Leiden Journal of International Law (2015), 28, pp. 899–913
 doi:10.1017/S0922156515000485

Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case

ANDREA GATTINI* AND GIULIO CORTESI**

Abstract
In the decision on the second Genocide case (*Croatia* v. *Serbia*) the ICJ did not deviate from its ruling of 2007 (*Bosnia-Herzegovina* v. *Serbia and Montenegro*) in matters of evidence. A comparison between the two cases nevertheless shows subtle but interesting nuances. Whereas in the first Genocide case the Court was confronted with a ICTY finding that a genocide had indeed been committed in Srebrenica in July 1995, in the present case the ICTY Prosecutor had not even indicted any Serbian or Croatian organ of such a crime. The ICJ was able to find the *actus reus* of genocide in many instances, both on the part of Serbia and Croatia, but it found that neither party had been able to prove the existence of the *mens rea*, either by relying on a pattern of conduct, or even by relying on the transcript of a governmental meeting. This throws a disquieting light on the actual capacity of the Court to deal with claims of commission of genocide, as distinguished from claims of lack of prevention or repression.

Key words
evidence; genocide; ICJ; ICTY; indictment

1. INTRODUCTION

As in the previous Genocide judgment of 2007, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), decided on 3 February 2015,[1] the ICJ was confronted with facts, which the parties did not contest and which had been previously scrutinized by the ICTY. Therefore, the Court did not need to embark on a cumbersome exercise of fact-finding. Its conclusions with regard to the central issues of burden, standard, and methods of proof are not dissimilar to those reached in its previous judgment.[2]

An inquiry into the decision's main tenets and arguments with regard to proof is nevertheless highly instructive. In fact, the two genocide judgments present similar but inverse problems. In the 2007 Genocide case, the Court had to deal with a claim with regard to which the ICTY had previously found that genocide had indeed been committed (in Srebrenica in July 1995), although not by the organs of the respondent

* Professor of International Law (Università di Padova) [andrea.gattini@unipd.it]. Andrea Gattini is the author of Sections 1, 2, 3, 5, and 6.
** Doctoral candidate (Università di Padova/Université de Paris I-Sorbonne) [cortesigiulio@gmail.com]. Giulio Cortesi is the author of Section 4.

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Merits, Judgment of 3 February 2015 (not yet published) [hereafter 'Judgment'].

2 See A. Gattini, 'Evidentiary Issues in the ICJ's Genocide Case', (2007) 5 *Journal of International Criminal Justice* 889.

state. In the present case several officials from both the applicant and the respondent state had been either charged or convicted by the ICTY on various counts of war crimes or crimes against humanity. However, none of them had faced charges of genocide, which had not been included in any ICTY indictment. In contrast to the 2007 Judgment where the problem of attribution played a major role, since the crimes were committed by the Bosnian Serbs militia, the outcome of the 2015 Judgment entirely revolved around the proof of the mental element of genocide, a hurdle which both parties were not able to overcome. In the present writers' view, this result does not come as a surprise and it sheds an unsettling light on the capacity of the Court to adequately deal with claims concerning the commission of genocide, as distinct from cases of lack of prevention or repression.

In the next sections we will follow the path indicated by the Court itself, and analyse the burden of proof (section 2), standard of proof (section 3), methods of proof (section 4), and, finally, the relationship with the ICTY jurisprudence (section 5).

2. Burden of proof

With regards to the burden of proof, the parties agreed, at least in principle, on the fundamental requirement that *actori incumbit probatio*. Nevertheless Croatia advanced the argument that Serbia was best placed to provide explanations of acts which Croatia claimed to have taken place in territories which, albeit under its sovereignty, had been in fact under Serbia's exclusive control. As in the previous Genocide case of 2007, the Court saw no reason to depart from the general principle on the *onus probandi*.[3]

However, since 2007 the Court has slightly refined its jurisprudence in this regard. In the *Diallo* decision of 2010 the Court said that 'the determination of the burden of proof is in reality dependent on the subject matter and the nature of the dispute' and that, consequently, it may vary 'according to the type of facts which it is necessary to establish for the purposes of the decisions of the case'.[4] In *Diallo*, the issue was whether Mr. Diallo had benefitted from the procedural guarantees to which he was entitled after his arrest as well as the exact duration of his detention. The Court came to the conclusion that it was not up to the Applicant to prove that particular negative fact, because 'a public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law'.[5]

The Court's more liberal approach with regard to the burden of proof was fully justified in the *Diallo* case, because behind the veil of an inter-state dispute what was at stake was the evidence of the treatment of an individual in a situation of deprivation of his personal liberty.[6] It is noteworthy that the Court now seems to be

3 Judgment, *supra* note 1, para. 172; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43 ('Bosnian Genocide Judgment'), para. 204.

