I. Facts and Rules of Evidence in the Sphere of International Adjudication

Part I will provide an overview of the context that is of interest in this thesis: international adjudication, and adjudication by the European Court of Human Rights (ECtHR) in particular. It will be shown that judicial fact-assessment is an important function of international adjudication and that, although there are some rules in place that regulate fact-finding, fact-assessment and the weighing of evidence, these rules are sparse and do not provide a clear framework as to how the international judiciary in general, and the ECtHR in particular, ought to contend with facts. Thus, international adjudicative bodies have quite wide discretion when it comes to the assessment of the information that is brought before them. It is important, thus, to scrutinise these fact-assessment procedures. Part I will provide the background that illustrates why the fact-assessment procedures of international courts matter. This will pave the way for the suggestion of using scientific principles as a methodology to assess and analyse fact-assessment procedures in the ECtHR's case-law.

1. What Are Facts?

To label something a 'fact' usually implies that one wants to insulate this product or statement from debate and give it a certain authority.[3] Depending on the context in which the term 'fact' is used, it may have different meanings. In other words, the answer to the question of what facts are may vary considerably depending on whether one is asking the question in a philosophical discussion, in a legal debate, or in everyday conversation. The Cambridge Dictionary and Merriam-Webster define 'fact' as follows:

> 'something that is known to have happened or to exist, especially something for which proof exists, or about which there is information[4]

3 Frédéric Mégret, 'Do Facts Exist, Can They Be "Found," and Does It Matter?' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) 28.

4 See Cambridge Dictionary, available at <https://dictionary.cambridge.org/de/worterbuch/englisch/fact>, last accessed on 12 July 2021.

> 1: something that has actual existence; an actual occurrence // 2: a piece of information presented as having objective reality // 3: the quality of being actual // […]'[5]

These definitions link facts to certainty, to objectivity, to actuality, and to reality. A person who labels something a fact indicates that she can prove her knowledge in some way or another. This is the traditional Enlightenment notion of what distinguishes facts from opinions: a fact is provable whereas an opinion is not.[6] However, statements cannot easily be categorised as either facts or opinions. Rather, there is a continuum because factual statements often contain some opinion.[7] At one end of the spectrum, I might state that A is holding a cup of tea. I can be quite certain because I can observe the cup in A's hand. At the other end of the spectrum, opinions might diverge on the existence of God. It is not possible to provide the kind of proof that can be provided for the statement about the cup. Between these two extremes, there exist extensive grey areas, or areas 'where statements involve varying degrees of inference and value judgment'.[8] An example that Michaele Sanders provides is the following: a person sees a classmate reading late on a Friday night, and states that that classmate is a diligent student. This statement cannot be placed squarely at one end of the abovementioned spectrum because it is neither purely fact nor purely opinion. It can be said that it is a fact that the classmate was reading, and that fact can be verified in the same manner as the holding of a cup of tea can be verified. The cup of tea might have been a cup of coffee and the classmate might have just been pretending to be reading or just staring at the book, but these 'facts' can be verified through inquiry. However, the inference that the classmate is a diligent student includes an element of opinion. The classmate might have been reading something merely for pleasure, but the observer inferred from the fact 'reading' that the reader was studying.[9] Of course, the judgment of the classmate might also have been made by the observer due to his previous experience of observing the classmate. Thus, even if the book was indeed, at that point in time, merely for pleasure, the previous observations push the statement

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5 See Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/fact>, last accessed on 12 July 2021.
6 Mégret (n 3) 30.
7 Michaele Sanders, 'The Fact / Opinion Distinction : An Analysis of the Subjectivity of Language and Law' (1987) 70 Marquette Law Review 680.
8 ibid 681.
9 ibid.

slightly closer to the factual end of the spectrum. Not only experience influences the qualification of a statement, but context does so as well. For instance, the place and time of reading may indicate whether the reading is done for pleasure or for studying.

What emerges from the above is that what must be assessed when we are trying to distinguish between facts and opinions is the *reliability* of a statement. The more reliable a statement is, the more likely it can be considered a fact. How do we determine whether a statement is reliable or not? There seems to be something optimistic in the labelling of a product as a fact; it seems to indicate that some things can be called 'true' or 'evident' or 'concrete'.[10] The more true, evident, and concrete a statement is, the more reliable it seems. Designating something a fact also is a form of exercising power. As HLA Hart put it:

> 'To be an authority on some subject matter a man must in fact have some superior knowledge, intelligence, or wisdom which makes it reasonable to believe that what he says on that subject is more likely to be true than the results reached by others through their independent investigations, so that it is reasonable for them to accept the authoritative statement without such independent investigation or evaluation of his reasoning.'[11]

Thus, one might say that a statement is reliable if it is uttered by someone with superior knowledge and whose utterance one is reasonable to believe. However, what should we do about situations in which two people who are both of superior knowledge and whose utterance one has reason to accept make different or even contradicting statements? Norwood Russell Hanson makes an interesting point in his discussion of observation. Two people may see the same thing, i.e. they start from the same visual data, but then they may have different interpretations and construe the evidence differently. 'The task is then to show how these data are moulded by different theories or interpretations or intellectual constructions.'[12]

Thus, when we are asked 'What are facts?', the answer should be: 'it depends.' As the examples above have shown, the context in which we find ourselves will have an impact on what can be considered a fact. And

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10 Mégret (n 3) 28.

11 HLA Hart, 'Essays on Bentham' [1982] Studies in Jurisprudence and Political Theory 261–262.

12 Norwood Russell Hanson, *Patterns of Discovery* (Cambridge University Press 1958) 5.

as Hanson noted, we need a theory to mould our understanding of facts before we can discuss whether a certain fact-analysis was done well or not. In order to clarify and show on what grounds facts are conceptualised in this thesis, the following sections will first 'set the scene' by elaborating on the context that is of interest here, i.e. international adjudication, the rules of evidence more generally speaking, and the context of the European Court of Human Rights in particular. Then, in a second step, theoretical considerations that serve as a basis for the analysis of the ECtHR's fact-assessment (third step) will follow.

2. *Particularities of the International Sphere*

This chapter will show that fact-finding is an important function of international adjudication and that there are rules of evidence in place that guide the different courts and tribunals in their adjudicative task. There is no uniform set of rules that applies to all adjudicative bodies equally. Rather, each court or tribunal has its own set of rules and practices with regard to the gathering of evidence. In order to understand the reasons for there not being one coherent evidentiary framework in international law, the peculiarities of the international sphere will be considered before looking more closely at the different rules that are in place.

a. Fragmentation

One first particularity of the international sphere is its fragmentation. The academic field of public international law has its origins in the late nineteenth century. Legal studies were oriented towards the idea of a world that was interdependent, that acted as a community, one with a cosmopolitan future, governed by a global law.[13] After 1989, there was a dynamic increase in new specialised fields and subfields of international law that went hand in hand with a growth in international actors, such as international organisations and non-governmental organisations (NGOs), and the emergence of new types of international legal norms.[14] The num-

13 Martti Koskenniemi, 'International Law as "Global Governance"' 199, 199.

14 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671, 673.

ber of international tribunals grew dramatically: many ad hoc tribunals were established in the late nineteenth century and existed throughout the twentieth century. After the Second World War, various permanent tribunals were established, including the Permanent International Court of Justice (PICJ), the International Court of Justice (ICJ), the European Court of Justice (ECJ) and the United Nations Administrative Tribunal.[15] The World Trade Organization (WTO) with its dispute settlement body was founded in 1994, followed by the International Tribunal for the Law of the Sea (ITLOS) in 1996. The European Court of Human Rights (ECtHR) became a permanent court that gave individuals direct access in 1998.[16] This development gave rise to fears that rather than heading towards a cosmopolitan future, the international legal system with its specialised courts would become increasingly fragmented and thereby dampen any hope for a coherent international legal system.[17]

The International Law Commission (ILC) tackled the topic in its report on 'Fragmentation of International Law', finalised by Martti Koskenniemi in 2006.[18] Fragmentation entails both risks and opportunities. It can create conflicts between legal obligations and lead to a loss of legal certainty due to potentially overlapping jurisdictions of different international courts, and it can thwart the prospect of a unified and coherent international legal system.[19] At the same time, fragmentation can also make the international legal order more effective due to the division of tasks and the specialised expertise that is available in the specialised institutions. There is less concentration of power and 'the number of decision-makers, their multiplicity, and their competition and rivalry will normally lead to a denser body of law, which also includes more sophistication, and a further elucidation of fundamental principles underpinning the order'.[20]

The laws of evidence in the international sphere are also fragmented in the sense that there is not one coherent system or framework, not one size

15 Jonathan I Charney and others, 'The "Horizontal"Growth of International Courts and Tribunals: Challenges Or Opportunities?' (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 369.

16 Peters (n 14) 673.

17 ibid.

18 Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (13 April 2006).

19 Peters (n 14) 678–680.

20 ibid 861.

that fits all. The different adjudicative bodies all have their own rules on fact-finding and evidence enshrined in their constitutive instruments and their rules of court. However, although the law of evidence seems to be an incoherent framework, similarities do exist between the rules of the different courts and tribunals. One reason for there being some overlap is that the rules of evidence in the international sphere are influenced by the rules and practices of municipal systems. Thus, in the following section, the particularity of international law being coloured by domestic legal systems will be discussed.

b. International Law and Domestic Law

International law was created and developed over centuries by jurists who got their legal education in different legal traditions. Inevitably, these creators brought elements from their own legal systems into the international realm and influenced it with structures and concepts from their municipal traditions.[21] This is reflected in the laws of evidence. Certain principles reflect influences from the common law tradition, whereas others are coloured by civil law. For instance, the power of international adjudicative bodies to order parties to produce evidence is adopted from civil law systems,[22] but the standard of proof 'beyond reasonable doubt' is drawn from common law systems.[23]

Although international courts do draw their rules from municipal laws, a difference between domestic legal systems and the international sphere is that the municipal legal systems have detailed rules on evidence that are applied by the courts in civil and criminal cases.[24] In the international realm, however, the rules that do exist are quite general in nature and are characterised by their flexibility and scarcity.[25]

An important factor that calls for the international realm to adopt a liberal approach to the laws of evidence is the sovereignty of states. This is another difference between the international and domestic sphere: international law's main addressees are states, whereas domestic law addresses

21 Colin Picker, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' (2008) 41 Vanderbilt Journal of Transnational Law 1083, 1091–1092.
22 See below, I.5.a.i.
23 See below, I.5.b.iii(3).
24 James Gerard Devaney, *Fact-Finding before the International Court of Justice* (Cambridge University Press 2016) 12.
25 ibid.

individuals. International law is unique in that its subjects are individual states and that those play 'a direct and fundamental role in the creation and maintenance of international law'; due to their sovereignty, states can, for instance, opt out of – or refuse to sign – a given treaty.[26] States can and do surrender their sovereignty to a certain extent when they become members of international institutions such as the WTO.[27] However, tools and procedures have been developed by international courts to accommodate the sovereign nature of the domestic procedures. For instance, the ECtHR provides a margin of appreciation to states when it assesses the conformity of a national measure with the Convention.[28] The margin of appreciation grants Member States the authority, up to a certain point, to determine whether a violation of the Convention has taken place in a case.[29] This doctrine, originally developed by the ECtHR,[30] has also emerged as a doctrine of deference outside Europe.[31] The intricacy of this doctrine is in striking the balance between overreliance on national interpretations and assessments and disregarding the national interpretations completely.[32] When the ECtHR determines whether a margin of appreciation should be granted to a state in a given case, the Court often uses the method of European consensus.[33] The determining feature for establishing a European consensus is whether 'there is consensus or common ground within the member States of the Council of Europe on the approach to the problem at issue'.[34]

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26 Picker (n 21) 1090.

27 For more on this, see Kent Albert Jones, 'The WTO and National Sovereignty', *Who's Afraid of the WTO?* (Oxford University Press 2004).

28 Peters (n 14) 685.

29 Andreas Føllesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359, 359.

30 Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' 31 New York Journal of International Law and Policy 850–853; George Letsas, 'Two Concepts of the Margin of Appreciation', *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007).

31 Andreas Føllesdal and Nino Tsereteli, 'The Margin of Appreciation in Europe and Beyond' (2016) 20 International Journal of Human Rights 1055, 1055.

32 ibid.

33 For a detailed account on the relationship between the margin of appreciation and the European consensus, see, e.g. Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' [2019] European Public Law 445, 445.

34 Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus?' (2013) 33 Human Rights Law Journal 248.

In a sense, these tools allow for the quality of the national process to be scrutinised at the international level while, at the same time, preserving the sovereignty of the domestic system. This also ties in with the above considerations on fragmentation: given that there are so many different players in the international field, tolerance of another body's assessment is necessary. Without tools such as the margin of appreciation, pluralism could not be preserved and cultural and political differences could not be accommodated.[35] This might, then, lead to states opting out of treaties. For international law to be maintainable, cooperation from the national level is required. And for states to be willing to cooperate, their sovereignty must be preserved to a certain extent. Preserving the parties' autonomy in a dispute is important in order to maintain their confidence in the adjudicative body. Regarding the laws of evidence, the sovereignty of the parties in a case requires international adjudication to accommodate for the parties' understanding of and approach to the presentation and substantiation of their version of events.[36] In the light of the equality of the parties, favouring one party's approach over another would be incompatible with the nature of sovereignty.[37]

Another explanation for the flexible rules in international law is that the obtainment of evidence simply is different and more challenging at the international level as compared to the national one. Managing evidence is more challenging for international bodies because there often is a significant lapse in time between the occurrence of the disputed event and the international legal proceedings. Furthermore, the events usually take place far away from the seat of the adjudicative body, which further complicates the gathering of evidence.[38] If these obstacles were coupled with very restrictive rules of fact-finding and evidence, resolving a case could become very hard.

The international courts might also have an interest in avoiding very technical and rigid rules of evidence because the judges themselves come from different legal traditions and have their own understanding of the laws of evidence. Thus, in sum, although the laws of evidence are influenced by domestic rules and procedures, the laws are flexible because any

35 Peters (n 14) 685.

36 Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009) 2.

37 Devaney (n 24) 12, n 60.

38 Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 852, with further references 851

too formalistic and technical rules could come into conflict with the parties' own sovereign approach, with the judges' ideas and understandings, and with the fact that in the international realm, the gathering of evidence need not be further complicated by formalistic evidentiary rules.

