as a central consideration for the evidentiary threshold and assessment of evidence.

5.4.2 Croatia Genocide: Reaffirming the ‘Fully Conclusive’ Standard of Proof

The subsequent *Croatia Genocide* closely mirrored the *Bosnia Genocide* case in terms of the nature of allegations, the underlying interests involved, as well as the broader factual context surrounding the alleged events. Significantly, the Court adhered to the same approach to the treatment of evidence that it had elaborated in the *Bosnia Genocide* judgment. It reiterated the ‘fully conclusive’ standard of proof,⁸⁶⁹ suggesting a degree of consistency in judicial practice across similar cases and crystallisation of a principle regarding the standard of proof for allegations under the Genocide Convention.⁸⁷⁰

5.4.2.1 Situating the Case

The background to the *Croatia Genocide* case, much like that of the *Bosnia Genocide* case, arises from the collapse of the FRY during the early 1990s and the violent armed conflict that followed. In Croatia, the conflict was shaped by nationalist tensions between Croats and the Serb minority, who opposed Croatian independence and sought to establish Serb-controlled territories within the country. The conflict involved extensive violations of international humanitarian and human rights law, notably including attacks on civilian populations, acts of ethnic cleansing, and mass displacement of ethnic groups.⁸⁷¹ Croatia instituted proceedings against the FRY, then composed of Serbia and Montenegro, on 2 July 1999, alleging violations of the Genocide

⁸⁶⁷ *Bosnia Genocide* (n 5) para. 61.

⁸⁶⁸ *ibid* para. 211.

⁸⁶⁹ *Croatia Genocide* (n 108) paras. 178-179.

⁸⁷⁰ Generally, see Gattini and Cortesi (n 102).

⁸⁷¹ *Bosnia Genocide*, paras. 52-73.

Convention.⁸⁷² Following the dissolution of the FRY, Serbia continued the proceedings as its legal successor.⁸⁷³ Similarly to the *Bosnia Genocide* case, Croatia invoked the jurisdictional clause in Article IX of the Genocide Convention and claimed that Serbia was responsible for the commission of genocide and for failing to prevent such acts and to punish those responsible.⁸⁷⁴ Following the Court's rejection of Serbia's preliminary objections,⁸⁷⁵ Serbia filed a counterclaim alleging that Croatia had committed genocide during and after 'Operation Storm', a large-scale Croatian military offensive undertaken in August 1995.⁸⁷⁶

Given its broadly comparable factual context to the *Bosnia Genocide* case, the *Croatia Genocide* case raised largely analogous legal and procedural issues under the Genocide Convention. These issues notably involved invocation of state responsibility for the commission of genocide under the Convention and addressing the legal and jurisdictional overlap with the ICTY concerning the alleged acts. In acknowledging these parallels, the Court recalled that certain issues were common to both cases and stated it would 'take into account' its judgment in *Bosnia Genocide* 'to the extent necessary for its legal reasoning,' while also reserving the right to elaborate further based on the specific arguments presented by the parties.⁸⁷⁷ This statement signals the Court's commitment to judicial consistency while allowing flexibility to address the specific circumstances of the case. As such, the stakes for the litigating states remained high, reflecting the unusual gravity of the allegations brought.

⁸⁷² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/118>> accessed 4 August 2025

⁸⁷³ *Croatia Genocide* (n 108) paras. 106-117. Following Montenegro's independence in 2006, Serbia was recognised as the continuing legal personality of the former FRY for the purposes of ongoing proceedings at the Court.

⁸⁷⁴ *Croatia Genocide* (n 108) para. 49.

⁸⁷⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Preliminary Objections) [2008] ICJ Rep 412. Serbia's preliminary objections concerned complex issues of state succession, the FRY's status as a party to the Genocide Convention (n 4) at the relevant time, and whether jurisdiction existed under Article IX; in its judgment, the Court ultimately upheld its jurisdiction.

⁸⁷⁶ *Croatia Genocide* (n 108) paras. 443-444.

⁸⁷⁷ *ibid* para. 125.

5.4.2.2 Evidence and Proof

The evidential issues raised by *Croatia Genocide* closely mirrored those in the *Bosnia Genocide* case, as both cases centred on assessing the same obligations under the Genocide Convention. A central distinction between the cases lay in Croatia's framing of the allegations, which it argued occurred across multiple localities within its territory. In doing so, Croatia emphasised that the widespread and systematic nature of acts targeting the Croatian national or ethnic group was aimed at supporting an inference of genocidal intent, with implications for the Court's subsequent assessment of evidence.⁸⁷⁸ Despite these differences in the framing of the allegations, the Court's approach to the treatment of evidence remained consistent with the *Bosnia Genocide* case.

The Court observed that both the principal claim and counterclaim involved numerous factual allegations, many of which were disputed to varying extents by the opposing parties.⁸⁷⁹ In respect of the principal claim, the Court held that 'the differences between the Parties relate less to the existence of the facts than to their characterisation by reference to the Convention and, in particular, to the inferences to be drawn from them in respect of proof of specific intent (*dolus specialis*)'.⁸⁸⁰ This statement highlights that the core dispute centred less on whether the events had occurred, and more on how those events should be legally interpreted under the Genocide Convention, particularly regarding the element of genocidal intent. Despite disagreeing on the facts, the parties agreed to a relatively large extent on the appropriate methodology to be employed by the Court in its assessment of evidence in view of central questions of evidence and proof.⁸⁸¹ This reflected that many of the general issues had already been settled in its previous *Bosnia Genocide* judgment, meaning the Court did not diverge substantially from the approach it had already elaborated.

While Croatia recognised the general principle regarding the allocation of the burden of proof, it argued that unless Serbia cooperated by presenting all relevant evidence in its possession, and by providing explanations, the Court should draw adverse inferences against Serbia.⁸⁸² The Court, however, recalled its general approach to the burden of proof, emphasising that the duty of

⁸⁷⁸ *Croatia Genocide* (n 108) paras. 203-207.

⁸⁷⁹ *ibid* para. 167.

⁸⁸⁰ *ibid* para. 168.

⁸⁸¹ *ibid* para. 169, that even if the parties had still 'discussed' the matters of the burden of proof, standard of proof, and methods of proof throughout the proceedings.

⁸⁸² *ibid* para. 170.

cooperation applies regardless of which party bears the burden. It further held a reversal of the burden of proof would not be appropriate in the present case and maintained the general principle of *actori incumbit probatio*, applying the same reasoning to Serbia's counterclaim.⁸⁸³

The parties agreed that the general approach to the standard of proof that had been established in the *Bosnia Genocide* case – 'fully conclusive' evidence for proving the commission of genocide, and a 'high degree of certainty' for the failures to prevent or punish such acts – remained applicable.⁸⁸⁴ Consequently, the Court's statement on the applicable standard of proof relied chiefly on its reasoning in *Bosnia Genocide* and the general approach initially articulated in the *Corfu Channel* case. It reaffirmed its position that claims of 'exceptional gravity', such as those involving genocide, must be supported by evidence that is 'fully conclusive'. Building on its earlier approach to the *Bosnia Genocide* case, the Court further clarified that it must also be 'fully convinced' that the allegations, including both the commission of genocide and the attribution of responsibility, have been 'clearly established'. Given the similarities between the cases, the Court held it would apply the same standard of proof.⁸⁸⁵

In evaluating the evidence, the Court reaffirmed its discretionary approach and focused on assessing both relevance and probative value.⁸⁸⁶ It held that it would accord significant weight to the prior findings of the ICTY, unless overturned on appeal.⁸⁸⁷ While the ICTY Prosecutor's decision not to charge genocide, especially against members of senior levels of leadership, could be probative, it would not be considered determinative.⁸⁸⁸ Moreover, the Court held that it would assess reports issued by independent bodies based on their source, the methodology, and content, remaining consistent with its judicial practice.⁸⁸⁹ Individual statements – whether signed, oral, or hearsay – would be evaluated cautiously and on a case-by-case basis, particularly when unsigned or second-hand accounts.⁸⁹⁰ This approach mirrors that initially established in the *Bosnia*

⁸⁸³ *Croatia Genocide* (n 108) paras. 172-176.

⁸⁸⁴ *ibid* para. 177. Similarly, see *Bosnia Genocide* (n 5) paras. 209-210.

⁸⁸⁵ *Croatia Genocide* (n 108) paras. 178-179.

⁸⁸⁶ *ibid* para. 180.

⁸⁸⁷ *ibid* para. 182. Similarly, see *Bosnia Genocide* (n 5) para. 223.

⁸⁸⁸ *Croatia Genocide* (n 108) paras. 184-187

⁸⁸⁹ *ibid* para. 190.

⁸⁹⁰ *ibid* paras. 192-197. Similarly, see *Nicaragua* (n 108) para. 68.

Genocide case, which emphasised contemporaneous, first-hand evidence and accorded particular weight to final ICTY judgments.⁸⁹¹ Overall, the Court's methodology reflects a demand for a robust evidentiary foundation, requiring proof to persuasively establish the facts to a high degree of certainty, consistent with the gravity of the allegations.

Following its assessment of evidence, the Court found that the acts committed by Serb forces against members of the Croat group during the conflict satisfied the *actus reus* of genocide under the Genocide Convention, specifically, acts of killing and causing serious bodily or mental harm, but that Croatia had not demonstrated the requisite genocidal intent in respect of those acts.⁸⁹² The Court reached this conclusion in light of the stringent standard of proof applied, a standard of 'fully conclusive' evidence under which genocidal intent must be the only reasonable inference to be drawn from the facts.⁸⁹³ On this basis, the Court dismissed Croatia's claim in its entirety. Reaffirming its jurisprudence, the Court held that the scope of the Genocide Convention remains limited to acts aimed at the physical or biological destruction of a group. The judgment thus turned on both the application of a high evidentiary threshold and a restrictive interpretation of the Genocide Convention.

Considering Serbia's counterclaim, the Court examined the alleged acts carried out by Croatian forces during and after Operation Storm, including the killing of Serb civilians and surrendering soldiers, indiscriminate shelling of towns and villages, and the forced displacement of the Serb population from certain regions of Croatia.⁸⁹⁴ While the Court found that several of the acts fulfilled the *actus reus* of genocide, as corroborated by the findings of the ICTY, it held that Serbia nevertheless had not established on the evidence the specific intent required for genocide under the stringent 'fully conclusive' standard of proof applied to the counterclaim.⁸⁹⁵ In particular, the Court held that neither the conduct during Operation Storm nor subsequent statements demonstrated an intent to physically destroy the Serb population, but rather indicated a motive to induce displacement. The broader pattern of conduct, it found, could not reasonably be interpreted as evidencing genocidal intent. Accordingly, the

⁸⁹¹ See the discussion of *Bosnia Genocide* in Chapter 5.4.1.

⁸⁹² *Croatia Genocide* (n 108) paras. 441-442.

⁸⁹³ *ibid* para. 440.

⁸⁹⁴ *ibid* paras. 443-445.

⁸⁹⁵ *ibid* paras. 516-521.

Court held that the requisite intent had not been substantiated and dismissed the counterclaim in its entirety.⁸⁹⁶

As such, the Court's judgment in *Croatia Genocide* reaffirmed the evidentiary principles established in the earlier *Bosnia Genocide* case, with the stringent standard of proof under the Genocide Convention remaining the cornerstone of the Court's factual findings.⁸⁹⁷ This consistency reflects the Court's cautious yet rigorous approach to allegations of genocide, shaped by the exceptional gravity and quasi-criminal nature of such claims, the overlap with ICTY jurisdiction, and the complexity of assessing large volumes of evidence. The Court's adherence to this high standard of proof may underscore its recognition of the significant legal, political, and reputational consequences attached to findings of genocide, and the attendant need for judicial caution and state interests to be carefully balanced in the evaluation of evidence.

5.4.3 Synthesis

In the *Bosnia Genocide* and *Croatia Genocide* cases, the Court consistently applied a stringent standard of proof, reflecting the exceptional gravity and quasi-criminal nature of the allegations under the Genocide Convention. It required 'fully conclusive' evidence as proof of the commission of genocide and for the attribution of such acts to a state, representing an apparently more stringent standard of proof than the 'conclusive' or 'convincing' evidence that it has required in cases relating to the use of force. This 'fully conclusive' standard demands that genocidal intent be the sole reasonable inference drawn from the evidence presented, underscoring the Court's highly cautious approach to the establishment of state responsibility for allegations of this gravity. However, in respect of the obligations to prevent and punish genocide, the Court appeared to apply a more lenient standard of proof, formulated as a requirement for evidence at 'a high level of certainty'. Because the commission of genocide involves an affirmative, intentional act, the Court viewed it as warranting the most exacting proof, whereas the obligations to prevent and punish genocide, framed as omissions, were assessed under a slightly lower, though still rigorous, requirement of evidence 'at a high level of certainty'. This differentiated threshold for allegations under the Genocide Convention underscores the Court's effort to balance the severe consequences attached to

⁸⁹⁶ *Croatia Genocide* (n 108) paras. 511-522.

⁸⁹⁷ See, for example, Gattini and Cortesi (n 102). On the Court's approach to the standard of proof, see also Milanović (n 25).

a finding of genocide with the need to protect state sovereignty and ensure procedural fairness, while also allowing some flexibility in the articulation of the standard of proof given the seriousness of the allegations. By emphasising this high evidentiary threshold, the Court recognized both the profound legal consequences and the significant political and reputational stakes involved for the states concerned. The evidentiary approach also aligned with the Court's broader methodology of affording substantial weight to prior findings of the ICTY, while carefully scrutinising other testimonial and documentary evidence to ensure a robust and reliable foundation for its conclusions.

The Court's differentiated approach, both between the various obligations under the Genocide Convention and in comparison, to earlier cases involving grave charges,⁸⁹⁸ reflects the relative gravity of the allegations as the central concern. This gravity is framed in terms of the severity of the consequences attached to a finding of state responsibility, where the standard of proof functions not only as a decisional threshold but also a mechanism for allocating the risk of erroneous judgment between the parties. Consequently, the standard serves to protect the respondent from being assigned responsibility in the absence of sufficient and compelling evidence, thereby safeguarding that state against wrongful attribution in cases of this nature. These interests are arguably even more pronounced in cases arising under the Genocide Convention, where allegations strike at the core of a state's identity and carry uniquely severe legal, political, and symbolic repercussions. By demanding 'fully conclusive' evidence for the commission and attribution of genocide, the Court adopts an overtly risk-averse posture aimed at preventing any wrongful branding of a state as genocidal. Even when it applies the slightly lower 'high level of certainty' threshold to omissions, the Court remains cautious and formalistic, limiting the scope for inference or evidentiary innovation. Compared to other cases relating to grave charges, particularly those relating to the use of force, the Court is less flexible in its treatment of evidence in the cases arising under the Genocide Convention. This underscores how its discretion tightens as the stakes, and the potential costs of error, rise.

⁸⁹⁸ See the discussion on cases involving the use of force in *Chapter 5.3*.

5.5 Conclusion

Following the initial articulation of its approach in the *Corfu Channel* case,⁸⁹⁹ the Court has consistently required a high standard of proof for ‘grave’ charges. While the Court has not always defined this standard in formal terms, with its expression in judgments remaining flexible, judicial practice confirms a requirement at either ‘convincing’, or ‘conclusive’, evidence. This articulation of the standard of proof, alongside the Court’s assessment of evidence in these cases, suggests a threshold that exceeds the typical ‘civil’ requirement that one account outweigh the other in terms of probability.⁹⁰⁰ The ambiguity with which the Court articulates, or merely implies, the applicable standard makes it difficult to ascertain with any certainty the exact evidentiary threshold. Thus, it remains a selective measure of evidentiary strength.⁹⁰¹ As the present chapter has shown, the applicable standard is shaped not only by the gravity of the allegations but by competing state interests and the broader context of each case, which prompt subtle adjustments to the threshold. These variations are evident in a comparison of the Court’s treatment of the standard of proof in the use of force cases, on the one hand, and the genocide cases, on the other.

The Court’s approach to the standard of proof reveals a marked differentiation between cases involving the use of force and those concerning allegations of genocide. In the use of force cases, the Court applies a less consistent and somewhat more flexible standard of proof, generally aligned with ‘conclusive’ or ‘convincing’ evidence. This standard, while still stricter than the typical ‘civil’ standard, is less exacting than the ‘fully conclusive’ threshold demanded in genocide cases. Moreover, the Court shows a greater willingness in these cases to draw inferences to establish facts, reflecting what may be a more pragmatic approach to evidence. This differentiated approach highlights that while the exceptional gravity of allegations has a decisive influence on the stringency of the evidentiary threshold, it operates alongside other factors. In this respect, state interests, as defined by the severity of potential consequences attached to a finding of responsibility, remain central for the stringency of the Court’s approach. It arguably reflects broader imperatives to accommodate the interests and preferences of states, safeguard the perceived legitimacy of judgments, and account for the finality of its decisions. These interests operate

⁸⁹⁹ *Corfu Channel* (n 5) p. 17.

⁹⁰⁰ On the distinction between civil and criminal standards of proof, see *Chapter 2.3.4*. See also Redmayne (n 140); and Schweizer (n 120).

⁹⁰¹ Compare to the discussion of evidential weight at the ICJ, see Nance (n 19) 295–297.

on two levels, which reflect the judicial function and institutional role of the Court: firstly, the immediate interests of the litigating states, which constrain the Court's discretion in determining the standard of proof; and secondly, the interests of the international community, where considerations of legitimacy and the shaping of legal and factual narratives may further inform the Court's approach to the determination of the standard of proof.

Alongside the gravity of allegations and state interests, the Court's evidentiary reasoning is shaped by a context-sensitive approach that recognises practical difficulties of proving complex facts in international disputes. This necessitates a degree of flexibility in the articulation and subsequent application of the standard of proof, thereby allowing the Court to balance judicial stringency with pragmatism. As the stakes rise, particularly in cases involving charges such as genocide, the Court's willingness to exercise such discretion appears to narrow, reflecting heightened caution and deference to state sovereignty. The Court's flexibility in evidentiary matters underscores the discretionary power afforded to it in respect of the treatment of evidence. However, as shown by the case studies, the presence of more salient state interests in a case tends to constrain the Court's exercise of discretion in evidentiary decision-making. It reflects the understanding of this discretionary power as being fundamentally 'bounded' by state interests.⁹⁰² These interests arguably extend to encompass political, moral, reputational factors, as well as legal narratives established by judgments. For example, the Court demonstrates greater flexibility in use of force cases by allowing inferences and accommodating evidentiary challenges, whereas in the genocide cases, it requires a stricter standard and limits its intervention in evidence gathering, reflecting the quasi-criminal nature of the allegations and their overlap with individual criminal responsibility, limiting its exercise of discretion. This illustrates the bounded discretion afforded to the Court in evidentiary decision-making, where the Court's freedom to interpret and assess evidence is increasingly constrained in cases involving more severe allegations, reflecting a balance between upholding legal standards, respecting state sovereignty, and managing complexities in high-stakes disputes.

The Court's approach to the standard of proof in cases involving grave charges reflects a carefully differentiated evidentiary threshold shaped not only by the gravity of the allegations but also by the broader legal and institutional context

⁹⁰² This corresponds to the notion of 'bounded discretion'. As discussed throughout *Chapter 4*, while the Court enjoys latitude and a significant 'flexibility' in evidentiary decision-making, this is constrained – directly and indirectly – by the interests and preferences of states. On the concept of 'bounded' discretion, see further Ginsburg (n 53) 633–634.

of dispute settlement. This nuanced approach demonstrates the varying degree of deference afforded to state interests while revealing selective judicial pragmatism, where a uniformly high standard is applied but the degree of flexibility in its application is adjusted to reflect the legal, political, and reputational stakes involved. In both *Bosnia Genocide* and *Croatia Genocide*, the Court exercised judicial restraint to protect state interests and to safeguard against error in the judicial outcome, while in the cases relating to the use of force, it adopted a more flexible approach to balance the high evidentiary threshold with practical concerns. The Court's approach in these cases thus reflects a constrained form of judicial discretion, adjusted to the high stakes and heightened sensitivities.

6. ‘Sufficient’ Evidence in State Responsibility and Boundary Delimitation Disputes

6.1 Introduction

There is no clearly articulated or uniform expression for the standard of proof across most of the judicial practice of the Court.⁹⁰³ This chapter turns to the broader group of cases in which the Court implies the existence of a standard of proof, most often framed in terms of the ‘sufficiency’ of evidence. It focuses on two subsets of cases within this group: 20 cases concerning the attribution of state responsibility for charges not characterised by the Court as ‘grave’ for evidentiary purposes; and 31 cases relating to territorial or maritime boundary delimitation.⁹⁰⁴ The frequent references to whether the evidence is ‘sufficient’ raise questions about the standard of proof applied across these distinct substantive categories of the Court’s case law. On the one hand, it suggests that ‘sufficiency’ may constitute a distinct, even if somewhat imprecise, standard of proof.⁹⁰⁵ On the other hand, it may function as a rhetorical device used by the Court to indicate whether the evidence has met an otherwise unarticulated standard of proof. If ‘sufficiency’ represents a distinct standard, its stringency and the rationale for its adoption are unclear. Alternatively, if merely a rhetorical device, this ambiguity may be intentional, allowing the Court flexibility in its articulation of the evidentiary threshold.

⁹⁰³ As noted in *Chapter 1.4.1*, scholarly commentators have understood the various expressions used by the Court to describe the standard of proof differently. See Riddell and Plant (n 16) 133–136; Del Mar (n 23) 97–101; and Brown (n 22) 98–101. See also Foster (n 17) 223, who suggests that the standard of proof is essentially a matter of whether the international court or tribunal considers that the evidence supports one proposition better than another.

⁹⁰⁴ See the selection criteria and methodological discussion in *Chapter 1.3.2.2*.

⁹⁰⁵ On this understanding of the Court’s judicial practice, see Brown (n 22) 101.

The ‘sufficiency’ of evidence likely refers to a variable standard of proof. The cases in these categories engage different types of state interests and require the Court to exercise distinct facets of its judicial function. In cases relating to state responsibility, the Court must deliver a binary determination of whether the respondent state is liable for a breach of international law. By contrast, boundary delimitation disputes require the Court to balance competing claims and establish an equitable division of territory.⁹⁰⁶ ‘Sufficiency’ in the context of establishing state responsibility most likely signals the need for evidence strong enough to support a finding of liability, while in boundary delimitation, it appears to refer to the adequacy of information necessary to justify a reasoned delimitation of boundaries. Thus, its meaning varies according to the distinct judicial roles the Court undertakes in each category and the interests raised by these cases. Considering the foregoing, the ‘sufficiency’ of evidence is perhaps better understood not as a distinct threshold of evidence but rather as a placeholder for a more clearly defined standard of proof.⁹⁰⁷

The present chapter adopts a thematic approach to examine the Court’s practice of articulating a threshold of ‘sufficient’ evidence in cases involving attribution of state responsibility, and those relating to territorial and maritime boundary delimitation.⁹⁰⁸ Following this introduction, Chapter 6.2 examines the nature of ‘sufficient’ evidence in cases involving the attribution of state responsibility for charges not characterised as ‘grave’ for evidentiary purposes, addressing both general references to ‘sufficiency’ and the subsequent articulation of a requirement at ‘convincing’ evidence for charges of this nature. Chapter 6.3 considers the requirement of ‘sufficient’ evidence in the context of territorial and maritime boundary delimitation disputes. Finally, Chapter 6.4 concludes.

⁹⁰⁶ See *Del Mar* (n 23) 101–106, who distinguishes between the standard of proof required for the Court in exercising its ‘declarative’ and ‘determinative’ functions.