4 See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, [2010] ICJ Rep. 639, para. 54.

5 Ibid., para. 55.

6 Compare the analogous jurisprudence by the European Court of Human Rights, ex multis *Salman v. Turkey* [GC], Appl. No. 21986/93, Judgment of 27 June 2000, para. 100, ECHR 2000-VII.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

willing to enlarge the rationale of this liberal approach and to advance it as a general principle. However, this move may have curious and, to some extent, paradoxical consequences. So in the present case the Court again used the 'negative fact' test, but in favour of the Respondent and, by doing so, it actually re-established the traditional rule of the burden of proof. In the Court's view, neither the subject matter nor the nature of the dispute, i.e. the claim of genocide and the determination of facts having taken place in a territory where the Respondent exercised exclusive control, were such 'as to make it appropriate to contemplate a reversal of the burden of proof'.[7]

Another interesting aspect which deserves a mention is the reference made by the Court to the duty of the other party to co-operate 'in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it'.[8] In this regard the Court quoted the *Pulp Mills on the River Uruguay* case of 2010, but inevitably one is reminded of the polemic which arose in the aftermath of the 2007 Judgment, in which the Court had not asked the FRY to produce certain internal documents that, in Bosnia's view, would have provided evidence of genocidal intent on the part of Serbian authorities.[9] It must be recalled, however, that the Court's contested decision not to order Serbia to produce the evidence had been motivated by the fact that Bosnia itself had not asked for it before the oral proceedings and Bosnia's counsels had not pressed for it later.[10] The sentence quoted in the present Judgment could therefore be seen as a gentle reminder of the duty of good faith, actually incumbent on both parties, to co-operate with the Court in the determination of the legal truth.

3. Standard of proof

The Court dedicated only three short paragraphs to the issue of standard of proof, with the purpose of confirming what it had said in the Bosnian case. It confirmed that the evidence supporting a claim involving charges of exceptional gravity must be 'fully conclusive' and the Court must be 'fully convinced'.[11] Since the allegations put forward in the present case were similar to those examined in 2007 and, as the two parties agreed on that standard, the Court saw no reason to depart from it.

But on a closer look, the issue is much more complex than it appears. In reality, given the fact that the Court found the *actus reus* of genocide established with regard to both Croatia's claim and Serbia's counterclaim, the solution of the whole case hinged on the question of which standard of proof should be adopted in order to assess the *mens rea* of genocide, especially by way of inference. Here the parties were far from agreement and in the Court itself views were also widely divergent, as it is made clear by some separate opinions.

7 Judgment, *supra* note 1, para. 174.
8 Ibid., para. 173, quoting *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Judgment of 20 April 2010, [2010] ICJ Rep. 14, para. 163.
9 M. Milanović, 'State Responsibility for Genocide: A Follow Up', (2007) 18 EJIL 669, at. 677.
10 Gattini, *supra* note 2, at 892–3.
11 Judgment, *supra* note 1, paras. 177–9, referring to the Bosnian Genocide Judgment, *supra* note 3, para. 209.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

In its 2007 Judgment, the Court admitted that the *dolus specialis* could be inferred by 'a pattern of conduct', but it followed that such a pattern 'would have to be such that it could only point to the existence of such intent'.[12] In the present case, Croatia's counsel asked the Court to reconsider the criterion, maintaining that it was excessively restrictive and not based on any precedent.[13] In particular, Croatia relied on the *Tolimir* Judgment by the ICTY Trial Chamber of 12 December 2012, in which the existence of genocidal intent was found on 'all of the evidence taken together' provided this inference was 'the only reasonable one'.[14]

The Court had no difficulty in clarifying that the notion of reasonableness must necessarily be regarded as implicit in what it had said in 2007 as, otherwise, it would always be impossible to reach any conclusions 'by way of inference'.[15] By that remark alone, however, the matter is not yet settled.

After having painstakingly reviewed all the incidents which had occurred from 1991 to 1995 and which were put forward by Croatia, the Court came to the conclusion that while the *actus reus* of genocide had been clearly established, the evidence of the *mens rea* was lacking in Croatia's claim. Croatia had listed 17 factors to assist the Court with concluding that there had been a clear intention to physically destroy the Croat population of some Croatian regions by the Jugoslav National Army (JNA) and Serb paramilitary forces.[16] In particular, Croatia's counsel insisted that the pattern of conduct by JNA and Serb forces should be assessed in the context in which the acts were committed and the opportunity which the JNA and Serb forces had to destroy the Croat population. The Court was not convinced by Croatia's arguments. Relying on relevant ICTY decisions,[17] the Court found a pattern of conduct from August 1991 which consisted of widespread attacks by the JNA and Serb forces on localities with Croat populations with the purpose to force them to leave. The Court, however, came to the conclusion that Croatia had not established that 'the only reasonable inference ... was the intent to destroy, in whole or in part, the Croat group'.[18]

In relation to Serbia's counterclaim concerning Operation Storm of August 1995, the Court found the *actus reus* established in at least two categories of acts: The killing of Serbs fleeing in columns from the towns under attack; and the killing of Serbs having remained in the areas of the Krajina protected by the United Nations. The Court, however, found that Serbia had not been able to prove the required *dolus specialis*. Unlike Croatia, which had attempted to demonstrate the genocidal intent of the JNA and Serb forces by arguing that various factors pointed towards a pattern

