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Reconcilable Difference: A Critical Assessment of the International Court of Justice’s Treatment of Circumstantial Evidence

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Reconcilable Difference:
A Critical Assessment of the International Court of Justice’s
Treatment of Circumstantial Evidence

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Abstract

This article examines a vexing evidentiary question that the International Court of Justice has struggled with in several cases over the years, 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 Bosnia Genocide case, the Court declined to do so under seemingly similar circumstances. By carefully examining the treatment of evidence in these and other international cases in which this situation has arisen, this article seeks to illuminate the nuances in the Court’s approach to circumstantial evidence. Because International Court of Justice cases significantly impact 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.

I. Introduction

While the International Court of Justice 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 World Court, however, has limited ability to compel production of evidence and instead generally relies on a “Compromis” containing agreed factual stipulations. The Court must therefore depend on cooperation of the parties to submit a sufficient evidentiary basis from which to make critical factual determinations. This article focuses on the question of 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 International Court of Justice’s first contentious case, Corfu Channel, the Court delineated procedural, evidentiary, and equitable rules that have shaped many of the Court’s decisions since then. Specifically, the Court addressed two significant evidentiary issues in the

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Corfu Channel case: (1) the Court’s attitude towards secret evidence, and (2) the rules surrounding the use of circumstantial evidence. In 2007, 58 years after its first contentious case, 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”].

The International Court of Justice takes a flexible approach to the admissibility of evidence. The Court evaluates the authenticity, reliability, and persuasiveness of the materials the Parties submit to it. One possible reason for the Court’s flexible approach, according to 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. The Court, therefore, permits the Parties to submit many types of direct and circumstantial evidence. Perhaps in part because of this flexible approach, the Court has not articulated its evidence policy in many cases.

The Court was quite candid about its decision to use the Crime of Genocide case to clarify the Court’s evidentiary standards. This decision by the Court in 2007 to reevaluate evidentiary principles will have a profound impact on future cases. The Judgment is particularly poignant given the fact that a case currently on the Court’s docket is a case brought by Croatia against Serbia dealing with largely the same issues and allegations as the 2007 Crime of Genocide case. The Crime of Genocide decision is similar to Corfu Channel in that in Crime of Genocide, the Court permitted a Party to keep evidence secret, but it is different in that the Court was not as willing to rely on circumstantial evidence to reach its legal conclusions.

At first glance, it appears that the International Court of Justice drastically altered its treatment of circumstantial evidence in the Crime of Genocide case from its treatment in Corfu Channel. The Court found solely circumstantial evidence persuasive enough to find that Albania incurred legal responsibility in Corfu Channel but did not find it persuasive enough alone to hold Serbia legally responsible for Bosnia and Herzegovina’s allegations in Crime of Genocide. 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’s treatment of circumstantial evidence is not as contradictory as most commentators have assumed. The Judges on the Court addressed circumstantial evidence in Corfu Channel, South West Africa, and in the Crime of Genocide case.

3 The World Court does not explicitly define “circumstantial evidence” in its judgments. However, the International Court of Justices in Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9), distinguished circumstantial evidence from “direct proof” and stated that “indirect evidence” could be drawn from “inferences of fact.” In this case, the Court classified circumstantial evidence as a type of indirect evidence.


7 Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) [hereinafter Corfu Channel].
Military and Paramilitary Activities in and against Nicaragua, Military and Paramilitary Activities in and against Nicaragua,9 Sovereignty Over Pulau Ligitan and Pulau Sipadan,10 Oil Platforms,11 and D.R.C. v. Uganda,12 before its Crime of Genocide13 decision. By examining the discussion of evidence in these seven cases, this article seeks to illuminate the nuances in the Court’s approach to circumstantial evidence.

While the ICJ issues only a handful of opinions each year, they significantly impact the practice of States and international organizations and are frequently cited as authority by national courts.14 A better understanding of the Court’s application of evidentiary standards, therefore, has broad scholarly and practical utility.