Multiple perspectives are not only brought into the international system due to the influences from different national legal traditions. Multi-perspectivity also exists due to potential interveners to international disputes. Thus, in the next section, the particularity of these multiple perspectives in the international realm will be discussed, and its influence on agenda-setting will be considered.

c. Multi-Perspectivity and Agenda-Setting

The 'international decision-making system'[39] has changed over the last decade due to the emergence of new participants in the international legal sphere.[40] These actors (e.g. international organisations, NGOs, corporations, private actors, hybrid networks, *amici curiae*) interact in various ways, in different procedures, settings and contexts.[41] These interactions can be controlled, e.g. through agenda-setting. Agenda-setting is the 'process of raising issues to salience among the relevant community of actors'.[42] The decision-making system is inevitably influenced by the multiple perspectives these actors bring with them, and this multi-perspectivity will impact the agenda of the decision-making process. However, an actor can only influence a proceeding if that actor is granted access. Thus, setting the agenda is inextricably linked to exercising power: only actors who are allowed into a proceeding will be able to influence it. A case where experts are involved, where there are third-party interventions or *amicus curiae* briefs, will differ from a case where these stakeholders do not have the right to participate. In a sense, the different courts and tribunals set the agenda of a decision-making process by deciding in their constitutive

39 Samantha Besson and José Luis Martí, 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9 Jurisprudence 504, 504.

40 For a thorough analysis, see, e.g. Jean D'Aspremont, *Participants in the International Legal System - Multiple Perspectives on Non-State Actors in International Law* (Jean D'Aspremont ed, 2011).

41 Besson and Martí (n 39) 505.

42 Steven G Livingston, 'The Politics of International Agenda-Setting: Reagan and North-South Relations' (1992) 36 International Studies Quarterly 313, 313.

instruments, their rules of proceedings, and their case-law who is allowed to participate and how.

Although many judicial bodies do accept submissions by *amici curiae* and third-party interventions, the manner in which such actors may participate varies between courts.[43] The president of the ECtHR, for instance, can 'invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings'.[44] Similarly, the IACtHR, the WTO bodies, and the ICJ allow such participation of interveners who are not parties to the case at hand.[45] With regard to *amicus curiae*, it was held in an ICSID decision that

> 'The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.'[46]

Thus, ideally, such interventions assist the adjudicative bodies and help them conduct a better hearing. For instance, third-party interveners can supply a court with relevant material for the case. In *S. and Marper v. the United Kingdom*, for instance, the ECtHR agreed with the view held in a report on the forensic use of bioethics that the particular policy on DNA data retention at hand was indiscriminate in nature and amounted to an interference with the applicants' private life.[47]

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43 See Yen Chiang Chang, 'How Does the Amicus Curiae Submission Affect a Tribunal Decision?' (2017) 30 Leiden Journal of International Law 647, 648.

44 Art. 36(2) ECHR, as modified by Protocol No. 11 in 1998. Rule 44 of the Rules of Court of the ECtHR gives further guidance on third party interventions.

45 For a full analysis, see Philippe J Sands and Ruth Mackenzie, 'International Courts and Tribunals, Amicus Curiae' (January 2008) in Peters A and Wolfrum F (eds), *Max Planck Encyclopaedia of Public International Law* (online ed). Available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e8?prd=OPIL>, with the relevant rules and practices, last accessed on 12 July 2021.

46 ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina* (Order in Response to a Petition for Participation as Amicus Curiae, 2006) ICSID Case No. ARB/03/17, para.13.

47 ECtHR, *S. and Marper v. United Kingdom*, App nos 30562/04 and 30566/04, Judgment of 4 December 2008, para. 124. See also ECtHR, *D.H. and Others v. the Czech Republic*, App no 57325/00, Judgment of 13 November 2007.

However, interventions can also have negative effects such as lengthening a proceeding.[48] For instance, Nicaragua's intervention in the ICJ's decision in *El Salvador/Honduras (Nicaragua Intervening)* did complicate and lengthen the proceedings, in which it took the ICJ five years and nine months to deliver a judgment.[49]

Not only do such interventions influence the length of proceedings, they can influence the decision – as they are intended to – and, in turn, impact and shape international law. Quite far-reaching reactions can ensue when courts decide on politically charged and contentious cases. In the context of the ECtHR, for instance, cases related to the legality of abortion, same-sex marriage, and assisted suicide have attracted considerable attention because the Court's decisions have far-reaching effects.[50] In the ECtHR's famous *Lautsi* case – concerning the compulsory display of a crucifix in a public school, and thus the fundamental question of the relationship between state and church –, third-party interventions were submitted by ten Member States, ten NGOs, and 33 members of the European Parliament.[51] A court ruling will, thus, be influenced by the participants, and it has been recognised that third-party interveners can influence international law.[52] On the one hand, this allows civil society and any stakeholders and other affected entities to participate in the proceedings and to 'positively influence the Court's legitimacy'. On the other hand, states fear that their position and influence may be diluted by the

48 For a thorough analysis on lengthy proceedings before the ICJ, see DW Bowett and others, 'Efficiency of Procedures and Working Methods: Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law' (1996) 45 International and Comparative Law Quarterly.

49 ibid 21, n 36. The average case before the ICJ usually takes around four years; some cases have even been decided within a year, see The International Court of Justice: Handbook (2004), p. 50, available at <https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf>, last accessed on 12 July 2021, referencing ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council—Aerial Incident of 10 August 1999 (Pakistan v. India)* (Merits) [1972] ICJ Rep 1972, 46 and ICJ, *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Merits) [2009] ICJ Rep 2009, 3.

50 Nicole Bürli, *Third-Party Interventions before the European Court of Human Rights: Amicus Curiae, Member-State and Third-Party Interventions* (Intersentia 2017) 1.

51 ECtHR, *Lautsi and Others v. Italy*, App no 30814/06, Judgment of 18 March 2011, para. 8.

52 Bürli (n 50) 2.

demand for wider participation.[53] Thus, these different actors may have countervailing interests, making it essential that the interests of the parties, of third parties, and of the relevant court are balanced properly.[54]

In this sense, international courts can be viewed as 'organs of the value-based international community whose values and interests they are supposed to protect and develop': their decisions do affect not only the parties to a case but the international community as a whole.[55] An adjudicative body should keep in mind its adjudicative task and decide on a case-by-case basis whether participation by stakeholders other than the parties to the case is suitable and whether such interventions will have a positive impact on the decision-making process. Another important step in the decision-making process is the finding and assessment of facts. Thus in what follows, the process of fact-assessment in international adjudication will be considered.

3. *Defining Fact-Assessment*

One important function of international courts is to deliver binding decisions on questions of international law.[56] Thus, art. 38 ICJ Statute holds that the court's 'function is to decide in accordance with international law such disputes as are submitted to it'.[57] An adjudicative body can only reach such a decision if it can ascertain the relevant facts of the case; only then can the principles of law be adequately applied to the given factual situation. Before judicial fact-assessment occurs, usually some sort of fact-finding has already been conducted, for instance by fact-finding commissions or by NGOs.[58] However, these types of fact-finding are not the focus of this study; the discussion will instead pertain mostly to fact-finding or fact-assessment – these terms are used synonymously – by the judiciary. Fact-assessment is understood in this thesis as the judicial process in which

53 ibid.
54 Paolo Palchetti, 'Opening the International Court of Justice to Third States: Intervention and Beyond' (2002) 6 Max Planck Yearbook of United Nations Law 139, 175.
55 Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014) 46.
56 ibid 6–7. For their account on the multifunctionality of international adjudication, see 5pp.
57 Art. 38, Statute of the International Court of Justice.
58 Mégret (n 3) 27–28.

the facts are established and then classified as relevant or irrelevant by an international court for a given case that is being adjudicated.[59]

In the realm of international adjudication, there are many different approaches to fact-assessment. Most international bodies have their own set of rules that regulate their fact-finding and fact-assessment powers.[60] This means that there is no coherent framework as to how fact-assessment is to be conducted. On the one hand, the lack of a consistent approach to fact-assessment in the context of international law has been widely criticised.[61] On the other hand, it seems impossible to create a single coherent framework for how international judges are to conduct fact-assessment, given that the adjudicative bodies differ from each other in terms of their set-up and the area of law they focus on.

The International Court of Justice (ICJ) is the only active body in international adjudication that has general jurisdiction.[62] Other permanent tribunals have been established for specific areas of international law, such as the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court (ICC), and human rights courts. There are quasi-judicial bodies, *ad-hoc* tribunals, dispute settlement bodies and many other adjudicative bodies, all of which have their own approaches as to how they analyse facts and evidence and what functions the different actors have in the process.[63]

Fact-assessment in the different courts can also take different forms due to the specific characteristics of the area of law that they contend with. Fact-assessment in the realm of human rights will inevitably be different from fact-finding in trade law. Thus Philip Alston and Sarah Knuckey, for example, treat human-rights fact-finding as synonymous with investi-

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59 This will be the focus in Parts II and III.

60 For instance, Plant refers to the following provisions: 'ICJ—Statute of the International Court of Justice, arts. 43–54, ICJ Rules of Court (1978), arts. 9, 44–72, 101; ITLOS—Statute of the International Tribunal for the Law of the Sea, arts. 16, 26–28, ITLOS Rules of the Tribunal, arts. 15, 44–84 (especially 76–84); WTO—Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 11–13, apps 3 and 4; Permanent Court of Arbitration—Arbitration Rules 2012, arts. 17, 27–9; Iran–US Claims Tribunal, Rules of Procedure, arts. 15, 25, 27.', in Brendan Plant, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement' (2018) 28 Journal of International Dispute Settlement 464, 466.

61 Anna Riddell, 'Evidence, Fact-Finding, and Experts' (n38) 852, with further references.

62 ibid 850.

63 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38).

gation, documentation, and research.[64] In the WTO context, Michelle T. Grando equates the process of fact-finding with the process of proof.[65] She defines the process of fact-finding as

> '[t]he process through which a panel formulates its conclusions with respect to the facts of a case, that is, it is the process through which the facts of a case are established. In this regard, it is important to note that panels consider and establish facts against the background of a legal provision – ie a provision in the WTO agreements. […]'[66]

The Max Planck Encyclopaedia of Public International Law (MPEPIL) defines fact-finding as follows:

> 'Fact-finding' or 'inquiry' is a recognized form of international dispute settlement through the process of elucidating facts, given that it is the varied perceptions of these facts that often give rise to the dispute in the first place. […] Fact-finding is a process distinct from other forms of dispute settlement in the sense that it is aimed primarily at clarifying the disputed facts through impartial investigation, which would then facilitate the parties' objective of identifying the final solution to the dispute.'[67]

This definition treats fact-finding synonymously with 'inquiry' and 'the process of elucidating facts'. The practice of different international courts as to how they use their fact-finding or fact-assessment powers and how they approach this task is different, as will be shown in detail below. Despite these differences and nuances, what all these definitions have in common is that the elucidation of facts is seen as a process. For the purpose of this work, fact-assessment is also seen as a process. However, it will be viewed as a necessary step for a court to rule on a case, rather than a process that 'stands by itself'.[68] It is seen as a strategic practice that is embedded in the judicial procedure and aimed at producing truth claims that

64 Philip Alston and Sarah Knuckey, 'The Transformation of Human Rights Fact-Finding: Challenges and Oppotunities' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) 7.

65 Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) 9.

66 Grando (n 65)., p. 5.

67 Agnieszka Jachec-Neale, 'Fact-Finding' (March 2011) in Peters A and Wolfrum R *Max Planck Encyclopaedia of Public International Law* (online edn).

68 Mégret (n 3) 28.

add to the clarification of the dispute at hand.[69] Does this entail that the goal of fact-assessment by the international judiciary is the ascertainment of truth? One would be inclined to answer in the affirmative. However, as will be shown in the next section, a clear answer as to what the goal of international fact-assessment is, is not easily provided.

4. Goals of International Fact-Assessment

a. Ascertaining 'the Truth'?

The topic of truth has been one of the most central topics in philosophy.[70] Some of the most widely held views on this subject in modern philosophy are correspondence theories of truth, which require truth to reflect how reality actually is; coherence theories of truth, where truth is seen to cohere with a set of beliefs; pragmatist views that focus on what is practicable; constructivist theories that analyse how the world is interpreted and how these interpretations shape traditions and choices; and deflationist theories that do not give much significance to the concept of truth and rather raise the question of what it means to say that something is true.[71]

In a paper titled 'Rethinking Bias and Truth in Evidence-Based Health Care', Wieringa et al. apply philosophical concepts of truth to decisions in the health care sector. They discuss a theory of truth called the ideal limit theory, 'which assumes an ultimate and absolute truth towards which scientific inquiry progresses'.[72] The authors criticise this dominant way of conceptualising truth in the discourse and practice of evidence-based health care as being conceptually insufficient. They argue that this conception of truth does not ask the fundamental question of 'how truths differ from untruths (and what is the nature of the grey zone in the middle)' and that it wrongly assumes truth to be unproblematic and that the right decision will be made once biases have been removed. Such a conception puts constraints on any analysis of what 'good decision-making' in the clinical context entails.[73] The questions that are raised in the paper are

69 This definition is inspired by ibid 29.
70 See <https://plato.stanford.edu/entries/truth/>, last accessed on 12 July 2021.
71 Sietse Wieringa and others, 'Rethinking Bias and Truth in Evidence-Based Health Care' (2018) 24 Journal of Evaluation in Clinical Practice 930, 931.
72 ibid 930.
73 ibid 931.

highly relevant to international adjudication: how do truths differ from untruths in the context of international decision-making? How should we approach grey areas (which are extensive in legal decision-making)? And what is 'good decision-making' in this context?

The approach to ascertaining truth differs between common law systems and civil law systems. In common law countries, the truth is seen to lie somewhere in between the parties' submissions, with the national courts taking a more passive role, similar to that of a referee.[74] In these traditions, the procedures are adversarial: the lawyers have the most active role in questioning witnesses and presenting the evidence. The judges or juries analyse the versions of events presented by the prosecutor on the one hand and the defence on the other hand; by applying the relevant standard of proof, they then decide which version of the facts convinces them most.[75] In civil law countries, judges take a more active role in establishing the facts. Here, the procedures are inquisitorial: the judges question witnesses and are responsible for the discovery of the facts.[76] Albeit these approaches differ, Cesare Romano holds that at the national level, the purpose of a trial is to ascertain the truth, or at least to reach 'factually correct verdicts'. He contrasts this with the international realm, where 'the ultimate purpose of international adjudication is not establishing facts, or truths, or even "the truth", but rather to settle the dispute'.[77]

These points seem to indicate that, although at the national level the ascertainment of truth may be the primary goal of fact-assessment, at the international level, this is not the case. Several points support this position. First, the decisions of international courts and tribunals are usually final and without appeal.[78] It would, thus, seem too commanding to give them

74 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 849.