12 Bosnian Genocide Judgment, *supra* note 3, para. 373.
13 CR 2014/20 per Sands.
14 *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2, T. Ch., 12 December 2012, para. 745.
15 Judgment, *supra* note 1, para. 148.
16 Ibid., para. 408.
17 *Prosecutor v. Mrkšić*, Judgement, Case No. IT-95-13/1-T, T. Ch., 27 September 2007 (in Judgment, *supra* note 1, para. 308), *Prosecutor v. Martić*, Judgement, Case No. IT-95-11-T, T. Ch., 12 June 2007 (in Judgment, *supra* note 1, paras. 257–9); *Prosecutor v. Stanišić and Simatović*, Judgement, Case No. IT-03-69-T, T. Ch., 30 May 2013 (in Judgment, *supra* note 1, para. 244, para. 334), *Prosecutor v. Strugar*, Judgement, Case No. IT-01-42-T, T. Ch., 31 January 2005, para. 176, (in Judgment, *supra* note 1, para. 367), *Prosecutor v. Jokić*, Judgement, Case No. IT-01-42/1-S, T. Ch., 18 March 2004, para. 27 (in Judgment, *supra* note 1, para. 293).
18 Judgment, *supra* note 1, para. 440.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

of conduct, Serbia's main strategy was to prove the existence of an official genocidal plan on the part of the highest Croatian authorities. For that purpose it mainly relied upon the transcript of a meeting held on the island of Brioni on 31 July 1995 under the chairmanship of the President of Croatia, Franjo Tudjman, concerning the launch of Operation Storm. Despite the ruthless, documented statements made by Tudjman and top Croatian military leaders about the fate of the Serbian civil population, the Court reached the same negative result as the ICTY Appeals Chambers in the *Gotovina* case,[19] which will be discussed below.

The Court was careful not to apply the same standard of 'only reasonable inference' when assessing the evidentiary value of the Brioni transcript as it had in the assessment of the pattern of conduct shown by Croatian authorities during and immediately after Operation Storm.[20] However, in all practical terms, the two standards were the same. It is not the present writers' intention to suggest that the Court should have used a more lenient standard for the first type of evidence as compared to the second. Nonetheless, it remains that, as we will later see, the Court, when dealing with Operation Storm, too easily reached the finding that there had not been any deliberate attack on Serbian civil population. This finding decisively paved the way for the Court's successive finding that there had not been any deliberate intent to destroy it either.

The Court's awkwardness with the issue of evidence of *dolus specialis* is articulated in some separate opinions of the majority. Noticeable among them are the opinions of Judges Skotnikov and Gaja. Judge Skotnikov reiterated the view he had already expressed in 2007, stressing that the ICJ is not a criminal jurisdiction and therefore lacks the capacity to ascertain any genocidal intent.[21] In such a case the Court can only rely on the findings of a competent criminal tribunal, if any, and then consequently address the issue of state responsibility for not having prevented or punished the crime of genocide.

On the contrary, in his elaborate opinion Judge Gaja tried to distinguish between two different concepts of genocide, one for the scope of individual criminal responsibility and the other for the scope of state responsibility. As previously explored,[22] this dichotomy is not only unfounded in practice, but it would be unwarranted in theory. In Judge Gaja's view, one of the main differences centres on the mental element. While the *mens rea* of the individual perpetrator must be specifically proven in a criminal process, the mental element of genocide for the purpose of state responsibility could be inferred from a pattern of conduct of unidentified state organs.[23] The distinction suggested by Judge Gaja is not persuasive. The main feature of genocide, which distinguishes it from other crimes against humanity, is exactly and specifically the requirement of *dolus specialis*.

19 *Prosecutor v. Gotovina*, Judgement, Case No. IT-06-90-T, T. Ch., 15 April 2011, and Judgement, IT-06-90-A, A. Ch., 16 November 2012.
20 Judgment, *supra* note 1, para. 507 and para. 512.
21 Judgment, *supra* note 1, Separate Opinion, Judge Skotnikov, para. 10.
22 Gattini, *supra* note 2, at 894.
23 Judgment, *supra* note 1, Separate Opinion, Judge Gaja, para. 3.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

In the present writer's view, the finding of the ICTY Appeals Chamber in the *Krstic* case marks the furthest possible limit of assessing the evidence of specific intent. As is well known, Mr. Krstic was found guilty of complicity in the genocide committed in Srebrenica in July 1995 by unidentified persons.[24]

In its Judgment of 2007, the ICJ undertook an autonomous qualification of the events in Srebrenica and similarly concluded that genocide had indeed been committed. Relying on the ICTY findings in the *Krstic* and in the *Blagojevic* cases, the Court stressed that it had 'no reason to depart from the Tribunal's determination that the necessary specific intent (*dolus specialis*) was established'.[25] From the passage quoted above one could infer that, despite the stringent standard of proof required, the Court finally contented itself with the generic proof of a *mens rea* by unidentified individuals. The reasons behind that conclusion could be various, but in the present writers' view the most plausible one was the desire of the Court to avoid entering into a thorny debate with the ICTY on a point which, in the context of the entire judgment, was of minor relevance. In fact the ICTY had found genocidal intent on the part of 'some members of the VRS Main Staff', but the ICJ ended up finding that the conduct of the Bosnian Serb militia was in no way attributable to Serbia. It is permissible to think that the Court would have discussed at greater length the exact determination of the *mens rea* if this point would have been determinative for the state responsibility, as it was in the present case.

