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The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences

Michael P. Scharf* and Margaux Day†

Abstract

This Article examines a vexing evidentiary question with which the International Court of Justice has struggled in several cases, namely: What should the Court do when one of the parties has exclusive access to critical evidence and refuses to produce it for security or other reasons? In its first case, Corfu Channel, the Court decided to apply liberal inferences of fact against the non-producing party, but in the more recent Crime of Genocide case, the Court declined to do so under seemingly similar circumstances. By carefully examining the treatment of evidence exclusively accessible by one party in these and other international cases, this Article seeks, first, to illuminate the nuances in the Court's approach to circumstantial evidence and adverse inferences and, second, to recommend a more coherent approach for the future. Because International Court of Justice cases have significant impact on the practice of states and international organizations and are frequently cited as authority by national courts, a better understanding of the Court's application of evidentiary standards has broad scholarly and practical utility.

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I. INTRODUCTION

While the International Court of Justice (ICJ or Court) differs greatly from an ordinary trial court, there is one thing the two have in common: Evidence often plays a key role in the outcome of litigation. The ICJ, however, has limited ability to compel production of evidence and instead often relies either on a *compromis* containing agreed factual stipulations or on documentary dossiers submitted by each of the parties. The Court must therefore depend on the parties' cooperation in submitting a sufficient evidentiary basis in order to make

critical factual determinations. So what happens when one of the parties has exclusive access to critical evidence and refuses to produce it for security or other reasons?

In the ICJ's first contentious case,¹ *Corfu Channel*,² the Court delineated procedural, evidentiary, and equitable rules that have shaped many of the Court's subsequent decisions. Specifically, the Court addressed two significant issues in *Corfu Channel*: (1) the Court's attitude towards nonproduction of classified evidence, and (2) the rules surrounding the use of circumstantial evidence.³ In 2007, fifty-eight years after *Corfu Channel*, the Court readdressed these same evidentiary issues in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Crime of Genocide)*.⁴

Over the years, the ICJ has taken a flexible approach to the admissibility of evidence. The Court evaluates the authenticity, reliability, and persuasiveness of the materials submitted by the parties. One possible reason for the Court's malleable approach, according to the ICJ's former Registrar, Eduardo Valencia-Ospina, is the Court's perceived ability to "ascertain the weight and relevance of particular evidence" due to the judges' qualifications and experience.⁵ The Court, therefore, permits the parties to submit many types of direct and circumstantial evidence. Because of this flexible approach, the Court has not found the need to articulate its evidence policy in many cases.

Despite this history of flexibility, the Court was candid about its decision to use *Crime of Genocide* to clarify the Court's evidentiary standards.⁶ This decision to reevaluate evidentiary principles will profoundly impact future cases. The judgment is particularly poignant given the fact that the Court's docket currently

¹ The ICJ adjudicates two types of cases: contentious and advisory. In contentious cases, only states may be parties. Statute of the International Court of Justice, Stat 1055, 33 UN Treaty Ser 993, Art 34 (June 26, 1945) (ICJ Statute). In contrast, an advisory opinion may be given in response to "any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." Id at Art 65.

² See *Corfu Channel (UK v Alb)*, 1949 ICJ 4 (Apr 9, 1949).

³ The Court does not explicitly define "circumstantial evidence" in its judgments. However, the ICJ in *Corfu Channel* distinguished circumstantial evidence from "direct proof" and stated that "indirect evidence" could be drawn from "inferences of fact." In that case, the Court classified circumstantial evidence as a type of indirect evidence. See id at 18.

⁴ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz v Serb & Monte)*, 2007 ICJ 43, ¶ 127 (Feb 26, 2007) (*Crime of Genocide*).

⁵ See Eduardo Valencia-Ospina, *Evidence Before the International Court of Justice*, 1 Intl L Forum du Droit Intl 202, 205 (1999).

⁶ See Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J Intl Crim Just 889, 890 (2007).

includes a case brought by Croatia against Serbia dealing with largely the same issues and allegations as *Crime of Genocide*.⁷

At first glance, it may appear that the ICJ radically changed its treatment of circumstantial evidence in *Crime of Genocide* from its earlier approach in *Corfu Channel*. In *Corfu Channel*, the Court used liberal recourse to circumstantial evidence as sufficient persuasive evidence to find that Albania incurred legal responsibility, whereas in *Crime of Genocide*, it did not find the same type of evidence sufficient to hold Serbia legally responsible for the majority of Bosnia's allegations.⁸ However, a closer evaluation of these two cases, as well as other cases in which the Court had to determine how much weight to give to circumstantial evidence, reveals that the Court has maintained a consistent, albeit nuanced, treatment of circumstantial evidence. Certain judges on the Court addressed circumstantial evidence in *Corfu Channel*,⁹ *South West Africa Cases*,¹⁰ *Military and Paramilitary Activities in and against Nicaragua (Military and Paramilitary Activities)*,¹¹ *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan Islands (Pulau Ligitan and Pulau Sipadan Islands)*,¹² *Oil Platforms*,¹³ and *Armed Activities on the Territory of the Congo (DRC v Uganda)*¹⁴ before its *Crime of Genocide*¹⁵ decision.

To provide background, Section II analyzes the ICJ's statutory authority to take adverse inferences in cases of nonproduction. Section III examines the ICJ's seven early circumstantial evidence cases in chronological order from *Corfu Channel* to *DRC v Uganda* in order to ascertain trends and discrepancies in the Court's treatment of circumstantial evidence, especially in cases in which a party with exclusive control of evidence fails to produce it. Section IV takes a close look at the 2007 *Crime of Genocide* case, in which the ICJ seemed to have departed from its earlier treatment of circumstantial evidence, refusing to take liberal findings of fact against Serbia despite Serbia's refusal to produce unredacted documents. Section V follows with an analysis of the treatment of circumstantial evidence by other international judicial bodies, including the Permanent Court of Arbitration, the Eritrea-Ethiopia Claims Commission, and the North American

⁷ See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat v Serb)*, 2008 ICJ 412 (Nov 18, 2008).

⁸ See *Corfu Channel*, 1949 ICJ at 18.

⁹ *Id.*

¹⁰ See *South West Africa Cases (Eth v S Afr; Liberia v S Afr)*, 1966 ICJ 6 (July 18, 1966).

¹¹ See *Military and Paramilitary Activities in and against Nicaragua (Nicar v US)*, 1986 ICJ 14 (June 27, 1986) (*Military and Paramilitary Activities*).

¹² See *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon v Malay)*, 2002 ICJ 625 (Dec 17, 2002) (*Pulau Ligitan and Pulau Sipadan Islands*).

¹³ See *Oil Platforms (Iran v US)*, 2003 ICJ 161 (Nov 6, 2003) (*Oil Platforms*).

¹⁴ See *Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda)*, 2005 ICJ 168 (Dec 19, 2005) (*DRC v Uganda*).

¹⁵ See *Crime of Genocide*, 2007 ICJ at 95–96 ¶ 127.

Free Trade Agreement (NAFTA) Claims Tribunal, whose case law may have a persuasive effect on the ICJ and vice versa. Drawing from this comparative jurisprudence, Section VI previews how the ICJ is likely to approach the question in its pending *Croatian-Serbia Crime of Genocide*¹⁶ case. The Article concludes by providing recommendations for approaching the issue in the future.

II. THE COURT'S POWER TO CONSIDER CIRCUMSTANTIAL EVIDENCE AND RELY ON ADVERSE INFERENCES

Contrary to the conventional view,¹⁷ the ICJ actually has a variety of well-designed means available to facilitate the gathering of evidence. For example, under the Statute of the ICJ (ICJ Statute) and the ICJ's Rules of Court, the ICJ can request that parties provide the Court with documents, ask questions to the parties, call on international organizations to provide relevant information, call witnesses and experts at its own initiative, conduct site inspections, and entrust third persons with "the task of carrying out an enquiry or giving an expert opinion."¹⁸

Nevertheless, by tradition, the ICJ has relied principally on the parties to a case for production of evidence, and since the parties are sovereign states, the Court does not have the power to compel them to produce evidence. Significantly, Article 49 of the ICJ Statute provides the Court with a device to offset this deficiency. Namely, the Court can take "formal note" of any refusal by the parties to turn over the requested materials.¹⁹

While the ICJ Statute does not provide further guidance, such "formal note" can be used in several different ways. For example, applying the approach of international arbitration tribunals, the ICJ could "infer" that the non-produced evidence "would be adverse to the interests" of the non-producing party.²⁰ This approach constitutes, in essence, a reversal of the burden of proof

¹⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat v Serb)*, Application Instituting Proceedings, 1999 ICJ Gen List No 118, 2 ¶ 1 (July 2, 1999) (Croatia's *Crime of Genocide* Application).

¹⁷ See, for example, Simone Halink, *All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment to the United Nations in the Armed Activities Case*, 40 NYU J Intl L & Pol 13, 17 (2008) (questioning "whether the Court is capable of fulfilling the evidentiary framework established in its basic documents and in preceding cases in which the Court made extensive use of secondary evidence gathered by others").