75 See the Research Project on 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' by Stephen Wilkinson, under the auspices of the Geneva Academy of International Humanitarian Law and Human Rights in close cooperation with Geneva Call, p. 17, available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf>, last accessed on 12 July 2021.

76 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 849.

77 Cesare PR Romano, 'The Role of Experts in International Adjudication' [2009] Legal Studies Paper No . 2011-04, Société française pour le droit international.

78 For instance, in the context of the ICJ: 'The ICJ is a court of first and last instance […]'. See Karin Oellers-Frahm, 'Article 92 UN Charter' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 178. See also the wording of art. 60 ICJ Statute: 'The judgment is final and without appeal.'

the monopoly on the last version of the truth. This ties in with the idea that international courts may be reluctant to enforce their version of the truth due to considerations of respect for the sovereignty of the litigating states and their version of the events.[79] Second, it may be more difficult or even impossible for international courts to ascertain 'the truth' given that by the time they do decide a dispute, often several years have passed since the events took place.[80]

Third, the absence of rigid rules on evidence in international adjudication may also reflect that the ascertainment of truth is not the prime goal of international fact-assessment.[81]

A fourth point is the level of complexity that cases have reached in modern times;[82] ascertaining 'the truth' may simply not be possible. Fifth, there is no rule in the international law of evidence that states that a court must ascertain 'the truth'. Given the increase in complexity of the cases and the fact that expert disagreement does exist, such a rule would seem unpracticable and undesirable. Thus, the ideal limit theory Wieringa et al.[83] deem insufficient in the context of evidence-based health care also seems unhelpful in the context of international legal decision-making. As truth does not seem to be the (only) goal of fact-finding, in what follows, other goals of fact-assessment will be discussed.

b. Other (Potentially Competing) Goals

Although fact-finding missions are not the focus of this study, looking at what goals they pursue is worthwhile because they illuminate one point that holds true for judicial fact-finding as well: fact-finding can have multiple goals, and these goals potentially compete with each other. In the 1991 UNGA Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security, the stated goals were to maintain international peace and security and to 'obtain detailed

79 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 851.
80 ibid.
81 Sandifer (n 1) 9. The quote from Sandifer was already reproduced above in the Introduction: 'no rule of evidence […] finds more frequent statement in the cases than the one that international tribunals are not bound to adhere to strict rules of evidence'.
82 Devaney (n 24) 6.
83 Wieringa and others (n 71) 930.

knowledge of the relevant facts'.[84] In other fact-finding missions as well, the ascertainment of facts alone was not the main goal. Rather, the tasks included 'determining state and individual responsibility for violations of international law, making recommendations regarding reform and reparations, and promoting accountability'.[85] These goals cannot all be attained at the same time, and again, certain goals will never be attainable due to limitations to human knowledge. Conflict resolution may be at odds with reconciliation, and the goal of 'finding the truth' can conflict with the aim to hold someone accountable as soon as possible. These examples show that considerations of efficiency might call for a 'quick fix' rather than lengthy procedures in certain cases – 'Who after all can wait for a trial to determine that genocide occurred?', as Frédéric Mégret asks.[86] Thus, there is a tension between the appeal to certainty and the 'need for actionable, real-time information'.[87]

In the context of the WTO dispute settlement system, potential goals are 'accuracy, participation impartiality, equality, good faith cooperation, the efficient use of resources (time and money), and the protection of confidential information'.[88] Again, these ideals cannot all be achieved simultaneously. Striving for a certain determination of the facts will inevitably conflict with the desire for an actionable and efficient solution to a case, and focusing on the protection of confidential information and privacy will inevitably prolong the process of adjudication. Thus if we acknowledge that goals and values can conflict, that there are limits to human knowledge, and that the existence of a dispute in itself reflects a non-ideal situation, the question becomes: what is an achievable goal under non-ideal circumstances?

c. Truth Founded on Evidence

Under the title 'the goals of legal adjudication', Michelle Grando writes that '[a]ccuracy, or the search for the truth is considered a – if not the – major objective of adjudication'.[89] However, can 'accuracy' and 'the search

84 UN GA Res. A/RES/46/59.
85 Shiri Krebs and others, 'The Legalization of Truth in International Fact-Finding' (2017) 211 Chicago Journal of Internadional Law 95–96.
86 Mégret (n 3) 27–28.
87 ibid.
88 Grando (n 65) 4.
89 ibid 10.

for the truth' really be used synonymously? I would argue that 'accuracy' is about 'conforming exactly to truth', as Merriam-Webster[90] defines it. And, as I have argued above, the exact truth will hardly ever be ascertainable. René Descartes wrote the following:

> 'It is very certain that, when it is not in our power to determine what is true, we ought to act according to what is most probable; and even although we should not remark a greater probability in one opinion than in another, we ought notwithstanding to choose one or the other, and afterwards consider it, in so far as it relates to practice, as no longer dubious, but manifestly true and certain, since the reason by which our choice has been determined is itself possessed of these qualities.'[91]

In a sense, this can be read as meaning that something can be considered true if the probabilities point in that direction. However, a certain qualifying element is required, one cannot simply arrive at qualifying something as 'true', rather, this decision-process must have certain qualities. What one ought to believe, according to the dominant view among philosophers, is what one can base on evidence. In other words, one only has good reason to believe something if this belief is based on evidence.[92] And as David Hume wrote in *An Enquiry Concerning Human Understanding*, '[a] wise man […] proportions his belief to the evidence'.[93] Thus, depending on the quality of the evidence, and on the requirements that are emphasised in the rules of evidence, a belief can have more weight or less; a belief may qualify as true or not; a decision reached may qualify as 'good' or not. What could these qualities be in international adjudication?

What truth is in international adjudication in the context of this thesis can be equated with what can meet the requirements under the laws of

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90 See <https://www.merriam-webster.com/dictionary/accurate>, last accessed on 12 July 2021.

91 René Descartes, *Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in the Sciences* (John Veitch trans., Cosimo Books 1st ed. 2008) (1924), 25; quoted in Makane Moïse Mbengue, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 53, 61.

92 For a discussion of evidentialism and pragmatism, see Miriam Schleifer McCormick, *Believing Against the Evidence: Agency and the Ethics of Belief* (Routledge 2015).

93 David Hume, *An Enquiry Concerning Human Understanding* (Oxford University Press 1902), L. A. Selby-Bigge (ed.), 110.

evidence, i.e. what can meet the standard of proof that is required in a given case. Acquiring evidence is not an exact science, and the results of any fact-finding process can vary and produce different results; sometimes the information obtained will be satisfactory, other times the information may be insufficient. Thus, the belief will have to be proportioned depending on the amount and quality of the information. In the context of reaching a conclusion in international adjudication, this can be translated as meaning the conclusion reached by an international court should reflect the specifics of the case and the quality of the evidence; the standard of proof and the attainment thereof being a qualifying element. There is not 'the truth', then, but rather a qualified truth that is considered true because there is evidence to support it, and that evidence is in turn considered evidence because the rules of evidence and fact-finding that are in place have been followed. If more evidence is produced or comes to light at a later point, the truth may change. Harking back to Descartes' quote above,[94] what is required is a qualification: not any fact will amount to truth; the process of fact-assessment and the rules of evidence must be followed, and if a statement is then deemed sufficient by the deciding court or tribunal, it can be qualified as true.

Truth can have different colours in international adjudication due to the fact that there are different standards of proof, as will be shown next.[95] The standard of 'proof beyond reasonable doubt' and that of 'preponderance of evidence' require different levels of certainty or different qualities of the information. In other words, not any submitted piece of information will qualify as proving something beyond reasonable doubt.

However, as will be shown in what follows, the rules of evidence and the rules as to how a court should conduct its fact-assessment procedures are quite scarce and leave the decision-makers with a lot of discretion. It, thus, is important to scrutinise the quality of fact-assessment procedures. It will be suggested in Part II that principles of scientific method can operate as 'qualifying elements' which will allow us to analyse and critique the fact-assessment procedure by the ECtHR in its jurisprudence. However, first, an overview will be provided of the rules of evidence that are in place, and a more detailed account will be given of the rules that guide the ECtHR.

94 Above at p. 19.
95 The standards will be discussed in detail below under I.5.b.iii.

5. Rules of Evidence in International Adjudication

The Max Planck Encyclopedia of Public International Law (MPEPIL) defines evidence as follows:

> 'Evidence in international adjudication embraces information submitted to an international court or tribunal by parties to a case or from other sources with the view of establishing or disproving alleged facts.'[96]

In his work on evidence-based jurisprudence, Hanjo Hammann equates the German term 'Evidenz' with knowledge of factual relationships, but only to the extent that such evidence is obtained through a systematic procedure of illustration or demonstration, not solely through introspection.[97] Thus, he emphasises the procedure of the obtainment of evidence and requires a certain level of objectivity in order for the factual basis to qualify as evidence. As Chester Brown rightly notes, evidence 'in itself is not a type of procedure; "evidence", properly understood, refers only to facts and opinions put before the court'.[98] This shows that, unlike fact-finding, evidence is not a process. Rather, evidence is (ideally) the outcome of the process or procedure of fact-finding. A proper administration of evidence requires rules on forms, standards, and burdens of proof, and on powers with regard to the gathering of facts.[99] Thus, in international adjudication, the emphasis is on the procedure of the gathering of information. If this procedure follows certain rules, the information may qualify as evidence.

As will be shown below, in international adjudication, the procedural aspects of who collects evidence and how it is assessed can vary between international courts or tribunals. The rules of the different courts, especially their rules of procedure, usually contain some provisions on evidence.

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96 See Rüdiger Wolfrum and Mirka Möldner, 'International Courts and Tribunals, Evidence' (August 2013) in Peters A and Wolfrum R (eds), *Max Planck Encyclopedia of Public International Law* (online edn), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e26>, last accessed on 12 July 2021.

97 Hanjo Hamann, *Evidenzbasierte Jurisprudenz* (Mohr Siebeck 2014) 3. In the original: 'Wissen über tatsächliche Zusammenhänge, und auch nur soweit es durch systematische Verfahren zur «Veranschaulichung» oder zum «Nachweis», und nicht allein durch Introspektion, gewonnen wird.'

98 Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2009) 84.

99 ibid 85.

a. The Powers of International Courts and Tribunals Regarding Evidence

Although there is no coherent framework with regard to evidence in the procedural laws of international tribunals, some rules can be found in the statutes and the rules of the courts and tribunals. In what follows, three roles or powers of international adjudicative bodies will be discussed: the power to require the parties to produce evidence; the power to conduct own investigations; and the power to consult experts.

i. Power to Order Parties to Produce Evidence

International adjudicative bodies can request the production of evidence.[100] This is a power that is closer to civil law procedure than to common law traditions. In common law countries, the production of evidence is mainly upon the parties. Although judges could request the production of further evidence, they seldom make use of this power. In the civil law systems, these powers tend to be used more extensively. A civil law judge will more often call for a further witness, take initiative on the examination of a witness, request an expert inquiry or inspection, or request that more documentary evidence be produced.[101]

The power of international adjudicative bodies to order the production of further information is conferred upon them in their constitutive instruments or rules of procedure.[102] This power to request is uncontroversial even in cases where an international court does not have an explicit power conferred to it in the relevant legal texts. The argument is that in order to fulfil their functions in the adjudicative process, international courts need to have some powers to obtain the evidence necessary to reach a conclusion.[103] However, it is somewhat controversial how far this power extends, i.e. whether international courts have the power to (coercively)

100 Sandifer (n 1) 154–163.

101 ibid 154–155.

102 For instance, for the ICJ, see arts. 34(2), 49 ICJ Statute and art. 62(1) ICJ Rules; for ITLOS, see art. 77 ITLOS Rules; for ICSID, see art. 43(a) ICSID Convention and Rules 34(2)-(3) and 37 ICSID Rules; in the WTO-Context, see art. 13(1) DSU; for the ECtHR, see art. 38(1)(a) ECHR and art. 42(1) of its Rules of Court; for the IACtHR, see art. 48 ACHR and art. 44(2) of its Rules of Procedure.

103 Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International 1996) 166.

demand the production of evidence and what the consequences are of a party's non-compliance if a court requests further evidence.[104]

There is wide consensus that a general obligation exists for parties in international litigation to produce evidence in their possession that is not available to the opposing party, even if the evidence might be adverse to that party's own interest.[105] As will be discussed in more detail below, it ordinarily is upon the party alleging a fact to introduce the relevant evidence to establish it.[106] However, as was held by the Mexico/U.S.A. General Claims Commission in *Parker v. Mexico*, even though this general rule does exist, it 'does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be'.[107] Other international tribunals have followed this rule,[108] and this 'duty of collaboration'[109] can be found in the constitutive instruments of some international courts and tribunals.[110] In the context of the WTO, a broad power to request information from the parties is given to the Panels in art. 13 of the DSU.[111] It provides Panels with the right 'to seek information and technical advice from any individual or body which it deems appropriate'[112] and to 'seek information from any relevant source'.[113] This investigative power is, thus, not limited to seeking scientific or technical advice or expert evidence.[114] Whether this right to seek information amounts to a binding power to compel the production of information is contested. Arguably, such a binding power has been established through judicial interpretation by the WTO's adjudicative bodies.[115] In *Argentina – Textiles and Apparel*, the Panel stated

104 Brown (n 98) 104.
105 Sandifer (n 1) 153.
106 See below, I.5.b.ii.
107 Reports of International Arbitral Awards, General Claims Commission, *Parker v. Mexico*, 4 RIAA 35, 39, para. 6 (US—Mexico GCC, 1926).
108 See, e.g. Reports of International Arbitral Awards, General Claims Commission, *Lillie S. Kling (USA) v. United Mexican States*, 4 RIAA 581–584 (US—Mexico CC, 1930); Reports of International Arbitral Awards, General Claims Commission, *Pinson v. Mexico*, 5 RIAA 411–414.
109 Devaney (n 24) 180.
110 See, e.g. arts. 86–87 Rome Statute and art. 24(3) Rules of Procedure of Iran-US Claims Tribunal.
111 Art. 13 DSU.
112 Art. 13(1) DSU.
113 Art. 13(2) DSU.
114 Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 International & Comparative Law Quarterly 325, 329.
115 Devaney (n 24) 181.