⁹⁰⁷ This approach is necessarily tentative and interpretative in nature as it is essentially a question of what the Court appears to have done, rather than what it has explicitly held. Similarly, see *Green* (n 102) 172.

⁹⁰⁸ See the methodological discussion in *Chapter 1.3.2*.

6.2 Attribution of State Responsibility: ‘Convincing’ Evidence

The Court has frequently required ‘sufficient’ evidence in disputes involving the attribution of responsibility. This category includes 20 cases, forming a significant part of the Court’s jurisprudence, and covers disputes involving alleged violations of international law for charges not defined as ‘grave’ for evidentiary purposes.⁹⁰⁹ The task of the Court in such cases involves a series of factual assessments to establish the existence of wrongful conduct, attribute that conduct to a responsible state, and to determine the legal consequences.⁹¹⁰ The Court has employed the term ‘sufficiency’ of evidence across a range of cases involving the attribution of state responsibility. Although this standard is likely lower than that of ‘conclusive’ or ‘fully conclusive’ evidence required for grave charges, it appears to exceed the ‘balance of probabilities’ standard of proof in terms of its stringency.⁹¹¹ This section first explores the Court’s use of ‘sufficiency’ as an evidentiary threshold and then examines its articulation of a ‘convincing’ evidence requirement.

6.2.1 ‘Sufficiency’ as the Evidentiary Threshold

The term ‘sufficiency’ of evidence, alongside similar expressions, is the most common approach of the Court to articulating the standard of proof, especially in cases involving the attribution of state responsibility. Rather than defining a precise threshold, the Court typically considers whether it found the evidence ‘sufficient’ to support its findings.⁹¹² This approach appears consistently across numerous judgments, occasionally with references to whether the evidence is ‘convincing’ as proof of the factual allegations.⁹¹³ There is only a handful of

⁹⁰⁹ On the selection of these cases, see the methodological discussion in *Chapter 1.3.2*.

⁹¹⁰ *Del Mar* (n 23) 101–106.

⁹¹¹ Compare to the discussion of the standard of proof in *Chapter 2.3.4*.

⁹¹² See *Brown* (n 22) 101, who considers this is to be a standard of proof in its own right.

⁹¹³ See further *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Judgment) [2022] ICJ Rep 266, paras. 64–70; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Judgment) [2020] ICJ Rep 300, paras. 107–108, 112 and 114–115; *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) [2015] ICJ Rep 665, paras. 81, 85, 95, 109,

judgments in which the Court does not employ any expressions for the required threshold of evidence, typically where there are fewer disputed questions of fact.⁹¹⁴ As already discussed, there are differing views on whether ‘sufficiency’ constitutes a distinct standard of proof, or is merely a placeholder used by the Court to avoid more precisely articulating the required evidentiary threshold. In this category of cases, the Court has considered the ‘sufficiency’ of evidence mostly in isolation from discussions of the evaluation of evidence, indicating that it applies a threshold without elaborating on the rationale. It thus adopts a less explicit approach where evidentiary matters are not contentious, or where the facts are largely undisputed.⁹¹⁵

The Court’s use of terms across this category of its case law shows that it varies the use of ‘sufficiency’ with other terms. These expressions include, *inter alia*, variations such as whether the evidence ‘shows’, ‘suggests’, or ‘indicates’ a particular fact,⁹¹⁶ references to the existence of ‘no’ or ‘limited’ evidence to support an allegation,⁹¹⁷ and whether the facts are ‘sufficiently clear’,⁹¹⁸ or

119-120 and 154; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment) [2008] ICJ Rep 177, para. 189; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Rep 3, paras. 52, 61 and 66; *LaGrand (Germany v. United States of America)* (Judgment) [2001] ICJ Rep 466, paras. 35-50; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (Judgment) [1989] ICJ Rep 15, paras 122 and 134; and *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (Judgment) [1952] ICJ Rep 176, pp. 200 and 209.

⁹¹⁴ This understanding is concordant with the view that the Court may be prohibited from investigating a fact not in dispute between the parties, and that it is more likely to explain its approach to questions of evidence if there is a disagreement between the parties. See further Benzing (n 18) 1377, para 5.

⁹¹⁵ As reflected in the results of the quantitative overview, the Court’s engagement with matters of evidence is more significant and explicit where there is a disagreement between the parties as to some matter of evidence. See also the discussion in *Chapter 1.3.2.1*.

⁹¹⁶ *Whaling in the Antarctic* (n 586) paras. 109, 194 and 201-202, in which the Court considered that the evidence ‘indicates’; 196 and 212, ‘suggests’; and 133 and 138, ‘shows’. See further *Jadhav (India v. Pakistan)* (Judgment) [2019] ICJ Rep 418, paras. 56 and 140.

⁹¹⁷ *Jadhav* (n 916) paras. 140, 143; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* (Judgment) [2011] ICJ Rep 664, para. 157; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] ICJ Rep 213, paras. 116, 126, 132, 143 and 149.

⁹¹⁸ *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12, p. 93.

have appeared with ‘sufficient clarity’ in the evidential record.⁹¹⁹ The use of the expressions ‘suggests’ and ‘indicates’ appear to imply evidentiary support that is plausible, but still not decisive. By contrast, ‘shows’ and ‘convincing’ suggest a higher degree of factual certainty. This informal hierarchy can be interpreted as the Court’s way of communicating different levels of confidence without committing to specific standards of proof.

Judgments from the earlier jurisprudence of the Court demonstrates its limited engagement with questions of evidence and proof, in line with descriptions of its primary focus on legal rather than factual determinations.⁹²⁰ In *Rights of Nationals of the United States of America in Morocco*, which concerned the scope of consular jurisdiction and fiscal rights under bilateral treaties between the United States and Morocco, the Court did not articulate its approach to the treatment of evidence and relied on treaty interpretation for its conclusions.⁹²¹ It held that the evidence was not ‘sufficient’ to reach a conclusion,⁹²² and that it was not ‘decisive’ in respect of some claims,⁹²³ upholding the United States’ right to exercise consular jurisdiction in the French Zone of Morocco.⁹²⁴ The case illustrates that the Court was not concerned with defining a standard of proof in the abstract, but with whether the facts aligned with its interpretative conclusions. Because the assessment of evidence is woven into the Court’s analysis, discerning a separate threshold of proof remains difficult. A similar approach was taken in the ‘*ELSI*’ case, which related to allegations by the United States that Italy had violated its obligations under the bilateral 1948 Friendship, Commerce and Navigation Treaty.⁹²⁵ Focusing on an assessment of substantive legal questions, the Court did not elaborate on its approach to evidence.⁹²⁶ The he Court limited itself to remarks on whether the evidence

⁹¹⁹ *Nottebohm (Liechtenstein v. Guatemala) (Second Phase) (Judgment)* [1955] ICJ Rep 4, p. 24.

⁹²⁰ Sandifer (n 27) 4, who suggested that, in general, international tribunals aim to ‘achieve truth in the absolute sense’ and are therefore ‘preoccupied with getting at the facts’.

⁹²¹ *Rights of Nationals of the United States of America in Morocco* (n 913).

⁹²² *ibid* p. 200, that ‘[i]n the present case there has not been *sufficient* evidence to enable the Court to reach a conclusion’.

⁹²³ *Rights of Nationals of the United States of America in Morocco* (n 913) p. 209.

⁹²⁴ *ibid* pp. 212-213.

⁹²⁵ *ELSI* (n 913).

⁹²⁶ Despite this, the Court still made repeated references to the need for the parties to substantiate their claims based on evidence. See, for example, *ELSI* (n 913) paras. 34, 36, 40 and 45.

was ‘sufficient’ to support the factual allegations,⁹²⁷ considering for one of the claims that there was ‘no very cogent evidence’.⁹²⁸ This implies a standard of proof somewhat higher than a mere balance of probabilities, yet falling short of the threshold of beyond reasonable doubt. The Court did not elaborate on this formulation, reflecting a reluctance to clarify the level of cogency required.

The reluctance to articulate a more precise standard than the ‘sufficiency’ of evidence persists also in later jurisprudence, particularly in cases focused on legal or procedural issues. In such instances, the Court tends to avoid detailed evidentiary analysis, yet still invokes a threshold of ‘sufficient’ evidence in its conclusions. In the *LaGrand* case,⁹²⁹ involving alleged violations of the Vienna Convention on Consular Relations (VCCR) concerning consular notification and rights, the Court merely referred to the ‘sufficiency’ of evidence.⁹³⁰ Likewise, in *Arrest Warrant*,⁹³¹ which related to a question of state responsibility for violations of the right to diplomatic immunity, the Court focused on a legal and jurisdictional analysis and did not articulate a formal standard of proof beyond indicating the need for ‘sufficient’ evidence.⁹³² The Court provided similarly little elaboration in the case *Certain Questions of Mutual Assistance in Criminal Matters*,⁹³³ merely considering that the evidence was ‘not sufficient’ for it to decide on the allegations.⁹³⁴ In the later case *Immunities and Criminal Proceedings*, which concerned the status of property and a question of state responsibility under the Vienna Convention on Diplomatic Relations (VCDR),⁹³⁵ the Court did not engage in a detailed discussion as to the evaluation of evidence, but considered whether the

⁹²⁷ *ELSI* (n 913) para. 122.

⁹²⁸ *ibid* para. 134.

⁹²⁹ *LaGrand* (n 913).

⁹³⁰ *ibid* paras. 35-50, in view of the Court’s assessment of the alleged violations. See further *Vienna Convention on Consular Relations* (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

⁹³¹ *Arrest Warrant* (n 913).

⁹³² *ibid* paras. 52, 61 and 66, referring to ‘sufficiency’ of evidence.

⁹³³ *Certain Questions of Mutual Assistance* (n 913).

⁹³⁴ *ibid* para. 189.

⁹³⁵ *Immunities and Criminal Proceedings* (n 913). See further *Vienna Convention on Diplomatic Relations* (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

evidence was ‘sufficient’,⁹³⁶ or noted the absence of evidence for certain allegations.⁹³⁷ These cases suggest that when factual disputes are minimal or peripheral to the legal question, the Court employs ‘sufficiency’ in a confirmatory way, reinforcing legal findings reached through interpretative or jurisdictional analysis. As such, ‘sufficiency’ may serve more to affirm than to decisively determine in such contexts.

In disputes involving complex scientific or environmental evidence, the Court often engages in a more detailed evaluation of evidence but still avoids clearly articulating a standard of proof. In these cases, terms like ‘sufficiency’ appear alongside ‘convincing’, ‘indicates’, and ‘suggests’, highlighting a somewhat greater emphasis on issues of fact as raised by the nature of those cases. For instance, in *Whaling in the Antarctic*,⁹³⁸ which concerned responsibility for alleged violations of various international environmental obligations, the Court did not articulate its approach to evidence and the applicable standard of proof. While not providing a general framework for evaluating evidence, the Court carried out an assessment of scientific and expert submissions and weighed the scientific testimony based on internal coherence and consistency with observed practices, relying on inferential reasoning rather than direct proof.⁹³⁹ It did not articulate a standard of proof but used expressions such as ‘indicates’,⁹⁴⁰ ‘suggests’,⁹⁴¹ and ‘shows’,⁹⁴² underscoring the absence of evidence.⁹⁴³ This implies a continuum of evidentiary weight, where terms like ‘suggests’ and ‘indicates’ signal a lower degree of confidence, while ‘shows’ or ‘convincing’ convey stronger conclusions. Although not formally defined, this gradation reflects a sliding scale of proof rather than a fixed threshold. Similarly, in the joined cases *Certain Activities Carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*,⁹⁴⁴ which

⁹³⁶ *Immunities and Criminal Proceedings* (n 913) paras. 112 and 114.

⁹³⁷ *ibid* paras. 107-108, considering that there was no evidence, and para. 115, that the evidence did not ‘establish’ some of the allegations.

⁹³⁸ *Whaling in the Antarctic* (n 586).

⁹³⁹ *ibid* paras. 144-146.

⁹⁴⁰ *ibid* paras. 109, 194, 201 and 202.

⁹⁴¹ *ibid* paras. 196 and 212.

⁹⁴² *ibid* paras. 133 and 188.

⁹⁴³ *ibid* para. 141, that there was ‘no’ evidence.

⁹⁴⁴ *Certain Activities and Construction of a Road* (n 913).

concerned matters of responsibility for unlawful activities in the border area and questions of environmental harm, the Court highlighted that it would make its own determination of the facts based on the scientific materials that had been presented by the parties. The Court underscored its duty ‘after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate’, noting that it would ‘[...] make its own determination of the facts, on the basis of the totality of evidence presented to it’, before applying the relevant rules to those facts.⁹⁴⁵ Moreover, the use of indirect language such as ‘indicates’, ‘suggests’,⁹⁴⁶ and references to the ‘sufficiency’ of evidence,⁹⁴⁷ reflects the challenge of proving complex facts, while describing the evidence as ‘convincing’ when supporting certain facts.⁹⁴⁸ Although the use of ‘convincing’ suggests the Court found some evidence sufficient to meet its factual burden, the absence of comparative reasoning limits clarity on what evidence would fail to meet that standard.

While in disputes involving complex or scientific materials the Court tends to engage in somewhat more detailed factual evaluation, it nevertheless avoids a formal articulation of the standard of proof. By contrast, in other categories of cases – often involving sensitive allegations or primarily legal questions – the Court’s approach to evidence is more selective and limited in nature, with less systematic assessment of credibility or conflicting testimonies.

Several cases illustrate the Court’s selective and limited approach to evidence, where ‘sufficiency’ appears to hint at a relatively demanding standard of proof. In *Nottebohm*,⁹⁴⁹ an earlier case which concerned the principle of effective nationality and a matter of state responsibility, the Court considered whether the facts had appeared with ‘sufficient clarity’ and appeared to require

⁹⁴⁵ *Certain Activities and Construction of a Road* (n 913) para. 176. These materials included, inter alia, satellite imagery, environmental impact assessments, and expert testimonies, and were used to infer causation and environmental impact, which are notoriously difficult to prove directly.

⁹⁴⁶ *Certain Activities and Construction of a Road* (n 913) paras. 86, that the evidence ‘gives support to’ certain conclusions; 95 and 119, that there was ‘no’ evidence; as well as 109 and 120, that the evidence ‘does not indicate’ or ‘does not show’.

⁹⁴⁷ *Certain Activities and Construction of a Road* (n 913) para. 81.

⁹⁴⁸ *ibid* paras. 119 and 154, considering that the parties had ‘not provided any convincing evidence’, or ‘not adduced any evidence’.

⁹⁴⁹ *Nottebohm* (n 919).

‘convincing proof of nationality’.⁹⁵⁰ This is one of the few instances where the Court directly referred to the need for ‘convincing’ proof. Given the context of nationality verification, which has dispositive jurisdictional consequences, this likely represented a higher evidentiary threshold, reflecting the importance of establishing legal status or standing with some degree of certainty. Similarly, in *Avena and Other Mexican Nationals*,⁹⁵¹ which related to responsibility for violations of the VCCR, the Court’s discussion on matters of evidence was limited but nonetheless addressed whether certain facts had been established with ‘sufficient clarity’.⁹⁵² Building on this selective evidentiary approach, the Court’s handling of sensitive and contested factual issues in more recent cases further illustrates a restrained engagement with questions of proof. As such, in *Jadhav*,⁹⁵³ the Court did not directly address questions of proof despite the disagreement between the parties on such matters.⁹⁵⁴ It instead engaged in a limited evaluation of the evidence, without a detailed assessment or weighing of the conflicting testimonies presented by the parties.⁹⁵⁵ It merely indicated whether the evidence ‘showed’ or ‘suggested’,⁹⁵⁶ and that there was ‘no evidence’ to substantiate some of the allegations.⁹⁵⁷ Despite the sensitive nature of allegations relating to espionage and issues of consular access, the Court refrained from assessing the reliability of the conflicting narratives, suggesting that ‘sufficiency’ may have served more to justify a legal outcome than to establish the factual accuracy of claims.

The Court has similarly referred to the ‘sufficiency’ of evidence in conjunction with the process of evaluation, particularly in its assessment of the credibility, weight, or consistency of evidence. This suggests that the Court may require a standard of proof that is more stringent than a typical civil threshold of ‘balance of probabilities’. The *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* case illustrates this dynamic.⁹⁵⁸ In that judgment,

⁹⁵⁰ *Nottebohm* (n 919) p. 24.

⁹⁵¹ *Avena* (n 918).

⁹⁵² *ibid* para. 93.

⁹⁵³ *Jadhav* (n 916).

⁹⁵⁴ *ibid* para. 20.

⁹⁵⁵ *ibid* para. 140, that there was ‘no evidence’ in respect of certain allegations.

⁹⁵⁶ *ibid* paras. 56, that the evidence ‘shows’, and 140, that the evidence ‘suggests’.

⁹⁵⁷ *ibid* paras. 140 and 143, that there is ‘no’ evidence.

⁹⁵⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces* (n 913).

the Court offered a relatively detailed assessment of the evidentiary record without articulating a formal standard of proof. It noted that Nicaragua's evidence lacked first-hand accounts and appeared to have been specifically prepared for the proceedings, whereas Colombia submitted materials from direct and contemporaneous sources.⁹⁵⁹ The Court thus found that Nicaragua's evidence was not 'sufficient', and that it had failed to discharge its burden of proof.⁹⁶⁰ It dismissed many allegations as not being proven 'to the Court's satisfaction', not 'sufficiently clear', or as lacking the weight to substantiate Nicaragua's claims.⁹⁶¹ The emphasis placed on the provenance and quality of evidence implies an implicit standard linked to reliability and independence, echoing criteria for probative value in national legal systems. While not formally stated, the Court's reasoning indicates a threshold that may be more demanding than a mere balance of probabilities.

In cases concerning the attribution of state responsibility, the Court refers to the 'sufficiency' of evidence, either alone or alongside other descriptors for the evidentiary threshold. Only a limited number of judgments omit such language, suggesting that 'sufficiency' represents the Court's typical, albeit imprecise, evidentiary standard in this category. In this context, the term functions less as a fixed benchmark and more as a rhetorical and evaluative device, affording the Court flexibility in both articulating and applying the standard of proof. This aligns with the broader character of the Court's evidentiary reasoning, which is shaped not by rigid doctrinal rules but by contextual assessments responsive to the nature of the dispute, the judicial function, and the values at stake. Even within this category, the stringency of what counts as 'sufficient' varies with the gravity of the allegations, ranging from exceptionally serious charges to more routine breaches of international obligations. This supports the conclusion that 'sufficiency' operates not as a stable legal threshold, but as a flexible evidentiary scale that is calibrated in each case to meet evidentiary challenges, manage risk allocation, and fulfil the Court's procedural and institutional role.

⁹⁵⁹ *Alleged Violations of Sovereign Rights and Maritime Spaces* (n 913) para. 67. The Court explicitly referenced its approach to the evaluation of evidence in *Nicaragua* (n 108), as discussed in *Chapter 5.3.1*.

⁹⁶⁰ *Alleged Violations of Sovereign Rights and Maritime Spaces* (n 913) paras. 64-69.

⁹⁶¹ *ibid* paras. 64-69.

6.2.2 ‘Convincing’ Evidence as the Standard of Proof

In a smaller subset of cases also involving the attribution of state responsibility, the Court has required a more demanding standard of proof at ‘convincing’ evidence.⁹⁶² To this end, it has used different terms considering whether the evidence is ‘convincing’,⁹⁶³ alongside ‘persuasive’,⁹⁶⁴ or if it establishes the factual allegations ‘to the [Court’s] satisfaction’.⁹⁶⁵ These expressions closely resemble those used in national legal systems for the intermediate – and thus more stringent – civil standard of proof at ‘clear and convincing’ evidence.⁹⁶⁶ Despite these more demanding terms, the Court seldom articulates a formal or consistently applied ‘convincing’ standard of proof. It remains unclear whether such expressions are used interchangeably with ‘sufficiency’, or whether they signal a higher and distinct threshold. This ambiguity suggests that the Court’s language reflects either stylistic variation or an incremental refinement of what ‘sufficiency’ entails as a matter of judicial practice.

6.2.2.1 Emergence of a Standard of ‘Convincing’ Evidence

In *United States Diplomatic and Consular Staff in Tehran*,⁹⁶⁷ which related to a matter of state responsibility for the attack on, and subsequent occupation of, the United States’ Embassy in Tehran by an armed group, the Court assessed the alleged violations of the VCCR, the bilateral 1955 Treaty of Amity, and customary international law. Given Iran’s absence from the proceedings, the Court emphasised that it needed to satisfy itself that the claims were ‘well

⁹⁶² See the methodological discussion in *Chapter 1.3.2*.

⁹⁶³ *Application of the Interim Accord* (n 956) para. 142; and *Pulp Mills* (n 422) paras. 189 and 228, requiring ‘convincing’ evidence, and paras. 254 and 262, referring to the ‘sufficiency’ of evidence. Compared to *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment) [2010] ICJ Rep 639, paras. 58 and 70, applying the ‘convincing’ standard of proof, and 65 and 71, applying a somewhat lenient standard of proof for violations of international human rights law.

⁹⁶⁴ *Dispute regarding Navigational and Related Rights* (n 917) para. 131, where the Court held that there was ‘no persuasive evidence’ in respect of one of the claims.

⁹⁶⁵ *United States Diplomatic and Consular Staff in Tehran* (n 282), requiring the establishment of facts to the ‘satisfaction’ of the Court.

⁹⁶⁶ This reflects the intermediate standard of proof employed in certain Common Law legal systems, such as the United States, in civil cases that involve allegations of a more serious nature, most commonly in view of the severity of consequences. See further *Chapter 2.3.4*.

⁹⁶⁷ *United States Diplomatic and Consular Staff in Tehran* (n 282).

founded' within the meaning of Article 53 of the ICJ Statute.⁹⁶⁸ The Court assessed the coherence and consistency of a wide range of evidence, drawing on affidavits from witnesses, official government statements, and contemporary press reports to establish the factual context.⁹⁶⁹ In respect of the applicable standard of proof, the Court underscored that the facts must be 'established to the Court's satisfaction',⁹⁷⁰ indicating it required a flexible but still relatively demanding approach. This approach underscores the Court's commitment to ensuring robust factual foundations even in the absence of full adversarial participation.

While the Court occasionally makes explicit its requirement of 'convincing' evidence, it also employs alternative expressions such as 'persuasive' to signal a similarly stringent standard, even in cases of lesser gravity, where the complexity or technical nature of the facts may trigger heightened evidentiary scrutiny.⁹⁷¹ In *Dispute regarding Navigational and Related Rights*,⁹⁷² which concerned Nicaragua's alleged violation of Costa Rica's right of access to the San Juan River, the Court not only outlined the geographical and historical context but also engaged in a relatively detailed evaluation of the evidence.⁹⁷³ It assessed conflicting expert reports and factual materials submitted by the parties, carefully considering its independence, reliability, and probative value of each piece of evidence.⁹⁷⁴ While the Court did not specify a formal standard of proof, but considered whether the evidence presented was 'persuasive'.⁹⁷⁵ This suggests that, even where the stakes are not exceptionally high, the Court may invoke terms like 'persuasive' to underscore its diligence in its evaluation complex or technical fact patterns.

Building on this approach in cases involving technical complexity, the *Pulp Mills* case, which concerned a question of state responsibility for violations of international environmental obligations, exemplifies the use of a stringent

⁹⁶⁸ *United States Diplomatic and Consular Staff in Tehran* (n 282) paras. 11-13.

⁹⁶⁹ *ibid* para. 90.

⁹⁷⁰ *ibid* para. 82.