4. Methods of proof

This section deals with the way in which the Court proceeded with the methods of proof as stated in paragraphs 180–199. In order to answer the question of whether the ICJ was faithful to its principles, the analysis will focus on the following topics: (i) the waiver of a party of its right to cross-examine the witnesses of the other party; (ii) hearsay evidence; (iii) written testimony and police reports; (iv) expert reports; and (v) the weight given by the ICJ to factual findings of the ICTY and to the indictments (or lack thereof) by the ICTY Prosecutor Office.

(i) As in the 2007 Judgment,[26] the Court supported its findings in the present case through hearing some of the witnesses called by the parties.[27] The necessity for a tribunal to ascertain the credibility of a witness is probably the basis of the abundance of cross-examination in international law and many scholars consider this the cornerstone of international procedure in an adversarial

24 'The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims.' *Prosecutor v. Krstic*, Judgment, IT-98-33-A, A. Ch. 19 April 2004, para. 35.

25 Bosnian Genocide Judgment, *supra* note 3, para. 295.

26 See Bosnian Genocide Judgment, *supra* note 3, para. 57 with the list of witnesses called by Bosnia and Herzegovina, and para. 58 with the list of witnesses called by Serbia and Montenegro.

27 Judgment, *supra* note 1, paras. 222, 226, 236, 253, 260, 282, 310 (witness called by Croatia that appeared before the Court), paras. 481, 484 (witness called by Serbia that appeared before the Court).

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

model.[28] In the present case, the parties agreed to limit cross-examination to only some witnesses to enhance procedural efficiency. In some instances, the Court accepted as evidence the declarations of witnesses that were not subject to cross-examination from the counterpart.[29] From this one should not infer that the Court simply relied on the parties' renunciation to cross-examine. On the contrary, in one instance the Court stressed that 'the fact that Croatia declined to cross-examine those witnesses in no sense implies an obligation on the Court to accept all of their testimony as accurate'.[30] In the *Free Zones* case of 1932, the PCIJ clearly stated, with regard to the principle *jura novit curia*, that if none of the opinions advanced by the parties were to be considered acceptable, '[the Court] may reject them both'.[31] It may be discussed whether the Court enjoys such a large discretion with regard to evidence also, which would make the procedure more akin to an inquisitorial system. An inference in this sense may be drawn from Article 62 of the Rules of the Court, in the present formulation adopted in 1978, according to which the Court may call for witnesses or experts, or call for the production of any other evidence without being limited to issues in regard to which the parties 'were not in agreement', as the previous wording of the Rules prescribed.[32] If the Court is not limited in the exercise of its power by an agreement between the parties, it is reasonable to infer a fortiori that it will not be bound by the unilateral renunciation of a party either. Moreover, this is in accordance with the general principle of the freedom of evaluation of proof, well established in international jurisprudence[33] and widely accepted in international literature.[34]

(ii) The issue of hearsay evidence in international procedure is widely debated. Many authors suggest that as a rule international law benches are composed of professional judges, who do not need to be 'protected' as jury members in common law countries.[35] It follows that hearsay evidence should in principle be

28 For further information about the importance of cross-examination for the purpose of the admissibility of testimonial evidence in international criminal law see for example C. Gosnell, 'Admissibility of Evidence', in K. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (2010), at 396–7. However, it must be recalled that some authors suggest that, at least in principle, international procedure should be neutral, being neither entirely adversarial nor inquisitional. See G. Petrochilos, *Procedural Law in International Arbitration* (2004), 219.

29 Judgment, *supra* note 1, paras. 236, 260 (with regard to witnesses called by Croatia to give oral testimony who Serbia did not wish to cross-examine) and para. 253 (with regard to a witness called by Croatia to give oral testimony whose statement was not contested by Serbia).

30 Judgment, *supra* note 1, para. 459.

31 *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Judgment, 7 June 1932, PCIJ Rep. Series A/B No. 46, at 138.

32 See M. Benzing, 'Evidentiary issues', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (2012) 1234, at 1239, who refers to M. Lachs, 'The Revised Procedure of the International Court of Justice', in F. Kalshoven et al. (eds.), *Essays on the Development of the International Legal Order* (1980) 21, at 38.

33 See *Georges Pinson* case, French-Mexican Claims Commission, 19 October 1928, *RSA* V, p. 412–13; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14 ('Nicaragua'), 40.

34 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 303; G. Niyungeko, *La preuve devant les juridictions internationales* (2005), 322; C. F. Amerasinghe, *Evidence in International Litigation* (2005), 187.

