Recent Developments

Proving Genocide: The High Standards of the International Court of Justice. By Peter Tzeng

On February 3, 2015, the International Court of Justice rendered a final judgment in the Croatian Genocide case. Between 1991 and 1995, ethnic Serbs and Croats had systematically killed, tortured, and raped members of each other’s ethnic group on Croatian territory. The Court thus found that the actus reus of genocide (genocidal acts) had been established, but it applied very high standards of proof for establishing the dolus specialis of genocide (genocidal intent), leading it to dismiss both Croatia and Serbia’s claims of genocide. Since the Court’s first pronouncement of the high standards of proof for genocide in the 2007 Bosnian Genocide case, many commentators have criticized it, while others have expressed their support. Yet even this latter group of commentators would acknowledge that the standards, even if completely justifiable, have not been adequately justified by the Court.

In accordance with the civil law tradition, the International Court of Justice has historically refrained from articulating consistent standards of proof. Instead, it has employed flexible terminology such as “(in)sufficient,” “satisf[y]ing,” “convincing,” “conclusive,” and

2. Id. ¶¶ 208, 295, 360, 485, 493, 495-96.
3. Id. ¶ 401, 499.
4. Id. ¶¶ 148, 178.
5. Id. ¶ 441, 522.
“decisive”¹⁵ to describe the evidence that it requires. But not all of the Court’s judges have approved of this practice. In a separate opinion to the Oil Platforms judgment, Judge Higgins demanded that the Court “make clear what standards of proof it requires to establish what sorts of facts.”¹⁶ Less than two and a half years later, Judge Higgins was elected President of the Court. Perhaps unsurprisingly, the Court’s first judgment during her presidency—the Bosnian Genocide judgment—articulated a clear set of standards for proving genocide, in particular a high standard for evidence¹⁷ and a high standard for inferences of dolus specialis.¹⁸ Although both of these standards were followed in Croatian Genocide, the Court has yet to provide an explanation for why such high standards are appropriate in the context of proving genocide.¹⁹

The Court’s high standard for evidence was best summarized in Bosnian Genocide: “The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”²⁰ At first glance, this high standard might have intuitive appeal. After all, the International Criminal Court (ICC),²¹ International Criminal Tribunal for Rwanda (ICTR),²² and International Criminal Tribunal for the Former Yugoslavia (ICTY)²³ apply similarly high standards for evidence of genocide. But unlike the International Court of Justice, they are in the industry of incarcerating individuals. As the U.S. Supreme Court has held on multiple occasions, the primary rationale behind the high standard of proof in U.S. law

17. See infra note 20 and accompanying text.
18. See infra note 29 and accompanying text.
19. Commentators have attempted to explain the high standards by noting that a finding of genocide would carry a grave stigma, and could also entail significant financial liabilities. Breuker, supra note 8, at 49; Schabas, supra note 8, at 108. Nevertheless, the Court does not provide an explanation.
21. The standard “fully conclusive” is arguably very close to the standard of “beyond a reasonable doubt.” See Benzing, supra note 10, at 1265-66; José E. Alvarez, Burdens of Proof: Notes from the President, 23 AM. SOC’Y INT’L L. NEWSLETTER 1, 7 (2007). Indeed, the Court later in the Bosnian Genocide judgment required certain facts to be established “beyond any doubt.” Bosnian Genocide, 2007 I.C.J. at 218.
for a criminal conviction is that an individual is at risk of losing his or her liberty.\textsuperscript{25} A finding of genocide by the International Court of Justice, on the other hand, would not put anyone behind bars. So why should the gravity of a charge affect the standard of proof?

