

Oxford Public International Law

Part Three Statute of the International Court of Justice, Ch.III Procedure, Evidentiary Issues

Markus Benzing

From: The Statute of the International Court of Justice: A Commentary
(3rd Edition)

Edited By: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm,
Christian Tomuschat

Content type: Book content

Product: Oxford Scholarly Authorities on International Law [OSAIL]

Series: Oxford Commentaries on International Law

Published in print: 20 March 2019

ISBN: 9780198814894

Subject(s):

Witnesses — Burden of proof — Equal treatment — Estoppel — Admissibility of evidence — Expert evidence — Production of documents

the production of the new document only in exceptional circumstances, *i.e.*, if it considers it necessary and if the production of the document at this stage of the proceedings appears justified to the Court. This leaves ample discretion for the Court to authorize the late production of documentary evidence. If a new document is produced under Article 56, para. 1 or 2 of the Rules, the other party has a right to comment upon it and to submit documents in support of its comments (Article 56, para. 3 of the Rules of Court).⁷⁷

II. Burden of Proof

1. Meaning and Allocation of the Burden of Proof

34 The burden of proof defines how the ICJ must decide if a disputed fact cannot be proved by a party, *i.e.*, when the Court, in accordance with the applicable standard of proof, cannot establish the existence or non-existence of a particular relevant fact. In this case, the Court will decide the issue against the party which bears the burden of proof, as a disputed fact that is not proved will be treated as non-existent (burden of persuasion).⁷⁸ The adversarial principle prevailing in international litigation implies that each party also bears the burden of producing or presenting evidence in relation to those facts for which it has the burden of proof (burden of production).

35 According to the *jurisprudence constante* of the Court, the allocation of the burden of proof follows the well-established principle of *onus probandi incumbit actori*. It is hence (p. 1383) for the party which alleges a fact in support of its claim to prove the existence of that fact.⁷⁹ Proceedings before other international tribunals follow the same rule.⁸⁰

36 However, this generally accepted tenet requires further clarification. First, it is clear that the allocation of the burden of proof is not necessarily influenced by the formal role of the parties in the proceedings, *i.e.*, it is independent from the role of the applicant or the respondent, as it would otherwise lead to arbitrary results. The Court has consequently held that the principle *onus probandi incumbit actori* applies to assertions of fact of both parties, whether applicant or respondent.⁸¹

37 It is equally unsatisfactory to make the burden of proof solely dependent on which party alleges a particular fact. While this rule may lead to the correct outcome in most cases, the allocation of the burden of proof must be independent from both the formal status and the procedural behaviour of the parties.

38 A comparative analysis of national laws reveals that the burden of proof is generally determined by examining the substantive rule of law that the court is called upon to apply. A party will have to assert and prove all facts essential or necessary to its case, *i.e.*, the facts which need to be established so that a rule favourable to that party can operate. The interpretation of a particular rule with a view to establishing which of its elements are essential or necessary in the way just described will begin with the text and structure of the norm as well as its context, but may also take into consideration other normative criteria.

39 According to the rule *reus in excipiendo fit actor*, a party that relies on an exception to a rule will normally be called upon to establish the facts supporting this exception.⁸² Hence, in the *Oil Platforms* case, the onus was on the United States to demonstrate ‘that it was the victim of an “armed attack” by Iran such as to justify it using armed force in self-defence’, Article 51 of the UN Charter being an exception to the prohibition of the use of force (Article 2, para. 4 UN Charter). The ICJ specifically held that ‘the burden of proof of the facts showing the existence of such an attack rests on the United States’.⁸³