¹⁸ ICJ Statute, Arts 34, 44, 48, 49, 50, 51, 59 (cited in note 1); International Court of Justice, *Rules of Court*, Arts 61, 62, 65, 66, 67, 69 (as amended Apr 14, 2005), online at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> (visited Mar 30, 2012).

¹⁹ ICJ Statute, Art 49 (cited in note 1).

²⁰ The *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitrations (IBA Rules)* provide that if a party "fails without satisfactory explanation" (1) to produce any document requested in a request for production or (2) to make available any other relevant

on the factual issue in question. In the alternative, the ICJ could apply the approach that US courts follow when dealing with requests for discovery from foreign sources over which they lack jurisdiction—that is, a court may “make findings of fact adverse to a party that has failed to comply with the order for production.”²¹ Neither of these approaches is designed as a penalty; rather, they are intended as “a form of pressure to induce compliance” before the end of the proceedings and to put the parties on equal footing.²²

As detailed below, to date, the ICJ has taken a softer approach to nonproduction than either shifting the burden of proof or making adverse findings of fact, using nonproduction instead as a license to resort liberally to circumstantial evidence where direct evidence would otherwise be preferred.

III. KEY EARLY ICJ CASES CONCERNING NONPRODUCTION OF EVIDENCE

Although ICJ cases are binding only on the parties to the particular dispute,²³ and thus do not statutorily have precedential value, the Court, other international bodies, and domestic courts frequently cite and heavily rely on past ICJ cases.²⁴ In fact, many studies and evaluations of ICJ cases contend that the international community views ICJ decisions as having precedential value.²⁵ Therefore, the ICJ’s treatment of evidentiary issues in one case can have

evidence, the tribunal “may infer” that such document or such evidence “would be adverse to the interests” of that party. See *IBA Rules*, Arts 9.4, 9.5 (1999), online at <http://www.int-bar.org/images/downloads/iba%20rules%20on%20the%20taking%20of%20evidence.pdf> (visited Mar 30, 2012).

²¹ See Restatement (Third) of Foreign Relations Law of the United States § 442(2)(c) (2009). It is noteworthy that adverse inferences have also been employed by domestic courts in purely domestic cases of non-production. A typical US jury instruction reads as follows: “If a party fails to produce evidence that is under that party’s control and reasonably available to that party and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.” Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 BU L Rev 1089, 1094 (2010), quoting Kevin O’Malley, Jay E. Grenig, and William C. Lee, *Federal Jury Practice and Instructions* 3 § 104.27 (5th ed 2000).

²² See Restatement (Third) of Foreign Relations Law § 442, cmt f (cited in note 21).

²³ ICJ Statute, Art 59 (cited in note 1).

²⁴ See, for example, *Maritime Delimitation in the Black Sea (Rom v Ukr)*, 2009 ICJ 61, 86 ¶ 68 (Feb 3, 2009); *Crime of Genocide*, 2007 ICJ at 95–96 ¶ 127; *DRC v Uganda*, 2005 ICJ at 204 ¶ 68; *Coplin v US*, 6 Cl Ct 115, 126 n 12 (1984); *Schmidl v Germany*, Comm No 1516/2006, HRC, ¶ 4.4 (Oct 31, 2007); *Little v Jamaica*, Comm No 283/1988, HRC, ¶ 3.8 (Nov 1, 1991).

²⁵ See generally Jordan Paust, *Domestic Influence of the International Court of Justice*, 26 Denv J Intl L & Poly 787 (1998). See also Mohamed Shahabuddeen, *Precedent in the World Court* 107–08 (Cambridge University 1996); *ASIL Plenary: International Law as Law at the International Court of Justice*, Statement of Judge Thomas Buergenthal (Inside Justice Apr 7, 2009), online at http://www.insidejustice.com/law/index.php/intl/2009/04/07/asil_annual_mtg_icj (visited Mar 26, 2012).

significant bearing on how it will likely treat similar issues in the future. This Section examines the ICJ's early case law on the question of circumstantial evidence and adverse inferences.

A. The *Corfu Channel* Case

In its first contentious case, *Corfu Channel*,²⁶ the ICJ faced burden of proof issues involving secret evidence, lack of defensive evidence, and circumstantial evidence. The case was between the UK and Albania and involved the North Corfu Channel, a strait between Albania and Greece.²⁷ On October 22, 1946, British warships went through the channel.²⁸ Two ships, the *Saumarez* and the *Volage*, struck mines while in Albanian territorial waters and sustained damage.²⁹

1. Legal responsibility of Albania.

To hold Albania responsible for the mines in its territorial waters, the UK attempted to prove that Albania had knowledge of the mines. The Court recognized that the fact the minefield was discovered in Albanian territorial waters was not enough to prove that Albania had such knowledge.³⁰ However, the Court also recognized that Albania's exclusive territorial control over its waters could make it impossible for the UK to "furnish direct proof of facts giving rise to responsibility."³¹ To solve this dilemma, the Court permitted the UK to take "more liberal recourse to inferences of fact and circumstantial evidence."³² The Court included the caveat, however, that proof may only be drawn from such inferences of fact and circumstantial evidence where doing so leaves no room for reasonable doubt.³³

Thus, the UK relied on indirect evidence to prove that Albania knew of the mines in its territorial waters. Namely, the UK established that Albania kept a close watch over the waters of North Corfu Channel³⁴ and that Albania had the ability to observe mine laying from the Albanian Coast.³⁵ The Court found that a declaration by the Albanian Delegate in the Security Council, diplomatic notes from Albania regarding the passage of ships through its territorial waters, messages to the Secretary-General, and evidence of past mine sweeps conducted

²⁶ *Corfu Channel*, 1949 ICJ 4.

²⁷ *Id.* at 12.

²⁸ *Id.* at 12–13.

²⁹ *Id.* at 14.

³⁰ See *Corfu Channel*, 1949 ICJ at 18.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See *Corfu Channel*, 1949 ICJ at 18–19.

³⁵ *Id.* at 20.

by Albania together revealed that Albania was vigilant in controlling its waters.³⁶ Moreover, the Court noted that there were many observation points along the coast, and a mine-layer placing the closest mine would have had to be within five hundred meters of the Albanian coast.³⁷

This circumstantial evidence adequately proved that Albania knew of the mines in the Corfu Channel. Albania consequently violated international law by failing to warn the British ships about the mines.³⁸ Thus, the Court inferred from the fact that Albania patrols and monitors its territorial waters that Albania had acquired legal responsibility for the damage to the British ships.

2. Legal responsibility of the UK.

Albania contended that the UK violated Albanian sovereignty by sending warships through the North Corfu Channel without obtaining authorization from the Albanian government.³⁹ The Court determined that the UK did not violate international law because all states have a right to send warships through international waterways as long as such passage is innocent.⁴⁰ Albania contended that the British warships' navigation through the North Corfu Channel on October 22, 1946 was not innocent.⁴¹ Albania alleged that the formation of the ships, the position of the ships' guns, the presence of soldiers on board, and the number of soldiers on board all showed bellicose intent.⁴²

The Court requested that the UK produce documents, titled XCU, which the commander of the ship *Volage* made reference to on October 23, 1946.⁴³ Citing naval secrecy, the agent for the UK refused to produce the documents.⁴⁴ In contrast to the language the Court used with regard to the issue of Albania's legal responsibility, the Court observed that it could not draw from the UK's refusal to produce the documents "any conclusions differing from those to which the actual events gave rise."⁴⁵ A variety of other, direct evidence produced by the UK contradicted Albania's claim, and, as a result, the Court found that the UK had not violated the sovereignty of Albania.⁴⁶

³⁶ Id at 19–20.

³⁷ Id at 20.

³⁸ See *Corfu Channel*, 1949 ICJ at 22–23.

³⁹ Id at 28.

⁴⁰ Id.

⁴¹ Id at 30.

⁴² See *Corfu Channel*, 1949 ICJ at 30.

⁴³ Id at 31–32.

⁴⁴ Id at 32.

⁴⁵ Id at 32.

⁴⁶ See *Corfu Channel*, 1949 ICJ at 32.

3. Analysis of evidentiary principles.

How can we reconcile the fact that the ICJ permitted the UK “liberal recourse to inferences of fact” regarding Albania’s knowledge of the mines yet did not allow Albania to rely on liberal inferences in response to the UK’s refusal to produce secret evidence? The difference between Albania’s and the UK’s evidentiary situations is the ability to furnish direct proof of a claim. Albania had the ability to gather evidence on the nature of the British warships’ passage through the strait. For example, Albania had eyewitness accounts of the ships’ movements.⁴⁷ The UK, on the other hand, did not have the ability to gather evidence to determine whether Albania knew of the mines in its territorial waters.⁴⁸ This information was in the exclusive control of Albania.⁴⁹

Therefore, the facts of exclusive control and availability of other evidence harmonize the Court’s treatment of circumstantial evidence for Albania and the UK. The Court refuses in all circumstances to infer conclusions that contradict evidence of actual events, regardless of whether a party is producing all of its evidence on the subject. The Court will permit liberal reliance on circumstantial evidence so long as two conditions are met: (1) the direct evidence is under the exclusive control of the opposing party; and (2) the circumstantial evidence does not contradict any available direct evidence or accepted facts.