⁹⁷¹ See the results of the quantitative overview in *Chapter 1.3.2.1*.

⁹⁷² *Dispute regarding Navigational and Related Rights* (n 917).

⁹⁷³ *ibid* paras. 15-29.

⁹⁷⁴ *ibid* paras. 56-59.

⁹⁷⁵ *ibid* paras. 116, 126, 132, 143, 149, on there being 'no' or 'limited' evidence to support the factual contentions of the parties, and 131, on that there was 'no persuasive evidence'.

evidentiary threshold in proceedings requiring the evaluation of large volumes of technical and scientific material.⁹⁷⁶ While the parties held divergent views on the independence and authority of certain expert materials, including those prepared by international organisations, the Court reaffirmed its practice of assessing the facts based on the evidential record as a whole.⁹⁷⁷ It did not articulate a formal standard of proof, but considered whether the evidence was ‘convincing’,⁹⁷⁸ and occasionally ‘sufficient’.⁹⁷⁹ The Court’s use of more precise language, such as ‘convincing’ or ‘persuasive’ evidence, rather than merely referring to the ‘sufficiency’ of evidence, suggests that more demanding standard of proof may have been required for attribution of state responsibility. The *Pulp Mills* case thus illustrates how scientific complexity and contested expertise may prompt the Court to adopt a substantively more demanding evidentiary threshold, even without a formal standard of proof.

Similarly, in *Ahmadou Sadio Diallo*,⁹⁸⁰ which concerned state responsibility for the wrongful arrest, detention, and expulsion of a Guinean national by the DRC in violation of diplomatic protection and international human rights law, the Court further refined its approach by applying different standards of proof within the same case, reflecting the nature and gravity of distinct allegations. Within the same judgment, the Court appeared to apply different evidentiary thresholds to distinct categories of allegations – such as unlawful detention, versus mistreatment⁹⁸¹ – suggesting that the nature and gravity of a claim may influence its evidentiary assessment. Acknowledging the parties’ disagreement over the existence of key facts,⁹⁸² the Court emphasised that the burden of proof does not rest exclusively with either party and that it is for the Court to assess the evidence.⁹⁸³ It adopted a contextual approach to the articulation of the standard of proof. While it requires ‘convincing’ evidence for serious

⁹⁷⁶ *Pulp Mills* (n 422) paras. 160-168.

⁹⁷⁷ *ibid* paras. 166-168.

⁹⁷⁸ *ibid* paras. 189 and 228.

⁹⁷⁹ *ibid* paras. 254 and 262.

⁹⁸⁰ *Ahmadou Sadio Diallo* (n 963).

⁹⁸¹ *ibid* paras. 1-14, on the chronology of proceedings and claims.

⁹⁸² *ibid* para. 53, that the Court was ‘[f]aced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case’.

⁹⁸³ *ibid* paras. 55-57.

allegations such as torture,⁹⁸⁴ it adopted a lower threshold focused on likelihood or reasonable assurance for charges deemed less grave.⁹⁸⁵ This differentiation, linked to the subject-matter of each claim, reinforces the idea that the Court calibrates evidentiary thresholds considering both evidentiary accessibility and the gravity of the allegations. The nature and gravity of the allegations appear to have significant influence on the Court's approach to the standard of proof. By applying a lower standard of proof to human rights violations, compared to a requirement of 'convincing' evidence for allegations of torture, the Court's approach may contribute to facilitating the enforcement and access to evidence in cases where the evidence is difficult to obtain.⁹⁸⁶

6.2.2.2 'Convincing' Evidence in Application of the ICFST and CERD

The Court's context-sensitive approach to the standard of proof was made even more explicit in the case *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* brought by Ukraine against Russia.⁹⁸⁷ The dispute arose amid the political unrest following the 2014 Euromaidan protests and Russia's illegal annexation of Crimea. Ukraine alleged that Russia had violated both the International Convention for the Suppression of the Financing of Terrorism (ICFST) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) through acts of discrimination against Ukrainians and Crimean Tatars in Crimea.⁹⁸⁸ Given the parties' disagreement as to several central questions of

⁹⁸⁴ *Ahmadou Sadio Diallo* (n 963) paras. 58 and 70.

⁹⁸⁵ *ibid* paras. 65, on allegations relating to arbitrary detention, and 71, on allegations relating to unlawful expulsion.

⁹⁸⁶ This appears to be aligned with the Court's previous practice of requiring a lower threshold of evidence for alleged violations of international human rights obligations. See further the discussion of *Armed Activities* (n 108) in *Chapter 5.3.3*.

⁹⁸⁷ *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)* (Judgment of 31 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf>> accessed 29 July 2025.

⁹⁸⁸ On the chronology of the proceedings, and the general factual background to the case, see further *Application of the ICFST and CERD* (n 987) paras. 1-27. See further *International Convention for the Suppression of the Financing of Terrorism* (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197; and *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

evidence and proof, the Court provided a more detailed and explicit analysis regarding the treatment of evidence related to these violations.⁹⁸⁹ Despite the variation in expressions used to describe the required threshold of evidence, the Court clarified that a standard of proof at ‘convincing’ evidence was applicable for the attribution of state responsibility in view of both the ICFST and CERD.⁹⁹⁰

The alleged violations of the ICFST concerned Russia’s purported support for terrorism-related activities, especially in the Donbas region of Ukraine. On one hand, Russia argued that the gravity of the allegations warranted a standard of proof at ‘fully conclusive’ evidence,⁹⁹¹ and that the Court should not draw inferences from an alleged ‘pattern of conduct’ unless financing terrorism was the ‘only reasonable inference’ to be drawn from the circumstances.⁹⁹² On the other hand, Ukraine held that a typical ‘civil’ standard of proof at ‘sufficient’ or ‘convincing’ evidence was appropriate for the nature of the allegations, underscoring that it should be allowed a more liberal recourse to inferences of fact and circumstantial evidence where the relevant evidence was found to be outside its ‘exclusive territorial control’.⁹⁹³ The Court acknowledged that the standard of proof ‘may vary from case to case’ and taking into account factors ‘including the gravity of the allegation’. It noted that while it had previously required proof at ‘a high level of certainty’ for grave charges, such as genocide, in other cases it had applied a ‘less exacting standard of proof’.⁹⁹⁴ Although the Court did not specify the threshold for a ‘grave’ charge for evidentiary purposes, it concluded that the allegations under the ICFST were ‘not of the same gravity as those relating to the crime of genocide’ and thus did not warrant the use of the ‘fully conclusive’ standard. The Court held that it would require ‘convincing’ evidence for the attribution of responsibility in view of the allegations under the ICFST, emphasising that each provision imposed a distinct obligation and that it would, in addition to assessing the relevance and

⁹⁸⁹ *Application of the ICFST and CERD* (n 987) paras. 77-85, in respect of the standard of proof for violations of ICFST (n 988), and 162-178, in respect of CERD (n 988).

⁹⁹⁰ This is consistent with one possible categorisation of the different standards of proof that are applied by the Court, and that it generally requires a standard of proof that is more stringent than a mere ‘balance of probabilities’ and more akin to a standard of ‘convincing’, or ‘clear and convincing’, evidence. See also Riddell and Plant (n 16) 133–136.

⁹⁹¹ *Application of the ICFST and CERD* (n 987) para. 77.

⁹⁹² *ibid* para. 78.

⁹⁹³ *ibid* para. 77.

⁹⁹⁴ *ibid* para. 81.

probative value of Ukraine's evidence, determine whether such evidence met the requisite threshold, thereby reflecting its context-sensitive approach to the standard of proof.⁹⁹⁵ The Court's emphasis on allegations of genocide as the only 'grave' allegation requiring the heightened standard, reflecting to a large extent the structure of the parties' arguments, left uncertain whether other types of serious charges such as terrorism or racial discrimination would also fall into this category.

In relation to the alleged violations of CERD, Ukraine alleged that Russia had engaged in discriminatory practices against both Ukrainians and Crimean Tatars. While Russia argued for the use of a more stringent standard of proof at 'fully conclusive' evidence, given the gravity of claiming a state is involved in 'a campaign of cultural erasure',⁹⁹⁶ Ukraine suggested that Russia had not justified the need for a heightened standard of proof and maintained that such a standard would be inappropriate for allegations not reaching the gravity of genocide, despite its characterisation of Russia's conduct as a 'systematic' campaign of racial discrimination.⁹⁹⁷ Acknowledging the disagreement on the threshold for a 'pattern' of racial discrimination, the Court reaffirmed the variable nature of the standard of proof and held it would require 'convincing' evidence in respect of each individual act of racial discrimination alleged by Ukraine, and whether those acts together would constitute a 'pattern' of racial discrimination.⁹⁹⁸ Regarding the ICFST, the Court assessed the probative value of the evidence presented and took note of the contextual constraints on evidence collection in conflict-affected areas. It found that Russia had failed to take appropriate investigatory measures in view of certain obligations under the Convention, but similarly rejected the remainder of Ukraine's claims under the ICFST.⁹⁹⁹ The Court found that Russia's implementation of its educational system in Crimea after the 2014 annexation violated its obligations under CERD but rejected Ukraine's other submissions.¹⁰⁰⁰

⁹⁹⁵ *Application of the ICFST and CERD* (n 987) paras. 83-84.

⁹⁹⁶ *ibid* para. 166.

⁹⁹⁷ *ibid* para. 164.

⁹⁹⁸ *ibid* paras. 169-171.

⁹⁹⁹ *ibid* para. 404.

¹⁰⁰⁰ *ibid* para. 404

6.2.3 Synthesis

One of the most common expressions to describe the threshold of evidence for the attribution of state responsibility is ‘sufficient’ evidence. Although the Court has not explicitly defined ‘sufficiency’ in its judgments, its evaluation of evidence suggests that this standard requires more than simply proving a claim is more likely than not. As seen in *Application of the ICFST and CERD*, the Court clarified that a ‘convincing’ standard of proof generally applies to the attribution of state responsibility.¹⁰⁰¹ This standard reflects the gravity of such findings and the significant legal, political, and reputational consequences for the responsible state.¹⁰⁰² The Court further distinguished this ‘convincing’ standard from the more stringent ‘conclusive’ or ‘fully conclusive’ standard reserved for grave charges. However, the Court has yet to clarify the boundary between grave and non-grave charges, leaving this distinction unresolved.

The Court’s approach to the standard of proof in state responsibility cases, excluding grave charges, reflects a nuanced balancing of competing interests, namely, the need to ensure judicial legitimacy, fairness to the parties, practical evidentiary constraints, and the preservation of the Court’s institutional role. While ‘sufficiency’ of evidence remains the default evidentiary threshold, the Court raises the threshold to a ‘convincing’ standard where allegations are more serious or evidence is complex, signalling greater caution in avoiding erroneous findings of responsibility. This standard arguably responds not only to the gravity of the alleged conduct, but also the difficulties in obtaining the necessary evidence, and the Court’s interest in maintaining procedural fairness. The use of a sliding scale of evidentiary confidence expressed through varying language – such as ‘suggests,’ ‘shows,’ ‘convincing’ – the Court manages evidentiary uncertainty and allocates the risk of error between parties, while also preserving its discretion to adapt to the circumstances of each case.

Although not explicitly defined, the Court’s use of a flexible standard of proof appears to correspond to balancing the competing interests of accuracy in fact-finding, access to justice despite evidentiary challenges, and safeguarding the Court’s credibility and legitimacy. As confirmed by the Court in *Application of the ICFST and CERD*, ‘convincing’ evidence is the applicable standard of proof for cases concerning the attribution of state responsibility for allegations falling short of genocide. Although explicit references to this standard are

¹⁰⁰¹ See the discussion in *Chapter 6.2.2.2*.

¹⁰⁰² This appears to be broadly aligned with the notion of ‘bounded’ discretion. See further the discussion of the concept in *Chapter 4.3.2*.

relatively infrequent, the Court's judicial practice demonstrates that the threshold is more stringent than a mere 'balance of probabilities'. Taken together, these cases reveal a consistent pattern in which the Court tailors its use of language and the required evidentiary threshold according to both the gravity of the alleged conduct and the nature of the available evidence. This suggests that the standard of proof is calibrated to balance several competing interests in terms of not only the relative gravity of the allegations, but also practical considerations such as difficulties in evidence collection and broader concerns related to enforcement, especially in complex contexts.

6.3 Boundary Delimitation Disputes: Selecting the Evidentially Most Plausible Option

The Court has required 'sufficient' evidence also in territorial and maritime boundary delimitation disputes, without articulating a clear standard of proof. Boundary delimitation disputes represent a broad category, comprising of a total of 31 cases, which involve variable legal and factual circumstances.¹⁰⁰³ In boundary delimitation disputes, the Court's role is limited to identifying a middle ground between the competing claims of the parties, recognising a boundary rather than performing a constitutive act.¹⁰⁰⁴ It must define the course of the boundary, even if neither party has presented a particularly persuasive claim of sovereignty, marking a clear contrast with the attribution of state responsibility where the Court may equally find that no wrongful conduct has taken place.¹⁰⁰⁵ This section first considers the Court's use of 'sufficiency' as the general threshold of evidence in boundary delimitation disputes, before exploring heightened standards such as 'convincing' or 'compelling' evidence.

6.3.1 'Sufficiency' as the Evidentiary Threshold

Although the Court often uses the term 'sufficiency' of evidence in boundary delimitation disputes, its references to the required threshold of evidence in this category of cases demonstrates considerable variation. As the Court's

¹⁰⁰³ See the results of the quantitative overview in *Chapter 1.3.2.1*, and further in the *Appendix: Evidentiary Standards in ICJ Contentious Cases*.

¹⁰⁰⁴ On these 'functions' of the Court, see further *Del Mar* (n 23) 101–106.

¹⁰⁰⁵ *Riddell and Plant* (n 16) 133–136.

function in boundary delimitation is essentially to determine which party has a better claim to sovereignty, this shapes the way it approaches the standard of proof.¹⁰⁰⁶ Adding to the nature of the judicial task in boundary delimitation disputes, such cases are frequently brought to the Court by Special Agreement, through which the parties may have clarified or agreed on matters of fact between themselves prior to submitting their dispute to the Court.¹⁰⁰⁷ This means that the Court's fact-finding role may be more constrained either by the absence of disputed facts due to prior negotiations, or by specific terms of the Special Agreement in which the parties have agreed on certain facts.¹⁰⁰⁸ To provide a focused analysis, this section first examines the Court's approach to the evidentiary threshold in territorial disputes, before turning to maritime delimitation cases, highlighting the particular evidentiary considerations and expressions of sufficiency used in each context.

6.3.1.1 Territorial Delimitation Disputes

The Court employs a broad and contextualised approach in territorial disputes, often engaging in quasi-historical reconstruction of facts. It first examines whether there is a valid treaty establishing the course of the disputed boundary, which operates as a *lex specialis* and allows it to determine the boundary without addressing other titles to territory or arguments from the parties.¹⁰⁰⁹ If no such treaty exists, the Court considers the titles invoked by the parties. It reviews a wide range of materials to determine the boundary – such as historical records, administrative practices, and agreements demonstrating the existence of a boundary – focusing on the relationship between territorial sovereignty titles and their corresponding *effectivités*.¹⁰¹⁰

The Court's approach to boundary delimitation is notably broad, encompassing diverse types of facts and evidence to capture the complex and evolving nature of territorial claims. This broad and flexible methodology is well illustrated by

¹⁰⁰⁶ Del Mar (n 23) 98–101. See also Riddell and Plant (n 16) 133–136.

¹⁰⁰⁷ Article 36(1) of the ICJ Statute (n 39) provides a jurisdictional basis for disputes which are referred to the Court by agreement between the parties, whether through a *compromis* (agreement), or a compromissory clause contained in a treaty.

¹⁰⁰⁸ See the discussion of jurisdictional limitations in *Chapter 3.2.1*.

¹⁰⁰⁹ See, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, para. 75.

¹⁰¹⁰ See, for example, Marcelo Kohen and Hébié Mamadou, 'Territorial Disputes' in Carlos Esposito and Kate Parlett (eds), *The Cambridge Companion to the International Court of Justice* (Cambridge University Press 2025) 359–361.

the Court's approach in the *Frontier Dispute* between Benin and Niger.¹⁰¹¹ In that case, the Court addressed the delimitation of a boundary between Benin and Niger, and focused particularly on whether the tributaries of the River Niger could serve as natural demarcations given the lack of clarity in former colonial-era boundary lines.¹⁰¹² The Court examined documentary evidence including historical documents, maps, and records, emphasising *effectivités* and the principle of *uti possidetis juris* to trace patterns of administrative control and local governance as indicators of sovereignty.¹⁰¹³ In doing so, the Court sought to reconstruct effective territorial administration inherited at independence, applying a flexible threshold of evidence at 'sufficiency'.¹⁰¹⁴ In its findings, the Court conducted a holistic assessment of detailed geographic and factual evidence to delineate the boundary, applying a standard of sufficiency that weighed competing claims without privileging either side.¹⁰¹⁵

This methodology, which emphasises the broader geographical, historical, and administrative context of territorial claims and applies a flexible 'sufficiency' standard without articulating a formal proof threshold, is further illustrated in the case relating to *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge*.¹⁰¹⁶ In that case, the Court resolved a dispute between Malaysia and Singapore in respect of three maritime features in the Singapore Strait and assessed which of them had showed a continuous and peaceful display of authority.¹⁰¹⁷ Aiming to reconstruct effective authority over territory to identify which state had sovereignty over the disputed features, the Court examined a diverse range of evidence, including historical documents, diplomatic correspondence, maps, as well as administrative acts such as those

¹⁰¹¹ *Frontier Dispute (Benin/Niger)* (Judgment) [2005] ICJ Rep 90.

¹⁰¹² *Frontier Dispute (Benin/Niger)* (n 1011) paras. 15-16, on the special agreement conferring jurisdiction to the Court and the parties' submissions, and 17, on the judicial task.

¹⁰¹³ The Court assesses *effectivités*, which refer to evidence of continuous and peaceful displays of state authority over a territory, in the context of territorial disputes to determine effective control, especially where title is uncertain. The principle of *uti possidetis juris* preserves the colonial administrative boundaries at independence, converting them into international borders to promote stability during processes decolonisation or state succession.

¹⁰¹⁴ *Frontier Dispute (Benin/Niger)* (n 1011) paras. 46, whether the evidence was 'indicative'; 55 and 69, on the need for 'sufficient' evidence; and 140, on that there was 'no' evidence.

¹⁰¹⁵ *Frontier Dispute (Benin/Niger)* (n 1011) para. 146.

¹⁰¹⁶ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (n 486).

¹⁰¹⁷ In territorial disputes, the 'continuous and peaceful display of sovereignty' refers to a state's public, consistent, and uncontested exercise of authority over a territory over time.

relating to lighthouse maintenance and water regulation. It did not apply a formalised standard of proof but considered whether the evidence was ‘sufficient’ to establish sovereignty.¹⁰¹⁸ It also suggested that there was ‘no’ evidence to support some of the claims.¹⁰¹⁹

Instead of awarding full sovereignty over all features to one party, the Court apportioned them: Pedra Branca to Singapore, Middle Rocks to Malaysia, and South Ledge to the state within whose territorial waters it lies.¹⁰²⁰ The outcome reflects the Court’s emphasis on equitable solutions, illustrating a general approach to the delimitation of territory, prioritising socially and contextually embedded practices as well as informal manifestations of authority.

In other territorial delimitation cases, the Court has similarly underscored the importance of the broader geographical, historical, and administrative context, considering whether the evidence is ‘sufficient’ without adopting a formal standard of proof. This is evident in the *Frontier Dispute*, between Burkina Faso and Mali, in which the Court described evidence as ‘indicative’,¹⁰²¹ or ‘sufficient’ to support particular conclusions as to the facts.¹⁰²² Similarly, in *Kasikili/Sedudu Island*, the Court used expressions indicating whether the evidence ‘showed’, ‘suggested’, and whether it could be considered as ‘persuasive’ or ‘sufficient’.¹⁰²³ In *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Court similarly considered the ‘sufficiency’ of the evidence.¹⁰²⁴

While the Court frequently refers to the ‘sufficiency’ of evidence in territorial delimitation disputes, there are several cases where it makes no explicit reference to a standard of proof.¹⁰²⁵ The Court may engage with evidentiary

¹⁰¹⁸ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (n 486) para. 177.

¹⁰¹⁹ *ibid* para. 62.

¹⁰²⁰ *ibid* para. 300.

¹⁰²¹ *Frontier Dispute (Burkina Faso/Mali)* (n 280) para. 30.

¹⁰²² *ibid* paras. 62, 65, 93, 97, 126 and 141-142.

¹⁰²³ *Kasikili/Sedudu Island* (n 446) para. 69, that the evidence ‘showed’ and that the Court was ‘not persuaded’, at para. 37; that the evidence ‘indicated’; para. 74, ‘would tend rather to suggest’; para. 78, ‘insufficiently proven’; and para. 87, did not ‘endorse’.

¹⁰²⁴ *Sovereignty over Pulau Ligitan and Pulau Sipidan* (n 446) para. 110.

¹⁰²⁵ This clearly contrasts with cases involving the attribution of state responsibility, where it is more common for the Court to use some type of expression for the threshold of evidence. See *Chapter 6.2* on the standard of proof for the attribution of state responsibility.

issues without expressly stating the standard of proof, resolving disputes by applying equitable principles. In *Dispute over the Status and Use of the Waters of the Silala*, despite significant factual disagreements, many legal claims were settled through prior agreements or during the course of the proceedings and the Court did not articulate any standard of proof.¹⁰²⁶ Similarly, in joined cases *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos*, which involved both territorial and maritime boundary delimitation, there was no clearly articulated standard of proof and many of the issues at stake had been settled through diplomatic negotiations.¹⁰²⁷ In *Temple of Preah Vihear*, the Court resolved the dispute by applying general principles such as estoppel and acquiescence, focusing on Thailand's conduct as consent to the boundary, and therefore did not articulate any clearly identifiable standard of proof.¹⁰²⁸

6.3.1.2 Maritime Delimitation Disputes

In maritime delimitation disputes, the Court adopts a structured and methodical approach, relying on a relatively well-established jurisprudential framework and technical principles to determine maritime boundaries.¹⁰²⁹ It begins by establishing a provisional boundary line based on the equidistance principle as a preliminary reference point. The boundary line is drawn so that every point on the line is equidistant from the nearest baselines of the coastal states involved, which are the baselines used to measure their territorial seas.¹⁰³⁰ Next, the Court assesses whether there are relevant circumstances – such as geographic features or the configuration of the coastline – that warrant

¹⁰²⁶ *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)* (Judgment) [2022] ICJ Rep 614.

¹⁰²⁷ *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) [2018] ICJ Rep 139.

¹⁰²⁸ *Temple of Preah Vihear* (n 407).

¹⁰²⁹ See *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13, para. 60. See also *Maritime Delimitation in the Black Sea* (n 485) paras. 115-122.

¹⁰³⁰ The Court draws such a line unless there are 'compelling' reasons that make it unfeasible in a particular case. See *Maritime Delimitation in the Black Sea* (n 485) para. 116, and further *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Judgment) [2007] ICJ Rep 659, para. 281. On the equidistance principle, see also Massimo Lando, *Maritime Delimitation as a Judicial Process* (Cambridge University Press 2019) 102–104.

adjustments in the provisional line to achieve an equitable result.¹⁰³¹ Finally, the Court examines whether the resulting boundary line produces a balanced outcome within the overall geographical context, ensuring that it does not create disproportionate effects for either of the litigating parties.¹⁰³² This methodology relies on technical data, including expert reports, hydrographic surveys, and cartographic evidence, which are subsequently evaluated within a framework of equitable considerations.¹⁰³³ Throughout this process, the Court has frequently referred to the ‘sufficiency’ of evidence without clearly defining the applicable standard of proof.