II. Background: Seven Key Cases

Although International Court of Justice cases are only binding on the parties to the particular dispute,15 and thus they do not statutorily have precedential value, the Court often cites its previous decisions in its judgments.16 In fact, many studies and evaluations of International Court of Justice cases contend that the international community views ICJ decisions as having precedential value.17 Therefore, the International Court of Justice’s treatment of evidentiary

11 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6) [hereinafter Oil Platforms].
15 Statute of the International Court of Justice, art. 59.
16 See e.g., Maritime Delimitation in the Black Sea (Rom v. Ukr.) 2009 I.C.J. 132, para. 68 (Feb. 3); Crime of Genocide, para. 127 (Feb. 26); DRC v. Uganda, para. 68 (Dec. 19).
issues in one case has significant bearing on how it (and other international courts) will treat similar issues in the future.

A. The Corfu Channel Case

In the International Court of Justice’s first contentious case, *Corfu Channel*, it faced burden of proof issues involving secret evidence, lack of defensive evidence, and circumstantial evidence. The case was brought by the United Kingdom against Albania and raised the issue of state responsibility for mines present in the North Corfu Channel, a strait between Albania and Greece. On October 22, 1946, British warships went through the channel. Two ships, the *Saumarez* and the *Volage*, struck mines while in Albanian territorial waters and were damaged.

1. Legal Responsibility of Albania

To hold Albania responsible for the mines in its territorial waters, the United Kingdom attempted to prove that Albania had knowledge of the mines. The Court recognized that the fact that the minefield was discovered in Albanian territorial waters is not enough to prove that Albania had such knowledge. However, the Court also recognized that the fact that Albania had exclusive territorial control over its waters could make it impossible for the United Kingdom to “furnish direct proof of facts giving rise to responsibility.” To solve this dilemma, the Court permitted the United Kingdom to take “more liberal recourse to inferences of fact and circumstantial evidence.” The Court included the caveat, however, that proof may only be drawn from inferences of fact if the facts leave no room for reasonable doubt.

Thus, the United Kingdom relied on indirect evidence to prove that Albania knew of the mines in its territorial waters. In this regard, the United Kingdom and the Court found it persuasive that evidence revealed that Albania kept a close watch over the waters of North Corfu Channel and that Albania had the ability to observe mine laying from the Albanian Coast. The Court further 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 by Albania together revealed that Albania was vigilant in controlling its waters. Moreover, the Court noted

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19 Id., pp. 13-14.

20 *Corfu Channel*, p. 18.

21 Id., p. 18.

22 Id., p. 18.

23 Id., p. 18.

24 Id., pp. 18-19.

25 Id., p. 20.
that there were many observation points along the coast, and a minelayer placing the closest mine would have had to be within 500 meters of the Albanian coast.\textsuperscript{26}

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.\textsuperscript{27} Thus, the Court read inferences from the fact that Albania patrols and monitors its territorial waters to conclude that Albania had acquired legal responsibility for the damage to the British ships.

2. Legal Responsibility of the United Kingdom

Albania, in turn, contended that the United Kingdom violated Albanian sovereignty by sending warships through the North Corfu Channel without obtaining authorization from the Albanian Government.\textsuperscript{28} The Court determined that the United Kingdom did not violate international law because all States have a right to send warships through international waterways.\textsuperscript{29} Albania further contended that the United Kingdom violated international law because the British warships’ navigation through North Corfu Channel on October 22, 1946 was not an innocent passage.\textsuperscript{30} 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 an intention not to merely pass through the waterway.\textsuperscript{31}

The Court requested that the United Kingdom produce documents, titled XCU, which the commander of the ship, \textit{Volage}, made reference to on October 23, 1946.\textsuperscript{32} Citing naval secrecy, the Agent for the United Kingdom refused to produce the documents. In contrast to the language the Court used in regards to the issue of Albania’s legal responsibility, the Court observed that it could not draw from the United Kingdom’s refusal to produce “any conclusions differing from those to which the actual events gave rise.”\textsuperscript{33} Various other direct evidence produced by the United Kingdom contradicted Albania’s claim, and as a result, the Court found that the United Kingdom did not violate the sovereignty of Albania.\textsuperscript{34}
3. Analysis of Evidentiary Principles

How can we reconcile the fact that the ICJ permitted the United Kingdom “liberal recourse to inferences of fact” regarding Albania’s knowledge of the mines but did not allow Albania to rely on liberal inferences in response to the United Kingdom’s refusal to produce secret evidence? The difference between Albania’s and the United Kingdom’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. The United Kingdom, on the other hand, did not have the ability to gather evidence to determine whether or not Albania knew of the mines in its territorial waters. This information was in the exclusive control of Albania.