B. The *South West Africa Cases*

In the *South West Africa Cases*, the Court considered what weight should be given to circumstantial evidence. Ethiopia and Liberia, which were members of the former League of Nations, alleged that the Republic of South Africa contravened the League of Nations Mandate for South West Africa.⁵⁰ Among the questions the Court addressed in this case were whether the Mandate was still in force, whether South Africa had to produce annual reports to the General Assembly, whether South Africa had promoted the well-being and social progress of the peoples in South West Africa, whether South Africa violated the Mandate by engaging in military actions, and whether South Africa violated the Mandate when it tried to modify the Mandate without General Assembly approval. Judge Van Wyk, in his separate opinion, briefly addressed the relevance of circumstantial evidence in relation to determining whether or not South Africa practiced apartheid and whether South Africa “failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory.”⁵¹ Judge Van Wyk opined on how “[a]n improper

⁴⁷ Id at 30.

⁴⁸ Id at 18.

⁴⁹ Id.

⁵⁰ See *South West Africa Cases*, 1966 ICJ at 10.

⁵¹ See id at 142 (separate opinion of Judge Van Wyk).

purpose or motive may be proved.”⁵² He recognized that, although direct statements could prove improper purpose or motive, it is more frequently proven by circumstantial evidence.⁵³ His opinion stands for the proposition that one may deduce that an act was motivated by an improper motive if that act is so unwarranted that no reasonable person with that same discretionary power and without the alleged motive would have performed it.⁵⁴

C. The *Military and Paramilitary Activities* Case

The Court also wrestled with how much weight to accord circumstantial evidence in the *Military and Paramilitary Activities* case.⁵⁵ In that case, the parties submitted various types of documents from various sources as evidence.⁵⁶ These documents included reports in press articles and extracts from books.⁵⁷ The Court recognized it had to be careful in its treatment of these documents because the materials were not alone capable of proving facts; instead, they were merely material that could contribute to corroborating the existence of a fact.⁵⁸

The Court also expressed concern about how much weight it should give to public knowledge—that is, events extensively reported in the world press. Relying on the *Diplomatic and Consular Staff in Tehran* case,⁵⁹ the Court determined that it could use public knowledge “to declare that it was satisfied that the allegations of fact were well-founded” so long as the Court kept in mind the possibility that widespread reports might all derive from one source.⁶⁰ Therefore, the Court found that pervasive reports of a fact, although not primary evidence of that fact, can be relied upon to establish the existence of that fact.

The Court also relied on inferences from circumstantial evidence when determining to what extent, if any, the Contra force was dependent on the US, a determination the Court viewed as fundamental to the case.⁶¹ To determine that the Contra force partially depended on the US, the Court relied on inferences from the US’ role in selecting the leaders of the Contra force; in organizing, equipping, training, and planning the Contra force; and in choosing targets and

⁵⁰ Id at 152.

⁵³ Id.

⁵⁴ *South West Africa Cases*, 1966 ICJ at 152.

⁵⁵ *Military and Paramilitary Activities*, 1986 ICJ 14.

⁵⁶ Id at 40 ¶ 62.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ *United States Diplomatic and Consular Staff in Tehran (US v Iran)*, 1980 ICJ 3, 9–10 ¶¶ 12–13 (May 24, 1980).

⁶⁰ *Military and Paramilitary Activities*, 1986 ICJ at 40–41 ¶ 63.

⁶¹ Id at 63 ¶ 111.

providing operational support.⁶² However, the Court concluded that it could not determine that the majority of Contra force activities were supported by the US because it did not have adequate direct proof and the circumstantial evidence alone could not answer this issue.⁶³

D. The *Pulau Ligitan and Pulau Sipadan Islands* Case

In the *Pulau Ligitan and Pulau Sipadan Islands* case, the Court refused to draw any clear and final conclusion from circumstantial evidence, which came in the form of maps upon which Malaysia relied.⁶⁴ The Court was asked to determine whether Malaysia or Indonesia had sovereignty over two islands, Ligitan and Sipadan. Malaysia contended that the maps clearly demonstrated that the line between the Dutch and British possessions did not extend into the sea east of Sebatik and that the two islands in dispute were considered British or Malaysian islands.⁶⁵ Indonesia protested the accuracy, relevance, and interpretation of the maps.⁶⁶ Relying on its treatment of maps in the past,⁶⁷ the Court decided that except when maps are “annexed to an official text of which they form an integral part,” maps did not establish territorial title.⁶⁸ Unattached maps, which all the maps except one were in this case, were merely “extrinsic” evidence, not direct evidence, which could be used either to establish or to reconstitute the facts.⁶⁹ The Court ultimately determined that the two islands were the sovereign territory of Malaysia.

Notably, Judge Kooijmans, in his separate opinion in the *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* case, adopted a dismissive approach to the use of maps, similar to the approach taken by the Court in *Pulau Ligitan and Pulau Sipadan Islands*.⁷⁰ Qatar relied upon many maps showing that the Hawar Islands belonged to the State of Qatar. Relying on the *Frontier Dispute* case,⁷¹ Judge Kooijmans emphasized that maps did not constitute

⁶² Id at 63 ¶ 112.

⁶³ Id at 63 ¶ 111.

⁶⁴ See *Pulau Ligitan and Pulau Sipadan Islands*, 2002 ICJ at 666–68 ¶¶ 85, 90.

⁶⁵ Id at 666 ¶ 86.

⁶⁶ Id at 666–67 ¶ 87.

⁶⁷ See *Frontier Dispute (Burkina Faso v Mali)*, 1986 ICJ 554, 582 ¶ 54 (Dec 22, 1986); *Kasikili/Sedudu Island (Botswana v Namibia)*, 1999 ICJ 1045, 1098–99 ¶ 84 (Dec 13, 1999).

⁶⁸ See *Pulau Ligitan and Pulau Sipadan Islands*, 2002 ICJ at 667 ¶ 88.

⁶⁹ In paragraph 88 of *Pulau Ligitan and Pulau Sipadan Islands*, the ICJ refers to unattached maps as “extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.” Id, citing *Frontier Dispute*, 1986 ICJ at 582 ¶ 54.

⁷⁰ See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)*, 2001 ICJ 40, 63–64 ¶¶ 67–69, 64 ¶ 71 (Mar 16, 2001) (separate opinion of Judge Kooijmans).

⁷¹ *Frontier Dispute*, 1986 ICJ at 582 ¶ 54.

a territorial title; rather they were merely extrinsic evidence. Judge Kooijmans discarded the maps because there was no direct evidence showing that Qatar had sovereignty over the islands⁷² and because, if an arbitrator knows of legally relevant facts that contradict cartographers “whose sources of information are not known,” that arbitrator cannot attach weight to the maps.⁷³

The dissenting opinion by Judge Franck, sitting as an ad hoc judge in the *Pulau Ligitan and Pulau Sipadan Islands* case, may also help shape our understanding of the Court’s future treatment of the role and weight of circumstantial evidence.⁷⁴ Judge Franck wrote that, when Britain and the Netherlands negotiated their 1891 Convention, they meant it to cover all potential points of conflict.⁷⁵ Judge Franck found that there was also circumstantial evidence that Britain and the Netherlands believed they were resolving all territorial problems with the 1891 Convention.⁷⁶ Even if the circumstantial evidence was inconclusive, wrote Judge Franck, it still permitted the invocation of the rebuttable presumption that the states intended to resolve all potential disputes in the geographical area surrounding Ligitan and Sipadan.⁷⁷ Using this circumstantial evidence, Judge Franck determined that the islands were the sovereign territory of Indonesia.

E. The *Oil Platforms* Case

The Court was far more dismissive of public reports in the *Oil Platforms* case⁷⁸ than in prior cases, such as *Military and Paramilitary Activities*. The US, in an attempt to prove that the Sea Isle City was attacked by Iran, relied on an announcement by President Ali Khamenei months earlier saying that Iran would attack the US, as well as on public sources that reported that Iran was responsible for an armed attack.⁷⁹ The Court explained that it had decided to disregard this secondary evidence because the Court had no knowledge of the original source, and that it was possible that “widespread reports of a fact” may in actuality “derive from a single source.”⁸⁰ Thus, concluded the Court,

⁷² See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, 2001 ICJ at 63 ¶ 68.

⁷³ Id at 70–71 ¶ 99–100, citing the *Island of Palmas (US v Neth)*, 2 RIAA 829, 869 (Perm Ct Arb 1928).