The Court’s approach is exemplified in the case relating to the *Continental Shelf* between Tunisia and Libya,¹⁰³⁴ which involved competing claims over the continental shelf. It examined historical agreements, correspondence, and state practice relating to the continental shelf to identify an existing understanding between the parties. While considering technical data, such as coastal geography and equidistance lines, it emphasised historic title and state practice. The Court did not specify a clear standard of proof but held that it required ‘sufficient’ evidence in support of the delimitation.¹⁰³⁵ Similarly, in the *Continental Shelf* case between Libya and Malta, the Court held that it was not ‘satisfied’ and was unable to ‘draw sufficiently cogent conclusions’, despite the significant volumes of evidence, most of which were technical in nature, submitted by the parties.¹⁰³⁶ It Court did not specify a formal standard of proof but resolved the dispute by applying equitable principles in delimiting the continental shelf, suggesting it employed a lenient threshold of evidence consistent with its general approach.¹⁰³⁷ This consistently flexible language

¹⁰³¹ See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, para. 288. See also *Territorial and Maritime Dispute between Nicaragua and Honduras* (n 1030) para. 271.

¹⁰³² *Maritime Delimitation in the Black Sea* (n 485) para. 122.

¹⁰³³ *Lando* (n 1030) 26–30.

¹⁰³⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18.

¹⁰³⁵ *Continental Shelf (Tunisia/Libya)* (n 1034) paras. 66, 92, 113, 127, considering whether the evidence was of ‘sufficient weight’ or ‘sufficient’ to support the allegations.

¹⁰³⁶ *Continental Shelf (Libya/Malta)* (n 1029).

¹⁰³⁷ *ibid* para. 41, where the Court held that it was not ‘satisfied’, that it could not ‘draw sufficiently cogent conclusions’, as well as underscoring the insufficiency of the available data for the delimitation of the boundary.

allows the Court to preserve discretion in assessing the factual basis of competing territorial claims, thereby avoiding a rigid evidentiary threshold.

Further reflecting this pattern, in the case *Land, Island and Maritime Frontier Dispute*,¹⁰³⁸ which concerned bilateral frontier agreements and sovereignty over islands in the Gulf of Fonseca, the Court again refrained from articulating a formal standard of proof beyond whether the evidence was ‘sufficient’.¹⁰³⁹ This demonstrates the Court’s continued preference for a flexible, context-sensitive approach that balances detailed factual assessment with equitable considerations, even in technically complex disputes.

The Court’s application of the standard of proof further evolved in the case *Territorial and Maritime Dispute*, between Nicaragua and Honduras, where it assessed sovereignty over several cays and applied equitable principles for the delimitation of the maritime boundary.¹⁰⁴⁰ It evaluated whether the parties’ evidence was ‘sufficient’ to support their claims, beginning with a median line as a provisional boundary and adjusting it where necessary to achieve an equitable result.¹⁰⁴¹ Notably, the Court clarified that establishing the existence of a tacit agreement requires ‘compelling’ evidence, implying a more stringent standard of proof than that applied to the main sovereignty issues.¹⁰⁴² In the *Territorial and Maritime Dispute* case, between Nicaragua and Colombia, the Court first determined sovereignty over maritime features before delimiting the maritime boundary.¹⁰⁴³ In examining the evidence, it considered a broad range of historical and other materials to assess effective authority and sovereignty, placing particular emphasis on the actual conduct of the parties in relation to the disputed territory. Although the Court did not articulate a formal standard of proof, it evaluated the ‘sufficiency’ of evidence alongside other expressions describing the quantum of evidence submitted.¹⁰⁴⁴

¹⁰³⁸ *Land, Island and Maritime Frontier Dispute* (n 393).

¹⁰³⁹ *ibid* paras. 67, 96-96, 102, 125, 138, 176, 178-179, 181, 195, 264, 266, 277, 304, 349, 360, on whether the evidence was ‘sufficient’; and further 90 and 140, on whether the evidence showed with ‘sufficient certainty’.

¹⁰⁴⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras* (n 1030).

¹⁰⁴¹ *ibid* paras. 110, 208, 253, 256.

¹⁰⁴² *ibid* para. 253.

¹⁰⁴³ *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624.

¹⁰⁴⁴ *Territorial and Maritime Dispute* (n 1043) paras. 35, 38, 53-54, 219 and 236.

Finally, in the *Land and Maritime Delimitation and Sovereignty over Islands* case, between Gabon and Equatorial Guinea,¹⁰⁴⁵ the Court considered what forms of evidence could establish legal title under the Special Agreement concluded between the parties. It affirmed that once *prima facie* authentic documents have been submitted, the burden of proof shifts to the other party to disprove them. Assessing the 1974 Bata Convention, the Court evaluated both the document's formal qualities and the broader context of state conduct and diplomatic exchanges to determine their respective intents to be legally bound.¹⁰⁴⁶ While the Court did not adopt a formal standard of proof, it referred to the 'sufficiency',¹⁰⁴⁷ 'convincing', or 'inconclusive' nature of evidence supporting certain allegations,¹⁰⁴⁸ alongside other expressions,¹⁰⁴⁹ indicating a flexible and lenient evidentiary threshold.

As already noted in respect of territorial boundary delimitation,¹⁰⁵⁰ the Court often refrains from using expressions which clearly articulate an evidentiary threshold. Notably, in the *North Sea Continental Shelf* cases, the Court focused primarily on interpreting agreements where facts were agreed upon by the parties, thereby obviating the need for extensive judicial fact-finding or an articulated standard of proof.¹⁰⁵¹ In the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, the Court concentrated on the interpretation of the parties' agreements without specifying a standard of proof, applying equitable principles for the delimitation of the boundary.¹⁰⁵²

¹⁰⁴⁵ *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)* (Judgment of 19 May 2025) <<https://www.icj-cij.org/case/179>> accessed 25 June 2025.

¹⁰⁴⁶ *Land and Maritime Delimitation and Sovereignty over Islands* (n 1045) paras. 36-38, 41 and 43.

¹⁰⁴⁷ *ibid* para. 193.

¹⁰⁴⁸ *Land and Maritime Delimitation and Sovereignty over Islands* (n 1045) paras. 85, 92 and 93, on the need for 'convincing' evidence, and 81, on the evidence being 'inconclusive'.

¹⁰⁴⁹ *Land and Maritime Delimitation and Sovereignty over Islands* (n 1045) paras. 80, that the evidence 'shows'; 140, 'points to'; 191, 'demonstrates'; and 93, 190, 193-194 and 197, on there being '(no) support' in the evidence, or 'no evidence'.

¹⁰⁵⁰ See the discussion in *Chapter 6.3.1.1*.

¹⁰⁵¹ *North Sea Continental Shelf* (n 325).

¹⁰⁵² *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Judgment) [2023] ICJ Rep 413.

6.3.2 Heightened Standard of Proof in Boundary Delimitation Disputes: ‘Convincing’ and ‘Compelling’ Evidence

The Court has considered whether the evidence is ‘convincing’, particularly in the context of requiring ‘convincing’ proof of title to territory. Despite the similar use of language to the ‘convincing’ standard of proof required by the Court for the attribution of state responsibility, the Court’s use of that term in territorial and maritime boundary delimitation disputes instead appears to refer to a lower evidentiary threshold. The need for ‘convincing’ evidence in this context seems to generally describe the quality of the evidence, rather than any distinct threshold of evidence.

6.3.2.1 ‘Convincing’ Proof of Title

In its earlier case law, the Court appears to have used the term ‘convincing’ evidence primarily as a general descriptor of the quality of evidence. In the *Fisheries* case,¹⁰⁵³ concerning the extent of Norway’s territorial waters and the methodology for drawing baselines, the Court took a broad, contextualised approach to assessing the evidence. In doing so, it focused on examining the historical use of straight baselines, official legislation, maps, and consistent enforcement measures in view of fishing activities to assess Norway’s method of delimiting its territorial sea. Taking a pragmatic stance, the Court considered the practical effect of Norway’s conduct and the international community’s acquiescence rather than applying a standard of proof. It assessed whether the facts were ‘clearly evidenced’,¹⁰⁵⁴ and found no ‘convincing’ evidence to support the United Kingdom’s challenge against Norway’s straight baseline method.¹⁰⁵⁵ Subsequently, in *Minquiers and Ecrehos*, a territorial dispute between the United Kingdom and France over sovereignty of two small groups of islets near the Channel Islands and was brought under a Special Agreement, the Court observed that many aspects of the evidence had already been agreed upon.¹⁰⁵⁶ As such, the Court’s role was confined to determining which party presented the most ‘convincing’ proof of legal title.¹⁰⁵⁷

¹⁰⁵³ *Fisheries (United Kingdom v. Norway)* (Judgment) [1951] ICJ Rep 116.

¹⁰⁵⁴ *Fisheries* (n 1053) p. 133.

¹⁰⁵⁵ *ibid* pp. 26, ‘in the absence of convincing evidence’, and 28, ‘in the absence of evidence to the contrary’.

¹⁰⁵⁶ *Minquiers and Ecrehos* (n 408).

¹⁰⁵⁷ *ibid* p. 52, where the Court pointed out that its task was to determine which party had produced the more ‘convincing’ proof of title.

In the case relating to *Sovereignty over Certain Frontier Lands*, a territorial dispute between Belgium and the Netherlands, the Court confronted deficient and conflicting evidentiary materials, many of which were unverified.¹⁰⁵⁸ Given that it was faced with a largely historical record, it considered whether the evidence could constitute ‘adequate’ proof,¹⁰⁵⁹ emphasising the need for ‘convincing’, or, at the very least, ‘sufficient’, evidence.¹⁰⁶⁰ The Court awarded sovereignty to Belgium, applying a relatively low standard of proof where the party with the marginally more persuasive case prevailed.¹⁰⁶¹ The case thus confirms that in territorial disputes, ‘convincing’ evidence functions as an adequacy check rather than a demanding evidentiary threshold.

The more recent judicial practice of the Court confirms that the requirement of ‘convincing’ evidence remains a flexible evaluative term rather than a distinct, more rigorous standard of proof. This consistent approach applies across both territorial and maritime delimitation disputes, with the Court assessing the coherence, consistency, and overall persuasiveness of the evidence. In several recent cases, the Court has reiterated the use of ‘convincing’ as a qualitative measure, not as an elevated evidentiary threshold. In the *Land and Maritime Boundary* case between Cameroon and Nigeria, the Court addressed the delimitation of land and maritime boundaries, including sovereignty over the Bakassi Peninsula.¹⁰⁶² The Court assessed a wide range of evidence including historical treaties, maps, and evidence of effective administration, balancing competing claims focusing on continuous and peaceful exercises of authority to determine the course of the boundary. It required ‘convincing’ evidence in view of the boundary delimitation,¹⁰⁶³ while also finding that neither party had ‘sufficiently’ proven facts related to alleged violations of international law or established state responsibility.¹⁰⁶⁴ While this might suggest a heightened standard of proof for boundary delimitation compared to state responsibility,

¹⁰⁵⁸ *Sovereignty over Certain Frontier Lands (Belgium/Netherlands)* (Judgment) [1959] ICJ Rep 209.

¹⁰⁵⁹ *Sovereignty over Certain Frontier Lands* (n 1058) p. 21.

¹⁰⁶⁰ *ibid* pp. 17, on ‘convincing’ evidence, and further 24, on ‘sufficient’ evidence.

¹⁰⁶¹ *ibid* p. 230.

¹⁰⁶² *Land and Maritime Boundary between Cameroon and Nigeria* (n 1031).

¹⁰⁶³ *ibid* para 207, on there being ‘convincing’ evidence; and 221 and 224, that the evidence ‘indicates’.

¹⁰⁶⁴ *ibid* para. 324, where the Court considered that neither party had ‘sufficiently’ proven the facts.

the Court's conclusion that neither party sufficiently proved their claims on state responsibility indicates a consistent evidentiary approach rather than a fundamentally more stringent standard.

Similarly, in the case *Maritime Delimitation in the Black Sea*, which concerned the delimitation of the continental shelf and exclusive economic zones between Romania and Ukraine, the Court emphasised that its role was limited to interpreting the parties' agreements rather than conducting judicial fact-finding.¹⁰⁶⁵ It characterised the evidence in terms of whether it was 'convincing,' at times noting the absence of evidence altogether, thereby reaffirming its consistent approach.¹⁰⁶⁶ In *Maritime Delimitation in the Indian Ocean*, between Somalia and Kenya, concerning a dispute over a maritime boundary in a potentially resource-rich area, the Court assessed the authenticity, reliability, and coherence of the parties' submissions. Adopting a broad approach, it focused on inconsistencies and contradictions in the evidence.¹⁰⁶⁷ The Court did not articulate any formal or rigid standard of proof, but considered whether the evidence was 'convincing',¹⁰⁶⁸ and made references to its 'sufficiency'.¹⁰⁶⁹

Despite their seemingly exacting nature, terms such as 'clearly evidenced' or 'convincing' in this context describe the clarity or plausibility of evidence within a pragmatic and contextual framework, rather than imposing a formal standard of proof. The absence of 'convincing' evidence therefore reflects a lack of sufficient persuasive force, rather than failure to satisfy a defined evidentiary threshold. Furthermore, the reference to 'most convincing' proof suggests a weighing of evidence, where the Court did not apply a high threshold but selected the more persuasive of two competing titles. The parties' agreement on the factual record reduced the evidentiary burden, reinforcing that 'convincing' evidence is a relative, not absolute, standard.

¹⁰⁶⁵ *Maritime Delimitation in the Black Sea* (n 485) para. 68, in which the Court noted that its task related to the interpretation of agreements between the parties and not fact-finding.

¹⁰⁶⁶ *ibid* para. 138.

¹⁰⁶⁷ *Maritime Delimitation in the Indian Ocean* (n 107).

¹⁰⁶⁸ *ibid* para. 159.

¹⁰⁶⁹ *ibid* paras. 83 and 193, on the need for 'sufficient' evidence, and further 209, 'sufficient certainty'.

6.3.2.2 ‘Compelling’ Evidence of Tacit Agreements

The Court has articulated a requirement of ‘compelling evidence’ to establish the existence of tacit agreements. This appears to reflect a more demanding standard of proof than that of ‘convincing’ evidence occasionally applied in boundary delimitation cases, aligning more closely with cases concerning the attribution of state responsibility.¹⁰⁷⁰ In the *Territorial and Maritime Dispute*, between Nicaragua and Honduras, the Court emphasised the requirement of ‘compelling’ evidence to establish the existence of a tacit agreement, noting that such an agreement ‘is not easily to be presumed’ given the gravity of establishing a permanent maritime boundary.¹⁰⁷¹ Similarly, in the *Maritime Dispute*, between Peru and Chile, the Court again considered that ‘compelling’ evidence is required to establish a tacit agreement. It found such evidence present, noting that the parties had subsequently formalised their tacit understanding through a bilateral agreement.¹⁰⁷² Moreover, in the case relating to *Maritime Delimitation in the Indian Ocean*, Somalia alleged the existence of a tacit agreement with Kenya as establishing the relevant maritime boundary.¹⁰⁷³ The Court emphasised that this would require ‘compelling evidence’ demonstrating a shared understanding and conduct,¹⁰⁷⁴ ultimately finding that the evidence did not support the existence of a tacit agreement.

The requirement of ‘compelling evidence’ demonstrates the Court’s nuanced approach and recognises that tacit agreements by their nature demand a higher level of proof to establish parties’ consent or conduct in the absence of explicit treaties. The distinction between ‘convincing’ and ‘compelling’ evidence reflects the Court’s functional calibration of evidentiary thresholds. Generally, the Court applies a more stringent standard of proof for establishing tacit agreements than for other boundary delimitation disputes, approaching the degree of proof required in cases of state responsibility. While ‘compelling’ evidence denotes a heightened standard necessary to establish legal obligations

¹⁰⁷⁰ See the discussion of the Court’s ‘functions’, *Del Mar* (n 23) 98–101.

¹⁰⁷¹ *Territorial and Maritime Dispute between Nicaragua and Honduras* (n 1030) para. 253, in which the Court held that ‘[it] must now determine whether there was a tacit agreement sufficient to establish a boundary. Evidence of a tacit legal agreement must be *compelling*. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed’ (emphasis added).

¹⁰⁷² *Maritime Dispute (Peru v. Chile)* (Judgment) [2014] ICJ Rep 3, paras. 91 and 174.

¹⁰⁷³ *Maritime Delimitation in the Indian Ocean* (n 107) para. 37.

¹⁰⁷⁴ *ibid* paras. 52, on the need for ‘compelling’ evidence, and 71 and 89, that there was ‘no compelling evidence’.

absent explicit agreement, ‘convincing’ evidence functions as a qualitative and relative measure to weigh claims to sovereignty or title.

6.3.3 Synthesis

Although the Court has frequently referred to the ‘sufficiency’ of evidence in territorial and maritime boundary delimitation, this appears to impose a lower evidentiary threshold than in other categories of cases. The Court has not explicitly clarified the nature or stringency of the evidentiary threshold, but it nevertheless appears less demanding than the ‘convincing’ standard applied in state responsibility cases and is likely comparable to that of the ‘balance of probabilities’. This lenient standard of proof seems justified primarily by the nature of boundary disputes, which often involve fewer contested facts and less reliance on precise factual determinations. This is particularly the case in territorial disputes grounded in historical claims, where the evidentiary record may be ambiguous or fragmented. In disputes of this nature, the Court appears to prioritise equitable outcomes over exhaustive fact-finding, aiming to define boundaries in a way acceptable to both parties. This is reflected in its contextual and holistic assessment of a relatively wide range of evidence, where interpretation carries more significant weight. Rather than relying solely on probative value, the Court’s approach thus acknowledges the socially constructed nature of territorial claims and its own role as an impartial arbiter, avoiding rigid legal formalism in the determination of boundaries.

Despite occasional references to the need for ‘convincing’ evidence throughout boundary delimitation disputes, the Court’s evaluation of evidence suggests that this may represent a mere variation in its use of language, rather than a more demanding standard of proof such as that required for the attribution of state responsibility. The term ‘convincing’ likely reflects the persuasive quality of the evidence rather than a fixed or heightened threshold of evidence. This understanding is reinforced by the Court’s consistent use of broad, contextual assessments and comparative reasoning in territorial and maritime delimitation cases, where the prevailing party is often the one with the more coherent and plausible claim. In judicial practice, the standard resembles a preponderance of the evidence rather than a formal or stringent test. This is underscored by the Court’s use of the term ‘compelling’ when assessing tacit agreements or acquiescence, indicating a higher evidentiary threshold than the ‘convincing’ standard occasionally referred to boundary delimitation disputes. This reflects a context-sensitive approach, where the requirement of ‘convincing’ evidence

signifies relative persuasiveness, while ‘compelling’ is reserved for claims demanding greater certainty due to their implicit legal consequences.

6.4 Conclusion

The standard of proof applied by the Court in cases concerning the attribution of state responsibility, on one hand, and boundary delimitation, and on the other hand, emerges as context dependent, shaped by factors such as the nature of the legal claim, the quality and availability of evidence, as well as the extent of factual contestation or prior agreement between the parties. This context-sensitive approach reflects the Court’s institutional role and the practical constraints it faces, balancing the imperative to uphold judicial legitimacy with the need to ensure procedural fairness and accessibility. While this institutional balancing confers necessary flexibility, it also gives rise to ambiguity and occasional inconsistency in evidentiary standards.

The Court’s frequent reference to ‘sufficient’ evidence highlights its flexible approach, with ‘sufficiency’ serving less as a fixed threshold and more as a contextual, adaptable standard. Rather than applying a uniform rule, the Court calibrates the evidentiary requirement according to the dispute’s nature and the interests involved, preserving judicial discretion, and avoiding rigid formulas. In cases of attribution of state responsibility, the Court applies a ‘convincing’ standard of proof, reflecting the gravity of the legal and reputational consequences at stake. By contrast, in boundary delimitation disputes, a lower standard, most likely akin to the ‘balance of probabilities’, is applied. This divergence rests on two key rationales: the necessity of a stricter standard to uphold state accountability in responsibility cases, and the need for a more flexible approach in boundary disputes, shaped by evidentiary limitations and the Court’s equitable, problem-solving function.

Firstly, in cases involving the attribution of state responsibility, the Court has referred to the need for ‘sufficient’ evidence and only more recently clarified that the applicable evidentiary threshold is that of ‘convincing’ evidence. While the terminology of ‘sufficiency’ has often been invoked, the Court’s evaluation of the facts suggests a relatively demanding evidentiary standard. The articulation of a ‘convincing’ standard of proof underscores the seriousness of assigning responsibility to a state and signals a context-sensitive rather than uniform approach to evidentiary reasoning. It also reflects a pragmatic balance between preserving judicial flexibility and ensuring a

reliable evidentiary foundation. In this light, the standard appears calibrated, at least in part, to the gravity of the legal, political, and reputational consequences that may be associated with a finding of state responsibility.

The Court's reliance on a 'convincing' standard of proof for allegations not defined as 'grave' raises questions about the coherence and consistency of its evidentiary framework, particularly regarding the line between grave and non-grave charges. This ambiguity was underscored in *Application of the ICFST and CERD*, where the Court affirmed that it would require 'convincing' evidence for the attribution of responsibility for allegations not defined as grave for evidentiary purposes, distinguishing this threshold from the stringent requirements of 'conclusive' or 'fully conclusive' evidence for particularly grave allegations.¹⁰⁷⁵ The lack of clarity as to the distinction between grave and non-grave charges for evidentiary purposes is particularly problematic in cases involving alleged violations of international human rights law, which do not fall squarely into either category. In *Ahmadou Sadio Diallo*,¹⁰⁷⁶ the Court required 'convincing' evidence for allegations of torture, but appeared to apply a more lenient, though unspecified, threshold for the other alleged violations of international human rights law. It is unclear how the Court assesses gravity for evidentiary purposes, and why allegations involving serious harm or potential breaches of *jus cogens* norms, such as allegations of torture, do not qualify as 'grave' for evidentiary purposes. This lack of clarity extends also to other alleged violations of human rights, which are neither treated as 'grave' nor consistently subjected to a higher evidentiary threshold. A similar ambiguity arose in the *Armed Activities* case, where the Court appeared to require a more lenient standard of proof for allegations of human rights violations compared to other types of allegations.¹⁰⁷⁷

The 'convincing' standard of proof may be warranted given the serious legal, political, and reputational consequences associated with the attribution of state responsibility for wrongful conduct, which can extend beyond the immediate dispute and affect the state's standing in the international community.¹⁰⁷⁸ However, the Court's willingness to apply a more lenient standard in cases

¹⁰⁷⁵ *Application of the ICFST and CERD* (n 987). See the discussion in *Chapter 6.2.2.2*.

¹⁰⁷⁶ *Ahmadou Sadio Diallo* (n 963). See the discussion in *Chapter 6.2.2.1*.

¹⁰⁷⁷ *Armed Activities* (n 108). See the discussion in *Chapter 5.3.3*.

¹⁰⁷⁸ See, for example, *Bosnia Genocide* (n 5) para. 293, in which the Court cited a passage from the ICTY describing the 'stigma' attached to a finding of responsibility for genocide. See the discussion of this case in *Chapter 5.4.1*.

involving human rights violations, even where the allegations are serious, suggests that gravity alone does not explain the differentiation. It suggests a nuanced and context-sensitive approach that is shaped not only by legal consequences but also by the moral and narrative weight of judicially framing state accountability. Overall, the standard of proof appears to be influenced by a range of considerations that include, but are not limited to, the gravity of allegations, reflecting underlying political, reputational, and moral interests that inform the Court's evidentiary reasoning.