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'.[116] However, the extent of this obligation and the consequences of non-compliance are uncertain.[117] A literal reading of art. 13 DSU does not seem to impose a binding legal obligation upon parties to a dispute to comply with a Panel's request for information.[118] However, the Appellate Body's interpretation suggests otherwise: in its report on *Canada – Civilian Aircraft*, it held that a Panel is 'vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs'.[119] Furthermore, the Appellate Body interpreted art. 13 DSU as evoking a duty to comply with a Panel's request and held that if the right to seek information were not an enforceable one, this would 'reduce to an illusion' the Members' right to have disputes resolved.[120] Not everyone agrees with the AB's interpretation of art. 13(1) DSU.[121] Still, the AB's assertion of a power to compel did not provoke an outcry from the WTO Member States, and it has been suggested that the ICJ could achieve the same result through its case-law.[122]

The starting point for this discussion is art. 49 of the ICJ Statute, which reads as follows: '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.'[123] This article does not express a mandate to comply, as the ICJ can only 'call upon' the parties rather than 'demand' or 'compel' the production of evidence. The stated consequence of non-compliance is that the ICJ would take 'formal note', suggesting that the repercussions would not be that serious. Similar wording can be found in art. 77(1) of the ITLOS Rules and art. 43(a) ICSID Convention,

116 WTO, *Argentina: Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items–Report of the Panel* (25 November 1997) WT/DS56/R, p. 90, para. 6.40.
117 Brown (n 98) 105.
118 For an in-depth discussion on this issue, see Devaney (n 24) 184–187. See also Brown (n 98) 104–110.
119 WTO, *Canada: Measures Affecting the Export of Civilian Aircraft–Report of the Appellate Body* (2 August 1999) WT/DS70, para. 192 (emphasis in the original).
120 ibid, para. 189.
121 See Rambod Behboodi, '"Should" Means "Shall": A Critical Analysis of the Obligation to Submit Information Under Article 13.1 of the DSU in the Canada - Aircraft Case' (2000) 3 Journal of International Economic Law.
122 Devaney (n 24) 187.
123 Art. 49 ICJ Statute.

according to which parties can also be 'called upon' to produce evidence. These rules do not seem to imply that there is an obligation to cooperate; however, it is up to the relevant courts to interpret the rules in their case-law. It is possible for them to push in a similar direction as the adjudicative bodies have been doing in the WTO context. This was done by the ICSID Tribunal in *Biwater Gauff (Tanzania) Ltd v. Tanzania* where the Tribunal stated that the respondent state was under 'an international legal obligation' to produce the requested documents.[124] Compared to the WTO's adjudicative bodies, the ICJ has taken a more reactive approach to requesting information and has been criticised for under-utilising its power to request information under art. 49 ICJ Statute.[125] Judge Owada, in a dissenting opinion in the *Oil Platforms* case, criticised the Court for being too concerned about respecting the parties' sovereignty and being impartial, and argued for the Court to adopt a more active approach regarding issues of evidence and fact-finding.[126] It has been claimed that the ICJ's deferential and passive approach is 'a hindrance to the proper administration of justice'.[127]

The European Court of Human Rights has a basic adversarial set-up that is coined with strong investigative powers.[128] These powers are provided in art. 38 ECHR, which holds that '[t]he Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities'.[129] Rules 44A – 44C of the Rules of Court and the Annex to the Rules of Court include further details on the duties to cooperate.[130] Rule A1 of the Annex to the Rules of Court states that the Chamber may 'invite the parties to produce documentary evidence'.[131] In the case of *Shamayev v. Georgia and Russia*, the

124 ICSID, *Biwater Gauff (Tanzania) Ltd v. Tanzania*, (Procedural Order No. 2 of 24 May 2006) ICSID Case No. ARB/05/22, paras. 8–9.
125 Devaney (n 24) 188.
126 ICJ, *Oil Platforms (Islamic Republic of Iran v. US)* (Merits) [2003] ICJ Rep 2003, 161, Dissenting Opinion of Judge Owada at 321.
127 Devaney (n 24) 188.
128 Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals* (Nomos/Hart 2018) 449, n 55.
129 Art. 38 ECHR.
130 Rules 44A–44C of the Rules of Court. See also Alix Schlüter, 'Beweisfragen in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in Armin von Bogdandy and Anne Peters (eds), *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol Band 288 (Springer 2019) 69ss.
131 Rule A1, Annex to the Rules of Court.

Court held that there was a 'duty to cooperate with [the Court] in arriving at the truth'.[132] The refusal of the Russian Government to cooperate in this case amounted to 'accepting that those refusals obstruct the functioning of the system of collective enforcement established by the Convention'.[133] Furthermore, the Court held that '[i]n order to be effective, this system requires […] cooperation with the Court by each of the Contracting States'.[134] In the case of non-cooperation, and if the Contracting State cannot provide any 'convincing explanation for its delays and omissions in response to the Court's requests for relevant documents, information and witnesses'[135], the Court may draw inferences that can be to the detriment of the uncooperative government.[136] Adverse inferences may also be drawn in the context of the ICJ and the WTO if a party to a dispute does not submit the requested information.[137]

ii. Power to Conduct Own Investigations

International courts have powers to conduct investigations *proprio motu*, i.e. to gather information on their own initiative. The ICJ, for instance, has the power to 'make all arrangements connected with the taking of evidence' according to art. 48 of its Statute.[138] From their power to make own investigations, international tribunals can, for instance, arrange visits to the sites that are linked to the dispute.[139] Art. 44(2) of the ICJ Statute allows the Court to 'procure evidence on the spot'[140], meaning that the ICJ has the power to conduct on-site visits. ICSID tribunals also have an express power under art. 43(b) ICSID Convention to 'visit any place con-

132 ECtHR, *Shamayev and Others v. Georgia and Russia*, App no 36378/02, Judgment of 12 April 2005, para. 502. With further reference to ECtHR, *Artico v. Italy*, App no 6694/74, Judgment of 13 May 1980, para. 30.
133 ECtHR, *Shamayev and Others v. Georgia and Russia*, App no 36378/02, Judgment of 12 April 2005, para. 502.
134 ibid.
135 ECtHR, *Tepe v. Turkey*, App no 27244/95, Judgment of 9 May 2003, para. 135.
136 ECtHR, *Shamayev and Others v. Georgia and Russia*, App no 36378/02, Judgment of 12 April 2005, para. 503.
137 Pauwelyn (n 114) 329. E.g. Panels may, with reference to art. 13 DSU, draw adverse inferences.
138 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 855.
139 ibid. See, e.g. art. 81 ITLOS Rules of the Tribunal.
140 Art. 44(2) ICJ Statute.

nected with the dispute or conduct enquiries there'.[141] The ECtHR has the power to conduct investigations *proprio motu* under its Rules of Court.[142] The Annex to these Rules specifies in Rule A1(3) that the Chamber has the power to take evidence by delegating to one or more judges of the Court the task and responsibility of conducting an inquiry, which includes carrying out on-site investigations.[143] It has made use of these powers in a number of cases. In *Ilascu and Others v. Moldova and Russia*, for instance, a delegation of the ECtHR conducted an on-site investigation in March 2003.[144] The ITLOS, too, has the mandate to make site visits to gather information and evidence.[145] International tribunals that do not explicitly have this right in their constitutive instruments still have an inherent power to do so.[146] However, it is a power that is not used frequently.

The first time an international judge made a 'descente sur les lieux' was in 1896, when an arbitrator in the case of *Ben Tillett* visited a prison for several days in order to gather evidence.[147] The PCIJ conducted its first on-site investigation in the dispute between the Netherlands and Belgium before the PCIJ in 1937.[148] An occasion where the ICJ made a 'descente sur les lieux' was in the *Gabčíkovo-Nagymaros* case where Slovakia asked the Court to 'visit the locality to which the case relates' and 'to exercise its functions with regard to the obtaining of evidence'.[149] The judges visited various sites along the Danube and spoke to representatives (designated by the parties) who gave them explanations on the technicalities of the case.[150] In *El Salvador/Honduras*, the ICJ refused El Salvador's request to conduct an on-site visit.[151] Riddell suggests that this reluctance could be 'related to the rather antiquated view that the ICJ primarily decides disputes on the law,

141 Art. 43(b) ICSID Convention.
142 Rule 42(2) ECtHR Rules.
143 Rule A1(3) Annex to the ECtHR Rules of Court.
144 Press release issued by the Registrar, ECtHR, *Ilascu and Others v. Moldova and Russia*, App no 48787/99, available at <https://hudoc.echr.coe.int/eng-press#{"itemid":["003-1047258-3021881"]}>, last accessed on 12 July 2021.
145 Art. 81 ITLOS Rules.
146 Brown (n 98) 111.
147 ibid 111 with further reference in n 204.
148 JH Leurdijk, 'Fact-Finding: Its Place in International Law and International Politics' (1967) 14 Netherlands International Law Review 141, 143.
149 ICJ, *Gabčikovo-Nagymaros Project, (Hungary v. Slovakia)* (Order, Site Visit) [1997] ICJ Rep 1997, 3, para. 10.
150 ibid.
151 *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* [1992] ICJ Rep 361–2, para. 22.

not disputes based on complex facts'; it may also stem from potentially high costs and safety considerations.[152] Site visits were also proposed but then refused in the *South West Africa* case. Here, the ICJ acted under art. 48 of its Statute and deemed it unnecessary to comply with the request.[153]

What is the use of such on-site visits? Judge Schwebel held with regard to the *Gabčíkovo-Nagymaros* case that insights into the complexity of the case were gained that could not have been attained if the judges had remained in The Hague.[154] Thus, such visits can have an illustrative function that helps the Court understand the localities better, and this background information could be helpful to the understanding of complex facts.[155] Given that the complexity of the cases in the international realm is on the increase, conducting more on-site visits to improve the understanding of cases could make sense. However, as Devaney rightly notes, establishing a commission of experts might well prove more useful than having a bench of judges travel to a site.[156] This was done by the ICJ in the *Corfu Channel* case. Here, the Court sent experts to the site to gather additional evidence.[157] In the following section, this power to engage experts will be discussed in more detail.

iii. Power to Engage Experts

International adjudicative bodies often have the power to engage experts.[158] Since adjudicative bodies have expertise in their field of law but usually not in other (scientific) fields that may play a role in a case at hand, they are often given the right to seek information and ask for technical advice from experts to help them deal with complex factual questions.[159] They can request expert reports in cases where the parties submit large

152 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 855.
153 ICJ, *South West Africa (Ethiopia v. South Africa)* (Order of 29 November 1965) [1965] ICJ Rep 1965, 9.
154 Stephen Schwebel, 'A Site Visit of the World Court', *Justice in International Law: Further Selected Writings of Stephen M. Schwebel* (Cambridge University Press 2011) 96.
155 Devaney (n 24) 18.
156 ibid.
157 ICJ, *Corfu Channel Case (United Kingdom v. Albania)* (Merits) [1949] ICJ Rep 1949, 4, p. 21.
158 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 856.
159 See, e.g. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s6p1_e.htm>, last accessed on 12 July 2021.

amounts of complex technical and scientific material and appoint their own experts when needed.[160] Due to the rising number of highly complex cases, it has become more common for parties to submit expert evidence to international courts. Such party-submitted evidence can put the court into a difficult position if the expert reports conflict.[161] Notably, experts may disagree even though they base their findings on the same factual data.[162] In the WTO's *US – Shrimp* case, there was expert disagreement on issues regarding sea turtle biology because there was only 'limited to anecdotal information', which lead to confusion 'or even disagreements in some of the documents'.[163] The expert evidence submitted by the parties can also be criticised as being biased because it is difficult not to see such party-experts as 'hired guns'.[164] International courts themselves will often not be in a position to assess the submitted expert material; thus, the power of courts and tribunals to appoint their own experts who help them assess this evidence but do not have a right to vote becomes all the more important.[165]

The power to appoint experts is often explicitly provided for in the constitutive instruments of international courts and tribunals. For instance, UNCLOS provides this right in art. 289 for disputes 'involving scientific or technical matters',[166] and the UNCITRAL Arbitration Rules provide that 'after consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal'.[167] Art. 13(1) DSU provides a Panel with the power 'to seek information and technical advice from any individual or body which it deems appropriate', and under art. 13(2) Panels may 'seek information from any relevant source and consult experts to obtain their opinion on certain aspects of the matter'.[168] Similarly,

160 Brown (n 98) 112–113.
161 ibid 113. See, e.g. ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] ICJ Rep 1962, 6, Dissenting Opinion of Judge Wellington Koo, para. 51, p. 99, who refers to the 'conflicting character of the two expert recommendations' as presenting a 'perplexing problem'.
162 ibid.
163 Dr. Eckert in WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products–Report of the Panel* (6 November 1998) WT/DS58/23, para. 9 at p. 361.
164 Pauwelyn (n 114) 334.
165 See, e.g. art. 289 UNCLOS and art. 30(2) ICJ Rules.
166 Art. 289 UNCLOS.
167 Art. 29(1) UNCITRAL.
168 Art. 13(1) DSU.

the ICJ may 'entrust any individual, body, bureau, commission, or other organisation that it may select, with the task of carrying out an enquiry or giving an expert opinion'.[169] These provisions show that the powers of international adjudicators range from appointing their own independent experts to give evidence, to inviting them to sit on the tribunal throughout the proceedings (without having a vote), to commissioning expert investigations.[170] In the EU, too, there is a tendency to involve experts in decision-making.[171] The ECJ has an explicit power to commission an expert report under art. 22 ECJ Statute,[172] and for instance in the European Food Authority, scientists also play an important role.[173]

How frequently these powers are used varies from court to court. The ICJ, for instance, only rarely makes use of it. In *Gulf of Maine*, the Court appointed an expert to help determine the maritime boundary after Canada and the US specifically requested it to do so.[174] In *Corfu Channel*, the ICJ appointed experts to conduct on-site visits and to collect and evaluate the evidence[175] and employed experts 'on account of the technical nature of the questions involved in the assessment of compensation' due to the UK.[176] Very recently, in the *Armed Activities on the Territory of the Congo (DRC v. Uganda)* case, the ICJ arranged for an expert opinion on the question of reparations.[177] In other instances, however, the ICJ refused to appoint experts. In *Nicaragua*, the Court considered that an enquiry according to art. 50 of its Statute would be neither practicable nor desirable.[178] In the *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)* the Court did appoint experts; however, it did so under the Special

169 Art. 50 ICJ Statute.
170 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 857.
171 Pauwelyn (n 114) 327.
172 Art. 22 ECJ Statute; see also art. 22 EFTA Statute, art. 23 Euratom Statute, and art. 25 ECSC Statute.
173 See <http://www.efsa.europa.eu/en/science/scientific-committee-and-panels>, last accessed on 12 July 2021.
174 The technical expert was nominated jointly by the parties, see art. II(3) of the Special Agreement of 25 November 1981, ICJ, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. US)*.
175 ICJ, *Corfu Channel (United Kingdom v. Albania)* (Special Agreement concluded on 25 March 1948) at pp. 142–162.
176 ICJ, *Corfu Channel (United Kingdom v. Albania)* (Assessment of Compensation) [1949] ICJ Rep 1949, 244, at pp. 258–260.
177 Justine N Stefanelli, 'ICJ Arranges for Expert Opinion on Reparations in DRC v. Uganda' (*American Society of International Law, International Law in Brief*).
178 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 1986, 14, para. 61.