⁷⁴ See *Pulau Ligitan and Pulau Sipadan Islands*, 2002 ICJ at 691–706 (dissenting opinion of Judge Franck).

⁷⁵ Id at 691–92 ¶ 1, 692 ¶ 5.

⁷⁶ Id at 705–06 ¶ 45.

⁷⁷ See *Pulau Ligitan and Pulau Sipadan Islands*, 2002 ICJ at 705–06 ¶ 45 (dissenting opinion of Judge Franck).

⁷⁸ *Oil Platforms*, 2003 ICJ at 190 ¶ 60.

⁷⁹ Id.

⁸⁰ Id, citing *Military and Paramilitary Activities*, 1986 ICJ at 40–41 ¶ 63.

numerous reports had no greater value than the original source, and these reports could not substitute for direct evidence.⁸¹

F. *DRC v Uganda*

In *DRC v Uganda*, the Court took note of the fact that the parties had presented it with “a vast amount of documentation.”⁸² The Court articulated its view on various evidentiary materials as follows:

The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them. The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention.⁸³

The Court chose not to rely on various items offered as evidence because of their circumstantial nature.⁸⁴ Specifically, the Court refused to rely on the International Crisis Group report of November 17, the Human Rights Watch Report of March 2001, portions of a report by the UN Secretary-General that relied on second-hand reports, articles in the Integrated Regional Information Network bulletin, articles in *Jeune Afrique*, and a statement by a person who was cooperating with the Congolese military, all submitted by the Democratic Republic of the Congo. The Democratic Republic of the Congo submitted these documents, along with other evidence, in an attempt to prove that Uganda had both created and controlled the Congo Liberation Movement from September 1998 onwards.⁸⁵ The Court deemed each of these sources to be either uncorroborated, based on second-hand reports, factually incorrect, or partisan. The ICJ found no direct evidence that Uganda had created the Congo Liberation Movement. Thus, the Court reaffirmed that it would not readily rely on circumstantial evidence presented by parties; instead, the Court critically examined circumstantial evidence and compared it to any direct evidence on the issue to see if it could be corroborated.

⁸¹ *Oil Platforms*, 2003 ICJ at 190 ¶ 60.

⁸² See *DRC v Uganda*, 2005 ICJ at 201 ¶ 60.

⁸³ *Id* at 201 ¶ 61 (internal citations omitted).

⁸⁴ *Id* at 225–26 ¶ 159.

⁸⁵ *Id* at 225 ¶ 155.

G. Observations about the ICJ's Treatment of Circumstantial Evidence and Adverse Inferences Prior to 2005

In the cases described above, the Court had the opportunity to discuss particular types of circumstantial evidence, such as maps, UN reports, non-governmental organization reports, newspaper articles, and information that is public knowledge.⁸⁶ Although the Court consistently permitted parties to submit circumstantial evidence, it critically evaluated this evidence. For example, the Court in *Oil Platforms* and *DRC v Uganda* realized that widespread reports of a fact should be evaluated with a critical eye because they could be based on one source. The Court was also critical of biased or uncorroborated evidence and evidence based on second-hand reports in *DRC v Uganda*. The Court refused simply to accept the authenticity of maps without further investigation into the sources used to create those maps.

The Court also evaluated the use of circumstantial evidence to prove substantively different legal claims. Judge Van Wyk permitted the use of circumstantial evidence to prove improper motive in the *South West Africa Cases*. The Court used circumstantial evidence to find that the US was involved with the Contra force in Nicaragua, but it did not find that circumstantial evidence could prove the level of its involvement. According to the Court in *Pulau Ligitan and Pulau Sipadan Islands*, maps alone cannot establish territorial boundaries. Judge Franck, in that case, relied on circumstantial evidence to invoke a rebuttable presumption.

Nonetheless, fifty-six years after the decision, *Corfu Channel* continued to be the leading case on the use of circumstantial evidence. Again, in that case, the Court permitted the UK to rely on inferences of fact and circumstantial evidence. The Court still assessed the weight of circumstantial evidence, but accepted it as valid evidence and ultimately found it persuasive enough to find that Albania incurred legal responsibility. It was not until 2007 that the Court faced a similar request by a state to resort to liberal inferences and circumstantial evidence. However, this time, the Court gave far less weight to the circumstantial evidence.

IV. THE *CRIME OF GENOCIDE* CASE

In the seminal *Crime of Genocide* case, the applicant, the Republic of Bosnia and Herzegovina (Bosnia), alleged that the respondent, Serbia and Montenegro (Serbia),⁸⁷ violated the Convention on the Prevention and Punishment of the

⁸⁶ Although maps, UN reports, non-governmental organization reports, newspaper articles, and information that is public knowledge could all be direct evidence in certain circumstances, they were indirect evidence in the cases analyzed. Each piece of evidence required the court to make an inference and did not directly stand for the principle claimed.

⁸⁷ Serbia and Montenegro constituted the Federal Republic of Yugoslavia at the outset of the case.

Crime of Genocide (Genocide Convention)⁸⁸ by contributing to acts of genocide and failing to prevent and punish acts of genocide.⁸⁹ As a remedy, Bosnia asked the Court to order Serbia to cease its illegal conduct, take immediate and effective steps to ensure compliance with its obligations under the Genocide Convention, restore the situation that existed before the violations of the Genocide Convention occurred, and pay Bosnia compensation.⁹⁰

Both Bosnia and Serbia proposed additional provisional measures to those ordered on April 8, 1993.⁹¹ The Court held that “the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court’s Order of 8 April 1993, but immediate and effective implementation of those measures.”⁹²

A. The Separate Opinion of Judge Lauterpacht

In a separate concurring opinion, Judge Lauterpacht discussed how the Court should have considered circumstantial evidence in its order.⁹³ In particular, he opined that the Court should have been more detailed in its measures and in its statement of material facts.⁹⁴

Judge Lauterpacht described the evidence Bosnia put forward as falling into two categories: (1) written primary evidence and (2) written secondary evidence.⁹⁵ The secondary evidence included statements of fact adopted by organs of the UN. Lauterpacht wrote that “there is no reason why the Court should not take both such categories of evidence into account.”⁹⁶ He then went on to discuss a particular type of circumstantial evidence, namely facts that are “public knowledge.” Relying on past ICJ cases,⁹⁷ Lauterpacht championed the doctrine of judicial notice for facts that are public knowledge. This circumstantial evidence must still be wholly consistent with the main facts and

⁸⁸ Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Ser 278 (1951).

⁸⁹ See *Crime of Genocide*, 2007 ICJ at 65 ¶ 65.

⁹⁰ *Id.*

⁹¹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz v Yugo (Serb & Monte))*, Provisional Measures, Order of 8 April 1993, 1993 ICJ 3 (Apr 8, 1993).

⁹² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz v Yugo (Serb & Monte))*, Order, 1993 ICJ 325, ¶ 59 (Sept 13, 1993) (*Crime of Genocide*, Sept Order).

⁹³ See generally *id.* (separate opinion of Judge Lauterpacht).

⁹⁴ *Id.* at 409–10 ¶ 8.

⁹⁵ *Id.* at 423 ¶ 42.

⁹⁶ *Crime of Genocide*, Sept Order at 423 ¶ 42.

⁹⁷ See *Military and Paramilitary Activities*, 1986 ICJ at 40–41 ¶ 63; *United States Diplomatic and Consular Staff in Tehran*, 1980 ICJ at 9–10 ¶ 12; *Fisheries (UK v Nor)*, 1951 ICJ 116, 138–39 (Dec 18, 1951).

circumstances of the case,⁹⁸ and in this case Lauterpacht determined that together, the secondary (public knowledge) evidence and the primary evidence were conclusive of the existence of atrocities.

Judge Lauterpacht cited the Court's reliance on circumstantial evidence in *Corfu Channel* when discussing the question of the complicity of Serbia in assisting the Bosnian Serb forces in Bosnia. Judge Lauterpacht likened Bosnia's situation to that of the UK, in that Bosnia could not obtain absolute proof of Serbia's complicity because the bulk of the conduct originated within the territory of Serbia.⁹⁹ Therefore, he relied on circumstantial evidence from Bosnia, including secondary reports derived from sources that are not sufficiently identified.¹⁰⁰ This evidence, in Judge Lauterpacht's view, indicated Yugoslav involvement in Serbian activity in Bosnia and, at the very least, shifted the burden of proof to Serbia.¹⁰¹ Serbia made no attempt to meet this burden and did not rebut Bosnia's material in circumstantial detail.¹⁰²

Therefore, Judge Lauterpacht, using *Corfu Channel*, was willing to rely on circumstantial evidence. He found that the circumstantial evidence comported with the primary evidence, and he found it notable that Serbia did not rebut any of Bosnia's circumstantial evidence.

B. The Opinion of the Court

In its judgment on the merits, however, the Court took a different view.

