Recent Developments

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

On February 3, 2015, the International Court of Justice rendered a final judgment in the *Croatian Genocide* case.[1] Between 1991 and 1995, ethnic Serbs and Croats had systematically killed, tortured, and raped members of each other's ethnic group on Croatian territory.[2] The Court thus found that the *actus reus* of genocide (genocidal acts) had been established,[3] but it applied very high standards of proof for establishing the *dolus specialis* of genocide (genocidal intent),[4] leading it to dismiss both Croatia and Serbia's claims of genocide.[5] Since the Court's first pronouncement of the high standards of proof for genocide in the 2007 *Bosnian Genocide* case,[6] many commentators have criticized it,[7] while others have expressed their support.[8] Yet even this latter group of commentators would acknowledge that the standards, even if completely justifiable, have not been adequately justified by the Court.

In accordance with the civil law tradition,[9] the International Court of Justice has historically refrained from articulating consistent standards of proof.[10] Instead, it has employed flexible terminology such as "(in)sufficient,"[11] "satisf[ying],"[12] "convincing,"[13] "conclusive,"[14] and

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1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.) (*Croatian Genocide*), Merits (Int'l Ct. Justice Feb. 3, 2015), http://www.icj-cij.org/docket/files/118/18422.pdf.

2. *Id.* ¶¶ 208, 295, 360, 485, 493, 495-96.

3. *Id.* ¶¶ 401, 499.

4. *Id.* ¶¶ 148, 178.

5. *Id.* ¶¶ 441, 522.

6. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), Merits, 2007 I.C.J. 43 (Feb. 26).

7. *E.g.*, Susana SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case Against Serbia and Montenegro*, 15 HUM. RTS. BRIEF 1, 2-3 (2007); David Scheffer, *The World Court's Fractured Ruling on Genocide*, 2 GENOCIDE STUD. & PREVENTION 123, 125-29 (2007); Antonio Cassese, *A Judicial Massacre*, GUARDIAN, Feb. 27, 2007, http://www.theguardian.com/commentisfree/2007/feb/27/thejudicialmassacreofsrebr; Ruth Wedgwood, Op-Ed, *Slobodan Milosevic's Last Waltz*, N.Y. TIMES, Mar. 12, 2007, http://www.nytimes.com/2007/03/12/opinion/12wedgwood.html.

8. *E.g.*, Lennert Breuker, *The Nature of the Genocide Case*, 2 HAGUE JUST. J. 44, 48-49 (2007); William A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2 GENOCIDE STUD. & PREVENTION 101, 108-09 (2007).

9. *See* ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 125 (2009); Anna Riddell, *Evidence, Fact-Finding, and Experts*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 848, 860 (Cesare P.R. Romano et al. eds., 2014).

10. ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 944-45 (2013); RIDDELL & PLANT, *supra* note 9, at 126-27; Markus Benzing, *Evidentiary Issues*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1234, 1265 (Andreas Zimmermann et al. eds., 2d ed. 2012).

11. Pulp Mills on the River Uruguay (Arg. v. Uru.), Merits, 2010 I.C.J. 14, 97 (Apr. 20); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (*Armed Activities*),

"decisive"[15] to describe the evidence that it requires. But not all of the Court's judges have approved of this practice. In a separate opinion to the *Oil Platforms* judgment, Judge Higgins demanded that the Court "make clear what standards of proof it requires to establish what sorts of facts."[16] Less than two and a half years later, Judge Higgins was elected President of the Court. Perhaps unsurprisingly, the Court's first judgment during her presidency—the *Bosnian Genocide* judgment—articulated a clear set of standards for proving genocide, in particular a high standard for evidence[17] and a high standard for inferences of *dolus specialis*.[18] Although both of these standards were followed in *Croatian Genocide*, the Court has yet to provide an explanation for why such high standards are appropriate in the context of proving genocide.[19]

The Court's high standard for evidence was best summarized in *Bosnian Genocide*: "The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive."[20] At first glance, this high standard[21] might have intuitive appeal. After all, the International Criminal Court (ICC),[22] International Criminal Tribunal for Rwanda (ICTR),[23] and International Criminal Tribunal for the Former Yugoslavia (ICTY)[24] apply similarly high standards for evidence of genocide. But unlike the International Court of Justice, they are in the industry of incarcerating individuals. As the U.S. Supreme Court has held on multiple occasions, the primary rationale behind the high standard of proof in U.S. law

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Merits, 2005 I.C.J. 168, 230 (Dec. 19); Oil Platforms (U.S. v. Iran), Merits, 2003 I.C.J. 161, 190 (Nov. 6); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (*Nicaragua*), Merits, 1986 I.C.J. 14, 62 (June 27); Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 16 (Apr. 9).