Agreement between the parties and its right to make orders under art. 48 of the ICJ Statute rather than under art. 50. It has been criticised for this reluctance. For instance, in *Temple of Preah Vihear (Cambodia v. Thailand)* Judge Wellington Koo, in his dissenting opinion, stated that due to the technical character of the case, the Court would have been 'well advised under Articles 44 and 50 of the Statute, to send its own expert or experts to investigate on the spot and make a report of their observations and recommendations, as was done in the *Corfu Channel* case'.[179] Why the Court shows such a reluctance in its use of its powers under art. 50 ICJ Statute is unclear.[180] In *Pulp Mills on the River Uruguay*, an ad hoc judge suggested that this reluctance may be due to the Court's fear of additional investigations delaying proceedings.[181] Riddell suggests that another possible explanation could be that international courts do not want to delegate because such delegation of a judicial function may be perceived as undermining the legitimacy of the decision. Furthermore, using independent experts causes additional costs that the tribunal has to cover if it appoints experts *proprio motu* rather than leaving the appointment to the parties.[182]

In comparison to the ICJ's practice, WTO Panels have made use of their power to appoint experts more frequently. Their power under art. 13 DSU is reinforced in art. 11(2) SPS Agreement and art. 14(2), 14(3) and Annex 2 of the TBT Agreement.[183] Where experts have been consulted, their opinion has had a clear impact on the Panels' decisions.[184] The Panels have used their consultation powers in cases that involved complex scientific and technical evidence,[185] but also when expert translating skills were

179 ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] ICJ Rep 1962, 6, Dissenting Opinion of Judge Wellington Koo, para. 55. Similarly, ICJ, *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* (Merits) [1999] ICJ Rep 1999, 1045, Separate Opinion of Judge Oda at para. 6; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 1986, 14, Dissenting Opinion of Judge Schwebel at para. 134.

180 Devaney (n 24) 22.

181 ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Merits), [2010] ICJ Rep 2010, 14, Dissenting Opinion of Judge *ad hoc* Vinuesa, p. 281, at para. 95.

182 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 857.

183 See also arts. 19(3), 19(4) and Annex 2 of the Agreement on Implementation of Article VII of GATT 1994 and arts. 4(5) and 24(3) of the SCM Agreement.

184 Grando (n 65) 340.

185 See, e.g., WTO, *Japan: Measures Affecting the Importation of Apples–Report of the Panel* (10 December 2003) WT/DS245/R, paras. 6.1–6.194 and WTO, *Australia:*

required.[186] The opinion of the experts is not binding on the Panel.[187] Still, in many cases, Panels have decided to give much weight to the expert analysis.[188]

The European Court of Human Rights also has the power to hear experts if their statements seem likely to assist in clarifying the facts of a case according to Rule A1(1) Rules of Court, Annex to the Rules. Paragraph 2 of the same provision allows the Chamber to 'ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case'.[189] The practicalities and technicalities of expert participation are detailed in Rules A5–A8 of the Annex to the Rules of Court.[190] Although the ECHR does not include any provisions regarding the format in which, e.g., forensic-science findings should be reported, procedures regarding the appointment of experts must conform with art. 6(1) ECHR: the Court must assess whether the right to a fair trial was respected.[191] In the ECtHR's case-law, it has been recognised that a lack of neutrality on the part of an expert may give rise to a breach of the principle of equality of arms under art. 6 ECHR.[192] An expert's procedural position and his or her role in the proceedings must be taken into account.[193] In cases where an expert reports on highly technical issues that are outside the judges' knowledge, the judges' assessment of the facts will be highly influenced by the expert.[194] In such a case, an expert report

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Measures Affecting the Importation of Salmon–Recourse to Art. 21.5 by Canada–Report of the Panel (18 February 2000) WT/DS18/RW; Brown (n 98) 115 n 230.

186 WTO, *Japan: Measures Affecting Consumer Photographic Film and Paper–Report of the Panel* (23 April 1998), paras. 1.8–1.11.

187 Grando (n 65) 340. Grando also mentions the exception to this rule on p. 340, n 488: thus, in certain cases, a panel may be obliged to accept expert conclusions.

188 ibid.

189 Rule A1 ECtHR Rules of Court, Annex to the Rules (concerning investigations).

190 See also Caroline E Foster, 'Court-Appointed Experts' (February 2019) in Ruiz-Fabri H (ed), *Max Planck Encyclopaedia of Public International Law* (online edn).

191 Joëlle Vuille, Luca Lupària and Franco Taroni, 'Scientific Evidence and the Right to a Fair Trial under Article 6 ECHR' (2017) 16 Law, Probability and Risk 55, 55.

192 ECtHR, *Placì v. Italy*, App no 48754/11, Judgment of 21 January 2014, para. 74.

193 See, e.g., ECtHR, *Sara Lind Eggertsdóttir v. Iceland*, App no 31930/04, Judgment of 5 July 2007, para. 47.

194 For an in depth analysis of the role of experts in judicial procedures, see Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press 2008).

constitutes 'an essential piece of evidence and the parties must be able to comment effectively'.[195]

In sum, there seems to be a general consensus in the literature that the power to appoint experts is an inherent one and that international adjudicatory bodies have the right to consult with experts even if they are not expressly permitted to do so in their rules.[196]

Now that the basic powers of the international adjudicative bodies with regard to evidence have been established, the next step is to ask what basic concepts apply in this context. Before a court can analyse the evidence, it must first assess whether the evidence is admissible. Then, the court will decide who bears the burden of proof and whether the bearer of this burden meets the applicable standard of proof. Thus, in the following, these basic concepts will be discussed.

b. Basic Concepts

i. Admissibility of Evidence

International courts' approach to the admissibility of evidence is quite similar to that of civil law systems. Whilst common law systems are restrictive with regard to the admission of evidence but less strict in their rules regarding the weight and probative value they attribute to the different forms of evidence (e.g. oral and documentary), civil law systems have less exclusionary rules for the admission stage, but are stricter about the weight they attach to different forms of evidence. In civil law systems,

195 Guide on Article 6 European Convention on Human Rights, Right to a fair trial (civil limb), updated on 30 April 2019, p. 68/97 available at <https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf>, with reference to ECtHR, *Mantovanelli v. France*, App no 21497/93, Judgment of 18 March 1997, para. 36; and ECtHR, *Storck v. Germany*, App no 61603/00, Judgment of 16 June 2005, para. 135.

196 See Christian J Tams, 'Art. 50' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 1289. Agreeing with this position, see Gillian M White, *The Use of Experts by International Tribunals* (Syracuse University Press 1965) 73. However, Sandifer considered that 'it is to be doubted whether an international tribunal has the power to appoint a commission of inquiry in the absence of a specific grant of authority in the arbitral agreement', see Sandifer (n 1) 329.

documentary evidence is preferred over the oral testimony of witnesses, which is deemed 'untrustworthy'.[197]

Along the civil legal systems' lines, international courts are restrictive with regard to the types of evidence they deem admissible: 'evidence in written form is the rule and direct oral evidence the exception'.[198] But with regard to the admission of evidence, the rules are generally not restrictive.[199] The idea behind a more flexible approach to the admissibility of evidence is that an international tribunal should have free discretion in estimating the value of the parties' submissions, and to this end, it must be able to consider 'all the evidence and all the assertions made on either side'.[200] The principle of free assessment of evidence is also reflected in the ICJ's statement in the *Nicaragua* case where it held that 'within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence'.[201] The ECtHR also adopts a flexible approach and has stated that it is 'entitled to rely on evidence of every kind […] in so far as it deems them relevant […]'.[202] As was held in *Nachova and Others v. Belgium*,

> '[i]n the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions.'[203]

If the general principle is that international courts enjoy wide discretion in their assessment of the evidence, the next question is: when can a fact that is brought before a court be regarded as proven?

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197 Brown (n 98) 89–91.
198 Sandifer (n 1) 3.
199 Brown (n 98) 91.
200 PCA, Reports of International Arbitral Awards, *Island of Palmas* 2 RIAA 829, 840–841 (US-Netherlands, PCA, 1928). See also ibid 91, n 50.
201 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 1986, 14, para. 60.
202 ECtHR, *Ireland v. the United Kingdom*, App no 5310/71, Judgment of 13 December 1978, para. 209.
203 ECtHR, *Nachova and Others v. Bulgaria*, App no 43577/98, Judgment of 6 July 2005, para. 147.

ii. The Burden of Proof

In order to answer the question as to when a fact can be regarded as proven, one must first identify the party who bears the burden of proof, i.e. who carries 'the onus of proving an assertion made in judicial proceedings'.[204] International procedure is, again, closer to civil law proceedings. Unlike in common law systems, the concept of the burden of proof is not subdivided into the burden of persuasion and the burden of going forward, nor is there a procedural motion to challenge the sufficiency of evidence.[205] Furthermore, a clear claimant/respondent distinction is not always possible in the international sphere.[206]

As a general principle in international procedures, the party who asserts a fact bears the burden of providing the proof for the assertion (*actori incumbit probatio*).[207] If the asserting party fails to provide sufficient evidence and thus fails to persuade the court, the decision will be unfavourable to the party bearing the burden of proof.[208] A second general principle that applies in international adjudication is that the party who invokes an exception to a general rule bears the burden of proof.[209]

Although nuances may exist in the way and the degree to which the rule of *actori incumbit probatio* is applied, most adjudicative bodies have applied it consistently. This holds true for tribunals such as the ICSID and the WTO Panels and Appellate Body, the PCIJ, the ICJ, and also for human rights bodies.[210] The ICJ famously held in its *Nicaragua* case that

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204 Brown (n 98) 92.

205 Grando (n 65) 80. For more on the differences between common law and civil law systems, see ibid, 74ss and Kazazi (n 103) 23ss.

206 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 546.

207 Kazazi (n 103) 85.

208 Grando (n 65) 81.

209 Devaney (n 24) 144.

210 See Anna Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 858–856, n 51–54. For the ICSID, see e.g. ICSID, *Plama Consortium Ltd v. Bulgaria* (Decision on Jurisdiction of 8 February 2005) ICSID Case No. ARB/03/24, paras. 118–20, 167; UNCITRAL, *Canfor Corporation v. US* (Order of the Consolidation Tribunal of 7 September 2005), para. 93. For the WTO, see e.g. *European Communities: Tariff Preferences–Report of the Appellate Body* (20 April 2004) WT/DS246/AB/R., paras. 87–8. For the PCIJ, see, e.g. PCIJ, *Legal Status of Eastern Greenland*, PCIJ Series A/B No. 53, 1933, at 49, paras. 100–1; PCIJ, *SS Lotus*, PCIJ Series A No. 9, 1927, at 18; PCIJ, *Mavrommatis Jerusalem Concessions*, PCIJ Series A No. 5, 1925, at 6. For the human rights context, see, e.g. HRC, *Bordes and Temeharo* (1996)

ultimately, 'it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible in limine on the basis of an anticipated lack of proof'.[211] This rule has even found its way into a legal code; the Rules of the Iran–US Claims Tribunal hold in art. 24(1) that '[e]ach party shall have the burden of proving the facts relied on to support his claim or his defence'.[212]

The burden of proof has a slightly different role in international human rights tribunals. Here, there usually is no onus of proof on any particular complainant.[213] The ECtHR, for instance, applies quite a flexible approach as regards questions of proof; it held in *Ireland v. the United Kingdom* that 'the Court examines all material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*'.[214] Whilst an applicant does bear an initial burden of proof in the sense that they have to make a *prima facie* case that is accepted by the court, once the court has accepted a case, the burden of proof falls onto the respondent government. It is then up to the state concerned to prove that it did not commit the alleged human rights infringement or that the actions in question were justified.[215]

Given that a clear applicant/respondent distinction is not always possible in international cases, where the parties present competing claims, the burden is on both of them to prove their claim accordingly.[216] According to Chittharanjan Felix Amerasinghe, the ability to determine who bears the onus 'is an inherent power which is essential for the proper function-

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HRC Decision No. 645/1995, para. 5.5 and the IACtHR, *Velásquez Rodriguez* (Reparations and Costs) [1989] 28 ILM 291, at 315.

211 *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment on Jurisdiction and Admissibility) [1984] ICJ Rep 1984, 392, para. 101.

212 Art. 24(1) Iran-US Claims Tribunal Rules.

213 Bertrand G Ramcharan, *International Law and Fact-Finding in the Field of Human Rights* (Bertrand G Ramcharan ed, 2nd edn, Brill Nijhoff 2014) 61.

214 ECtHR, *Ireland v. the United Kingdom*, App no 5310/71, Judgment of 13 December 1978, paras. 160–161.

215 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 859.