1. Submission and use of secret evidence.

In addition to requesting that the Court allow it to rely on circumstantial evidence, Bosnia submitted that the typical burden of proof (*actori incumbit probatio*) should be reversed in respect to the attribution of acts of genocide to Serbia because Serbia refused to produce the full text of particular documents.¹⁰³ Serbia failed to produce complete copies of documents of the Supreme Defense Council of Serbia, which had been classified as a military secret by the Council of Ministers of Serbia and Montenegro.¹⁰⁴ Instead, Bosnia and the Court had access only to substantially redacted copies of these documents, with most of the relevant portions blacked out.¹⁰⁵

⁹⁸ See *Crime of Genocide*, Sept Order at 423 ¶ 43 (separate opinion of Judge Lauterpacht).

⁹⁹ Id at 424 ¶ 45.

¹⁰⁰ Id at 430 ¶ 64.

¹⁰¹ Id at 427–28 ¶ 57, 430–31 ¶ 67.

¹⁰² See *Crime of Genocide*, Sept Order at 430 ¶ 64, 430–31 ¶ 67 (separate opinion of Judge Lauterpacht).

¹⁰³ See *Crime of Genocide*, 2007 ICJ at 128 ¶ 204.

¹⁰⁴ Id at 128–29 ¶ 205.

¹⁰⁵ See generally Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 Fordham Int'l L J 911 (2008).

Bosnia submitted that the Court should prohibit Serbia from discussing or relying on these redacted documents because it would provide Serbia an “overriding advantage.”¹⁰⁶ Moreover, Bosnia asked the Court to draw its own conclusions from Serbia’s failure to produce complete copies of these documents as well as call for the full production of the documents.¹⁰⁷

The ICJ denied Bosnia’s request for the Court to prohibit Serbia from using these redacted documents. One reason the Court cited for this decision is that Bosnia already had access to extensive evidence, in particular from the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁰⁸ Thus, the Court did not call upon Serbia to provide these documents to Bosnia. The Court did note, however, that it had the power to draw its own conclusions based on Serbia’s nonproduction.¹⁰⁹

2. Recourse to liberal findings of fact.

In its memorial submitted to the ICJ, Bosnia cited *Corfu Channel* to justify its request that the Court recognize how difficult it was for Bosnia to furnish direct proof of facts given that Serbia had exclusive territorial control of the evidence.¹¹⁰ Bosnia contended that evidence of Serbia’s efforts, assuming they exist, to bring to trial and punish persons guilty of violating the Genocide Convention would exist solely within Serbia.¹¹¹ Bosnia asked the Court to make inferential deductions from patterns of evidence regarding both the Genocide Convention’s requirement to investigate, prosecute, and punish genocide and the intent of Serbia to commit proven acts.¹¹² Bosnia alleged that Serbia had the burden to rebut these inferences.¹¹³

3. Specific intent to commit genocide.

In the decision on the merits, the Court addressed Bosnia’s request to have the Court draw inferences from established facts involving the specific intent required for the crime of genocide.¹¹⁴ Bosnia relied on an alleged overall plan to

¹⁰⁶ Id at n 55; *Crime of Genocide*, 2007 ICJ at 76 ¶ 205.

¹⁰⁷ Groome, 31 Fordham Intl L J at n 55 (cited in note 105); *Crime of Genocide*, 2007 ICJ at 76 ¶ 205.

¹⁰⁸ See *Crime of Genocide*, 2007 ICJ at 129 ¶ 206.

¹⁰⁹ Id.

¹¹⁰ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz v Serb & Monte)*, Memorial of the Government of The Republic of Bosnia and Herzegovina, 216 ¶ 5.3.3.7 (Apr 15, 1994) (*Crime of Genocide*, Memorial of Bosnia & Herzegovina).

¹¹¹ Id.

¹¹² Id at 216–17 ¶ 5.3.3.8, 217 ¶ 5.3.3.9; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz v Serb & Monte)*, Reply of Bosnia and Herzegovina, 8 ¶¶ 21, 22 (Apr 23, 1998).

¹¹³ See *Crime of Genocide*, Memorial of Bosnia & Herzegovina, 216–17 ¶ 5.3.3.8.

¹¹⁴ See *Crime of Genocide*, 2007 ICJ at 129 ¶ 207.

commit genocide and a pattern of genocidal or potentially genocidal acts to prove the necessary intent to constitute genocide.¹¹⁵ Bosnia contended that the required specific intent was thus shown by the consistency of practices and the pattern of the acts.¹¹⁶

The Court refused to find that the pattern of atrocities demonstrated the required intent.¹¹⁷ The Court determined that for a pattern of conduct to be evidence of specific intent, the pattern would have to “be such that it could only point to the existence of such intent.”¹¹⁸ Relying on decisions by the ICTY, the Court noted that the pattern of atrocity crimes in Bosnia did not solely point to the specific intent to destroy the group in whole or in part.¹¹⁹ Thus, excluding the crimes committed at Srebrenica, which the Court discussed later in its decision, the Court determined that Bosnia was unable to prove that Serbia had the specific intent required by the Genocide Convention.¹²⁰

4. Duty to prevent and punish.

The ICJ found Serbia legally responsible for failing to prevent and punish the atrocities that occurred at the Muslim community of Srebrenica.¹²¹ Although the Court made no specific mention of relying on inferences from circumstantial evidence, it appeared to do so with regard to Serbia’s duty to prevent acts of genocide. The Court reaffirmed that it had not found evidence that the Belgrade authorities knew of the decision to eliminate the adult male population of Srebrenica.¹²² Nonetheless, given all of the “international concern” about what appeared likely to occur at Srebrenica, and given Milošević’s own observations, the Court observed that it must have been clear to Belgrade authorities that there was a serious risk that genocide would occur in Srebrenica.¹²³ Serbia did not show that it tried to prevent or avert the genocide at Srebrenica.¹²⁴ Therefore, the Court relied on indirect evidence to determine that Serbia knew of the possibility of genocidal acts at Srebrenica yet did not adequately prevent those acts.

¹¹⁵ Id at 194–95 ¶ 370.

¹¹⁶ Id at 195 ¶ 371.

¹¹⁷ Id at 196–97 ¶ 373.

¹¹⁸ See *Crime of Genocide*, 2007 ICJ at 196–97 ¶ 373.

¹¹⁹ Id at 197–98 ¶ 374.

¹²⁰ Id at 198 ¶ 376.

¹²¹ Id at 225–26 ¶ 438, 229 ¶ 450.

¹²² See *Crime of Genocide*, 2007 ICJ at 225–26 ¶ 438.

¹²³ Id.

¹²⁴ Id.

The Court did not explicitly rely on inferences to reach its finding that Serbia failed to punish perpetrators of genocide. Instead, the Court found direct evidence that Serbia failed to cooperate fully with the ICTY.¹²⁵

5. The Court's limited reliance on circumstantial evidence.

Bosnia was trying to prove a case in which the direct evidence was under the territorial control of the opposing party and the opposing party used redacted documents. Therefore, this appears to be a case where the Court should have been highly concerned with equality between the parties and could have achieved that equality by liberally construing Bosnia's circumstantial evidence.

Instead, the Court chose to rely on circumstantial evidence for one significant issue but not for another. The Court relied on evidence of international concern to find that Serbia failed in its duty to prevent acts of genocide. However, the Court did not rely on Bosnia's circumstantial evidence allegedly proving Serbia had the intent to commit acts of genocide.

One reason the Court may have relied on certain circumstantial evidence but not other circumstantial evidence is that it found the evidence of public concern more reliable and consistent with direct evidence. The Court relied on some of Milošević's own observations to corroborate the circumstantial evidence showing "international concern." The Court did not find direct evidence to support Bosnia's submission that the pattern shown by circumstantial evidence proved that Serbia had intent to commit acts of genocide. In fact, Serbia presented direct evidence to the contrary. In addition, using circumstantial evidence to prove specific intent of high-level government officials is particularly difficult in that the Court requires the intent to be "convincingly shown."¹²⁶ For a pattern of conduct to be accepted as evidence of specific intent, it would have to be such that it could only point to the existence of such intent.¹²⁷

Moreover, it is significant that *Crime of Genocide* is distinct from past cases in that such an overwhelming amount of direct evidence existed for the Court to assess.¹²⁸ This is in stark contrast to many past cases, where a paucity of direct evidence existed.¹²⁹ Because the parties presented so many different documents and pieces of evidence to the Court, the Court was more or less forced to explain how much it could rely on the different types of evidence. Thus, it naturally was explicit about its preference for direct evidence. Since Serbia could

¹²⁵ Id at 229 ¶ 449.

¹²⁶ See *Crime of Genocide*, 2007 ICJ at 196–97 ¶ 373.

¹²⁷ Id.

¹²⁸ See Gattini, 5 J Intl Crim Just at 890 (cited in note 6).

¹²⁹ Id, citing *Military and Paramilitary Activities*, 1986 ICJ at 42 ¶ 67.

produce so much direct evidence in its favor, it was extremely difficult for Bosnia to mount a case based on circumstantial evidence.

