IN THE EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

APPLICATION Nos. 5111/07 and 42757/07

Between:

MIKHAIL BORISOVICH KHODORKOVSKIY

PLATON LEONIDOVICH LEBEDEV

Applicants

- and -

THE RUSSIAN FEDERATION (No. 3)

Respondent

ANNEXE 4
ANALYSIS OF THE APPROACH OF INTERNATIONAL COURTS AND TRIBUNALS TO ALLEGATIONS OF "BAD FAITH"

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(1) Summary of international jurisdictions

1. The applicants are aware of no international or national jurisdiction that requires "*incontrovertible and direct*" evidence of bad faith to be adduced by a complainant against the authorities.

2. The applicants have analysed the jurisprudence of the major international courts and tribunals as to the appropriate standard of proof to be applied in such cases. This study has involved review of the case law of the International Court of Justice, the UN

Human Rights Committee, the Inter-American Court of Human Rights, the Mixed Claims Commission, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the WTO Dispute Settlement Body and Appellate Body, international investment treaty arbitral tribunals, the Iran-US Claims Tribunal and the Permanent Court of Arbitration.

3. Rather than requiring "*incontrovertible and direct*" evidence of bad faith, these courts actually require a much lower standard of proof to be adduced by a party alleging bad faith against a State. The analysis below reveals that while there are a range of evidential standards applied by international courts and tribunals, a general consistency in approach emerges indicating that parties alleging bad faith against other parties must generally do so to the "*prima facie evidence*" standard,[1] the "*preponderance of evidence*" / "*balance of probabilities*" standard[2] or the "*clear and convincing evidence*" standard[3]. Less commonly, some members of the International Court of Justice have required proof to a "*sufficient evidence*" standard. In certain exceptionally rare and grave cases it has been considered appropriate for the International Court of Justice to require proof to the standard of "*beyond reasonable doubt*", however it is notable that even before the various international criminal courts and tribunals, this standard of proof is only applicable to allegations of bad faith when they are formally charged as the crime of contempt of court. The most common standard applied by far across all the international courts and tribunals is the "*prima facie*" evidence standard such that where the Claimant adduces *prima facie* evidence of bad faith the evidential burden shifts to the Respondent to rebut this evidence.

4. Similarly, all of these courts and tribunals: (1) allow reliance on circumstantial rather than direct evidence; (2) authorise a party to be ordered to produce further information or evidence negating a prima facie assertion of bad faith; and (3) enable the drawing

[1] This is the practice of certain chambers at the International Court of Justice, the Mixed Claims Commission, all of the *ad hoc* international criminal tribunals, certain chambers at the International Criminal Court and most WTO dispute settlement panels.
[2] This is the practice of certain chambers at the International Court of Justice, certain chambers at the International Criminal Court, certain WTO dispute settlement panels and certain investment treaty arbitral tribunals.
[3] This is the practice of certain chambers at the International Court of Justice, the Inter-American Court on Human Rights, most investment treaty arbitral tribunals and the Iran-US Claims Tribunal.

of an adverse inference where a State refuses to provide such further information and / or evidence. Accordingly, it is submitted that there is no proper basis in international practice for an "*incontrovertible and direct*" standard of proof to be applied in the present case.

5. Each of the different jurisdictions referred to above will be examined in turn.

(2) The International Court of Justice ("the ICJ")

6. The general principle applied by the ICJ is that it is for the party asserting a fact to discharge the burden of proof.[4]

a. <u>The varying standards of proof before the ICJ, the use of adverse inferences by the ICJ and a summary of how these are relevant for the instant cases</u>

7. In terms of the standard of proof to be applied, the Court's Statute and Rules do not state the level of proof a party needs to meet in order to succeed on a claim.[5] Rather, its determination of the standard of proof is made on an *ad hoc* basis and is only notified to the parties at the end of the process when the Court renders its judgment.[6] There appear to be at least five different standards of proof that have been applied to date by the ICJ in its proceedings. These are: (1) proof beyond a reasonable doubt; (2) proof in a convincing manner; (3) a '*preponderance of evidence*' or '*balance of probabilities'*; (4) a test of '*sufficiency of evidence'*, and (5) a flexible evidential standard in cases which are difficult for an applicant claimant to substantiate equating to the showing of *prima facie* evidence.[7]

8. One of the reasons for these differing standards is that the applicable standard of proof varies between common law and civil law systems and between criminal and civil proceedings in both systems. Romano, Alter and Shany observe that civil law

[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* 26 November 1984, [1984] ICJ Rep 392, 437; *Frontier Dispute,* 22 December 1986, [1986] ICJ Rep 554, 587; *Land and Maritime Boundary (Preliminary Objections),* 11 June 1998, [1998] ICJ Rep 275, 319.
[5] Teitelbaum, Ruth., *"Recent fact-finding developments at the ICJ",* The Law and Practice of International Courts and Tribunals, 6(2007): 119-158 at 124.
[6] Ibid.
[7] Brown, Chester, "*A common law of international adjudication"*, Oxford University Press, 2007, at 98.

systems regard the appropriate standard of proof not as a question of probability or certainty beyond reasonable doubt, but instead as a matter for the personal appreciation of the judge.[8] If the judge considers him or herself to be persuaded by the argument on a certain matter then the standard of proof has been met. The former President of the Iran-United States Claims Tribunal has adopted this approach on at least one occasion stating: "*the burden of proof is that you have to convince me*".[9] This proposition directly follows the civil law tradition where the question of whether the party bearing the burden of proof has established their case is essentially a subjective one, which can be answered by reference to the "*inner, deep-seated, personal conviction of the Judge*".[10]

9. In the *Oil Platforms,* Judge Higgins commented that there seemed to be a "*general agreement*" that despite the numerous standards of proof which have been applied by the ICJ, "*the graver the charge the more confidence must there be in the evidence relied on*".[11] That view was shared by Judge Shahabuddeen in *Qatar v Bahrain* that "*generally speaking, the standard of proof varies with the character of the particular issue of fact*".[12] However, precisely when an allegation reaches the level of gravity for the standard to shift from prima facie, to sufficient, to preponderance of evidence, to convincing evidence or to evidence beyond a reasonable doubt is far from clear and has rightly been the subject of international judicial criticism.[13]

10. Furthermore, the standard can even be variable within a case, as the *Bosnian Genocide case* demonstrates. In those proceedings, there was a lower standard applied for a breach of the Genocide Convention and a higher standard for the Court to impute State responsibility for the international crime of genocide. In that case, the

[8] Romano, Cesare, Alter, Karen., and Shany, Yuval., "*The Oxford Handbook of International Arbitration"*, Oxford University Press, 2014, p. 860.
[9] GM Von Mehren and CT Salomon, "*Submitting evidence in an international arbitration: the common lawyer's guide"* (2003) 20 JIA 290 cited in Romano, Cesare., Alter, Karen., and Shany, Yuval., "*The Oxford Handbook of International Arbitration"*, Oxford University Press, 2014, p. 860.
[10] KM Clermont and E Sherwin, *"A comparative view of standards of proof*" (2002) 50 Am J of Comparative Law 246 cited in Romano, Cesare., Alter, Karen., and Shany, Yuval., "*The Oxford Handbook of International Arbitration"*, Oxford University Press, 2014, p. 860.
[11] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Higgins, 6 November 2003, [2003] ICJ Rep 161, 234 §33.
[12] *Qatar v Bahrain*, Dissenting Opinion of Judge Shahabuddeen, 15 February 1995, [1995] ICJ Rep 6, 63.
[13] See for example: *M/V "Saiga" (No 2),* Separate Opinion of Judge Wolfrum, 1 July 1999, (1999) 120 ILR 143, 220, 222; *Schering Corporation v Iran,* Dissenting Opinion of Judge Mosk, 13 April 1984, (1984) 5 Ir-USCTR 361, 374, 375.

lower standard was "*a high level of certainty*" and the higher standard was separately regarded as either being "*fully convinced*" or proved "*beyond reasonable doubt*". The issues under consideration in the *Bosnian Genocide case* were of the most exceptional gravity. By comparison, it is clear that a breach of a treaty pertaining to the rationale for restrictions of an individual's rights to liberty, fair trial and private life (i.e. the issues in the instant cases) would attract a much less onerous standard of proof if dealt with by the ICJ.