12. *Armed Activities*, 2005 I.C.J. at 201; *Nicaragua*, 1986 I.C.J. at 24.

13. *Armed Activities*, 2005 I.C.J. at 208; *Nicaragua*, 1986 I.C.J. at 24.

14. *Armed Activities*, 2005 I.C.J. at 268; *Oil Platforms*, 2003 I.C.J. at 195; *Corfu Channel*, 1949 I.C.J. at 17.

15. *Corfu Channel*, 1949 I.C.J. at 16.

16. *Oil Platforms*, 2003 I.C.J. at 234 (separate opinion of Judge Higgins). Judge Buergenthal similarly criticized the vague standards of proof in his separate opinion. *Oil Platforms*, 2003 I.C.J. at 286-87 (separate opinion of Judge Buergenthal).

17. *See infra* note 20 and accompanying text.

18. *See infra* note 29 and accompanying text.

19. Commentators have attempted to explain the high standards by noting that a finding of genocide would carry a grave stigma, and could also entail significant financial liabilities. Breuker, *supra* note 8, at 49; Schabas, *supra* note 8, at 108. Nevertheless, the Court does not provide an explanation.

20. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), Merits, 2007 I.C.J. 43, 129 (Feb. 26) (citing *Corfu Channel*, 1949 I.C.J. at 17). The standard was followed in *Croatian Genocide*. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb) (*Croatian Genocide*), Merits, ¶ 178 (Int'l Ct. Justice Feb. 3, 2015), http://www.icj-cij.org/docket/files/118/18422.pdf (quoting *Bosnian Genocide*, 2007 I.C.J. at 129).

21. The standard "fully conclusive" is arguably very close to the standard of "beyond a reasonable doubt." *See* Benzing, *supra* note 10, at 1265-66; José E. Alvarez, *Burdens of Proof: Notes from the President*, 23 AM. SOC'Y INT'L L. NEWSLETTER 1, 7 (2007). Indeed, the Court later in the *Bosnian Genocide* judgment required certain facts to be established "beyond any doubt." *Bosnian Genocide*, 2007 I.C.J. at 218.

22. Rome Statute of the International Criminal Court art. 66(3), July 17, 1998, 2187 U.N.T.S. 90.

23. ICTR, Rules of Procedure and Evidence (Apr. 10, 2013), r. 87(A).

24. ICTY, Rules of Procedure and Evidence (May 22, 2013), r. 87(A).

for a criminal conviction is that an individual is at risk of losing his or her liberty.[25] A finding of genocide by the International Court of Justice, on the other hand, would not put anyone behind bars. So why should the gravity of a charge affect the standard of proof?

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

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

25. *E.g.*, Santosky v. Kramer, 455 U.S. 745, 755 (1982); Hankerson v. North Carolina, 432 U.S. 233, 241 (1977); *In re* Winship, 397 U.S. 358, 363-64 (1970).

26. *Bosnian Genocide*, 2007 I.C.J. at 129 (citing Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 17 (Apr. 9)).

27. *Corfu Channel*, 1949 I.C.J. at 17.

28. Corfu Channel (U.K. v. Alb.), Oral Proceedings (First Part), 1950 I.C.J. Pleadings 166, 635 (Nov. 26, 1948).

29. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.) (*Croatian Genocide*), Merits, ¶ 148 (Int'l Ct. Justice Feb. 3, 2015), http://www.icj-cij.org/docket/files/118/18422.pdf (citing *Bosnian Genocide*, 2007 I.C.J. at 196-97). The Court did not use the adverb "reasonably" in the *Bosnian Genocide* judgment, but it stated in the *Croatian Genocide* judgment that reasonableness had been implied in the *Bosnian Genocide* judgment. *Id.*

30. *Id.* ¶ 435. The Court made similar findings in *Bosnian Genocide*. *Bosnian Genocide*, 2007 I.C.J. at 196.

31. *E.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 158 (Mar. 4, 2009).