216 This was the case, e.g. in the ICJ's case *Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] ICJ Rep 1962, 6, Dissenting Opinion of Judge Wellington Koo, at 15.

ing of international tribunals'.[217] Chester Brown notes that courts will be reluctant to decide who bears the burden in cases where the evidence is competing.[218] Still, courts will have to determine pragmatically – in some way or another – who bears the burden of proof.[219] This requires the courts to ascertain which party is relying on which facts and whether the evidence produced meets the required standard of proof.

iii. Standard of Proof

Closely linked to the burden of proof is the standard of proof. It determines whether the burden of proof was met.[220] It is 'the measure against which the value of each piece of evidence as well as the overall value of the evidence in a given case should be weighed and determined'.[221] In international law, there are no rigid rules on the standard of proof.[222] This flexible approach is reflected in a statement made by the IACtHR in the famous *Velásquez Rodríguez* case: 'international jurisprudence has recognised the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment'.[223] In *US – Shirts and Blouses*, the Appellate Body of the WTO held that:

> 'in the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.'[224]

Thus, there are no clear rules and no uniform standard of proof that applies to all cases. The difficulty in pinning down the concept of the

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217 Chittharanjan Felix Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005) 75.
218 Brown (n 98) 97.
219 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 859.
220 Kazazi (n 103) 323.
221 ibid.
222 Brown (n 98) 98.
223 IACtHR, *Velásquez Rodríguez* (Merits) [1988] 95 ILR 259, referring to the ICJ's *Corfu Channel* case and *Nicaragua*. See ibid 98, n 109.
224 WTO, *United States: Measures Affecting Imports of Woven Wool Shirts and Blouses from India–Report of the Appellate Body* (23 May 1997) WT/DS33/AB/R and Corr. 1, at 335.

standard of proof stems from the different approaches that are adopted in common versus civil law systems.[225] In common law traditions, usually two standards of proof are applied: in civil law cases, there is the standard of 'preponderance of evidence' (or 'balance of probabilities'), whereas in criminal law cases, the standard of proof 'beyond reasonable doubt' is required.[226] The approach is different in civil law countries. In this legal tradition, the key question is whether the judge is convinced or persuaded by the presented evidence or not; it is about the 'inner, deep-seated, personal conviction of the Judge'.[227] However, although the common law approach may appear to be more objective and clear, there still exists a degree of subjective weighing on the judge's part if the evidence from one party has to be weighed against the evidence presented by the other party.[228]

What, then, is an acceptable standard of proof before international tribunals? The issue is that the judgment as to what is acceptable or sufficient will vary from one person to another, it is 'discretionary and subject to human judgment'.[229] Chester Brown identifies five different standards that have been applied in international proceedings: the 'requirement to show prima facie evidence', the proof of facts 'beyond reasonable doubt', 'proof in a convincing manner', the 'preponderance of evidence' (or 'balance of probabilities'), and the judiciary's own evaluation of whether the presented evidence meets the standard of 'sufficient evidence'.[230] Whether these are all distinct standards that can be clearly distinguished from each other is debatable. Mojtabar Kazazi, for instance, only lists three benchmarks: prima facie evidence, proof beyond reasonable doubt, and preponderance of evidence.[231] These are also the three standards that Joost Pauwelyn distinguishes in a more recent analysis of questions of proof in international law.[232] Thus, in line with Kazazi and Pauwelyn, in the following, the focus will also be on these three standards. What can be said is that the highest

225 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 860.
226 ibid.
227 Kevin M Clermont and Emily Sherwin, 'A Comparative View of Standards of Proof' (2002) 50 American Journal of Comparative Law 243, 243.
228 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 860–861.
229 Kazazi (n 103) 325.
230 Brown (n 98) 100–101.
231 Kazazi (n 103) 344.
232 Joost Pauwelyn, 'Defenses and the Burden of Proof in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions and Defences in International Law* (Oxford University Press) 4.

standard is the requirement of proof 'beyond reasonable doubt' while the standard of 'prima facie evidence is the lowest.

(1) Prima Facie Evidence

The lowest degree of proof is, arguably, the standard of 'prima facie evidence'. It is questionable whether it even constitutes a standard of proof in its own right, or whether it is a concept that is just very much entangled with other concepts such as the questions pertaining to the admissibility of a case, the use of presumptions, the shifting of the burden of proof, and the overarching question of what constitutes sufficient evidence. For instance, Kazazi writes that '[i]n international procedure the question of whether prima facie evidence is acceptable as a standard of proof sometimes appears in the guise of the question whether the probative value of the evidence adduced in a given case is sufficient for it to be considered prima facie evidence.'[233] Looking at this sentence, one might ask what the difference is between the standard of 'prima facie evidence' and the question of what constitutes 'sufficient evidence'. According to Kazazi, the question is 'whether the evidence in question is sufficient for it to be accepted *prima facie*'.[234] However, would that not be a question concerning admissibility rather than a question pertaining to the relevant standard of proof? This also seems to follow from, e.g., statements made by the ILO and the European Commission of Human Rights: if no *prima facie* case was made, or if the applicants failed to provide *prima facie* evidence, an application may not be further pursued by the ILO or may be rejected by the Commission.[235] Grando, in her analysis of the WTO, mentions the idea of *prima facie* evidence as an 'initial standard of proof'.[236] However, what the distinction is – if there is any – between an 'initial standard of proof' and questions of admissibility seems questionable.

Yuval Shany points out that '[i]nstances of prima facie incompatibility with the governing legal text or lack of factual substantiation represent one set of situations in which international courts may sometimes invoke

233 Kazazi (n 103) 336.
234 ibid.
235 ibid 328.: Kazazi refers to ILO and Commission in n 13 and 14.
236 Grando (n 65) 118.

questions of merit in the jurisdictional phase of the proceedings'.[237] Thus, arguably, questions pertaining to 'prima facie' can be situated between the admissibility and the merits phase of a ruling. For instance, the ECtHR can decide that a case is inadmissible under art. 35 ECHR if it deems a claim 'manifestly ill-founded'. This is a conclusion on a matter of substance.[238] Thus, one might argue that 'prima facie' analyses may serve as a tool to discuss substantive rights before the merits stage.

In the literature, *prima facie* evidence is also mentioned in connection to presumptions and the shifting of the burden of proof.[239] Chester Brown discusses the *prima facie* case rule under the title of the burden of proof and the shifting thereof. He quotes the Appellate Body stating in *Japan – Apples* that:

> 'It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof.'[240]

Thus, in his view, having to establish a fact on a *prima facie* basis is not the same thing as having the obligation to establish a fact upon which one wants to base a claim. However, what happens once a *prima facie* case has been made? Does the burden then automatically shift onto the other party to the dispute? The case-law of the WTO seems to indicate that such a shift does take place and that the respondent party has to rebut the claim that was established *prima facie*.[241] However, whether a 'real' shift of the burden of proof really does take place in these cases is highly debated.[242] Even if one argued that the burden does shift onto the other party, the question

237 Yuval Shany, *Questionsof Jurisdiction and Admissibility before International Courts* (Cambridge University Press 2016) 91–92. With references to the Behrami and Bankovic cases.

238 ibid 93.

239 This is the case, for instance, in the context of the WTO: see, e.g. the analysis by John J Barceló III, 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement' (2009) Paper 119 Cornell Law Faculty Publications.

240 Brown (n 98) 97; (references omitted).

241 See, e.g. WTO, *United States: Measures Affecting Imports of Woven Wool Shirts and Blouses from India–Report of the Appellate Body* (23 May 1997) WT/DS33/AB/R and Corr. 1, at 14 and WTO, *European Communities: Measures Concerning Meat and Meat Products (Hormones)–Report of the Complaint by Canada* (13 February 1998) WT/DS48/R/CAN, para. 9.264.

242 Grando (n 65) 120ss.

becomes whether such a shift also relieves the asserting party from the burden of proof. In the context of the WTO, Joost Pauwelyn argues that such a relief does not take place. He states that despite the French translation of 'prima facie' in official WTO reports being '*un commencement de preuves*', in his opinion, 'it is hard to imagine that a mere scintilla of evidence or mere *prima facie* evidence would be enough not just to shift the burden of production (that may well be the case) but also to formally discharge the real burden of proof or persuasion'.[243]

Much confusion thus persists around the concept of *prima facie* evidence. The Oxford Handbook[244] does not mention a 'prima facie' standard in its discussion of evidence and the standards of proof. And in Brown's analysis,[245] *prima facie* evidence is discussed before 'standard of proof'; in fact, he discusses prima facie under the title of 'burden of proof'. One could argue that *prima facie* is a threshold requirement; something that has to be discussed even before the burden or standard of proof can apply. Only if there is a *prima facie* case of a violation or infringement of a right does the burden of proof have to be determined more precisely. If no *prima facie* case is established, the case will be dismissed. What seems uncontroversial still is that the party asserting a fact must establish it. Thus, on a *prima facie* basis, the party who wants to bring a case must 'make the first move'.

(2) Preponderance of Evidence

The 'preponderance of evidence' standard is a mid-range standard of proof adopted from the common law tradition.[246] This standard has been interpreted as 'meaning that the party having the burden of persuasion on a proposition must prove that the proposition is "more probably true than false." It is also said that the "weight" or "convincing force" of the evidence in favour of the proposition must be "greater than" the weight of evidence tending to establish the assertion's falsehood.'[247] In other words, preponderance of evidence means that one party succeeded in presenting

243 Pauwelyn (n 232) 24.
244 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38).
245 Brown (n 98).
246 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 861.
247 Vern R Walker, 'Preponderance, Probability and Warranted Factfinding' (1996) 62 Brooklyn Law Review 1075, 1076, references ommitted.

evidence outweighing that presented by the other party.[248] The rationale behind such a mid-range standard is that in certain cases, an exact standard of proof could never be met; the level of absolute certainty will often be impossible to reach, and without a mid-range standard, the party bearing the burden of proof would always be disadvantaged as any doubt would lead to a decision in favour of the opponent.[249] More broadly speaking, it would seem unfair to require a high standard in cases where such a standard is impossible to attain.

But where is this threshold for an assertion to be more probably true than not? Some argue that this should be a statistical calculation, based on a cardinal scale between 0 and 1, in which the threshold of preponderance of evidence would be at 0.5.[250] But there is much discussion as to how high the required probability should be and whether this should vary from one case to another, for instance taking into account what is at stake. Thus, 'a higher degree of probability within the more probable than not range' would be required for claims of greater gravity.[251] Do these considerations and possible calculations really lead to more clarity or a clearer standard of proof? Grando argues that the standard of 'preponderance of evidence' provides less room for the judiciary to exercise discretion. However, a certain margin of discretion does remain. 'When applying this standard the adjudicator determines whether a certain proposition is more probable than not on the basis of her assessment of the evidence, that is to say, the adjudicator does not apply a mathematical formula which yields an exact probability of the occurrence of the fact at issue.'[252] Whatever formula one wants to apply, the standard of 'preponderance of evidence' seems closest to what Descartes required. Let me quote him again here:

> 'It is very certain that, when it is not in our power to determine what is true, we ought to act according to what is most probable; and even although we should not remark a greater probability in one opinion than in another, we ought notwithstanding to choose one or the other, and afterwards consider it, in so far as it relates to practice, as no longer dubious, but manifestly true and certain, since the reason

248 Kazazi (n 103) 349.
249 Grando (n 65) 138–139.
250 Walker (n 247) 1076.
251 Grando (n 65) 140.
252 ibid 138.

> by which our choice has been determined is itself possessed of these qualities.'[253]

Thus, harking back to the above discussion of truth, this standard seems to most reflect that 'the truth' is hardly ever attainable and that, therefore, we need a standard that allows a situation of imperfect information to be resolved. It also allows a case to be resolved if a party fails to cooperate. For instance, in *Trepashkin v. Russia (No. 2)*, there was much disagreement between the parties 'as to many aspects of the physical conditions of the applicant's detention' and with regard to the manner and condition in which the transport of the applicant to and from prison had taken place.[254] The Court decided that it was not necessary to ascertain whether each statement and allegation was true, and primarily based its factual conclusions on the standard of preponderance of evidence because the specific context of the case, i.e. a complaint with regard to prison conditions, allowed to Court to deviate from its 'go-to' standard of 'beyond reasonable doubt'. It held that

> 'In such cases the Court may draw adverse inferences from the Government's failure to produce sufficient evidence or explanations, and decide on the basis of preponderance of evidence.'[255]

(3) Beyond Reasonable Doubt

This standard places a high burden onto the parties and has not often been invoked in international contexts.[256] It is applied by criminal courts in common law jurisdictions.[257] At least in some cases, international

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253 René Descartes, *Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in the Sciences* (John Veitch trans., Cosimo Books 1st ed. 2008) (1924), 25.

254 ECtHR, *Trepashkin v. Russia (No. 2)*, App no 14248/05, Judgment of 16 December 2010, para. 107.

255 ibid. With further references to ECtHR, *Kokoshkina v. Russia*, App no 2052/08, Judgment of 28 May 2009, para. 59; and ECtHR, *Ahmet Özkan and Others v. Turkey*, App no 21689/93, Judgment of 6 April 2004, para. 426; see also ECtHR, *Gultyayeva v. Russia*, App no 67413/01, Judgment of 1 April 2010, para. 151.

256 Riddell, 'Evidence, Fact-Finding, and Experts' (n 38) 861.

257 Kazazi (n 103) 344. International criminal tribunals are not the focus of this study, but see, e.g., the Rome Statute of the ICC that requires proof beyond reasonable doubt in art. 66 of its Rules of Procedure and Evidence.

tribunals do adopt this high standard of proof.[258] This was implicitly confirmed by the ICJ in the *Corfu Channel* case, where a 'high degree of certainty' was required due to the gravity of the charge put forward by the UK against the Albanian Government.[259] Along the same lines, in *Velásquez Rodríguez* the IACtHR took account of 'the special seriousness' of the case at hand and required the truth to be established 'in a convincing manner'.[260] The WTO Panel in *Canada – Dairy (Article 21.5 – New Zealand and US II)* rejected applying the 'beyond reasonable doubt' standard because such a standard would have required information the Canadian government would hardly have had access to; such an approach was considered to be unworkable and too costly.[261]

The ECtHR usually uses the standard of 'beyond reasonable doubt' as its standard of proof.[262] In the *Greek case*, the Commission held that

> '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 drawn from the facts presented.'[263]

In *Ireland v. the United Kingdom*, the ECtHR followed the Commission in adopting the standard of 'beyond reasonable doubt',[264] and it has continued to use this standard as its 'go-to' standard.[265] It considers as

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258 ibid 346.