Therefore, the Court’s treatment of circumstantial evidence for Albania and the United Kingdom is actually in harmony. The Court refuses in all circumstances to infer conclusions that contradict evidence of actual events, regardless of whether or not 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 direct evidence and accepted facts.

B. South West Africa

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. Some of the issues were whether: the Mandate was still in force; South Africa had to produce annual reports to the General Assembly; South Africa had promoted the well-being and social progress of the peoples in South West Africa; South Africa violated the Mandate by engaging in military actions; and whether South Africa violated the Mandate when it tried to modify it 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 someone with discretionary power acted with an improper purpose or motive. He recognized that although direct statements could prove improper purpose or motive, it is more frequently proven by circumstantial evidence. His opinion stands for the proposition that one may deduce that an act was motivated by an improper motive if that act is so unreasonable that no reasonable person with that same discretionary power would have performed it.

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35 Id., p. 30.


38 Id., para. 19(h).

39 Id.
C. Nicaragua v. United States

The Court also wrestled with how much weight to accord circumstantial evidence in the Military and Paramilitary Activities in and against Nicaragua case.\(^{40}\) In that case, the Parties submitted various types of documents from various sources as evidence.\(^{41}\) These documents included reports in press articles and extracts from books. The Court recognized that it had to be careful in its treatment of these documents because they are merely material which can contribute to corroborating the existence of a fact; the materials were not alone capable of proving facts.\(^{42}\)

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,\(^{43}\) the Court determined that it could use public knowledge “to declare that it was satisfied that the allegations of fact were well-founded”\(^{44}\) so long as the court kept in mind the possibility that widespread reports might all derive from one source. Therefore, the Court found that wide 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 United States, a determination the Court viewed as fundamental to the case.\(^{45}\) The Court relied on inferences from the United States’ role in selecting the leaders of the contra force, in organizing, equipping, training, and planning of the contra force, and in choosing targets and providing operational support to determine that the contra force partially depended on the United States.\(^{46}\) However, the Court concluded that it could not determine that the majority of contra force activities were supported by the United States because it did not have adequate direct proof, and the circumstantial evidence alone could not answer this issue.\(^{47}\)

D. Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan

In the Pulau Ligitan and Pulau Sipadan Islands case, the Court refused to draw any clear

\(^{41}\) Id., para. 62.
\(^{42}\) Id.
\(^{44}\) Nicaragua, para. 63.
\(^{45}\) Nicaragua, para. 111.
\(^{46}\) Id., para. 112.
\(^{47}\) Id., para. 111.
and final conclusion from circumstantial evidence, in the form of maps relied upon by Malaysia.48 The Court was asked to determine what country, Malaysia or Indonesia, had sovereignty over two islands, Litigan 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 to be British or Malaysian islands.49 Indonesia protested the accuracy, relevance, and interpretation of the maps.50 Relying on its treatment of maps in the past,51 the Court decided that except when maps are “annexed to an official text of which they form an integral part,” maps do not establish territorial title.52 Rather, the Court opined that unattached maps, which all the maps except one were in this case, were merely extrinsic evidence, not direct evidence, which could be used to either establish or reconstitute the facts. The Court ultimately determined that the two islands are the sovereign territory of Malaysia.

The dissenting opinion by Judge Franck, sitting as an ad hoc judge, may also help shape our understanding of the Court’s future treatment of the role and weight to be accorded to circumstantial evidence.53 Judge Frank wrote that when Britain and the Netherlands negotiated their 1891 Convention, they meant it to cover all potential points of conflict.54 In addition to this presumption, Franck notes that there is also circumstantial evidence that Britain and the Netherlands believed they were resolving all territorial problems with the 1891 Convention.55 Even if the circumstantial evidence was inconclusive, wrote Franck, it still permits the invocation of the rebuttable presumption that the States intended to resolve all potential disputes in the geographical area surrounding Litigan and Sipadan.56 Using this circumstantial evidence, Franck determined that the islands were the sovereign territory of Indonesia.