11. It is important to note that for the purposes of public international law, an allegation of breach of a treaty is akin to an allegation of bad faith or improper purpose made in a human rights context. This is because in public international law there is a direct link between a State's duty to act in good faith and the need to respect the meaning and purpose of treaties to which it is a signatory as well as uphold the obligations assumed by them as UN members. This link is set out in the Vienna Convention on the Law of Treaties and the UN Charter.[14] It has been recognised by the ICJ that the question of good faith or otherwise by a State is approached by reviewing the objective conduct of the State and its consequences in fact rather than its subjective intentions.[15] As such, a lack of good faith by a State can be demonstrated not only when a State violates a treaty but also when the State seeks to avoid or to 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.[16] The latter good faith breach is understood as an abuse of the rights of the other parties to the treaty.[17]

12. As a general rule, cases which do not concern the attribution of international responsibility (such as boundary disputes) usually adopt the sufficient or balance of probabilities / preponderance of evidence standard. Cases where the international

[14] See articles 18, 26, and 31 of Vienna Convention on the Law of Treaties and article 2(2) of the UN Charter.
[15] *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter), Advisory Opinion,* 11 April 1949, *Individual Opinion of Judge Azevedo*, 28 May 1948, ICJ Rep 73, 80.
[16] For example it would be a good faith breach to make national regulations which in substance destroy or frustrate the rights of another treaty party. McNair, A., "*The Law of Treaties"*, Oxford University Press, 1961, p. 540 cited in Fitzmaurice, M and Sarooshi, D., "*Issues of State Responsibility before International Judicial Institutions"*, Hart Publishing, 2004, p. 93.
[17] See, for example, *Free Zones of Upper Savoy and the District of Gex Case (France v Switzerland)* (Merits), 7 June 1932, Permanent Court of International Justice Reports, Ser A/B, No. 46, 167. See also Bin Cheng, *General Principles of Law as applied by international courts and tribunals*, London, 1953, pp. 121, 131; and Fitzmaurice, G., "*The Law and Procedure of the International Court of Justice"*, 1951-54: General Principles and Sources of International Law, 35 British Year Book of International Law, 1959, pp. 183-209.

responsibility of a State is involved vary (depending upon the widely varying gravity of the subject matter of the underlying alleged breach of treaty / act of bad faith) between a sufficiency standard, balance of probabilities / preponderance of evidence and a convincing standard. Finally, cases regarding exceptionally grave allegations (such as determining State responsibility for the crime of genocide, or for laying a minefield in order to damage another State's naval vessels or for committing the international crime of aggression) attract the beyond reasonable doubt or convincing standard of evidence.

13. It is notable that in a recent case relating to the unlawful detention and expulsion of an individual from a State (i.e. a topic which unusually for inter-State cases is analogous with the allegations in the instant proceedings), the ICJ has applied a *prima facie* evidence standard, requiring the Respondent Government to itself prove that it had duly guaranteed the detainee's rights since it alone was in a position to do so[18]. This position is a reflection of the Court's recognition of the need for a flexible evidential standard in cases where direct evidence is likely to be in the exclusive possession of the Respondent Government. In the ICJ's most recent ruling to date, the *Whaling case* between Australia and Japan, the Court likewise placed a heavy emphasis on the Respondent Government being obliged to prove that it had acted in good faith and not in breach of a treaty, rather than requiring Australia to prove that Japan had abused its rights by breaching the treaty[19].

14. This jurisprudence indicates that the ICJ would be very likely to require Russia to prove that it had acted in good faith if the complaints raised in these cases were before it, on the basis that the applicants had adduced *prima facie* evidence.

15. It is notable that the ICJ has a statutory power to order the production of evidence and / or explanations from a State party and if these are not forthcoming, to draw adverse inferences against that State. Although these powers have been used rarely by the Court to date, there is an array of international judicial opinion to the effect that such orders and adverse inferences should be drawn in cases where there is an inherent

[18] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §55.
[19] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §§ 138-139, § 141, § 226.

asymmetry between the parties in discharging the burden of proof (i.e. in cases where the majority of the evidence is held by the Respondent Government, as is the position in these applications).

b. <u>The five different standards of proof before the ICJ and their application to date in differing allegations of bad faith by State parties</u>

i. Proof beyond reasonable doubt

16. The most exacting standard applied by the ICJ is the criminal standard of proof of "*beyond reasonable doubt*" (that is applied in common law jurisdictions). Significantly, the ICJ has applied this standard on very rare occasions.

17. The first mention of this standard was by a common law judge (Judge Read of Canada) in a Dissenting Opinion in the *Anglo-Norwegian Fisheries case*, who stated that:

> "The evidence with regard to the Kanuck and Lord Weir incidents shows, beyond all reasonable doubt, that the Norwegian system was not being asserted and applied in the Disputed Area in 1923, 1930 or 1931".[20]

18. The "*beyond reasonable doubt*" standard was also applied in the *Corfu Channel* case in the context of what was described as a "*charge of exceptional gravity against a State*".[21] The allegation of exceptional gravity in that case was made by the Claimant Government (the United Kingdom) to the effect that the Albanian government had connived to lay a minefield which caused damage to two British naval vessels. The Court stated in its judgment that "*[a] charge of such exceptional gravity against a State would require a high degree of certainty that has not been reached here*".[22]

19. In the *Corfu Channel case* the Court acknowledged that because of the exceptional gravity of the issue, positive inferences could be drawn only if "*they leave no room*

[20] *Anglo-Norwegian Fisheries case*, Dissenting Opinion of Judge Read, 18 December 1951, [1951] ICJ Rep 116, 196.
[21] *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, 17.
[22] Ibid.

for reasonable doubt".[23] In its judgment, the Court did however rely upon a series of inferences and circumstantial evidence in order to conclude that the Albanian Government knew about the laying of the minefield.[24] Having set out the facts from which it could be appropriately inferred that Albania had knowledge of the minefield, the Court stated that:

> "from all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on 22 October 1946, could not have been accomplished without the knowledge of the Albanian Government".[25]

20. Despite giving a Dissenting Opinion in the *Corfu Channel case,* Judge Azevedo agreed with the majority that it was right to draw positive inferences when one could be reasonably certain of their accuracy, stating:

> "[i]t would be going too far for an international court to insist on direct and visual evidence and refuse to admit, after reflection, a reasonable amount of human certainty with which, despite the risk of occasional errors, a court of justice must be content."[26]

21. Similarly that standard was applied in the *Cameroon v Nigeria* case in the Dissenting Opinion of Judge Ajibola (the judge from the Respondent State) who said that "*Cameroon's allegations of the very serious offence of State responsibility must be proved beyond reasonable doubt. This proof is missing*."[27] In that case, the allegation made by Cameroon was extremely serious. As well as disputing the sovereignty of the area of Bakassi and requesting the Court to determine a maritime frontier between the two nations, Cameroon alleged that Nigeria had committed an act of aggression against it by occupying several Cameroonian localities on the Bakassi Peninsula.

22. A standard similar to that of "*beyond reasonable doubt*" has been applied by the Court with respect to what is probably the most grave of all claims – a State party asserting that another State was responsible for genocide against the Claimant State's population. However, even in these circumstances, the Court in the *Bosnian Genocide*

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[23] *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, 18.
[24] *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, 18.
[25] *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, 22.
[26] *Corfu Channel (United Kingdom v Albania),* Dissenting Opinion of Judge Azevedo, 9 April 1949 [1949] ICJ Rep 4, 90 §16.
[27] *Land and Maritime Boundary Between Cameroon and Nigeria* (*Cameroon v Nigeria: Equatorial Guinea intervening)*, Dissenting Opinion of Judge Ajibola, 10 October 2002, [2002] ICJ Rep 303, 599 §194.

case did not apply a standard which directly equated to the common law test in criminal cases but seemingly imposed a series of different standards. In that case, the Applicant argued for the common law civil standard to apply (i.e. balance of probabilities) while the Respondent contended that the standard must be that "there be no room for reasonable doubt".[28] The Court at times considered the facts in terms of a clear and convincing level of proof – this related to the allegation that Serbia had breached the Genocide Convention by failing to prevent genocide in Bosnia. At other times in the judgment, the Court applied a standard of "*beyond any doubt*" when ruling that legal responsibility for committing the crime of genocide could not be attributed to Serbia by the Court because "*it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied and continued to supply the VRS leaders who decided upon and carried out the acts of genocide with their aid and assistance…*"[29]. By adopting this extremely strict formula the Court avoided making a factual finding on this complex matter by either calling on one of the parties to produce evidence or by drawing inferences.[30]

ii. Proof in a convincing manner

23. This standard was applied by the ICJ in the *Nicaragua case* because the United States did not appear in the merits stage of the case, the ICJ noted its obligation under article 53 of the ICJ Statute to "*satisfy itself … that the claim is in fact and law*".[31] The ICJ held that this provision implied that "*the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence*".[32] The Court was willing to draw a positive inference in Nicaragua's favour in this case to the effect that the United States had intended to encourage acts contrary to international law, on the basis that Nicaragua

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* 26 February 2007, [2007] ICJ Rep 43, §208.
[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, [2007] ICJ Rep 43, §422.
[30] Teitelbaum, Ruth, "Recent fact-finding developments at the ICJ", *The Law and Practice of International Courts and Tribunals*, 6(2007): 119-158 at 128.
[31] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*, 27 June 1986, [1986] ICJ Rep 14, 24 §28.
[32] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*, 27 June 1986, [1986] ICJ Rep 14, 24 - 25 §29.

had established that they had published and distributed a manual on psychological operations.[33]