259 ICJ, *Corfu Channel Case (United Kingdom v. Albania)* (Merits) [1949] ICJ Rep 1949, 4, pp. 16–17.

260 IACtHR, *Velásquez Rodríguez* (Merits) [1988] 95 ILR 259, para. 129. Here, Chester Brown disagrees and states that this standard should be considered a separate one, one that sits in between 'proof beyond reasonable doubt' and 'preponderance of evidence'. See Brown (n 98) 99.

261 WTO, *Canada: Measures Affecting the Importation of Milk and the Exportation of Dairy Products– Report of the Panel Second Recourse to Article 21.5 of the DSU by New Zealand and the United States* (26 July 2002) WT/DS103/RW2, WT/DS113/RW2, at V.323.

262 Schlüter (n 130) 26.

263 See *Yearbook of the European Convention on Human Rights* (Brill Nijhoff 1969) 196, para. 30.

264 ECtHR, *Ireland v. the United Kingdom*, App no 5310/71, Judgment of 13 December 1977, para. 161.

265 ECtHR, *Denmark, Norway, Sweden and the Netherlands v. Greece*, ECHR, Commission Report, 1969, para. 30; ECtHR, *Ireland v. the United Kingdom*, App no 5310/71, Judgment of 18 January 1978, para. 61; ECtHR, *Aydin v. Turkey*, App no 57/1996/676/866, Judgment of 25 September 1997, para. 72; ECtHR, *Mentes and Others v. Turkey*, App no 58/1996/677/867, Judgment of 28 November 1997, para. 66; ECtHR, *Kaya v. Turkey*, App no 158/1996/777/978, Judgment of 19

'reasonable' not 'a doubt based merely on a theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be drawn from the facts presented'.[266] For instance, in *Tanrikulu v. Turkey*, the seriousness of the allegation that Turkish security forces had been involved in the killing of Zeki Tanrikulu had led the Commission to adopt the standard of proof beyond reasonable doubt. The ECtHR reiterated[267] that this evidentiary standard 'may follow from the co-existence of sufficiently strong, clear and concordant inferences or unrebutted presumptions', and that their 'evidential value must be assessed in the light of the circumstances of the individual case and the seriousness and nature of the charge to which they give rise against the respondent State'.[268] The Court agreed with the Commission that this threshold had not been reached in the case at hand.[269]

The Court can thus be seen as usually employing the 'beyond reasonable doubt' standard; however, as seen above in the case of *Trepashkin v. Russia (No. 2)*, due to the flexible approach the Court has opted for regarding questions of evidence and proof, it may adapt the standard of proof depending on the Convention right that is in question.[270]

These cases show that international tribunals may adopt the standard of proof beyond reasonable doubt in cases where the charges are serious and the nature of the allegation or the right at stake calls for a high degree of certainty. However, under certain circumstances, requiring such a high standard of proof would be illusionary and unattainable. This can be linked back to the discussion above on different concepts of truth. Applying the standard 'beyond reasonable doubt' in a rigid manner may suggest that there is a truth that can be ascertained.[271]

February 1998, para. 38; ECtHR, *Veznedaroğlu v. Turkey*, App no 32357/96, Judgment of 11 April 2000, para. 30; ECtHR, *Çakıcı v. Turkey*, App no 23657/94, Judgment of 8 July 1999, para. 92; ECtHR, *Kılıç v. Turkey*, App no 22492/93, Judgment of 28 March 2000, para. 64.

266 *Denmark, Norway, Sweden and the Netherlands v. Greece*, ECHR, Commission Report, 1969, para. 30.

267 Originally used in ECtHR, *Ireland v. the United Kingdom*, App no 5310/71, Judgment of 13 December 1977, para. 161.

268 ECtHR, *Tanrikulu v. Turkey*, App no 23763/94, Judgment of 8 July 1999, para. 97.

269 ibid, para. 99.

270 Schlüter (n 130) 25.

271 For an in-depth analysis of the ECtHR's rules and practice with regard to questions of proof, see Schlüter (n 130).

6. The ECtHR's Institutional Variations

a. Applications Before the ECtHR

As of 31 May 2020, 59'650 applications were pending before the ECtHR.[272] Many such applications are rejected before the merits stage because the criteria for admissibility are not satisfied.[273] Due to the massive workload of the Court, Protocol No. 14 to the Convention was brought into force on 1 July 2010, the purpose of which was to ensure the effectiveness of the ECtHR.[274] It empowered the Court to deal with applications within a reasonable time and provided a filtering mechanism.[275]

The ECtHR's supervision is, mainly, triggered by individual applications.[276] Art. 34 ECHR guarantees the right of individual application. It states that '[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.'[277] Thus, this provision guarantees the right to legal action at the international level. It is also 'one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection'.[278] In its well-established case-law, the Court refers to the Convention as 'a living instrument', meaning that interpretations must take into account present-day conditions.[279] The Court itself has clarified that this applies not only to the substantive provisions of the Convention, but also to the procedural ones.[280] For instance, Rule

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272 See <https://www.echr.coe.int/Documents/Stats_pending_month_2020_BIL.PDF>, last accessed on 12 July 2021.

273 For an in-depth analysis of the statistics of inadmissibility or strike out decisions in 2019, see p. 4 of ECHR – Analysis of Statistics 2019, available at <https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf>, last accessed on 12 July 2021.

274 Protocol No. 14 to the ECHR.

275 Anne Peters and Tilmann Altwicker, 'Die Verfahren Beim EGMR' [2018] MPIL Research Paper Series n 1.

276 ECtHR, 'Practical Guide on Admissibility Criteria' (2019) 7.

277 Art. 34 ECHR.

278 ECtHR, *Mamatkulov and Askarov v. Turkey*, App nos 46827/99 and 46951/99, Judgment of 4 February 2005, para. 100.

279 See, e.g. ECtHR, *Tyrer v. the United Kingdom*, App no 5856/72, Judgment of 25 April 1978, para. 31.

280 ECtHR, *Loizidou v. Turkey*, App no 15218/89, Preliminary Objections of 23 March 1995, para. 71.

47(1)(e) of the Rules of Court requires 'a concise and legible statements of the facts'.[281]

The proceedings before the ECtHR are adversarial. The parties to a case must substantiate their claims and provide the factual evidence and make the legal arguments to show that the Convention rights were violated (applicant's perspective) or not violated (Government's perspective). The requirements with regard to the contents of an individual application can be found in Rule 47 of the Rules of Court.[282] The application must contain, among other things, a concise description of the facts of the case, allowing the Court to assess the nature and extent of the complaint without having to consult additional documents.[283] Complaints that do not fulfil the requirements are sorted out 'administratively' by a Judge Rapporteur or, following Rule 49(1) of the Rules of Court, are rejected by a single-judge formation.[284]

The Court can request further documents at any time in the proceedings.[285] As mentioned above, non-cooperation may have detrimental effects on the parties who fail to comply with their duty to cooperate.[286] If parties fail to provide sufficient evidence to substantiate their claims, and do not comply with the request to provide further information, they run the risk of the Court itself not conducting further investigations of its own, which may lead to the complaint being deemed inadmissible or unfounded due to a lack of factual evidence. Moreover, the Court often draws negative conclusions from the failure to comply with the duties to cooperate under art. 38 ECHR with regard to the credibility of the submission of the respective party.[287] In general, the Court largely follows the submissions of the parties and merely can be seen as switching back-and-forth between the factual submissions of the parties in its own assessment of the facts. The ECtHR also emphasises that, as a rule, it does not want to deviate from the findings of fact of the national courts and authorities, given that they are closer to the events and can be considered in principle to be in a better position to make the relevant findings of fact.[288] This idea of the national

281 Rule 47(1)(e) of the Rules of Court.
282 Rule 47 Rules of Court.
283 Schlüter (n 130) 17.
284 Rule 49(1) of the Rules of Court.
285 Rule 54(2)(C) of the Rules of Court.
286 See above, I.5.a.i.
287 Schlüter (n 130) 18.
288 ibid.

authorities being 'better placed' will be discussed in more detail below in the context of the principle of subsidiarity.

b. Final Assessment of the Facts

A decision has *res iudicata* force when it is final and the parties to a case are bound by the judgment.[289] This is a shared feature of common and civil law systems.[290] The rationale of this doctrine is two-fold: on the one hand, there must be an end to litigation, and on the other hand, the rule of *ne bis in idem* states that one should not be proceeded against twice for the same cause of action.[291]

The doctrine of *res iudicata* is widely accepted and is applied by the ECtHR. This rule is reflected in art. 46(1) ECHR, according to which States Parties to the ECHR 'undertake to abide by the final judgment of the Court in any case to which they are parties'. In the Grand Chamber case *Scozzari and Giunta v. Italy*, the Court clarified the implications of art. 46 in stating that

> 'a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects […].'[292]

Thus, the *res iudicata* force of a judgment has implications on the domestic level. Depending on how the national legal system in question is set up, a

289 Brown (n 98) 153. Brown discusses post-adjudication roles of international courts and tribunals, for the rare cases where there is a possibility of recourse, see pp. 153ss. This is also reflected in the Statute of the International Court of Justice, arts. 59–60, International Court of Justice Rules of Court, art. 94. In the ECHR, arts. 44 and 46 are relevant.

290 Niccolò Ridi, 'Precarious Finality? Reflections on Res Judicata and the Question of the Delimitation of the Continental Shelf Case' (2018) 31 Leiden Journal of International Law 383, 384.

291 William S Dodge, 'Res Judicata' (January 2006) in Peters A and Wolfrum R (eds), *Max Planck Encyclopedia of Public International Law* (online edn) para 2.

292 ECtHR, *Scozzari and Giunta v. Italy*, App nos 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249.

reaction upon a decision by the ECtHR could come from the legislative, executive, or judicial branch.[293] The European Convention on Human Rights does not include any obligation or requirement for Member States to follow a specific action or legal process in order to be in compliance with an ECtHR decision.[294] It is established case-law that the Court does not have jurisdiction to order a government to reopen proceedings.[295] On the national level, most State Parties allow for a reopening of proceedings in criminal cases, and some others also allow for a reopening in civil cases.[296]

The effect of *res iudicata* would seem to imply that the ECtHR's finding of a violation only affects the State Parties to the case concerned. However, it has been argued that judgments of the Court may also have *erga omnes* effect due to the principle of *res interpretata*.[297] The aim of *res interpretata* is to go beyond art. 46(1) ECHR, under which ECtHR judgments are only binding *inter partes*.[298] Thus, although there is no legal obligation in the ECHR for Member States to adhere to a judgment made by the ECtHR, once the Court in Strasbourg has decided an issue, for reasons of 'legal certainty, foreseeability and equality before the law', the ECtHR has itself stated that it 'should not depart, without good reason, from precedents laid down in previous cases'.[299] Thus, it is expected that the Court's interpretation will be applied in the same manner if a similar claim is brought to the Court against a different state.[300]

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293 Marten Breuer, '"Principled Resistance" to ECtHR Judgments: An Appraisal' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer 2019) 327.

294 ibid.

295 See, e.g., ECtHR, *Saïdi v. France*, App no 14647/89, Judgment of 20 September 1993, para. 47; ECtHR, *Pelladoh v. The Netherlands*, App no 16737/90, Judgment of 22 September 1994, para. 44; ECtHR, *Kudeshkina v. Russia (No. 2)*, App no 28727/11, Judgment of 17 February 2015, para. 57.

296 For an overview of different States Parties approaches with regard to the reopening of cases, see Breuer (n 293) 327–328.

297 Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 European Journal of International Law 819.

298 Breuer (n 293) 334.

299 See ECtHR, *Christine Goodwin v. United Kingdom*, App no 28957/95, Judgment of 11 July 2002, para. 74.

300 Arnardóttir (n 297) 823–824.

c. Rules on Fact-Assessment and Evidence Before the ECtHR

The Court has elaborated in its case-law that art. 35(2)(b) ECHR, which refers to the exhaustion of domestic remedies, ties the Court to base its decision on the factual complaint as presented by the applicant.[301] In other words, while the Court may 'view the facts in a different manner',[302] 'it is nevertheless limited by the facts presented by the applicants in the light of national law'.[303] The enforcement of Convention rights largely takes place before the national administrative authorities and courts rather than before the ECtHR, and the determination of the facts in the national proceedings follows the evidentiary rules of the national legal system.[304] Although it is the responsibility of the parties to a case to substantiate their claims, it is up to the Court to assess and establish the facts. This can be derived from art. 38 ECHR, which states that '[t]he Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities'.[305] Thus, this provision allocates the task of fact-finding to the ECtHR and provides it with the necessary competences. However, it also clarifies that investigations should only be carried out when necessary, e.g. because the facts were insufficiently established in the preceding national procedures. Other than in art. 38 ECHR, the Convention does not provide any further information regarding the fact-finding proceedings conducted by the Court.[306] Some further rules can be found in the Rules of Court.[307]

The Court's competence to provide itself with its own rules of procedure regarding fact-assessment and evidence is derived from art. 25(d) ECHR. Since there are hardly any rules on evidence and fact-finding to be

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301 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018, para. 123.

302 See ECtHR, *Foti and Others v. Italy,* App nos 7604/76; 7719/76; 7781/77; 7913/77, Judgment of 10 December 1982, para. 44.

303 ECtHR, *Radomilja and Others v. Croatia*, App nos 37685/10 and 22768/12, Judgment of 20 March 2018, para. 121.

304 Arthur Brunner, 'Subsidiaritätsgrundsatz und Tatsachenfeststellung unter der Europäischen Menschenrechtskonvention', *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 283* (Springer 2019) 28.

305 ibid, 29.

306 ibid.

