Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice

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I. Introduction

During a debate at the 100th annual meeting of the American Society of International Law in 2006,[1] passing reference was made by one of the participants to the 2005 *Democratic Republic of the Congo* v. *Uganda* merits judgment of the International Court of Justice (ICJ).[2] Specifically, this decision was cited with regard to the evidentiary standards employed in determining international legal questions, particularly those involving the use of force. The claim was briefly made that, in the view of the speaker, the *DRC* v. *Uganda* decision 'set out' such evidentiary standards in this context 'in accordance with normal practices.'[3] In the same year, it was noted in an article in the *European Journal of International Law* that the *DRC* v. *Uganda* decision offered a 'ray of hope' with regard to understanding evidentiary standards in the ICJ.[4]

At first glance, these high profile comments are understandable, given that the ICJ allocated a large amount of the *DRC* v. *Uganda* judgment to evidentiary issues relating to the use of force. Indeed, more of the judgment was devoted to evidentiary questions than in any use of force decision since the *Corfu Channel* case of 1949.[5] However, the evidentiary standards applicable to the law on the use of force, as with international law more generally, remain extremely unclear. It is manifestly incorrect to say that the *DRC* v. *Uganda* decision 'set out' an evidentiary standard for legal assessment. Moreover, in the important context of the law governing self-defence, not only did the *DRC* v. *Uganda* decision fail to clarify the existing situation with regard to evidentiary standards in the ICJ, in several passages, it contradicted the standard that appeared to have been tentatively developing in the preceding jurisprudence of the Court: a standard that was employed in other parts of the same judgment.

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[1] 'Debate: Adjudicating Operation Iraqi Freedom' (2006) 100 *Am. Soc'y Int'l L. Proc.* 179.

[2] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), merits (2005), http://www.icj-cij.org/docket/files/116/10455.pdf.

[3] 'Debate: Adjudicating Operation Iraqi Freedom,' 190. The speaker in question was Professor Philippe Sands, who actually appeared on behalf of the DRC in the oral round of proceedings in the *DRC* v. *Uganda* case, and, notably (and correctly), argued before the Court that there was no set practice with regard to the standard of evidence to be applied by the ICJ. See *DRC* v. *Uganda*, merits, CR 2005/3, paras. 19-20.

[4] M. Milanović, 'State Responsibility for Genocide' (2006) 17 *Eur. J. Int'l L.* 533, 594.

[5] *Corfu Channel* (*United Kingdom* v. *Albania*), merits (1949) ICJ Rep. 4.

One of the most pressing and fundamentally overlooked questions relating to the international legal regulation of self-defence is the standard of evidence to be applied in assessing the lawfulness of such a claim. The incident or delict upon which the avowed self-defence action is premised requires evidentiary support (most commonly *ex post facto*).[6] Given the importance of an occurrence of an 'armed attack' for lawful self-defence,[7] the question must be asked: what evidentiary standard need the defending State meet to establish that such an attack has in actuality occurred, or to attribute the attack to any particular actor? The existence and attribution of an armed attack is a question of fact, and one that can and should be subject to proof.[8]

The focus of this article is therefore upon the evidentiary standard – or, if one prefers, the 'standard of proof' – necessary to establish the occurrence of an armed attack (as the key legal criterion triggering a forcible action taken in self-defence). It is argued that, in something of a contrast to the general 'flexible' practice in international law, it is desirable that an explicit and consistent evidentiary standard be identified and applied with regard to self-defence claims.

As such, this article does not assess the procedural rules, such as they are, on the nature or general admissibility of evidence before the Court.[9] Equally, there is no consideration of the issues relating to the difficulty of evidence gathering in international arbitration,[10] although it is worth noting that such difficulty is heightened in the context of disputes involving the use of force, and particularly ongoing conflicts.[11] Instead, the following constitutes an examination of the specific question of whether a *standard* of evidence can be identified, through reference to the jurisprudence of the ICJ, against which the lawfulness of a response taken in self-defence is to be tested. It is concluded that, through close textual analysis, an implicit standard could be seen as being in the process of developing through the two cases

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[6] M. Jacobsson, 'Evidence as an Issue in International Legal Practice' (2006) 100 *Am. Soc'y Int'l L. Proc.* 40, at 42.

[7] Article 51 of the UN Charter states that there may be a resort to 'individual or collective self-defence *if an armed attack occurs*' (emphasis supplied). The ICJ has since held this criterion to be 'the condition *sine qua non* for the exercise of the right of collective self-defence.' *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*) merits, (1986) ICJ Rep. 14, para. 237.

[8] M.E. O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 *Am. Soc'y Int'l L. Proc.* 44, 46.

[9] There are few clear 'rules of evidence' with regard to proceedings before the ICJ. The provisions that do exist are contained within the ICJ's Statute and the Rules of the Court (notably Articles 48-53 and Articles 57-72, respectively). The basis of evidentiary assessment in the ICJ is clearly premised upon a principle of 'freedom of evidence' (although this is not made explicit in the Rules of the Court). As such, the relevant provisions are extremely general, and allow the Court sweeping powers with regard to the acceptance and evaluation of anything that it determines may have evidential value. Article 58(2) of the Rules of the Court neatly demonstrates this: 'the method of handling the evidence and the examination of any witnesses and experts…shall be settled by the Court.' See E. Valencia-Ospina, 'Evidence Before the International Court of Justice' (1999) 1 *Int'l L. F. D. Int'l* 202; J. Evensen, 'Evidence Before International Courts' (1955) 25 *Nordisk Tidsskrift Int'l Ret* 44, particularly at 46 and K. Highet, 'Evidence, the Court and the *Nicaragua* Case' (1987) 81 *Am. J. Int'l L.* 1, 6- 13.

[10] See T.M. Franck, 'Fact-Finding in the ICJ' in R.B. Lillich (ed.), *Fact-Finding Before International Tribunals* (New York: Transnational) (1991), 21.

[11] R.N. Gardner, 'Commentary on the Law of Self-Defence' in L.F. Damrosch and D.J. Scheffer (eds.), *Law and Force in the New International Order* (Oxford: Westview Press) (1991), 52-53.

that dealt directly with self-defence prior to 2005, the *Nicaragua* case[12] and the *Case Concerning Oil Platforms*.[13] However, following *DRC* v. *Uganda*, the situation with regard to the evidentiary standard for self-defence is once again unclear.

