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PATRICK KINSCH\*

ON THE UNCERTAINTIES SURROUNDING THE STANDARD  
OF PROOF IN PROCEEDINGS BEFORE INTERNATIONAL  
COURTS AND TRIBUNALS

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1. The standard of proof is a question central to judicial (or administrative) fact-finding, and a question common to international and national adjudication. It refers to “the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen”;<sup>1</sup> for persuasion is susceptible of degrees, and it does make a difference whether the adjudicator considers it sufficient for the relevant fact to have been proven to be likely to exist on a balance of probabilities, or whether only proof to the exclusion of doubt will be considered satisfactory. The adoption of the one or the other of these standards of proof (or of other, intermediary, standards) will inevitably mean that in those cases where the facts are seriously in dispute, the risk of adverse judgment for the party having the burden of proof is more or less high.<sup>2</sup> The issue of determining the proper standard of proof is not so much an epistemological issue – although the aim of rules on evidence is to

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<sup>1</sup> As was recently stated in an English case: *In re B (Children)* [2008] UKHL 35 § 4 (Lord Hoffmann).

<sup>2</sup> On the link between the burden and the standard of proof, see (in the literature on international adjudication) M. KAZAZI *Burden of Proof and Related Issues* 1996, 323; C. AMERASINGHE *Evidence in International Litigation* 2005, 232; G. NIYUNGEKO *La preuve devant les juridictions internationales* 2005, 441-442; C. BROWN *A Common Law of International Adjudication* 2007, 97.

assist the adjudicating body in its search for the truth,<sup>3</sup> or as near an approximation of it as possible – as an issue of responsible decision making in the face of any remaining uncertainty.<sup>4</sup> The standard of proof is, in last analysis, part of the institutional ethics of adjudicating bodies – and as such, it should be governed by predictable legal rules.

It is believed that for that reason, a study of the standard of proof in international adjudication could be an appropriate tribute to an eminent scholar and international judge of Fausto Pocar's temperament. The study is limited to the standard of proof in findings on the merits of an international case; other decisions, such as decisions on provisional measures, may well be taken on reduced standard of proof.

2. In the absence of a treaty provision, or clause of an arbitral agreement, relating to the standard of proof to be applied by a given tribunal (and such provisions are rare and mostly imprecise),<sup>5</sup> the most likely source of the rules governing the standard of proof in international proceedings are the “general principles of law recognized by civilised nations” to which reference is made in Art. 38 (1) (c) of the ICJ Statute. The law of procedure is considered as one of the fields where the application of principles common to the various national legal systems is at first sight most useful:<sup>6</sup> the basic questions

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<sup>3</sup> A reference to the “search for the truth”, as the aim of the judicial taking of evidence, can be found in ICJ, 9.4.1949, *Corfu Channel (United Kingdom v Albania)*, Merits, ICJRep 1949, 20. This is of course the classical (and normative) view, to which the courts continue to adhere; in legal *sociology*, there are alternative, more critical and to some extent darker, but not necessarily more accurate, views.

<sup>4</sup> A. STEIN *Foundations of Evidence Law* 2005, 12 et seq.

<sup>5</sup> The most important example in the field of general international law is Art. 53 of the Statute of the ICJ, which provides that in default proceedings, the Court must “satisfy itself... that the claim is well founded in fact and in law”, and which is sometimes regarded as laying down a (rather high) standard of proof of general applicability before the Court (see ICJ, 27.6.1986, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJRep 1986, 24: “The use of the term ‘satisfy itself’... implies that the Court must attain the same degree of certainty as in any other case... so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence”). Yet, as Amerasinghe has pointed out (Final Report to the Institut de droit international, AnnIDI 2002-2003 I, 354), an argument from Art. 53 “is a circular argument. The point is how does the ‘actor’ ‘satisfy’ the court... or show that his case is well-founded in fact?”. On that question, which is properly the question of the standard of proof, the terms of Art. 53 are not very helpful. – The statutes and rules of procedure and evidence of the international criminal tribunals are more precise in their specific field, see *infra*, text accompanying fn 26 (requirement of proof beyond reasonable doubt for a finding of guilt).

<sup>6</sup> H. LAUTERPACHT *Private Law Sources and Analogies of International Law* 1927, 210-211; B. CHENG *General Principles of Law as Applied by International Courts and Tribunals*

relating to a proper procedure will be the same whether the tribunal is a national or an international tribunal; transposition to the international level of the general principles governing procedure in national courts can be contemplated both in criminal proceedings against individuals and in proceedings among States or between individuals and States.

But in order to qualify as a true “general principle of law”, a principle is supposed to be subjected to a detailed comparative law analysis.<sup>7</sup> Only “legal principles which find a place in all or most of the various legal systems of law”<sup>8</sup> or more specifically principles “adhered to by the prevailing number of nations within each of the main families of laws”<sup>9</sup> will enter into that definition. Regarding the standard of proof, this approach leads to an interesting problem: although every tribunal, national or international, has to apply (explicitly or implicitly) some kind of standard of proof, in comparative national law there would appear to be no true unanimity on what the standard of proof should be in civil proceedings and therefore no general agreement between legal systems which could be the basis for extending a standard of proof to, for instance, inter-State disputes as a “general principle of law recognised by civilised nations”.

The necessary unanimity exists only for criminal proceedings. There, the weight of the presumption of innocence is such that the accused’s guilt must be established beyond reasonable doubt (the time-honoured formula used in Anglo-American legal systems),<sup>10</sup> or “to a moral certainty” (a formulation that may today have a quaint and antiquated charm, but that has the advantage of having been historically used both in common law and in civil law systems).<sup>11</sup> The requirement of proof beyond reasonable doubt reflects the defendant’s “interest of transcending value” in his liberty;<sup>12</sup> it is a part of the

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1953, 252-386; C. BROWN *supra* fn 2, 53-55; specifically on the rules of evidence D. SANDIFER *Evidence Before International Tribunals* 1975, 44.

