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State Responsibility for Genocide:

ICJ Ruling in Bosnia and Herzegovina's Genocide Case

Odgovornost države za genocid:

Razsodba Meddržavnega sodišča (ICJ) v primeru Bosne in Hercegovine

Diplomsko delo

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To my † parents,

who taught a young girl about responsibility

The choice of subject of this thesis was motivated initially by certain research in peace and conflict studies, and the Rwandan Genocide in particular, at the Faculty of Social Sciences, University of Copenhagen, Denmark, which resulted in an invitation to attend the 7th Biennial Meeting of the International Association of Genocide Scholars in Sarajevo in 2007. Active participation at this special event, where I also had the opportunity to talk and work with the Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Carla del Ponte, made a huge impact on my academic interests. Some of the research was conducted in 2009 during my volunteer work in Kenya, where only three years ago, in 2007, a double hydra of corruption and negative ethnicity pushed the country to the fringes of genocidal warfare. Working and living in Kenya was a great opportunity to experience the tensions that might be the underlying triggers of the horror of genocide, and to devote my study to the complicated issues involved in the definition of genocide. Both in Bosnia and Africa I spent many hours with genocide survivors, and I have visited the melancholy memorials to the killings. The smell of the mass graves cannot be forgotten and has its own contribution to what sometimes may seem a rather dry and technical study of legal terms.

I wish to express my gratitude, first and foremost, to my supervisors, Jørn Vestergard, Ph.D., Faculty of Law of the University of Copenhagen, and Milan Brglez, Ph.D., Faculty of Social Sciences of the University of Ljubljana, for their limitless advice, their time and patience. Like the wisest of teachers, they did not persuade me to 'enter the house of their wisdom', but rather led me to the threshold of my own mind. I would also like to thank to Professors Miro Cerar, Ph.D., Ljubo Bavcon, PhD., and Vasilka Sancin, Ph.D., all at the Ljubljana Faculty of Law of the University of Ljubljana, for valuable and encouraging discussions on state responsibility in international law. Deep gratitude is extended to my friend Daniel Sheppard for agreeing to read through the completed draft of the text and for the incisive and helpful comments he offered. I am indebted to a variety of friends who provided support and encouragement throughout the long journey. Above all, I wish to thank my aunt, Cvetka Rus, and her family for all their moral and practical support.

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State Responsibility for Genocide: ICJ Ruling in Bosnia and Herzegovina's Genocide Case

While the act of genocide is as old as humanity, the law addressing this crime is considerably younger. It was only with the atrocities in the former Yugoslavia and Rwanda in the 1990s that the international courts started to apply and enforce the Genocide Convention. International legal system has now been increasingly concerned with the role of individuals. However, the state remains the pivotal actor, and this fact should not become obscured by the attention currently given to individual criminal responsibility. This thesis explores the responsibility upon a state qua state, where it can and should complement individual criminal liability for genocide. For the very first time in history, the definition of the scope of state responsibility under the Genocide Convention was initiated by the International Court of Justice (ICJ) in the *Bosnian Genocide* case. Can a state be responsible for genocide? Are not international crimes, in the famous words of the Nuremberg Tribunal, committed by men not by abstract entities? Furthermore, can a state have a genocidal intent, the fundamental necessity for the crime of genocide? Against this background, the thesis analyses state responsibility for genocide thematically, drawing on the Genocide Convention, its *travaux préparatoires,* and subsequent developments in international law, particularly the ICJ Judgment in the *Bosnian Genocide* case.

Key words: genocide, state responsibility, Genocide Convention, ICJ, Bosna and Herzegovina.

Odgovornost države za genocid: Razsodba Meddržavnega sodišča (ICJ) v primeru Bosne in Hercegovine

Medtem ko je genocid sam star toliko, kot je staro človeštvo, je pravo tega zločina mnogo mlajše. Mednarodna sodišča so začela aplicirati Konvencijo o genocidu iz leta 1948 šele v času zločinov v bivši Jugoslaviji in Ruandi v 90ih letih. Mednarodni pravni sistem je danes čedalje bolj osredotočen na vlogo posameznika. Vendar država ostaja poglavitni akter, kar ne sme biti zanemarjeno ob prevladujoči pozornosti, usmerjeni na kazensko odgovornost posameznika. Diplomsko delo preučuje odgovornost države kot države, kjer le-ta lahko, in bi tudi morala dopolnjevati, kazensko odgovornost posameznika v primeru genocida. Meddržavno sodišče, ki je prevzelo nadzor nad preiskavo odgovornosti vpletene države za genocid v Bosni in Hercegovini, je prvič v zgodovini postavilo vprašanje o opredelitvi obsega odgovornosti države v okviru Konvencije o genocidu. Ali je lahko država odgovorna za genocid? Ali niso mednarodni zločini, glede na slovite besede sodišča v Nürnbergu, zagrešeni s strani ljudi in ne abstraktnih entitet? Ali ima lahko tudi sama država genocidni namen, ki je temeljni element zločina genocida? Za odgovore na ta vprašanja, naloga tematsko analizira odgovornost države za genocid, ozirajoč se na Konvencijo o genocidu, njena pripravljalna dela, ter naknadni razvoj norm na področju odgovornosti države, s posebnim poudarkom na razsodbi Meddržavnega sodišča v primeru genocida v Bosni.

Ključne besede: genocid, odgovornost države, Konvencija o genocidu, Meddržavno sodišče, Bosna in Hercegovina.

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List of Abbreviations

ARSIWA	*Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (Osnutek pravil o odgovornosti držav za mednarodna protipravna dejanja)
BiH	*Bosnia and Herzegovina* (Bosna in Hercegovina)
ECOSOC	*United Nations Economic and Social Council* (Ekonomski in socialni svet Organizacije združenih narodov)
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms* (Evropska konvencija o varstvu človekovih pravic in temeljnih svoboščin)
ECtHR	*European Court of Human Rights* (Evropsko sodišče za človekove pravice)
FRY	*Federal Republic of Yugoslavia* (Zvezna republika Jugoslavija)
ICC	*International Criminal Court* (Mednarodno kazensko sodišče)
ICCPR	*International Covenant on Civil and Political Rights* (Mednarodni pakt o državljanskih in političnih pravicah)
ICJ	*International Court of Justice* (Meddržavno sodišče)
ICTR	*International Criminal Tribunal for Rwanda* (Mednarodno kazensko sodišče za vojne zločine v Ruandi)
ICTY	*International Criminal Tribunal for the Former Yugoslavia* (Mednarodno kazensko sodišče za vojne zločine na območju bivše Jugoslavije)
ILC	*International Law Commission* (Komisija za mednarodno pravo)
IMT	*International Military Tribunal at Nuremberg* (Mednarodno vojaško sodišče v Nürnbergu)
JCE	*Joint criminal enterprise* (Skupno kriminalno dejanje)
PCIJ	*Permanent Court of Justice* (Stalno meddržavno sodišče)
SA	*Assault Divisi*on (Jurišni oddelki nacistične stranke)
SS	*Protective Squadron* (Zaščitni oddelki nacistične stranke)
UK	*United Kingdom* (Združeno kraljestvo Velike Britanije in Severne Irske)
UN	*United Nations* (Organizacija združenih narodov)

UNGA	*United Nations General Assembly* (Generalna skupščina Organizacije združenih narodov)
UNSC	*United Nations Security Council* (Varnostni svet Organizacije združenih narodov)
US	*United States* (Združene države Amerike)
VRS	*Army of Republika Srbska* (Vojska Republike Srbske)

1 Introduction

1.1 Purpose

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (IMT 1946, 41).

"The state is an abstract entity and cannot act of itself. Acts of the states are rather performed by their *de facto* or *de jure* organs, or persons acting on behalf or under control of the State" (Sancin 2007, 501).

It is now sixty-two years since the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide (hereinafter the 'Genocide Convention' or 'Convention') by the General Assembly of the United Nations (UNGA). The adoption of the Convention after the chaotic and alienating events of the Second World War represented an outstanding milestone in public international law at that time. This treaty adopted by the United Nations (UN), only one day before the Declaration of Human Rights, was the first general human rights treaty which laid the cornerstone for new common ideals and the unification of the international community. Unfortunately, this huge step forward soon came to a standstill, as the Genocide Convention did nothing as a legal mechanism for forty years. It was only with the atrocities in the former Yugoslavia and Rwanda in the 1990s, that the international courts, in the cooperation with the national courts, started to apply and enforce the Convention.

In particular, individual criminal accountability for the crime of genocide has attracted a lot of attention since the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the International Criminal Court (ICC) were established. This increased momentum in the growth of international criminal law, concentrated on the individual as a perpetrator, has pushed aside the matter of the responsibility of the state for violations of the Genocide Convention. This of course, reflecting the times we live in, raises the question of whether when dealing with crimes such as genocide, individual criminal accountability alone is enough.

This thesis explores a different form of accountability: putting the responsibility upon a state *qua* state, where it can and should complement individual criminal liability for genocide. It is especially important in the context of international law that the state shoulders the responsibility for genocide. While, as the introducing quote suggests, only individuals but not abstract entities can act and actually commit crime such as genocide, sovereign state, afforded unequalled power and legitimacy in international legal order, is still the one entitled to regulate conduct of individual perpetrators. The relevance of this matter was particularly evident in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (hereinafter the '*Bosnian Genocide* case' or '2007 Judgement') before the International Court of Justice (hereinafter the 'ICJ' or 'Court') where Bosnia and Herzegovina (BiH) sued the then Federal Republic of Yugoslavia (FRY) (then Serbia and Montenegro, now Serbia) for contravening the Genocide Convention during the Yugoslav hostilities. The ICTY had already to a greater extent settled its jurisprudence on the crime of genocide by the time the *Bosnian Genocide* case was decided in February 2007. However, for the very first time the definition of the scope of state responsibility under the Genocide Convention was initiated by the ICJ who had assumed legal authority in order to investigate the corresponding state's responsibility for genocide in Bosnia.

The language of the Genocide Convention does not provide very precise guidelines regarding the extent of state's obligations, and the *travaux préparatoires*[1] of the Convention point to the fact that those responsible for drawing up the Convention never actually reached a joint agreement on the extent of state responsibility. It seems clear that the Convention is not intended to apply to acts of genocide committed by states *per se*. Apparently, it simply focuses on genocide as a crime perpetrated by individuals and necessitating their own criminal accountability.

Nevertheless, the wording of the Convention represents an unsatisfactory compromise incorporated in two Articles that are not easy to harmonize. Article IV states: "Persons committing genocide or any of the other acts enumerated in Article III shall be

[1] Under the Vienna Convention on the Law of Treaties, when the ordinary meaning of treaty language is ambiguous, recourse may be made to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" (Art. 32). In international law, this preparatory work, namely the legislative or drafting history of treaties, is typically referred to by its French title, "*travaux préparatoires*." Garner (2009, 1638) defines *travaux préparatoires* as "[m]aterials used in preparing the ultimate form of an agreement or statute, and especially of an international treaty".

punished, whether they are constitutionally responsible rulers, public officials or private individuals". Although this provision seems to suggest that accountability only applies to natural persons, Article IX puts forward a suggestion. By granting legal authority to the ICJ, Article IX proposes that states can be held accountable under the Convention:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

This hesitancy about state responsibility originates from the unease between the readiness to ban genocide on the one hand and the states' unwillingness to lay themselves open to culpability on the other. The Genocide Convention comes into direct conflict with state sovereignty as it looks to make illegal acts which have in the past been committed by state officials in accordance with a state policy (Gaeta 2007, 634). An effective procedure for the prevention and punishment of genocide could only have been made possible if states were ready to give up large portions of their sovereignty, something that states were as reluctant to do in those days as they are today. Consequently, the Convention is a legal document whose power lies more in its moral scope than in the content and severity of its legal obligations.

This thesis is intended to present and show to what extent the Genocide Convention, apart from stipulating that states have an obligation to prevent and bring to justice individuals accountable for the acts of genocide, also provides for other state commitments, the contravention of which would bring about state responsibility. Can a state be responsible for genocide and what does it even mean? Are not international crimes, in the famous words of the Nuremberg Tribunal, committed by men, not by abstract entities? Furthermore, can a state even have genocidal intent, a fundamental necessity for the crime of genocide? And finally, what part does the Genocide Convention play in the preservation of international human rights, and how has the nature of an advocate for human rights impacted the Court's understanding of state obligations and responsibility according to the Convention in the *Bosnian Genocide* case?

1.2 Methodology

The entire thesis is based upon the critical analysis of the application of the proper methodology of state responsibility, particularly maintaining the distinction between primary and secondary rules of international law.[2] Every legal system, says Hart (in Pavčnik 1999, 471), consists of a union of primary rules of obligation and secondary rules. While the theoretical approach to the state responsibility, focused on a strict separation between *lex specialis* and general international law, will serve as a desirable practice, the application of the Genocide Convention in the *Bosnian Genocide* case will show if the two branches of law can really remain strictly separated, and if the ICJ faced any legal obstacles in applying this methodology.

The application of the Genocide Convention to state responsibility for genocide is a two way-process between general international law and international human rights law. While the purpose of the application of general international law codified in the *Vienna Convention on the Law of the Treaties* (hereinafter the 'Vienna Convention') and the law of state responsibility as codified in the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (hereinafter 'ARSIWA' or 'ILC Articles') is mainly to define a proper standard for attribution, it is in the primary rules contained in the Genocide Convention where we will find answers regarding the Court's jurisdiction, intent or burden of proof. This thesis therefore also addresses the question of whether the methods and rules applied in the interpretation of 'ordinary' international treaties differ from the ones used for human rights treaties such as the Genocide Convention. This includes a comparative overview of the various international law mechanisms.

The analysis will also be conducted from the historical perspective. It will chart the evolution and development of legal norms in the field of state responsibility. *Travaux préparatoires* of the ARSIWA and the Genocide Convention, as well as the legacy of the International Military Tribunal at Nuremberg (IMT), will all assist in outlining the concept of state responsibility applicable to the crime of genocide. The research material is also extended to books, law reviews, articles and relevant case law of the *ad hoc* tribunals.

[2] Similar methodological approach, following a distinction between primary and secondary rules of international law has also been adopted as the principal thesis by Marko Milanović (2006), in his analysis of state responsibility.