II. Evidentiary Standards in International Law

In any adjudicative process, the application of an evidentiary requirement to a legal question has two aspects. The first of these is the *quantum* of evidence necessary to substantiate the factual claims made by the parties.[14] This is what may be labelled the required 'standard of proof'. The second question in any evidentiary assessment is: upon which of the parties does the burden of meeting this standard fall?[15] This is best termed the 'burden of proof'. The approach taken in international adjudication to the burden of proof issue is relatively easy to identify. International courts and tribunals essentially employ the concept of *actori incumbit probatio*: the party who relies upon a contention of fact is obliged to establish it.[16] This article deals instead with the former question: what evidentiary *standard* is necessary to 'establish' the validity of factual claims, upon which legal claims are premised?

In general, international law does not have a clear benchmark against which the persuasiveness or reliability of evidence may be gauged for the purposes of attributing responsibility or assessing legal claims.[17] In other words, there is no consistent standard of proof with regard to international obligations. International courts, tribunals and arbitrators essentially determine their own evidentiary standards.[18] Moreover, in most cases, there is no requirement that the standard employed remains the same within a tribunal across its decisions.[19]

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[12] *Nicaragua*, merits.
[13] *Case Concerning Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), merits, (2003) ICJ Rep. 161.
[14] D.V. Sandifer, *Evidence Before International Tribunals* (Charlottesville: University Press of Virginia) (revised ed., 1975), 123.
[15] *Ibid.*
[16] *Ibid.*, 123-132; R. Wolfrum, 'Taking and Assessing Evidence in International Adjudication' in T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes:* Liber Amicorum *Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff) (2007), 344-345; C.N. Brower, 'Evidence Before International Tribunals: The Need for Some Standardised Rules' (1994) 28 *Int'l L.* 47, 49; M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (The Hague: Kluwer Law International) (1996), 221-223 and Valencia-Ospina, 'Evidence Before the International Court of Justice,' 203.
[17] Brower, *Ibid.*, in general, but particularly at 47 and 49; C. Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press) (2007), 98; M. Kazazi and B.E. Shifman, 'Evidence Before International Tribunals: Introduction' (1999) 1 *Int'l L. F. D. Int'l* 193, 193; T. Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court' in Lillich (ed.), *Fact-Finding Before International Tribunals*, 261, at 271; Sandifer, *Evidence Before International Tribunals*, 123-125 and Valencia-Ospina, *Ibid.*, 203.
[18] See, for example, the statements concerning evidentiary standards made in the Inter-American Court of Human Rights, in the *Velasquez Rodriquez* case (1988) Inter-Am. Ct. H.R. 1, paras. 127-129. For discussion, see A. Philip, 'Description in the Award of the Standard of Proof Sought and Supplied' (1994) 10 *Arbitration Int'l* 361; Brown, *A Common Law of International Adjudication*, 98; Wolfrum, 'Taking and Assessing Evidence in International Adjudication,' 342; Kazazi, *Ibid.*, 350-352 and C. Reymond, 'The Practical Distinction Between the Burden of Proof and Taking of Evidence – A Further Perspective' (1994) 10 *Arbitration Int'l* 323, 326-327.
[19] Evensen, *Ibid.*

This is not to say that international arbitral or judicial decisions are made without any application of a standard of proof.[20] Rather, the level of proof required to meet the evidentiary burden in any given dispute is often opaque, and the standard employed is far from consistent across decisions. Thus, as with other international arbitral bodies, the ICJ has essentially limitless power to determine what evidentiary standard it will require in any given case.[21] As such, it has avoided explicitly articulating a general standard with regard to its decisions. Instead, the Court has employed different standards, depending upon the dispute before it. These variable standards are often merely implicit in the decisions, if indeed they can be ascertained at all.[22] In disputes before the ICJ, then, 'we generally know which party carries the burden, but we do not know with certainty what the burden is.'[23]

However, irrespective of this lack of clear evidentiary standards in international adjudication, it is possible, by examining the decisions of international courts and tribunals, to distinguish various evidentiary standards that have been employed with regard to specific international legal disputes. Four distinct evidentiary standards may be identified as appearing, *ad hoc*, throughout the jurisprudence of a variety of international courts and tribunals.[24] These standards sometimes are applied explicitly; however, in the majority of instances the evidentiary standard employed is implicit in the manner in which the court or tribunal examined the evidence in the given dispute. The evidentiary standards that can be identified in international adjudication are similar to those that may be found in the domestic law of many jurisdictions, and so are likely to be rather familiar to most lawyers. Nonetheless, it is worth briefly reiterating them here.

The first of the standards that may be identified in the jurisprudence of various international arbitral bodies is what may be termed a '*prima facie*' standard. This

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[20] T. O'Donnell, 'Security Council Resolution 1530, Evidence and the United Nations Security Council' (2006) 100 *Am. Soc'y Int'l L. Proc.* 47, 49.

[21] As the Court itself pointed out in the *Nicaragua* case: 'within the limits of its Statute and Rules, it [the Court] has freedom in estimating the value of the various elements of evidence.' *Nicaragua*, merits, para. 60. It has already been noted that Article 58(2) of the Rules of the Court gives the ICJ the power to determine its own 'method of handling evidence.' The only mention of any kind of a 'standard' for evidentiary assessment in the Statute or Rules of the Court is of an extremely general nature: Article 53 of the Statute of the ICJ provides that in instances where a party has failed to appear, the Court's decision must nonetheless be '*well founded* in fact and law', emphasis supplied. See K. Highet, 'Evidence and Proof of Facts' in L.F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (New York: Transnational) (1987), 355, at 355-356 and Valencia-Ospina, 'Evidence Before the International Court of Justice,' 203-204.

[22] See Sandifer, *Evidence Before International Tribunals*, 132-141, who sets out the references made to the standard of proof that appeared in the jurisprudence of the ICJ (and the Permanent Court of International Justice before it) up to 1975. This textual examination of the decisions ultimately offers little insight into the evidentiary standard(s) that were applied by the Court, even implicitly.

[23] O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era,' 44.