307 See <https://www.echr.coe.int/documents/rules_court_eng.pdf>, last accessed on 12 July 2021.

found in the Convention itself, the Court enjoys a great deal of freedom in designing the laws of evidence within its own proceedings.[308]

Art. 25(d) ECHR allows the Court to adopt the Rules of Court. In those rules, more information on the establishment of facts can be found. Because the ECHR itself contains no other rules on facts and evidence, it is to a great extent up to the discretion of the ECtHR to formulate these rules, which concern the procedure before the Court itself.[309] But even in the Rules of Court, there are not that many provisions. The ones that are relevant with regard to facts and evidence are art. 38 (procedural rules on the written pleadings); arts. 44A–44E (rights and duties of the parties to cooperate and participate), arts. 46–47 (contents of inter-State and individual applications), and arts. 63–70 (rules on the hearings).[310]

Neither the Convention nor the Rules of Court provide any clear rules regarding the burden or standard of proof or the exact process and procedure of how the Court conducts its fact-assessment. Many of these questions have been addressed, and procedures and standards have been developed in the Court's case-law.[311] An important role is played by the principle of subsidiarity that will be discussed below.

d. Subsidiarity and Fact-Assessment

The embeddedness of an international court within a framework matters with regard to how it engages in fact-finding and fact-assessment.[312] For the ECtHR, this means that its institutional embeddedness within the wider institutional framework of its Member States has an influence on the Court's decision-making process and on how proactive it can, or wants to, be. The ECtHR only decides a case subsidiary to the Member State in question.[313] The principle of subsidiarity is reflected in art. 13 ECHR

308 See Jens Meyer-Ladewig, 'Art. 25', *Europäische Menschenrechtskonvention Handkommentar* (4th edn, Nomos 2017) n 6.
309 See ibid.
310 Brunner (n 304) 30.
311 ibid.
312 José E Alvarez, 'Are International Judges Afraid of Science?: A Comment on Mbengue' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 81, 92.
313 ECtHR, *Kudła v. Poland*, App no 30210/96, Judgment of 26 October 2000, para. 152.

and art. 35(1) ECHR.[314] Art. 13 ECHR provides everyone with the right to an effective remedy before a national authority in case of a violation of a Convention right.[315] It ensures that Convention rights are already effectively implemented at the national level.[316]

Conceptions of subsidiarity are often used by academics, judges, and politicians 'as a normative framework for assessing how to allocate and exercise authority within a multilevel political and legal order'.[317] This principle espouses a rebuttable presumption that authority is situated at the local level.[318] The presumption is that decision-making should take place at the local level and that centralisation of powers – in this case the allocation of decision-making powers to the ECtHR – should only be allowed for particular reasons.[319] In the context of human rights, the principle of subsidiarity leaves States with the primary responsibility to ensure that human rights standards are adhered to, and only provides international human rights institutions with a subsidiary, supervisory function.[320] Thus far, the principle of subsidiarity has been a jurisprudential one. For instance, in *S.A.S. v. France*, the Court held:

> 'It is also important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.'[321]

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314 Brunner (n 304) 87.

315 Art. 13 ECHR.

316 Anne Peters and Tilmann Altwicker, *Europäische Menschenrechtskonvention* (2nd edn, Beck 2012) 173.

317 Andreas Føllesdal, 'Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights - Or Neither?' (2016) 79 Law and Contemporary Problems 147, 147.

318 ibid 148.

319 Markus Jachtenfuchs and Nico Krisch, 'Subsidiarity in Global Governance' (2016) 79 Law and Contemporary Problems 1, 1.

320 Samantha Besson, 'Subsidiarity in International Human Rights Law-What Is Subsidiary About Human Rights?' (2016) 61 American Journal of Jurisprudence 69, 69.

321 ECtHR, *S.A.S. v. France*, App no 43835/11, Judgment of 1 July 2014, para. 129. See also famously: ECtHR, *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v. Belgium* (Belgian Linguistic case), App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 9

However, Protocol No. 15 to the ECHR was adopted on 16 May 2013 by the Committee of Ministers and as soon it is in force, the principle will also be added at the end of the Preamble to the Convention.[322]

Part I has shown that the international sphere is influenced by different legal traditions.[323] Different constitutional values and historical developments at national levels have led to divergences in the fundamental rights standards at the European level. Thus, the European Court of Human Rights is faced with the challenge of balancing 'the need for uniform and effective human rights protection with respect for diversity'.[324] The margin of appreciation doctrine, which is one aspect of the principle of subsidiarity,[325] is seen by some as the main tool for striking this balance; however, it has been criticised by others as having become an 'empty rhetorical device'.[326] From the perspective of fact-assessment, the principle of subsidiarity has an influence on the ECtHR's practice.

As was shown above, unlike in national legal systems, there are not many rules of evidence, fact-finding, and fact-assessment in the ECHR or in the Rules of Court. Unlike in national legal systems, where courts are usually tied to the factual analyses by the previous national authority, there is no rule that ties the Court to the factual analyses of another institution.[327] It can, thus, be seen as having free cognition.[328] However, due to the principle of subsidiarity, the Court is reluctant to make use of this broad factual cognition.[329] In this regard, the margin of appreciation

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February 1967 and ECtHR, *Handyside v. the United Kingdom*, App no 5493/72, Judgment of 7 December 1976.

322 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.' (art. 1 Protocol No. 15 ECHR), <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf>, last accessed on 12 July 2021.

323 See above, I.2.b.

324 Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495, 495.

325 Besson (n 320) 69.

326 Gerards (n 324) 495.

327 Brunner (n 304) 74.

328 However, see ECtHR, *Annenkov and Others v. Russia*, App no 31475/10, Judgment of 25 July 2017, para. 80.

329 Brunner (n 304) 74.

doctrine can be considered 'a self-imposed restraint'.[330] For instance, in *Klaas v. Germany* the Court refrained from conducting its own fact-assessment due to the principle of subsidiarity;[331] it has done so in more recent cases as well.[332] The Court held in *Klaas v. Germany*:

> 'It is further recalled that it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them […].'[333]

In this case, the applicant and the Government put forward different accounts as to the facts of the case. The question pertained to whether or not the treatment of the first applicant (mother) by the police officers during her arrest amounted to inhuman and degrading treatment under art. 3 ECHR. The first applicant argued that the police officers had assaulted her. The police officers denied this.[334] The first applicant's neighbour and the second applicant (daughter) gave evidence in the proceedings before the national authorities, in favour of the first applicant.[335] The police officers, however, argued that the mother had been extremely violent and that it had thus been necessary for them to use force in order to ensure that the mother would not escape.[336] After hearing the diverging accounts given by the two witnesses, by the applicant, and by the police officers, the Detmold Regional Court concluded that the police officers had provided convincing arguments, and dismissed the first applicant's complaint.[337] The Hamm Court of Appeal dismissed the first applicant's appeal and

330 Sabino Cassese, 'Ruling Indirectly Judicial Subsidiarity in the ECtHR' Paper for the Seminar on "Subsidiarity: a double sided coin?" held to coincide with the ceremony marking the official opening of the judicial year of the European Court of Human Rights, 30 January 2015 1, 6. available at <https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf>, last accessed on 12 July 2021.

331 ECtHR, *Klaas v. Germany*, App no 15473/89, Judgment of 22 September 1993, para. 29. See also ECtHR, *Vidal v. Belgium*, App no 12351/86, Judgment of 22 April 1992, para. 33; and ECtHR, *Edwards v. the United Kingdom*, App no 13071/87, Judgment of 16 December 1992, para. 34.

332 ECtHR, *R.D. v. France*, App no 34648/14, Judgment of 16 June 2016, para. 37.

333 ECtHR, *Klaas v. Germany*, App no 15473/89, Judgment of 22 September 1993, para. 29.

334 ibid, paras. 6–7.

335 ibid, para. 16.

336 ibid, paras. 9ss.

337 ibid, para. 17.

upheld the Detmold Regional Court's decision that Mrs. Klaas had not been treated with excessive force by the police officers.[338] Subsequently, a panel of three judges of the Federal Constitutional Court upheld the Court of Appeal's assessment, as this assessment was not considered to appear arbitrary in any manner that would constitute a violation of constitutional law.[339] Thus, the ECtHR was confronted with two different accounts of the facts. With six votes to three, the Court held that there had been no violation of art. 3 ECHR with respect to the first applicant.[340] Given that the injuries that the applicant had suffered could have originated from the version of events described by the applicant as well as from the version of events that the police officers had provided, and given that the national authorities had heard the witness statements and assessed the evidence, the majority did not see it fit to depart from the findings of fact reached by the national courts.[341] In the majority's opinion, there was no material 'which could call into question the findings of the national courts and add weight to the applicant's allegations'.[342] There were three dissenting opinions in this case arguing that the burden of proof to provide more evidence for her allegations of having been arrested and treated with undue force should not have been pushed onto the applicant, and that rather the Government should have carried the onus to provide sufficient evidence to show that the force had been proportionate. Given that this burden of proof had not been met by the Government, the Court should have ruled in favour of the applicant.[343]

This case exemplifies how important the role of fact-assessment is for the substantive outcome of the proceedings before the ECtHR.[344] The majority gave more weight to the ECtHR's institutional variation, i.e. the principle of subsidiarity, than the dissenters. And as the disagreement between the majority and the dissenters with regard to the allocation of the burden of proof showed, this allocation is of pivotal importance for the outcome of a case.

This sensitivity to the principle of subsidiarity with regard to the Court's role as a fact-assessor was further developed and clarified in *Tanli v. Turkey*:

338 ibid, para. 18.
339 ibid, para. 19.
340 ibid, para. 36.
341 ibid, para. 30.
342 ibid.
343 ibid, Dissenting Opinions of Judges Pettiti, Walsh and Spielmann.
344 Brunner (n 304) 76.

> 'The Court is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case […]. Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them […]. Though the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts […].'[345]

The Court remains reluctant to depart from the fact-assessment conducted by the national authorities. It takes into account 'the quality of the domestic proceedings and any possible flaws in the decision-making process', but 'sound evidence' must be provided rather than 'mere hypothetical speculation' to call the domestic courts' assessment into question.[346] This reluctance has been reiterated by the Court in *Sadkov v. Ukraine* where it held that it would only depart from the fact-assessment reached by the national authorities if this were 'unavoidable by the circumstances of a particular case'.[347]

Of course, this leaves room for interpretation and speculation, as it is not clear where the threshold is for national proceedings to be deemed so flawed as to trigger the Court to re-evaluate the domestic fact-assessment; and what exactly 'unavoidable by the circumstances' is supposed to mean.

There are several reasons for the Court's reluctance to depart from the national fact-assessments. The Court considers the national authorities 'better placed' to assess the evidence and to establish the facts due to multiple factors, including the time lapse between the events in question and the Court being presented with the case, the geographical distance, and the Court's immense workload.[348] Reasons such as these mean that the Court is unable to fully determine all the facts of a given case, let alone fully grasp the general situation in the respondent Member State.[349] The

345 ECtHR, *Tanli v. Turkey*, App no 26129/95, Judgment of 10 April 2001, para. 110.
346 ECtHR, *Khlaifia and Othes v. Italy*, App no 16483/12, Judgment of 15 December 2016, para. 208.
347 ECtHR, *Sadkov v. Ukraine*, App no 21987/05, Judgment of 6 July 2017, para. 90.
348 Brunner (n 304) 77–81.
349 Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Nijhoff 2009) 276. For a critical

Court's fact-assessment abilities are, thus, limited due to it being unable to obtain all facts and re-evaluate them.

The 'better placed' argument was first used in the *Handyside* case where the Court held:

> 'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of [the requirements of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.'[350]

However, as Judge Pinto de Albuquerque, joined by Judge Sajó, wrote in their dissenting opinion in the case of *Correia de Matos v. Portugal*, the 'better placed' rule 'should not be mistaken for a carte blanche to rubber-stamp any policy adopted or decision taken by national authorities'; the Court must – and usually does – provide an explanation for why it considers the domestic authorities better placed to make a certain assessment.[351] Thus, the Court's own assessment of the facts – or its decision not to make its own assessment of the facts – can and must still be scrutinised. Since there are no clear rules as to how factual arguments should be evaluated, I propose in Part II that one way of assessing the Court's factual analyses is to employ principles of scientific method to detect potential flaws in the factual conclusions.

7. Conclusion

What follows from the above is that although rules of fact-finding and evidence exist in international adjudication, there is no one coherent framework. Unlike national jurisdictions, the international realm approaches questions of evidence and proof in a flexible manner. This is necessary

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analysis, see Stefan Schürer, 'Der Europäische Gerichtshof für Menschenrechte als Tatsacheninstanz – Zur Bedeutung divergierender Sachverhaltsfeststellungen durch den EGMR am Beispiel einiger Schweizer Fälle' (2014) Europäische Grundrechte Zeitschrift 512, 513ss.

350 ECtHR, *Handyside v. the United Kingdom*, App no 5493/72, Judgment of 7 December 1976, para. 48. See also, e.g. ECtHR *Chapman v. the United Kingdom*, App no 27238/95, Judgment of 18 January 2001, para. 91.

351 ECtHR, *Correia de Matos v. Portugal,* App no 54602/12, Judgment of 4 May 2018, Dissenting Opinion of Judge Pinto de Albuquerque, joined by Judge Sajó, para. 7.

due to the fact that the cases tend to be highly complex and thus an ascertainment of 'the truth' cannot be the sole aim. In the international realm, an added layer of complexity exists due to the fragmentation of the international legal sphere, the influences from different national legal traditions, and the fact that multiple actors and potential interveners must be taken into account.

Pinning down the concepts of the burden of proof and the standards of evidence turned out to be quite a difficult task. As Kazazi notes, it is not possible to specify strict standards because it is equally impossible to 'specify the different degrees of belief which may strike human minds'.[352] International tribunals and courts have rather, 'whenever necessary', 'combined them or adopted other standards justifiable under the circumstances of a given case'.[353] The rules and standards in the international sphere are less formal than those that exist in municipal systems. It is much up to the discretion of the tribunals to assess the facts. Because international courts enjoy wide discretion with regard to their fact-assessment, it is important to pay attention to how they contend with facts and to critically analyse the fact-assessment procedures.

In the context of the ECtHR, neither the Convention nor the Rules of Court provide many clear rules as to how the Court ought to contend with facts. The institutional embeddedness of the Court, and its subsidiary position to the Member States must be taken into account when one wants to analyse the manner in which the Court conducts its fact-assessment. For instance, in certain circumstances, the national authorities may be 'better placed' to assess the facts of a given case. However, when and how the ECtHR decides to conduct its own fact-assessment must still be scrutinised.

In what follows, it will be suggested that scientific principles can be used as a methodological framework to analyse the quality of the ECtHR's fact-assessment procedures.

352 Kazazi (n 103) 350.
353 ibid 351.