<sup>7</sup> See the sceptical remarks by J. VERHOEVEN *Droit international public* 2000, 348.

<sup>8</sup> R. JENNINGS, A. WATTS (eds) *Oppenheim’s International Law*<sup>9</sup> 1992, 36.

<sup>9</sup> M. BOGDAN *General Principles of Law and the Problem of Lacunae in the Law of Nations NordiskTids* 1977, 37, 44 (and see 49-51, on the necessary use of comparative law in that context).

<sup>10</sup> C. TAPPER (ed) *Cross and Tapper on Evidence*<sup>11</sup> 2007, 169 et seq; K. BROWN (ed) *McCormick on Evidence*<sup>6</sup> II 2006, § 341, 490 et seq.

<sup>11</sup> It would appear to remain used in criminal proceedings in Massachusetts: K. BROWN *supra* fn 10, 492-493 and fn 9 thereto. A famous instance of use of the requirement of “moral certainty” (“certezza morale”) occurs in C. BECCARIA *Dei delitti e delle pene* 1764, ch. XIV, and references to “certezza morale” still occasionally appear in contemporary Italian law. On the philosophical and theological origins of the concept, see B. SHAPIRO “To a Moral Certainty”: *Theories of Knowledge and Anglo-American Juries, 1600-1850* *HastLJ* 1986, 153 and ID. “Beyond Reasonable Doubt” and “Probable Cause” 1991, ch. I.

<sup>12</sup> *Speiser v Randall*, 357 U.S. 513, 525-526 (1958).

accused's due process rights<sup>13</sup> and of the international human rights guarantee of a fair trial and of protection of the presumption of innocence.<sup>14</sup> It must be considered as a truly general principle,<sup>15</sup> at least from a normative standpoint – admittedly, the reality may sometimes be different.<sup>16</sup>

It is difficult to contend that the same degree of unanimity on the standard of proof exists in civil proceedings. Here we have an opposition between different national traditions: the position of those legal systems for which certainty (or at least that approximation of it that can be termed moral certainty) is in principle the only permissible basis for a judicial decision even in civil proceedings, and uncertainty is to be dealt with under the rules governing the burden of proof that designate the party bearing the risk of uncertainty;<sup>17</sup> and that of other legal systems that manage differently the possible uncertainty remaining after the judicial fact-finding has taken place. The idea behind the latter position is that a judicial error in favour of the claimant is generally – and quite unlike an error in favour of the accusation in criminal proceedings – no worse than an error in favour of the respondent. That is the rationale for adoption of a standard of proof on the “balance of probabilities” (the preferred formulation in England and many other common law jurisdictions, where this standard is understood to mean that “if the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden [of proof] is discharged, but if the probabilities are

<sup>13</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>14</sup> ECtHR, 6.12.1988, *Barberà, Messegué and Jabardo v Spain*, ECHR Pb Series A/146, § 77 states that the presumption of innocence (Art. 6 (2) of the European Convention) requires that “the burden of proof is on the accusation, and any doubt should benefit the accused”. Similarly, for Art. 14 (2) of the CCPR, M. NOWAK *U.N. Covenant on Civil and Political Rights. CCPR Commentary*<sup>2</sup> 2005, sub Art. 14, § 44.

<sup>15</sup> As it is indeed, sometimes hidden beneath the instruction to courts and jurors to follow their “intime conviction” – which is not a standard of proof but a rule relating to freedom from technical rules in the evaluation of evidence –, as is the case in France (see M. DELMAS-MARTY *La preuve pénale* Droits 1996 53, 59-60), or under a different terminology (“volle richterliche Überzeugung” – “full persuasion of the judge” – in Germany).

<sup>16</sup> Cf. M. TARUFFO *Rethinking the Standards of Proof* AJCL 2003 659, 665 and F. STELLA *Giustizia e modernità*<sup>3</sup> 2003, 115 et seq.

<sup>17</sup> France: J. GHESTIN, G. GOUBEAUX, M. FABRE-MAGNAN *Traité de droit civil. Introduction générale*<sup>4</sup> 1994, § 645; Germany: G. WALTER *Freie Beweiswürdigung* 1979 who emphasizes that the same high standard of proof applies to civil (or administrative) and to criminal proceedings; H. PRÜTTING in T. RAUSCHER, P. WAX, J. WENZEL (Hrsg.) *Münchener Kommentar zur ZPO*<sup>3</sup> 2008, § 286, sub-§ 35 et seq. There is a minority view in Germany favouring proof on a balance of probabilities in civil proceedings, e.g. G. KEGEL *Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwiegender Wahrscheinlichkeit* in K. BIEDENKOPF, H. COING, E.J. MESTMÄCKER (Hrsg.) *Festgabe für Heinrich Kronstein* 1967, 321 et seq.



equal it is not”)<sup>18</sup> or “preponderance of the evidence” as it is generally understood in American law.<sup>19</sup>