1.3 Structure

Against this background, the thesis divides the examination of state responsibility for genocide into nine chapters. Research analyses and interprets state responsibility for genocide thematically, drawing on the Genocide Convention, its *travaux préparatoires* and subsequent developments in international law, particularly the ICJ Judgement of 2007. The study of state responsibility in the second chapter begins with an examination of substantive law, which requires an assessment of the place of responsibility within international law. It reviews the framework of state responsibility under international law, and charts the evolution and development of legal norms in the field of state responsibility. The third chapter, with the historical focus, addresses the development of international legal efforts to prosecute genocide, up to and including the Nuremberg trial. It surveys the process of drafting the Convention, as well as the subsequent normative activity within the UN bodies such as the International Law Commission (ILC). Chapter 4 explores the legal basis of the principles of state responsibility. It further outlines the methods and rules used in interpreting international treaties, and the differentiation between those methods and rules is a theme throughout the critical analysis of the 2007 Judgement. Parallel to the exegeses in the first four chapters of the thesis, the following sections discuss the *Bosnian Genocide* case. Considering the law and mechanisms applied in the 2007 Judgement, chapter 5 examines under which conditions a state can be held responsible for genocide, as well as several specific problems genocide poses for the state responsibility under international law. In connection to the relationship between individual and state responsibility, the *mens rea* or mental element of the offence is set out. In light of this debate on the subjective element of genocide, chapter 6 then considers state responsibility for complicity in genocide. Chapter 7 is devoted to the prevention of genocide, a question of vital importance but one not fully considered in the Convention. This obligation plays a significant role for the protection of international human rights and has been interpreted comprehensively in the context of other international treaties. Accordingly, chapter 8 considers the Convention as a human rights instrument, not only as a criminal law instrument. The final chapter provides answers to the main research questions and offers the author's thoughts on the prospects for state responsibility on genocide as a means of enforcing international human rights.

2 The Concept of State Responsibility: The Evolution of a Doctrine

Prior to contemplating the extent of state responsibility for genocide under the Genocide Convention, some preliminary observations about the idea: the rules of state responsibility dictate whether the state has breached one or more of its international obligations. The term 'responsibility' is occasionally used interchangeably with the notion of 'obligation'. In the field of international law, however, it has a more precise meaning. When a state is held 'responsible' for an unlawful act or omission, it bears legal consequences that flow from this breach of its legal duties (Cheng 1953, 163). To put it differently, the rules of state responsibility determine whether there has been an infringement of international law that the state can be held responsible for, and the resulting legal consequences. Whether a state operates outside the law in a particular case, to a large measure depends on the extent of primary norms that control the rights and duties of states (Milanović 2006, 560; Sancin 2007, 502).

2.1 The ILC Articles on State Responsibility – The Separate Delict Theory and the General Principle of Non-Attribution of Private Acts

The ILC adopted its ARSIWA in 2001 in an endeavour to systemize and enhance the development of customary international law. The ILC Articles, which were in preparation for fifty years, do not make any effort to define the considerable obligations, or 'primary obligations', that states are bound to under international law. In contrast, they tell of the 'secondary obligations' that are attributed as soon as a state has contravened a primary obligation (Milanović 2006, 553; Sancin 2007, 502).

This differentiation between primary and secondary obligations is "the central organizing device of the [A]rticles" (Crawford 2002, 874), and is crucial to be able to comprehend the system of state accountability. As Halldórsdóttir Birkland (2009, 1628), points out, "the goal of the Articles is not to summarize the *content* of states' international obligations but merely to outline the *consequences* that flow from violating those obligations" (emphasis by the author). For that reason, the ILC Articles do not explain state responsibilities under the Genocide Convention, but simply delineate the consequences emanating from breaching these responsibilities.

ARSIWA depart from the premise that "every internationally wrongful act of a state entails the international responsibility of that State" (ILC 2001a, Art. 1). A necessary precondition is the existence of an international legal obligation among states, violated by a state by means of an act or omission (*Ibid.,* Art. 2). The act or omission of a state qualifies as an internationally wrongful act when two conditions are met. First, the act or omission must constitute a breach of an international obligation, or, as the ILC Articles put it, is "not in conformity with what is required" by the international obligation (*Ibid,* Art. 12). This implies that the obligation in question must be binding on the state at the time of conduct which is said to constitute a breach of the international obligation. Second, the act or omission must be "attributable" to the state (*Ibid.,* Art. 2).

As a general rule, only acts and omissions by state organs or by persons exercising governmental authority or acting on the instruction, direction or control of a state are covered (*Ibid.*, Arts. 4–9). This rule suggests that acts of states are committed by individual actors whose illegal conducts can then be attributed to the state. In the case of such an internationally wrongful act, a state is obliged to make full reparation for the injury suffered (*Ibid.*, Art. 31). This involves appropriate restitution, compensation or satisfaction (*Ibid.*, Art. 34). These cardinal principles have been repeatedly affirmed by the Permanent Court of Justice (PCIJ), the ICJ, and the leading scholarly works on state responsibility (Crawford 2002, 4, 76, 81).

The legal responsibility of the state is therefore engaged by an unlawful act of the state, operating through its official organs and agents. According to the this perspective, the direct responsibility of the state for the acts of private individuals is engaged only when the individual, for one reason or another, is treated as acting on the behalf of the state. In this way, the principles of attribution and responsibility, embodied in the ILC Articles, are commonly viewed as intimately related to conceptions of agency[3]. To put it differently, *de facto* or *de jure* agencies are the principal exceptions to the strict division between the public and private domains made by the ILC. They, however, prove that

[3] Principal-agent theory is an approach that originates from economics, but has often been applied to analyse the relationships between actors in the political realm. Briefly, "in an agency relationship, the principal wants the agent to act in the principal's interests" (Padilla 2003, 4). To put it differently, while the principal represents someone who delegates, the agent represents someone to whom authority is delegated. It is here, that we can find an analogy of the approach with the concept of attribution of the acts of individuals to the state. The question being addressed is whether individuals have been acting in the interest of a state? Throughout this thesis principal will refer to the state, and agent or agencies to the individual perpetrator(s).

primary and secondary rules of international law are interrelated, or, as explained by Pavčnik (1999, 278), they complete and upgrade each other.

However, since today private perpetrators of crimes such as genocide can engage in state-like violence without bearing the burden of state responsibility, rules that govern state responsibility for private conduct need to be carefully examined. This inquiry must identify their nature, scope and authority, and it must ask whether they can be usefully harnessed to meet today's challenges or need to be re-evaluated in light of the threat posed by private actors.

Considering that state is only legally responsible for its own wrongful acts, it follows that conduct of a private individual, wholly unrelated to the state, cannot trigger that state's responsibility. This legal doctrine, supported by the ILC Articles as well as the long history of jurisprudence, is termed as the 'separate delict theory' (Shelton 2005b, 62). It is based on the general principle of non-attribution of private acts, which, as illustrated above, is an implicit part of the ARSIWA. This perception of the state, operating through its officials and agents, as the primary bearers of rights and obligations, has highly significant implications for the international legal system. It advances a strict division between the public and private sphere, and avoids undue regulation and control over the latter. However, it is important to note that this model of the state and its responsibility was not always the prevailing one.

2.2 The Doctrine of Collective Responsibility

In the Middle Ages, the accepted view was based on feudal notions of collective responsibility that had their origins in the Roman *jus gentium* (Hessbruegge 2004, 276–9). According to this doctrine, a group was automatically responsible for the acts committed by its members (Sørensen 1986, 531). In its formative stages, international legal practice recognized a doctrine of reprisals that allowed for retaliation against a foreign entity for the unfriendly act of one of its subjects. Under this approach, the act of the foreign subject was deemed automatically to be an act of the collective entity, justifying countermeasures against it (Lauterpacht 1970, 251).

In Nuremberg, the above considerations led to the so-called collective criminal theory. On the basis of this theory, the IMT convicted the 'major war criminals' of the crime of

conspiracy while the lower and mid-level accused were prosecuted and convicted for membership of a criminal organisation by the allied military courts and tribunals in subsequent proceedings (Sliedregt 2003, 16).

As Colonel Murray C. Bernays (in Smith 1982, 35) wrote in his proposal, "Behind each Axis war criminal lies the basic criminal instigation of the Nazi doctrine and policy". Following this approach, both crimes and criminals were collectivised. The Nuremberg Trials classified Nazi organisations such as the Nazi government, the Nazi party, Gestapo, and SA[4], SS[5] to be criminal (Bavcon *et al*. 1999, 64). Such adjudication of responsibility required no proof that the individual affected participated in any overt act other than membership in the conspiracy (Smith 1977, 36). This 'collective punishment' was later often a matter of dispute, as well as a source trying to delegitimize the IMT and its Nuremberg judgement (Bavcon *et al*. 1999, 64).

Approach of collective responsibility was further echoed by Hannah Arendt (in Arendt and Jerome 2005, 121–32), who asserted that the central thesis of Nazi political strategy was that there was no difference between Nazis and German, and that people stood united behind the government. However, Arendt pertains collective responsibility to the individual belonging to a community, which is due to the individual's membership in that group (Herzog 2004, 42). She distinguishes collective responsibility from the moral one which corresponds to personal guilt (*Ibid.*).

2.3 The Theory of Complicity

The shift away from a doctrine of collective responsibility, predating the system of sovereign states, and towards the principle of non-attribution of private acts, has been gradual. Principle of non-attribution, illustrated above, draws inspiration from concepts that were famously articulated in the international sphere by Hugo Grotius. He was among the first to formulate a theory of state responsibility for private acts that was not derived from principles of collective responsibility. Essentially, he asserted that a collective such as state would not normally be responsible for the wrongful conduct of its subjects, without first establishing its own distinct wrongdoing (Grotius 2001, 523–

[4]Abbreviation of *Sturmabteilung* (German: "Assault Division"): a paramilitary organization whose methods of violent intimidation played a key role in Adolph Hitler's rise to power.
[5] Abbreviation of *Schutzstaffel* (German: "Protective Squadron"): the black uniformed elite corps of the Nazi party.

26). However, such responsibility would arise if the state was 'complicit' in the private act through notions of *patientia* or *receptus* (*Ibid.*).

A state, aware of private wrongdoing, yet failing to take appropriate measures to prevent it (*patientia*) or offering the offender protection, after the fact, by refusing to extradite or punish him (*receptus*), revealed its approval of the wrongful act and thus became an equal party to it (*Ibid.*). The responsibility of the state was thus born not from the act of the individual alone, but from the implied complicity of the state in that act, through its failure to prevent and punish.

As Hessbruegge (2004, 286–87) explains, advocates of the complicity theory of that age sought to establish state responsibility for private acts by deeming the state a party to the act itself by reason of its wrongful failure to prevent the offense or to hold the private offender accountable. Thus, the theory did not go far enough in respecting the distinctions between the public and private realm. Those that invoked the criminal language of complicity implied by the states, through its omission, had somehow intentionally created the circumstances to facilitate the commission of the offense and should therefore be held responsible for it. However, the cases addressing the issue concerned civil damages and made no effort to prove such an intention on the part of the state (*Ibid.*). To put it differently, complicity was implied by legal fiction, not evidence.

As scholars became increasingly convinced that state responsibility should be grounded in 'objective' violations of international obligations, rather than any kind of fault or malicious intent, the concept of state complicity became untenable. As Robert Ago (in ILC 1978a, 96), the second special rapporteur of the ILC on state responsibility was to argue: "Since a private individual cannot violate an international obligation, complicity between the individual and the state for the purpose of such a violation is inconceivable".

Nevertheless, while certain cases and scholars criticized the theory of complicity which drifted out of favour in the early decades of the 20th century, the final ILC Articles invoked early theories of complicity in their codification of state responsibility. The rule prohibiting the complicit behaviour of a state is a 'secondary' or 'derivative' form of responsibility which target states that aid or assist others in violating international law (ILC 2001a, Art. 16). However, it is clear that this terminology is not invoked in the strict legal sense used by earlier theorists, and that, rather than from the state omission,

complicity requires some positive action to furnish aid or assistance. In other words, it is a negative rather than positive obligation. As it will be examined in Chapter 6, in the *Bosnian Genocide* case the ICJ tried to reconcile this notion of aiding and abetting enshrined in Article 16 of the ARSIWA with the notion of complicity in the Genocide Convention.

2.4 The Failed Concept of State Criminal Responsibility

It has sometimes been said that criminal law deals necessarily with individuals because its premises refer to individual psychology and its sanctions are applicable to individuals alone. Bavcon *et al.* (2009, 531–533) are of that opinion: a state is the sum of its individual parts and state crime is a fiction. This view is embodied in the maxim *societas delinquere non potest*. To speak of inflicting punishment upon a state is to mistake both the principles of criminal jurisprudence and the nature of the legal personality of a corporation. Criminal law instead is concerned with a natural person (Bohinc *et al*. 2006, 321).

The adage that "guns do not kill people, people kill people" raises the same issue. It would be ridiculous to prosecute a tangible object, for example a gun, for manslaughter. Guns are controlled by human beings. The same is true of a state. Is it therefore equally absurd to talk of the criminality of an abstract, fictional, intangible entity such as the state?

While state responsibility originally dealt with international wrongful acts in general, without distinguishing between different classes of wrongs, there have been efforts to introduce the idea of state crimes into this notion. Žolger (in Türk 2007, 281), for example, argues that what should be established as the main feature of the international wrongful act is the penal responsibility of the state or the government itself. In other words, advocates of the so-called subjective doctrine of state responsibility, who believed that criminal responsibility shall extend not only to private persons and associations, but also to states and governments, found analogies between criminal and international law. However, international law developments turned towards direction towards the objective doctrine of state responsibility (*Ibid.*, 282; Bavcon *et al*. 1999, 60–1).

During the drafting of the ILC Articles, the issue of whether the states can commit crimes was raised (Vučinić 1999, 16–19). The idea has caused controversy ever since (e.g. Rosenne in Dinstein and Tabory 1996; Jørgensen 2000; Pellet 1999). An early draft by the ILC referred to international crimes of states, describing them as a breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime (ILC 1993, Art. 19(2)). However, due to the ensuing controversy on this subject, the final ILC Articles adopted in 2001 do not include a provision on international crimes.

It is, however, doubtful whether the earlier reference to international crimes of a state could be seen as an indication of the theoretical view that a state can be held criminally accountable for a crime. The draft of the ARSIWA did not envisage any criminal sanctions, after all. The basic idea was rather to distinguish between different kinds of internationally wrongful acts, and the duty of the state to make reparation for its consequences.[6] The reference to international crimes of states was meant to reflect that the violation of a substantive norm of a fundamental character weighed more heavily (ILC 2001b, 110–16). It related to the international community as a whole, and compensation could therefore be claimed by all states. Nevertheless, although an aggravated form of state responsibility, it still indicated the 'civil liability' of states, rather than a penal form of responsibility (Pellet 1999, 433). In other words, the applicability of international criminal law to states was rejected.

This view was clarified by a final set of Articles (ILC 2001a, Arts. 40–41) which, referring to serious breaches, emphasized its nature as a tort. The original use of the terms 'crime' and 'delict', which in several Continental European legal systems are genuine criminal law terms, had been misleading (Pellet 1999, 433). A distinction was not retained by the ILC, due to its criminal law connotation. Two different provisions were adopted instead, dealing with "serious breaches of obligations under peremptory norms of general international law" (ILC 2001a, Arts. 40–41). The latter refer to gross or systemic breaches of peremptory norms (*jus cogens*). However, the ILC Articles are not *lex specialis* rules modifying the rules of state responsibility (*Ibid.*, Art. 55), but provide for the duty of third parties not to recognize such serious breaches and bring them to the end (*Ibid.*, Arts. 41(1)–(2)),

[6] This idea was advocated by the Nordic countries before the ILC (1998, 53–54). See also Pellet (1999, 433), who argues that international responsibility is neither civil nor penal.