32. *E.g.*, Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Appeals Chamber, Judgement, ¶ 80 (Mar. 18, 2010); Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Trial Chamber, Judgement and Sentence, ¶ 75 (May 31, 2012).

33. *E.g.*, Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Chamber, Judgement, ¶ 41 (Int'l

same high standard for inferences, but, as discussed above, the consequences of their convictions are different from those of the Court. So there must be a separate reason why the Court finds that the high standard should apply.

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

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

Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Trial Chamber, Judgement, ¶ 745 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012).

34. Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 17 (Apr. 9).

35. *Id.* at 18.

36. *Id.*

37. *Id.*

38. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.) (*Croatian Genocide*), Merits, ¶ 143 (Int'l Ct. Justice Feb. 3, 2015), http://www.icj-cij.org/docket/files/118/18422.pdf ("The Parties agree that the *dolus specialis* . . . will seldom be expressly stated."); Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Appeals Chamber, Judgement, ¶ 40 (July 7, 2006) ("By its nature, [genocidal] intent is not usually susceptible to direct proof."); *Prosecutor v. Tolimir*, ¶ 745 ("Indications of [genocidal] intent are rarely overt . . . .").

39. *Croatian Genocide*, ¶¶ 440, 512; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), Merits, 2007 I.C.J. 43, 196-97 (Feb. 26).

40. *See supra* notes 7-8 and accompanying text.

41. For examples of potential justifications, see *supra* note 19.

Recent Developments

An Impossible Standard of Intent?: *Croatia v. Serbia* at the International Court of Justice. By Tara Zivkovic

In 1999 the government of Croatia filed a lawsuit at the International Court of Justice (ICJ)[1] against Serbia for acts of genocide committed between 1991 and 1995.[2] Ten years later, Serbia retaliated with a countersuit arguing that Croatia had also violated the 1948 Genocide Convention for crimes committed against Serbian populations during the Balkan wars in 1995.[3] In February of this year—sixteen years after the original complaint was filed—the ICJ unceremoniously dismissed both claims.[4]

The ICJ's verdict in *Croatia v. Serbia* was entirely expected. International legal experts, as well as the countries themselves, understood from the beginning that their cases lacked a viable legal basis, mainly due to the highly demanding standard for establishing 'genocidal intent' of the perpetrator under international law.[5] In proving intent, consistent with Article 2 of the Genocide Convention, international courts have held that it is not sufficient to establish that the offender meant to engage in an act of genocide; a prosecutor must also demonstrate that the offender engaged in the conduct *with the specific intent* of destroying "in full or in part, a national, ethnical, racial or religious group as such."[6] While the legal definition of genocide therefore requires both a physical (*actus reus*) and mental (*mens rea*) element, proving the latter—known as the *dolus specialis*, or the "specific intent" requirement—is exceptionally difficult.[7] Indeed, the ICJ has found only a single case of genocide from the Balkan wars: the massacre of 8,000 Muslims in Srebrenica.[8]

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1. The International Court of Justice (ICJ) is the primary judicial organ of the United Nations.

2. *See* Application of Croatia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugoslavia), (Int'l Ct. Justice July 2, 1999), http://www.icj-cij.org/docket/files/118/7125.pdf.

3. *See* Counter-Memorial Submitted by the Republic of Serbia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2009 I.C.J. 118 (Dec. 1).

4. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.) (*Croatian Genocide*), Merits (Int'l Ct. Justice Feb. 3, 2015), http://www.icj-cij.org/docket/files/118/18422.pdf.

5. *See* Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669 (2007).

6. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

7. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 217-25 (2d ed. 2009).

8. In 2007, the ICJ held in *Bosnian Genocide* that though Serbia had not committed genocide in Bosnia it nevertheless had "violated the obligation to prevent genocide . . . in respect of the genocide that occurred in Srebrenica in July 1995." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), Merits, 2007 I.C.J. 43, 183 (Feb. 26).