[24] A number of writers have identified these standards as they have appeared in the decisions of international courts and tribunals, including the ICJ. The analysis in this section therefore represents an amalgamation of the conclusions reached by the following: Kazazi, *Burden of Proof and Related Issues*, 326-350; Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court,' 271-272; Brown, *A Common Law of International Adjudication*, 98-101 and A. Reiner, 'Burden and General Standards of Proof' (1994) 10 *Arbitration Int'l* 328, 335-337. Most notably, in 2006, Mary Ellen O'Connell referred to the evidentiary standards discussed in this section with specific regard to the possible application of these standards in the context of the use of force in international law. O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era,' 44.

represents a test of very low degree with regard to the assessment of evidence: it simply requires that the evidence produced is indicative of the proposition claimed. The second identifiable test is that of a 'preponderance' – or, alternatively, a 'balance of probabilities' – standard. This refers to evidence that is more convincing than the evidence that is offered in opposition to it, or evidence that establishes that the factual proposition of the relevant party was more likely than not. It can be seen that this test is similar to, but is somewhat more onerous than, requiring mere *prima facie* evidence.

These two standards – *prima facie* and preponderance – may be contrasted with the 'beyond a reasonable doubt' standard. Somewhat self-evidently, the latter is a strict standard of proof, requiring that the proposition being presented is supported with evidence of a nature that there can be no 'reasonable doubt' as to the factual validity of the proposition. Under this standard, then, a proposition must be virtually indisputable, given the evidence.

Falling in between the first two 'low level' standards and the strict 'beyond a reasonable doubt' approach is what is often termed the 'clear and convincing' evidentiary standard.[25] To prove something by a 'clear and convincing' standard, the party with the burden of proof must convince the arbiter in question that it is *substantially* more likely than not that the factual claims that have been made are true. This is obviously a more onerous test than a mere *prima facie* or preponderance standard, but does not require the virtual certainty of the 'beyond a reasonable doubt' test.

It has been stated that 'the preponderance of evidence is predominantly applicable in international procedure.'[26] This is possible: an evidentiary standard of 'preponderance' may well be the informal default position in international arbitration. However, this is a difficult claim to make with any degree of certainty. As we have already noted, there is little consistency in the application of evidentiary standards in international law: this varies greatly across tribunals and across decisions.

Indeed, it is arguable that a specific evidentiary standard for determining international legal questions in an adjudicatory context would in fact be undesirable. The inherent flexibility of the current approach suits the variety of challenges that face the international legal system.[27] It may certainly be argued that the context or 'type' of dispute in question should be relevant to the evidentiary standard employed in establishing relevant facts.[28] The ICJ has repeatedly demonstrated that, with regards

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[25] Brown, *Ibid.*, 99-100.

[26] Kazazi and Shifman, 'Evidence Before International Tribunals: Introduction,' 195. This point was previously made by Kazazi in *Burden of Proof and Related Issues*, at 347-350 and 377. See also A. Redfern, 'The Practical Distinction Between the Burden of Proof and the Taking of Evidence – An English Perspective' (1994) 10 *Arbitration Int'l* 317, 321.

[27] Especially when one considers that this system is, in relation to the majority of municipal law systems, a comparatively underdeveloped and indeterminate one.

[28] Reiner, 'Burden and General Standards of Proof,' 331-332. See also, T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing) (2006), 147, commending the decision of the International Law Commission in making almost no reference to evidentiary standards in its Articles on State Responsibility (Articles on the *Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session, November 2001).

to evidentiary standards, the context of each dispute will be an important factor. This pragmatic approach makes conceptual sense, due to the fact that the standard of evidence that it is *desirable* for the relevant party to meet to establish a factual claim may be higher in the context of certain disputes than in others. Inevitably, the gravity or consequence of certain breaches of international law will differ from others.[29] As such, the evidentiary standard for establishing such a breach should differ.[30]

Therefore, it is not herein argued that a single standard for assessing evidence across all international law disputes is desirable. Nonetheless, it is contended in the next section that in regard to the specific question of whether an armed attack has occurred for the purposes of assessing the lawfulness of a self-defence claim, it is necessary that a consistent standard of proof can be identified. In other words, the evidentiary standard for establishing the factual basis for one claim of self-defence should be the same as for any other self-defence claim, and, if possible, that standard should be explicit.

III. Is the Lack of an Explicit Standard for Self-Defence Desirable?

It is perhaps unsurprising, given our previous discussion, that the practice of the ICJ in relation to self-defence mirrors that of its decisions in other contexts. The Court has not yet articulated an explicit standard of proof for the establishment or attribution of an armed attack as a precursor to assessing the lawfulness of claims regarding the right of self-defence.[31] In the 1986 *Nicaragua* merits judgment, for example, the Court on a number of occasions rejected evidence as being 'insufficient' to establish the facts necessary to determine the lawfulness or unlawfulness of the self-defence claim made by the United States.[32] Thus, the Court stated at paragraph 159 of the *Nicaragua* judgment that it was 'unable to give weight to alleged statements to the effect of which there is insufficient evidence.'[33] However, in each instance, the ICJ determined that evidence was 'insufficient' without indicating where the line between sufficiency and insufficiency actually lay.

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[29] As Judge Higgins stated in her separate opinion to the *Oil Platforms* case, there is 'a general agreement that the graver the charge the more confidence there must be upon the evidence relied on.' *Oil Platforms*, merits, separate opinion of Judge Higgins, para. 33.

[30] For example, in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), merits, (2007), http://www.icj-cij.org/docket/files/91/13685.pdf, the ICJ indicated with regard to State responsibility for the commission of genocide that evidence that avowedly established this must meet a test approximating that of the 'beyond a reasonable doubt' standard (see paras. 209-210). The standard of proof employed in that decision was explicitly of a higher degree than the more commonly employed 'preponderance' standard. Given the gravity of levelling a charge – albeit in this context not a criminal one – of *genocide*, it would seem desirable that the factual basis of the claim must be virtually certain. Indeed, the Court explicitly stated at paragraph 209 that 'claims against a State *involving charges of exceptional gravity* must be proved by evidence that is *fully conclusive*.' (emphasis supplied). See S. Sivakumaran, 'Decisions of International Tribunals: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007' (2007) 56 *Int'l & Comp. L.Q.* 695, particularly at 698-699 and 706-708. This policy argument will perhaps not be suitable in regard to most international legal disputes, however.

[31] O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era,' 43.

[32] *Nicaragua*, merits, paras. 54, 110, 159 and 216.