Judge Kooijmans, in his Separate Opinion in the Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, adopted a dismissive approach to the use

49 Id., para. 86.
50 Id., para. 87.
54 Id., paras. 1, 5.
55 Id., para. 45.
56 Id., para. 45.
of maps similar to the Court in the *Pulau Ligitan and Pulau Sipadan Islands* case.\(^{57}\) Qatar relied upon many maps that the Hawar Islands belonged to the State of Qatar. Relying on the *Frontier Dispute* case,\(^ {58}\) Judge Kooijmans recalled that maps do not constitute a territorial title; rather they are merely extrinsic evidence. Kooijmans discarded the maps because there was no direct evidence showing that Qatar had sovereignty over the islands\(^ {59}\) 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.\(^ {60}\)

**E. Oil Platforms**

The Court was far more dismissive of public reports in the *Oil Platforms* case\(^ {61}\) than in prior cases, such as *Nicaragua*. The United States, 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 United States and on public sources that reported that Iran was responsible for an armed attack.\(^ {62}\) The Court explained that its decision to disregard this secondary evidence was because the Court had no knowledge of the original source, and that it is possible that “widespread reports of a fact” may in actuality “derive from a single source.”\(^ {63}\) Thus, concluded the Court, numerous reports have no greater value than the original source, and these reports cannot substitute for direct evidence.

**F. Democratic Republic of the Congo v. Uganda**

In *D.R.C. v. Uganda*, the Court chose not to rely on various items offered as evidence because of their circumstantial nature.\(^ {64}\) Specifically, the court refused to rely on the International Crisis Group report of November 17\(^ {th}\), the Human Rights Watch Report of March 2001, portions of a report by the United Nations Secretary-General that relied on second-hand reports, articles in the IRIN 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.


\(^{58}\) Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. 554, para. 54 (Dec. 22).


\(^{60}\) Id., para. 71, citing Island of Palmas Case, RIAA, Vol. II, 829, 853.


\(^{62}\) Oil Platforms, para. 60.

\(^{63}\) Oil Platforms, citing Nicaragua, para. 112.

\(^{64}\) DRC v. Uganda, para. 159.
Liberation Movement (Mouvement de libération du Congo) from September 1998 onwards. The Court deemed these sources to be uncorroborated, based on second-hand reports, factually incorrect, and/or partisan. The International Court of Justice 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 examines circumstantial evidence and compares it to any direct evidence on the issue to see if it can be corroborated.

III. Analysis of the Court’s Treatment of Circumstantial Evidence as of 2005

In the cases described above, the Court had the opportunity to discuss particular types of circumstantial evidence, such as maps, United Nations reports, non-governmental organization reports, newspaper articles, and information that is public knowledge. Although the Court consistently permitted Parties to submit circumstantial evidence, it critically evaluated this evidence. For example, the Court in Oil Platforms, Pulau Ligitan, and D.R.C. 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 evidence that is based on second-hand, biased, or uncorroborated reports in the D.R.C. v. Uganda case. The Court refused to simply 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 different elements. Judge Van Wyk permitted use of circumstantial evidence to prove improper motive in the South West Africa case. The Court used circumstantial evidence to find that the United States 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 Sovereignty Over Pulau Ligitan and Pulau Sipadan, maps alone cannot establish territorial boundaries. Judge Franck, in that case, relied on circumstantial evidence to invoke a rebuttable presumption.

Nonetheless, after 56 years of cases, the Corfu Channel case continued to be the most controlling case on the issues of how the Court should rely on circumstantial evidence. Again, in that case, the Court permitted the United Kingdom to rely on inferences of fact and circumstantial evidence. The Court would still assess the weight of circumstantial evidence, but it 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

65 Id., para. 155.

66 Although “maps, United Nations 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 purported.
In this seminal case, the Applicant, the Republic of Bosnia and Herzegovina, alleged that the Respondent, Serbia,\(^{67}\) violated the Convention on the Prevention and Punishment of the Crime of Genocide, by contributing to acts of genocide and failing to prevent and punish acts of genocide.\(^{68}\) As a remedy, Bosnia and Herzegovina asked the Court to Order Serbia and Montenegro to cease its illegal conduct, take immediate and effective steps to ensure compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, restore the situation that existed before the violations of the Convention occurred, and pay Bosnia and Herzegovina compensation.\(^{69}\)