The exact standards of the regime of aggravated state responsibility remained largely unsettled. A suggestion to separate between different classes of wrongful acts and the ensuing modes of reparation, depending on the gravity of the acts, made a development in the field of state responsibility. But the idea should not be misunderstood as a mode of criminal responsibility. The ILC's discussion and its codification efforts show that the concept of state criminal responsibility was overwhelmingly rejected. However, the division of internationally wrongful acts into international crimes and international delicts may be regarded as an example of limited, but not insignificant, impact of international human rights law on general international law. While the term 'state crimes' has been consigned to the dustbin, it is now generally accepted that certain breaches of general law are more serious than others and therefore entail more serious consequences.

International courts have also repeatedly rejected the idea of criminal state responsibility (ICJ 2007a, § 170). The international criminal tribunals established since the IMT, have been concerned only with the prosecution of individuals (*Ibid.*, § 172). They do not try or penalize states, as a consequence for their breaches of *jus cogens* norms of international law (ILC 2001b, 110). As the ICTY Appeals Chamber explained in *Blaškić* "[u]nder present international law it is clear that states, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems" (ICTY 1997, § 25). Ergo, the jurisdiction of the ICC is limited to natural persons (ICC 1998, Art. 25(1)).

3 Applicability of the Concept of State Responsibility to the Genocide Convention

While there is no state criminal accountability in international law, there still remains a doubt of whether a state can be responsible for breaching the Genocide Convention by means of compensation. There is no doubt that a state, being a party to the Convention, bears international responsibility if not abiding the criminal law obligations under Articles V and VI. If those accountable for genocide on its territory are not punished by the state, it entails state responsibility (Crawford and Olleson in Shelton 2005a, 905). More contentious is the question of whether, under the Genocide Convention, a state alone can be held responsible for an act of genocide that can be attributed to it, or whether only the individual offender him- or herself can be held liable. This introduces the concern whether state parties, besides their duty to prevent the acts of genocide and bring to justice their perpetrators, should not, under the Convention, be involved in genocide.

Most commentators agree that states can be held responsible for genocide under customary international law (*Ibid.*, 910; Gaeta 2007, 642; Schabas 2009, 434; Shaw in Dinstein 1989, 814). It is, however, controversial whether this concept is also implied in the Genocide Convention and can therefore be invoked before the ICJ.[7] This, at first sight, a purely academic question, became relevant in the *Bosnian Genocide* case where being decisive for the Court's competence to decide the case. According to the compromissory clause of Article IX of the Convention, the ICJ has jurisdiction solely as far as the interpretation, application or fulfilment of the Convention itself is concerned. As pointed out by Gaeta (2007, 632), case challenging the violation of customary international law could not be based on this clause. However, while the substantive scope of the Convention determined the Court's jurisdiction, as we will see below, the interpretation of the Genocide Convention itself does now exclude other sources of international law such as customary law. Whether state responsibility under the Convention also extends to the commission of genocide had been an issue discussed ambiguously already during the drafting of the Convention (Schabas 2008a, 37). However, a view of those advocating a reading of the Genocide Convention as strictly

[7] Judge Oda (in ICJ 1996b, § 9) argued in the *Bosnian Genocide* case that the Convention dealt exclusively with the rights of individuals, but not with inter-state relations.

limited to obligations of states as regards individual criminal responsibility for genocide, was refuted by the ICJ in the *Bosnian Genocide* case.

3.1 Drafting History

The *travaux préparatoires* has been adduced as a justification against the applicability of state responsibility for genocide under the Genocide Convention (Jørgensen 2000, 32–55; Schabas 2009, 513). Yet, on closer inspection, this assumption is not incontrovertibly supported. The extent of state responsibility under the Convention was discussed ambiguously by the delegates of the Sixth Committee of the UNGA, which pored over the definition of genocide in 1948 (Jørgensen 2000, 35–44; Schabas 2009, 72–77). Some states, such as France, the United States (US), and the Soviet Union, favoured an entirely criminal mechanism (ECOSOC 1948e, 344), which only concerned itself with individual criminal culpability for genocide, while others recommended also embracing a provision on the state responsibility for genocide. An amendment proposed by the United Kingdom (UK) and upheld by Belgium (*Ibid.*, 345) introduced a provision expanding criminal accountability for acts of genocide to states. It read as follows: "Criminal responsibility for any act of genocide as specified in articles II and IV shall extend not only to all private persons or associations, but also to States, governments, or organs or authorities of the State or government. Such acts committed by or on behalf of States or governments constitute a breach of the present Convention (ILC 1964, 126).[8] The latter amendment attracted opposition by other states and was later refused, as the notion of state crimes was heavily disputable (Mohamed 2009, 337). Most of the opposition did not object the idea that states may entail any kind of state responsibility under the Convention, but rather rejected the concept of state criminal responsibility (ECOSOC 1948e, 344). The fact that the UK amendment did not receive the requisite approval (ECOSOC 1948f, 355), only barely missing the majority, can therefore not be taken as evidence for rejection of state responsibility for genocide under the Convention (Schabas 2009, 420). To the opposite, the compromissory clause of Article IX was later adopted. The later reads:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for

[8] For a detailed analysis of the drafting history see Schabas (2009, 59–116) or Jørgensen (2000, 32–55).

> any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute (Genocide Convention, Art. IX).

The adoption of this provision confirmed the applicability of state responsibility as a notion of 'tort liability'. The reference to state responsibility in this context indicates that the Genocide Convention and its interpretation are not limited to criminal matters, but also extend to the state responsibility for violating the Convention. The text was again based on the amendment by the UK and Belgium. It was supported by the majority of delegates (ECOSOC 1984h, 456), since it finally made clear that the state responsibility envisaged was not criminal in nature (ECOSOC 1948g, 431). Hence, while the *travaux préparatoires* show that the idea of state criminal responsibility was clearly refuted, the ordinary concept of state responsibility for the failure to comply with the Convention indeed remained. Or as Kunz (1949, 738) says, states alone are internationally responsible for genocide, but under the general conditions of state responsibility, not under criminal law. However, the tendencies of conflating the rules of state responsibility with those of primary international law lead to the question of different approaches towards interpretation.

4 Interpretation of the Law Applicable to the Case of Genocide

4.1 The Law Applicable to the Genocide Case and the Hierarchy of Sources of International Law

In the *Bosnian Genocide* case, the Court insisted on its jurisdiction under the Genocide Convention as opposed to a general jurisdiction dealing with other areas of international law. Hence, the ICJ recalled that it is not competent, under the compromissory clause, to hear claims related to human rights law or to international humanitarian law (even of *erga omnes* or *jus cogens* character), if not directly related to a provision of the Convention (ICJ 2007a, § 147). This approach, however, considering the broad stance adopted by the ICJ as to the scope of the compromissory clause as well as the Article I of the Convention, does not seem as a disclaimer of other sources of international law that might provide legal grounding for state responsibility for genocide. Rather, it appears as a reminder that Article IX of the Genocide Convention, refers in first place to the contents of the Convention, and that any other source of international law must be brought within its four corners by way of meticulous analysis. While explicitly stating that it would not purport to base its judgment on any other legal source than the Genocide Convention, the judgment contains further implications for state responsibility for genocide, which go beyond the responsibility introduced by the text of the Convention, as it was introduced in 1948.

In its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter the '1951 Advisory Opinion'), the ICJ wrote that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (ICJ 1951, 23). This important statement is often cited as the judicial recognition of the prohibition of genocide as a customary legal norm, although the Court does not refer to it expressly in this way. However, this is evidence that other sources of international law such as customary law can be imported into the treaty. Article 38 of the ICJ Statute recognizes two non-conventional sources of international law: international custom and general principles. In theory there is no hierarchy among the three sources of law.[9] In practice, however, as also the *Bosnian Genocide* case will

[9] Article 38 of the ICJ Statute is regarded as the most authoritative statement on sources of international law, between which there exists no hierarchical order:

provide, international lawyers need to determine which source shall prevail in the cases of conflict.

International custom is established by evidence of a general practice accepted as law, while general principles are those "recognized by civilized nations" (ICJ Statute, Art. 38). While the conclusion is that treaty and custom law are of equal authority, there is an exception of the principle of *jus cogens,* and obligations *erga omnes*, a notion closely bound up to that of *jus cogens*. This principle refers to peremptory norms that, while not specifically mentioned in the Article 38 of the ICJ Statute, developed as a new category of international rules in recent years. States may not derogate *jus cogens* through any other source of international law, and it therefore follows that *jus cogens* is hierarchically superior to all other rules of international law (Hamid 2003, 25). Obligations having an *erga omnes* character, on the other hand, are regulated through imperative norms, that are obligations of a state towards the international community as a whole (Frowein and Wolfrum 2000, 10).

The crime of genocide, as defined in Article II of the Convention, is a part of customary law and *jus cogens* (ICJ 1951, 23; 2007, § 161; ICTR 1998, § 495; ICTY 2001, § 541). Moreover, as will be discussed below, the obligations of the Genocide Convention were deemed *erga omnes* and *jus cogens* by the ICJ in its 2007 Judgement, and a broad notion of state responsibility has been read into Article I of the Convention.

Article 38 of the ICJ Statute further lists judicial decisions and writings as subsidiary means for the determination of the rules of law. Judicial decisions, as also demonstrated in the *Bosnian Genocide* case where the Court made frequent references to the case law of the ICTY, appear to have more weight. Moreover, even though there is no doctrine on binding precedent in theory of international law, in practice the Court, as just described earlier, usually refers to its previous decisions.

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1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) International convention, whether general or particular, establishing rules expressly recognized by the contesting States;
   (b) International custom, as evidence of general practice accepted as law;
   (c) The general principles of law recognized by civilised nations;
   (d) Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Court's references to notions such as 'moral law', and its recognition of the principles recognized by civilized nations, suggest that the prohibition of genocide as a legal norm derives from the general principles of law, rather than from customary international law. On the other hand, the universal acceptance by the international community, of the norms set out in the Convention since its adoption in 1948, means that what originated in general principles ought now to be considered a part of customary law (ICTR 2001, § 151). In 2006, the ICJ said that the prohibition of genocide was "assuredly" a peremptory norm (*jus cogens*) of public international law, the first time it has ever made such a declaration about any legal rule (ICJ 2006b, § 64). A year later, in the *Bosnian Genocide* case, it said that the affirmation in Article I of the Convention that genocide is a crime under international law means it sets out "the existing requirements of customary international law, a matter emphasized by the Court in 1951" (ICJ 2007a, § 161).

It can be argued that some of these interpretative moves have expanded the scope of the provisions of the Convention itself, as well as recognized customary international law that developed in parallel to the Convention, and filled out some of its normative and institutional gaps. Therefore, in order to adequately understand the legal meaning and content of state responsibility under the Genocide Convention, as applied by the Court in 2007 Judgment, the parallel body of other rules of international law needs to be taken into account. Or as Ku and Diehl (2009, 7) suggest, "customary law and conventions work in tandem to regulate state behaviour".

4.2 Interpretation of the Genocide Convention

Jurisdiction of the Court is directly related to the interpretation which is implicit in any act of application. This chapter summarizes the methods and rules of interpretation which are used in international treaty interpretation. As these methods of treaty interpretation have developed over time, and taking into consideration the essence of the Genocide Convention, the objective of this chapter is to function as the grounds for additional analysis and understanding of the decision of the Court in the *Bosnian Genocide* case.

Interpretation of law is an analytical activity. It is connected to hermeneutics (Pavčnik 1998, 51), the form of activity "which aims at explaining and expounding the meaning

and scope of an utterance" (Bredimas 1978, 3). This utterance can be a law, treaty or judgement.

Generally speaking, interpretation can fulfil two different functions. The first may be described as "making the text clear to oneself", the second as "making the text understandable" (Pavčnik 1998, 47–51). To complete both functions, one can address the text in different ways, which are called methods. These methods of interpretation can be described as mechanisms which aid the interpreter "to ascertain the meaning of the law by reference to three fundamental elements: the text, the intention and the object" (Bredimas 1978, 3). Different ways of looking at the subject may lead to almost any result, so rules have to be made to ensure the predictability of the interpretation and restrict the interpreting body from making changes to the treaty. Or, as explained by the ICJ (in Hambro 1966, 48) itself, "it is the duty of the Court to interpret the Treaties, not to revise them". These types of rules can either be part of customary law, when they are drawn from previous judgements or a codified law, such as the Vienna Convention. On the other hand, they can be presented in the treaty itself.

Interpreting the Genocide Convention, the first human rights treaty adopted by the UNGA, serves the same purpose. Taking into consideration the above-mentioned tasks of interpretation, the basic rule in interpreting the Genocide Convention is that a judge must determine the purpose of the legislature when implementing the provisions of the Convention. This prerequisite introduces the question of which method of interpretation should be implemented: objective, underlining the reason for the treaty; subjective, emphasising the intention of those who drafted the Convention; teleological, stressing the object and purpose of the treaty; or dynamic, examining the meaning of the treaty as stated by its objectives according to the present situation. One of the goals of this thesis is to point out and objectively evaluate the methods of interpretation of the Genocide Convention by the ICJ in the *Bosnian Genocide* case, bearing in mind the extent and essence of the Convention.

4.2.1 Methods of interpretation in international law

4.2.1.1 Subjective method

In handling ambiguous provisions, the subjective method commences by trying to determine the historical objective of those adopting the agreement (Pavčnik 1998, 73). The objective of those who drafted the Convention becomes an independent basis of interpretation. This was the preferred method in international law before the drafting of the Vienna Convention.

4.2.1.2 Objective method

The objective method focuses on the actual text of the treaty and stresses the analysis of the words used (Sinclair 1984, 114–15). In its work leading up to the Vienna Convention, the ILC took the stance that what is important is the intention of the parties as set out in the text, which is the best indication to the current common objective of the parties. The system of law of the ICJ upholds the textual approach (Fitzmaurice 1951, 1–28), and it is adjusted in essence in Section 3 of the Vienna Convention. One of the arguments why the objective method was favoured over the subjective method was the reality that the subjective resolve of the treaty partners had rarely been made public or it was inclined to change in the passing years.

4.2.1.3 Teleological method

The third approach assumes a wider viewpoint than the other two factions. The stress is on the objects and purposes of the treaty "as the most important backcloth against which the meaning of any particular treaty provision should be measured" (Shaw 2008, 479). The teleological faction puts emphasis on the role of the judge, as he or she is expected to define the object and purpose of the treaty, and because of this it has been widely criticized as "judicial law making" (*Ibid.*).