35 D. V. Sandifer, *Evidence before International Tribunal* (1971), 257.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

deemed admissible before international jurisdictions.[36] In this case more than in any other it is necessary to keep in mind that 'the fact that a piece of evidence was admitted to the record did not mean that the evidence in question would be relied upon in the final judgment'.[37] This approach, however, only shifts the problem of assessing hearsay evidence to a later stage in the proceedings devoted to the evaluation of proof. In the present case, the Court took a very prudent approach, neither adhering to the principled positive view held by Croatia on the relevance of hearsay evidence nor to the principled negative view held by Serbia. The Court recalled its previous jurisprudence, with its rule of thumb that 'hearsay [is not] of much weight'.[38] On the whole, the Court admitted the production of hearsay evidence as such, but nevertheless decided not to give any evidential weight to it, when coming to its evaluation.[39]

(iii) Scholars agree that the value of a witness statement depends on both formal and substantial prerequisites.[40] The formal prerequisites, such as the signature or confirmation of the declaration, are clearly settled in order to ensure that the statement shall be attributable to a specific person, while the substantial ones, such as integrity and impartiality, are related to the credibility of the witness.

As a general rule, the Court stated that it 'cannot accord evidential weight to those statements which are neither signed nor confirmed'.[41] The Court seemed to uphold the view that the mere fact that certain statements satisfy the formal requirements does not, per se, guarantee their probative value. Consequently, the majority stated that the Court would proceed to a sort of cross-checking of those statements with other sources of evidence to verify whether, even in the absence of certain 'reliability requirements' – for example an indication of the circumstances in which they were given – they could have a certain probative value.[42] It might be argued, however, that the Court ended up taking for granted all the assertions contained in certain statements on the condition that they were signed or, more generally, satisfied the formal requirements.

In one instance, for example, the Court concluded that a statement made before a domestic court by a nurse who described ill-treatment of Croats by Serb forces inside the clinic of Voćin in Western Slavonia had no evidential value because it 'contained no details about the nature of the proceedings or the court where the statement was made' and, moreover, it was not signed.[43] On the other hand, the Court held that another statement describing the acts

36 Gosnell, *supra* note 28, 389.
37 Y. McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis', (2013) 25 LJIL 971, at 981.
38 Nicaragua, *supra* note 33, para. 68, referring to *The Corfu Channel Case*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, para. 17.
39 Judgment, *supra* note 1, para. 228: 'To those statements which do not constitute first-hand accounts of the events, the Court gives no evidential weight'; See further paras. 266 and 343 for similar statements.
40 Cheng, *supra* note 34, 312; Niyungeko, *supra* note 34, 360; Sandifer, *supra* note 35, 208.
41 Judgment, *supra* note 1, para. 198.
42 'The Court will accord evidential weight to these statements only where they have been confirmed by other witnesses, either before the Court or before the ICTY, or where they have been corroborated by credible evidence.' Judgment, *supra* note 1, para. 199.
43 Ibid., para. 343.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

of ill-treatment to which the author and others had allegedly been subjected to in late August 1991 could be given evidential weight because it was signed and represented a first-hand account. A similar line of argument was made by the Court in other relevant paragraphs, in which the Court said that 'it must give … evidential weight'[44] or that it 'can give credence'[45] to signed statements or statements which were subsequently confirmed. By taking this stance it seems that in the Court's view the existence of the formal elements provides evidential weight regardless of the existence of the substantial requirements. Although the Court was careful not to assign an unduly high probative value to those statements, one cannot but agree with Judge Donoghue who, in her separate opinion, lamented that 'the Court['s] analysis seems to leap from the refrain that a statement deserves evidential weight to a finding that *actus reus* of genocide is established'.[46]

Another interesting point concerns the reports prepared by the Croatian police which provided accounts of witnesses or statements not signed or confirmed. On the whole, the Court did not give any evidential weight to those reports, taking the same prudent view as in the Nicaragua judgment of 1986 that was subsequently upheld in the Genocide judgment of 2007.[47] The decision of the Court not to give any weight to police reports in the present case, as well as similar sources of evidence in precedent cases, suggests the existence of a trend to disregard *ex parte* evidence in cases where the international responsibility of a state is at stake, in line with the Court's careful choice to apply a high standard of proof.[48] In fact, as observed recently, the Court's approach is less demanding when it exercises its declarative function, for instance when the ICJ is requested to define a territorial or maritime boundary.[49]

(iv) Among the other sources of evidence considered by the Court, there were some reports and documentaries related to the subject matter. The approach maintained by the Court in the present case is very similar to the one taken by the Court in the previous Genocide case of 2007. In that Judgment, the Court had very carefully set out the criteria for evaluating reports from official or independent bodies. In the Court's view, the value of such sources of evidence will depend:

> on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).[50]