### A. Order for Additional Provisional Measures

Both Bosnia and Herzegovina and Yugoslavia proposed additional provisional measures to those ordered on 8 April 1993.\(^{70}\) 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."\(^{71}\) In Judge Lauterpacht’s Separate Opinion, in which he concurred with the Court’s Order, he discussed how the Court should have considered circumstantial evidence in its Order.\(^{72}\) In particular, he opined that the Court should have been more detailed in its measures and in its statement of material facts.\(^{73}\)

Judge Lauterpacht described the evidence Bosnia and Herzegovina put forward as falling into two categories: written primary evidence and written secondary evidence.\(^{74}\) The secondary evidence included statements of fact adopted by organs of the United Nations. Lauterpacht wrote that “there is no reason why the Court should not take both such categories of evidence into account.”\(^{75}\) He then went on to discuss a particular type of circumstantial evidence, facts

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\(^{67}\) Originally the Federal Republic of Yugoslavia.

\(^{68}\) Crime of Genocide, para. 65.

\(^{69}\) Id.


\(^{73}\) Id., para. 8.

\(^{74}\) Id., para. 42.

\(^{75}\) Id.
that are “public knowledge.” Relying on past ICJ cases, 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 circumstances of the case, and in this case Lauterpacht viewed the public evidence and primary evidence as being conclusive of the existence of atrocities.

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

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 Yugoslavia did not rebut any of Bosnia and Herzegovina’s circumstantial evidence. The Court in its Judgment on the Merits, however, took a different view.

**B. Judgment**

1. *Secret Evidence*

In addition to requesting the Court to allow it to rely on circumstantial evidence, Bosnia and Herzegovina 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. Serbia and Montenegro failed to produce

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78 Id., para. 45.

79 Id., para. 64.

80 Id., paras. 57, 67.

81 Id., paras. 64, 67.

82 Crime of Genocide, para. 204.
complete copies of documents of the Supreme Defence Council of Serbia, which had been classified as a military secret by the Council of Ministers of Serbia and Montenegro. Instead, Bosnia and the Court had access to redacted copies of these documents.

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

The International Court of Justice denied Bosnia’s request for the Court to prohibit Serbia from using these redacted documents. One reason the Court cites for this decision is that Bosnia and Herzegovina already had access to extensive evidence, in particular from the International Criminal Tribunal for the Former Yugoslavia. Thus, the Court did not call upon Serbia and Montenegro to provide these documents to Bosnia. The Court did note, however, that it has the power to draw its own conclusions.

2. Recourse to Liberal Findings of Fact

In Bosnia and Herzegovina’s Memorial submitted to the International Court of Justice, it 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. 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. Bosnia and Herzegovina 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. Bosnia alleged that Serbia had

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83 Id., para. 205.
84 Id.
85 Id.
86 Id., para. 206.
87 Id.
89 Id., para. 5.3.3.7.
the burden to rebut these inferences.  

3. Specific Intent to Commit Genocide

In the decision on the Merits, the Court addressed Bosnia and Herzegovina’s request to have the Court draw inferences from established facts involving the specific intent required for the crime of genocide. Bosnia relied on an alleged overall plan to commit genocide and a pattern of genocidal or potentially genocidal acts to prove the necessary intent to constitute genocide. Bosnia contended that the required specific intent is thus shown by the consistency of practices and the pattern of the acts.

The Court refused to find that the pattern of atrocities demonstrated the required intent. 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.” Relying on decisions by the International Criminal Tribunal for the Former Yugoslavia, the Court noted that the pattern of atrocity crimes cannot only point to the specific intent to destroy the group in whole or in part. Thus, excluding the crimes committed at Srebrenica, which the Court discussed later in its decision, the Court determined Bosnia and Herzegovina was unable to prove that Serbia had the specific intent required by the Genocide Convention.