4.2.1.4 Dynamic method

It is from the principle of effectiveness that the dynamic method has its origins. In order to give effect to the stipulations in accordance with the objectives of the parties (ICJ 1949, 244–47) this principle has to be used. The principle of effectiveness, with its

"broader purpose approach" (Shaw 2008, 481), is used in two areas in a dynamic manner. One such area is when a treaty operates as the constitutional document of an international organisation. As an example, the UN Charter asks for a less rigid method of interpretation, as one is dealing with a device that is being implemented in order to achieve the set aims of that organization.[10] This step-by-step interpretation has been used to bestow powers which were not explicitly provided for in the Charter, but which were considered necessary for the purpose of the UN (Klabbers 2002, 70).

The second area is in the interpretation of human rights treaties, where the principle of effectiveness is used in a dynamic, sometimes called 'evolutive', approach to interpretation. Human rights treaties involve an objective responsibility to protect human rights instead of subjective reciprocal rights. Therefore, in this area, a flexible step-by-step and objective oriented method of interpretation has tended to be favoured (Council of Europe 1961, 116). This method was instituted by the European Court of Human Rights (ECtHR) as being the most important for the interpretation of human rights treaties through a series of cases (ECtHR 1978, 15). Ever since the Tyrer decision, one quote has been referred to repeatedly: "[T]he Convention is a living instrument, which has to be interpreted in the light of present day conditions" (ECtHR 1995a, § 71). This quote is reflected in Article 31(1) of the Vienna Convention and, as will be illustrated below, the importance of this method has also been substantiated by the *Bosnian Genocide* case.

The use of the dynamic method is restricted by the thought that it should not result in making changes to the treaty (ICJ 1966, 6), as it does not "warrant an interpretation which works a revision of the treaty or any result contrary to the latter and the spirit of the treaty" (Starke 1989, 481).

4.3 Rules of Interpretation in International Law – Systemized rules in the Vienna Convention on the Law of the Treaties

In the *Bosnian Genocide* case, the Court stated it would interpret the obligations imposed on states by the Genocide Convention in accordance with the principles of the Vienna Convention (ICJ 2007a, § 160). The Vienna Convention is a unique treaty

[10] An example for enabling an organisation to function more efficiently can be found in the Advisory Opinion on *Reparation for Injuries* (Klabbers 2002, 68).

mechanism. This treaty was designed to govern all other treaties, unlike other international agreements that monitor a state's behaviour in a particular field of international relations, such as human rights. Today, treaties are the principle source of international obligations, and the rules of the law of treaties create the basic framework within which this regulation operates.

Section Three of the Vienna Convention is dedicated to Treaty Interpretation. The interpretation of the treaty is dealt entirely in Article 31 and 32, with Article 31 having precedence over Article 32. Article 31 sets out a general rule of interpretation: "1.A treaty shall be interpreted in a good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose". To put it in another way, the Vienna Convention is founded on the concept that there is one fundamental rule for the interpretation of international treaties, and this rule may be described as that of "general consent" (Klabbers 2002, 96). Only having one basic rule is important for two reasons. Firstly, this means that the Convention does not see a difference between "law making treaties" and "treaty contracts". This may be demonstrated by an example of the national legal system, where quite often different sets of rules for the interpretation of different types of law can be found. As an illustration, countries that use a common law system differentiate between statutory interpretation and precedent.

Secondly, as the Vienna Convention accepts only one set of general rules, we are confronted by the problem of whether the Convention has the desire to bring further rules into play in a particular order. By using the singular in the title ("General rule of interpretation"), it is made clear that Article 31 is the only rule for interpretation.

First of all, this rule makes it a duty to obey the principle of good faith ("*bona fides*"). This principle underpins the most basic of all the conventions of treaty law, the rule "*pacta sunt servanda*". Because every treaty is mandatory between the parties, its provisions must be conducted in good faith. If in relation to the compliance with the treaties, good faith is requested of the parties, "logic demands" that good faith be implemented in the interpretation of the treaties (Sinclair 1984, 119).

"Ordinary meaning"[11], the next component of the rule, does not automatically result from a "pure grammatical analysis" (Sinclair 1984, 121). The correct meaning of a text has to be achieved by taking into account all the consequences which normally and reasonably arise from the text (Klabbers 2002, 100). Sinclair indicates that there is "no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted" (Sinclair 1984, 121).

If the link between ordinary and special meaning is to be understood, Section 4 of Article 31 has to be read alongside Section 1: "A special meaning shall be given to a term if it is established that the parties so intended". By reading both sections together, a rule is established that special meaning has precedence over ordinary meaning. Nevertheless, whether an expression has special meaning is to a large extent a question of burden of proof, "which lies with the party which is trying to invoke special meaning of the term" (ILC 1966, 189). The degree of proof seems to be very high when detracting from the generally accepted meaning of the expression is involved. That being so, it is unlikely that one party only uses this specific expression in a specific way.[12]

Article 31(2) of the Vienna Convention explains the extent of the 'context' of a treaty. For the objectives of interpretation, the "context" of the treaty includes its opening statement and annexes, "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty". "Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" should also be taken into consideration (*Ibid.*). In his personal opinion on the application for provisional measures by BiH against Yugoslavia, Judge *ad hoc* Elihu Lauterpacht referred to the ensuing practice of state parties to the Genocide Convention in concluding that they did not seem to consider that an obligation to intervene militarily was included in their commitment to prevent genocide (Schabas 2009, 527).

[11] The principle of ordinary meaning can be seen very clearly in the Advisory Opinion concerning the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consolidative Organisation (Klabbers 2002, 99–100). Under the dispute was the meaning of the words "largest ship-owning nations".

[12] An example is the *1933 Eastern Greenland* case (Cavell 2008, 436–37).

If, as has already been explained above, specific words and expressions in a treaty are misleading, their structure should be determined by the general substance of the treaty, and by the context, and must not be read in isolation. Focussing on one term or just one provision is illogical. The opening statements of a treaty may help to determine the aim and the purpose of the treaty. The Genocide Convention includes a short introduction, but no annexes. In the introduction there are included several important ideas that are nowhere to be found in the rest of the Convention, including the reference to the General Assembly Resolution 96(I), the idea that genocide has existed "at all periods of history", and the necessity of international cooperation "in order to liberate mankind from such an odious scourge". In its 1951 Advisory Opinion, the Court, referring to the "humanitarian and civilizing purpose" of the introduction of the Genocide Convention, allowed minor reservations to the Convention, but excluded reservations affecting the substance and purpose (ICJ 1951, 24). Furthermore, as will be outlined in the chapters that follow, the introduction to the Genocide Convention has been referred to several times also in its 2007 Judgement, specifically at the point when the Court used its dynamic method of interpretation, so that it could give some basis to its judgement.

Lastly, as has been discussed above, all treaty provisions must be read not only in their own context, but in the wider context of general international law. Nevertheless, this stipulation raises the question of whether a treaty provision should be interpreted in the light of the rules of the international law in force at the time of the interpretation or those in force at the time of the conclusion of the treaty. As it is possible that a treaty may remain in force for a number of years and as international law may change and develop during this period, the interpreter may take into account this progression. This line of reasoning leads to the dynamic interpretation method, which has been discussed above.

Article 32 of the Vienna Convention states that "supplementary means of interpretation" may also be applied on those occasions where the rules set out in Article 31 leave the meaning misleading or obscure, or lead to a result which is "manifestly absurd or unreasonable". The Vienna Convention refers to "the preparatory work of the treaty and the circumstances of its conclusion" as additional means, although points out that this is not a comprehensive list of possible sources. The *travaux préparatoires* played an important part in the interpretative analysis dealt with by the ICJ in the *Bosnian Genocide* case.

Preparatory work is a broad expression and there is a danger that reliance on the *travaux* would be likely to control or restrict the interpretation of the Genocide Convention, so that it is prevented from evolving by continually going back to the benchmark of the 1947 and 1948 debates. The view of the PCIJ was that the *travaux préparatoires* of particular provisions could only be taken into consideration when the states appearing before the Court had participated in the preliminary conference (Dixon 2007, 74). Nevertheless, human rights tribunals, including the ICJ, came to an understanding with this issue, embracing the 'evolutive' or 'dynamic' approach to interpretation that has been mentioned above. They justify this by explaining that those who drafted the text intended such a result. Judge Alvarez, whose judgement singularly disagreed with the 1951 Advisory Opinion of the ICJ, spoke of taking great care of the risks when making excessive reference to the drafting history of the Genocide Convention. The danger is that conventions like the Genocide Convention "have acquired a life of their own", he said (ICJ 1951, 53). "They can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only with regard to the future" (*Ibid.*).

Other rules of interpretation are also said to apply to the Genocide Convention because of its nature as a human rights or humanitarian law treaty. In their joint dissenting opinion in the 1951 Advisory Opinion, Judges Guerrero, McNair, Read and Mo of the ICJ said "the enormity of the crime of genocide can hardly be exaggerated, and any treaty of its repression deserves the most generous interpretation" (*Ibid.*, 47).

5 State Responsibility for Genocide: Analysis of the ICJ Judgment in the *Bosnian Genocide* Case

The claim that states are accountable for the authorization of genocide under the Genocide Convention was raised in several cases before the ICJ.[13] The most applicable are the Yugoslavian cases presented to the Court in the 1990s[14] and at a later date the cases submitted by the Democratic Republic of Congo against Rwanda, Uganda and Burundi.[15] Following other cases that were unsuccessful at the admissibility stage, the first substantive judgment under the Genocide Convention was pronounced by the Court in February 2007, in the *Bosnian Genocide* case. Serbia and Montenegro had argued that the Convention only required state individuals to stop genocide, and bring to trial and punish individual perpetrators accountable for the acts of genocide. Other than that, there was no accountability of states for acts of genocide *per se*, according to the respondent (ICJ 2007a*,* § 176). The sanctioning of genocide was a matter of individual criminal accountability (*Ibid.,* § 156).

But the Court dismissed this point of view. Its opinion was that Article I, which requires state authorities to stop and bring to justice genocide perpetrators, was not merely an assertion of the responsibilities outlined in later articles (*Ibid.,* § 162). It had its own supervisory content, also forbidding states from perpetrating genocide with the assistance of their authorities (*Ibid.,* § 166). The Court additionally explained: "… the Contracting parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III"[16] (*Ibid.,* § 179). Bearing in mind

[13] The first case concerning the breach of the Convention was brought to the ICJ in 1973 by Pakistan. This case against India, however, did not concern the question whether India was responsible for genocide, but only the question whether the transfer of alleged perpetrators to Bangladesh for trial was in violation of the Genocide Convention. The case was later settled (Schabas 2009, 499–502).

[14] Apart from the *Bosnian Genocide* case brought in 1993, Croatia brought suit against Serbia and Montenegro in 1999 and Yugoslavia challenged several NATO members for their conduct during the bombing campaign of Kosovo. The application for provisional measures in the latter case was rejected by the ICJ in the absence of an arguable case for violation of the Genocide Convention (ICJ 1999, 71).

[15] In its 2006 decision in the *Case Concerning Armed Activities in Congo (Democratic Republic of the Congo v. Rwanda*), the Court held that the prohibition of genocide is a peremptory norm of international law, in other words *jus cogens*. But it did not further elaborate on this, as the decision concerned admissibility issues, and the Court held that it did not have jurisdiction to decide the case (ICJ 2006b, 16).

[16] Article III of the Genocide Convention reads that "The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;

the phrase in Article IX, that reads "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III", it is very clear that the ICJ interpreted this Article, which after all, determined its jurisdiction, literally. As stated by the Court, "the use of the word "including" tended to confirm that state responsibility was included within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention" (ICJ 2007a, § 169).

As noted above, according to the Court, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide. It extended the prohibition to conspiracy, incitement, attempt and complicity in genocide (ICJ 2007a, § 167). This approach relates to a concept the Court had already referred to in its 1951 Advisory Opinion, where it had emphasized the "humanitarian and civilizing purpose" of the Convention, which had to be considered in the interpretation (ICJ 1951, 23). This consideration led the Court in its 2007 Judgment to frame the obligations undertaken by states under the Convention broadly (ICJ 2007a, § 373). Although the interpretation method cannot be called entirely objective, since the subjective views, especially through evaluating the drafting history, played a role for the Court, the ICJ also relied on a teleological approach in its analysis of Article I of the Genocide Convention. Object and purpose of the Convention were emphasized (*Ibid.,* § 167), and reference was made to the context and purpose of the Convention as a whole (*Ibid.,* § 175). To sum up, although the text of the provisions of the Convention served as the basis for interpretation, the object and purpose of the treaty prevailed over a strict literal interpretation. Moreover, referring to the *present* context of the Convention (*Ibid.,* § 169; emphasis added), the Court invoked something close to a dynamic approach.

Nowadays, nobody would dare to deny that customary international law contains a rule prohibiting states from committing genocide. Moreover, it is generally contended that such a rule belongs to *jus cogens* (Bassiouni 1996, 270). It is furthermore asserted that its violation gives rise to consequences that exceed those normally stemming from ordinary wrongful acts. However, in the *Bosnian Genocide* case, the Court had to rule on the alleged responsibility of Serbia for genocide under the Genocide Convention and not under customary international law, and this jurisdictional constraint complicated

(d) Attempt to commit genocide;
(e) Complicity in genocide."

things significantly. The question of whether the Genocide Convention also obliges states themselves not to commit genocide is a fascinating question from the point of view of the relationship of state responsibility and criminal liability of individuals under international law.

5.1 The Relationship of State Responsibility and Individual Criminal Liability

As the preceding part of this chapter reveals, regardless of the exact scope and parameters of state responsibility, there is a growing conviction today that states incur responsibility for genocide. With this perspective, individual criminal responsibility is an important, but not the only aspect of international law enforcement. It is complemented by international state responsibility, a concept which, in fact, predates the recent accelerated development of international criminal law. At the time the IMT at Nuremberg was created, the existence of state responsibility had been, by-and-large, firmly established. The IMT's (1946, 41) famous pronouncement that "[c]rimes against international law are committed by men, not by abstract entities" was intended to explain that individuals could be held accountable, despite the fact that at that point in time, international law had been primarily concerned with state obligations. However, it was not the intent of the IMT to negate state responsibility (Dupuy in Cassese *et al.* 2002, 1086; Nollkaemper 2003, 625; ICJ 2007a, § 172).

The ICJ in the *Bosnian Genocide* case, distinguishing between individual criminal responsibility and state responsibility, referred to the concept of "dual responsibility" (ICJ 2007a, § 173). The dual existence of state responsibility and individual criminal responsibility has also been recognized by international criminal tribunals. The ICTY explained in *Furundžija*: "Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish tortures" (ICTY 1998, § 142).

Article 25(4) of the Rome Statute clarifies that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of states under international law. On the other hand, Article 58 of the ARSIWA affirms that the articles are without prejudice to any question on individual responsibility under international

law (ILC 2001b, 363–65). Both provisions underline the autonomy of each respective mode of responsibility.