24. Similarly, in the *Armed Activities in the territory of the Congo case*, the Court expressly stated that it had not received "*convincing evidence that Uganda forces were present ... in the period under consideration of the Court for purposes of responding to the final submissions of the DRC*".[34] It also reiterated that evidence must be "*sufficient to convince*"[35] the Court and must be "*sufficient and convincing*".[36]

25. Even though the Court appeared at times to apply the common law criminal standard of "*beyond reasonable doubt*" to the allegation that Serbia was responsible for committing the crime of genocide in the *Bosnian Genocide case*, it also appeared to apply the "*convincing evidence*" / "*conclusive*" standard at other times for this same allegation:

> "the Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive";[37]
>
> "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".[38]

26. The Court also made clear that in relation to other lesser, though undoubtedly grave, allegations (such as for example, the charge that Serbia had breached the Genocide Convention by failing to prevent genocide), the standard of proof was much lower

[33] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*, 27 June 1986, [1986] ICJ Rep 14, 129 §254: "The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties".
[34] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, §91.
[35] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, § 207.
[36] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, §237.
[37] *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, [2007] ICJ Rep 43, §209, citing *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, §17.
[38] *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, [2007] ICJ Rep 43, §209.

than this, and required "*a high level of certainty*". It stated in relation to this lesser allegation:

> "In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation."[39]

27. This standard of "*convincing"* evidence has also been applied by the Inter-American Court on Human Rights in the *Velasquez Rodriguez* case which considered allegations of state torture by Honduras. The Court found that in the circumstances, it was necessary to apply "*a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner*."[40]

iii. A 'preponderance of evidence' or evidence on the 'balance of probabilities'

28. The standard of the "preponderance of evidence" (which is widely seen as being akin to the common law civil standard of proof on the "*balance of probabilities*") has been recognised by the ICJ and in particular in the *Norwegian Loans* case.[41] Judge Lauterpacht stated in that case that:

> "the degree of burden of proof … to be adduced ought not to be so stringent as to render the proof unduly exacting".[42]

29. Similarly, in his Declaration in the *Sovereignty over Certain Frontier Land case,* Judge Spiropoulos stated that:

> "[f]aced as I am with a choice between two hypotheses which lead to opposite results with regard to the question to whom sovereignty over the plot belong, I consider that

[39] Ibid.
[40] *Velasquez Rodriguez v Honduras* (Merits), 29 July 1988, Inter-American Court of Human Rights Series C 4, 95 ILR 259, 285.
[41] *Certain Norwegian Loans (France v. Norway),* Separate Opinion Judge Lauterpacht, 6 July 1957, [1957] ICJ Rep 9, 39-40.
[42] Ibid.

> preference ought to be given to the hypothesis which seems to me to be the less speculative."[43]

30. Other cases in which the "*balance of probabilities*" standard has been applied include by Judge Fitzmaurice in the *Barcelona Traction case* where it was said that the standard was that of "*reasonable conjecture, warranted by those facts that are known, and by the probabilities involved*",[44] or even by a "*very reasonable presumption as to what occurred*".[45]

31. Similarly in *El Salvador v Honduras* the Court spoke of determining the boundary "*on a balance of probabilities, there being no great abundance of evidence either way*".[46]

32. Finally, the case of *Kasikili / Sedudu Island (Botswana v Namibia)* saw a judicial view expressed by Judge Rezak in his Dissenting Opinion that the:

> "[p]reponderance of evidence [was] in favour of the finding that the boundary line lies in the southern channel and that Namibia has sovereignty over Kasikili / Sedudu".[47]

iv. 'Sufficiency of evidence'

33. The ICJ has also relied upon the lower standard of the "*sufficiency of evidence*" on occasion. In the *Oil Platforms* case[48] the ICJ appeared to apply such a test in considering whether the US had proved that its vessels had been attacked by Iran. It held that "*if at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been*

[43] *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, Declaration of Judge Spiropoulos, 28 June 1959, [1059] ICJ Rep 209, 232.
[44] *Barcelona Traction Case*, Separate Opinion of Judge Fitzmaurice, 5 February 1970, [1970] ICJ Rep 3, 65 §58.
[45] Ibid.
[46] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras),* 11 September 1992, [1992] ICJ Rep 351, 506 § 248.
[47] *Kasikili/ Sedudu Island (Botswana v Namibia)*, Dissenting Opinion of Judge Rezak, 13 December 1999, [1999] ICJ Rep 1045, 1233.
[48] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, 6 November 2003, [2003] ICJ Rep 161, 189 §§ 57, 61, 76.

discharged by the United States".[49] The Court then went on to say that it was not "*sufficiently convinced that the evidence available supports the contentions of the United States*".[50]

34. Despite also referring to the need for "*sufficient and convincing*" evidence in *Democratic Republic of the Congo v Uganda*, the Court in that case also made several discrete mentions of evidence being "*sufficient*" or "*insufficient*" and at one stage spoke of "*sufficient credible evidence*".[51] The various observations made by the court were as follows:

> "the Court must examine whether there is sufficient evidence…"[52]
>
> "The Court further finds that there is sufficient evidence of a reliable quality to support the DRC's allegation…"[53]
>
> "The Court finds that there is sufficient evidence…"[54]
>
> "The Court considers that Uganda has not produced sufficient evidence…"[55]
>
> "The Court finds that there is sufficient evidence to prove that there were attacks against the Embassy…"[56]
>
> "the Status Report on the Residence and Chancery … provides sufficient evidence for the Court to conclude that Ugandan property was removed from the premises"[57]

35. The *Nicaragua case,* although applying a standard of "*convincing*" evidence in part, elsewhere seemed to apply the "*sufficiency*" threshold:

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[49] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, 6 November 2003, [2003] ICJ Rep 161, 189 §57.
[50] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, 6 November 2003, [2003] ICJ Rep 161, 189 §76.
[51] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 253 §250.
[52] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 230 §173.
[53] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 240 §208.
[54] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 252 §246.
[55] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 267 §298.
[56] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 277 §334.
[57] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* 19 December 2005, [2005] ICJ Rep 168, 278 §342.

> "the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point".[58]

36. Perhaps understandably, the threshold of "*sufficiency of evidence*" has been the subject of judicial criticism.[59] Judge Buergenthal in the *Oil Platforms* case observed:

> "what is meant by 'insufficient' evidence? Does the evidence have to be 'convincing', 'preponderant', 'overwhelming' or 'beyond a reasonable doubt' to be sufficient? The court never spells out what the here relevant standard of proof is".[60]

v. A flexible evidential standard – 'prima facie' evidence?

37. Judges at the ICJ have also, on occasion, recognised that a flexible evidential standard may be applied where direct evidence is likely to be in the exclusive possession of the other party.

38. Thus in the *Corfu Channel* case, the first case heard by the ICJ, the Court found that the fact that a State exercises control over a territory:

> "has a bearing upon methods of proof available to establish knowledge of that State as to events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[61]

39. One commentator has noted that although the ICJ in the *Corfu Channel* case did not expressly refer to a *prima facie* standard in its judgment as to the need for flexible

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[58] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*, 27 June 1986, [1986] ICJ Rep 14, 49 §110.
[59] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Higgins, 6 November 2003, [2003] ICJ Rep 161.
[60] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Buergenthal, 6 November 2003, [2003] ICJ Rep 161, 270 §41.
[61] *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, 18.

evidential standards, it recognised that a lower standard of proof can be appropriate in certain cases.[62] Brown argues that one such low standard of proof which could be applied by the ICJ is that of a *prima facie* case (this standard has been applied by other tribunals such as the WTO Dispute Settlement Panel and the Iran-US Claims Tribunal).[63] In practice, that test means that once the claimant has produced evidence showing a *prima facie* case, the burden of proof shifts to the Respondent State to rebut that prima facie evidence.

40. That approach was applied by Judge Read in his Dissenting Opinion in the *Asylum Case (Columbia v Peru)* when he concluded that Colombia had "*established considerably more than a prima facie case*", and added:

> "The question remains whether the third day of January 1949 has been proved to have been a time of political disturbance of a revolutionary character. This is a matter peculiarly within the knowledge of the territorial State, and, in my opinion, Colombia was not bound to establish more than a prima facie case. There can be no doubt that Colombia has discharged the burden of proof to this extent. On the other hand Peru has not furnished a scintilla of evidence with regard to the political condition obtaining in Lima at the beginning of January, 1949."[64]

41. This approach is supported by Sandifer who noted that there are a range of historical cases from the early part of the Twentieth Century before the Mixed Claims Commission where the facts stated by the claimant Government were substantiated only by partial proof, and judgment in its favour was found to be warranted when the Respondent Government could easily have rebutted such statements, if untrue, by submitting evidence within its control.[65]

42. Similarly, the *prima facie* evidential approach has also been relied upon by the UN Human Rights Committee in the case of *Bleier v Uruguay* where the Respondent

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[62] Brown, Chester, "*A common law of international arbitration"*, Oxford University Press, 2007, 99.