[33] *Ibid.*, para. 159.

Similarly, in the 2003 *Oil Platforms* case, the ICJ held that 'if at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof [to establish that the missile attack constituted an 'armed attack'] has not been discharged by the United States.'[34] As in *Nicaragua*, the Court in *Oil Platforms* did not then go on to explicitly indicate what the 'necessary burden of proof' was. *DRC* v. *Uganda* followed its predecessors, in that no explicit evidentiary standard for self-defence was articulated in that decision either.[35]

Of course, it may be questioned as to whether an explicit and consistent evidentiary standard to be applied to all cases involving self-defence is desirable. One could take the view that there are good reasons for the Court to avoid indicating a generic standard for such cases. We have already seen that, in general, international courts and tribunals employ various evidentiary standards, and that there are sound reasons for this flexibility.[36] Why should self-defence be any different? As with disputes in general international law, each dispute involving a claim of self-defence will necessarily have context specific factors. *Nicaragua*, for example, involved a conflict of a relatively large scale between contra forces and the Sandinista government. In contrast, *Oil Platforms* concerned far more limited uses of force, both in terms of the alleged attacks and the responses taken. Perhaps the severity or scale of the dispute involving self-defence could be seen as requiring a different evidentiary standard to be applied to each given dispute?

It is argued here that a consistent evidentiary standard is desirable for self-defence. Or, to clarify this: it is argued that an explicit standard should be adopted for the question of *whether an armed attack has occurred and if so who perpetrated* it (the *sine qua non* legal trigger for self-defence).[37] Self-defence is a rather special claim within international law, in that it constitutes the only clearly recognised legal justification for the unilateral use of military force. Outside of UN enforcement, self-defence alone legally validates institutionalised violence (on a potentially large scale). It is also, at least in the first instance, a legal determination that is self-assessed. States decide whether an armed attack has occurred, and whether it is necessary to respond with force. As such, the potential for abuse of the right of self-defence (and the degree of human suffering that can be caused by such abuse) is obvious.[38] On occasion, States make disingenuous claims of 'self-defence', and support such claims with spurious 'evidence'. It is therefore crucial that international law requires that claims of self-defence are supported by evidence, even if this evidence is only made available *ex post facto*.

To ensure that such evidence is actually present in cases where States avowedly act in self-defence and that it can be produced if necessary, comparatively strict rules of evidence are needed. The very nature of the use of military force heightens the need for strict evidentiary requirements in respect of legal claims justifying such actions. As part of this need for tighter evidentiary rules in this context, it is important – when one turns to the question of the occurrence of an armed attack – that the standard of

[34] *Oil Platforms*, merits, para. 57.
[35] See Section V.
[36] See Section II.
[37] To borrow the phrase used by the Court, *Nicaragua*, merits, para. 237.
[38] J. Lobel, 'Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *Yale J. Int'l L.* 537, 547.

evidence necessary to establish this as a factual matter is both *consistent* and *explicit* across cases.

This is because a transparent consistent standard would have the effect of producing a level of certainty with regard to the use of military force.[39] It would be clear what quality of evidence a State may be expected to produce, and *should expect to have to produce*, in support of a claim of self-defence. This will inevitably contribute to limiting the abuse of the right. The current position – or lack of a position – of the ICJ on the question of an evidentiary standard for self-defence means, ultimately, that a State party before the Court that is *defending itself against a military attack* must attempt to establish the factual existence of that attack without knowing what evidentiary threshold will be required by the Court before it will accept the State's claims. Such uncertainty is surely undesirable when it comes to such an important operational decision.

We have seen that differences in the 'gravity' of the subject matter relating to a claim under international law may mean that differing evidentiary standards are desirable: as a general rule evidentiary standards are and should be context specific.[40] However, this does not apply to the question of the occurrence of an armed attack, because that question is itself based upon the gravity of the use of force against the responding State. In this respect, the question being asked in *Nicaragua* was the same as that asked in *Oil Platforms*: did an armed attack occur? Despite the factual differences between the two cases, the legal 'gravity threshold' for this question was the same. That is, could the attack or attacks against the responding State be considered to be of 'the most grave form of the use of force'?[41] This is not a context specific question, despite some contentions to the contrary.[42] It is a standard of scale that must be met in all instances of self-defence,[43] and as such, the evidence required to establish this can also be set at the same level.

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[39] A point made by Wolfrum, but with regard to any comparable factual determination, not specifically with regard to the use of force, Wolfrum, 'Taking and Assessing Evidence in International Adjudication,' 355.

[40] See Section II.

[41] This is the legal test employed by the ICJ for identifying an armed attack. See *Nicaragua*, merits, para. 191, and also *Oil Platforms*, merits, para. 51.

[42] For example, see the view taken by Gray, in the context of the Eritrea/Ethiopia Claims Commission's decision on the *jus ad bellum* aspects of that dispute. In that decision, the Claims Commission emphatically stated: 'Localised border encounters between small infantry units, even those involving the loss of life, *do not* constitute an armed attack for the purposes of the Charter.' Eritrea/Ethiopia Claims Commission, Partial Award, *Jus ad Bellum* (Ethiopia claims 1-8), available at http://www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ET%20JAB.pdf, para. 11, emphasis supplied. Gray has argued, first, that the Claims Commission should have elaborated upon what an armed attack did in fact entail (not merely upon what did *not* equate to an armed attack), and, second, that the Claim Commission's view that frontier incidents can *never* constitute armed attacks may be erroneous. Instead, she takes the position that the jurisprudence of the ICJ in cases such as *Nicaragua* and *Oil Platforms* should be taken in the context of those cases (collective self-defence and third State intervention during an ongoing conflict respectively). Thus, *in the right context*, a border incident may be sufficiently severe to constitute an armed attack. C. Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?' (2006) 17 *Eur. J. Int'l L.* 699, particularly at 717-720.

[43] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press) (1994), 250.

To put this differently, the question of whether an armed attack has occurred is an objective one, in both a factual and legal sense. We are not here talking about the difference between a legal determination of genocide and the breach of a trade agreement, but instead about whether a particular legal criterion has been met – something for which the evidentiary standard should be the same in any instance, especially when that criterion is the primary trigger for initiating military force. The perfectly sensible assertion made by Judge Higgins that 'the graver the charge the more confidence there must be upon the evidence relied on'[44] is surely not relevant when the 'charge' is the same.