4. Duty to Prevent and Punish

The International Court of Justice found Serbia legally responsible for failing to prevent and punish the atrocities that occurred at the Muslim Community of Srebrenica. Although the Court makes no specific mention of relying on inferences of circumstantial evidence, it appeared to do so with regard to Serbia’s duty to prevent acts of genocide. The Court reaffirmed that it

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92 Crime of Genocide, para. 207.

93 Id., para. 370.

94 Id., para. 371.

95 Id., para. 373.

96 Id.

97 Crime of Genocide, para. 374.

98 Id., para. 376.

99 Id., paras. 438, 450.
had not found evidence that the Belgrade authorities knew of the decision to eliminate the adult male population of Srebrenica. Nonetheless, given all of the “international concern” about what appeared likely to occur at Srebrenica, and given Milošević’s own observations, the Court observes that it must have been clear to Belgrade authorities that there was a serious risk that genocide would occur in Srebrenica. Serbia did not show that it tried to prevent or avert the genocide at Srebrenica. Therefore, the Court relied on indirect evidence to determine that Serbia knew of the possibility of genocidal acts at Srebrenica and did not adequately prevent those acts.

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 International Criminal Tribunal for the Former Yugoslavia.

5. Why Didn’t the Court Rely More Heavily on Circumstantial Evidence?

It certainly seems at first glance that the Court should have placed reliance on Bosnia and Herzegovina’s circumstantial evidence to be consistent with its past rulings. Bosnia and Herzegovina 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. On its face, this appears to be a case where the Court should have been highly concerned with equality between the Parties and may have achieved that equality by liberally construing Bosnia and Herzegovina’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 and Herzegovina’s circumstantial evidence that it alleged proved 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 and Herzegovina’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.” For a pattern of conduct to be accepted as

100 Id., para. 438.
101 Id.
102 Id.
103 Id., para. 449.
104 Id., para. 373.
evidence of specific intent, it would have to be so that it could only point to the existence of such intent.  

Moreover, it is significant that the Crime of Genocide case is unique from past cases because such an overwhelming amount of direct evidence existed for the Court to assess. This is in stark contrast to many past cases were a paucity of direct evidence existed. 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 produce so much direct evidence in its favor, it was extremely difficult for Bosnia and Herzegovina to mount a case based on circumstantial evidence.

The Court had the option to rely on multiple decisions from the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). The Court determined that trial decisions by the ICTY merit special attention because the fact-finding process of the ICTY tests evidence through cross-examination. This comports with the Court’s decision in D.R.C. v. Uganda. The ICTY decisions were highly persuasive to the Court, and they made it difficult for Bosnia and Herzegovina to rely on any circumstantial evidence that contradicts these decisions.

In addition, one possible reason why the Court did not grant Bosnia and Herzegovina an evidentiary benefit in response to Serbia’s refusal to disclose secret documents is that the Agent for Bosnia and Herzegovina did not raise this issue of the necessity of disclosure until the eve before oral arguments. In addition, after the Court had decided not to call upon Serbia to produce those documents at that state of the proceedings, the Agent for Bosnia did not renew its request. This may or may not have had an effect on the Court’s reasoning, but it does show that Bosnia and Herzegovina did not seem to firmly or repeatedly press the issue.

C. Reconciling Corfu Channel with Crime of Genocide

105 Id.


107 Id., citing Nicaragua, para. 67.


109 D.R.C. v. Uganda, para. 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.”).


111 Id.
The Court’s treatment of circumstantial evidence in Corfu Channel and Crime of Genocide cases seems partially incompatible. The Court found circumstantial evidence from the United Kingdom reliable enough to hold Albania legally responsible but did not find Bosnia and Herzegovina’s circumstantial evidence reliable enough to decide that Serbia intended to commit genocide. In addition, the Court was explicit about permitting the United Kingdom to take “more liberal recourse to inferences of fact and circumstantial evidence” but never explicitly permitted Bosnia and Herzegovina to do the same.

Upon further examination, however, the two Judgments’ treatment of circumstantial evidence reveals similarities. The Court permitted both the United Kingdom and Bosnia and Herzegovina 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 United Kingdom’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 and Herzegovina’s circumstantial evidence.