[63] For example, *Canada – Aircraft,* DSR 1999-III, 1428 (ABR); *EC-Hormones (Canada Complaint)*, DSR 1998-II, 173 (ABR); *Lockheed Corporation v Iran*, 18 Ir-USCTR 292, 318 ,1988; Time Inc v Iran, 7 Ir-USCTR 8,11, 1984,; *International Technical Products v Iran*, 9 Ir-USCTR 10, 28-9, 1885.

[64] *Asylum Case* (*Colombia v Peru),* Dissenting Opinion of Judge Read, 20 November 1950, [1950] ICJ Rep 266, 328 §§326-327.

[65] *De Lemos Case (Great Britain v Venezuala)* 1903 Ralston's Report,1904, 302, 319; *Brun Case (France v Venezuala)*, French-Venezualan Mixed Claims Commission, 1902 Ralston's Report, 1906, 5, 25; *Hatton Case (United States v Mexico)* 1923 Opinions 6-10 (1929); *Janin v Etat Allemand* (Franco-German Mixed Arbitral Tribunal), 1 Recueil des Decisions 774 (1922) cited in Sandifer, Dunward., *Evidence Before International Tribunals*, University Press of Virginia, Charlottesville, Revised Edition, 1975 at page 173.

State had significantly better access to information than the Claimant. In that case, the Committee expressed the view that:

> "With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party".[66]

43. These historical cases appear to be supported by the more recent jurisprudence of the ICJ such as the *AS Diallo case*, decided in 2010.[67] In that case, between Guinea and the Congo, the Court applied a rule often applied by human rights jurisdictions, that the due application of a detainee's guaranteed rights must be proved by the detaining State, since it alone is in a position to do so properly.[68]

> "As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact (see, most recently, the Judgment delivered in the case concerning *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Reports 2010 (I), p. 71, para 162). However, it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.
>
> In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law – if such was the case – by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.

[66] *Bleier v Uruguay*, Report of the UN Human Rights Committee, Communication number 30/1978, Views Adopted on 29 March 1982, para 13.3.
[67] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §54.
[68] Ibid.

> It is for the Court to evaluate all the evidence produced by the two parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions. In short, when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof."[69]

44. The Court's approach in the *AS Diallo* proceedings is perhaps most closely analogous to the situation under consideration in the instant proceedings. Mr Diallo was a Guinean national conducting business in the DRC. He was arrested and imprisoned before being released a year later following closure of the case by the public prosecutor for "inexpediency of prosecution". He was further arrested and detained for several months some six years later before finally being expelled from the DRC.

45. Guinea requested the Court to declare that his initial arrest and detention was in breach of his individual rights under international law and that his subsequent detention and expulsion were in violation of Article 13 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 12 of the African Charter on Human and People's Rights ("African Charter"). The Court found that Guinea's claim regarding the initial period of detention was inadmissible (for failing to exhaust local remedies) but upheld the claims in relation to the ICCPR and African Charter with respect to his subsequent detention and expulsion as well as a violation of the Vienna Convention on Consular Relations for not informing Mr Diallo of his right to request consular assistance from Guinea.[70]

46. Importantly, in upholding each of these treaty violations by the DRC, the Court noted that:

> "It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons [against his expulsion] where "compelling reasons of national security require" otherwise. The Respondent maintains that this was precisely the case here. However, it has not provided the Court with any tangible information that might establish the existence of such "compelling reasons". … It is for the State to demonstrate that the "compelling reasons" required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure."[71]

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[69] Ibid.
[70] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §§47, 73, 74, 76, 79, 82, 94-96.
[71] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §74.

> "There is no evidence that the authorities of the DRC sought to determine whether Mr Diallo was "likely to evade implementation" of the expulsion decree and, therefore, whether it was necessary to detain him."[72]
>
> In addition, the DRC has produced no evidence to show that the detention was reviewed every 48 hours as required [by Article 15]".[73]
>
> "The DRC has failed to produce a single document or any other form of evidence to prove that Mr Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995 or that he was in some way informed, at that time, of the reason for his arrest. … The DRC, which should be in a position to prove the date on which Mr Diallo was notified of the decree, has presented no evidence to that effect."[74]
>
> "As for the DRC's assertion … that Mr Diallo was "orally informed" of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it."[75]

47. The recent *Whaling in the Antarctic case (Australia v Japan)* at the ICJ is also instructive as to the Court's current approach to the standard of proof in cases where improper motives are alleged against a Respondent State.

48. In this case, Australia essentially alleged that Japan was acting in bad faith by not conducting its whaling programme for the purposes of scientific research (as is required by Article VIII of the International Convention for the Regulation of Whaling ("ICRW")) but was instead carrying out commercial whaling.

49. The approach of the majority of the Court appears to be a manifestation of the prima facie evidence approach to the standard of proof. In approaching the standard of review the Court determined that the key question was whether or not the Japanese government's issuance of permits under its whaling programme were "for the purposes of scientific research".[76] That is, whether the programme's methods, objectively reviewed, are "reasonable in achieving its stated objectives".[77] As the Court set out:

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[72] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §79.
[73] Ibid.
[74] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §84.
[75] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* 30 November 2010, [2010] ICJ Rep 639, §96.
[76] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §§67-69, 88, 97.
[77] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §67.

> "It follows that the Court will look to the authorizing State, which has granted special permits [under its whaling programme], to explain the objective basis for its determination [that these are issued for the purpose of scientific research]".[78]

50. In concluding that the evidence did not establish that the special permits granted by Japan for the killing of whales under the programme were "for purposes of scientific research" pursuant to the ICRW,[79] the Court lamented the absence of evidence or explanation from Japan establishing a reasonable basis for its whaling programme, observing that:

> "The Court did not hear directly from Japanese scientists involved in designing [the programme]"[80]
>
> "[the documents submitted by Japan] contain no reference to feasibility studies by Japan"[81]
>
> "Japan identified no other analysis that was included in, or was contemporaneous with, the JARPA II Research Plan"[82]
>
> "there is no evidence of studies of the feasibility or practicability of non-lethal methods"[83]
>
> "The absence of any evidence pointing to consideration of the feasibility of non-lethal methods was not explained".[84]
>
> "Nor has Japan explained how these research objectives remain viable given the decision to use six-year and 12-year research periods for different species…"[85]

51. Emphasising the failures of Japan to adduce evidence establishing the reasonableness of its whaling programme was a point similarly made by Judge Keith in his Separate Opinion.[86]

52. By approaching the issue of reasonableness in this way the Court appears to have required the Respondent Government, Japan, to bear the burden of proof in having to establish that the program is reasonable "*for purposes of scientific research*". This is the opposite approach to that taken by the Court in the *Dispute regarding*

[78] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §68.
[79] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §227.
[80] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §138.
[81] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §139.
[82] Ibid.
[83] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §141.
[84] Ibid.
[85] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* 31 March 2014, §226.
[86] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* Separate Opinion of Judge Keith, 31 March 2014, §§9, 10, 11, 12.

Navigational and Related Rights (Costa Rica v Nicaragua) in which the Costa Rican government, in support of its claim of unlawful action, bore the burden of establishing the unreasonableness of the Nicaraguan Regulation restricting Costa Rica's navigational rights to the San Juan River.[87] Indeed, Judge Owada (Japan) pointed out in his dissenting opinion that the approach of the majority appeared to be contrary to the usual practice of the ICJ which requires the Applicant to prove its case.[88] As Judge Owada put it:

> "it should be the Applicant, rather than the Respondent, who has to establish by credible evidence that the activities of the Respondent under [the programme] cannot be regarded as "reasonable" scientific research activities for the purposes of article VIII of the Convention".[89]

53. Judge Xue, while agreeing with the majority's conclusion as to Japan's breach of the ICRW, felt that the Court's approach to the standard of review posed a number of questions.[90] She felt the need to clarify that:

> "As special permits are granted by the authorizing party pursuant to Article VIII, paragraph 1 of the Convention to programmes for purposes of scientific research, it should be presumed that activities under such programmes involve scientific research. It is up to Australia to prove with convincing evidence to the Court that such is not the case with JARPA II, with Japan having the right to rebuttal. As the Court stated in the Pulp Mills case that in accordance with the well-established principle *onus probandi incmubit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle has been consistently upheld by the Court …"[91]

54. Accordingly, the *Whaling* case appears to demonstrate that, contrary to the concerns of the Japanese and Chinese judges, the *prima facie* evidential standard may be enjoying a renaissance in the ICJ's judicial reasoning.