Secondly, the use of a lower evidentiary threshold in territorial and maritime boundary delimitation disputes reflects the evidentiary realities and the judicial function exercised by the Court in such disputes. Although the Court frequently refers to the 'sufficiency' of evidence, the threshold applied appears less demanding than the 'convincing' standard required in cases involving the attribution of state responsibility. If understood in the context of the evaluation of evidence in such cases, the threshold of proof appears to resemble a 'balance of probabilities' approach. This threshold is likely justified by the nature of these disputes, which revolve around long-standing, historically or socially constructed claims where the evidential record may be ambiguous, incomplete, or indeterminate. In this context, a strict evidentiary threshold could hinder the Court's ability to make determinations and reach a decision. As such, the Court adopts a pragmatic, and in some respects holistic assessment of the evidential record. The approach of the Court to the treatment of evidence in boundary delimitation disputes suggests that it prioritises the equitable settlement of the boundary dispute in a manner that is acceptable to the litigating parties.

The relatively lenient standard of proof applied by the Court in territorial and maritime boundary delimitation reflects both the nature of these disputes and the character of the evidence available. These cases involve overlapping claims rather than allegations of fault, meaning that the outcome of the proceedings does not impose a heavier burden on one party over the other. The relatively even allocation of the risk of error thus supports a more pragmatic evidentiary approach, with a lower evidentiary threshold. The historical, geographical, and often fragmented nature of evidence also necessitates a degree of flexibility, allowing the Court to interpret the evidential record in a contextualised manner rather than requiring precise factual reconstructions. In practice, this results in a standard of proof that closely resembles that of the 'balance of probabilities', rather than the demanding 'convincing' standard required for the attribution of state responsibility. Although the Court occasionally refers to 'convincing' or even 'compelling' evidence in boundary disputes, particularly in the context of assessing claims of tacit agreement or acquiescence, these terms are not used

in a uniform or absolute sense. Instead, they take on a more context-dependent meaning, functioning as markers of persuasive weight rather than signalling a higher, fault-oriented standard of proof. In this way, the Court preserves flexibility in its reasoning while adapting evidentiary expectations to the specific function and stakes of the dispute at hand. The Court's focus in these cases is less on establishing legal fault and more on facilitating equitable and workable outcomes, which is reflected in the use of a lower standard of proof. Taken together, these practices reveal a Court that prioritises institutional adaptability over evidentiary uniformity, one that seeks to deliver principled judgments within the constraints of fragmented records, contested narratives, and diverse forms of legal responsibility.

7. Conclusions

7.1 Considerations in Determining the Standard of Proof: An ‘Open-Close’ Model of Evidentiary Decision-Making

The standard of proof is a central, yet underexplored, component of the Court’s evidentiary regime. As a decisional threshold, it determines the point at which the evidence is sufficient proof for a claim to be recognised as a judicial fact. The standard of proof thereby functions not only as a tool for judicial decision-making, but as a mechanism for navigating factual uncertainty in adjudication. Before the Court, the standard of proof is one of the least clarified aspects of its evidentiary regime and judicial practice. As Judge Higgins observed in her Separate Opinion in the *Oil Platforms* case, ‘[t]he principal judicial organ of the United Nations should [...] make clear what standards of proof it requires to establish what sorts of facts’.¹⁰⁷⁹

This section begins by addressing the first sub question asked by the present thesis: *What considerations in the context of the evidentiary regime of the International Court of Justice are relevant to guide the determination of the standard of proof?*¹⁰⁸⁰ This question invites an inquiry into the nature of the standard of proof within the evidentiary regime of the Court. It calls, first, for an examination of the legal and conceptual foundations that inform the use of a particular standard of proof, and second, for an analysis of the discretionary power of the Court in weighing these considerations, given the institutional, procedural, and normative interests at stake. These elements are developed progressively in the thesis. Chapter 2 conceptualises the standard of proof as a decisional threshold in adjudication. Chapter 3 continues by situating that concept of proof within the Court’s flexible evidentiary regime. Finally, Chapter 4 examines the Court’s ‘bounded discretion’ and how it shapes the

¹⁰⁷⁹ *Oil Platforms* (Separate Opinion of Judge Higgins) (n 24) para. 33.

¹⁰⁸⁰ See the description of the research questions asked by this thesis in *Chapter 1.2*.

articulation and application of the standard of proof. These chapters identify both the relevant considerations for determining the standard of proof and the constraints that limit the Court's evidentiary decision-making. Together, they provide the conceptual framework for answering the first sub-question and establish a basis for the subsequent examination of judicial practice.

As demonstrated by Chapter 2, the standard of proof functions as a decisional threshold that allocates the risk of error between the parties in response to factual uncertainty in adjudication. In national contexts, its articulation often shifts with contextual factors, in particular the gravity of the allegations or the potential severity of consequences attached to a finding of liability, as well as the asymmetry of accessing evidence, and institutional priorities. Chapter 2 thus establishes that the standard of proof is a necessary component of judicial decision-making that enables courts to reach decisions despite conditions of factual uncertainty. This represents a shared functional concern across legal systems, even if they vary in their precise conceptualisations of proof.

Drawing on the outlined understanding of the standard of proof as a decisional threshold in adjudication, Chapter 3 situates the concept within the evidentiary regime of the ICJ. It also identifies the principal considerations informing the process of its determination in this context. The absence of detailed legal rules of evidence provides the Court with freedom to adjust its treatment of evidence on a case-by-case basis, as a scope of flexibility grounded in the understanding of factual issues as occupying a secondary role in inter-state adjudication. The judicial practice of the Court confirms the use of a variable standard of proof, which has been expressed in terms ranging from 'fully conclusive' evidence to the need for 'sufficient' evidence. This variation is broadly consistent with three central factors: first, the gravity and severity of consequences attached to a finding of liability for the states concerned; second, the Court's dual role as both a dispute settlement body and principal UN organ; and third, underlying normative values, including those of fairness and legitimacy. While these factors correspond to the considerations identified in Chapter 2 – framing the standard of proof as a mechanism for risk allocation, judicial policy, and normative commitments – they are shaped by the distinct institutional context of the Court. The consent-based nature of the Court's jurisdiction, its sparse evidentiary framework, and political sensitivity of certain types of disputes require it to balance legal reasoning with respect for state sovereignty and broader international stability, resulting in a flexible standard of proof. Yet, the Court has yet to provide a principled account justifying the use of a particular standard of proof, thereby preserving its discretion in evidentiary matters.

Chapter 4 analyses the Court's 'flexibility' in evidentiary matters through the lens of discretion. In doing so, it draws on the notion of 'bounded' discretionary power to describe the scope of the Court's evidentiary decision-making. The chapter demonstrates that the Court's ability to select which considerations to make operational in each case is fundamentally constrained by a framework of legal, procedural, and institutional factors to ensure coherence, fairness, and legitimacy of the Court's decision-making. The Court's consent-based jurisdiction and its distinct role within the broader UN framework restrict its fact-finding powers, requiring judicial restraint and sensitivity to the interests of sovereign states appearing as litigating parties. Normative and political pressures further demand that the Court strikes a balance between competing interests to preserve its authority and avoid politicisation, especially in sensitive disputes. The scope of the Court's discretion may accordingly shift according to the stakes involved in each case. While higher stakes for states may narrow the scope of discretion the Court can exercise, lower stakes provide greater latitude in the treatment of evidence. This reflects the bounded nature of the Court's discretionary power, whereby its judicial authority is shaped by state interests, institutional constraints, and political context rather than fixed rules, shedding light on the context-dependent nature of the determination of the standard of proof. However, this pragmatism carries the risk of uneven application, where considerations of a political or institutional nature may override procedural fairness, with further consequences for legitimacy.

The determination of the standard of proof before the Court can be understood through an 'open-close' model. Although the Court may consider a broad range of factors in its determination of the standard of proof – representing the 'open' dimension – its ability to do so is constrained by legal, procedural, and institutional limitations – the 'closed' dimension. This duality reflects the characterisation of the Court's evidentiary regime and decision-making as both flexible and 'open', yet fundamentally constrained and, in that sense, 'closed'.

The openness of the Court's determination of the standard of proof is grounded in the flexible, multi-faceted nature of its judicial function, situated within a procedurally minimalist and consent-based system of adjudication. The lack of codified evidentiary rules allows the Court to adjust its standard in response to contextual factors, such as the gravity of the allegations, the accessibility of evidence, and the broader legal or political stakes. This flexibility is further reinforced by the functional multiplicity of the Court. It operates not only to settle disputes between states, but as an institutional actor contributing to the progressive development of international law.

Alongside the diversity of interests at stake in judicial proceedings before the Court, these functions invite distinct expectations regarding the treatment of evidence. It also widens the range of considerations relevant to the Court's 'flexible' determination of the standard of proof. In high-stakes disputes, which may involve particularly serious breaches of international law, the Court is likely to opt for a stringent standard to safeguard the interests of the litigating states while also protecting its institutional legitimacy. By contrast, when facilitating peaceful settlement, or addressing less politically sensitive matters, a more flexible standard may encourage compromise and cooperation. This structural and functional fluidity of the Court's evidentiary regime expands the interpretive and normative space within which the Court exercises discretion, reflecting the 'open' dimension of its treatment of evidence.

The considerations that guide the Court's determination of the standard of proof may be understood as including, *inter alia*, the following:

1. *Interests of the litigating states.* Sovereignty concerns, power asymmetries between the parties, and potential consequences of adverse findings, whether legal or reputational in nature. The Court's consideration of litigating states' interests may include the awareness of power asymmetries, necessitating the use of a more stringent standard of proof to protect disadvantaged parties, as well as ensuring equity and preventing exploitation of disparities. This may privilege state interests over those of the judicial process.
2. *Judicial process considerations.* This includes aspects of procedural fairness and equality of arms, access to and availability of evidence, sound administration of justice, due process as well as transparency and predictability. Due process considerations, including equality of arms and equal opportunity to present evidence, are foundational to the Court's procedural fairness, especially given its limited fact-finding powers and reliance on state cooperation.
3. *Judicial policy and broader institutional objectives.* Interests tied to the Court's dual, and occasionally triadic, role as adjudicator, law-declarer, and institutional actor, promotion of peaceful settlement of disputes, contribution to the development of international law, as well as maintenance of institutional legitimacy in the international community. Balancing the judicial truth-seeking function with the Court's peace-promoting role within the UN framework also entails judicial policy considerations that may shape evidentiary discretion and outcomes fostering international stability and legal certainty.

4. *Normative and value-based considerations.* Including balancing fairness, legal certainty, and equity, managing risks of error in judicial fact-finding, and reflecting the broader values that underpin international adjudication.

Within the ‘open’ part of the model, considerations of this nature often exist in competition with one another and require the Court to engage in a balancing act. This is neither formalised in a unified doctrine nor consistently transparent, raising questions about the predictability of the Court’s evidentiary reasoning. While a wide range of considerations may inform the Court’s determination of the standard of proof, its ability to operationalise those considerations as a matter of practice is constrained by legal, procedural, and institutional factors. This ‘closes’ the otherwise expansive scope of discretion afforded to the Court and reflects the narrowing function within the open-close model.

Legal constraints – grounded in the Statute, procedural rules, and general principles – serve as embedded standards that promote consistency, coherence, and accountability within the Court’s evidentiary reasoning. Institutional constraints arise from the Court’s consent-based jurisdiction and positioning within the wider UN system, requiring judicial restraint and sensitivity to the litigating states and political context in which dispute settlement takes place. Normative and political expectations further constrain the Court’s exercise of discretion by imposing standards of neutrality, impartiality, and procedural fairness, expectations that are particularly salient in disputes involving high stakes or politically sensitive interests. As such, these constraints significantly narrow the permissible range for the Court’s exercise of discretion. As a matter of judicial practice, this results in a cautious and context-sensitive approach to the standard of proof, balancing competing interests while operating within a constrained scope of discretion.

The balance between diverse interests in the determination of the standard of proof reflects tensions between safeguarding state sovereignty and upholding judicial integrity, the challenge of reconciling truth-finding in adjudication with the practical need for efficient dispute resolution, as well as navigating political considerations. The Court’s navigation of these tensions is central to the legitimacy and effectiveness of its decisions, with the standard of proof exemplifying the inherent opacity in its evidentiary reasoning.

7.2 Judicial Pragmatism and Restraint in the Application of the Standard of Proof

Building on the analysis of considerations guiding the Court's determination of the standard of proof, this section addresses the second sub question: *How is the standard of proof applied by the International Court of Justice in its judicial practice, and how does this reflect the considerations identified as relevant within its evidentiary regime?*¹⁰⁸¹ Addressing this question required a two-stage inquiry. It began with a quantitative overview of the articulation, and application, of evidentiary standards across the Court's judicial practice. This was followed by a qualitative analysis of judicial practice to identify what considerations have shaped the application of the standard of proof as a matter of judicial practice. Two case studies were examined: Chapter 5 analysed the Court's consistent, and relatively explicit, practice of aligning the standard of proof with the gravity of the charge, requiring an explicit standard of proof at 'conclusive' or 'fully conclusive' evidence. Chapter 6 examined the broader group of cases in which the Court has merely required 'sufficient' evidence.

Chapter 5 demonstrated that the Court's use of a heightened standard of proof – at either 'conclusive' or 'fully conclusive' evidence – in cases involving grave charges is justified primarily by the significant stakes involved for the litigating states. It is further differentiated by the nature of the allegations and the legal and political context in which a dispute has arisen. Although the Court has refrained from formally articulating a standard of proof, the use of terms such as 'conclusive', alongside 'convincing' and 'persuasive', to describe the quality of evidence suggests a demanding but still malleable threshold. This flexibility and pragmatism were made clear in the *Armed Activities* case, where the Court applied a more lenient threshold of evidence for alleged violations of international humanitarian and human rights law. By contrast, the Court's approach in cases under the Genocide Convention reveals the use of a more stringent standard of proof. In contrast to other grave charges, which have typically met the standard of 'conclusive' evidence, allegations of genocide have been subject to the more stringent requirement of 'fully conclusive' evidence. This represented a quasi-criminal approach to the standard of proof, emphasising caution in fact-establishment and less flexibility in its approaches to evidence. This heightened standard reflects the gravity of the allegations,

¹⁰⁸¹ See further in *Chapter 1.2*.

and the political and reputational costs associated with the attribution of state responsibility to a state for the commission of genocide.

Chapter 6 revealed a much more variable and context-sensitive approach to the standard of proof. While ‘sufficiency’ is used consistently across much of the Court’s judicial practice not involving grave charges, it appears to vary from a seemingly low threshold to the demanding ‘convincing’ standard of proof. In cases involving the attribution of state responsibility for charges not characterised as ‘grave’, the requirement of ‘sufficient’ evidence may be most closely aligned with a flexible yet demanding ‘convincing’ standard of proof. Distinct from the ‘fully conclusive’ standard, the use of the term ‘sufficient’ evidence rather than articulating a formal standard of proof reflects the Court’s management of factual uncertainty through a sliding scale of confidence which is tailored to the complexity of the case. This is clear in the contrast between the notion of ‘sufficiency’ in cases involving the attribution of responsibility, on one hand, and boundary delimitation disputes, on the other, where in the latter category ‘sufficiency’ appears to approximate a standard of proof more akin to the ‘balance of probabilities’. This reflects the function exercised by the Court in such cases, not to assign fault but instead to stake out a middle ground between the competing claims of the parties and produce an equitable delimitation of territory. The Court can therefore be described as taking a contextualised approach, assessing the overall ‘sufficiency’ of evidence. While additional terms such as ‘compelling’ or ‘convincing’ occasionally appear in boundary delimitation disputes, they serve rather as indicators of weight than fixed evidentiary thresholds.

The case studies in Chapters 5 and 6 demonstrate that the Court applies a varied and context-sensitive standard of proof, adjusted to the nature and stakes of the dispute. On one hand, judicial practice relating to grave charges shows that the Court exercises restraint by requiring a stringent standard of proof, with varying degrees of flexibility depending on the salience of state interests at stake. In such cases, it has required both ‘conclusive’ and ‘fully conclusive’ evidence. On the other hand, in cases not involving grave charges, the Court applies lower and more flexible standards of proof while differentiating them in terms of their stringency and depending on whether it has been tasked with assigning responsibility or merely delimiting between opposing claims. The Court has thus required ‘convincing’ evidence where the attribution of state responsibility is at issue, treating ‘sufficiency’ as a relatively lower threshold in boundary delimitation disputes, where the Court is not assigning responsibility but merely resolving competing claims.

The differentiated standard of proof across the Court's judicial practice reveals a dynamic between judicial restraint and pragmatism. In cases involving grave allegations, where the political and reputational stakes for the litigating states are high, the Court exercises restraint, adopting strict and often explicitly articulated standards – such as 'conclusive' or 'fully conclusive' evidence – to minimise the risk of wrongful attribution of conduct. The exercise of restraint reflects both the significant stakes for the litigating states, encompassing not only legal consequences but also the potential reputational harm resulting from a finding of responsibility. These high stakes require the Court to adopt a stringent standard of proof to minimise the risk of erroneous findings and mitigate risks that a judgment would be perceived as politicised by the litigating states or the wider international community. In cases involving less severe charges, by contrast, the Court instead tends to lean towards judicial pragmatism, applying flexible and context-sensitive thresholds of evidence. These are most commonly framed in terms of the 'sufficiency' of evidence and occasionally require a more demanding standard of 'convincing' evidence. In doing so, the Court demonstrates a greater openness to considerations of a contextual nature – such as the evidentiary constraints of the case, the nature of the dispute, or facilitating the need for an equitable solution – demonstrating flexibility. This approach allows the Court to accommodate limitations in the evidential record and the functional demands of dispute resolution, including cases where overly rigid rules of evidence would hinder dispute resolution.

The case studies illustrate how the Court balances central considerations in its determination of the standard of proof. In cases involving grave charges, it applies a strict yet differentiated approach shaped by significant state interests, particularly reputational concerns. An implicit moral dimension appears to inform this heightened scrutiny, especially in the distinction between use of force and genocide cases, where the Court has recognised the extreme gravity of the allegations and imposed higher evidentiary thresholds. While not explicitly acknowledged, this moral element underpins the Court's more exacting demands under the Genocide Convention. In such contexts, discretion is heavily constrained by the preferences and sensitivities of states. By contrast, in cases not involving grave charges, the Court adopts more flexible standards, reflecting sensitivity to evidentiary limitations, the functional needs of dispute resolution, and its dual role as both a judicial body and an institutional actor. In these cases, discretion is comparatively broader, calibrated to the lower stakes and less pronounced state interests at play.

7.3 Concluding Remarks

The articulation and application of standards of proof have long remained the ‘black box’ of evidentiary decision-making at the Court. This has made it difficult to fully appreciate how the Court reaches its decisions. Considering the foregoing, the present thesis is guided by the following overarching research question: *What is the role of the standard of proof at the International Court of Justice, and how does it reflect, and shape, the legal and systemic considerations of international adjudication?*¹⁰⁸²

The standard of proof at the Court emerges not as a fixed or rigid threshold but as a flexible tool shaped by a wide range of jurisdictional, procedural, and institutional factors. Although the Court exercises a considerable discretion in the process of determining the standard of proof, its approach balances considerations relating to the gravity and consequences of the allegations, asymmetries between parties, procedural fairness, and broader judicial and institutional objectives. These considerations operate within what this thesis has conceptualised as an ‘open-close’ model of evidentiary decision-making, capturing the process by which the Court determines the standard of proof as simultaneously flexible and constrained. The Court’s ability to operationalise these considerations is further circumscribed by structural limitations relating to the consent-based nature of its jurisdiction, institutional positioning within the UN framework, and the need to preserve legitimacy in its decision-making. The scope of discretionary power in evidentiary decision-making may thus shift with the interests at stake, narrowing when the stakes for states are high and thereby limiting the weight given to competing considerations.

The case studies demonstrated a context-sensitive approach to the articulation, and subsequent application, of the standard of proof, reflecting a dynamic between pragmatism and restraint. Where the stakes for the litigating states are high, the Court exercises restraint by imposing stringent evidentiary thresholds such as ‘conclusive’ and ‘fully conclusive’ evidence. This serves to mitigate the risks of erroneous or overly politicised findings and safeguard the legal, political, and reputational interests of the litigating states, thereby narrowing the Court’s discretionary power. In cases involving less severe charges, the Court’s application of the standard of proof instead demonstrates pragmatism. In such cases, standards of proof are more flexible and contextually adaptive, from ‘convincing’ evidence to the implicit threshold of ‘sufficient’ evidence.

¹⁰⁸² See further in *Chapter 1.2*.

Where state interests are less pronounced and exert less restraint on the Court's discretion, it can consider a broader range of factors, including the functional demands of adjudication, in determining the standard of proof.

These findings reveal that the standard of proof at the ICJ operates as a flexible yet constrained mechanism, shaped not only by legal and procedural principles but also by political and institutional pressures. While flexibility enables the Court to navigate complex factual claims in a pragmatic manner, it also risks inconsistent application and a relatively significant degree of deference to the interests and preferences of the litigating states. This is evident in the Court's strict evidentiary demands for grave allegations, which leave little room for accommodation of competing interest – such as challenges relating to access to evidence – that the Court is more willing to consider in cases involving less serious breaches and correspondingly less salient state interests.

The standard of proof can be understood as both reflecting and reinforcing the structural limitations of the Court, given its consent-based jurisdiction and need to maintain legitimacy in its decision-making. This means the Court must carefully calibrate its evidentiary thresholds to navigate competing demands of state consent, managing political sensitivities, and preserving its authority as an impartial judicial body. Consequently, the standard of proof acts as both a legal and strategic tool that shapes the scope and impact of the Court's decisions within the constraints imposed by its institutional framework. This means the standard of proof is shaped not only by balancing risk allocation between parties, seeking to minimise erroneous or otherwise unjust findings, but also by broader institutional and normative concerns, including legitimacy, fairness in dispute resolution, and the dual role of the Court as a judicial body and an organ within a wider international organisation.

The present thesis has offered a systematic and normative framework, which has clarified the rationale and constraints shaping decision-making regarding the articulation and application of the standard of proof. Integrating theoretical insights on the flexible, yet ultimately bounded, nature of considerations that are relevant for the standard of proof, this thesis has revealed how the Court strikes a balance between risk allocation, institutional legitimacy, and political sensitivities within its consent-based jurisdiction. The contribution of the present thesis can therefore be described as essentially two-fold. First, it has provided a theoretical framework clarifying the Court's evidentiary regime and discretionary power in the determination of the standard of proof. Second, it has offered an analytical contribution by identifying the considerations that shape the Court's decision-making in evidentiary matters. In doing so, the thesis has not only shed light on a foundational yet opaque aspect of the Court's

judicial practice but has offered a basis for the further critical engagement with evidentiary reasoning in international adjudication.

While this thesis offers a systematic framework clarifying the ICJ's standard of proof, its emphasis on a single international court and published materials may limit its broader applicability. Further comparative studies relating to other international courts as well as judicial bodies, insights into judges' deliberations, and empirical analysis of their evidentiary engagement would contribute to the understanding of the international law of evidence. This study's focus on legally relevant considerations expressed in judicial practice provides insight into decision-making processes, but without fully capturing the political and extra-legal influences that may underpin the Court's decision-making. Taking a broader perspective, examining how evidentiary practices influence the establishment of facts in international adjudication, especially how findings shape legal discourse and state behaviour, offers promising avenues for future research.