Both concepts are based on the same substantive primary rule: the prohibition of genocide. This is the reason why individual criminal responsibility and state responsibility are related and overlap to some degree (Nollkaemper 2003, 615–40). Both require a violation of international law. There are therefore good reasons to ground both concepts on a unified definition of genocide as a matter of substance. But while international criminal law further requires that such a violation incurs individual criminal responsibility, the concept of state responsibility follows its own rules on attribution and reparation. State responsibility does not depend on criminal responsibility (Gaeta 2007, 628). Different from international criminal law, the traditional law of state responsibility does not have the aim of punishing a state, but primarily of providing for reparation (Bohinc *et al*. 2006, 133; Ignjatović 1991, 106; Dupuy in Cassese *et al*. 2002*,* 1097; Nollkaemper 2003; 620; Sancin 2007, 502).[17] The difference in purpose justifies autonomous rules regulating the different modes of responsibility (Cassese, 2007, 875).[18] The rules on the necessary prerequisites for responsibility and on the legal consequences are therefore different (Nollkaemper 2003, 627). This also concerns the procedure to establish responsibility (Dupuy in Cassese *et al*. 2002, 1097). For example, the standard of proof is usually higher for a criminal conviction than for the establishment of state responsibility (Gaeta 2007, 646; Nollkaemper 2003, 630). Even though genocide involves an aggravated form of state responsibility and therefore requires conclusive evidence, it is questionable whether the strict standard of 'beyond reasonable doubt'[19] should be applied (Bavcon *et al*. 2009, 142; Shapiro 2001, 22). This might lead to an excessively high threshold for establishing state responsibility.

[17] Nollkaemper argues that aggravated responsibility may require going beyond reparation to prevent repetition (*Ibid*., 625–6). Indeed reparation may even include punitive damages in order to deter repetition (Shelton 2005b, 103).

[18] Dupuy (in Cassese *et al.* 2002, 1094–9) refers to two distinct types of responsibility coming under mutually autonomous legal regimes. See also Gaeta (2007, 637), who argues that the two forms of responsibility are different in nature.

[19] This requirement, adopted from the American legal tradition, defines the margin of error which has to be observed by the courts. Evaluation of evidence in criminal cases can thus be regarded as determination of whether or not the evidence of the defendant's guilt is so strong that the defendant's guilt may be regarded as certain (Diesen 2000, 170).

With this difference in mind, it does not come as a surprise that there are multiple jurisdictions dealing with these different modes of responsibility. The jurisdictions of international criminal courts such as the ICC, ICTY, ICTR, and of the ICJ, properly understood, are not competing but complementary in nature. Consequently, the establishment of individual criminal responsibility by a criminal court is not a prerequisite for the determination of state responsibility by the ICJ, and vice versa (ICJ 2007a, §§ 181–2).

Nevertheless, although, as explained in Chapter 2, the boundary was fixed between the private and public realm, throughout the 19th and early 20th century, private insults could still propel nations towards war. Terrorist acts such as the events of September 11th, as well as the acts of genocide perpetrated by the Bosnian Serb troops (VRS), serve as a good example. The acts of states and the acts of their subjects remain interlinked. So, while the 'separate delict theory' or 'dual responsibility' is a reflection of the separate legal rules on which individual and state responsibility are grounded, contemporary challenges of private violence might require a responsibility regime that reflects the reality of the interconnected and multi-actor word. As a result, a strict separation of the criminal responsibility of individual, on the one hand, and state responsibility, on the other hand, might be hard to sustain. This dissonance between theory and practice, as to better understand legal and conceptual inadequacies of existing approaches, is the core of the analysis of the next Section.

5.2 The Court's Ruling on Attribution of State Responsibility: The Agency Paradigm

In Section 2.1, it was argued that an act or omission can be regarded as state conduct by operation of attribution principles. Conceptually, the latter embrace a system of legal responsibility that is largely grounded on what we have called the agency paradigm. Having established these principles that are commonly held to apply to activity of the individual perpetrators, it will now be examined how these principles have been relied upon in the case of state responsibility in the *Bosnian Genocide* case. Moreover, it is necessary to consider whether restricting such responsibility only to the unlawful conduct of actors that may be regarded as state agents, is well equipped to account for

the complex nature of the interaction between the state and non-state individual (genocide) actors.

In its analysis of the respondent's responsibility for the commission of genocide, the Court developed a high threshold in the *Bosnian Genocide* case. It first examined whether genocide had been committed by the principal perpetrators and then asked whether it could be attributed to the state. The Court's main focus was clearly on the conduct of the immediate perpetrators. It formulated a high threshold for special intent, requiring a convincing demonstration of intent, for which a pattern of conduct did not suffice (ICJ 2007a, § 373).

Only the massacre at Srebrenica met this requirement. But even though the massacre was qualified as genocide (*Ibid.,* § 297), the Court denied the responsibility of the FRY for the following reasons. The FRY had not participated in the massacre, nor could the conduct of Republika Srpska or of the VRS be attributed to the respondent, as they had been neither *de jure* nor *de facto* organs of the FRY (*Ibid.,* § 395).

The Court recognized that the FRY made "considerable military and financial support available to the Republika Srpska" and that "had it withdrawn that support, [it] would have greatly constrained the options that were available to the Republika Srpska authorities" (*Ibid.,* § 241). However, despite this causal relationship, the Republika Srpska and the VRS were not *de jure* organs of the FRY as defined under the FRY's internal law (*Ibid.,* § 386), so the Court drew on the international law of attribution to determine whether there was a *de facto* relationship.

The major question that has concerned jurists in this regard related not to the principle itself, but to the nature of the link that had to be established in order to transform acts of private individuals into the acts of *de facto* state agents. Applying the *Nicaragua* test to the conflict in the former Yugoslavia, the ICJ reaffirmed its *Nicaragua* judgment that attribution of third party's (non-state actor's) conduct requires "effective control" of the operation by the state over the non-state forces "in all fields" (*Ibid.,* §§ 109–15).[20] Based on that test, the Court concluded that the VRS could not be characterized as a *de*

[20]Although the Court acknowledged that the US aid was "crucial to the pursuit of [the contras'] activities," this support was "insufficient to demonstrate their *complete* dependence on United States aid" (*Ibid.,* § 110; emphasis added). Ultimately, the Court refused to impose liability even though it was clear that the contra force was "at least at one period . . . so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States" (*Ibid.,* § 111).

facto organ of the FRY, because it was not in a relationship of "complete dependence", nor was it "merely [an] instrument" of the FRY (*Ibid.*, § 392). In other words, the VRS' conduct was neither directed nor controlled by the respondent. The financial support the FRY received, albeit crucial to the genocide campaign, was not sufficient for the purposes of attribution (*Ibid.,* § 388). To put it differently, even though the massacres in Srebrenica qualified as genocide (*Ibid.,* § 297) and the FRY contributed significantly to those massacres,[21] under the Convention, the state was still not responsible.

The Court distinguished the question of state responsibility from characterization of a conflict as an international armed conflict, which is what had been at issue in *Tadić*, when the ICTY developed its overall control test (ICTY 1999, §§ 68–162).[22] It concluded that Serbia did not commit genocide, nor could it be held responsible for conspiracy, incitement or complicity, as it had not been established that Serbian authorities were clearly aware that genocide was about to take place when Serbia supplied aid to the Bosnian Serbs (ICJ 2007a, § 422).[23] The contrast between the *Nicaragua* and *Tadić* may be seen as an example of normative conflict between an earlier and a later interpretation of a rule of general international law. However, considering that the Court in the *Bosnian Genocide* relied rather on the former, the cases can also be distinguished from each other on the basis of their facts. Whichever view seems more well-founded, it seems obvious that the difference in approach is due to a difference between the starting points. While the ICTY takes the individual victim as its point of departure, the ICJ has the interests of states uppermost in its mind.

With this line of analysis, the ICJ in the *Bosnian Genocide* case inevitably developed a test of state responsibility that closely follows criminal law standards. As indicated above, the standard of proof applied was as demanding as in criminal procedure, in order to reflect the exceptional gravity of the allegation (*Ibid.*, § 181). Applying a standard of beyond reasonable doubt which obviously draws from the international criminal law, the Court did not follow the human rights treaties standards which consider state responsibility rather on the basis of a standard of carelessness. Relying on its *Nicaragua* jurisprudence, it is remarkable that the Court did not follow the dynamic

[21] "The Court established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities" (*Ibid.* § 241).

[22] For a critique of the ICJ's test see e.g. Spinedi (2007, 829), Goldstone and Hamilton (2008, 97–103).

[23] For elaboration on this issue see Section 5.2 and Chapter 6 of this thesis.

interpretation method which would suggest a consideration of today's inter-penetration of the public and private sphere for a workable model of state responsibility. A key problem with a reliance on the 'complete control' is that it makes very difficult to prove state responsibility for non-state actors and might not be applicable to the climate of the 21st century, where private actors can wield state-like power.

The Court's conclusion provides modern authority for the preposition that the existence of an agency relationship between the state and the non-state actor is critical for the determination of the scope of a state responsibility. Absent such a relationship, the state can be held responsible for its own wrongdoing, but not for the private conduct itself. The result is to conflate the principles of attribution and the principles of responsibility, by using *de facto* agency exception and circumscribing the responsibility that may be engaged by the state's illicit conduct.

These conclusions are significant because many jurists presume that the *de facto* agency exception, as developed in *Nicaragua* and *Tadić*, represents the only real way to trigger direct responsibility for private genocide activity. The problem is, however, that few principles which are as clear in theory, pose as great a difficulty or as rare an exception in practice. Adhering to agency-based criteria as the sole ground for engaging direct state responsibility for private activity, the Court falls far short of reflecting the reality of the interaction between states and private actors that makes the infliction of private harm possible. To put it differently, between the poles of *de facto* agency, in the *Bosnian Genocide* case, and purely private conduct, as contemplated by the principle of non-attribution, lies a broad spectrum of possible interactions between the state and the private actor, including toleration of ideological inspiration, material support and general guidance.

In short, the fact that the ICJ required such decisive evidence of 'complete control' to establish an agency relationship, has been criticized for transforming the prospect of direct state responsibility for private conduct into little more than a theoretical possibility. According to the Court's strict formulation, the bond between the state and non-state actor must be shown to be substantial and pervasive that it is virtually indistinguishable from the legal relationship between a state and its own officials.

Taking into account that the Court dealt with genocide as a tort, the question remains whether the standards for this kind of responsibility are the same as for individual

criminal responsibility. As we will see, parameters remain largely unsettled and require clarification in the future.

5.3 The Mental Requirement or *Mens Rea* for State Responsibility for Genocide

I will now turn to the issue arguably most specific to genocide, namely, whether it is a crime that can be distinguished from other international crimes only by a specific genocidal intent to destroy a protected group as such, in whole or in part (Bavcon *et al*. 1997, 95; Wald 2007, 623). This mental requirement is part of the primary norm and by virtue thereof becomes relevant for the determination of state responsibility. So, if a state can be responsible for genocide, how should we proceed with contributing genocidal intent to a state? Can a state even have intent, and what does it mean that a state has intent or not? Or as the following section will show, it could be that all these questions should be asked in a different way.

Mens rea means 'a guilty mind'. In more modern terms, it refers to the mental or fault element required for a particular crime. Kenny (1978, 1–2) submits that "the 'guilty mind' need not be any consciousness of wickedness nor any malevolent intent: in most cases it is simply a knowledge of what one is doing, where one is doing something illegal". Or as Article 30 of the Rome Statute declares, the *mens rea* or mental element of genocide has two components, knowledge and intent.

Unlike the ICC Statute, the founding documents of the Former Yugoslavia and Rwanda do not provide any separate provision on *mens rea* or the mental element. The Tribunals therefore often review the domestic laws.[24] However, within national legal orders, introduction of not only its mental element, but genocide *per se*, is rarely necessary for domestic offenders to be judged and punished (Schabas 2009, 241). At present, Anglo-American law does not provide definition of 'intention', while the mental element in civil law systems also covers various forms and fault gradations (Sliedregt 2003, 44–5). Indeed, the notion of intent with respect to genocide remains rather unsettled, and leaves room for different interpretations.

[24] In *Krstić*, for example, the ICTY Chamber extensively reviewed English, French, and German law to rule on the intention of the principal perpetrator (ICTY 2004b, §§ 140–1).

In order to apply the definition of genocide set out in Article II of the Genocide Convention, it is necessary to determine whether the atrocities were committed "with specific intent". While human rights violations usually do not require a specific mental element (ILC 1993, 25), the case is indeed different with genocide (Dupuy in Cassese *et al.* 2002, 1095). The question remains, if the 'mental element' requirement for attributing acts of genocide to the state is the same 'mental element' requirement employed in criminal liability cases. Confirming the latter would be assuming that the criminal accountability and state responsibility, under the Genocide Convention, are identical in nature. This would be, as determined in Section 2.4, to mistake both the principles of criminal as well as state responsibility. Or, as pointed out by Ainley (2006, 144), nothing in criminal law allows us to conceive of states as having *mens rea* as it is a psychological property that can only be held by an agent with a mind.

Could we sustain then that a state can be responsible for genocide, as concluded by the ICJ in the *Bosnian Genocide* case, if denying the required element of genocidal intent completely, when speaking of state responsibility for a 'crime of crimes'? Even if accepting Gaeta's (2007, 642) view that state is prohibited to commit genocide under the customary international law, but not under the Genocide Convention, the same issue of intent arises. Negating the intent requirement for state responsibility, there would be no state responsibility for genocide in customary law. And since there is such responsibility, the intent requirement should not be an obstacle. While a literal definition of the crime of genocide obviously inquires mental element for any subject of responsibility for genocide under the Genocide Convention, including a state, the puzzling question is by which method this should be done. To put it differently, what is behind the 'mental element' when speaking of state responsibility for genocide?

Most of those advocating state responsibility agree that there needs to be a showing of specific intent on the part of state authorities.[25] Less agreement exists with respect to the question in relation to which part of the state apparatus needs to have a genocidal intent. According to Crawford and Olleson (in Shelton 2005a, 905) at least one person whose acts are attributable to the state should have specific intent. Schabas requires the involvement of state leaders (Schabas 2009, 444).

[25] In this respect, the Genocide Convention operates as *lex specialis* to general rules of state responsibility in which intention is not a prerequisite (Crawford and Olleson in Shelton 2005a, 909).

However, as state responsibility for genocide and complicity can arise under the Convention without an individual being convicted (ICJ 2007a, § 182), this approach seems unconvincing, and rather calls for a different method to establish the mental element. This inquiry, while an individual her- or himself should not be of a concern in the cases of state responsibility, can anyway be transposed from the case law as developed in the context of individual accountability for genocide.