As the principal judicial organ of the UN, the ICJ would seem well placed, when suitable cases come before it, to elucidate upon such a standard, irrespective of the fact that this is not its usual practice. Although not binding beyond the case in dispute, any such articulation of a standard for this question would possess a good deal of authority coming from the ICJ. Moreover, if the Court were explicit about the evidentiary standard employed in such cases, it would enable to judges themselves to fully engage with questions of evidence, and be clear in their own minds what evidence will suffice, something that is likely to strengthen the quality of the adjudicative process.[45]

Given all of the above, the Court has received criticism for not setting out an evidentiary standard in relation to self-defence.[46] Most notably, such criticism has emerged from within; in their separate opinions to the *Oil Platforms* merits decision, Judges Higgins, Owada and Buergenthal all raised concerns with the fact that the Court refused to set out any clear evidentiary standard with regard to self-defence in that case.[47] Judge Buergenthal, for example, asked:

> What is meant by 'insufficient' evidence? Does the evidence have to be 'convincing', 'preponderant', 'overwhelming', or 'beyond a reasonable doubt' to be sufficient?'[48]

Judge Higgins extended her criticism to the *Nicaragua* decision, and thus implied that *Oil Platforms* should be viewed as compounding the mistakes made in this regard in 1986.[49]

Moreover, even if one takes the contrary view to that put forward here – that due to the inherent contextual nature of each and every dispute, it may be desirable to employ different evidentiary standards in relation to different disputes – *Nicaragua* and *Oil Platforms* may nonetheless be criticised in regard to their approach to evidentiary standards. In neither decision did the Court at any point explicitly state what the standard required was *in the case before it*:

> The principal judicial organ of the United Nations should make it clear what standard of proof it requires to establish what sorts of facts. Even if the Court does not wish to

[44] *Oil Platforms*, merits, separate opinion of Judge Higgins, para. 33.
[45] Wolfrum, 'Taking and Assessing Evidence in International Adjudication,' 355.
[46] J.A. Green, 'The *Oil Platforms* Case: An Error in Judgment?' (2004) 9 *J. Conflict & Sec. L.* 357, 382-384.
[47] *Oil Platforms*, merits, separate opinion of Judge Higgins, paras. 30-36, separate opinion of Judge Owada, paras. 41-52 (particularly at para. 48) and separate opinion of Judge Buergenthal, para. 41.
[48] *Ibid.*, separate opinion of Judge Buergenthal, para. 41.
[49] *Ibid.*, separate opinion of Judge Higgins, para. 32.

> enunciate a general standard for non-criminal cases, *it should…have decided, and been transparent about, the standard required in this particular case*.[50]

As Wolfrum has argued, the general principle of freedom of evidence in international arbitration should not 'absolve' international courts and tribunals of the need to be explicit about the evidentiary standard being employed in any given decision, or with regard to any particular factual question, even if standards vary across cases.[51]

IV. The Implicit 'Clear and Convincing' Standard

In the previous section, we noted the lack of explicit elucidation by the ICJ of an evidentiary standard for assessing self-defence claims. Whilst this is certainly true, if one undertakes a close textual examination of the three merits decisions of the Court that directly relate to the application of the right of self-defence, it is possible to identify *implicit* standards of evidence that appear to have been employed by the Court. Despite a lack of explicit invocation of evidentiary standards, implicit approaches may be identified in each of the judgments. The standards employed can be inferred from cumulative indications as to the approach of the Court.

It is important to note that this process must necessarily be a tentative one. When examining what the Court *appears* to have done, rather than what it has actually explicitly held, there is always a danger of misinterpretation, or of reading too much into the text of the judgment. In the *Nicaragua* case, the Court stressed that it does not possess 'authority to ascribe to States legal views which they do not themselves advance.'[52] When determining the conclusions reached by the ICJ, one must be careful not to ascribe conclusions to the *Court* that it did not itself advance. As such, the following section is accompanied with the caveat that it constitutes an *interpretation* of the evidentiary standards employed by the ICJ.

Leaving such concerns to one side, upon examination of both the *Nicaragua* and the *Oil Platforms* merits decisions, it is striking that a consistent approach to evidentiary issues may be identified throughout. The inference that may be drawn from both judgments is that the standard employed was one of 'clear and convincing evidence'.[53]

For example, in the *Nicaragua* decision the Court stated that it 'must attain some degree of certainty [regarding the claim of the United States that El Salvador *et al* had suffered an armed attack] and…[ensure] that the facts on which it is based are *supported by convincing evidence*.'[54] Elsewhere, the Court asserted that there was 'no clear evidence of the United States having exercised such a degree of control [of contras]'.[55] This suggests a need for something beyond a mere preponderance of

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[50] *Ibid.*, para. 33, emphasis supplied.
[51] Wolfrum, 'Taking and Assessing Evidence in International Adjudication,' 342.
[52] *Nicaragua*, merits, para. 207. This is an expression of the so-called '*non ultra petita*' rule, which aims to preserve the consensual nature of the Court's jurisdiction, and provides that the ICJ cannot examine aspects of a dispute not raised by the parties.
[53] See M.E. O'Connell, 'Evidence of Terror' (2002) 7 *J. Conflict & Sec. L.* 19, 23-25; Highet, 'Evidence, the Court and the *Nicaragua* Case,' 40-41 and Brown, *A Common Law of International Adjudication*, 100, though all three make this point with regard to *Nicaragua* only.
[54] *Nicaragua*, merits, para. 29, emphasis supplied.
[55] *Ibid.*, para. 109.

evidence. Similarly, *prima facie* evidence supporting the existence of 'interventions' conducted by Nicaragua into Honduras and Costa Rica was rejected on the basis that such evidence was insufficient to establish that these constituted armed attacks.[56] In addition, there are a number of other points in *Nicaragua* that equally suggest a reliance on a 'clear and convincing' standard.[57]

A similar pattern emerges when one turns to the *Oil Platforms* decision. Thus, at paragraph 71, the Court took the view that the available evidence regarding the Iranian responsibility for the mine that struck the USS *Samuel B. Roberts* – being that it was surrounded by other moored mines bearing serial numbers attributable to Iran – was 'highly suggestive, but not conclusive'.[58] This evidence was clearly indicative, *prima facie*, of Iranian responsibility fro an armed attack on the United States. In rejecting that evidence, the Court implicitly rejected a balance of probabilities approach, and indicated the need for a higher evidentiary standard. Elsewhere the Court held that 'the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City* is not sufficient to support the contentions of the United States.'[59] Thus 'indicative evidence' – evidence that meets a *prima facie* standard – was viewed as being 'insufficient' to establish factually the attribution of an armed attack. Equally, the assessment of evidence in the decision clearly did not approach a strict 'beyond a reasonable doubt' standard.