The ICJ has never answered this question. The one case it cites for this “long recognized” standard\textsuperscript{26} Corfu Channel, does not provide any justification either. In Corfu Channel, the United Kingdom sought to show that Yugoslavia had laid mines in Albanian territorial waters. In evaluating the evidence, the Court held that “[a] charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here.”\textsuperscript{27} Yet the context suggests that the Court was only emphasizing that the degree of certainty reached in that instance was too low: the evidence in question was a single Yugoslav Lieutenant-Commander’s double hearsay testimony.\textsuperscript{28} The Court in Bosnian Genocide and Croatian Genocide, however, emphasized the converse, namely that the degree of certainty required for “[a] charge of such exceptional gravity” should be very high. In any case, even if this interpretation were appropriate, the Court still has never—not in Corfu Channel, nor Bosnian Genocide, nor Croatian Genocide—explained why a higher degree of certainty should be required for charges of exceptional gravity.

The Court has likewise never justified its high standard for inferences of dolus specialis. The standard was most precisely articulated in Croatian Genocide: “[I]n order to infer the existence of dolus specialis from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.”\textsuperscript{29} This standard of “only reasonable inference” is extremely difficult to meet; indeed, the Court rejected Croatia’s strongest claims of genocide by noting that in some instances the Serbs had only forcibly displaced, not killed, ethnic Croats, from which it could be inferred that the Serbs aimed only to expel Croat populations, not to destroy them (as dolus specialis requires).\textsuperscript{30} The ICC,\textsuperscript{31} ICTR,\textsuperscript{32} and ICTY\textsuperscript{33} apply the

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\item \textsuperscript{26} Bosnian Genocide, 2007 I.C.J. at 129 (citing Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 17 (Apr. 9)).
\item \textsuperscript{27} Corfu Channel, 1949 I.C.J. at 17.
\item \textsuperscript{28} Corfu Channel (U.K. v. Alb.), Oral Proceedings (First Part), 1950 I.C.J. Pleadings 166, 635 (Nov. 26, 1948).
\item \textsuperscript{30} Id. ¶ 435. The Court made similar findings in Bosnian Genocide. Bosnian Genocide, 2007 I.C.J. at 196.
\item \textsuperscript{31} E.g., Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 158 (Mar. 4, 2009).
\item \textsuperscript{32} E.g., Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Appeals Chamber, Judgement, ¶ 80 (Mar. 18, 2010); Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Trial Chamber, Judgement and Sentence, ¶ 75 (May 31, 2012).
\item \textsuperscript{33} E.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Chamber, Judgement, ¶ 41 (Int’l
same high standard for inferences, but, as discussed above, the consequences of their convictions are different from those of the Court. So there must be a separate reason why the Court finds that the high standard should apply.

Once again, however, the Court does not explain its reasoning. In fact, the Court does not even cite to prior authority, though the standard—at least in public international law—can once again be traced back to Corfu Channel. After the United Kingdom failed to show that Yugoslavia had laid the mines, it argued that one could infer that Albania must have, at the very least, had knowledge of the mine laying. 34 In setting a standard for inferential reasoning, the Court held that “indirect evidence . . . must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion,”35 and that “proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.”36 The Court, however, moderated this high standard by noting that if the evidence is in the exclusive control of one state, the other state “should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.”37 The Court in Bosnian Genocide and Croatian Genocide, however, appears to have applied the high standard without the moderating principle. Although it is widely recognized that proof of dolus specialis, a mental state, is often in the exclusive control of the perpetrator,38 the Court in both Bosnian Genocide and Croatian Genocide apparently did not allow more liberal recourse to inferences of fact and circumstantial evidence, as it strictly applied the “only reasonable inference” test.39

Defining standards of proof is not a trivial exercise. The Court’s dispositions in Bosnian Genocide and Croatian Genocide arguably turned on the standards of proof, which exculpated the states in question from liability for unforgivable genocidal acts. This is not to say that the Court’s standards were too high; that debate has been ongoing for years.40 But if the Court wishes to follow Judge Higgins’s recommendation to establish consistent standards of proof, then at the very least the Court must accompany those standards with well-reasoned justifications.41 Otherwise, we are left wondering whether consistent standards are any better than inconsistent ones.


35. Id. at 18.
36. Id.
37. Id.
40. See supra notes 7-8 and accompanying text.
41. For examples of potential justifications, see supra note 19.