IV. Circumstantial Evidence and Other International Tribunals

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

A. Permanent Court of Arbitration at The Hague

Before the creation of the International Court of Justice, the Netherlands and the United States of America agreed to submit a dispute over which country had sovereign control over the Island of Palmas to the Permanent Court of Arbitration at The Hague. The Arbitrator, Max Huber, expressed concern about relying on maps, a type of circumstantial evidence, to determine sovereignty. Huber determined that the tribunal must exercise great caution when using maps to decide a question of sovereignty. Huber rejected any maps that did not “precisely indicate” the political distribution of territories unless the maps helped show the location of geographical names. Huber also recognized the problem that many cartographers make maps by referring to already existing maps instead of collecting their own information. Huber wrote that if the Arbitrator finds that there are legally relevant facts that contradicted the maps of cartographers that relied on unknown sources, then the Court could not attach any weight to the maps.

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112 Corfu Channel, p. 18.

113 Statute of the International Court of Justice, art. 38(1)(d).


115 Id., p. 852.

116 Id., p. 853.
More important than the *Island of Palmas* case’s direct implication for 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 International Court of Justice has relied on the *Island of Palmas* case in seventeen of its own decisions. Thus, the Court is willing to adopt other judicial bodies’ attitudes towards circumstantial evidence.

**B. Eritrea Ethiopia Claims Commission**

Established by Article 5 of the Agreement signed in Algiers on December 12, 2000, the Eritrea Ethiopia Claims 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.

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. The case involved claims by Eritrea against Ethiopia for “loss, damage and injury suffered” by Ethiopian nationals during the period of 1998-2000 on the Central Front. Ethiopia requested monetary compensation.

One claim by Eritrea was that Ethiopian troops loot ed and stripped a cemetery in the town of Tserona. Eritrea presented witness testimony that the cemetery was undamaged at the time that he 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 is liable for seventy-five percent of the damage caused to the cemetery. Thus, the Court relied on

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120 Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, Eritrea Ethiopia Claims Commission (Apr. 28, 2004).

121 Id., para. 1.

122 Id., para. 71.
circumstantial evidence to formulate the presumption that Ethiopia is partially responsible for the property damage.

Eritrea also claimed that Ethiopian troops were responsible for damage to the Electrical Authority buildings in Senafe Town. 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 Eritrea Ethiopia Claims Commission’s decision to read negative inferences of fact against Ethiopia when it did not produce defensive evidence is particularly poignant within a discussion of the International Court of Justice’s treatment of the burden of proof because the Eritrea Ethiopia Claims Commission relies on the same sources of international law as the ICJ. 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.

C. NAFTA Claims Tribunal

The NAFTA Claims Tribunal displayed no reluctance in relying on inferences and circumstantial evidence in the case of Methanex Corporation v. United States of America, despite the fact that it ultimately found the circumstantial evidence unpersuasive. Although the NAFTA Tribunal applies a set of procedural and evidentiary rules different from that of the International Court of Justice, it relies on “applicable rules of international law,” which the Tribunal interpreted to mean the same sources of law the International Court of Justice relies on in Article 38(1) of its Statute.

Methanex Corporation requested $970 million in compensation from the United States due to losses caused by the State of California’s ban on the sale and use of the gasoline additive.

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123 Id., para. 95.

124 Eritrea – Ethiopia Claims Commission, Rules of Procedure, art. 19; Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, Eritrea Ethiopia Claims Commission, para. 19. See also ICJ Statute art. 38(1).

125 Id.


127 Id., part II, chap. B, para. 3.
known as “MTBE.” The Tribunal noted that many of Methanex’s arguments were not based on facts but rather are based on factual inferences. In fact, Methanex invited the Tribunal to draw inferences from the unreasonableness of the justifications the State of California put forth for why it imposed the ban of MTBE. The Tribunal did not question whether or not this is 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.

The Tribunal addressed circumstantial evidence specifically when discussing “Dot 5,” namely the emphasis Methanex placed on a dinner hosted by ADM (the largest United States producer of ethanol) for Governor Davis (Lieutenant Governor then Governor of California). The Court 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. 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 evidence could support, by way of inference, Methanex’s claim they formed an illegal agreement. The Court evaluated Methanex’s circumstantial evidence for this claim, one piece of evidence being that the meeting was “secret.” The Court did not find this circumstantial evidence of secrecy to be accurate because direct evidence, such as Davis 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. 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 United States of Articles 1101, 1102, 1105, and 1110 of NAFTA.