At the margin, it is true, the distinction becomes somewhat blurred. Quite apart from possible occasional discrepancies between the rules and their practical implementation by the courts, the systems that normally require certainty as the standard of judicial persuasion tend to lower their standard of proof for certain defined issues<sup>20</sup> or to admit, under carefully defined conditions, unrebutted *prima facie* evidence as equivalent to full proof.<sup>21</sup> On the other hand, in those jurisdictions where proof is normally a matter of probabilities, it is possible that for certain types of civil proceedings, or for the dealing with certain allegations of great gravity, a higher standard of proof is applicable. Thus in American law – which has the advantage of clarity in that respect – it is recognised that there is a third, intermediary standard of proof, applicable to certain types of cases, between proof beyond reasonable doubt (the criminal standard) and proof on a preponderance of the evidence (the usual civil standard): the requirement of “clear and convincing evidence.”<sup>22</sup> English law is less clear in that respect, but here too the idea of a third, intermediary, standard of proof for claims of extraordinary gravity, or the need for a degree of flexibility of the civil standard in such cases or at least for the taking into consideration that “some things are inherently more likely than others”, is discussed.<sup>23</sup> This description

<sup>18</sup> Cf. the *locus classicus* for the distinction between the civil and the criminal standard of proof in England: *Miller v Minister of Pensions* ALLER 1947 II, 372, 373-374 (Denning J.). A similar distinction exists in some at least of the Scandinavian countries (in particular the *övervikt*-principle as promoted in Sweden); and see, on the human rights implications of the presumption of innocence on this standard of proof in civil cases involving criminal conduct, ECtHR, 11.2.2003 Appl. 34964/97, *Ringvold v Norway*; Appl. 56568/00, *Y. v Norway*, ECHRRep 2003-II; 13.11.2003 Appl. 48518/99, *Lundkvist v Sweden*, ECHRRep 2003-XI; 15.5.2008 Appl. 31283/04, *Orr v Norway*.

<sup>19</sup> Generally but not unanimously: see the references in K. BROUN *supra* fn 10, § 339, 485-486 (the probability standard also corresponds to the authors’ own view).

<sup>20</sup> Arguably, causality in the law of torts is an example: in Germany see H. PRÜTTING *supra* fn 17, *sub*-§ 47.

<sup>21</sup> Germany again: H. PRÜTTING *ibidem*, *sub*-§ 48 et seq; but *prima facie* evidence is relevant only for standardised happenings, proof of which can lead, in the absence of rebuttal, to full persuasion of the reality of a fact that is linked to them.

<sup>22</sup> See K. BROUN *supra* fn 10, § 340, 487-490. This standard applies, for instance, to charges of fraud or to “miscellaneous types of claims and defenses... where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds”, 489.

<sup>23</sup> See generally C. TAPPER *supra* fn 10, 185-186. That English case law is in need of clarification has been (repeatedly) recognised by the House of Lords, whose latest pronouncement appears to go into the direction of recognising a single standard of proof in civil proceedings,

shows the existence (and the limits) of a real distinction between the normative positions taken by different systems of civil procedure on the issue of the standard of proof in civil proceedings – a distinction that should not simply be denied or explained away, despite valiant attempts by a few comparative lawyers to do so.<sup>24</sup>

Our foray into comparative national procedural law has not been a digression, but will prove to provide the background to the discussion that follows. In fact, to a large extent the uncertainty as to the standard of proof that is appropriate for certain types of international adjudication has its origin in the difference between national systems, which means that in these cases the generally recognised principle that could simply be transposed to international proceedings simply does not exist. But it is clear that first it is necessary to distinguish between types of proceedings.

3. It was Fausto Pocar who suggested<sup>25</sup> that the principles of evidence in general, and the standard of proof in particular, in human rights tribunals or international criminal tribunals were too specific to lend themselves to a combined approach of the international law of judicial evidence in the form of a synthesis with the rules of evidence in the field of inter-State adjudication. The point is well-taken, as it will become apparent from an overview of both of these fields.

3.a. It has been seen that the requirement that the accusation prove the criminal defendant's guilt beyond reasonable doubt is a constant feature of comparative national law and a part of the defendant's fundamental rights protected by international human rights norms. It comes at no surprise, then, that this requirement figures expressly in the Rules of Procedure and

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of the strict "more probable than not" variety, but taking into consideration the varying inherent probabilities of factual claims of various degrees of gravity: *In re B. (Children)* *supra* fn 1.

<sup>24</sup> Principle 21.2 of the ALI/Unidroit Principles of Transnational Civil Procedure ULR 2004 IV, 796 defines what appears to be a compromise standard of proof: "Facts are considered proven when the court is reasonably convinced of their truth." This compromise may have some merit (*infra* fn 59), but the Comment added does not appear entirely devoid of disingenuousness: "The standard of 'reasonably convinced' is in substance that applied in most legal systems. The standard in the United States and some other countries is 'preponderance of the evidence' but functionally it is essentially the same" (*ibidem*). For an attempt, optimistically pretending to be *de lege lata*, at equating the German to the English standard of proof (and understanding the latter as a flexible standard), see M. BRINKMANN *Das Beweismaß im Zivilprozess in rechtsvergleichender Sicht* 2005.

<sup>25</sup> During the *travaux préparatoires* of a projected resolution of the Institut de droit international on Principles of Evidence in International Litigation: written observation in AnnIDI 2002-2003 I, 341-343.