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[87] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, 13 July 2009, [2009] ICJ Rep 213, 253 §101.
[88] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* Dissenting Opinion of Judge Owada, 31 March 2014, §§40, 43-45.
[89] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* Dissenting Opinion of Judge Owada, 31 March 2014, §45.
[90] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* Separate Opinion of Judge Xue, 31 March 2014, §§1, 14.
[91] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* Separate Opinion of Judge Xue, 31 March 2014, §15.

c. *Judicial power to order evidence or explanations from a party and the drawing of adverse inferences in the event of non-production*

55. Quite apart from the *prima facie* evidence standard, it is widely accepted that parties to international litigation have a general obligation of disclosure which requires them to produce relevant evidence which is in their possession and which is not available to the opposing party.[92] This obligation implies that a Court may take into account any failure by a party to produce such evidence.[93]

56. The power of ICJ judges to seek evidence or an explanation from a party where the document that the party is holding is deemed material, is expressly provided for in article 49 of the ICJ Statute and Rule 62 of its Rules of Court.[94] To date, the Court has generally refrained from seeking information beyond that which the parties have presented during the written and oral phases of proceedings.[95] Although the Court also has the power to draw adverse inferences from non-production following a production order pursuant to article 49 and Rule 62 of the Rules of Court, this power has additionally been used infrequently.

57. The application of the adverse inference principle was supported by judicial dissent in the *Case concerning Sovereignty over certain frontier lands*. In that case there arose an issue with respect to Belgium's refusal to produce a document (which was ultimately produced by the Netherlands). Judge Moreno Quintana, in his Dissenting Opinion, stated that:

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[92] Vol. IV, 35, p.39. of *William A. Parker (USA) v United Mexican States*, Mexican-United States General Claims Commission, Reports of International Arbitral Awards.

[93] Vol. IV, 35, p.39 of *William A. Parker (USA) v United Mexican States*, Mexican-United States General Claims Commission, Reports of International Arbitral Awards,: "in any case where evidence which would probably influence its decisions is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision."

[94] See for example rule 62 of the Rules of Court: "(1) The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose. (2) The Court may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings". See also article 49 of the Court's Statute which states that: "the Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."

[95] Teitelbaum, Ruth, *"Recent fact-finding developments at the ICJ",* The Law and Practice of International Courts and Tribunals, 6(2007): 119-158 at 123.

> "[i]n producing it in this case the Netherlands has discharged its obligation as to the burden of proof resting on each of the parties … and in accord with the law laid down by the Court in the *Minquiers and Echrehos Case* (see ICJ Reports, p. 52). Belgium, which has not produced its copy – must in accordance with a well known principle of procedure, bear the consequences of its negligence."[96]

58. Taking a different approach, in the *Corfu Channel case*, the Court called upon the United Kingdom (the Respondent Government) to produce "*Document XCU*" for the use of the Court pursuant to article 49. The UK declined to do so and instead pled "*naval secrecy*" refusing to answer any questions relating to the document. Despite this, the Court did not draw any inference in respect of the possible contents of the document against the Respondent Government.[97]

59. Similarly, in the *Tehran Hostages* case, the ICJ also put questions to the United States Government, one of which the US did not answer, but in this case too, the ICJ made no comment or adverse inference in its Judgment.[98]

60. In the *Bosnian Genocide* case, the Court declined to order Serbia and Montenegro to produce certain documents under article 49 and rule 62 after being requested by Bosnia and Herzegovina to do so.[99] Despite failing to exercise its jurisdiction to order production of the documents, the Court observed in its judgment that *"it [had] not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions [from the non-production of the documents]".*[100] The Court's failure to draw any express conclusions from the missing documentation was criticised by dissenting judges Al-Khasawneh and Mahiou.[101] In his dissent, Vice-President Al-Khasawneh stated that:

> "It is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability. The reasoning given by the Court in paragraph 206 of the Judgment '[o]n this matter, the Court observes that the

[96] *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, 28 June 1959, [1959] ICJ Rep 209, 256.
[97] *Corfu Channel (United Kingdom v Albania),* 9 April 1949 [1949] ICJ Rep 4, 32.
[98] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran),* 24 May 1980, [1980] ICJ Rep 3, 10.
[99] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* 26 February 2007, [2007] ICJ Rep 43, §44.
[100] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* 26 February 2007, [2007] ICJ Rep 43, §206.
[101] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Dissenting Opinion of Judge ad hoc Mahiou, 26 February 2007, [2007] ICJ Rep 43, §§56- 63.

> Applicant has extensive documentation and other evidence available to it, especially readily accessible ICTY records…', is worse than its failure to act. … It would normally be expected that the consequences of the note taken by the Court would be to shift the onus probandi or to allow a more liberal recourse to inference as the Court's past practice and considerations of common sense and fairness would all demand. This was expressed very clearly by the Court in the *Corfu Channel* judgment…"[102]

61. Certain judges have posited that this is because it is difficult for the Court to be certain that the reason for withholding the documents is due to the fact that they contain information which would be prejudicial to the withholding parties' case. As Judge Fitzmaurice in his Separate Opinion in the *Barcelona Traction case* put it:

> "It is by no means an inescapable inference that the reason why the Deeds were not produced was because they contained material that would have been prejudicial to the Belgian case. Documents drawn up in contemplation of war, and in the situation which confronted countries such as Belgium at that time, may well have contained provisions, or phraseology, which after the lapse of nearly 30 years – or for other reasons – a government would be reluctant to make public."[103]

62. Judge Jessup in the *Barcelona Traction case* took the view that it was always open to a State to plead prejudice to national interest if they wished to avoid the drawing of an adverse inference and yet decline to produce evidence. He stated:

> "I believe that in the circumstances which have been described it is proper to apply the common law rule which is to the effect that if a party fails to produce on demand a relevant document which is in its possession, there may be an inference that the document 'if brought, would have exposed facts unfavourable to the party' (Wigmore, Evidence 3rd Ed, 1940, Vol 2, secs 285 and 291. Wigmore traces the rule back to the beginning of the 17th century)… Although it is true as Sir Fitzmaurice emphasises, that one should give due weight to the pressures engendered by the situation in the Second World War, international law has long taken cognizance of practices designed to thwart belligerents by concealing the truth; the history of the law of neutral rights and duties, is full of examples. If disclosure of the text of the trust deeds would have prejudiced some governmental interest, Belgium could have pleaded this fact, as the United Kingdom successfully pleaded 'naval secrecy' in the *Corfu Channel case* (ICJ Reports 1949, pages 4, 32)."[104]

63. Other judges have also favoured a more active stance being taken by the ICJ in order to alleviate the asymmetrical situation where an applicant bears the burden of proof in

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Dissenting Opinion of Vice President Al-Khasawneh, 26 February 2007, [2007] ICJ Rep 43, §35.
[103] *Barcelona Traction Case*, Separate Opinion of Judge Fitzmaurice, 5 February 1970, [1970] ICJ Rep 3, 98-9 §58.
[104] *Barcelona Traction Case*, Separate Opinion of Judge Jessup, 5 February 1970, [1970] ICJ Rep 3, 215 §97.

cases where the majority of documents are held by the Respondent. Judge Owada observed in his Separate Opinion in the *Oil Platforms* decision:

> "It is primarily the task incumbent upon the party which claims certain facts as the basis of its contention to establish them by producing sufficient evidence in accordance with the principle *actori incumbit onus probandi*.
>
> Accepting as given this inherent asymmetry that comes into the process of discharging the burden of proof, it nevertheless seems to me important that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion. It would seem to me that the only way to achieve this would have been for the Court to take a more proactive stance on the issue of evidence and that of fact-finding in the present case."[105]

(3) The International Criminal Court & ad hoc International Criminal Tribunals

64. The jurisprudence of the various international criminal courts and tribunals also supports the applicants' central contention that a standard of proof requiring "*incontrovertible and direct*" evidence imposes a far too stringent evidential standard when seeking to prove "bad faith" by another party to the proceedings.

65. The case law of the various international criminal courts and tribunals surveyed for these purposes includes that of the International Criminal Court ("ICC") as well as the jurisprudence of the various *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL") and the Extraordinary Chambers in the Courts of Cambodia ("ECCC").

a. *General standards of proof before the international criminal courts and tribunals*

[105] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Owada, 6 November 2003, [2003] ICJ Rep 161, §§46 and 46.

66. While all the international criminal courts and tribunals pay heed to "*general principles of law*" when there is a lacunae in their rules of evidence[106] and accord the jurisprudence of the ICJ with "*considerable weight*",[107] they have their own highly developed precedents as to the standard of proof to be applied by parties within their respective jurisdictions.