The analysis of circumstantial evidence in Islands of Las 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 Tribunal, reveal a general acceptance of the use of circumstantial evidence in international law. Although circumstantial evidence must be critically

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128 Id., part I, para. 1.
130 Id.
132 Id., part III, chap. B, para. 34.
133 Id., part III, chap. B, para. 36.
137 Id., part III, chap. B, para. 46.
examined, it is generally permissible. As judicial decisions, the International Court of Justice can rely on these cases when deciding how to value circumstantial evidence.\(^{138}\) In fact, the International Court of Justice has used Max Huber’s reasoning in the *Island of Las Palmas* on many occasions.\(^{139}\) In addition, the World Court has referred to NAFTA decisions and agreements.\(^{140}\) In addition, the Court could use these decisions in the future to show customary international law standards on the use of circumstantial evidence.

V. What this means for the Current Crime of Genocide Case

On July 2, 1999, Croatia filed an Application against the Federal Republic of Yugoslavia (now Serbia) alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide.\(^{141}\) 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.\(^{142}\) 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.\(^{143}\)

In the Court’s decision regarding preliminary objections,\(^{144}\) the Court (1) found that the

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\(^{138}\) I.C.J. Statute, Article 38(1)(d).


\(^{142}\) Id., para. 3.

\(^{143}\) Id.

Court had jurisdiction over the case;\textsuperscript{145} (2) rejected the first, second, and third preliminary objections of Serbia,\textsuperscript{146} and (3) determined that the preliminary objections were not of an exclusively preliminary character during its determination of the merits of the case.\textsuperscript{147}

There are lessons from Bosnia and Herzegovina’s experience before the International Court of Justice that Croatia can use in its preparation for the upcoming proceedings. First, Croatia cannot expect to prevail if it solely relies on circumstantial evidence and inferences to prove Serbia’s intent to commit alleged crimes. Despite the difficulty of 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. In addition, it seems inevitable that the Court will rely on evidence from the International Criminal Tribunal for the Former Yugoslavia, so both Parties need to understand how this will affect their cases.

**VI. Conclusion**

This article has shown that the International Court of Justice will rely on circumstantial evidence to determine legal 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 United Kingdom kept information confidential in *Corfu Channel*, and Serbia kept information confidential in the *Crime of Genocide*. The Court does not find a party’s decision to keep information secret sufficient in and of itself warrant liberal reliance on circumstantial evidence. It remains to be seen whether or not the Court would liberally construe circumstantial evidence from a party if the opposing party kept evidence confidential and still materially relied on it. The United Kingdom did not rely on documents that it kept secret from Albania and the Court in *Corfu Channel*. Paradoxically, in *Crime of Genocide*, it was Bosnia and Herzegovina that 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 analysis of the International Court of Justice’s opinions related to evidentiary standards indicates that the Court perceives a hierarchy of evidence. The Court favors direct evidence over circumstantial evidence. The Court finds factual evidence that has been put

\textsuperscript{145} Id., p. 50.
\textsuperscript{146} Id.
\textsuperscript{147} Id., para. 145.
through the trial process more persuasive than factual evidence that has not withstood cross-examination. 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 its opponent’s case. Serbia was able to furnish reliable direct evidence in its favor, but Albania was not.

Although the International Court of Justice 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 Court’s use of circumstantial evidence differs from domestic courts in some ways. Justice 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.” This may be in part because of domestic courts’ power to compel production of evidence. The International Court of Justice, on the other hand, can merely “call upon the agents to produce any document or to supply any explanations.” If the parties do not comply, then “[f]ormal note shall be taken of any refusal,” 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 therefore carefully chosen when to rely on circumstantial evidence. These insights should help both litigants before the International Court of Justice and scholars and practitioners who strive to fully comprehend the Court’s judgments.

148 Corfu Channel, p. 18 (stating that “[t]his indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.”).


151 Statute of the International Court of Justice , art. 49. See also, International Court of Justice, Rules of Court, art. 62(1), Jul. 1, 1979 (“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.”).

152 Id.