44 Ibid., para. 314.
45 Ibid., paras. 318 and 322.
46 Judgment, *supra* note 1, Declaration of Judge Donoghue, para. 9.
47 Nicaragua, *supra* note 33, para. 64. See also Bosnian Genocide Judgment, *supra* note 3, para. 213.
48 For a critical view in respect of the fact finding process in Nicaragua, *supra* note 33, see, T. M. Franck, 'Fact Finding in the ICJ', in R. B. Lillich (ed.), *Fact-Finding by International Tribunal, Eleventh Sokol Colloquium* (1992), 17.
49 K. Del Mar, 'The ICJ and the Standard of Proofs', in K. Bannelier et al (eds.), *The ICJ and the Evolution of International Law: The Enduring impact of the Corfu Channel Case* (2012), 98, at 101–2.
50 Judgment, *supra* note 1, para. 190.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

An issue at stake in the present case was to decide the value of some reports prepared by non-governmental organizations. The Court admitted all the material presented by the parties. One of the most discussed documents was the Helsinki Watch Report (drafted by a non-governmental organization, Helsinki Watch), that was quoted several times by Croatia in support of its claims. The Court recalled the criteria quoted above and came to the conclusion that the report, on its own, was insufficient to prove Croatia's allegations as it was considered at best circumstantial evidence. The same view was upheld with regard to other similar sources, such as a publication entitled *The Anatomy of Deceit* by a US-Croatian physician in which the author described the torture suffered by a Croat at the hands of Serb forces,[51] as well as a documentary film produced by a Serbian television channel.[52] This last example is quite significant because the evidence came from an entity ethnically linked with the opponent party and therefore might have been regarded in a broader sense as a statement again interest.

Obviously, a completely different matter is the evaluation of official reports issued or endorsed by the United Nations. In the present case the Court applied the same criteria as in 2007, where it had accepted as highly persuasive the report named *The Fall of Srebrenica*[53] which the United Nations Secretary-General had submitted in November 1999 to the General Assembly.[54] In fact, in the present case many of the Court's findings were based on the *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia of 7 November 1995*, presented to the United Nations General Assembly and the Security Council by the Special Rapporteur of the Commission on Human Rights, Elisabeth Rehn.[55] The Court stated the reasons for its reliance on the report in unmistakable terms, i.e. 'it must give evidential weight to … the above-mentioned documents, by reason both of the independent status of its author' and 'of the fact that it was prepared at the request of organs of the United Nations, for purposes of the exercise of their functions'.[56]

(v) A final point to address is the value of the findings of the ICTY and indictments (or lack thereof) by the ICTY Prosecutor Office.

In the Genocide case of 2007 the ICJ directly relied on findings of fact of the ICTY, accepting them as 'highly persuasive' without any further consideration.[57] Judge Donoghue's declaration that even if the Court had set aside every witness statement 'there would be no change in the Court's conclusions as to the principal claim'[58] suggests that the Court maintained the same approach

51 Ibid., para. 344.
52 Ibid., para. 329.
53 UN Doc. A/54/549.
54 Bosnian Genocide Judgment, *supra* note 3, para. 228.
55 UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic Report, UN Doc. S/1995/993- A/50/727, 7 November 1995.
56 Judgment, *supra* note 1, para. 459.
57 Bosnian Genocide Judgment, *supra* note 3, para. 223.
58 Judgment, *supra* note 1, Declaration of Judge Donoghue, para. 2.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

in the present case. The Court's regard for the ICTY output goes even further to encompass the cases where the accused had pleaded guilty as well as the decisions of the prosecutor not to charge genocide.

The reasons behind the Court's behaviour have probably one and the same rationale – namely, to use the ICTY findings to their fullest extent in order to avoid an extensive fact-finding exercise, a task for which the ICJ is ill-equipped. However on several occasions the Court did not solely rely on the ICTY rulings. Instead, it employed them together with other sources of evidence, mainly witness statements, stressing the fact that 'certain statements produced by Croatia corroborate the findings of the ICTY'.[59] In another instance, the Court reversed the order, and considered primarily some statements submitted by the Applicant and subsequently concluded that they were 'corroborated' by the findings of the ICTY.[60] It seems that in the ICJ's view the statements produced by a party and the findings of an international tribunal may be used interchangeably to support one party's case. This conclusion may not only be limited to the rulings of the ICTY following an adversarial process, but, as it has been suggested, extended to cases where the accused has pleaded guilty, for example in the ICTY *Babić* decision of 2004.[61] The Court does not go any further in discussing the value of a judgment that had its root in an agreement between the accused and the prosecutor. However, ordinary rulings of the ICTY should be distinguished since, as it has been remarked, where an accused pleads guilty, the judges' powers of evaluation are somewhat curtailed by the previous agreement between the prosecutor and the accused on the relevant facts, their qualification, and the participation of the accused.[62] The reason for the silence of the ICJ is probably explained by the fact that, in any case, the Court concluded that the acts for which the person pleaded guilty did not constitute genocide.