Evidence of the Yugoslavia and Rwanda Tribunals and in the Rome Statute of the International Criminal Court,<sup>26</sup> and that it is a prominent element of the jurisprudence of the Tribunals.<sup>27</sup>

Although in substance, the idea of proof beyond reasonable doubt characterises both common law and (with a sometimes different terminology) civil law legal systems, the judgments of the Tribunals appear to betray the special influence of common law concepts. That has been the case of the ICTY's *Čelebići* Trial Judgment of 16 November 1998<sup>28</sup> which squarely discusses the applicable standard of proof against English and Australian precedents, as if it arose in a prosecution in a municipal court of England or Australia; or of the settled case law according to which "the standard of proof with regard to mitigating circumstances is... proof on a balance of probabilities: the circumstance in question must have existed 'more probably than not'":<sup>29</sup> proof "on a balance of probabilities" is a typical common law concept. The influence of technical common law rules became most evident in the decision, in the *Jelisić* Appeal Judgment of 5 July 2001, on the issue of the correct test for determining the issue of insufficiency of the prosecution's evidence "to sustain a conviction" for the purposes of an acquittal by the Trial Chamber after the close of the prosecution case, under Rule 98-*bis* (B) of the ICTY Rules; there the modelling of that part of the Rules after common law procedures primarily designed for jury trials exercised an influence on the non-jury trial procedure before the International Tribunal that was remarkable and quite possibly unjustified.<sup>30</sup>

<sup>26</sup> R. 87 (A) of the ICTY and ICTR Rules; Art. 66 ("Presumption of innocence"), § 3 of the Statute of the ICC. For an explanation in the light of comparative national law, see A. CASSESE *International Criminal Law* 2003, 425-427.

<sup>27</sup> See, e.g., ICTY, 27.9.2007 case IT-03-66-A, *Limaj, Bala and Musliu*, Appeal Judgment, § 21, with references to earlier cases (the requirement applies to all the elements necessary to a conviction); ICTR, 9.7.2004 ICTR-96-14-A, *Niyitegeka*, Appeal Judgment, § 60 ("It is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution's case"). The ICTY, 12.6.2007 case IT-95-11-T *Martić*, Trial Judgment, has given the phrase "beyond reasonable doubt" a probabilistic ring, indicating that "the Trial Chamber interprets the standard 'beyond reasonable doubt' to mean a high degree of probability; it does not mean certainty or proof beyond a shadow of a doubt." The holding appears to be inspired, more or less *verbatim*, by the leading English case on the various standards of proof, *Miller v Minister of Pensions*, *supra* fn 18, 372-373.

<sup>28</sup> ICTY, 16.11.1998 case IT-96-21-T, *Čelebići*, Trial Judgment, §§ 600 et seq.

<sup>29</sup> ICTY, 18.7.2005 case IT-03-72-A, *Babić*, Appeal Judgment, § 43, with references.

<sup>30</sup> ICTY, 5.7.2001 case IT-95-10-A, *Jelisić*, Appeal Judgment, §§ 30-40, where it was held that the Trial Chamber could not acquit at the close of the Prosecution case simply because it had found for itself that the evidence against the defendant was insufficient to prove guilt beyond reasonable doubt; it had to find that the evidence was so weak that no "reasonable trier

At any rate, on the issue of the standard of proof (as well as on many others), proceedings before the international criminal tribunals are wholly unrepresentative of international adjudication in general. There is a genuine consensus in national law on the “beyond reasonable doubt” standard for criminal cases which would inevitably be transferred to international criminal proceedings. That factor, together with the gap-filling potential of specific concepts which the Tribunals tend to borrow from the common law tradition, is such that the standard of proof for findings on the merits in international criminal cases is sufficiently clear.

3.b. Genuine fact-finding – the reconstruction of events that occurred in the past and that are in dispute among the parties – is only part, and frequently not even a very characteristic part, of the tasks of human rights tribunals. In many cases, there is no real dispute, between the applicant and the respondent State, about the course of events; the facts are established by the judicial or administrative records of national proceedings, or they have always been undisputed; what will be at stake will be an assessment of the legal consequences that follow from applying human rights norms to those facts. Or it may be “legislative facts”, those that provide the background and motivation for a given legislative policy and may or may not provide justification, when reviewed under the principle of proportionality, in case of conflict with individual rights. Although the result of a human rights tribunal’s assessment or review can in each of these cases be worded in terms of “persuasion” or “conviction”,<sup>31</sup> it is clear that those terms bear no more than a superficial resemblance to cases where evidence of disputed facts, and the standard of proof of those facts, is decisive. The position is otherwise with respect to those cases of great gravity which involve allegations of torture or killings by State officials. Those cases are likely to give rise to true issues of fact to be resolved by the tribunal – as the European Court of Human Rights recently said, “[i]n cases where there are conflicting accounts of the events,

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of fact” could possibly come to a conclusion of guilt beyond reasonable doubt (§ 37). See Judge Pocar’s vigorous dissent from that part of the judgment, 70-72.

<sup>31</sup> Among many other examples, see, in the case law of the ECtHR, 26.11.1991, *Observer and Guardian v United Kingdom*, ECHR Pb Series A/216, § 59 and *Sunday Times (No 2) v United Kingdom*, ECHR Pb Series A/217, § 51 (the “Spycatcher” case) (“the necessity for any restrictions [to freedom of expression] must be convincingly established”), or 30.6.2008 No 22978/05, *Gäfgen v Germany*, § 78 (assessment of the effects of a criminal sentence subsequently imposed on police officers who had threatened the applicant with torture).

the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court.”<sup>32</sup>

In 1967, Denmark, Norway, Sweden and the Netherlands brought a case against Greece in the European Commission of Human Rights which alleged, among others, numerous cases of torture or ill-treatment of political prisoners; the Commission conducted an extended fact-finding exercise and handed down a detailed report in which it gave its opinion on the standard of proof for an alleged violation of Art. 3 of the Convention: “[The Commission] must... maintain a certain standard of proof, which is that in each case the allegations of torture or ill-treatment, as breaches of Article 3 of the Convention, must be proved beyond reasonable doubt. A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented.”<sup>33</sup> The same standard of proof was later adopted, again in the context of alleged violations of Art. 3, by the European Court in *Ireland v the United Kingdom*, but it was also held in that case that proof beyond reasonable doubt “may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.”<sup>34</sup> This still is the standard of proof adhered to by the European Court up to the present day.<sup>35</sup>