67. The core evidential principle before all the various international criminal courts and tribunals is that the Prosecution has the burden to prove "*beyond reasonable doubt*" all the elements of the crimes pleaded in the indictment.[108] This standard applies whether the evidence is direct or circumstantial[109] and emanates from the right of the accused to be presumed innocent.[110] Closely connected with the beyond reasonable doubt standard of proof is the principle of *in dubio pro reo*, which is the principle of international criminal law meaning that when an underlying fact may lead to more than one interpretation, including one inconsistent with the guilt of the accused, then the interpretation favourable to the accused person must be adopted by the Court.[111] Accordingly, the Trial Chamber can render a guilty verdict only if the finding of guilt is the only reasonable inference from the evidence available.[112]

68. Where the accused is bound by law to prove a fact, for example that he is not of sound mind, the legal burden of proving such a fact rests with the defence, however proof is only required on "*the balance of probabilities*".[113] Similarly, in sentencing, while aggravating circumstances must be proved by the prosecution beyond a reasonable doubt, mitigating circumstances need only be established by the defence on the

[106] For example, Rule 89(B) of the ICTY, ICTR and SCSL Rules and Article 21(4) of the STL Statute contain a similar provision stipulating that unless otherwise provided for by tribunal specific rules of Court, a Chamber must apply rules of evidence "which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". Likewise, at the ECCC, in case of uncertainties regarding the interpretation or application of the law, "guidance may be sought in procedural rules established at the international level" (Extraordinary Chambers in the Courts of Cambodia, Internal Rule 2).
[107] *Prosecutor v Aleksovski*, ICTY Appeal Judgment, 24 March 2000, §96.
[108] *Prosecutor v Delalic et al,* ICTY Trial Judgment, 16 November 1998, §599.
[109] *Prosecutor v Stakic,* ICTY Appeal Judgment, 22 March 2006, §219.
[110] *Prosecutor v Ntagerura et al,* ICTR Appeal Judgment, 7 July 2006, §175.
[111] *Prosecutor v Limaj et al,* ICTY Trial Judgment; §21 of *Prosecutor v Limaj et al,* ICTY Appeal Judgment, 27 September 2007, §10; *Prosecutor v Brima,* SCSL Trial Judgment, 20 June 2007, §§98, 101.
[112] *Prosecutor v Mucic et al*, ICTY Appeal Judgment, 20 February 2001, §458.
[113] *Prosecutor v Delalic et al,* ICTY Trial Judgment, 16 November 1998, §603.

balance of probabilities.[114] Defence applications for provisional release are similarly judged on the "*balance of probabilities*" standard of proof.[115]

b. Allegations of bad faith in the conduct of proceedings before the ad hoc *international criminal tribunals*

69. Where a party to proceedings before the *ad hoc* international criminal tribunals alleges that the other party has acted in bad faith during the course of proceedings, the party making the allegation is obliged to make out a *prima facie* evidential case before the Chamber considers the issue. For example, if the integrity of the statement taking process which is imputed, the alleging party must prove, to a *prima facie* standard "*foul play, either deliberate or negligent, ... in order to justify an inquiry by the Chamber into the said process*".[116] The *ad hoc* tribunals have confirmed that evidence of bad faith need not be direct but must amount to "*evidence from which a clear inference can be drawn*" that the other party was acting in this manner.[117]

c. Allegations of bad faith before the ICC

70. The issue of proving bad faith arises before the international criminal courts and tribunals not just in relation to allegations of improper conduct by the other party during proceedings, but also as a substantive issue during the jurisdictional phase of proceedings at the ICC. Under the Rome Statute, the ICC is only permitted to exercise jurisdiction over crimes committed in a State where the State is not genuinely willing or able to prosecute those crimes itself. This has led to a spate of case law as to the burden and standard of proof arising when a party (such as the prosecutor or an accused person) asserts that a State is not genuinely willing or able to prosecute suspects within their national judicial systems. The ICC has made clear that the general principle of *onus probandi actori incumbit*, or "*he who alleges must prove*"

[114] *Prosecutor v Sikirica et al,* ICTY Sentencing Judgment, 13 November 2001, §110.
[115] *Prosecutor v Krajisnik and Plavsic*, ICTY Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001, §30.
[116] *Prosecutor v Sesay et al*, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution moulding of evidence is impermissible, SCSL, 1 August 2006, §§16-18.
[117] *Prosecutor v Delalic*, IT-96-21-A, Judgment, ICTY. 20 February 2001, §611.

applies, meaning that the party alleging that the State may be acting in bad faith bears the burden of proof.[118]

71. An international panel of distinguished legal experts appointed by the ICC Office of the Prosecutor to advise on this issue has opined that the appropriate standard of proof in such instances may be that once the party alleging bad faith has provided prima facie evidence of bad faith, the burden ought to shift to the party with exclusive or superior access to necessary information.[119] The expert panel noted in this regard:

> "Various authorities, including in the context of international law, have allowed a shift of the burden of proof where the State has exclusive or superior access to the necessary information, and therefore is in the best position to know the state of affairs and provide evidence … [Such an approach is supported in decisions of international bodies such as *Bleier v Uruguay* (decision of the UN Human Rights Committee) and *Avsar v Turkey* and *Salman v Turkey* (judgments of the European Court of Human Rights)]. This principle may be particularly useful in shifting the burden on the "genuineness" issue to the State claiming to genuinely carry out proceedings. This will arise primarily where the State is becoming uncooperative and successfully prevents the Office of the Prosecutor from gathering information, which certainly raises grave doubts about the State's intent. It may also arise in cases of non-public trials (There may of course be a sound explanation for non-public trials – e.g. reasons of security – but the State should at least be expected to provide an explanation, and provide some information, since the Court's capacity to verify genuineness would otherwise be frustrated)."[120]

72. This expert panel also emphasised that other international law principles:

> "may facilitate the work of the prosecutor by making it easier to satisfy the burden of proof. For example, proof of obstruction or other suspicious circumstances may enable adverse inferences to be drawn, although additional supplementing information may still be required to complete a persuasive case."[121]

73. In the recent Libyan admissibility challenges before the ICC, the Appeals Chamber at the ICC has confirmed that although the State challenging the Court's jurisdiction technically bears the burden of proof of satisfying the Court (on the balance of probabilities) that the relevant cases are inadmissible (based on the criteria set out in the Rome Statute), where the Defence asserts that the State is acting in bad faith and

[118] International Criminal Court Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, paras 54-55.
[119] International Criminal Court Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, para 56.
[120] International Criminal Court Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, para 56.
[121] International Criminal Court Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, para 57.

not "*genuinely willing or able to prosecute*", it bears the evidential burden of adducing *prima facie* evidence of bad faith.[122] Only once this *prima facie* evidence is provided is the State concerned obliged to disprove such allegations on the balance of probabilities.[123]

74. For completeness sake, it is noted that one Pre-Trial Chamber at the ICC has applied a different standard of proof on this issue. Its approach is inconsistent with other decisions of the ICC. In a jurisdictional challenge where a party both expressly asserted "bad faith" by another party[124] and where it has been alleged that the State involved is not "*genuinely willing and able to prosecute*" the Bemba Pre-Trial Chamber ruled that the appropriate standard of proof which the asserting party must fulfil for both situations is proof on the balance of probabilities.[125] This ruling, which pre-dated the Libyan ICC Appeals Chamber precedents, was reached despite detailed arguments from the parties as to the potential applicability of the "*prima facie evidence*" standard[126] and the "*clear and convincing evidence*" standard.[127]

d. Bad faith amounting to the crime of contempt before the international criminal courts and tribunals

75. Even when a party's alleged bad faith is so grave as to potentially amount to the commission of a criminal offence (for example, assertions of a knowing violation of a court order, intentional interference with witnesses, or the manufacturing of evidence), the international criminal courts and tribunals do not require a party asserting contempt to provide "*incontrovertible and direct*" evidence. In light of the gravity of the crime of contempt, any such allegations must be brought on the basis of

[122] *Prosecutor v Al-Senussi*, Appeals Chamber Decision on Admissibility, ICC-01/11-01/11-OA6-565, 24 July 2014, §162-167.
[123] Ibid.
[124] *Prosecutor v Bemba*, Decision on admissibility and abuse of process challenges, ICC-01/05-01/08, 24 June 2010: In this case the Defence had suggested that there had been incomplete disclosure by the Prosecution and that the Prosecutor had inappropriately prompted the Central African Republic to request an investigation by the Prosecution. The Court ultimately concluded that this abuse of process charge against the Prosecutor's office was without foundation.
[125] *Prosecutor v Bemba*, Decision on admissibility and abuse of process challenges, ICC-01/05-01/08, 24 June 2010, §§68, 202-204.
[126] *Prosecutor v Bemba*, Decision on admissibility and abuse of process challenges, ICC-01/05-01/08, 24 June 2010, §73.
[127] *Prosecutor v Bemba*, Decision on admissibility and abuse of process challenges, ICC-01/05-01/08, 24 June 2010, §72.