With a weak legal basis, the *Croatia v. Serbia* case, stretching over a decade, was instead driven primarily by political considerations: a significant portion of victims in both countries have yet to receive any legal recognition for the crimes perpetrated against them.[9] Politicians from each country, by pursuing an ongoing trial at the ICJ, were able to claim to their local populations that they were engaging in efforts of post-conflict justice, without doing much of anything.[10] The case therefore serves as an important reminder: international courts can sometimes be used as costly and unnecessary theaters for political problems that should instead be dealt with domestically.[11]

Although the recent ICJ judgment is in many ways anti-climactic, it still presents a valuable opportunity to review the legal standing of genocide. I will proceed by examining the necessary elements for substantiating a claim of genocide under the Genocide Convention, paying specific attention to the demanding requirement of *dolus specialis* as discussed by the majority opinion in the *Croatia v. Serbia* decision. I will then consider whether genocide has actually served as a productive legal category for addressing the atrocities committed by governments during the Balkan wars.

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The Genocide Convention makes clear that genocide is first and foremost a crime of intent. Indeed, the "intent to destroy" requirement is directly related to the specific wrong that genocide—as opposed to other crimes against humanity—attempted to capture. Raphael Lemkin, a Polish lawyer, coined the term in 1943 based on his belief that groups themselves are essential to humanity, beyond the individuals that comprise them.[12] As David Luban, a scholar of international criminal law and legal ethics, aptly describes it: "to annihilate a group is a crime that diminishes humanity over and above the loss of the slaughtered individuals."[13]

Particularly striking is the fact that genocide is a crime whose legal definition differs substantially from its common usage. The systematic killing of an ethnic population, usually considered an obvious case of genocide, cannot be classified as such absent the *dolus specialis* requirement. This is a subtle but important legal distinction and is critical to understanding why the claims brought by the two countries in *Croatia v. Serbia* were tenuous from the start. The main argument dismissing both genocide claims rests precisely on the distinction of genocide and ethnic cleansing: with no proof of genocidal intent, acts of ethnic cleansing can only legally be classified as crimes against humanity, and are subsequently outside of the jurisdiction of the ICJ in this specific case.[14]

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9. *International Court of Justice: Croatia v. Serbia*, ECONOMIST, Mar. 11, 2014, http://www.economist.com/blogs/easternapproaches/2014/03/international-court-justice.

10. *Id.*

11. *Id.*

12. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 40-45 (2002); *see also* SCHABAS, *supra* note 7.

13. David Luban, *Calling Genocide By Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 309 (2006).

14. "Article 9 of the Genocide Convention stipulates that disputes arising out of the

While acts of ethnic cleansing alone do not constitute genocide under the Convention, they can be evidence of the *actus reus* of genocide.[15] Indeed, in the *Croatia v. Serbia* opinion, the Court acknowledged that genocidal acts by Serbia had been established in certain instances against the Croats.[16] Yet the Court reiterated that forced displacements of an ethnic group only constitute genocide if it is also proven that the displacements "were calculated to bring about the physical destruction of the group."[17] The Court posited instead that the campaigns of mass extermination were committed for other purposes—rendering certain regions ethnically homogenous, for example—rather than for the specific intent of destroying an ethnic group.[18]

Legal debate has centered on the necessary standard of proof for establishing *dolus specialis*, particularly concerning how standards of proof might differ for states as compared to individuals.[19] While the standard of proof for individuals is supported by robust case law coming from various international tribunals, the ICJ has had relatively few opportunities to clarify the standard for *dolus specialis* as it pertains to states. In the previous genocide case from the Balkan wars, *Bosnia v. Serbia*,[20] the ICJ evaded the task of providing a definite *mens rea* standard for state intent. Instead, the Court argued that although genocide had been conclusively committed in Srebrenica, there was no evidence that the government of Serbia was aware of the genocidal intent of the Bosnian leadership responsible for the massacre. Lacking the knowledge requirement, the Court found there was no reason to address the *mens rea* element, and ruled that Serbia was not responsible for the genocide in Srebrenica.[21]

Like the *Bosnia v. Serbia* judgment, the ICJ in *Croatia v. Serbia* does little to elucidate the legal uncertainty that surrounds the standard of proof for *dolus specilias* as it applies to states. The opinion instead follows the standard advanced by previous case law, holding that in the absence of direct evidence, "specific intent" is most likely established through inference, for states and individuals alike.[22] In line with judgments from the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICJ argues that the inference of genocidal intent is proven if it is the "only reasonable inference" that can be drawn from the pattern of conduct.[23] In other words, if a given pattern of

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Convention may be submitted to the ICJ at the request of the parties involved." Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. The Court reiterated these boundaries in the *Croatia v. Serbia* opinion: it had no authority to exercise jurisdiction over other crimes of war, including crimes against humanity. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.) (*Croatian Genocide*), Merits, ¶¶ 84-89 (Int'l. Ct. Justice Feb. 3, 2015).