The Court had the option to rely on multiple decisions from the ICTY. The Court determined that trial decisions by the ICTY merited special attention because the fact-finding process of the ICTY tests evidence through cross-examination.¹³⁰ It determined that “in principle” the ICTY decisions would be accepted “as highly persuasive.”¹³¹ This determination comports with the Court’s decision in *DRC v Uganda*.¹³² However, the ICJ did not rely on all findings of the ICTY, including “the Tribunal’s use of circumstantial evidence to prove genocidal intent in the absence of smoking gun evidence of such intent.”¹³³ The ICJ also rejected the ICTY’s “overall control” test and instead applied the “effective control” test for imputing liability to a state for the acts of non-state actors.¹³⁴ Nonetheless, the ICTY decisions were highly persuasive to the Court, and they impeded Bosnia’s attempt to rely on any circumstantial evidence that contradicted these decisions.

An additional possible reason why the Court did not grant Bosnia an evidentiary benefit in response to Serbia’s refusal to disclose secret documents is that the agent for Bosnia did not raise the issue of the necessity of disclosure until the day before oral arguments.¹³⁵ In addition, after the Court had decided not to call upon Serbia to produce those documents at that stage of the proceedings, the agent for Bosnia did not renew its request.¹³⁶ This may or may not have had an effect on the Court’s reasoning.

C. Reconciling *Corfu Channel* with *Crime of Genocide*

The Court’s treatments of circumstantial evidence in the *Corfu Channel* and *Crime of Genocide* cases seem partially incompatible. The *Crime of Genocide* decision

¹³⁰ *Crime of Genocide*, 2007 ICJ at 131 ¶ 214.

¹³¹ Id at 134 ¶ 223. See also Susana SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia’s Genocide Case against Serbia and Montenegro*, 15(1) Human Rights Brief 2 (2007).

¹³² See *DRC v Uganda*, 2005 ICJ at 201 ¶ 61 (“The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention.”).

¹³³ See SáCouto, 15(1) Human Rights Brief at 4 (cited in note 131). See also *Crime of Genocide*, 2007 ICJ at 196–97 ¶ 373 (“Turning now to the Applicant’s contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. . . . [A]nd for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.”).

¹³⁴ See *Crime of Genocide*, 2007 ICJ at 209–10 ¶¶ 403–06.

¹³⁵ See Gatini, 5 J Intl Crim Just at 892 (cited in note 6). See also *Crime of Genocide*, 2007 ICJ at 57 ¶ 44.

¹³⁶ *Crime of Genocide*, 2007 ICJ at 57 ¶ 44.

is similar to *Corfu Channel* in that, in both cases, the Court permitted a party to keep evidence secret, but it is different in that, in *Crime of Genocide*, the Court relied far less on circumstantial evidence to reach its legal conclusions. The Court found circumstantial evidence from the UK reliable enough to hold Albania legally responsible, but did not find Bosnia's circumstantial evidence reliable enough to decide that Serbia intended to commit genocide. In addition, the Court was explicit about permitting the UK to take "more liberal recourse to inferences of fact and circumstantial evidence,"¹³⁷ but never explicitly permitted Bosnia to do the same.

Upon closer examination, however, the two judgments' treatments of circumstantial evidence reveal similarities. The Court permitted both the UK and Bosnia to present circumstantial evidence. In both cases, the Court evaluated the reliability of this evidence by comparing it to direct evidence. In *Corfu Channel*, Albania did not present adequate direct evidence to call into question the authenticity of the UK's circumstantial evidence. In *Crime of Genocide*, Serbia presented numerous documents that included direct evidence that Serbia did not intend to and did not commit genocide. Therefore, the Court in *Crime of Genocide* had direct evidence that contradicted Bosnia's circumstantial evidence.

V. CIRCUMSTANTIAL EVIDENCE AND OTHER INTERNATIONAL TRIBUNALS

The ICJ is not the only international judicial body to evaluate a party's recourse to circumstantial evidence to make its decisions. Other courts' treatment of these evidentiary issues can affect the ICJ's future decisions because judicial decisions are a source of law on which the Court can and has relied.¹³⁸

A. Permanent Court of Arbitration at The Hague

Before the creation of the ICJ, the Netherlands and the US agreed to submit to the Permanent Court of Arbitration at The Hague a dispute over which country had sovereign control over the Island of Palmas.¹³⁹ The arbitrator, Max Huber, expressed concern about relying on maps, a type of circumstantial evidence, to determine sovereignty.¹⁴⁰ Huber determined that the Court must exercise great caution when using maps to decide a question of sovereignty.¹⁴¹ Huber rejected any maps that did not "precisely indicate" the political distribution of territories unless the maps helped show the location of

¹³⁷ See *Corfu Channel*, 1949 ICJ at 18.

¹³⁸ ICJ Statute, Art 38(1)(d) (cited in note 1).

¹³⁹ See *Island of Palmas Case (US v Neth)*, 2 RIAA 829 (Perm Ct Arb 1928).

¹⁴⁰ *Id* at 852.

¹⁴¹ *Id*.

geographical names.¹⁴² Huber also recognized the problem that many cartographers make maps by referring to already existing maps instead of collecting their own information.¹⁴³ Huber wrote that, if the arbitrator finds that there are legally relevant facts that contradict the maps of cartographers that relied on unknown sources, then the Court would determine it could not attach any weight to the maps.¹⁴⁴

More important than the direct implications of the *Island of Palmas Case* upon a state's ability to rely on maps, this decision shows how an international judge must critically examine circumstantial evidence and compare it with direct evidence. Judges of the ICJ have relied on the *Island of Palmas Case* in seventeen of its decisions.¹⁴⁵

B. Eritrea-Ethiopia Claims Commission

Established by Article 5 of the Agreement signed in Algiers on December 12, 2000,¹⁴⁶ the Eritrea-Ethiopia Claims Commission (Commission), set in The Hague, is a binding arbitration tribunal for claims brought by the Governments of Eritrea and Ethiopia against the other and by the nationals of one government against the other.¹⁴⁷

In the Commission's *Partial Award for the Central Front, Involving Eritrea's Claims 2, 4, 6, 7, 8, and 22*, the Commission read negative inferences of fact against Ethiopia because it failed to produce evidence.¹⁴⁸ The case involved claims by Eritrea against Ethiopia for "loss, damage and injury suffered" by Eritrea nationals during the period from 1998 to 2000 on the Central Front.¹⁴⁹ Eritrea requested monetary compensation.

One claim by Eritrea was that Ethiopian troops looted and stripped a cemetery in the town of Tserona. Eritrea presented witness testimony that the

¹⁴² Id.

¹⁴³ See *Island of Palmas Case* (US v Neth), 2 RIAA at 852.

¹⁴⁴ Id at 853.

¹⁴⁵ See, for example, *Pulau Litigan and Pulau Sipadan Islands*, 2002 ICJ at 665 ¶ 83; *The Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, 2002 ICJ 303, 404-05 ¶ 205 (Oct 10, 2002); *The Temple of Preah Vihear (Camb v Thai)*, 1962 ICJ 6, 69 (June 15, 1962) (dissenting opinion of Judge Moreno Quintana); *Sovereignty Over Certain Frontier Land (Belg v Neth)*, 1959 ICJ 209, 254 (June 20, 1959) (dissenting opinion of Judge Moreno Quintana).

¹⁴⁶ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Art 5, online at <http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf> (visited Mar 30, 2012).

¹⁴⁷ Id; Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, online at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (visited Apr 3, 2012).

¹⁴⁸ See Eritrea-Ethiopia Claims Commission, *Partial Award*, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, (Apr 28, 2004).

¹⁴⁹ Id at 1 ¶ 1.

cemetery was undamaged at the time that the witness fled, which was shortly before the Ethiopian troops arrived. When he returned, it had been destroyed. Ethiopia presented no evidence to rebut Eritrea's circumstantial evidence. This failure to produce evidence, coupled with the fact that Ethiopia was the occupying power from May 2000 through February 2001, led the Commission to conclude that Ethiopia was liable for 75 percent of the damage caused to the cemetery.¹⁵⁰ Thus, the Court relied on circumstantial evidence to formulate the presumption that Ethiopia was partially responsible for the property damage.

Eritrea also claimed that Ethiopian troops were responsible for damage to the Electrical Authority buildings in Senafe Town.¹⁵¹ An expert witness testified for Eritrea about the damage done to the Electrical Authority buildings. Because the Commission had credible evidence that the town had electrical lighting before the Ethiopian forces entered, the Commission could presume that the damage occurred during Ethiopia's occupation. Again, the Commission relied on circumstantial evidence. The burden of proof shifted to Ethiopia to prove non-attribution, and Ethiopia presented no defensive evidence. The Commission consequently found Ethiopia liable for the damage to the Electrical Authority buildings.