A delicate aspect on which the parties took different positions was the lack of indictments for genocide by the ICTY prosecutor regarding the same facts which were at the origin of the dispute between Croatia and Serbia. Here the Court expressly upheld its previous position to take into consideration the absence of charges by the ICTY prosecutor, despite having been criticized widely for this decision in the literature.[63] The Court justified its decision by recalling that the ICTY indictments had been brought against officers that were at the apex of the chain of command[64] and that they had included allegations of the existence of an overall strategy of crimes as well as the existence of a joint criminal enterprise. Therefore the Court seems to imply that the prosecutor

59 For example, Judgment, *supra* note 1, para. 270.
60 Ibid., paras. 352–3.
61 *Prosecutor v. Babić*, Sentencing Judgment, Case No. IT-03-72-S, T. Ch., 29 June 2004 (in Judgment, *supra* note 1, para. 387).
62 See Gattini, *supra* note 2, at 900. It will be recalled that in the Bosnian Genocide Judgment, *supra* note 3, the Court had somehow reduced the relevance of such sentencing judgments by saying that may be given 'a certain weight' at para. 224.
63 D. Groome, 'Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?', (2007) 31(4) *Fordham International Law Journal* 944.
64 Judgment, *supra* note 1, para. 187.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

had conducted an accurate and complete investigation of all possible relevant facts.

To conclude, despite the many distinctions elaborated in its previous jurisprudence and reiterated in the present decision, the Court ended up admitting all the evidence presented and giving some value, and in some cases decisive value, to all of it. It did this to a point that has attracted criticism in the same majority. The only sources that it did not give any evidentiary weight to are non-signed or unconfirmed statements that probably should not to be considered as a source of evidence in any case.

5. Dialogue with ICTY case law

As we have seen in the previous paragraphs, the ICJ greatly relied on the ICTY jurisprudence, not only with regard to fact-finding but also to some extent with regard to substantive issues as it had done previously in the 2007 Judgment.[65] Whereas this attitude is in principle unobjectionable with regard to the first aspect, it is more problematic with regard to the second, especially when the issue at stake was strongly debated in the same international criminal court which had rendered the decision.

A case in point is the way the Court dealt with the ICTY *Gotovina* decisions. As is well known, in April 2011, the ICTY Trial Chamber unanimously sentenced the Croat General Ante Gotovina to a term of imprisonment of 24 years for various crimes committed during Operation Storm. In particular, he was convicted of the deliberate shelling of civilians in Kraijna towns inhabited by Serbs with the precise purpose of terrorizing the population so as to force it to leave. The trial chamber had reached that conclusion by mainly referring to the so-called '200-metre standard', under which shells impacting more than 200 metres from a military target should be regarded as evidence of the indiscriminate nature of the attack.[66] However in November 2012, the Appeals Chamber reversed the Trial Chamber's decision and acquitted General Gotovina. By a majority, the Appeals Chamber held that the 200-metre standard had no basis in law and that, in any event, none of the evidence produced by the prosecutor showed that Croatian armed forces had deliberately targeted the Serb civilian population.[67]

Understandably Croatia relied on the final judgment of the ICTY Appeals Chamber and Serbia pointed out the fact that this had been a majority decision. Seen as a whole, five of the eight ICTY judges who heard the case had held that the indiscriminate nature of the attacks carried out in Operation Storm were proven.

The Court was noticeably uneasy about the situation. It started by noting that, irrespective of the manner in which the members of the Appeals Chamber are chosen, their decisions represent the last word of the ICTY. Therefore the Court is 'bound to

65 In some instances the Court referred to the ICTY jurisprudence as a source for the legal definition of some aspects of genocide, see Judgment, *supra* note 1, paras. 157, 517–18 and 691.

66 *Gotovina* Trial Judgement, *supra* note 19, para. 1970.

67 *Gotovina* Appeals Judgement, *supra* note 19, para. 61.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

accord greater weight' to them in comparison to the findings and determinations by the Trial Chamber, while obviously 'ultimately retaining the power to decide the issues before it on the facts and the law'.[68] However, that is exactly what the Court does not seem to have done. Indeed, in the paragraph immediately following the quotation, the Court hastened to state that 'it would only be in exceptional circumstances that it would depart from the findings reached by the ICTY on an issue of this kind'.[69] Here the Court seems to have deliberately chosen ambiguous wording to the extent that it does not make a distinction between findings 'on the facts' and findings 'on the law'.

The statement poses some problems. There is no apparent reason why the Court should resign its judicial powers to apply substantive norms of international law out of deference to an international criminal tribunal, regardless of whether it is an organ of the UN. Inevitably the bland, remissive language of the Court in this instance reminds one of the opposite stance of the Court in its previous judgment of 2007 in which it fiercely rebuffed the ICTY regarding the attribution of conduct of an individuals to a state.[70] The argument could then be made that the Court, while reserving its full powers with regard to general and, more importantly, structural questions of customary international law, is on the contrary willing to pay respect to the views of specialized courts in matters belonging to their field of competence.[71] But even so, it would be difficult to grasp the exact scope of its position. In fact, the principle of discrimination is not some remote exotic quibble of international humanitarian law, but one of its core concepts. If the Court had intended to announce a new judicial policy with regard to the debate on fragmentation of international law and inter-court dialogue, one would have expected a more principled, less unassuming and, at the least, more reasoned argument.