Due to the scope of genocide it seems implausible that it can be committed by an individual acting alone. This is another way of saying that, for genocide to take place, there should be a kind of a plan or state policy[26], though there is nothing in the Genocide Convention that requires this. In other words, given that genocide presents itself as the archetypical crime of state, it possibly requires organization and planning. Or as the Eichmann judgement says, "wherein many people participated, on various levels and in various modes of activity - the planners, the organizers, and those executing the deeds, according to their various rangs - there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime" (Arendt 1994, 246). Hence, the element of a state plan was tackled by the District Court of Jerusalem, and Eichmann was convicted of genocide only for acts committed when being aware of the *plan* for a 'Final Solution' (Schabas 2009, 247; emphasis added). However, while several commentators agree that genocide is collective in nature (see e.g. Dupuy in Cassese *et al.* 2002, 1092; Groome 2008, 922; Seibert-Fohr 2009, 6), it is highly controversial whether this presupposes a state policy.[27] While this issue is usually discussed in the context of individual criminal responsibility, it is, as the following sections will show, less settled in the context of state responsibility.

5.3.1 Is Genocidal Policy a Requirement for the Crime of Genocide?

"Serbia has not committed, conspired to commit, been complicit in or incited others to commit genocide" and "the existence of a concerted plan directed against non-Serbian Bosnians could not be proved" (Mitchell 2007).

[26] For the discussion, see also Gaeta (2007, 631); Loewenstein and Kostas (2007, 839); Abass (2008, 871).
[27] Compare e.g. the ICTY (2006, § 26) in *Prosecutor v. Nikolić* with the Report of the Inquiry Commission on Darfur to the Secretary General (2005, §§ 515, 518). It is not entirely clear from the report why the Commission required the government policy.

One of the various obscure issues in determining state responsibility in the 2007 Judgement of the ICJ was whether or not the policy of Serbia and its Bosnian allies was one of ethnic cleansing or of genocide (ICJ 2007a, § 190). This relates to whether it is required for acts of genocide to be underpinned by a general genocidal policy. The problem is further complicated by the fact that the Genocide Convention, taken literally, does not clarify the matter, for it does not explicitly provide for this requirement, but neither does it exclude it. Two distinct and opposed schools of thought have formed on this issue.

5.3.1.1 The View According to which the Existence of a Genocidal Policy is not a Requirement for the Crime of Genocide

"Crimes against international law are only committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced," reads the IMT Judgement (1946, 41). This phrase, cited on so many occasions, conveys a critical idea, but on the other hand, it may also be the reason for certain misunderstandings about the essential attributes of international crimes. The Nuremberg Court made the pronouncement in reply to the accusation that Nazi leaders were acting for the benefit of the German state and so were not accountable as individuals for war crimes. The well known declaration about abstract entities may lead to misunderstandings as it implies that the state's involvement is irrelevant or even subordinate with regard to the debate about crimes against international law.

When talking about genocide, it is obvious that nothing in the text of the definition of genocide clearly pinpoints the reality of a state plan or policy as a component of the crime of genocide. Originally genocide was defined in Article II of the 1948 Genocide Convention, but an almost identical provision appears in modern mechanisms such as the ICTY Statute (Art. 4), the ICTR Statute (Art. 2), and the Rome Statute (Art.6). When the Genocide Convention was being drafted in 1948, proposals to include an absolute requirement that genocide be planned by a government were turned down (ECOSOC 1948a, 3–6).

In recent years, case law has tended to down-play the role of state policy in international crimes. The view holding that the policy element is not required by relevant rules as a

legal ingredient of the notion of genocide was first set out by the ICTR Trial Chamber in *Kayishema and Ruzindana* in 1999, although the Chamber recognized that in practice, it frequently occurs that acts of genocide are accompanied by or based on a plan or a sort of conspirational scheme. The Chamber stated that:

> It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without such a plan, or organization. Morris and Scharf note that "it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime" [V. Morris and M. Scharf, the International Criminal Tribunal for Rwanda (1988), at 168]. They suggested that "it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy." The Chamber concurs with this view (ICTR 1999, § 94).

The Chamber affirmed the point later in the same judgment. It asked itself whether, considering the applicable law, it could be determined that genocide had occurred in Rwanda. In this respect, the ICTR Trial Chamber opined that "the existence of such a plan would be a strong evidence of the specific intent requirement for the crime of genocide. To make a finding on whether this plan existed, the Trial Chamber examines evidence presented regarding the more important indicators of the plan" (*Ibid*., § 276).

The ICTY Appeals Chamber expounded a similar view in its first genocide prosecution in *Jelišić* in 2001. It held that:

> The existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime (ICTY 2001, § 48).

To support its view, the Chamber cited the June 1, 2001 oral decision by the Appeals Chamber of the ICTR in *Kayishema and Ruzindana* (*Ibid.*). However, the courts did not provide any specific legal justification supporting their view that no policy element is required for genocide. They simply relied on either judicial precedent or certain scholarly opinions. Implicit in this development in law may be a worry that the requirement of state policy as a component of such crimes will make prosecution of quasi non-state actors more difficult.

5.3.1.2 The View According to which the Existence of a Genocidal Policy is a Requirement for the Crime of Genocide

According to another point of view, the elimination of a "protected group" either partially or as a whole, or even the killing of an individual from such a group, can only be regarded as genocide when such illegal acts are an integral component of a general plan or policy. To put it in another way, genocide may never comprise solitary acts directed against a particular protected group. To count as genocide, such acts need to be backed by or be based on a general offensive, sought for by a government or a *de facto* state-like authority. This thinking has been proposed by several scholars and has also been supported in national legislation and in early case law at the ICTR and the ICTY.

The exclusion of non-state actors is a key argument against such an interpretation of genocide and crimes against humanity. Nonetheless, this difficulty can be adequately tackled by a broad definition of the idea of state policy, applying it to state-like actors to the same extent as states in the formal sense. Institutions such as the Republika Srpska or the Sudanese authorities would be dealt with in this manner, but not gangs like Hell's Angels or the mafia.

While there may be some exceptions in theory, in practice, it is hard to think of genocide, due to its large scale, as not being planned and organized either by the state or a state-like body, or by some group related to it. Raphael Lemkin (1944, 79), the scholar who first put forward the idea of genocide in his book *Axis Rule in Occupied Europe*, very often spoke of a plan, as if this was *sine qua non* for the crime of genocide. Or, as Schabas (2009, 246) puts it, "genocide is an organized and not a spontaneous crime".

The subject-matter for the legal authority of the court, as defined by Article VI of the IMT Charter, listed the primary offences, namely crimes against peace, war crimes, and crimes against humanity (Zagorac 2003, 66). Here again, an important element is often forgotten. Article VI begins with an introductory paragraph, stating that the perpetrator must have been "acting in the interests of the European axis countries" (IMT 1945, Art.1). This strengthens the claim on the statement that the perpetrator must be acting in the interests of a state. Even a brief reading of the judgment issued in 1946 clearly shows just how pivotal the policy of the Nazi state was to the prosecution.

In reality, there have not been many, if any, cases involving enterprising criminals who have exploited a state of hostility in order to advance their own twisted personal

agendas, come before international tribunals. Basically, all prosecutions have involved perpetrators acting on behalf of a state and in agreement with state policy, or those acting for an organization that was state-like in its endeavours to take control of a territory and seize political power, such as the Republika Srpska (Arendt 1994, 246; Koskenniemi 2002, 1–35; Lemkin 1944, 79; ICTY 2001, § 101; Van der Wilt 2008, 233–4).

Report of the Commission of Inquiry on Darfur (hereinafter the 'Darfur Commission), set up towards the end of 2004 at the request of the UN Security Council (UNSC), illustrates a good example as to why state plan or policy are important for determination of the crime of genocide. In order to answer the UNSC's question of "whether or not acts of genocide have occurred", the Darfur Commission (2005, 4) did not look into the acts of individual perpetrators, but by coming to the conclusion "that the government of Sudan has not pursued a policy of genocide" (*Ibid.*). The Commission explained it position as follows:

> Nonetheless, there seems to be one key element missing: genocidal intent, at least as far as the central Government authorities are concerned. In general the policy of assaulting, killing and violently relocating members of some tribes does not reveal a specific intent to wipe out, in whole or in part, a group of people determined on racial, ethnic, national or religious grounds. Instead, it would appear that those who planned and organized attacks on villages intended to drive the victims from their homes, essentially for purposes of counter-insurgency warfare (*Ibid.,* § 518).

Hence, the Darfur Commission in reality connected the concept of policy with that of specific intent. Still, this does "not rule out the possibility that in some instances single individuals, including Government officials may entertain a genocidal intent, or in other words, attack the victims with a specific intent of annihilating, in part, a group perceived as a hostile ethnic group" (*Ibid.*, § 132). To put it differently, according to the Commission, genocidal acts perpetrated by government officials do not necessarily entail state responsibility for genocide.[28] States would be held responsible for genocide committed by their own officials (or with their acquiescence) only if such acts formed part of an organized governmental policy to commit genocide.

While the separation between 'private' acts of state officials and 'official' state policy may appear counter-intuitive, it however finds support in the aforementioned distinction

[28] This is notwithstanding the fact that acts of state officials are necessarily attributable to the state under the laws of state responsibility (see Art. 4 of the ARSIWA).

between the treaty and customary law-based prohibitions on genocide. Since the Genocide Convention focused on individual criminal responsibility, the provided definitions of the prohibitions against genocide should not necessarily serve as the basis of the parallel prohibition on states to commit genocide, which derives from customary international law. The state responsibility norm may therefore have different contours than the parallel treaty norm and could, in theory, include additional prerequisites not found in the Convention.

As explained above, in practice, the Darfur Commission tried to answer the UNSC's question by looking for evidence of a policy conceived by the Sudanese state (Schabas 2008b, 968). A similar occurrence appears in the 2007 Judgment pursuant to Article IX of the Genocide Convention, where the ICJ talked about whether or not the policy of Serbia and its Bosnian allies was one of ethnic cleansing or of genocide (ICJ 2007a, § 190). However, as we will see below, the Court did not limit its mandate to the state policy as did the Darfur Commission.

With regard to the ICJ, the actions must be perpetrated "with the necessary specific intent (*dolus specialis*), that is to say, with a view to the destruction of the group, as distinct from its removal from the region" (ICJ 2007a, § 190). The Court deduced "that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such" (*Ibid.,* § 277). Bear in mind that the Court spoke of "the perpetrators" in a shared sense. Although, as analysed in Section 5.2, the Court first focused on the principal perpetrators, those being individuals, the 2007 Judgment further includes an interesting discussion on specific intent in the context of the Srebrenica massacre:

> The [Krstić] Trial Chamber highlighted the issue of intent. In its findings, it was persuaded of the actuality of intent by the submission presented to it. Under the title "A Plan to Execute the Bosnian Muslim Men of Srebrenica," the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave" ... (*Ibid.,* § 292).

As is evident, the ICJ essentially interprets specific intent in terms of the existence of a plan, but at the same time demands the same mental requirement that is employed in the criminal liability cases. This approach appears to lie with the assumption that the same concepts of the Convention, many being criminal in nature, attach to both individual

and state responsibility. As analysed earlier, it is less than obvious that this follows from the text of the Convention, and nothing in the *travaux préparatoires* points in this direction. The judgement fails to explain the distinction between the governmental plan or policy and specific intent requirement. Moreover, speaking of a plan in the criminal law context, as in *Krstić*, is not an uncomplicated matter. As Schabas (2008b, 969) notes, a number of individuals may take part in a common plan, but this does not automatically mean that they all have the same specific intent.

In the *Bosnian Genocide* case, the Applicant was responsible for some of the lack of distinction between specific intent and a state plan or policy (*Ibid.*). The Court noted:

> [T]his reasoning of the Applicant goes from the intent of the individuals responsible for the alleged acts of genocide complained of, to the intent of a higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the unavailability of the official statement of aims reflecting such an intent, the Applicant contends that the specific intent (*dolus specialis*) of those directing the course of events is obvious from the uniformity of practices, especially in the camps, indicating that the pattern was of actions perpetrated "within an organized institutional framework" (*Ibid.,* § 371).

Effectively, Bosnia was arguing that the specific intent to commit genocide could be shown by the manner in which the acts were perpetrated "within an organized institutional framework" (*Ibid.,* § 371). The Court studied the evidence of the official statements by Bosnian Serb officials, but however found: "The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership[,] to create a larger Serb State, by a war of conquest if necessary[,] did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion" (*Ibid.,* § 372).

This conclusion shows that an additional point was added by the Court: the question of motive. Once again, policy would have better described the element being considered. Combining specific intent and a state plan or policy, the Court came to the conclusion: "The *dolus specialis,* the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist" (*Ibid.,* § 373). Furthermore, "[T]he Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events review above

reveal a consistent pattern of conduct which could only point to the existence of such intent" (*Ibid.,* § 376).

The ICJ's rejection of "pattern approach" (*Ibid.*, § 373) and refusal to infer requisite intent from circumstantial evidence is at odds with the jurisprudence of the Darfur Commission as well as the ICTR which held that genocidal intent could be inferred from "the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others" (ICTR 1998, § 523). The onerous specific intent standards imposed by the Court in the *Bosnian Genocide* case, combined with the high standard of proof and the difficult requirements for attribution, made imposition of state responsibility for the direct commission of genocide virtually impossible. Or, as Shackelford (2007, 22) puts it, "By applying the specific intent requirement in such a stringent manner, the ICJ has arguably limited prosecution of genocide to situations where there is 'smoking gun' evidence or its equivalent". Yet, as I argue in Chapter 7, the Court did not entirely foreclose state responsibility for genocide committed by non-state actors.

The Darfur Commission and the ICJ both examined genocide through the lens of state responsibility. They tried to apply the definition of genocide set out in Article II of the Genocide Convention, which describes genocide as one of five unlawful acts, including killing "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." These words separate genocide from ordinary killing. Or as judgments of the international criminal tribunals declare, the deciding element of genocide is the "specific intent" or, for continental jurists, "*dolus specialis*" (ICTR 1998, § 121, 497, 498; ICTY 2000, § 636).

If either of the two institutions had actually accepted the idea that genocide does not necessarily require a state plan or policy, and that it can be committed by someone working alone, they would have rather looked for evidence that a lone perpetrator, whose acts could be attributed to either Sudan or Serbia, respectively, had killed a member of a targeted group with the intent to completely or partially destroy it (Schabas 2008b, 968). The Darfur Commission interpreted the request of the UNSC to mean whether or not Sudan had a plan or a policy to commit such acts, and the ICJ reasoned along similar lines (*Ibid.*). However, while both institutions reached the same

conclusion on the very need to establish the state's 'mental element' (*dolus specialis*), they did not completely agree on the method by which this should be done. The Darfur Commission (2005, § 491) described the mental requirement as follows: "An aggravated criminal intention or *dolus specialis*: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such". While the ICJ applied this standard to state officials, the Darfur Commission rather looked for the demonstration of this necessary element in governmental plan or policy.