Statements of this kind in the jurisprudence do not in themselves establish with any clarity the evidentiary standard employed by the ICJ in this context. However, the cumulative weight of these suggestions as to the Court's approach to evidence is certainly indicative of reliance, in both *Nicaragua* and *Oil Platforms*, upon a 'clear and convincing' standard, rather than a *prima facie* or preponderance standard, or the converse 'beyond a reasonable doubt' approach.[60] Indeed, aside from one anomalous exception,[61] this approach appears to have been consistent throughout each decision and, also, *between them*.

The fact that there exists no explicit standard in the Court's jurisprudence remains, in the view of the present author, unfortunate. However, it is arguable that – following *Oil Platforms* – a reasonably consistent 'clear and convincing' standard was tentatively emerging from the case law, albeit without concrete expression. This process constituted a desirable second best to having an explicit standard. Indeed, a 'clear and convincing' standard appears particularly appropriate in the context of self-defence. A standard of either *prima facie* evidence or of preponderance would not be strict enough given the fact that such disputes involve the use of force. If an armed attack is established by the evidence, this constitutes a green light for a State to initiate, legally, military force against another. This determination surely should not hinge on a mere 'balance of probabilities' approach. Equally, the right of self-defence relates directly to a State's national security. A strict 'beyond a reasonable doubt'

[56] *Ibid.*, para. 231.
[57] In addition to the examples already cited, see *Ibid.*, paras. 106, 115 and 135.
[58] *Oil Platforms*, merits, para. 71.
[59] *Ibid.*, para. 61. The Court similarly indicated at para. 59 that evidence that was 'suggestive but no more' was not sufficient.
[60] O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era,' 44.
[61] In the *Oil Platforms* decision, the Court makes a reference to the attribution of responsibility between either Iran or Iraq based upon 'a balance of evidence' – apparently, and anomalously, referring to a preponderance standard, see *Ibid.*, para. 57.

standard seems too onerous when it is considered that States making a genuine claim of self-defence will be faced with a *defensive necessity* for a military response. Certainly, expecting a State faced with such a necessity to ensure that it can meet a 'beyond a reasonable doubt' standard of proof before responding is wholly unrealistic.[62]

Moreover, the 'clear and convincing' standard may concord with the standard of evidence increasingly employed in practice by States – notably the United States – with regard to self-defence claims made outside of the adjudicative context. This is not the place to set out this practice, but it is worth noting the work done by Mary Ellen O'Connell in identifying a number of instances where the United States has claimed that it has 'compelling' or 'convincing' evidence establishing a right to self-defence.[63] This evidentiary standard was claimed to have been met by the United States with regard to the bombings of Libya in 1986, the raid against Iraq in 1993 in response to the plot to assassinate former President Bush, and the attacks on Afghanistan and Sudan in 1998 following the bombings of United States embassies.[64] Whilst the practice of one State is far from legally constituting (in the sense of the formation of a customary standard), it is nonetheless telling that there has been an apparently consistent approach to evidence in the context of self-defence from the world's sole superpower.[65] Thus, it is possible to argue that the 'clear and convincing' standard seemingly employed in *Nicaragua* and *Oil Platforms* may not only be *desirable*, it may also be an accurate reflection of an embryonic formalist approach to evidence with regard to self-defence claims more generally.

V. *DRC* v. *Uganda*: Fluctuating Standards

In *DRC* v. *Uganda*, the third contentious self-defence decision of the ICJ, the Court offered a comparatively high degree of commentary on the weight it ascribed to various pieces of evidence presented before it. This more overt approach to evidentiary issues is commendably transparent, and was therefore an improvement upon the *Oil Platforms* case in this regard.[66] Nonetheless, the case in no way introduced an explicit standard of evidence for self-defence claims. The Court assessed whether individual pieces of evidence were credible, but rarely stated what 'level' of credibility the parties were required to attain (particularly as a cumulative whole) to support assertions as to the occurrence of one or more armed attack. For example, the Court stated that it considered that 'Uganda had not produced sufficient evidence to show that the Zairean authorities were [responsible for] attacks against Ugandan territory.'[67] As in its previous decisions, the Court did not then explicitly indicate what would constitute 'sufficient evidence'.

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[62] As Judge Sir Hersch Lauterpacht stated in 1957, in the context of the standard of proof before the Court more generally: 'the degree of burden of proof adduced ought not to be so stringent as to render the proof unduly exacting.' *Case of Certain Norwegian Loans* (*France* v. *Norway*), merits (1957) ICJ Rep. 9, separate opinion of Judge Sir Hersch Lauterpacht, 39.
[63] O'Connell, 'Evidence of Terror,' particularly, 25-28.
[64] *Ibid.*
[65] As O'Connell points out, as the United States is one of the few States that is capable of employing force in self-defence on any significant scale, its position in this context has particular weight, *Ibid.*, 25.
[66] Wolfrum, 'Taking and Assessing Evidence in International Adjudication,' 354.
[67] *DRC* v. *Uganda*, merits, para. 298.

Again, as with *Nicaragua* and *Oil Platforms* (in spite of a lack of explicit articulation), the *DRC* v. *Uganda* judgment does contain a number of implicit indications regarding the evidentiary standard applied. However, unlike in preceding cases, it appears that the Court in *DRC* v. *Uganda* referenced *different* standards at different points of the judgment *with regard to the same question* (that of the existence of an armed attack, be it an armed attack against Uganda, or, in the context of the counter-claim, against the DRC). In other words, the Court not only appeared to refer to a 'clear and convincing' standard throughout the *DRC* v. *Uganda* case, it also appeared, in some instances, to assess evidence relating to the self-defence claims of the parties based upon other standards.