Neither the (now defunct) Commission nor the Court have ever explained the reason behind the adoption of that high standard of proof. At first sight, use of the phrase “beyond reasonable doubt”, which in its standard English usage bears strong connotations of criminal proceedings, might imply either that the relevant human rights violations are a form of State criminality (which they sometimes clearly are), with the respondent State being entitled to the benefit of any doubt; or, more leniently, that they result from allegations of criminal conduct by individuals for which the State is ac-

<sup>32</sup> ECtHR, 10.1.2008 Appl. 67797/01, *Zubayrayev v Russia*, § 69.

<sup>33</sup> Report adopted on 5.11.1969, *The “Greek Case”* YECHR 1969, 196, § 30.

<sup>34</sup> ECtHR, 18.1.1978, *Ireland v the United Kingdom*, ECHR Pb Series A/25, § 161. The applicant Government had objected to unadulterated adoption of the “beyond a reasonable doubt” standard: Memorial, ECHR Pb Series B/23 II, 36 et seq, but the respondent Government had defended it “where the allegation is of exceptional gravity, as in the case of an allegation of torture or ill-treatment in breach of Article 3 of the Convention”: Counter Memorial, *ibidem*, 135 (the latter appears in fact to be derived from a passage of the ICJ’s judgment in *Corfu Channel (Merits)*, *infra* fn 62).

<sup>35</sup> See, among very numerous cases, ECtHR GCh, 6.7.2005 Appl(s) 43577/98 and 43579/98, *Nachova v Bulgaria*, ECHRRep 2005 VII, § 147; 4.5.2006 Appl. 62393/00, *Kadiķis v Latvia (No 2)*, § 50 (repeating the very words of the Commission, as quoted above, in the “Greek case”) and *Zubayrayev v Russia*, *supra* fn 32, § 71.

countable. That possible explanation has given rise to principled criticism, both in literature and in dissenting opinions by individual judges;<sup>36</sup> and in the 2005 case of *Nachova v Bulgaria* the Court's Grand Chamber disavowed the idea that it would ever have "been its purpose to borrow the approach of the national legal systems that use that standard", adding that "[i]ts role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention".<sup>37</sup>

A second explanation, which appears more attractive, is to have regard to the fact that in most civil law legal systems full persuasion of the judge or (moral) certainty is the standard of proof to be followed both in criminal and in civil cases:<sup>38</sup> in those systems a requirement of proof "beyond reasonable doubt" is in no way surprising even in non-criminal cases. The high standard of proof consistently used by the European Court would appear to be an effect of the influence of civil law concepts on that aspect of the Court's jurisprudence,<sup>39</sup> possibly made palatable to common lawyers by the factor of "exceptional gravity" of the allegations involved.<sup>40</sup> There has been a proposal, in a dissenting opinion of a member of the Court (Judge Bonello of Malta), to consider replacing the "beyond reasonable doubt" standard by "the more juridically justifiable ones of preponderance of evidence or bal-

<sup>36</sup> L.G. LOUCAIDES *Standards of Proof in Proceedings under the European Convention of Human Rights* in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu* II 1992, 1431 et seq.; U. ERDAL *Burden and Standard of Proof in Proceedings under the European Convention* ELR HR 2001, 68, 76; and see the joint partly dissenting opinion of Judges Pastor Ridruejo and seven others in ECtHR GCh, 6.4.2000 Appl. 26772/97, *Labita v Italy*, ECHRRep 2000 IV, 153, the partly dissenting opinion of Judge Bonello in 11.4.2000 No 32357/96, *Vežnedaroglu v Turkey*, §§ 12-13 and the partly dissenting opinion of Judge Loucaides, joined by Judge Spielmann in ECtHR, *Zubayrayev v Russia*, supra fn 32, 28-29.

<sup>37</sup> *Supra* fn 35, § 147; see already the Commission's report on *Ribitsch v Austria*, ECHR Pb Series A/336, §§ 110-111.

<sup>38</sup> *Supra* § 2, text accompanying fn 17.

<sup>39</sup> Cf. B. RUDOLF *Beweisprobleme in Verfahren wegen Verletzung von Art. 3 EGMR* EuGRZ 1996, 497-498; J. KOKOT *The Burden of Proof in Comparative and International Human Rights Law* 1998, 205. It is perhaps no coincidence that the holding of the Court in *Ireland v the United Kingdom* on – to quote the French version of the text quoted above (accompanying fn 34) – "présomptions non réfutées, suffisamment graves, précises et concordantes" closely follows the wording of Art. 1353 of the French Civil Code.

<sup>40</sup> See the Counter Memorial of the United Kingdom in *Ireland v the United Kingdom*, supra fn 34; and cf. R. WOLFRUM *The Taking and Assessment of Evidence by the European Court of Human Rights* in S. BREITENMOSE, B. EHRENZELLER, M. SASSOLI, W. STOFFEL, B. W. PFEIFER (eds) *Human Rights, Democracy and Rule of Law. Liber Amicorum Luzius Wildhaber* 2007, 915, 922: "it seems that the determining factor for opting for the standard of proof beyond reasonable doubt is the seriousness that attaches to a ruling that fundamental rights have been violated".



ance of probabilities”;<sup>41</sup> but it is clear that what appears “more juridically justifiable” is in fact largely a question of national law traditions, and that far from all national systems in Europe agree on the superiority of that particular standard.