Bibliography

Treaties and International Agreements

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

Convention for the Pacific Settlement of International Disputes (Hague Peace Conference 1899) 32 Stat 2025 (entered into force 4 September 1900)

Convention for the Pacific Settlement of International Disputes (Hague Peace Conference 1907) 1 Bevans 240 (entered into force 26 January 1910)

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159

Dispute Settlement Understanding, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5

International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993

Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 561

Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 16 September 1921) 6 LNTS 379

Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 93

Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261

Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95

International Case Law

International Court of Justice

Judgments

Aerial Incident of July 27th, 1955 (Israel v. Bulgaria) (Preliminary Objections) [1959] ICJ Rep 127

— Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender [1959] ICJ Rep 156

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Judgment) [2010] ICJ Rep 639

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) (Judgment) [2022] ICJ Rep 266

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Preliminary Objections) [1996] ICJ Rep 595

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Preliminary Objections) [2008] ICJ Rep 412

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Judgment) [2015] ICJ Rep 3

Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece) (Judgment) [2011] ICJ Rep 664

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) (Judgment of 31 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf>> accessed 29 July 2025

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment) [2005] ICJ Rep 168

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Reparations) [2022] ICJ Rep 13

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Jurisdiction and Admissibility) [2006] ICJ Rep 6

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment) [2002] ICJ Rep 3

Avena and Other Mexican Nationals (Mexico v. United States of America) (Judgment) [2004] ICJ Rep 12

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) (Judgment) [1970] ICJ Rep 3

Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America) (Judgment) [1952] ICJ Rep 176

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) [2015] ICJ Rep 665

Certain Norwegian Loans (France v. Norway) (Judgment) [1957] ICJ Rep 9

- Separate Opinion of Judge Lauterpacht [1957] ICJ Rep 34
Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (Judgment) [2008] ICJ Rep 177
Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment) [1985] ICJ Rep 13
- Dissenting Opinion of Judge Ago [1984] ICJ Rep 115
Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Judgment) [1982] ICJ Rep 18
Corfu Channel (United Kingdom v. Albania) (Preliminary Objections) [1948] ICJ Rep 15
Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Judgment) [1949] ICJ Rep 4
- Dissenting Opinion of Judge *ad hoc* Ečer [1949] ICJ Rep 115
Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia) (Judgment) [2022] ICJ Rep 614
Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment) [2009] ICJ Rep 213
Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) (Judgment) [1989] ICJ Rep 15
Fisheries (United Kingdom v. Norway) (Judgment) [1951] ICJ Rep 116
Frontier Dispute (Benin/Niger) (Judgment) [2005] ICJ Rep 90
Frontier Dispute (Burkina Faso/Mali) (Judgment) [1986] ICJ Rep 554
Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7
Immunities and Criminal Proceedings (Equatorial Guinea v. France) (Judgment) [2020] ICJ Rep 300
Jadhav (India v. Pakistan) (Judgment) [2019] ICJ Rep 418
Kasikili/Sedudu Island (Botswana/Namibia) (Judgment) [1999] ICJ Rep 1045
Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) (Judgment) [2002] ICJ Rep 303
- Dissenting Opinion of Judge *ad hoc* Ajibola [2002] ICJ Rep 538

Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea) (Judgment of 19 May 2025) <<https://www.icj-cij.org/case/179>> accessed 25 June 2025

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment of 11 September 1992) <<https://www.icj-cij.org/case/75>> accessed 7 August 2025

—Separate Opinion of Judge Torres-Bernandez [1992]

LaGrand (Germany v. United States of America) (Judgment) [2001] ICJ Rep 466

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Judgment) [2001] ICJ Rep 40

—Separate Opinion of Judge Kooijmans [2001] ICJ Rep 225

Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Judgment) [2009] ICJ Rep 61

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) [2018] ICJ Rep 139

Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (Judgment) [2021] ICJ Rep 206

Maritime Dispute (Peru v. Chile) (Judgment) [2014] ICJ Rep 3

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgment) [1986] ICJ Rep 14

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction of the Court and Admissibility of the Application) [1984] ICJ Rep 392

Minquiers and Ecrehos (France/United Kingdom) (Judgment) [1952] ICJ Rep 47

Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections) [1963] ICJ Rep 15

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3

Nottebohm (Liechtenstein v. Guatemala) (Second Phase) (Judgment) [1955] ICJ Rep 4

Nottebohm (Liechtenstein v. Guatemala) (Preliminary Objections) [1953] ICJ Rep 111

Nuclear Tests (Australia v. France; New Zealand v. France) (Judgment) [1974] ICJ Rep 253

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) (Judgment) [2018] ICJ Rep 507

—Declaration of President Yusuf [2018] ICJ Rep 566

Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection) [1996] ICJ Rep 803

Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgment) [2003] ICJ Rep 161

—Separate Opinion of Judge Higgins [1996] ICJ Rep 847

—Separate Opinion of Judge Kooijmans [1996] ICJ Rep 246

Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14

—Joint Dissenting opinion of Judges Al-Khasawneh and Simma [2010] ICJ Rep 108

—Separate Opinion of Judge Keith [2010] ICJ Rep 121

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia) (Judgment) [2023] ICJ Rep 413

South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Preliminary Objections) [1962] ICJ Rep 319

—Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice [1962] ICJ Rep 465

Sovereignty over Certain Frontier Lands (Belgium/Netherlands) (Judgment) [1959] ICJ Rep 209

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

Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia) (Judgment) [2002] ICJ Rep 625

Temple of Preah Vihear (Cambodia v. Thailand) (Judgment) [1962] ICJ Rep 6

Territorial and Maritime Dispute (Nicaragua v. Colombia) (Judgment) [2012] ICJ Rep 624

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgment) [2007] ICJ Rep 659

Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Judgment) [1994] ICJ Rep 6, para. 75

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) (Judgment) [1980] ICJ Rep 3

Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (Judgment) [2014] ICJ Rep 226

Advisory Opinions

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403

Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion) [2024] <<https://www.icj-cij.org/case/186/advisory-opinions>> accessed 7 July 2025

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16

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

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66

Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15

Western Sahara (Advisory Opinion) [1975] ICJ Rep 12

Orders

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Request for Indication of Provisional Measures: Order of 8 April 1993) [1993] ICJ Rep 3

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Further Requests for Indication of Provisional Measures: Order of 13 September 1993) [1993] ICJ Rep 325

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Request for Indication of Provisional Measures: Order of 26 January 2024) [2024] ICJ Rep 3

Procedural Documents

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Application Instituting Proceedings) [1993] <<https://www.icj-cij.org/case/91>> accessed 4 August 2025

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/118>> accessed 4 August 2025

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Application Instituting Proceedings and Request for the Indication of Provisional Measures) [2023] <<https://www.icj-cij.org/case/192>> accessed 25 June 2025

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Oral Proceedings, 17 May 2024) [2023] <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240517-ora-01-00-bi.pdf>> accessed 7 July 2025

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Sudan v. United Arab Emirates) (Application Instituting Proceedings) [2025] <<https://www.icj-cij.org/case/197>> accessed 7 July 2025

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/115>> accessed 4 August 2025

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/117>> accessed 4 August 2025

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Application Instituting Proceedings) [1999] <<https://www.icj-cij.org/case/116>> accessed 4 August 2025

Corfu Channel (United Kingdom v. Albania) (Application Instituting Proceedings) [1947] <<https://www.icj-cij.org/case/1>> accessed 1 August 2025

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Application Instituting Proceedings) [1984] <<https://www.icj-cij.org/case/70>> accessed 4 August 2025

Oil Platforms (Islamic Republic of Iran v. United States of America) (Application Instituting Proceedings) [1992] <<https://www.icj-cij.org/case/90>> accessed 4 August 2025

Permanent Court of International Justice

Mavrommatis Palestine Concessions (Greece v. United Kingdom) (Jurisdiction) [1924] PCIJ Series A No 2

Other International Courts

European Court of Human Rights

Blokhin v Russia, App No 47152/06 (ECtHR, 23 March 2016)

Papamichalopoulos and Others v. Greece, App No 14556/89 (ECtHR, 24 May 1995)

Scordino v. Italy, App No 36813/97 (ECtHR, 29 March 2006)

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Radislav Krstić (Judgment) ICTY-98-33-A (19 April 2004)

Prosecutor v Ratko Mladić (Judgment) ICTY-09-92-A (8 June 2021)

Prosecutor v Vujadin Popović and Ljubiša Beara (Judgment) ICTY-05-88-A (30 January 2015)

Prosecutor v Zdravko Tolimir (Judgment) IT-05-88/2-A (8 April 2015)

World Trade Organisation

US—Certain EC Products (Appellate Body Report) [2001] WT/DS165/AB/R

Reports and Institutional Publications

International Court of Justice

Rules of Procedure

Rules of Court of the International Court of Justice (adopted 28 July 1978) <<https://www.icj-cij.org/en/documents/rules>> accessed 17 July 2025

Practice Directions (adopted 31 October 2001) <<https://www.icj-cij.org/practice-directions>> accessed 24 July 2025

Other Publications

Joan E. Donoghue, ‘Speech of H.E. Judge Joan E. Donoghue, President of the International Court of Justice, at the 73rd session of the International Law Commission’ (Speech, 1 June 2022) <<https://www.icj-cij.org/node/106189>> accessed 23 November 2024

International Law Commission

'Draft Articles on State Responsibility for Internationally Wrongful Acts' (1996) UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2)

'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/76/10, Chapter IV, Section E, Item 1

'Report of the Work of the Sixty-Ninth Session of the International Law Commission' (2017) UN Doc A/72/10

United Nations Resolutions

General Assembly

UNGA Res. 171 (II) (14 November 1947) UN Doc. A/519

UNGA Res. 2625 (XXV) (24 October 1970) UN Doc. A/RES/2625(XXV)

UNGA Res. 37/10 (15 November 1982) UN Doc. A/RES/37/10

UNGA Res. 40/9 (8 November 1985) UN Doc. A/RES/40/9

UNGA Res. 42/22 (18 November 1987) UN Doc. A/RES/42/22

UNGA Res. 43/51 (5 December 1988) UN Doc. A/RES/43/51

UNGA Res. 47/120 (18 December 1992) UN Doc. A/RES/47/120

UNGA Res. 55/2 (8 September 2000) UN Doc. A/RES/55/2

UNGA Res. 57/26 (19 November 2002) UN Doc. A/RES/57/26

UNGA Res. 57/337 (3 July 2003) UN Doc. A/RES/57/337

Security Council

UNSC Res. 22 (9 April 1947) UN Doc S/RES/22

UNSC Res. 771 (13 August 1992) UN Doc S/RES/771

UNSC Res. 780 (6 October 1992) UN Doc S/RES/780

UNSC Res. 808 (22 February 1993) UN Doc S/RES/808

UNSC Res. 827 (25 May 1993) UN Doc S/RES/827

UNSC Res. 1258 (6 August 1999) UN Doc S/RES/1258

UNSC Res. 1279 (30 November 1999) UN Doc S/RES/1279

UNSC Res. 1291 (24 February 2000) UN Doc S/RES/1291

UNSC Res. 1493 (28 July 2003) UN Doc S/RES/1493

Other Institutional Documents and Publications

United Nations

Report of the Committee of Jurists for the Establishment of a Permanent Court of International Justice, *United Nations Conference on International Organization: Documents (Vol. XIV, 1945) Annex 4*

UN Conference on International Organization, Committee 1, 'Report of Committee 1 on the International Court of Justice' (UN Doc 264 IV/1/18, 12 May 1945)

Organisation for Economic Co-Operation and Development

The Standard and Burden of Proof in Competition Law Cases (OECD Roundtables on Competition Policy Papers No. 318, OECD 2024)

National Legislation, Case Law, and Official Publications

England and Wales

Case Law

Miller v Ministry of Pensions [1947] 2 All ER 372

Official Publications

Judicial College, Crown Court Compendium (Judicial College 2024)
<<https://www.judiciary.uk/wp-content/uploads/2024/09/Crown-Court-Compendium-Part-I-July-2024.pdf>> accessed 14 April 2025

Judicial College, The Civil Bench Book (2023)

<<https://www.judiciary.uk/publications/civil-bench-book/>> accessed 14 April 2025

Canada

Official Publications

Canadian Judicial Council, Model Jury Instructions, <<https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en>> accessed 14 April 2025

France

Legislation

Code civil (Civil Code)

<https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721> accessed 14 April 2025

Code de procédure civile (Code of Civil Procedure)

<https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716/> accessed 14 April 2025

Code de procédure pénale (Code of Criminal Procedure)

<https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154> accessed 14 April 2025

Germany

Legislation

Zivilprozessordnung (Code of Civil Procedure) <<https://www.gesetze-im-internet.de/zpo>> accessed 14 April 2025

Italy

Legislation

Codice di Procedura Civile (Code of Civil Procedure)

<<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1940-10-28;1443>> accessed 14 April 2025

Codice di Procedura Penale (Code of Criminal Procedure)

<<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1988-09-22;447>> accessed 14 April 2025

New Zealand

Case Law

Z v Dental Complaints Assessment Committee [2008] NZSC 55, [2009] 1 NZLR 1

Spain

Legislation

Ley de Enjuiciamiento Civil (Code of Civil Procedure) (BOE-A-2000-323)

<<https://www.boe.es/buscar/act.php?id=BOE-A-2000-323>> accessed 14 April 2025

Ley de Enjuiciamiento Criminal (Code of Criminal Procedure) (BOE-A-1882-6036)

<<https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036>> accessed 14 April 2025

Case Law

STS 136/2022 (Spanish Supreme Court, Criminal Chamber, 17 February 2022) ECLI:ES:TS:2022:680

STS 291/2024 (Spanish Supreme Court, Criminal Chamber, 21 March 2024) ECLI:ES:TS:2024:1961

STS 771/2024 (Spanish Supreme Court, Criminal Chamber, 13 September 2024) ECLI:ES:TS:2024:4451

Sweden

Case Law

NJA 1980 s. 725

NJA 1993 s. 764

United States

Official Publications

US Court of Appeals for the Ninth Circuit, Manual of Model Criminal Jury Instructions (2022) <https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2024_11.pdf> accessed 14 April 2025

US Department of State, 'Revolution Beyond Our Borders': Sandinista Intervention in Central America, Special Report No 132 (September 1985)

Secondary Sources

Monographs and Edited Volumes

Aldrich GH, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon 1996)

Alston P and Knuckey S (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016)

Alvarez JE, *International Organizations as Law-Makers* (Oxford University Press 2005)

Amerasinghe CF, *Evidence in International Litigation* (Martinus Nijhoff 2005)

Anderson T, Schum DA and Twining WL, *Analysis of Evidence* (2nd ed., Cambridge University Press 2005)

Appazov A, *Expert Evidence and International Criminal Justice* (1st ed. 2016, Springer International Publishing: Imprint: Springer 2016)

Barak A, *Judicial Discretion* (Yale University Press 1989)

Baron J, *Thinking and Deciding* (Fifth edition, Cambridge University Press 2023)

Benzing M, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer-Verlag 2010)

Blackstone W, *Commentaries on the Laws of England*, vol Book the first (Third edition, Printed for John Exshaw, Henry Saunders, Boulter Grierson, and James Williams 1769)

Bolding PO, *Bevisbörda Och Beviskrav* (Juridiska föreningen i Lund: Distribution, Akademibokhandeln i Lund 1983)

Brower CN and Brueschke JD, *The Iran-United States Claims Tribunal* (M Nijhoff Publishers; Sold and distributed in the USA and Canada by Kluwer Law International 1998)

Brown C, *A Common Law of International Adjudication* (Oxford University Press 2007)

Cheng B, *General Principles of Law: As Applied by Internat. Courts and Tribunals; with a Forew. by Georg Schwarzenberger* (Grotius 1987)

Combs NA, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010)

Couvreur P, *The International Court of Justice and the Effectiveness of International Law* (Brill Nijhoff 2017)

Crawford J, *State Responsibility: The General Part* (1. paperback ed, Cambridge University Press 2013)

Dahlman C, *Beviskraft: metod för bevisvärdering i brottmål* (2018)

Damaška MR, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991)

— *Evidence Law Adrift* (Yale University Press 2008)

— *Evaluation of Evidence: Pre-Modern and Modern Approaches* (Cambridge university press 2019)

Darcy S, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge University Press 2014)

D'Aspremont J, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2013)

Devaney JG, *Fact-Finding before the International Court of Justice* (Cambridge University Press 2016)

Diesen C and Strandberg M, *Bevisprövning i Tvistemål: Teori Och Praktik* (Upplaga 1, Norstedts Juridik 2012)

Duggal KAN and Cai WW, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* (Brill 2018)

Dworkin R, *Taking Rights Seriously* (Harvard University Press 2001)

Ekelöf PO, Bylund T and Boman R, *Rättegång IV. Fjärde häftet* (1992) (6th edn, Norstedts juridik 1992)

Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (Nachdr, Harvard Univ Press 1980)

Heuman L, *Bevisbörda Och Beviskrav i Tvistemål* (Norstedts juridik 2005)

— *Bevisbörda Och Beviskrav i Tvistemål* (Andra upplagan, Norstedts Juridik 2022)

Ibe O, *Fundamentals of Applied Probability and Random Processes* (Academic Press 2014)

Feller AH, *The Mexican Claims Commission, 1923-1934* (Macmillan Co 1935)

Foster CE, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011)

Franck TM, *Fairness in International Law and Institutions* (Reprinted, Oxford Univ Press 2002)

Frank J, *Law & the Modern Mind* (Routledge 2017)

Galligan DJ, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 2011)

Goldberg R, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (Hart 1999)

Grando MT, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2010)

Grossman N and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018)

Haack S, *Evidence Matters: Science, Proof, and Truth in the Law* (Cambridge University Press 2014)

Hart H, *The Concept of Law* (3rd edition, Oxford university press 2012)

Hernández GI, *The International Court of Justice and the Judicial Function* (Oxford University Press, Incorporated 2014)

Higgins R, *Problems and Process: International Law and How We Use It* (Clarendon Press 2010)

Ho HL, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press 2008)

Hocking J and others (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Brill | Nijhoff 2001)

Kazazi M, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Kluwer Law International 1996)

Kennedy D, *A Critique of Adjudication: Fin de Siècle* (1. paperback ed, Harvard Univ Press 1998)

Keynes JM, *A Treatise on Probability* (Macmillan 1921)

Khan KAA, Buisman C and Gosnell C (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010)

Khoury L, *Uncertain Causation in Medical Liability* (Hart Pub 2006)

Klamberg M, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff Publishers 2013)

Kokott J, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International 1998)

Kolb R, *The International Court of Justice* (Hart Publishing 2013)

Kulick A, *Global Public Interest in International Investment Law* (First paperback ed 2014, Cambridge Univ Press 2014)

Lando M, *Maritime Delimitation as a Judicial Process* (Cambridge University Press 2019)

Lauterpacht H, *The Development of International Law by the International Court of Justice* (Stevens & Sons 1958)

— *The Development of International Law by the International Court* (Unveränd Nachdr der Ausg von 1982, Cambridge Univ Press 2010)

Lindell B, *Bevis- Och Rättstillämpning - En Samtidig Verksamhet: En Bok Om Tvivel Och Val Av Beslutsalternativ i Mer Komplicerade Fall* (Upplaga 1:1, Norstedts Juridik 2024)

- Lindkvist G, *Utredningsskyldighet, Bevisbörda Och Beviskrav i Förvaltningsprocessen* (Upplaga 1, Norstedts juridik 2018)
- López Escarcena S, *Indirect Expropriation in International Law* (Elgar 2014)
- Mani VS, *International Adjudication: Procedural Aspects* (Nijhoff 1980)
- May R and Wierda M, *International Criminal Evidence* (Transnational Publishers 2002)
- McCormick CT and others, *McCormick on Evidence* (Robert P Mosteller ed, Eighth edition, West Academic Publishing 2020)
- McDermott Y, *Proving International Crimes* (Oxford University Press 2024)
- McWhinney E, *The World Court and the Contemporary International Law-Making Process* (Sijthoff & Noordhoff 1979)
- Murphy P (ed), *Evidence, Proof, and Facts: A Book of Sources* (Oxford University Press 2003)
- Nance DA, *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief* (Cambridge University Press 2016)
- Noll G (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (M Nijhoff Publishers 2005)
- Nordh R, *Bevisrätt C: bevisvärdering.* (2019)
- Nordklint C, *Bevisrättens Tillämpning i Skatteprocessen* (Jure 2019)
- Ramcharan BG (ed), *International Law and Fact-Finding in the Field of Human Rights* (M Nijhoff Publishers; Distributors for the US and Canada, Kluwer Boston 1982)
- Raz J, *The Authority of Law: Essays on Law and Morality* (Clarendon press 1990)
- Reisman WM and Skinner CP, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law* (Cambridge University Press 2014)

Riddell A and Plant B, *Evidence before the International Court of Justice* (2016)

Rosenne S, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005)

— *The Law and Practice of the International Court, 1920-2005* (4th ed, M Nijhoff Publishers 2006)

Sandifer DV, *Evidence before International Tribunals* (Rev ed, University Press of Virginia 1975)

Sourgens FG, Duggal KAN and Laird IA, *Evidence in International Investment Arbitration* (First edition, Oxford University Press 2018)

Stein A, *Foundations of Evidence Law* (Oxford University Press 2005)

Strandberg M, *Beviskrav i Sivile Saker: En Bevisteoretisk Studie Av Den Norske Beviskravslærens Forutsetninger* (Fagbokforlaget 2012)

Venzke I, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (1st ed, Oxford University Press 2012)

Vranes E, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press 2009)

Wahlberg L, *Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations* (Media-tryck 2010)

Wilson RA, *Writing History in International Criminal Trials* (Cambridge University Press 2011)

Witenberg JC, 'Onus probandi' devant les juridictions arbitrales (Pédone 1951)

Contributions to Edited Volumes

Bedjaoui M, 'L'opportunité Dans Les Decisions de La Cour Internationale de Justice' in Laurence Boisson De Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Brill 2001)

Benzing, 'Evidentiary Issues' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019)

Berman KCMG QC SF, 'The International Court of Justice as an "Agent" of Legal Development?' in Christian J Tams and James Sloan (eds), *Development of International Law by the ICJ* (Oxford University Press 2013)

Bilder RB, 'The Fact/Law Distinction in International Adjudication' in Richard B Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992)

Bowett D, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes' (1983-II) 180 *Recueil des Cours de l'Académie de Droit International* 169

Brower CN, 'The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence' in Richard B Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992)

Caron DD and Tomuschat C, 'Article 2, Para. 3 UN Charter' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019)

Del Mar K, 'The International Court of Justice and Standards of Proof' in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2013)

Fitzmaurice MA, 'The Corfu Channel Case and the Development of International Law' in Nisuke Ando and others (eds), *Liber Amicorum Judge Shigeru Oda* (BRILL 2022)

Franck TM, 'Fact-Finding in the I.C.J.' in Richard B Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992)

Gaeta P, 'The Character of the Breach' in James Crawford and others (eds), *The law of international responsibility* (Oxford University Press 2010)

Gaja G, ‘Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts’ in Antonio Cassese and others (eds), *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (De Gruyter 2011)

Gärdenfors P and Sahlin N-E, ‘Unreliable Probabilities, Risk Taking and Decision Making’ in Peter Gärdenfors and Nils-Eric Sahlin (eds), *Decision, Probability, and Utility: Selected Readings* (Cambridge University Press 1988)

Grossman N, ‘Solomonic Judgments and the Legitimacy of the International Court of Justice’ in Nienke Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2019)

Hernandez G, ‘International Judicial Lawmaking’ in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016)