At points in its decision, the ICJ clearly rejected evidence that would *prima facie* establish that an armed attack had occurred, either against the DRC or against Uganda, and instead indicated the need for evidence to meet a weightier 'clear and convincing' standard. Thus, in examining whether Ugandan attacks had in fact occurred in the eastern part of the DRC based upon the available evidence, the Court rejected a 'sketch map' provided by the DRC as being inadequate to establish such attacks.[68] The map indicated the presence of Ugandan troops (or, perhaps, Ugandan directed troops) at various positions within the eastern part of the DRC. The map, in conjunction with other available evidence, would meet a low level *prima facie* test (and perhaps even a preponderance test) for establishing the presence of these troops. Instead, the ICJ held that Ugandan action in the eastern part of the DRC needed to have been '*convincingly* established by the evidence'.[69] Further, the Court echoed this terminology later in the judgment when reiterating that it had not been established that attacks of the character of armed attacks had occurred in the eastern part of the DRC, holding that the evidence that had been produced that did indicate this was insufficient because it was not clear and convincing.[70] Therefore, in the context of the alleged armed attacks in the eastern areas of the DRC, it seems relatively apparent that the Court was not be satisfied with indicative evidence, but instead required that it meet a clear and convincing test.

Similarly, when the Court examined whether the DRC itself had committed an armed attack (or armed attacks) against Uganda – potentially justifying Uganda's resort to force – it concluded that alleged attacks by the Allied Democratic Forces (an anti-Ugandan militant group) and support for that group by the DRC was not established on the evidence. Here, Uganda presented a variety of pieces of evidence that *prima facie* supported this factual claim. However, this evidence – media reports and other secondary accounts, including witness statements[71] – was not seen as satisfying the standard of evidence applied by the Court. It held that this evidence did not establish the attacks by the Allied Democratic Forces, or the DRC's involvement with that group, due to the fact that the available evidence was not 'weighty and convincing'.[72] The Court rejected this evidentiary material, at least to the extent that it established the occurrence of an armed attack, irrespective of the fact that it was relatively independent of the parties, because it was not of sufficient clarity, indicating that these materials did not have the necessary 'quality or character' to support the

[68] *Ibid.*, para. 75.
[69] *Ibid.*, para. 72, emphasis supplied.
[70] *Ibid.*, para. 91.
[71] *Ibid.*, paras. 73 and 133.
[72] *Ibid.*, para. 136.

contentions of Uganda in this regard.[73] This again suggests that the Court rejected *prima facie* evidence in favour of a clear and convincing standard.

It would seem then that with regard to the respective claims of self-defence made by both parties, that the ICJ assessed the question of whether one or other party had perpetrated an armed attack against the other with reference to a clear and convincing evidentiary standard. This mirrors the approach taken by the Court in its earlier decisions.

However, at other key points in the *DRC* v. *Uganda* decision, the Court appeared to accept evidence (with regard to the establishment of an armed attack) based upon a notably lower standard: either that of preponderance or of *prima facie* evidence. This can be shown, for example, by reference to the Court's examination of whether Uganda was responsible for alleged attacks against the DRC by the Mouvement de Libération du Congo (a rebel group comprised predominantly of Banyamulenge Tutsis), and therefore whether it could be said that Uganda had perpetrated one or more armed attacks against the DRC. With regard to this specific question, the Court found that the evidence provided by the DRC was not indicative of Ugandan responsibility in this context.[74] However, it would appear that *indicative* evidence was all that the Court would have required to make such a finding. The Court held that there was not enough evidence to 'suggest' (to use the Court's word) that Uganda was responsible for any armed attacks perpetrated by the Mouvement de Libération du Congo, but that there was enough *prima facie* evidence to establish a more general breach of international law.[75]

When assessing whether an alleged aerial operation by Uganda at Kitona in the DRC constituted, factually, an armed attack by Uganda, the Court examined evidence provided by the DRC to support this contention. In doing so, it appeared to assess the evidence provided by the DRC on the basis that such evidence should meet a balance of probabilities test. There was no indication that the Court sought clear and convincing evidence to establish Ugandan responsibility for the Kitona incident and the required gravity of that incident, only that this needed to be shown to have been more likely to have been the responsibility of Uganda than not.[76]

It therefore seems apparent that the ICJ applied a 'clear and convincing' standard at some points of the judgment, but then elsewhere referred to a notably lower test, with regard to the same issue: the factual basis of an armed attack.[77] Apparently, the Court adopted a clear and convincing standard with regard to whether the actions in the eastern part of the DRC, and the attacks against Uganda by the Allied Democratic Forces constituted armed attacks, yet adopted a notably lower standard with regard to whether the actions of the Mouvement de Libération du Congo and the aerial attack at Kitona were similarly armed attacks.

As such, evidence set out by both parties to support directly comparable factual claims were assessed by the Court based upon differing evidentiary standards. It has

[73] *Ibid.*, para. 134.
[74] *Ibid.*, paras. 159-160.
[75] *Ibid.*, para. 161.
[76] See *Ibid.*, paras. 55-71, particularly 62 and 71.
[77] O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era,' 45.

already been argued that there are good reasons for employing the same evidentiary standard with regard to all assertions that an armed attack has occurred.[78] This is particularly true when such assertions are made within the context of the same overall self-defence claim, as was the case in *DRC* v. *Uganda*. There is no contextual difference between the empirical occurrence of an attack in the eastern DRC as opposed, for example, to an alleged aerial attack at Kitona: both are instances of the same character – an unlawful use of force that must be assessed against the 'gravity test' to determine whether they constitute an armed attack has been met, and whether the State against which self-defence measures are being taken is responsible. There is no justification for applying different evidentiary standards to these separate uses of force. Indeed, to do so is illogical.

Ultimately, then, not only must the standard applied by the Court be teased from the *DRC* v. *Uganda* judgment (as with its predecessors), but it appears that the ICJ applied different standards at different stages of the same judgment. The seeming 'dual standard' aspect of the case undermines any conclusion that it clarifies the evidentiary standard that is likely to be adopted in future cases. Despite a commendable commentary on the process of the examination of much of the evidence relied upon in the case, in terms of a *standard* of evidence, the decision actually further confuses the already somewhat murky waters of *Nicaragua* and *Oil Platforms*.