The Commission's decision to read negative inferences of fact against Ethiopia when it did not produce defensive evidence is particularly pertinent within a discussion of the ICJ's treatment of the burden of proof because the Eritrea-Ethiopia Claims Commission relies on the same sources of international law as the International Court of Justice.¹⁵² The Commission is directed to look to: (1) international conventions, (2) international custom, (3) general principles of law recognized by civilized nations, and (4) judicial and arbitral decisions and the teachings of the most highly qualified publicists.¹⁵³

C. NAFTA Claims Tribunal

The NAFTA Claims Tribunal (Tribunal) had no issue with relying on inferences and circumstantial evidence in the case of *Methanex Corporation v US*,¹⁵⁴ despite the fact that it ultimately found the circumstantial evidence unpersuasive. Although the Tribunal applies a set of procedural and evidentiary rules different from that of the ICJ, it relies on "applicable rules of international law," which

¹⁵⁰ Id at 16–17 ¶ 71.

¹⁵¹ Id at 22 ¶ 95.

¹⁵² See Eritrea-Ethiopia Claims Commission, *Rules of Procedure*, Art 19; Eritrea-Ethiopia Claims Commission, *Partial Award* at 5 ¶ 19 (cited in note 148). See also ICJ Statute, Art 38(1) (cited in note 18).

¹⁵³ Eritrea-Ethiopia Claims Commission, *Rules of Procedure*, Art 19 (cited in note 152).

¹⁵⁴ Final Award of the Tribunal, 44 ILM 1345 (Aug 3, 2005).

the Tribunal interpreted to mean the same sources of law the ICJ relies on under Article 38(1) of the ICJ Statute.¹⁵⁵

Methanex Corporation requested \$970 million in compensation from the US due to losses caused by the State of California's ban on the sale and use of the gasoline additive known as "MTBE."¹⁵⁶ The Tribunal noted that many of Methanex's arguments were not based on facts but rather based on factual inferences.¹⁵⁷ In fact, Methanex invited the Tribunal to draw inferences from the unreasonableness of the justifications the State of California put forth for its ban of MTBE.¹⁵⁸ The Tribunal did not question whether this was an appropriate way to interpret evidence. Instead, it literally adopted a "connect the dots" strategy that permitted the use of circumstantial evidence and inferences to connect different factual allegations.¹⁵⁹

The Tribunal addressed circumstantial evidence specifically when discussing "Dot 5," namely the emphasis Methanex placed on a dinner hosted by Archer Daniels Midland Company (ADM), which is the largest US producer of ethanol, for Governor Gray Davis.¹⁶⁰ The Tribunal assumed, in the absence of contrary evidence, that this meeting permitted Davis to present himself to potential contributors and for them to present to him their interests.¹⁶¹ Methanex could not offer direct proof that Davis and ADM officials entered into an illegal agreement during that dinner, so the Tribunal needed to determine if its evidence could support, by way of inference, Methanex's claim that they formed an illegal agreement.¹⁶² The Tribunal evaluated Methanex's circumstantial evidence for this claim, one piece of evidence being that the meeting was "secret."¹⁶³ The Tribunal did not find this circumstantial evidence of secrecy to be accurate because direct evidence, such as Davis's reporting the trip on his campaign donation forms, the use of a traffic escort, and reports of the meeting in the press, contradicted Methanex's claim.¹⁶⁴ Therefore, although the Tribunal expressed no qualms about using circumstantial evidence in general, it found that the circumstances did not support an inference that there was a violation by the US of NAFTA Articles 1101, 1102, 1105, and 1110.¹⁶⁵

¹⁵⁵ Id at 1352.

¹⁵⁶ Id at 1345.

¹⁵⁷ Id at 1430.

¹⁵⁸ See *Methanex*, 44 ILM at 1430 (cited in note 154).

¹⁵⁹ Id.

¹⁶⁰ Id at 1434.

¹⁶¹ Id at 1434–35.

¹⁶² See *Methanex*, 44 ILM at 1435 (cited in note 154).

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Id at 1436.

The analysis of circumstantial evidence in *Islands of Palmas*, the Eritrea Ethiopia Claims Commission's *Partial Award for the Central Front, Involving Eritrea's Claims 2, 4, 6, 7, 8, and 22*, and the *Methanex* case before the NAFTA Claims Tribunal reveal a general acceptance of the use of circumstantial evidence in international law. Although circumstantial evidence usually is critically examined, it is generally permissible. As judicial decisions, the ICJ can rely on these cases when deciding how to value circumstantial evidence.¹⁶⁶ In fact, the ICJ has used Max Huber's reasoning in the *Island of Palmas* on many occasions.¹⁶⁷ In addition, the Court has referred to NAFTA decisions and agreements.¹⁶⁸ The Court could use these decisions in the future to show the existence of customary international law standards on the use of circumstantial evidence.

VI. IMPLICATIONS FOR CROATIA'S CRIME OF GENOCIDE CASE

On July 2, 1999, Croatia filed an application against the Federal Republic of Yugoslavia (now Serbia) alleging violations of the Genocide Convention.¹⁶⁹ Croatia alleged specifically that Serbia is liable for ethnic cleansing of Croatian citizens because it directly controlled "the activity of its armed forces, intelligence agents, and various paramilitary detachments" in various regions of Croatia.¹⁷⁰ Croatia maintained that this ethnic cleansing resulted in the deaths, displacement, torture, and illegal detainment of Croatian citizens as well as property destruction. Croatia requested reparations for these damages. Croatia then alleged a "second round" of ethnic cleansing by Serbia in 1995.¹⁷¹ In the Court's decision regarding preliminary objections,¹⁷² the Court: (1) found that

¹⁶⁶ ICJ Statute, Art 38(1)(d) (cited in note 18).

¹⁶⁷ See, for example, *Pulau Ligitan and Pulau Sipadan Islands*, 2002 ICJ at 638 ¶ 18; *Arrest Warrant of 11 April 2000 (DRC v Belg)*, 2002 ICJ 3, 36 ¶ 4 (Feb 14, 2002) (separate opinion of President Guillaume); *Land and Maritime Boundary Between Cameroon and Nigeria*, 2002 ICJ at 404–05 ¶ 205; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 2001 ICJ at 70–71 ¶ 100; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herz v Yugoslavia)*, Order, 1997 ICJ 243, 270–71 ¶ 4 (Dec 17, 1997) (declaration of Judge Kreća); *Kasikili/Sedudu Island*, 1999 ICJ at 1114 ¶ 3 (declaration of Judge Higgins); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v US)*, Order, 1992 ICJ 114, 199 ¶ 43 (dissenting opinion of Judge El-Koshi); *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, 1994 ICJ 83, ¶ 109 (Feb 3, 1994) (declaration of Judge Ago).

¹⁶⁸ See, for example, *Kasikili/Sedudu Island (Botswana v Namibia)*, 1999 ICJ at 1190–91 ¶ 109 (dissenting opinion of Vice-President Weeramantry); *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, 1997 ICJ 7, 93 (Sept 25, 1997) (separate opinion of Vice-Pres Weeramantry).

¹⁶⁹ See Croatia's *Crime of Genocide Application* at 2 ¶ 1 (cited in note 16).

¹⁷⁰ *Id* at 4 ¶ 3.

¹⁷¹ *Id*.

¹⁷² See generally *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, 2008 ICJ 412 (cited in note 7).

the Court had jurisdiction over the case;¹⁷³ (2) rejected the first and third preliminary objections of Serbia;¹⁷⁴ and (3) determined that Serbia's second preliminary objection was not of an exclusively preliminary character.¹⁷⁵

There are lessons from Bosnia's experience before the ICJ that Croatia can use in its preparation for the upcoming proceedings. First, Croatia cannot expect to prevail if it relies solely on circumstantial evidence and inferences to prove Serbia's intent to commit alleged crimes. Despite the difficulty in obtaining some of the evidence that was and is in the territorial control of Serbia, Croatia needs to obtain direct evidence for its case. At the very least, Croatia needs to be able to discredit any direct evidence Serbia submits that contradicts circumstantial evidence Croatia submits.

On January 4, 2010, Serbia filed its counter-memorial, in which it alleged counter-claims against Croatia.¹⁷⁶ Serbia alleges that Croatia violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide when it harmed its Serb population in 1995 and failed to punish those acts of genocide.¹⁷⁷ At the time of writing this Article, it is difficult to obtain more information on the specifics of Serbia's counter-claim.¹⁷⁸

In addition, it seems inevitable that the Court will rely on evidence from the ICTY, so both parties need to understand how this will affect their cases. This is particularly pertinent given that, in April 2011, the ICTY found Ante Gotovina, a former commander in the Croatian Army, and Mladen Markač, a former commander of the special police force of the Republic of Croatia, guilty of committing war crimes during an attack on ethnic Serb areas in 1995.¹⁷⁹ According to a statement that Radoslav Stojanović, a former Professor of Law at the University of Belgrade, made to the newspaper, "[t]he International Court

¹⁷³ Id at 446 ¶ 146.