Hernandez G, ‘The International Court of Justice as a Law-Creative Actor’ in Achilles Skordas and Lisa Mardikian (eds), *Research Handbook on the International Court of Justice* (Edward Elgar Publishing 2025)

Hight K, ‘Evidence and Proof of Facts’ in Lori Fisler Damrosch (ed.), *The International Court of Justice at a Crossroads* (Transnational Pub 1987)

Hutchinson T, ‘Doctrinal Research’ in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* (2nd edn, Routledge 2017)

Jeßberger F, ‘The Definition and the Elements of the Crime of Genocide’ in Paolo Gaeta (ed), *The UN Genocide Convention: A Commentary* (2009)

Kohen M and Mamadou H, ‘Territorial Disputes’ in Carlos Esposito and Kate Parlett (eds), *The Cambridge Companion to the International Court of Justice* (Cambridge University Press 2025)

Lippold M, ‘The Interpretation of UN Security Council Resolutions between Regional and General International Law: What Role for General Principles?’ in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill | Nijhoff 2019)

Paul A, ‘An Overview of the Inter-American Court’s Evaluation of Evidence’ in Yves Haecq, Oswaldo Ruiz-Chiriboga and Clara Burbano (eds.) *The Inter-*

American Court of Human Rights: Theory and Practice, Present and Future (Intersentia 2015)

Pellet A, 'Article 38' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2012)

Prosperi L and Zammit Borda A, 'A Partial View of History - ICTY Judgments as "Judicial Truths"' in Carsten Stahn and others (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia - A Multidisciplinary Approach* (Oxford University Press 2020)

Ramcharan BG, 'Evidence', *International law and fact-finding in the field of human rights* (M Nijhoff Publishers; Distributors for the US and Canada, Kluwer Boston 1982)

Riddell A, 'Evidence, Fact-Finding, and Experts' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford Univ Press 2014)

Sahlin N-E, 'On Higher Order Beliefs' in Jacques-Paul Dubusc (ed), *Philosophy of Probability* (Kluwer Academic 1993)

Sahlin N-E and Persson J, 'Epistemic Risk: The Significance of Knowing What One Does Not Know' in Berndt Brehmer and Nils-Eric Sahlin (eds), *Future Risks and Management* (Kluwer 1994)

Simma B, 'From Bilateralism to Community Interests in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217

Thirlway H, 'The Jurisdiction of Provisional Measures by the International Court of Justice' in Rudolf Bernhardt (ed), *Interim measures indicated by international courts*, vol 117 (Springer 1994)

——'Procedural Law and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 2009)

Tulkens F, 'La preuve devant la Cour européenne des droits de l'homme: Commentaire du rapport de H Tigroudja' in Helene Ruiz-Fabri and JM Sorel (eds), *La preuve devant les juridictions internationales* (Pédone 2007)

Von Bogdandy A and Venzke I, 'Beyond Dispute: International Judicial Institutions as Lawmakers' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012)

— 'On the Democratic Legitimation of International Judicial Lawmaking' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012)

Watts SA, 'Burden of Proof, and Evidence before the ICJ' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000)

Westerman P, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (aa, Hart 2011)

Wylter E and Castellanos-Jankiewicz L, 'Serious Breaches of Peremptory Norms' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of shared responsibility in international law: an appraisal of the state of the art* (Cambridge University Press 2014)

Zyberi G, 'The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015)

Journal Articles and Periodicals

Allen R and Callen CR, 'The Juridical Management of Factual Uncertainty' (2003) 7 *International Journal of Evidence & Proof* 1

Allen RJ and Stein A, 'Evidence, Probability, and the Burden of Proof' (2013) 55 *Arizona Law Review* 557

Bancroft HF and Stein E, 'The Corfu Channel Case: Judgment on the Preliminary Objection' (1949) 1 *Stanford Law Review* 646

Bernardino AL, 'The Discursive Construction of Facts in International Adjudication' (2020) 11 *Journal of International Dispute Settlement* 175

Bills A, 'Revisiting the Standard of Proof for Charges of Exceptional Gravity before the International Court of Justice' [2023] Max Planck Yearbook of United Nations Law Online 1

Boas G, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility' (2001) 12 Criminal Law Forum 41

Boutruche T, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 Journal of Conflict and Security Law 105

Bovino A, 'Evidential Issues before the Inter-American Court of Human Rights' (2005) 2 SUR International Journal on Human Rights 57

Brower CN, 'Evidence before International Tribunals: The Need for Some Standard Rules' (1994) 28 International Lawyer (ABA) 47

Brown C, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 British Yearbook of International Law 195

Chayes A, 'Nicaragua, the United States, and the World Court' (1985) 85 Columbia Law Review 1445

Clermont and Sherwin, 'A Comparative View of Standards of Proof' (2002) 50 The American Journal of Comparative Law 243

Cohen J, 'The Role of Evidential Weight in Criminal Proof' (1986) 66 Boston University Law Review 635

Dahlman C and Nordgaard A, 'Information Economics in the Criminal Standard of Proof' (2023) 21 Law, Probability and Risk 137

Damaška M, 'Free Proof and Its Detractors' (1995) 43 American Journal of Comparative Law 343

Damrosch LF, 'The Impact of the *Nicaragua* Case on the Court and Its Role: Harmful, Helpful, or In Between?' (2012) 25 Leiden Journal of International Law 135

De Brabandere E, "'Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims' (2012) 3 Journal of International Dispute Settlement 609

Del Mar K, 'Weight of Evidence Generated through Intra-Institutional Fact-Finding before the International Court of Justice' (2011) 2 *Journal of International Dispute Settlement* 393

Donoghue Joan E., 'Expert Scientific Evidence in a Broader Context' (2018) 9 *Journal of International Dispute Settlement* 379

Duffy H and Pinzauti G, 'Genocide and Armed Conflict before the International Court of Justice' [2024] *Questions of International Law* 77

Dworkin R, 'Judicial Discretion' (1963) 60 *The Journal of Philosophy* 624

Ekelöf PO, 'Bevisvärde' [1988] *Filosofisk tidskrift* 1

Engel C, 'Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law' (2009) 33 *Vermont Law Review* 435

Farnelli GM, 'Consistency in the ICJ's Approach to the Standard of Proof: An Appraisal of the Court's Flexibility' (2022) 21 *Law & Practice of International Courts & Tribunals* 98

Fontanelli F and Busco P, 'The Function of Procedural Justice in International Adjudication' (2016) 15 *The Law & Practice of International Courts and Tribunals* 1

Ford CA, 'Judicial Discretion and International Jurisprudence: Article 38(1)(c) and "General Principles of Law"' (1994) 5 *Duke Journal of Comparative & International Law* 35

Foster CE, 'Burden of Proof in International Courts and Tribunals' (2010) 29 *Australian Yearbook of International Law* 27

Franck TM, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705

Franck TM and Fairley HS, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74 *American Journal of International Law* 308

Gaja G, 'Assessing Expert Evidence in the ICJ' (2016) 15 *Law & Practice of International Courts and Tribunals* 409

Gattini A, 'Evidentiary Issues in the ICJ's Genocide Judgment' (2007) 5 *Journal of International Criminal Justice* 889

Gattini A and Cortesi G, 'Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case' (2015) 28 *Leiden Journal of International Law* 899

Ginsburg T, 'Bounded Discretion in International Judicial Lawmaking' (2004) 45 *Virginia Journal of International Law*

Green JA, 'The Oil Platforms Case: An Error in Judgment' (2004) 9 *Journal of Conflict and Security Law* 357

Green JA, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 *International and Comparative Law Quarterly* 163

Greenawalt K, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges' (1975) 75 *Columbia Law Review* 359

Groome D, 'Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility' (2007) 31 *Fordham International Law Journal* 911

Gros G, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?' (2015) 6 *Journal of International Dispute Settlement* 578

Haack S, 'Truth and Justice, Inquiry and Advocacy, Science and Law' (2004) 17 *Ratio Juris* 14

Hart H, 'Discretion' (2013) 127 *Harvard Law Review* 652

Hernandez G, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 *The British Yearbook of International Law* 13

Hight, 'Evidence, the Court, and the Nicaragua Case' (1987) 81 *The American Journal of International Law* 1

Jackson BS, 'Hart et Dworkin sur le pouvoir discrétionnaire : points de vue sémiotiques' (1989) 34 *Archives de philosophie du droit* 243

Jennings RY, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1

Jennings SR, 'Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly' (1994) 88 *American Journal of International Law* 421

Kaplan, 'Decision Theory and the Factfinding Process' (1968) 20 *Stanford Law Review* 1065

Kaplow L, 'Burden of Proof' (2011) 121 *Yale Law Journal* 738

—'On the Optimal Burden of Proof' (2011) 119 *Journal of Political Economy* 1104

Kazazi and Shifman, 'Evidence before International Tribunals - Introduction' (1999) 1 *International Law FORUM du droit international* 193

Keith KJ, 'The International Court of Justice and Criminal Justice' (2010) 59 *International and Comparative Law Quarterly* 895

Leach P, Paraskeva C and Uzelac G, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 *Netherlands Quarterly of Human Rights* 41

Lima L c., 'The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case' (2015) 6 *Journal of International Dispute Settlement* 621

Linderfalk U, 'Treaty Abuse—Why Criticism of the Doctrine Is Unfounded' (2018) 9 *Journal of International Dispute Settlement* 254

—'The Exercise of Discretion in International Law – Why Constraining Criteria Have a Proper Place in the Analysis of Legal Decision-Making' (2021) 62 *German Yearbook of International Law* 407

Lowe V, 'The Function of Litigation in International Society' (2012) 61 *International and Comparative Law Quarterly* 209

Mbengue MM, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 53

——'Scientific Fact-Finding at the International Court of Justice: An Appraisal in the Aftermath of the Whaling Case' (2016) 29 *Leiden Journal of International Law* 529

Milanović M, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553

——'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669

Munro HA, 'The Corfu Channel Case: Judgment on the Preliminary Objection' (1947) 10 *The Modern Law Review* 363

Nollkaemper A, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International and Comparative Law Quarterly* 615

Paul A, 'In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights' (2012) 55 *Revista Instituto Interamericano de Derechos Humanos* 57

Pauwelyn J, 'Evidence, Proof and Persuasion in WTO Dispute Settlement - Who Bears the Burden' (1998) 1 *Journal of International Economic Law* 227

Peczenik A, 'A Theory of Legal Doctrine' [2001] *Ratio Juris* 32

Pietrowski R, 'Evidence in International Arbitration' (2006) 22 *Arbitration International* 373

Redmayne, 'Standards of Proof in Civil Litigation' (1999) 62 *The Modern Law Review* 167

Redmayne M, 'The Structure of Evidence Law' (2006) 26 *Oxford Journal of Legal Studies* 805

Reichler PS, 'The Impact of the Nicaragua Case on Matters of Evidence and Fact-Finding' (2012) 25 *Leiden Journal of International Law* 149

Schweizer M, 'The Civil Standard of Proof - What Is It, Actually' (2016) 20 *International Journal of Evidence & Proof* 217

Shah NH, 'Discovery by Intervention: The Right of a State to Seize Evidence Located within the Territory of the Respondent State' (1959) 53 *American Journal of International Law* 595

Shany Y, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225

Tams CJ and Tzanakopoulos A, 'Barcelona Traction at 40: The ICJ As an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781

Taruffo, 'Rethinking the Standards of Proof' (2003) 51 *The American Journal of Comparative Law* 659

Teitelbaum R, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 *The Law & Practice of International Courts and Tribunals* 119

Tuzet G, 'Evidence Assessment and Standards of Proof: A Messy Issue' [2021] *Quaestio facti. Revista internacional sobre razonamiento probatorio*

Tzeng P, 'Proving Genocide: The High Standards of the International Court of Justice' (2015) 40 *Yale Journal of International Law* 419

Valencia-Ospina E, 'Evidence before the International Court of Justice' (1999) 1 *International Law FORUM Du Droit International* 202

Villalpando S, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 *European Journal of International Law* 387

Von Bogdandy A and Venzke I, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49

Weeramantry CG, 'Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law' (1997) 10 *Leiden Journal of International Law* 308

Zarbiyev F, 'Judicial Activism in International Law--A Conceptual Framework for Analysis' (2012) 3 *Journal of International Dispute Settlement* 247

Zarbiyev F, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 *Journal of International Dispute Settlement* 291

Conference Proceedings

Buergenthal T, 'Lawmaking by the ICJ and Other International Courts' (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 403

O'Connell ME, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 *Proceedings of the Annual Meeting (American Society of International Law)* 44

Encyclopaedia Articles and Reference Works

Pellet A, 'Peaceful Settlement of International Disputes', *Max Planck Encyclopaedia of International Law (MPEPIL)* (Oxford University Press 2013)

Ho, Hock Lai 'The Legal Concept of Evidence', *The Stanford Encyclopaedia of Philosophy* (Winter 2021 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/win2021/entries/evidence-legal/>>

Electronic Sources

Electronic Journals

Suedi, Yusra, and Bendel, Justine, 'The Recent Genocide Cases and Public Interest Litigation: A Complicated Relationship' (2024) *EJIL: Talk!* <<https://www.ejiltalk.org/the-recent-genocide-cases-and-public-interest-litigation-a-complicated-relationship/>> accessed 7 July 2025

News Articles

‘Court clears Serbia of genocide’ *BBC News* (26 February 2007) <<http://news.bbc.co.uk/1/hi/world/europe/6395791.stm>> accessed 18 November 2024

‘ICJ rules Israel must prevent acts of genocide in Gaza: Key takeaways’ *Al-Jazeera* (26 January 2024) <<https://aje.io/387ro5>> accessed 24 June 2025

‘Israel refutes South Africa’s accusations at UN world court’ *UN News* (17 May 2024) <<https://news.un.org/en/story/2024/05/1149916>> accessed 7 July 2025

‘UN World Court acquits Serbia of genocide in Bosnia; finds it guilty of inaction’ *UN News* (26 February 2007) <<https://news.un.org/en/story/2007/02/210142>> accessed 18 November 2024

Van den Berg, Stephanie, Masoud, Bassam, and Al-Mughrabi, Nidal, ‘World Court stops short of Gaza ceasefire order for Israel’ *Reuters* (27 January 2024) <<https://www.reuters.com/world/middle-east/israel-braces-world-court-ruling-focuses-attack-south-gaza-2024-01-26/>> accessed 24 June 2025

Other Websites

‘Discretion’, *Cambridge English Dictionary* <<https://dictionary.cambridge.org/dictionary/english/discretion>> accessed 22 January 2024

‘Discretion’, *Merriam-Webster English Dictionary* <<https://www.merriam-webster.com/dictionary/discretion>> accessed 22 January 2024

Appendix: Evidentiary Standards in ICJ Contentious Cases

This appendix provides an overview of the instances in which the International Court of Justice (ICJ) has referred to a standard of proof or used some other term to indicate the application of some threshold of proof. It focuses on cases decided by the Court within its contentious jurisdiction. The purpose of this overview is described in further detail in Chapter 1.

The table is based on the complete list of contentious cases published on the ICJ's official website (<<https://www.icj-cij.org/contentious-cases>>), listed in descending chronological order. The information presented in the table is up to date as of 25 June 2025. As of that date, the list includes 147 cases in their original order of appearance on the website. It therefore includes cases which have not been decided on the merits. These are presented in the table below for transparency and to maintain consistency with the Court's own list of cases but are excluded from the analysis. A total of 75 cases of these cases are Judgments decided on the merits, and the remaining 72 have not been decided at merits.

Each entry in the table below includes a reference number (#), the case name (including the litigating parties and the year the decision was delivered), and a brief description of the subject-matter of the dispute. The right-hand side of the table contains five columns, marked 1 to 5, which correspond to the categories of analysis. The five categories used to structure the analysis are as follows:

- 1) Headings explicitly addressing the standard of proof.
- 2) Explicit references to a standard of proof.
- 3) Rationale explaining the use of a standard of proof.
- 4) General or implicit expressions indicating the application of a standard of proof, or threshold of evidence.
- 5) No discernible reference to a standard of proof

As indicated, several cases fall into more than one category. A judgment may include both a dedicated heading on evidentiary standards and articulate a clear

standard of proof. In such instances, multiple categories are marked to reflect the presence of more than one relevant feature in the Court’s reasoning.

The data below show the instances in which the Court has referred, explicitly or implicitly, to a standard of proof or some threshold of evidence:

- Category 1: 3
- Category 2: 4
- Category 3: 5
- Category 4: 41
- Category 5: 31

The following table presents the full dataset of contentious cases decided by the ICJ, organised according to the framework described in the foregoing.

#	CASE – PARTIES – YEAR	SUBJECT	1	2	3	4	5
1	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. United Arab Emirates)</i> 2025	State responsibility (Genocide Convention)					
			<i>Dismissed for lack of jurisdiction. Not included in the analysis.</i>				
2	<i>Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)</i> 2025	Boundary delimitation				X	
			<i>Implicit threshold terms: ‘convincing’ (paras. 85, 92, 93); ‘inconclusive’ (para. 81); ‘sufficient evidence’ (para. 193); and formulations such as ‘shows’ (para. 80), ‘demonstrates’ (para. 191), ‘points to’ (para. 140), ‘(no) support’ (paras. 93, 193), and ‘no evidence’ (paras. 190, 194, 197).</i>				
3	<i>Application of the International Convention for the Suppression of the Financing of Terrorism and of the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)</i>	State responsibility (ICFST, CERD)	X	X	X		
			<i>Headings relating to evidence, rationale for standard of proof (paras. 77-84, and 162-178). Explicit</i>				

	2024		<i>use of 'convincing' standard of proof (paras. 83 and 170).</i>						
4	<i>Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)</i>	Boundary delimitation	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td>X</td> </tr> </table> <i>No articulated standard of proof.</i>						X
					X				
	2023								
5	<i>Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)</i>	International watercourses; use of transboundary water resources	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td>X</td> </tr> </table> <i>No articulated standard of proof.</i>						X
					X				
	2022								
6	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i>	Reparations	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> </table> <i>Judgment only on reparations. Not included in the analysis. Merits judgment issued in 2005 (see entry #52).</i>						
	2022								
7	<i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)</i>	State responsibility (sovereign rights, maritime zones)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td>X</td> <td></td> </tr> </table> <i>Discussion on proof (paras. 64-70). Implicit threshold terms: 'sufficient' or 'insufficient' (para. 69)</i>					X	
				X					
	2022								
8	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)</i>	State responsibility (CERD)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> </table> <i>Preliminary objections upheld. Not included in the analysis.</i>						
	2021								
9	<i>Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)</i>	Boundary delimitation; state responsibility (sovereignty, maritime zones)	<table border="1"> <tr> <td></td> <td>X</td> <td>X</td> <td>X</td> <td></td> <td></td> </tr> </table> <i>Explicit standard of 'compelling' evidence for tacit agreements or acquiescence, with rationale (para. 52, also paras. 71, 89). Implicit threshold terms: 'convinced' (para. 159); 'sufficient' (paras. 83, 193); and 'sufficient certainty' (para. 209).</i>		X	X	X		
	X	X	X						
	2021								

10	<i>Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section II, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt, and United Arab Emirates v. Qatar)</i> 2020	Appeal of ICAO Council Decision						X
								<i>No articulated standard of proof.</i>
11	<i>Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)</i> 2020	Appeal of ICAO Council Decision						X
								<i>No articulated standard of proof.</i>
12	<i>Immunities and Criminal Proceedings (Equatorial Guinea v. France)</i> 2020	State responsibility (status of property, VCDR)					X	
								<i>Implicit threshold terms: 'sufficient' (paras. 112, 114); 'no' evidence (paras. 107, 108); evidence does not 'establish' (para. 115).</i>
13	<i>Jadhav (India v. Pakistan)</i> 2019	State responsibility (VCDR)					X	
								<i>Implicit threshold terms: evidence 'shows' (para. 56); 'suggests' (para. 140); that there is 'no' evidence (paras. 140, 143).</i>
14	<i>Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)</i> 2018	Compensation						
								<i>Judgment only on reparations. Not included in the analysis. Merits judgment issued in 2015 (see entry #24, joined cases).</i>
15	<i>Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)</i> 2018	Treaty interpretation					X	
								<i>Implicit threshold terms: 'adequate' evidence (para. 116), and 'based on the evidence' (para. 139).</i>
16	<i>Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the</i>	Boundary delimitation						X
								<i>No articulated standard of proof. Assessment of</i>

	<i>Northern Part of Isla Portillos (Costa Rica v. Nicaragua)</i> 2018		<i>geographical, legal, historical factors; equitable result (paras. 47-50, 51-56, and 57-58).</i>
17	<i>Application for revision of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)</i> 2018	Application for revision	<i>Discontinued. Not included in the analysis.</i>
18	<i>Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)</i> 2018	Request for interpretation	<i>Discontinued. Not included in the analysis.</i>
19	<i>Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)</i> 2016	Obligations related to nuclear disarmament	<i>Preliminary objections upheld. Not included in the analysis.</i>
20	<i>Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)</i> 2016	Obligations related to nuclear disarmament	<i>Preliminary objections upheld. Not included in the analysis.</i>
21	<i>Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)</i> 2016	Obligations related to nuclear disarmament	<i>Preliminary objections upheld. Not included in the analysis.</i>
22	<i>Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)</i>	State responsibility (confidentiality in legal proceedings)	<i>Discontinued. Not included in the analysis.</i>

	2015								
23	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)</i> 2015	State responsibility (Genocide Convention)	X	X	X				
			<i>Specific heading for questions of proof (paras. 167-179). Explicit standard of proof at 'fully conclusive' evidence (paras. 178-179)</i>						
24	<i>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)</i> 2015	State responsibility (international environmental law)					X		
			<i>Implicit threshold terms: 'sufficient' or 'no' evidence (paras. 81, 85, 95, 109, 119, 154).</i>						
25	<i>Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)</i> 2014	State responsibility (ICRW, international environmental law)					X		
			<i>Implicit threshold terms: 'indicates' (paras. 109, 194, 201, 202); 'suggests' (paras. 196, 212); 'shows' (paras. 133, 188); 'no' evidence (para. 141).</i>						
26	<i>Maritime Dispute (Peru v. Chile)</i> 2014	Boundary delimitation							X
			<i>No articulated standard of proof.</i>						
27	<i>Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)</i> 2013	Request for interpretation							X
			<i>No articulated standard of proof.</i>						
28	<i>Aerial Herbicide Spraying (Ecuador v. Colombia)</i> 2013	State responsibility (transboundary harm)							
			<i>Discontinued. Not included in the analysis.</i>						
29	<i>Frontier Dispute (Burkina Faso/Niger)</i> 2013	Boundary delimitation					X		
			<i>Implicit threshold terms: 'sufficient' evidence (para. 68)</i>						
30	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i> 2012	Boundary delimitation					X		
			<i>Implicit threshold terms: 'sufficient' (paras. 35, 38, 53-54, 219, 236); the</i>						

							<i>parties not providing 'any evidence' (para. 72); 'affords some measure of support' (paras. 95, 102); 'no' evidence (para. 217); and 'neither offers evidence' (para. 223).</i>
31	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> 2012	Compensation					<i>Judgment only on compensation. Not included in the analysis. Merits judgment issued in 2010 (see entry #40).</i>
32	<i>Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)</i> 2012	State responsibility (immunities)					X <i>No articulated standard of proof.</i>
33	<i>Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)</i> 2012	State responsibility (CAT)					X <i>No articulated standard of proof.</i>
34	<i>Application of the Interim Accord of 13 September 1965 (FRY Macedonia v. Greece)</i> 2011	State responsibility (bilateral treaty); treaty interpretation					X <i>Implicit threshold terms: 'convincing' evidence (para. 142), there being 'no' evidence (para. 157).</i>
35	<i>Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)</i> 2011	Interpretation and application of a treaty					<i>Discontinued. Not included in the analysis.</i>
36	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)</i> 2011	State responsibility (CERD)					<i>Preliminary objections upheld. Not included in the analysis.</i>
37	<i>Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i> 2010	State responsibility (bilateral treaty; international environmental law)					X <i>Heading on the burden of proof and use of expert evidence (paras. 160-168). Implicit</i>