"*properly prepared and substantiated submissions*"[128] and there must be "*prima facie evidence*" of contempt before a Trial Chamber is permitted to make orders relating to contempt investigations.[129]

76. Assertions not meeting the *prima facie* evidence standard lead to judicial reprimand of the party making the unfounded assertion. As such, in *Prosecutor v Seselj* the ICTY Trial Chamber found the "*unsubstantiated allegations of the Accused*" given without "*so much as a scintilla of evidence to support his very grave allegations*" cannot satisfy the threshold and therefore "*there is absolutely no basis upon which to proceed*".[130] The Trial Chamber further found that the accused's behaviour amounted to a "*serious abuse of the opportunity afforded to him to have access to a public forum at this Tribunal*" and that any future unsubstantiated accusation "*is more likely to meet with sanctions*".[131]

77. Importantly, the only time when the various international criminal courts and tribunals require allegations of bad faith to be proved beyond the "*balance of probabilities*" standard is when a person's actions in bad faith are actually charged as the criminal offence of contempt of court. A conviction on the basis of a charge of contempt, like any other criminal offence before the international criminal tribunals must be proved "*beyond reasonable doubt*".[132]

(4) The World Trade Organisation ("WTO") Dispute Settlement Panel & Appellate Body

78. Although there remains a lack of clarity as to the precise standard of proof applicable in all cases before the WTO Dispute Settlement Panel & Appellate body, the areas of

[128] *Prosecutor v Nyiramasuhuko et al*, ICTR, Decision on the Prosecutor's allegations of contempt, the harmonisation of the witness protection measures and warning to the Prosecutor's counsel, 10 July 2001, §12.
[129] *Prosecutor v Nyiramasuhuko et al*, ICTR, Decision on the Prosecutor's allegations of contempt, the harmonisation of the witness protection measures and warning to the Prosecutor's counsel, 10 July 2001, §7; *Prosecutor v Simic et al*, ICTY, Scheduling Order in the matter of allegations against Milan Simic and his counsel, 7 July 1999.
[130] *Prosecutor v Seselj*, ICTY, Decision on certain allegations made in motion number 23, ICTY Trial Chamber, 18 November 2003.
[131] *Prosecutor v Seselj*, ICTY, Decision on certain allegations made in motion number 23, ICTY Trial Chamber, 18 November 2003.
[132] *Prosecutor v Simic et al*, 30 June 2000, ICTY, Judgment in the matter of contempt allegations against an accused and his counsel, §§99 and 100.

real contention are limited only to whether the applicable standard is the "*preponderance of evidence*" standard or the "*prima facie evidence*" standard. At least one dispute settlement panel – that of *Canada – Dairy (Article 21.5 – New Zealand and US II)* has outright rejected the application of the standard of "*beyond a reasonable doubt*".[133]

79. In most cases WTO dispute settlement panels refer expressly to the *prima facie* case standard[134] whereas application of the "*preponderance of evidence*" standard is generally done infrequently and by implication only.[135] There is at least one more dated dispute settlement panel report in which a "*sufficiency*" of evidence standard is referred to but this reference appears to be out of kilter with the general practice of the WTO dispute settlement organs to apply a "*prima facie evidence*" standard.[136]

80. Even in a case where the WTO dispute settlement organs have had to determine whether or not to attribute fault to the EC itself for purportedly maintaining a *de facto* moratorium on approval of biotech products in violation of Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), the panel has apparently relied upon inferences and a standard akin to

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[133] *Canada – Measures affecting the incorporation of milk and the exportation of dairy products* – second recourse to article 21.5 of the DSU by New Zealand and the United States, Panel Report, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, §5.67.

[134] In *European Communities – Measures concerning meat and meat products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135 §104 the Appellate Body defined a prima facie case as "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case". See also: *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, Appellate Body Report, adopted 23 October 2002, at §270; *United States – Measures affecting the cross-border supply of gambling and betting services,* WT/DS285/R, Panel Report, adopted 20 April 2005, at para 6.12; *US – Measures affecting imports of woven wool shirts and blouses from India,* WT/DS33/AB/R and Corr. 1, Appellate Body Report, adopted 23 May 1997, DSR 1997:1, 323 at §14.

[135] E.g. Indirect references have been made in certain cases such as *India – Autos* where the panel noted in one occasion that the European Communities had "not proven on balance" that a certain proposition was true (*India – Measures affecting the automotive sector*, Panel Report, WT/DS146/R, WT/DS175/R and Corr. 1, adopted 5 April 2002, §7.233). More recently, in *US – Upland Cotton (Article 21.5 – Brazil),* the Appellate Body noted that "the Panel's finding … provides a sufficient evidentiary basis for the conclusion that it is more likely than not that the revised GSM 102 programme operates at a loss" (*United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, Appellate Body Report, WT/DS267/AB/RW, adopted 20 June 2008, §321).

[136] In *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Complaint by India (WT/DS58), Complaint by Malaysia (WT/DS58), Complaint by Pakistan (WT/DS58), Complaint by Thailand (WT/DS58)*, Report of the Panel DSR 1998: VII, 2821, the Panel observed at §7.14 that: "We [therefore] have to assess the evidence before us in the light of the particular circumstances of this case. This implies that we may consider any type of evidence, and also that we may reach our conclusions regarding a particular claim on the basis of the level of evidence that we consider sufficient."

the "*preponderance of evidence*" test. This is significant because cases under the SPS Agreement affect not only trade, but also human, animal or plant life or health in the territory of the respondent and are therefore of grave importance for Respondent States or organisations.[137] In the *EC Biotech case* the Panel has stated that the facts did not naturally lead to the conclusion that a prohibition on imports was warranted and "*strongly suggest[ed]*" that the EC had not fulfilled the requirements of Article 5.1 in relation to individual Member States' safeguard measures.[138] Given the gravity of an adverse ruling in respect of the SPS Agreement for the EC it is submitted that a WTO dispute settlement organ would certainly not apply a higher evidential standard than "*strongly suggestive evidence*" to an allegation of "bad faith" by a party. If anything, given the already severe consequences for an organisation of a (non-SPS Agreement) WTO decision, it is much more likely that the highest possible evidential standard to apply to an allegation of bad faith would be that of "*preponderance of evidence*" or the *prima facie* evidential test.

81. As well as being willing to rely upon inferences, the WTO dispute settlement bodies also require parties to disclose evidence in their possession which is not available to the opposing parties. In *Argentina – Textiles and Apparel*, the WTO panel held that:

> "the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some prima facie evidence in support of its case."[139]

82. The WTO Appellate Body has further confirmed that it has the power to draw adverse inferences from a party's refusal to provide any information requested by the panel pursuant to article 13(1) of the WTO Understanding on rules and procedures governing the settlement of disputes.[140] While not expressly authorised by the text of article 13, the Appellate Body held in the *Canada – Aircraft case* that the drawing of

[137] See description of cases under the SPS Agreement in Grando, M., *Evidence, Proof and Fact-finding in WTO Dispute Settlement*, OUP, 2009, at 141.
[138] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ("EC – Biotech case"),* 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, page 970, §7.3064.

[139] *Argentina – Textiles and Apparel*, 25 November 1997, DSR 1998-III, 1033, 1159 (PR), §6.54.
[140] *Canada – Aircraft*, 2 August 1999, DSR 1999-III, 1377, 1431-3, 1433 (ABR).

inferences was "*an inherent and unavoidable aspect of a panel's basic task of finding and characterising the facts making up a dispute*" and noted that it "*had the legal authority and discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel*".[141]

83. Accordingly, it seems clear if an allegation of bad faith against a Respondent were to be determined by one of the WTO dispute settlement organs, the evidential standard to be applied would either be the *prima facie* standard or the preponderance of evidence standard. The WTO dispute settlement bodies are also willing to draw adverse inferences in the event of a party refusing to produce evidence when ordered to do so following the establishment of a prima facie case by the other party.

(5)The International arbitral tribunals

84. The jurisprudence of the international arbitral tribunals supports the applicants' submissions that a standard of proof of "*incontrovertible and direct*" is inconsistent with the practice of international courts and tribunals.

85. The arbitral tribunals considered under this heading include the various investment treaty arbitral tribunals as well as specialist arbitral tribunals such as the Iran-US Claims Tribunal.

86. The rules and laws applicable to evidence in an international arbitration are complex as they are influenced by both common and civil law traditions and may be found in an array of sources including the underlying bilateral investment treaty and / or constituent instrument of the tribunal as well as the rules incorporated into that treaty by reference,[142] the procedural law of the place of the arbitration and the substantive law applicable to the merits of the dispute.

a. <u>Investment treaty arbitral tribunals</u>

[141] Ibid.
[142] E.g. bodies of arbitration rules such as those of UNCITRAL, ICSID, ICC, IBA.

87. As with the other international arbitral tribunals, the burden of proof lies with a party asserting a fact whether it is the claimant or the respondent.[143] If the party adduces evidence that prima facie proves the facts alleged, the burden of proof shifts to the other party, who needs to produce evidence to rebut the presumption.[144] As well as the prima facie evidential standard, international investment treaty arbitral tribunals frequently adopt the common law standard of "*preponderance of evidence*" (or "*balance of probabilities*").[145]

88. In respect of the specific issue of proving corruption by a respondent State, certain investment treaty arbitral tribunals have held that a party charging government officials with corruption must meet a "*clear and convincing standard of proof*" and that in so doing must "*take the utmost care*" to proffer "*truthful and genuine evidence*". Ultimately in *EDF (Services) Limited v Romania*, the Tribunal found that EDF's evidence of corruption did not satisfy this standard.[146] The Tribunal in *Westinghouse v Philippines* also applied this standard to an allegation of fraud, stating that in such cases:

> "fraud … must be proven to exist by clear and convincing evidence amounting to more than a mere preponderance and cannot be justified by mere speculation. This is because fraud is never to be taken lightly".[147]

89. Other investment treaty arbitral tribunals have applied a lower evidential standard to allegations of bad faith. In *Rompetrol v Romania* the Tribunal considered that investment arbitration is not subject to rigid standards of proof and that the standard of proof is the balance of probabilities.[148] Similarly, in *Libananco v Turkey* it was

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[143] *Feldman v Mexico* (AF), Award, 16 December 2002, §177; *Soufraki v UAE*, Award, 7 July 2004, §§58, 81; *Thunderbird v Mexico* (UNCITRAL), Award, 26 January 2006, §95; *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March 2007, §83.