The ICJ's statement would be no more acceptable if the rationale of the Court was to mask its failure to tackle the issue of the legal appreciation of the indiscriminate nature of the attack under the cloak of evidence. This seems to be the shortcut taken by the Court, which, in the same paragraph, swiftly moved to the issue of the evidence, or rather the lack of evidence, of the Croatian authorities' intent to kill Serb civilians. Here again the Court eluded its duty by a simple reference to the Brioni transcript, with the notice that the Court would later conduct 'more detailed analysis' of that transcript in relation to the existence of the *mens rea* of genocide. In this context, the ICJ's move seems particularly debatable. Whether or not it is possible to extract evidence of the mental element of genocide from the Brioni transcript, that analysis must be completely different from the one of establishing the intention of the Croatian authorities to kill the Serb civilian population of the Krajina region. In the present authors' view, even a perfunctory overview of the Brioni transcript

68 Judgment, *supra* note 1, para. 471.
69 Ibid., para. 472
70 Bosnian Genocide Judgment, *supra* note 3, para. 403.
71 Ibid.: 'As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it … The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction'.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

shows the determination of Croatian authorities to exactly perpetrate the latter crime, as the dissenting opinion of Judge and Former President of the ICTY Pocar in the ICTY Appeals Chamber's *Gotovina* decision clearly demonstrated.[72] Of course nothing would hinder the ICJ from reaching the same conclusion as the majority of the ICTY Appeals Chamber as to the lack of intent of the different crime of genocide, but an autonomous inquiry into the point would have been warranted.

As we have already observed, the issue was particularly relevant for the assessment of the entire Serbian counterclaim, because, by denying that the Serbian civilian population had been intentionally killed by the Croatian forces shelling the Krajina towns, the Court reached the conclusion that not even the *actus reus* of genocide had been established in that regard. That finding then proved to be the pivotal argument for the dismissal of the Serbian counterclaim. In fact, when the Court later dealt with the specific genocidal intent of the two categories of acts for which the genocidal *actus reus* had been established, namely the killings of Serbs fleeing in columns from the towns under attack and the killings of Serbs having remained in Krajina, the Court held that the killings 'were not committed on a scale such that they could only point to the existence of a genocidal intent'.[73]

It is worth reflecting upon whether the Court could have reached the same conclusion as easily if it had considered also the extensive killings of Serb civilians during the initial shelling of the Krajina towns. Qualifying the killings of civilians during the initial phases of Operation Storm for what it really had been, i.e. an indiscriminate attack, and adding it to the subsequent phases of the operation, in which genocidal acts were found to have indeed been committed, would have possibly influenced the Court to read the Brioni transcript in a different light.

Apart from such debatable but fortunately rare instances, the Court's obliging attitude towards the ICTY may have various reasons and could, on the whole, be justified. However, it is more than doubtful whether the Court will be able to maintain in future such a comfortable position with regard to other non-UN established international criminal courts, foremost the International Criminal Court, because of the many deficiencies of evidentiary practice of the latter.[74]

6. Conclusions

In conclusion, taking the two Genocide judgments of the Court as a whole, one may not help but subscribe to Judge Skotnikov's view that '

72 For a sharp criticism of the majority decision see also J. Clark, 'Courting Controversy: The ICTY's Acquittal of Croatian Generals Gotovina and Markac', (2013) 11 *Journal of International Criminal Justice* 399. See also Judge Pocar's Dissenting Opinion in *Gotovina* Appeals Judgement, *supra* note 19.

73 Judgment, *supra* note 1, para. 512.

74 For a marked criticism of some practices of the ICC, such as the excessive reliance of the Office of the Prosecutor on local information providers, known as 'intermediaries', see C. De Vos, 'Investigating from Afar: The ICC's Evidence Problem', (2013) 26 LJIL 1009. For a more general assessment of the challenges ahead in developing a truly international criminal evidence practice, see the contributions of the Symposium, 'Expertise, Uncertainty and International Law: Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals', published in (2013) 26 LJIL 933, and in (2014) 27 LJIL 189.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press

> [a]s a matter of fact, the Court, in both cases, when making determinations as to whether the crime of genocide and other acts enumerated in Article III of the Convention have occurred, has largely relied on (indeed more than it has been prepared to acknowledge), and has never contradicted, the findings of the ICTY. Both now and in 2007, this reliance was decisive for the Court in reaching its conclusions as to whether or not genocidal acts were committed.[75]

This finding only confirms the sobering view that the Court is not well equipped, and, one might add, even structurally unsuitable, to deal with questions of state responsibility for the commission of genocide, as distinguished from its responsibility for not having prevented or repressed it.

75 Judgment, *supra* note 1, Separate Opinion, Judge Skotnikov, para. 14.

https://doi.org/10.1017/S0922156515000485 Published online by Cambridge University Press