That being said, it is true that there is a certain degree of tension between the concern for certainty in adjudication and a concern for maximum effectiveness in the protection of human rights. Those who unconditionally favour the latter are likely to promote lowering the standard of proof and leaving the risk of any remaining uncertainty with the respondent State.<sup>42</sup> They may prefer the approach of the Inter-American Court of Human Rights in the *Velásquez Rodríguez v Honduras* case of 1988<sup>43</sup> where it was held, in a case involving the “disappearance” of a political opponent, that “international protection of human rights should not be confused with criminal justice”, that as a general matter, there were no rigid rules in international jurisprudence “regarding the amount of proof necessary to support the judgment” and which had concluded, in a *dictum* not devoid of ambiguity, that “[t]he Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court 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”.<sup>44</sup>

The Inter-American Court did not refer to an inflexible standard of proof “beyond reasonable doubt”. It stressed the need for flexibility in international adjudication, and perhaps adopted an intermediate standard of

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<sup>41</sup> Partly dissenting opinion in ECtHR, 13.6.2002 Appl. 38361/97, *Anguelova v Bulgaria*, ECHRRep 2002 IV, § 18. For remarks to the same effect, see his partly dissenting opinion in *Vezenedaroğlu v Turkey*, *supra* fn 36, § 13.

<sup>42</sup> B. RUDOLF *supra* fn 39, 503 and D. THÜRER, B. DOLD *Rassismus und Rule of Law* EuGRZ 2005, 1, 7 justify this solution by reference to the gravity of the violations alleged – the very criterion that, for more conservative minds, justifies the opposite conclusion; see also Judge Bonello in ECtHR, *Anguelova v Bulgaria*, *supra* fn 41, § 12 (“in areas where the highest level of protection, rather than the highest level of proof, should be the priority”). The main problem with this approach from the viewpoint of promoting human rights is that, while it serves to ensure compensation to the victims of human rights violations (as well as to some non-victims), it appears to give less moral force to the condemnation of a State practice whose actual existence is not exempt from doubt in the Court’s mind.

<sup>43</sup> IACtHR, 29.7.1988, *Velásquez Rodríguez v Honduras*, IACtHR Series C/4.

<sup>44</sup> *Ibidem*, §§ 134, 127 and 129, respectively.

“convincing evidence” – although the latter is less clear if the Spanish version of the judgment is taken into consideration.<sup>45</sup>

In practice, however, the difference between the approaches of both Courts should perhaps not be overestimated. The European Court has developed a number of doctrines that allow it to find “beyond reasonable doubt” a violation even in the absence of direct evidence of the events:<sup>46</sup> shifting the burden of proof where injury or death occur in police custody; “procedural violation” of Articles 2 and 3 that will be held to have existed where the direct State responsibility is not proven, but where the State has failed effectively to investigate the events; failure by the Government to submit a convincing explanation on the basis of information to which only it could have access.<sup>47</sup> Similar techniques have been used by other international human rights bodies – without reference, it is true, to a definite standard of proof.<sup>48</sup>

4. It will have been seen that the answer to this question is affirmative in international criminal proceedings and in human rights proceedings, at least before the European Court of Human Rights. But this type of clarity is, on the whole, untypical of international proceedings generally. Notoriously, the standard of proof tends to vary from tribunal to tribunal or even from case to case, in a continuum going from a light standard (balance of probabilities) to a high one (proof beyond reasonable doubt). Writers on evidence before international tribunals always note this – generally, it must be said, with the stoic indifference of the true positivist,<sup>49</sup> or even with approval for the “flexi-

<sup>45</sup> “Capaz de crear la convicción de la verdad de los hechos alegados” – “capable of creating the conviction of the truth of the facts alleged” – does not necessarily point to an intermediate standard of proof. See the comments by J. KOKOTT *supra* fn 39, 201.

<sup>46</sup> A list of these devices, with references to the Court’s case law, is given in Judge Bonello’s opinion in ECtHR, *Anguelova v Bulgaria*, *supra* fn 41, §§ 14-17.

<sup>47</sup> As an illustration of the latter device, see the ECtHR, 12.6.2008 Appl. 26064/02, *Atabayeva v Russia*, where a *prima facie* case by the applicants (§ 83), together with the absence of a convincing explanation by the Government, led the Court to find “beyond reasonable doubt” that a person “must be presumed dead following his unacknowledged detention by State servicemen” in the Chechen Republic (§ 87).

<sup>48</sup> The HRCComm, 29.3.1982 No 30/1978, *Bleier v Uruguay*, § 13.3; 16.7.2001 No 839/1998, *Mansaraj et al. v Sierra Leone*, § 5.4 (and see M. NOWAK *supra* fn 14, *sub* Art. 5 ICCPR-OP1, § 4). The African Commission on Human and People’s Rights, cf. the materials cited by G. NIYUNGEKO *L’établissement des faits dans la pratique de la Commission africaine des droits de l’homme et des peuples, lors de l’examen des communications émanant de particuliers in Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon* 2007, 1317, 1346-1349 (see at 1353-1357 the account of the varying standards of proof used by that Commission, the author’s impression being that of “une application quelque peu arbitraire de ces critères”, 1357).