[144] *AAPL v Sri Lanka*, Award, 27 June 1990, §56; *Middle East Cement v Egypt*, Award, 12 April 2002, §94, 160; *Feldman v Mexico (AF)*, Award, 16 December 2002, §177; *Thunderbird v Mexico (UNCITRAL),* Award, 26 January 2006, §§92-95.

[145] *Westinghouse and Burns & Roe (USA) v National Power Company and the Republic of the Philippines,* Award, 19 December 1991, published in Mealey's Int Arb Rep, January 1992, Doc B-1, Ad hoc arbitration (UNCITRAL), 34.

[146] *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 at 221, available at http://icsid.worldbank.org/; see also Procedural Order No 3 of 29 August 2008, at 28, available at: http://ita.law.uvic.ca/documents/EDFP03.pdf

[147] *Westinghouse and Burns & Roe (USA) v National Power Company and the Republic of the Philippines*, Award, 19 December 1991, published in Mealey's Int Arb Rep, January 1992, Doc B-1, Ad hoc arbitration (UNCITRAL), 34.

[148] *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, §§182-184.

declared that allegations of serious misconduct did not necessarily require a higher standard of proof but an accumulation of persuasive evidence.[149]

90. The Tribunal in *Methanex Corporation v United States of America* expressly recognised that investment treaty arbitral tribunals are permitted to rely upon both inferences and circumstantial materials in reaching their conclusions on the applicable standard of proof.[150] Likewise, investment treaty arbitral tribunals are expressly permitted to order parties to produce documents or other evidence.[151]

b. The Iran-US Claims Tribunal

91. The standard of evidence most commonly applied before the Iran – US Claims Tribunal is that of the "*preponderance of evidence*" or "*balance of probabilities*". This standard has been applied by the Tribunal in an array of decisions, including in the *Combustion Engineering Case* where the Tribunal concluded:

> "The Respondents have criticized the sufficiency of the Claimants' evidence, but they have not rebutted it with their own contemporaneous evidence … Weighing all of these factors, the Tribunal concludes that [the Claimant] has proven by a preponderance of the evidence that it paid its SIO contributions".[152]

92. Iran-US Claims Tribunal members have generally held that allegations of bad faith require a higher threshold of proof than the usual "*preponderance of evidence standard*". In the decision of the Iran-US Claims Tribunal in *Dadras International* it was held that allegations of forgery "*must be proven with a higher degree of probability [...] the proper standard of proof [being] "clear and convincing evidence*"".[153] This approach was later followed in the *V.L and J Aryeh Case*.[154] The *Dadras International* Tribunal's reasoning on this issue is as follows:

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[149] *Libananco Holdings Co Limited v Republic of Turkey,* ICSID Case No ARB/06/8, Award, 2 September 2011, §125.
[150] *Methanex Corporation v United States of America* UNCITRAL, Partial Award, 7 August 2002, §49.
[151] Article 43 ICSID: "the Tribunal may, if it deems it necessary at any stage of the proceedings (a) call upon the parties to produce documents or other evidence"; Article 27 UNCITRAL (2010): "… at any time during the arbitral proceedings the arbitral Tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine". Article 20(5) ICC (1998): "At any time during the proceedings the Arbitral Tribunal may summon any party to provide additional evidence".
[152] *Combustion Engineering Inc. v Iran,* 18 February 1991, (1991) 26 Iran-US CTR 60, 79-80 §70.
[153] *Dadras International et al and the Islamic Republic of Iran et al*, 7 November 1995, Award No 567-213/215-3, 31 Iran-US CTR 127, §162.
[154] *V. L. and J. Aryeh Case v Iran,* 22 May 1997, (1997) 33 Iran-US CTR 272, §317.

> "In these cases, the Tribunal is confronted with allegations of forgery that, because of their implications of fraudulent conduct and intent to deceive, are particularly grave. The Tribunal has considered whether the nature of the allegation of forgery is such that it requires the application of a standard of proof greater than the customary civil standard of "preponderance of the evidence". Support for the view that a higher standard is required may be found in American law and English law, both of which apply heightened proof requirements to allegations of fraudulent behaviour. …
>
> The allegations of forgery in these Cases seem to the Tribunal to be of a character that requires an enhanced standard of proof. Consistent with its past practice, the Tribunal therefore holds that the allegation of forgery must be proved with a higher degree of probability than other allegations in these Cases. … The minimum quantumof evidence that will be required to satisfy the Tribunal may be described as "clear and convincing evidence" …"[155]

93. Despite the application of the "*clear and convincing*" evidential standard to allegations of fraud, the Iran-US Claims Tribunal has clearly stipulated on a variety of occasions that it will adopt the *prima facie* evidential standard in cases where the other party has failed to produce any evidence rebutting the prima facie evidence produced by the claimant.[156] For example, in the *Rockwell case* the Tribunal explained that it was prepared to decide the case on the basis of prima facie evidence because of the difficulty encountered by the claimant in obtaining evidence:

> "*Prima facie* evidence must be recognised as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn. This is particularly true where the difficulty of proof is the result of the Respondent's failure to raise objections in a timely manner and in such a way that the Claimant could adequately establish its Claim. In such a case, a lower standard of proof is acceptable …"[157]

94. Similarly, the Iran-US Claims Tribunal has also confirmed that it is prepared to draw adverse inferences from the failure of a party, generally the respondent to produce evidence. For example, in the *INA Corp Case*, the Tribunal drew adverse inferences from the refusal of the respondent to produce the documents that would explain the basis on which an Iranian accounting firm concluded its report that the value of an expropriated firm was negative at the date of expropriation.[158] In drawing this inference, the Tribunal noted that the Respondent's belated attempt to excuse its non-

[155] *V. L. and J. Aryeh Case v Iran,* 22 May 1997, (1997) 33 Iran-US CTR 272, §122-124.
[156] *Lockheed Corporation v Iran*, 18 Ir-USCTR 292, 318, 1988; *Time Inc v Iran*, 7, 22 June 1984, Ir-USCTR 8, 11, 1984; *International Technical Products v Iran*, 28 October 1985, 9 Ir-USCTR 10, 28-9,1985.
[157] *Rockwell v Iran,* 5 September 1989, 23 Iran –US CTR 188.
[158] *INA Corp v Iran,* 12 August 1985, (1985) 8 Iran-US CTR,373, 382.

compliance with the Tribunal's Order to produce the documents by merely stating that they were "*voluminous*" was "*not convincing*".[159] Other cases following this practice are the *Foremost Tehran Inc et al case*[160] and the *Sedco Inc case*.[161]

95. The Permanent Court of Arbitration has determined that there may be special circumstances where it is clear that the proponent of the burden of proof is not able to provide a particular piece of evidence or information because it is being held by the other party, the tribunal may take specific action in terms of proof, such as by drawing adverse inferences. This is despite the fact that usually in international litigation, the drawing of adverse inferences is limited to circumstances where a party has failed, without proper justification, to adduce as evidence the documents proved to be in its sole possession and ordered by the tribunal. In the *Lighthouses Arbitration (France v Greece)* the Permanent Court of Arbitration held that the claim must succeed despite the paucity of evidence, because in the circumstances of the case:

> "it would be unreasonable, and contrary to law, to require of the firm strict proof of the amounts which it lost under this head; it is rather for the Greek Government to provide now the necessary information".[162]

(6) Conclusions

96. On the basis of the analysis above, it is clear that no other international court or tribunal requires "*incontrovertible and direct*" evidence of bad faith to be adduced by a complainant against the authorities. Rather, the most common standard applied across all the international courts and tribunals is the "*prima facie*" evidence standard – that is, that where the Claimant adduces *prima facie* evidence of bad faith the evidential burden shifts to the Respondent to rebut this evidence. The next most frequently cited standards of proof for alleging bad faith by one party against another are the "*preponderance of evidence*" / "*balance of probabilities*" and the "*clear and convincing evidence*" tests.

97. Consequently the applicants submit that there is no basis in international practice for an "*incontrovertible and direct*" standard of proof to be applied in the instant cases.

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[159] Ibid.
[160] *Foremost Tehran Inc. v Iran,* 10 April 1986, (1986) 10 Iran-US CTR 229.
[161] *Sedco, Inc. v Iran,* 2 July 1987, (1987) 15 Iran-US CTR, 23.
[162] *Lighthouses Arbitration (France v Greece)*, Claim No. 6, PCA, 1956, 23 ILR, §678.