The practice of applying differing evidentiary standards in the same judgment to the same factual question inevitably opens the ICJ up to accusations of bias.[79] Having said this, it is not as though the Court applied a 'clear and convincing' standard to the evidence produced by the DRC in support of its claim that it had suffered an armed attack, and then switched to a '*prima facie*' or 'preponderance' standard for the corresponding counter-claim of Uganda. It applied fluctuating standards across the claims of the parties. For this reason an accusation that the Court acted in a *biased* manner towards either party cannot be sustained. A charge of arbitrariness, however, could certainly be levelled at the ICJ. As such, this aspect of the *DRC* v. *Uganda* decision cannot be good for the long term credibility of the Court.

Interestingly, this aspect of the *DRC* v. *Uganda* case worryingly echoes the approach to evidentiary standards employed in the *Corfu Channel* decision of 1949. In that judgment, as with *DRC* v. *Uganda*, a comparatively open approach to evidentiary issues belied the fact that the Court employed a fluctuating standard of proof. Of course, the *Corfu Channel* decision did not specifically examine the lawfulness of a self-defence claim. Nonetheless, it dealt directly with the use of force, and the claim advanced by the United Kingdom amounted to an analogous one of 'self-help'.[80] It is notable that in *Corfu Channel*, the Court at one point referred to the need for 'conclusive evidence [and]…a degree of certainty'.[81] The terminology employed here is indicative of an approach similar to the 'clear and convincing' standard, or, as some have argued, to the application of a 'beyond a reasonable doubt' standard.[82] Such a

[78] See particularly Section III.
[79] A point made more generally by Kazazi, *Burden of Proof and Related Issues*, 323.
[80] *Corfu Channel*, reply of the United Kingdom (1948) ICJ Plead., Vol. II, 241, 284.
[81] *Corfu Channel*, merits, 17.
[82] Wolfrum, 'Taking and Assessing Evidence in International Adjudication,' 354-355.

conclusion is strengthened by a passage on the next page of the decision, where the Court noted that the evidence must 'leave *no room* for reasonable doubt.'[83]

However, in between these two allusions to a relatively high evidentiary standard, the ICJ referred to the establishment of '*prima facie* responsibility' on the part of Albania.[84] It then went on to argue that in certain circumstances, a State which has been the victim of a breach of international law but 'is unable to furnish direct proofs of facts…should be allowed more liberal recourse to inferences of fact and circumstantial evidence.'[85] This passage demonstrates a notable shift from a higher standard – the requirement of 'conclusive evidence' – to a much lower standard of evidence in the context establishing responsibility for the use of force, *within the space of a page*.

Despite some suggestions that the *Corfu Channel* constituted a rare success with regard to the assessment of evidence in the ICJ,[86] it is submitted that this kind of flexibility with regards to evidentiary standards is at least somewhat detrimental to the credibility of the decision. The *ad hoc* approach employed in *Corfu Channel* was not apparent in *Nicaragua* or *Oil Platforms*, but it is something that was a notable aspect of *DRC* v. *Uganda*. A return to the methodology employed in *Corfu Channel* in this respect is wholly undesirable.

VI. Conclusion

The evaluation of evidence in international law is far from an exact science. As has been indicated already, one must be wary of reading too much into the various statements made in the Court's judgments: the evidentiary standards identified as having been applied by the ICJ herein are at best *implied* in the jurisprudence. Indeed, in general it runs against the grain of international arbitral practice to attempt to identify evidentiary standards at all. Equally, when standards can be identified, it is evident that flexible and fluctuating application is the norm. Indeed, there is arguably a need for a degree of flexibility in the evidentiary standards applied in international law, given the very disparate issues faced by international courts and tribunals.

Having said this, the question of whether an armed attack has occurred as a trigger for the unilateral use of military force represents a special case. Given that the legal test for an armed attack is the gravity of the use of force, it cannot be said that different standards of evidence should be applied to instances of different gravity. The factual 'gravity threshold' for the occurrence of an armed attack will be the same in each case. Moreover, a transparent and consistent standard will, on the one hand, facilitate the process of decision making in States that have genuinely suffered an attack, by providing clarity as to what level of evidence will be required in support of a self-defence claim. On the other hand, a clear standard should help to limit abuse of the unilateral right of self-defence, by imposing on States a clear degree of proof that they have been the victim of a use of force of the most grave form, and that the State being responded against is responsible for this.

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[83] *Ibid.*, 18 (emphasis in original).
[84] *Ibid.*
[85] *Ibid.*
[86] See, for example, *Oil Platforms*, merits, separate opinion of Judge Owada, paras. 50-52.

It is therefore here argued that a consistent and explicit evidentiary standard should be adopted for self-defence, and that the ICJ is well placed to articulate such a standard, irrespective of its wider policy of avoiding questions of evidence where possible. In the absence of an explicit expression of such a standard, it is still desirable that the test *in fact* applied by the Court (even if not articulated by it) is consistent across its case law. Failing even this, it is surely the case that the standards employed should at the very least be consistent *within decisions*.

The *DRC* v. *Uganda* case failed on all of these fronts with regard to evidentiary standards for self-defence. It not only constituted another missed opportunity for the articulation of an explicit standard, but by implicitly employing differing standards throughout, it undermined the possibility of a desirable 'clear and convincing' standard emerging from the jurisprudence of the Court.

How the fluctuating standards implicitly employed in the *DRC* v. *Uganda* case will affect future decisions on self-defence in practice is, at this juncture, impossible to say with any certainty. One could speculate that this variable approach to evidentiary assessment within the same decision opens the ICJ up to charges of arbitrariness or bias on the part of States. Similarly, a lack of certainty in this regard may well deter States from submitting claims involving self-defence to the Court. Finally, the lack of clear evidentiary standards for establishing the factual basis of a self-defence claim is likely to encourage the abuse of the right, rather than – as is surely desirable – to limit it.

What is certainly clear is that, despite some contentions to the contrary, at least with regard to the standard of evidence in self-defence, the *DRC* v. *Uganda* decision 'highlights that a systematic, consistent and transparent methodology of…evidence is yet to emerge from the case law of the ICJ.'[87] It is not necessarily the case that this would be desirable in general terms. In the context of self-defence, however, an evidentiary standard needs to be set and consistently applied.

[87] P.H.F. Bekker, 'The 2005 Record of the International Court of Justice' (2006) 5 *Chinese J. Int'l L.* 371, 378.