¹⁷⁴ Id.

¹⁷⁵ Id at ¶ 145.

¹⁷⁶ See ICJ, Press Release, No 2010/3 (Feb 18, 2010), online at <http://www.icj-cij.org/docket/files/118/15847.pdf> (visited Mar 30, 2012).

¹⁷⁷ Id. See also *Serbia Files Genocide Lawsuit Against Croatia* (B92 Jan 4, 2010), online at http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=01&dd=04&nav_id=64226 (visited Mar 30, 2012); *Serbia and Croatia to Meet in The Hague in December Over Genocide Lawsuits*, Croatian Times (Nov 18, 2011), online at http://www.croatiantimes.com/news/General_News/2011-11-18/23292/Serbia_and_Croatia_to_meet_in_The_Hague_in_December_over_genocide_lawsuits (visited Mar 30, 2012).

¹⁷⁸ Before the Court, "written pleadings remain confidential until such time as the Court decides to make them accessible to the public, generally at the opening of the oral proceedings." ICJ, Press Release, No 2010/3 (cited in note 176).

¹⁷⁹ See *Prosecutor v Gotovina, Čermak, and Markač*, Case No IT-06-90, Judgment (Apr 15, 2011). See also *Croatian Genocide Suit in Wake of Hague Ruling*, (B92 Apr 18, 2011), online at http://www.b92.net/eng/news/crimes-article.php?yyyy=2011&mm=04&dd=18&nav_id=73867 (visited Mar 30, 2012).

of Justice respects Hague Tribunal verdicts. In other words, the Gotovina ruling is bad for Croatia's genocide lawsuit filed against Serbia. This shows that there was no genocide, but rather a civil war."¹⁸⁰

VII. CONCLUSION

From the cases described above, we can conclude that the ICJ will rely on circumstantial evidence and liberal inferences to determine factual issues, but only in certain circumstances. The Court will resort to using circumstantial evidence in favor of one party when the other party has *exclusive* control of the evidence and when the other party or the Court cannot furnish any contradictory direct evidence. Simply submitting that the other party has territorial control is insufficient to earn the right to resort to circumstantial evidence. In order for the Court to rely substantially on circumstantial evidence, it must be convinced that the circumstantial evidence proves an issue beyond reasonable doubt.

In this regard, the Court will not permit a party to rely on circumstantial evidence just because the other party is keeping evidence confidential. The UK kept information confidential in *Corfu Channel*, and Serbia kept information confidential in *Crime of Genocide*. The Court does not find a party's decision to keep information secret enough to warrant automatically liberal reliance on circumstantial evidence. It remains to be seen whether the Court would liberally construe circumstantial evidence from a party if the opposing party kept evidence confidential and still materially relied on it. The UK did not rely on documents that it kept secret from Albania and the Court in *Corfu Channel*. Interestingly, in *Crime of Genocide*, it was Bosnia that first referred to the redacted documents, and Serbia was permitted to respond. Serbia, therefore, used these redacted documents, but it did not heavily or arguably even directly rely on these redacted documents to state its case.

Finally, the ICJ's case law discussed herein indicates a hierarchy of preferred evidence. The Court favors direct evidence over circumstantial evidence. The Court finds factual evidence that has been put through the trial process more persuasive than factual evidence that has not withstood cross-examination.¹⁸¹ Thus, if reliable direct evidence contradicts circumstantial evidence, the Court is unlikely to rely on the circumstantial evidence. Therefore, a party's ability to rely on circumstantial evidence may depend on the strength of

¹⁸⁰ See *Croatian Genocide Suit in Wake of Hague Ruling* (cited in note 179).

¹⁸¹ See *Crime of Genocide*, 2007 ICJ at 130–31 ¶ 213, citing *DRC v Uganda*, 2005 ICJ at 201 ¶ 61 (“The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention.”).

its opponent's case. Serbia, for example, was able to furnish reliable direct evidence in its favor, but Albania was not.

Although the Court adopted the evidentiary principle of permitting a state "more liberal recourse to inferences of fact and circumstantial evidence" from other international decisions and domestic legal systems, the ICJ's use of circumstantial evidence differs from domestic courts' in some ways.¹⁸² Judge Owada explained that the "procedures and rules on evidence [in an international court] seem to be much less developed, and the task of the Court for fact finding much more demanding, than in the case of the national courts."¹⁸³ This may be in part because of domestic courts' power to compel production of evidence.¹⁸⁴ The ICJ, on the other hand, can merely "call upon the agents to produce any document or to supply any explanations."¹⁸⁵ If the parties do not comply, then "[f]ormal note shall be taken of any refusal,"¹⁸⁶ but production cannot be compelled. Thus, the Court may only have before it circumstantial evidence of a claim or may be confined to limited direct evidence. It has consequently carefully chosen when to rely on circumstantial evidence. These insights should help both litigants before the ICJ and scholars and practitioners who strive to comprehend fully the Court's judgments.

Having disclosed and explained the nuances of the ICJ's approach to nonproduction of evidence in the exclusive control of a party, a final question is whether the Court's approach could be modified to better ensure the fair

¹⁸² See *Corfu Channel*, 1949 ICJ at 18 (stating that "[t]his indirect evidence is admitted in all systems of law, and its use is recognized by international decisions").

¹⁸³ See *Oil Platforms*, 2003 ICJ at 322–23 ¶ 52 (separate opinion of Judge Owada).

¹⁸⁴ For example, see Richard Norton-Taylor, *Binyam Mohamed Torture Evidence Must Be Revealed*, *Judges Rule* (The Guardian Feb 10, 2010), online at <http://www.guardian.co.uk/world/2010/feb/10/binyam-mohamed-torture-ruling-evidence> (visited Mar 30, 2012) (explaining how the UK Court of Appeals required British government to disclose information about Binyam Mohamed's treatment in Guantanamo Bay); *Obtaining Evidence Abroad, A Project of the International Litigation Committee, Australia (New South Wales)* (ABA Section of International Law) online at <http://www.abanet.org/intlaw/committees/disputes/litigation/ausnswales.pdf> (visited Mar 30, 2012) (explaining how Australian law allows for compelling the production of evidence); FRCP 26(b)(2)(B) (2009) (granting a US court the power to compel production of discovery evidence); *Kastigar v US*, 406 US 441, 443 (1972), citing *Statute of Elizabeth*, 5 Eliz 1, ch 9, § 12 (1562) ("The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence."); *Countess of Shrewsbury's Case*, 2 How St Tr 769, 778 (1612). See also *Edwards v UK*, App No 46477/99, Eur Ct HR (Mar 14, 2002) (finding that an investigation into the death of a prisoner violated Article 2 of the European Convention on Human Rights in part because the inquiry did not have the power to compel witnesses).

¹⁸⁵ ICJ Statute, Art 49 (cited in note 18). See also ICJ, *Rules of Court*, Art 62(1) (cited in note 18) ("The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.").

¹⁸⁶ ICJ Statute, Art 49 (cited in note 18).

administration of justice. For example, consistent with the powers vested in the Court by the ICJ Statute, at the pre-trial stage of cases requiring production of evidence, the ICJ could appoint a "special master" who would monitor discovery and act as a mediator relating to discovery disputes.¹⁸⁷ This approach would enable the Court to settle in detail which facts are uncontested, what evidence the parties accept, and which issues need further clarification.

As part of the process, the special master could recommend production orders and suggest inferences of fact that should be taken in response to a party's failure to produce relevant evidence exclusively in its possession. This approach would shift the ICJ from merely sanctioning liberal recourse to circumstantial evidence in response to nonproduction to explicitly taking adverse findings of fact in appropriate circumstances. Following the example of domestic courts, such adverse findings of fact should be made only after prior warning and should be subject to reopening if the information is produced by a given date.¹⁸⁸

While this proposal may engender criticism that it punishes justified nonproduction of classified information, the authors note that, under the Classified Information Procedures Act,¹⁸⁹ if a US court determines that classified information is relevant and important to the defense, it may order the government to produce either the evidence or an adequate substitution, including a statement admitting relevant facts that the specific classified information would tend to prove.¹⁹⁰ The proposed approach similarly would not require disclosure of intelligence sources and methods to the other party or the ICJ, but would provide the Court greater ability to level the playing field in such cases.

¹⁸⁷ See Halink, 40 NYU J Intl L & Pol at 41–42 (cited in note 17).

¹⁸⁸ See Restatement (Third) of Foreign Relations Law § 442(2)(c), cmt f (cited in note 21).

¹⁸⁹ Classified Information Procedures Act, Pub L No 96-456, 94 Stat 2025, 18 USC App 3 §§1–16 (2000 & Supp IV 2004).

¹⁹⁰ See Brian McEvoy, *Classified Evidence and the Confrontation Clause: Correcting a Misapplication of the Classified Information Procedures Act*, 23 BU Intl L J 395, 407 (2005), citing Classified Information Procedures Act (cited in note 189).