<sup>49</sup> C. BROWN *supra* fn 2, 97-101; C. AMERASINGHE *supra* fn 2, 232-261 (but in his draft resolution on Principles of Evidence in International Litigation, prepared for the Institut de



bility” of the standards of proof used in international adjudication, the “freedom” with which international judges go about their fact-finding and the discretion reserved to international courts.<sup>50</sup> Occasionally an international court will itself join in this chorus; the Inter-American Court of Human Rights has been particularly insistent, in the grounds for its judgments, on the idea that international jurisprudence “has always avoided a rigid rule regarding the amount of proof necessary to support the judgment”,<sup>51</sup> and has claimed for itself a “sound judicial discretion” in this respect.<sup>52</sup>

For those who think that “equal justice under law”, or a similar motto, embodies the essence of a properly functioning judiciary, whether international or national, such pronouncements can hardly be the end of the matter. It is unsatisfactory to be told that in truth, there is no such thing as a standard of proof in international adjudication (for a standard of proof that varies at the unfettered discretion of the tribunal is anything but a standard). There is reason to have sympathy for other views – typically expressed by members of international courts or tribunals who wrote in polite exasperation at what they perceived as the absence of a clearly defined standard of proof in their own adjudicating bodies. Take the separate opinion of Vice-President Wolfrum, writing in the ITLOS case of the *M/V “Saiga” (No 2)*: “International tribunals enjoy some discretion concerning the standard of proof they apply, namely whether they consider a fact to be proven. Nevertheless, in spite of that discretion there must be a criterion against which the value of each piece of evidence as well as the overall value of evidence in a given case is to be weighed and determined. It is a matter of justice that this

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droit international, Amerasinghe had formulated a proposal of his own for a general standard of proof – preponderance of the evidence – with possible resort, “in exceptional circumstances” and “with notice”, to a higher standard, such as proof in a convincing manner: AnnIDI 2002-2003 I, 398).

<sup>50</sup> Moderately supportive of this view: M. KAZAZI *supra* fn 2, 323-365, in particular 352-353; strongly in favour G. NIYUNGEKO *supra* fn 2, 413-442, in particular 441: “l’absence d’un critère fixe de la preuve paraît... s’harmoniser mieux avec le principe de la libre appréciation des preuves par le juge”; the author’s opinion is that it is all a matter of trust (“[p]uisque l’on fait confiance [au juge]”). Similar ideas had been expressed by J.C. WITENBERG *La théorie des preuves devant les juridictions internationales* RCADI 1936 III, 91-102, with a particularly fervent finish at 99-102.

<sup>51</sup> *Velásquez Rodríguez v Honduras*, *supra* fn 43, § 127; see also, e.g., IACtHR, 15.3.1989, *Fairén Garbi and Solís Corrales v Honduras*, IACtHR Series C/6, § 130.

<sup>52</sup> IACtHR, 31.5.2001, *Cesti Hurtado v Peru*, IACtHR Series C/78, § 21; 27.2.2002, *Trujillo Oroza v Bolivia*, IACtHR Series C/92, § 37.

criterion or standard is spelled out clearly, applied equally and that deviations therefrom are justified”<sup>53</sup>.

Words to the same effect have been written by judges at other courts and tribunals.<sup>54</sup>

Of course, to agree that a clear standard of proof would be preferable to an unpredictable one makes things more difficult, not easier. After all, it appears that the uncertainty in the standard of proof to be used by an international tribunal has as a background the absence of a consensus among national systems of law on the standard to be applied in non-criminal matters. No national standard is clearly preferable to the other; a low standard of proof as well as a high one can be considered to be founded on (different) utilitarian or deontological grounds; and, as the variations in international jurisprudence serve to demonstrate, it cannot be said that the specific needs of international adjudication give the advantage to one view or the other. This is one aspect where an international judge's national background can *de facto* be decisive; Lasok's opinion, expressed in 1994, that “at one time”, in proceedings in the European Court of Justice, “the position was sufficiently uncertain as to leave it a plausible supposition that each judge applied the standard of proof adopted in the legal system in which he was trained”, so that “the resultant decision on an issue of fact... appeared to spring from a pot pourri of national standards which might differ in terms of formulation, if not also in degree”,<sup>55</sup> may have an explanatory value beyond the case of that particular court.<sup>56</sup>

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<sup>53</sup> ITLOS, 1.7.1999, *M/V “Saiga” (No 2)*, separate opinion Wolfrum, § 10. See also, writing extrajudicially, R. WOLFRUM *Taking and Assessing Evidence in International Adjudication* in T. M. NDIAYE, R. WOLFRUM, C. KOJIMA (eds) *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensab* 2007, 341, 355.

<sup>54</sup> See ICJ, 6.11.2003, *Case concerning Oil Platforms (Iran v United States of America)*, ICJRep 2003, 161, separate opinions of Judges Higgins (233-234) and Buergenthal (286); see also Iran-USCT, *Schering Corporation v Iran*, 5 Iran-USCTR 361, dissenting opinion of arbitrator Mosk, 375.

<sup>55</sup> K.P.E. LASOK *The European Court of Justice: Practice and Procedure*<sup>2</sup> 1994, 431. He adds that “[t]he position still is not entirely clear”, but also that “[f]or reasons of legal certainty it would probably be better if the Court identified one standard of proof.” Today the position seems to have been clarified at least as far as proof of an infringement of competition law is concerned; there recognition of the quasi-criminal nature of the fines imposed by the European Commission has led to recognition of the applicability of the presumption of innocence (Art. 6 (2) ECHR: e.g. ECJ, 8.7.1999 case C-199/92, *Hüls* ECR I-4287, §§ 149-150) and to a high standard of proof before the Commission and a strict standard of review by the Court (CFI, 27.9.2006 joined cases T-44/02, *OP et al.*, *Dresdner Bank et al.*, ECR II-3567, §§ 60 and 62). In merger control cases, the standards of proof and of review seem still to be in need of ultimate clarification, but there the most difficult issue invariably is the anti-competitive effect that a merger, if approved, will have, an issue that differs significantly from