Both the Darfur Commission and the ICJ were looking for the specific intent of a state, such as Sudan, or a state-like entity, such as the Bosnian Serbs, respectively. "States, however, do not have specific intent. Individuals have specific intent" (Schabas 2008b, 970). States, on the other hand, have policy. While the term specific intent is used to describe the proof the courts are looking for, the real subject is state policy. It seems conceivable, in fact quite likely, that actions whose purpose is not genocidal may be committed by groups of individuals, some of whom have genocidal intent. Hence, it is quite obvious that when asked whether acts of genocide have been committed, bodies like the Darfur Commission and the ICJ do/should not go looking for these marginal individuals. Instead, they (should) pursue their search for the policy.

The relationship between state responsibility and individual criminal liability presents an important legal difficulty. Using Hannah Arendt's (1994) vocabulary that described the personality of Adolf Eichmann, states are not the "banality of evil" kind of wrongdoers. However, as explained in Chapter 2, this concept travels in tandem with the concept of state responsibility. The Darfur Commission and the ICJ seem to address this through the concept that a state can have specific intent (Schabas 2008b, 971). However, it might be more productive to turn this logic around. Instead of imposing criminal concepts that belong to individual liability on the behaviour of state, it would be better to take state policy as the basis and try to apply this to individual culpability. Staying with this approach, as to whether genocide is being committed, the Court first needs to determine whether a state policy exists. If the answer is yes, then the inquiry moves to the individual perpetrator. The key question at this point, however, is not the individual's intent, but rather his or her knowledge of the policy. Individual intent arises, anyway, because the specific acts of genocide, such as killing, have their own

cerebral element, but as far as the plan or policy is concerned, knowledge is the key to criminality (Schabas 2008b, 971).

One important problem that this dynamic approach helps to settle is the possibility of different results in terms of state responsibility and individual criminal liability. Moreover, it also helps to address another difficulty that has puzzled judges and international tribunals: complicity in genocide. Complicity has been addressed by convicting those who assist in perpetrating the crime to the extent that the accused is fully aware of the intent of the offender (ICTY 2004a, §§ 119–24). Once more, it is not very practical to expect one individual perpetrator to know the intent of another, especially when it is *dolus specialis* that is being examined. Even courts can only assume the intent from the perpetrator's behaviour. When the question is whether the accomplice had knowledge of the policy, the inquiry appears far more logical and coherent. General Krstić, for example, was convicted of complicity because the ICTY believed that he was aware of the policy being sought by General Mladić, and not because he believed he had read Mladić's mind and was aware of his specific intent (ICTY 2004b, § 87).

True, this involves a comprehensive rethinking of the definition of genocide. It includes reading in the definition adopted in the Genocide Convention a component that is, at best, only there by implication. From the perspective of the interpretation of a treaty there is nothing inadmissible about this. It may not be substantiated with reference to the *travaux préparatoires*, but as Judge Shahabuddeen of the ICTY Appeals Chamber explained in his dissenting opinion in *Krstić*, too much confidence should not be placed on the drafting history (*Ibid.*, § 52).

Other factors within the evolving discipline of international criminal law also argue for revival of the role of state policy as an element of international crimes. The Rome Statute of the ICC and the Elements of Crimes that complement its interpretation suggest a role for state policy that is somewhat enhanced by comparison with the case law of the *ad hoc* Tribunals. In addition, with a growing focus on "gravity" as a test to distinguish cases that deserve the attention of international tribunals, a state policy requirement may prove useful in the determination of whether genocide has occurred (Schabas 2008b, 955). When a legal doctrine of 'joint criminal enterprise' is applied to the cases, the state policy element also becomes crucial. Joint criminal enterprise is used

in international criminal law to describe what is better known to national criminal justice systems as common purpose complicity (Fiori 2007, 61). Perhaps of greatest interest, a requirement of state policy for certain international crimes, notably genocide and crimes against humanity, facilitates reconciling perspectives on individual criminal responsibility with those of state responsibility. To put it differently, the confirmation of the importance of a state plan or policy as a component of the crime of genocide has many advantages in terms of consistency and judicial policy.

Furthermore, the Elements of Crimes, adopted by the ICC in September 2002, includes the following element of the crime of genocide: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction" (Art. 6(a)). While the Elements do not mention plan or policy expressly, and require a "manifest pattern of similar conduct" instead, any difference between the two notions seems to be largely semantic. Surprisingly, this rather persuasive evidence of *opinio juris* for the presence of state policy component with respect to genocide was not even tackled by the ICTY in either *Jelišić* or *Kunarac*. In a subsequent judgment, the Appeals Chamber observed that the definition of genocide adopted in the Elements of Crimes "did not reflect customary law as it existed at the time *Krstić* committed his crimes" (ICTY 2004b, § 224).

5.3.2 Preliminary Conclusions

To sum up, whether a plan or policy is an element of the crime of genocide, might not be a question of great practical importance in terms of the number of the ICJ cases dealing with state responsibility like the *Bosnian Genocide* case. However, recognizing the state responsibility for genocide under the Convention, we must somehow satisfy the *mens rea* requirement on behalf of the state. As the analysis above has shown, this element, when attributed to the state, might best be inferred from objective "behaviour" such as policy or plan. To put it differently, rather than looking for intent, the term loaded with criminal connotation that does not sit comfortably with present conceptions of state conduct that rejects the idea of state crimes, the ICJ should be concerned of the objective effects of state wrongful acts or omissions.

The major problem to this *mens rea* approach is the difficulty of determining whether the state policies or plans amount to the requisite degree. Courts tend to emphasize

intent rather than a plan or policy to carry out genocide. However, they highlight the collective dimension of the crime of genocide. Thus, regardless whether they deem such a plan or policy to be an 'element' in a formal sense, the inquiry directs towards the plan or policy of a state or similar entity. This requirement will, however, depend on the particular factual circumstance. In each case of either state or individual (in terms of his or her knowledge) responsibility, it would be necessary to demonstrate the existence of a state plan or policy, and then establish whether the policy or plans amount to a feature of the offence. This approach may also be profound since only states are parties to the ICJ. Agency relationship between the principal (a state) and the immediate perpetrators, as illustrated earlier, may be difficult, if not impossible to prove. But in the 'state plan or policy-approach' state responsibility is rather framed in terms of the causal connection between the acts or omission of the state and the harm that is subsequently inflicted. This is not to suggest that crime of genocide itself is not perpetrated by individuals, either in their official or private capacity, but rather that if genocide happened, state plan or policy might be a proof of state responsibility for the wrongful conduct of those individuals, even if an agency relationship cannot be previously established. This approach, while keeping in mind the object and purpose of the Genocide Convention, requires a flexible procedure or dynamic interpretation of the rules of state responsibility for genocide.

6 State Responsibility for Complicity in Genocide

It is in its connection with the principles of causation that complicity retains an intuitive attraction as a modern theory for regulating state responsibility for genocide. Ultimately, it is because of the causal link between the state's wrongdoing, and the private genocide activity that it makes sense to treat the state, in certain circumstances, as responsible for the private act even though it is not its immediate perpetrator.

In 1978, Roberto Ago, the UN Special Rapporteur of the ILC on the topic of state responsibility at that time, submitted a draft article entitled "Complicity of a state in the internationally wrongful act of another State" (ILC 1978a, 223). This proposal concerned a situation in which a state came to the aid and helped another state in the perpetration of an internationally illegal act. It stated that in such situations, the reality of coming to the aid and helping amounts itself to an internationally wrongful act, for which the state giving assistance shoulders the responsibility. Amidst various cases of 'complicity', Ago also made reference to the situation where aid takes the form of the provision of arms to assist another state in perpetrating genocide. With regard to such cases, Ago observed that "Article III of the Genocide Convention includes 'complicity in genocide' in the list of acts punishable under the Convention" (*Ibid.*). He continued: "It is not specified, however, whether complicity by another state in the commission of genocide by a particular government does or does not come within the terms of this provision" (*Ibid.*). UN Special Rapporteur left open the question of the precise extent of the responsibility imposed on states by the provisions of Article III(e) of the Genocide Convention, having discovered that a connection could exist between complicity under Article III(e) and a state supplying aid and helping another state in the perpetration of wrongful acts.

The proposed draft article submitted by Ago was adopted with minor modifications during the first reading by the ILC (ILC 1978b, Art. 27, 80). After some additional changes made during the second reading, it has become Article 16 of the ILC Articles (ILC 2001b, 155). One of the changes to Ago's original text concerned the use of the term 'complicity'. As some of the ILC members noted, it was not recommended for the ILC to borrow a term from international criminal law.[29] Finally, coming to the

[29]See, for instance, the views held by Reuter, Ushakov and Sahović (ILC 1978a, 229 and 233–34).

conclusion that its use could have been a "source of ambiguity or misinterpretation", the ILC discarded the term 'complicity', (ILC 1978a, 269).[30] This follows from the fact that the concept of complicity in criminal law demands that all actors involved are actual perpetrators of a criminal act (Bohinc *et al*. 2006, 349). But, as discussed earlier, state *qua* state itself cannot commit acts.

The discussion of the ILC on state responsibility may help clarify the possible meaning of the notion of 'complicity' when being used in relation to the state conduct. However, it is doubtful, whether this may also apply to the notion of 'complicity in genocide', as provided for in the Article III(e) of the Genocide Convention. By interpretation of this notion, the particular context in which the latter is used must be taken into account.

The term of 'complicity' has not been defined by the Genocide Convention. Article III simply reads that "the following acts shall be punishable: ... (e) complicity in genocide". But, as clarified by the ICJ in the *Bosnian Genocide* case, it has to be taken into account when interpreting this provision, that Article III refers to both the criminal accountability of individuals and the international state responsibility (ICJ 2007a, § 167). Since the same notion covers two distinct forms of responsibility, its substance may be interpreted differently, depending on which element one regards as prevailing. On the one hand, complicity as primarily a criminal law notion may be emphasized, and the fact that the Convention mainly aims to criminalize certain conducts of individuals. In this regard, it may be argued that, even when referring to the state conduct, the notion of complicity should necessarily be construed in light of the meaning given to this notion under the general principles of international criminal law (Milanović 2006, 566). On the other hand, following the proposal made by Ago in 1978, in situations like this the notion of complicity should be interpreted by taking Article 16 of the ARSIWA into account. Seen in this light, it does not seem suitable that the term 'complicity' is not used in the current ARSIWA, also since, as explained above, it was basically that notion of complicity that the ILC members had in mind when first drafting Article 16. As pointed out by Ago (in ILC 1978a, 241), "the Commission could try to avoid the use of the term, provided that the situation referred to was made perfectly clear, and that it was realized that what was at issue was in fact complicity".

[30] It can be observed that in legal literature, the word 'complicity' has continued to be used to refer to the case of a state aiding and assisting another state in the commission of an internationally wrongful act (Quigley 1986, 77; Graefrath 1996, 370).

In the *Bosnian Genocide* case, the ICJ took an intermediate position when considering the interpretation of Article III(e) of the Genocide Convention. It took the view that the Convention primarily concerns the criminalization of the conduct of individual perpetrators. It acknowledged that "the concepts used in paragraphs (b) to (e) of Article III, and particularly that of 'complicity', refer to well known categories of criminal law" (ICJ 2007a, § 167). By interpretation of Article III(e), the Court took into account even the meaning given to such a notion "in certain national systems of criminal law" (*Ibid.*, § 419). This seems as an unusual step for the ICJ that, unlike international criminal tribunals, very rarely applies comparative law in order to either interpret concepts or identify general principles. However, even though the Court made these references to criminal law, it mainly relied on Article 16 of the ILC Articles to determine the content of the notion of complicity. It concluded that there was "no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (e), of the Convention and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16" (*Ibid.*, § 420).

The Court's determination of the elements required for state responsibility for complicity in genocide has been criticized for adopting a stringent criminal law approach (Cassese 2007, 882–7; Milanović 2007, 680–4). However, while Article III(e) uses the same notion to refer to both criminal individual responsibility and state responsibility, this does not mean that the same elements for complicity necessarily need to be found in the law relevant to the international individual criminal responsibility. The exact meaning of the notion of complicity rather depends on the context in which being used. As the international law of state responsibility applies to a category that is similar to that of complicity in criminal law, it seems reasonable that, when the notion of complicity refers to the state conduct, as opposed to that of individuals, instead of focusing on the rules of the individual criminal responsibility, reference should rather be made to the relevant rules on state responsibility. In this regard, although some differences might exist between these two concepts, the use of Article 16 of the ILC Articles may serve as guidance for determining the elements required for state complicity in genocide under the Genocide Convention.

6.1 The Scope of the Notion of Complicity under Article III(e) of the Genocide Convention

Article III(e) of the Genocide Convention and Article 16 of the ARSIWA do not completely overlap. In particular, although Article 16 involves the example of a state supplying aid and helping another state, the responsibility to abstain from complicity in genocide applies independently of whether genocide is perpetrated by another state, an international organization or a group of individuals. Except for this difference, concerning the extent or *ratione personae* of each individual provision, it is not so obvious whether, for the objectives of state responsibility, the idea of 'complicity in genocide' includes precisely the same set of circumstances that fall within the compass of Article 16 of the ARSIWA.

In the *Bosnian Genocide* case, the ICJ observed that "complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide" and therefore that "complicity results from commission" (ICJ 2007a, § 432). Therefore, in the view of the Court, there is a difference between 'aiding and assisting' and 'complicity in genocide'. Article 16 of the ARSIWA, on the other hand, does not require that aid or assistance always consists of positive action.[31] The only requirement is that the conduct of the assisting state materially contributes to the wrongful act of the assisted state. Contrary to the ICJ's view, aid or assistance may also result from omission, under particular circumstances. The ILC (2001b, 157) recognized that a situation, when a state deliberately allows its territory to be used by another state for committing a wrongful act against a third state, the conduct of the territorial state may certainly amount to a form of aid or assistance falling under Article 16 of the ARSIWA. In this regard, it is difficult to understand why, under similar circumstances, the state conduct of deliberately tolerating the presence on its territory of troops sent by another state for the commission of genocide, could not be qualified as complicity under Article III(e) of the Convention. Rather than accepting divergent requirements, it seems more reasonable to say that, opposite to the Court's position, complicity in genocide may also result from omission (Milanović 2006, 687).

[31] This point was made clear during the first reading of the ILC Articles. Referring to the provision which has now become Article 26, Chairman Schwebel of the ILC's Drafting Committee observed that, under the text adopted by the Drafting Committee, "the giving of such aid or assistance would be wrong even if, under other conditions, the actions or omissions in question would be lawful under international law" (ILC 1978a, 270).

A nexus between the act of assistance and the commission of the wrongful act is a component required for both 'aid and assistance' and 'complicity in genocide'. While the text of Article 16 of the ARSIWA does not explicitly mention this requirement, the ILC's commentary clarifies that aid or assistance, while not necessarily essential to the commission of the internationally wrongful act, should have at least "contributed significantly to that act" (ILC 2001b, 157). In is probably this requirement that the ICJ had in mind in the *Bosnian Genocide* case, when dealing with the question of the responsibility of Serbia for complicity in genocide. As the ICJ (2007a, § 422) stressed, "the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as result of the general policy of aid and assistance..." pursued by Serbia.