15. *Croatian Genocide*, ¶¶ 157, 158, 161, 166.

16. *Id.* ¶¶ 295, 360, 401.

17. *Id.* ¶ 160.

18. *Id.* ¶ 426.

19. SCHABAS, *supra* note 7.

20. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), 2007 I.C.J. 43, 183 (Feb. 26).

21. *Id.* at 179.

22. *Croatian Genocide*, ¶ 147.

23. *Id.* ¶ 146.

conduct potentially gives rise to more than one inference, genocidal intent cannot be established.

The "only reasonable inference" standard is a stringent threshold, difficult to prove both in cases in which the perpetrator is an individual, and arguably even more challenging concerning the actions of a state—by nature, a complex amalgam of different institutions and people.[24] Indeed, international courts dealing with the Balkan wars have found "genocidal intent" only in four cases, all against individuals.[25] A state has yet to be convicted.

This is troubling for many reasons, some of which were addressed in the dissenting opinion of *Croatia v. Serbia* by the Brazilian Judge Cançado Trindade. In his opinion, Judge Trindade argues that the ICJ has pursued "too high a standard of proof for the determination of the occurrence of genocide."[26] This makes it nearly impossible for a state to be convicted—a problem, given that genocide, by its nature and sheer scope, is a crime more likely committed by states rather than by individuals. Too stringent a standard for establishing genocidal intent allows egregious state behavior to go unpunished. Under such circumstances, the Genocide Convention will effectively lose its power, giving rise to a world where "[l]awlessness would replace the rule of law."[27]

The real legal puzzle presented in the *Croatia v. Serbia* decision is this: as parties to the 1948 Genocide Convention, Croatia and Serbia can only be convicted under international law for acts of genocide and not for crimes against humanity.[28] There is subsequently a significant lacuna in international law in which crimes committed by states, such as mass extermination, widespread rape, or ethnic cleansing, fall just below the standard of genocide and will therefore go unpunished. To resolve this problem, certain academic commentators, as well as the dissenting opinion of Judge Cançado Trindade, argue for a looser definition of genocide as a means to hold states accountable for crimes against humanity that would otherwise go unaddressed. Opponents of this view believe that genocide, precisely due to its uniqueness, *should* be difficult to prove, and therefore only applicable in the most extreme cases.[29] Thus far, the ICJ's decisions seem to be in support of this latter view.

Law is a powerful reconciliation mechanism for recognizing and publicly affirming individual losses.[30] The case of *Croatia v. Serbia* demonstrates how

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24. *See generally* BEATRICE I. BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES (2009) (exploring the tensions between state and individual responsibility in dominant paradigms of international criminal law).

25. *See* Prosecutor v. Popović, IT-02-57, Decision on Motion for Joinder (Int'l Crim. Trib. for the Former Yugoslavia Sept. 21, 2005), http://www.icty.org/x/cases/popovic/tdec/en/050921.htm; Prosecutor v. Krstić, IT-98-33, Appeals Chamber Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf.

26. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.) (*Croatian Genocide*) (Int'l. Ct. Justice Feb. 3, 2015) (Cançado Trinidade, J., dissenting), http://www.icj-cij.org/docket/files/118/18432.pdf.

27. *Id.* ¶ 143.

28. Unlike the 1948 Genocide Convention, no other comprehensive treaty exists for crimes against humanity.

29. William A. Schabas, *Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 301-02 (2001).

30. *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING

the unrelenting pursuit for the legal recognition of genocide—a crime meant only to apply in the smallest subset of cases—can actually be antithetical to the greater process of transitional justice. Genocide should not be employed to shoulder the burden of addressing atrocities that cannot legally be classified as such. As evidenced by the *Croatia v. Serbia* decision, law cannot be bent to solve what are largely political problems. Rather than getting caught up in a lengthy, meritless trial at the ICJ, doomed from the beginning, the respective governments would have done better to engage in bilateral initiatives of post-conflict justice. Pursuing this avenue would have given rise to a reconciliation process between Croatia and Serbia that would certainly be more legally sound, and possibly more expedient, than the one currently in place.

HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998) (exploring the tension between post-conflict policy approaches that prioritize the desire to punish perpetrators and those that focus on reconciliation).