But ultimately, to be content with such an explanation (there is no clear standard of proof because it is too difficult to agree on one) is cynical rather than wise. It should be recognized that the practice of international courts which, despite these difficulties, have been able to agree on one standard of proof is preferable. In the absence of a treaty provision, definition of a standard of proof in non-criminal matters is simply part of the inherent power of an international tribunal to settle an aspect of its practice. That standard can be proof beyond reasonable doubt combined with certain mechanisms that facilitate, in predictable circumstances, the administration of proof, as in the case of the European Court of Human Rights. It can also be, as in proceedings before the Eritrea-Ethiopia Claims Commission where allegations of systematic and widespread violations of international law are involved, the standard of “clear and convincing evidence”<sup>57</sup> – a standard originating in American law and applying, in that national system, where issues of a high degree of gravity are involved,<sup>58</sup> but one that appears also to be more generally a possible, and not unpromising, compromise candidate between balance of probabilities (or preponderance of the evidence) on the one hand and full conviction of the tribunal (or moral certainty) on the other.<sup>59</sup> In the end, whatever standard a given international tribunal agrees on, having a clear and predictable standard of proof can only be beneficial to the admini-

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the proof of past events (see D. BAILEY *Standard of Proof in EC Merger Proceedings: A Common Law Perspective* CMLRev 2003, 845 et seq; A.L. SIBONY, E. BARBIER DE LA SERRE *Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective* RTDE 2007, 205 and generally P. CRAIG *EU Administrative Law* 2006, 465 et seq).

<sup>56</sup> For instance Vice-President Wolfrum’s separate opinion in *M/V Saiga (No 2)*, *supra* fn 53, § 12 construes the ITLOS Statute as referring to proof beyond reasonable doubt, “as applied in many national systems” (but note that in a recent academic contribution – R. WOLFRUM *supra* fn 53, 354 – Wolfrum writes that “the standard of proof in international litigation among States, in general, is preponderance of evidence”), and according to a concurring opinion of the (American) arbitrator Mosk in *Iran-USCT, William L. Pereira Associates, Iran v Iran*, 5 Iran-USCTR 198, 231, the standard of proof before the Iran-US Claims Tribunal is proof on a preponderance of the evidence.

<sup>57</sup> EECC, 1.7.2003, *Prisoners of War (Eritrea’s Claim 17)*, Partial Award, § 46, and many other awards of the Commission.

<sup>58</sup> See *supra* text and fn 22. It may be thought that the fact that the Eritrea-Ethiopia Claims Commission is composed of four American-trained jurists (plus one Belgian President) has facilitated the Commission’s agreement on this standard.

<sup>59</sup> The standard of “reasonable conviction of the truth” used in Art. 21 § 2 of the ALI/Unidroit Principles of Transnational Civil Procedure (*supra* fn 24) may perhaps come down to the same, or a very similar, compromise.

stration of justice, as will having clear rules on the (closely related) issue of the effect of *prima facie* evidence.<sup>60</sup>

That paradigm of an international court, the International Court of Justice, has itself made considerable progress in the definition of a clear standard in the type of cases where the events are in dispute before the Court – and which involve typically grave violations of international law.<sup>61</sup> Transcending the allusions to be found in the judgments in the *Corfu Channel Case (Merits)*<sup>62</sup> and the *Case concerning Military and Paramilitary Activities in and against Nicaragua*,<sup>63</sup> the 2007 *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* appears to go a long way towards clarifying the standard used by the Court, by discussing in detail, in a separate section of the judgment, “[q]uestions of proof: burden of proof, the standard of proof, methods of proof”.<sup>64</sup> That initiative calls for respectful approval – and for imitation by a number of other international courts and tribunals.

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<sup>60</sup> This is a domain of some confusion in international jurisprudence: see the description in C. AMERASINGHE *supra* fn 2, 246 et seq. The better view would appear to be the one advocated by Amerasinghe, *ibidem*, 254-256: *prima facie* evidence neither shifts the burden of proof nor does it affect the standard of proof, especially “where the standard of proof required is higher than probability or preponderance of evidence”; it merely permits reasonable inferences to be made by the tribunal, unless it is rebutted by the other party.

<sup>61</sup> A special case, calling for findings “on a balance of probabilities”, is frontier delimitation: ICJ, 11.9.1992, *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)*, ICJRep 1992, 506 (it is worth noting that in national law, analogous disputes – disputes about the ownership of real estate – can be treated, even in civil law jurisdictions, “on a balance of probabilities”: cf. P. JOURDAIN *Les biens* 1995, 277-278).

<sup>62</sup> ICJ, 9.4.1949, *United Kingdom v Albania*, ICJRep 1949, 4, 17-18 (“A charge of exceptional gravity against a State would require a degree of certainty that has not been reached here”; “[t]he proof may be drawn from inferences of fact, provided they leave *no doubt* for reasonable doubt”, emphasis in original).

<sup>63</sup> *Nicaragua v United States of America*, *supra* fn 5, 24: “convincing evidence.”

<sup>64</sup> ICJ, 26.2.2007, *Bosnia and Herzegovina v Serbia and Montenegro*, §§ 208-210 (in answer to an argument by the applicant saying that the proper standard of proof was balance of probabilities “inasmuch as what is alleged is breach of treaty obligations”, the Court holds that “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”; “the Court requires that it be fully convinced [that the acts alleged] have been clearly established”; “the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation”). – On the recent efforts of the Court to clarify its practice in relation to evidence, see generally M. KAMTO *Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires portées devant elle* GYIL 2006, 259.