										<i>threshold terms: 'convincing' (paras. 189, 228); 'sufficient' (paras. 254, 262).</i>
38	<i>Certain Criminal Proceedings in France (Republic of the Congo v. France)</i>	State responsibility (universal jurisdiction; torture; immunities)								
			2010	<i>Discontinued. Not included in the analysis.</i>						
39	<i>Certain Questions concerning Diplomatic Relations (Honduras v. Brazil)</i>	Diplomatic relations								
			2010	<i>Discontinued. Not included in the analysis.</i>						
40	<i>Ahmadou Sadio Diallo (Guinea v. DRC)</i>	State responsibility (African Charter; VCDR)							X	
			2010	<i>Implicit threshold terms: low standard at the 'balance of probabilities' for human rights law violations (paras. 65, 71); 'convincing' evidence for serious violations (paras. 58, 70).</i>						
41	<i>Request for Interpretation of the Judgement of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)</i>	Request for interpretation								X
			2009	<i>No articulated standard of proof.</i>						
42	<i>Maritime Delimitation in the Black Sea (Romania v. Ukraine)</i>	Boundary delimitation							X	
			2009	<i>Implicit threshold terms: 'convincing' (para. 138); 'no evidence' (para. 198). The Court's task not focused on making findings of fact (para. 68).</i>						
43	<i>Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)</i>	Territory; treaty interpretation (navigational rights)							X	
			2009	<i>Implicit threshold terms: 'no' or 'limited' evidence (paras. 116, 126, 132, 143, 149); '(no) persuasive' evidence (para. 131).</i>						

44	Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) 2008	Boundary delimitation	<table border="1"> <tr> <td></td><td></td><td></td><td></td><td>X</td><td></td> </tr> <tr> <td colspan="6"><i>Implicit threshold terms: 'sufficient' (para. 177); 'no' evidence (para. 62).</i></td> </tr> </table>					X		<i>Implicit threshold terms: 'sufficient' (para. 177); 'no' evidence (para. 62).</i>					
				X											
<i>Implicit threshold terms: 'sufficient' (para. 177); 'no' evidence (para. 62).</i>															
45	Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) 2008	State responsibility (bilateral treaty)	<table border="1"> <tr> <td></td><td></td><td></td><td></td><td>X</td><td></td> </tr> <tr> <td colspan="6"><i>Implicit threshold terms: 'sufficient' (para. 189).</i></td> </tr> </table>					X		<i>Implicit threshold terms: 'sufficient' (para. 189).</i>					
				X											
<i>Implicit threshold terms: 'sufficient' (para. 189).</i>															
46	Territorial and Maritime Boundary Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) 2007	Boundary delimitation	<table border="1"> <tr> <td></td><td></td><td></td><td></td><td>X</td><td></td> </tr> <tr> <td colspan="6"><i>Heading dealing only with evaluation of evidence (paras. 209-219). Implicit threshold terms: 'sufficient' (paras. 110, 208, 253, 256); 'no evidence', or that the evidence did not 'establish' (para. 167); 'no proof' (para. 207).</i></td> </tr> </table>					X		<i>Heading dealing only with evaluation of evidence (paras. 209-219). Implicit threshold terms: 'sufficient' (paras. 110, 208, 253, 256); 'no evidence', or that the evidence did not 'establish' (para. 167); 'no proof' (para. 207).</i>					
				X											
<i>Heading dealing only with evaluation of evidence (paras. 209-219). Implicit threshold terms: 'sufficient' (paras. 110, 208, 253, 256); 'no evidence', or that the evidence did not 'establish' (para. 167); 'no proof' (para. 207).</i>															
47	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 2007	State responsibility (Genocide Convention)	<table border="1"> <tr> <td>X</td><td>X</td><td>X</td><td></td><td></td><td></td> </tr> <tr> <td colspan="6"><i>Heading dealing with proof, including the standard of proof (paras. 202-230). Explicit standards of proof for at 'full conviction'/'fully conclusive' evidence for commission of genocide (para. 209); 'high level of certainty appropriate to the seriousness of the allegation', for failure to prevent and punish (para. 210). Unmoderated standard of proof applied (paras. 207, 370-376).</i></td> </tr> </table>	X	X	X				<i>Heading dealing with proof, including the standard of proof (paras. 202-230). Explicit standards of proof for at 'full conviction'/'fully conclusive' evidence for commission of genocide (para. 209); 'high level of certainty appropriate to the seriousness of the allegation', for failure to prevent and punish (para. 210). Unmoderated standard of proof applied (paras. 207, 370-376).</i>					
X	X	X													
<i>Heading dealing with proof, including the standard of proof (paras. 202-230). Explicit standards of proof for at 'full conviction'/'fully conclusive' evidence for commission of genocide (para. 209); 'high level of certainty appropriate to the seriousness of the allegation', for failure to prevent and punish (para. 210). Unmoderated standard of proof applied (paras. 207, 370-376).</i>															
48	Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) 2006	State responsibility (use of force; human rights and humanitarian law)	<table border="1"> <tr> <td></td><td></td><td></td><td></td><td></td><td></td> </tr> <tr> <td colspan="6"><i>Preliminary objections upheld. Not included in the analysis.</i></td> </tr> </table>							<i>Preliminary objections upheld. Not included in the analysis.</i>					
<i>Preliminary objections upheld. Not included in the analysis.</i>															
49		Diplomatic relations	<table border="1"> <tr> <td></td><td></td><td></td><td></td><td></td><td></td> </tr> </table>												

	<i>Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations (Commonwealth of Dominica v. Switzerland)</i>						Discontinued. Not included in the analysis.
	2006						
50	<i>Certain Property (Liechtenstein v. Germany)</i>	Property claims					Preliminary objections upheld. Not included in the analysis.
	2005						
51	<i>Frontier Dispute (Benin/Niger)</i>	Boundary delimitation				X	
	2005						<i>Implicit threshold terms: 'indicative' (para. 46); 'sufficient' (paras. 55, 69); that the evidence can provide the basis of a decision (para. 76); that there is 'no' evidence (para. 140). The Court discussed the methods of proof, as well as the Special Agreement between the parties, in view of the burden of proof.</i>
52	<i>Armed Activities on the Territory of the Congo (DRC v. Uganda)</i>	State responsibility (non-use of force; non-intervention; various other obligations)				X	
	2005						<i>Implicit threshold terms: in respect of the first submission, 'established', 'convincingly established', 'established to [the Court's] satisfaction', 'convinced', and 'convincing' (paras. 58, 59-61, 68-71, 72, 132, 133-136, 146-147); in respect of the second submission, 'sufficient', 'convincing', 'sufficient evidence of a reliable quality', 'persuasive evidence', 'convincing evidence', 'credible</i>

			evidence sufficient to conclude' (paras. 207, 208, 209, 210, 211, 212); in respect of the third submission, 'sufficiency', 'convincing', 'reliable', 'credible', 'credible and persuasive' (paras. 237, 242); and in respect of the counterclaim, 'sufficient', 'proven', 'sufficient credible evidence' (paras. 246, 249, 250).																						
53	<i>Avena and Other Mexican Nationals (Mexico v. United States of America)</i> 2004	State responsibility (VCDR)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td>X</td> <td></td> </tr> <tr> <td colspan="11">Implicit threshold term: 'sufficiently clear' (para. 93).</td> </tr> </table>										X		Implicit threshold term: 'sufficiently clear' (para. 93).										
									X																
Implicit threshold term: 'sufficiently clear' (para. 93).																									
54	<i>Legality of the Use of Force (Serbia and Montenegro v. Italy)</i> 2004	State responsibility (use of force)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td colspan="11">Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</td> </tr> </table>												Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.										
Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.																									
55	<i>Legality of the Use of Force (Serbia and Montenegro v. Canada)</i> 2004	State responsibility (use of force)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td colspan="11">Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</td> </tr> </table>												Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.										
Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.																									
56	<i>Legality of the Use of Force (Serbia and Montenegro v. Belgium)</i> 2004	State responsibility (use of force)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td colspan="11">Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</td> </tr> </table>												Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.										
Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.																									
57	<i>Legality of the Use of Force (Serbia and Montenegro v. United Kingdom)</i> 2004	State responsibility (use of force)	<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td colspan="11">Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</td> </tr> </table>												Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.										
Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.																									
58			<table border="1"> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> </table>																						

	<i>Legality of the Use of Force (Serbia and Montenegro v. Portugal)</i> 2004	State responsibility (use of force)						<i>Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</i>
59	<i>Legality of the Use of Force (Serbia and Montenegro v. Germany)</i> 2004	State responsibility (use of force)						<i>Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</i>
60	<i>Legality of the Use of Force (Serbia and Montenegro v. Netherlands)</i> 2004	State responsibility (use of force)						<i>Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</i>
61	<i>Legality of the Use of Force (Serbia and Montenegro v. France)</i> 2004	State responsibility (use of force)						<i>Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</i>
62	<i>Oil Platforms (Iran v. United States of America)</i> 2003	State responsibility (use of force; bilateral treaty)					X	<i>Implicit threshold terms: 'indicative', but not 'sufficient' (para. 61); 'highly suggestive' but 'not conclusive' (para. 71).</i>
63	<i>Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)</i> 2003	Application for revision					X	<i>No articulated standard of proof. Application for revision inadmissible.</i>
64	<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie</i>	State responsibility; treaty interpretation (Montreal Convention)						<i>Judgment only on preliminary objections. Later discontinued. Not</i>

	<i>(Libyan Arab Jamahiriya v. United Kingdom)</i> 2003		<i>included in the analysis.</i>						
65	<i>Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)</i> 2003	Application for revision							X
			<i>No articulated standard of proof. Application was inadmissible.</i>						
66	<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)</i> 2003	State responsibility; treaty interpretation (Montreal Convention)							
			<i>Judgment only on Preliminary Objections. Later discontinued. Not included in the analysis.</i>						
67	<i>Arrest Warrant of 11 April 2000 (DRC v. Belgium)</i> 2002	State responsibility (right of diplomatic immunity)							X
			<i>Implicit threshold terms: 'sufficient' (paras. 52, 61, 66).</i>						
68	<i>Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)</i> 2002	Boundary delimitation; sovereignty						X	
			<i>Implicit threshold terms: 'sufficiency' of evidence (para. 110); whether the evidence is capable of providing a basis for a decision (paras. 126, 149); 'no evidence' (paras. 113, 114).</i>						
69	<i>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)</i> 2002	Boundary delimitation; state responsibility						X	
			<i>Implicit threshold terms: in respect of the boundary delimitation, 'convincing' (para. 207), and 'indicates' (paras. 221, 224); and in respect of the attribution of state responsibility, 'sufficiently' proven the facts (para. 324).</i>						
70	<i>Maritime Delimitation and Territorial Questions between</i>	Boundary delimitation							X
			<i>No articulated standard of proof.</i>						

	<i>Qatar and Bahrain (Qatar v. Bahrain)</i>							
	2001							
71	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)</i>	State responsibility (use of force; human rights and humanitarian law)						
	2001							<i>Discontinued. Not included in the analysis.</i>
72	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)</i>	State responsibility (use of force; human rights and humanitarian law)						
	2001							<i>Discontinued. Not included in the analysis.</i>
73	<i>LaGrand (Germany v. United States of America)</i>	State responsibility (VCDR)					X	
	2001							<i>Implicit threshold terms: 'sufficient' (paras. 35-50).</i>
74	<i>Aerial Incident of 10 August 1999 (Pakistan v. India)</i>	State responsibility (use of force; aviation)						
	2000							<i>Judgment only on preliminary objections; lack of jurisdiction. Not included in the analysis.</i>
75	<i>Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)</i>	Request for interpretation						X
	1999							<i>No articulated standard of proof.</i>
76	<i>Legality of the Use of Force (Yugoslavia v. Spain)</i>	State responsibility (use of force)						
	1999							<i>Removed from the list. Not included in the analysis.</i>
77	<i>Legality of the Use of Force (Yugoslavia v. United States of America)</i>	State responsibility (use of force)						
	1999							<i>Removed from the list. Not included in the analysis.</i>
78	<i>Kasikili/Sedudu Island (Botswana/Namibia)</i>	Boundary delimitation					X	
	1999							<i>Implicit threshold terms: that the evidence 'shows', or that the Court is not</i>

			'persuaded' (para. 37); 'indicates' (para. 69); 'would tend rather to suggest' (para. 74); the Court is unable to draw conclusions based on the evidence (para. 87); the evidence 'does not endorse' (para. 87); and that a fact is 'insufficiently proven' (para. 78).
79	<i>Vienna Convention on Consular Relations (Paraguay v. United States of America)</i> 1998	State responsibility (VCCR)	Discontinued. Not included in the analysis.
80	<i>Fisheries Jurisdiction (Spain v. Canada)</i> 1998	Boundary delimitation; jurisdiction	Preliminary objections not upheld; lack of jurisdiction. Not included in the analysis.
81	<i>Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)</i> 1996	State responsibility (use of force; aviation)	Discontinued. Not included in the analysis.
82	<i>East Timor (Portugal v. Australia)</i> 1995	Boundary delimitation; administration of territory	Lack of jurisdiction. Not included in the analysis.
83	<i>Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)</i> 1995	Boundary delimitation	Discontinued. Not included in the analysis.
84	<i>Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case</i> 1995	Article 63 request	Examination under Art. 63 of the ICJ Statute. Not included in the analysis.
85	<i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>	Boundary delimitation	No articulated standard of proof. X

										<i>to the need for the parties to substantiate their allegations (paras. 34, 36, 40, 459).</i>
94	<i>Border and Transborder Armed Actions (Nicaragua v. Costa Rica)</i> 1987	State responsibility (various obligations)								
			<i>Discontinued. Not included in the analysis.</i>							
95	<i>Frontier Dispute (Burkina Faso/Mali)</i> 1986	Boundary delimitation							X	
			<i>Implicit threshold terms: 'indicative' (para. 30); 'sufficient' (paras. 62, 65, 93, 97, 126, 141-142). The Court consider the evaluation of evidence at some length, and the burden of proof.</i>							
96	<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)</i> 1986	State responsibility (non-use of force; non-intervention; various treaty obligations)							X	
			<i>Implicit threshold terms: 'established' and 'sufficiently established' (paras. 75 ff.); 'insufficiency' of evidence (paras. 106, 108). Emphasis on the evaluation of evidence.</i>							
97	<i>Continental Shelf (Libya/Malta)</i> 1985	Boundary delimitation							X	
			<i>Implicit threshold terms: 'satisfied' (para. 41); could not 'draw sufficiently cogent conclusions' from the evidence (para. 41); and 'insufficiency' of some data (para. 41). The Court briefly noted the significant volume of technical evidence (para. 38).</i>							
98	<i>Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libya) (Tunisia v. Libya)</i>	Application for revision and interpretation								X
			<i>No articulated standard of proof.</i>							

	1985								
99	<i>Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)</i> 1984	Boundary delimitation							X
			<i>Decided by chambers. No articulated standard of proof.</i>						
100	<i>Continental Shelf (Tunisia/Libya)</i> 1982	Boundary delimitation						X	
			<i>Implicit threshold terms: whether the evidence is of 'sufficient weight', or is 'sufficient' (paras. 66, 92, 113, 127); that the evidence 'falls short' (para. 95); 'no evidence' (paras. 92, 125).</i>						
101	<i>United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)</i> 1980	State responsibility (VCDR)						X	
			<i>Implicit threshold terms: 'established to the Court's satisfaction' (para. 82). The Court points to the facts of the case (para. 42).</i>						
102	<i>Aegean Sea Continental Shelf (Greece v. Turkey)</i> 1978	Boundary delimitation							
			<i>Lack of jurisdiction. Not included in the analysis.</i>						
103	<i>Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)</i> 1974	Boundary delimitation.						X	
			<i>Non-appearance case triggering Art. 53 of the ICJ Statute (para. 17). Brief explanation for the approach taken. Implicit threshold terms: 'well founded (paras. 16, 19, 76).'</i>						
104	<i>Nuclear Tests (New Zealand v. France)</i> 1974	State responsibility (environmental law)							
			<i>Inadmissible. Not included in the analysis.</i>						
105	<i>Fisheries Jurisdiction (United Kingdom v. Iceland)</i> 1974	Boundary delimitation						X	
			<i>Non-appearance case triggering Art. 53 of the ICJ Statute (paras. 15-16). Brief explanation for the</i>						

									<i>approach to evidence. Implicit threshold terms: 'well founded' (para. 18).</i>
106	<i>Nuclear Tests (Australia v. France)</i> 1974	State responsibility (environmental law)							<i>Inadmissible. Not included in the analysis.</i>
107	<i>Trial of Pakistani Prisoners of War (Pakistan v. India)</i> 1973	State responsibility (various violations)							<i>Discontinued. Not included in the analysis.</i>
108	<i>Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)</i> 1972	Jurisdiction of ICAO Council						X	<i>No articulated standard of proof.</i>
109	<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)</i> 1970	Diplomatic protection							<i>Judgment only on preliminary objections; no legal standing. Not included in the analysis.</i>
110	<i>North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)</i> 1969	Boundary delimitation						X	<i>No articulated standard of proof. Compare to reservation at para. 59, 'convincingly'.</i>
111	<i>North Sea Continental Shelf (Federal Republic of Germany/Denmark)</i> 1969	Boundary delimitation						X	<i>No articulated standard of proof. Compare to reservation at para. 59, 'convincingly'.</i>
112	<i>South West Africa (Liberia v. South Africa)</i> 1966	State responsibility (mandate obligations)							<i>Judgment only on preliminary objections; no legal standing. Not included in the analysis.</i>
113	<i>South West Africa (Ethiopia v. South Africa)</i> 1966	State responsibility (mandate obligations)							<i>Judgment only on preliminary objections; no legal standing. Not included in the analysis.</i>

114	<i>Northern Cameroons (Cameroon v. United Kingdom)</i> 1963	State responsibility (trusteeship agreement)							
			<i>Lack of jurisdiction. Not included in the analysis.</i>						
115	<i>Temple of Preah Vihear (Cambodia v. Thailand)</i> 1962	Boundary delimitation; declaration of sovereignty							X
			<i>No articulated standard of proof. Briefly discussion of the allocation of the burden of proof (pp. 13-14).</i>						
116	<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)</i> 1961	Diplomatic protection							
			<i>Removed from the list. Not included in the analysis.</i>						
117	<i>Right of Passage over Indian Territory (Portugal v. India)</i> 1960	Right of passage							X
			<i>No articulated standard of proof.</i>						
118	<i>Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient (France v. Lebanon)</i> 1960	Diplomatic protection							
			<i>Removed from the list. Not included in the analysis.</i>						
119	<i>Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)</i> 1960	Interpretation of arbitral award							X
			<i>No articulated standard of proof.</i>						
120	<i>Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)</i> 1960	State responsibility (use of force; aviation)							
			<i>Removed from the list. Not included in the analysis.</i>						
121	<i>Interhandel (Switzerland v. United States of America)</i> 1959	Property rights							
			<i>Inadmissible. Not included in the analysis.</i>						
122	<i>Aerial Incident of 7 November 1954 (United States of America v. Union of Soviet Socialist Republics)</i> 1959	State responsibility (use of force; aviation)							
			<i>Lack of jurisdiction. Not included in the analysis.</i>						
123	<i>Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria)</i> 1959	State responsibility (use of force; aviation)							
			<i>Discontinued. Not included in the analysis.</i>						

	<i>Nottebohm (Liechtenstein v. Guatemala) (Second Phase)</i> 1955	State responsibility (diplomatic protection; nationality)	<i>Implicit threshold terms: whether the facts appear 'with sufficient clarity' (p. 24).</i>					
134	<i>Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian Peoples' Republic)</i> 1954	Treatment of foreign nationals	<i>Lack of jurisdiction. Not included in the analysis.</i>					
135	<i>Electricité de Beyrouth Company (France v. Lebanon)</i> 1954	Expropriation	<i>Removed from list. Not included in the analysis.</i>					
136	<i>Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Union of Soviet Socialist Republics)</i> 1954	Treatment of foreign nationals	<i>Lack of jurisdiction. Not included in the analysis.</i>					
137	<i>Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)</i> 1954	Sovereignty	<i>Lack of jurisdiction. Not included in the analysis.</i>					
138	<i>Minquiers and Ecrehos (France/UK)</i> 1953	Boundary delimitation; declaration of sovereignty	<i>Implicit threshold terms: 'convincing (proof of title)' (p. 9).</i>				X	
139	<i>Ambatielos (Greece v. United Kingdom)</i> 1953	State responsibility (breach of contract)	<i>No articulated standard of proof.</i>					X
140	<i>Anglo-Iranian Oil Co. (United Kingdom v. Iran)</i> 1952	Expropriation	<i>Preliminary objections upheld. Not included in the analysis.</i>					
141	<i>Rights of Nationals of the United States of America in Morocco (France v. United States of America)</i> 1952	State responsibility (bilateral treaty)	<i>Implicit threshold terms: 'sufficient' evidence (p. 200); "decisive" evidence (p. 209)</i>				X	
142								X

	<i>Haya de la Torre (Colombia v. Peru)</i> 1951	Declaration of sovereignty; question of <i>res judicata</i>					<i>No articulated standard of proof.</i>
143	<i>Fisheries (United Kingdom v. Norway)</i> 1951	Boundary delimitation				X	<i>Implicit threshold terms: 'clearly evidenced' (p. 21); 'in the absence of convincing evidence' (p. 26); 'in the absence of convincing evidence to the contrary' (p. 28).</i>
144	<i>Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)</i> 1950	Request for interpretation					X <i>No articulated standard of proof. Request for interpretation dismissed.</i>
145	<i>Asylum (Colombia/Peru)</i> 1950	Diplomatic asylum					X <i>No articulated standard of proof.</i>
146	<i>Protection of French Nationals and Protected Persons in Egypt (France v. Egypt)</i> 1950	Diplomatic protection					<i>Discontinued. Not included in the analysis.</i>
147	<i>Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)</i> 1949	State responsibility (use of force; right of innocent passage)			X	X	<i>Rationale for the use of a high standard of proof, and implicit threshold terms: '[a] charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here' (p. 17); inferences of fact may not leave room for 'reasonable doubt' (p. 18).</i>

The Standard of Proof at the ICJ

The standard of proof at the International Court of Justice (ICJ) is a central, yet underexplored, aspect of its judicial decision-making. This thesis critically examines how the Court articulates and applies standards of proof across its jurisprudence, revealing a flexible yet ultimately bounded approach shaped by both legal constraints and state interests. Through doctrinal research and empirical analysis, it proposes an ‘open-close’ model that captures the extensive scope of discretion afforded to the Court in evidentiary matters, tempered by institutional and political constraints. The thesis offers a systematic conceptual framework of the ICJ’s evidentiary reasoning, deepening understanding of international judicial fact-finding and advancing critical engagement with the Court’s decision-making.

AMANDA BILLS is a Doctoral Candidate at Lund University and holds an LL.M, also from Lund University. Her doctoral research critically examines the standard of proof at the International Court of Justice through a combination of doctrinal legal analysis and empirical study. By developing a conceptual framework alongside quantitative and qualitative case studies, her work provides a nuanced understanding of the Court’s evidentiary reasoning and decision-making within the broader context of international procedural law.