In light of this aspect, the notion of complicity under Article III(e) of Convention and that of aid or assistance overlap, since the state conduct can be qualified as complicity if that state aided or assisted another state in the commission of genocide within the meaning of Article 16 of the ARSIWA. It is doubtful, however, whether this notion also applies to situations excluded from the extent of application of Article 16 of the ARSIWA. By it interpretation of the meaning of 'complicity in genocide', the ICJ in the *Bosnian Genocide* case justified its reference to Article 16 asserting that "there is no doubt that 'complicity'... *includes* the provision of means to enable or facilitate the commission of the crime" (*Ibid.*; emphasis added). The word 'includes', as used by the Court, may suggest that, in the ICJ's perspective, complicity is not limited to a situation in which a state aids and assists another state in the commission of genocide.

The main issue in this regard is whether complicity under Article III(e) also concerns a situation where a state incites, instructs or orders another subject to commit genocide. The ICJ did not address this question in the *Bosnian Genocide* case. However, in order to answer it, a distinction between different situations has to be drawn. As remarked by the Court in the 2007 Judgement (ICJ 2007a, § 419), if a state gives instructions or orders to persons to commit genocide, and the group commits the act in question, that state will be responsible for the complicity in the commission of genocide. In such context, the act of the group of individuals will be attributed to the state, under the general rules of attribution of an internationally wrongful act to a state (ILC 2001a, Art. 8). On the other hand, when incitement to commit genocide involves "direction and control" or "coercion" of internationally wrongful act of another state, within the

meaning of Articles 17 and 18 of the ARSIWA, respectively, the "dominant" state will be responsible for the genocide committed by the other state, but not for complicity in genocide. To put it another way, state responsibility does not derive from its act of direction, control, or coercion, but rather from the wrongful conduct resulting from the action of another state.

Apart from the provisions described above, there are no other situations of incitement that, under the law of international responsibility, may give rise to state responsibility for the acts of another.[32] Under particular circumstances, incitement may be invoked under Article III(c), which imposes on states parties the obligation to abstain from "[d]irect and public incitement to commit genocide" (ILC 2001b, 154). As that incitement, for example, may not be covered by Article III(c) in the case when incitement is not public but private, it may be asked whether it could fall within the scope of Article III(e). While this approach would not find support in the general rules of state responsibility, a dynamic method of interpretation of complicity, including the situations where incitement substantially contribute to the decision of another state to commit genocide within the scope of Article III(e), could be justified with regard to the object and purpose of the Genocide Convention.

6.2 The Mental Requirement or *Mens Rea* for State Complicity in Genocide

The reality that a state provides or helps a group of individuals, another state or an international organization to perpetrate genocide, does not of necessity suggest that it has to be viewed as responsible for complicity in genocide. Aid or assistance of the very perpetration of genocide by another, is an essential requirement for complicity in genocide. However, it is not apparent, whether Article III(e) of the Genocide Convention requires that the state giving assistance shares the same intent as the principal perpetrator, or alternatively, whether it only requires that the state is aware of the fact that the subject given assistance will use the aid or help to commit genocide.

This question was given significant attention during the proceedings in the *Bosnian Genocide* case. Bosnia, in particular, held the argument that there is a difference in this

[32] According to the ILC (2001b, 154), "[t]he incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction or control on the part of the inciting State".

regard between Article III(e) of the Genocide Convention and Article 16 of the ARSIWA. While complicity in genocide would require that the assisting state shares the genocidal intent of the principal perpetrator, state responsibility under Article 16 would be incurred by the mere fact that the accomplice *knowingly* aided and abetted the principal perpetrator, without necessarily sharing the latter's specific intent (ICJ 2006a, 30–34; emphasis added). The Court (ICJ 2007a, § 151), determining in general terms, that complicity in genocide under Article III(e) of the Convention and aid and assistance under Article 16 of the ARSIWA are not different in substance, did obviously not accept this view. This approach seems to imply that, in the Court's view, *mens rea* for 'aiding and assisting' is the same as for 'complicity' in genocide. However, the ICJ did not consider the problem of whether intent or knowledge is required for complicity. Assuming that responsibility for complicity in genocide presupposes that the accomplice is aware of the specific intent of the perpetrator, the ICJ did not find it necessary to determine whether the accomplice also has to share the specific intent of the principal perpetrator. Accordingly, the Court found that, with regard to the events in Srebrenica, it had not been proven that Belgrade authorities were fully aware that the aid supplied would be used to commit genocide (*Ibid*., §§ 422–3).

As Article III(e) of the Convention does not define the mental element required for a state to be held responsible for complicity in genocide, it appears suitable, as remarked earlier, to consider Article 16 of the ARSIWA as guidance. In this context, it can be observed that, while the text of Article 16 requires that the assisting state acts "with knowledge of the circumstances of the internationally wrongful act", the ILC's commentary seems to require a higher threshold for assistance in order to amount to internationally wrongful act. It demands that the state "intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct" (ILC 2001b, 154). While its commentary on this issue is ambiguous, it seems, however, that by requiring the "intent to facilitate", the ILC simply meant that the act of aiding and assisting must be a deliberate act. To put it differently, even if the assisting state *knows* that its aid and assistance would facilitate the commission of the wrongful act, it must also have the general intention to aid and assist the wrongdoing state. However, that does not mean that the assisting state must want the wrongful act to be committed and that it acts with that specific intent, in order to incur responsibility (Quigley 1999, 18). Hence, the assisting state may be indifferent to the consequences of its conduct. There is no

reference made, in the commentary, to this rigorous requirement. Therefore, turning to the analogies with Article 16 for guidance when determining the elements of complicity in genocide, in the ILC work we find clear support of the idea that state complicity in genocide does not require the assisting state to share the genocidal intent of the principal perpetrator.

The analogies with the ILC work, and Article 16 in particular, also shed light on another aspect of the *mens rea* for complicity under Article III(e). In the *Bosnian Genocide* case, the ICJ drew a distinction between complicity in genocide and a breach of the obligation to prevent genocide. It found that complicity requires, at the very least, that the accomplice must have given support to the principal perpetrator of genocide "with full knowledge of the fact" (ICJ 2007a, § 432). To incur state responsibility for violating the obligation to prevent genocide, on the other hand, "it is enough that the State was aware, or should normally have been aware, of the serious danger that the acts of genocide would be committed" *(Ibid.)*.[33] An interesting finding here is that it is not sufficient for complicity in genocide that the accomplice knew or must have known that its assistance could eventually be used for the commission of genocide. It is important to mention that this holding finds support in the work of the ILC on Article 16. In its commentary on the draft article adopted during the first reading, the ILC explained that "it is not sufficient that the state providing aid or assistance should be aware of the eventual possibility" that such aid or assistance is used for the commission of an internationally wrongful act by another state (ILC 2001b, 195; ILC 1978b, 10). This view seems to imply that the assisting state incurs responsibility only if having full knowledge that its assistance will be used to commit a wrongful act (Quigley 1999, 112).

[33] The ICJ's view on this point has been criticized by Cassese (2007, 883), on the grounds that the Court relied on the criminal law requirements for complicity, as set out by international criminal courts.

6.3 The Temporal Scope of the Duty to Abstain from Complicity in Genocide and Non-compliance with the Obligations towards the Assisting State in Order to Avert Responsibility

The analysis above demonstrates that a state incurs responsibility for complicity in genocide only from the moment it provides aid or assistance to the principal perpetrators with full knowledge that the latter will be used for commission of genocide. Therefore, the assisting state can avoid responsibility for complicity in genocide, as soon as becoming fully aware that genocide is about to happen or is underway. For that purpose, the assisting state must end all forms of aid or assistance that may facilitate the commission of genocide. Simply objecting to the conduct of the assisted state or group of individuals would not be enough (Quigley 1999, 123–4). To the scope that the obligation to abstain from complicity in genocide imposes an obligation on states to suspend the aid or assistance to internationally wrongful conduct of the principal perpetrators of genocide, a view can be held that Article III(e) complements the general obligation to prevent genocide, imposed on states by Article I of the Genocide Convention. Apart from the fact that complicity presupposes full knowledge of the genocidal intent of the principal perpetrator, the main difference between the two obligations mentioned is that while the obligation to prevent genocide leaves to states a choice of measures to be taken to prevent genocide, Article III(e) implies an obligation on states to end and suspend all aid or assistance which may used for the commission of genocide.[34]

When a state is bound by a treaty to supply arms or other assistance to a state that is that is about to commit genocide, the question of whether that state incurs responsibility if it refuses to comply with its obligation may arise. To answer this question, the *jus cogens* character of the rule prohibiting genocide must be taken into account. It might be held that, when the implementation of an obligation leads a state to aid or assist another state in the breach of a peremptory rule, a failure of compliance is justified. During the second reading of the ILC Articles, a rule to that effect was formulated by the Special Rapporteur, James Crawford. He suggested adding a rule to the ILC Articles that would justify non-compliance with an obligation when its implementation would amount or

[34] Another possible difference concerns the temporal extension of the duty to prevent genocide, as it is not clear whether that duty applies also when acts of genocide have already been committed (Gattini 2007, 704).

contribute to the violation of a *jus cogens* rule.[35] Although the rule suggested by Crawford was not adopted by the ILC in 2001, it is important to note that the principal embodied in his proposal did not meet any opposition during the discussion within the ILC.[36] Furthermore, considering that the act of genocide seriously impairs an essential interest of the international community, necessity might be invoked in order to justify the failure to aid the perpetrator of genocide by a treaty obligation.[37] Accordingly, this approach also sheds light on the hierarchy of norms and sources of international law.

A violation of the prohibition of genocide covers the entire period of the commission of any of the genocidal conducts defined in Article II of the Convention, as within the meaning of Article 15 of the ARSIWA this is a "composite obligation".[38] At the same time, all states being fully aware that genocide is being committed are under the obligation to abstain from providing any form of aid or assistance that may facilitate the commission of genocide. In this regard, the obligation of states under Article III(e) goes in parallel with the state obligation under Article 41(2) of the ARSIWA. According to the latter provision, which applies more generally to the cases of serious breaches by a state of an obligation arising under a *jus cogens* norm of general international law, states are prohibited from supplying aid or assistance in sustaining the situation created by a serious breach of an obligation of this character.

6.4 Preliminary Conclusions

As illustrated above, criminal acts such as genocide are committed by individuals who can engage in state-like violence without bearing the burden of state-like responsibility. The immediate perpetrators of those acts are not necessarily identifiable government officials but obscure non-state actors that are often not distinguishable from the civilian

[35] See draft Article 29 bis, which provided that "[t]he wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law". In Crawford's view (ILC 1999, 43), this provision would have covered situations such as "where weapons promised to be provided under an arms supply agreement were to be used to commit genocide or crimes against humanity".

[36] Draft Article 29 bis was reformulated in the negative and has become Article 26 of the ARSIWA, which provides that "[n]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".

[37] The ILC commentary to Art. 25 of the ARSIWA clarifies that the "essential interest" whose protection may justify a plea of necessity "extends to particular interests of the State and its people, as well as of the international community" (ILC 2001b, 202).

[38] On the qualification of genocide as a composite act, see the ILC's commentary to Art. 15 (ILC 2001b, 146–7).

population within which they operate. They can be private individuals, acting in the shadows as diffuse networks rather than hierarchical organizations.

Of all the responsibility theories traditionally suggested, complicity comes closest to approximating this model. In general terms, complicity suggests a common enterprise in which the state and the private genocide group can be seen as operating together to achieve a given result. But in several respects complicity remains problematic, and it would be a mistake to simply resurrect the theory of complicity that was discarded as an organizing principle for responsibility so many decades ago.

Nevertheless, while complicity in today's international law of state responsibility is rather treated as a separate breach, and not as an obligation to prevent and punish, the notion of complicity, as the analysis of the 2007 Judgement demonstrates, still draws analogies from the criminal law categories. Moreover, it remains unclear whether complicity means that the state should be treated as the actual actor of the private act, or rather as responsible for a distinct and lesser role as an accomplice.

7 Prevention of Genocide

Although the first section of the 2007 Judgment had involved the obligation not to perpetrate or to participate in genocide, the second section was obligated to take effective actions to stop others from perpetrating genocide. It was concerning third party involvement.[39] It was here that the standards for state responsibility were not so high.[40] Instead of asking for irrefutable evidence of a state's positive awareness that genocide would happen,[41] it was enough that Serbian authorities had been warned and were surely aware that there was a very real likelihood of genocide in Srebrenica (ICJ 2007a, § 438).[42]As nobody intervened, it failed to stop genocide and so violated its obligation under the Genocide Convention. In the end, the respondent was judged responsible for not cooperating with the ICTY, in contravention of Article VI (*Ibid.*, § 449).

As Serbia and Montenegro had not complied with the obligation to stop genocide, BiH had an entitlement to compensation in the shape of satisfaction (*Ibid.*, § 179). However, the Court decided that its announcement that the respondent had not complied with the obligation to stop genocide was appropriate satisfaction in itself. As maintained by the Court, a necessary link for an award of recompense could only be contemplated "if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so" (*Ibid*., § 462).

As stated in its Preamble, the Genocide Convention rests on the understanding that "at all periods of history genocide has inflicted great losses on humanity". This acknowledgement accorded the grounds for the Convention's intention: "to liberate mankind from such an odious scourge". International collaboration has been drawn up as the *indispensible* condition for reaching this objective.[43] Such cooperation was to

[39] According to the Court, state parties are obliged "to employ all means reasonable available to them, so as to prevent genocide so far as possible" (ICJ 2007a, § 430).
[40] It requires the capacity to influence the action of persons likely to commit or committing genocide (*Ibid.,* § 430).
[41] For the commission of genocide, the Court had required that it was established beyond any doubt that a state was fully aware of the special intent of the principal perpetrator (*Ibid*., §§ 421–2).
[42] The cognitive element was described as awareness of the danger that genocide would be committed (*Ibid.,* § 432).
[43] The Preamble of the Convention states: "The Contracting Parties, ... being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required" (ICJ 2007a, § 4).

follow two separate, although related, paths: prevention beforehand and punishment after the fact. Thus, Article I of the Convention provides: "The contracting parties confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".

Article I consists of three parts: *(i)* the classification of genocide as international crime in times of peace and of war;[44] *(ii)* the responsibility to prevent genocide; and *(iii)* the responsibility to bring those who perpetrate genocide to justice. The set elements are then given different degrees of expression in what remained of the essential provisions of the Convention: Articles II and III specify the first part by defining genocide and collusion thereto; Article VIII, in endorsing the right of state authorities to call upon the appropriate instruments of the UN to take the correct action to stop and suppress genocidal acts, is associated directly to the obligations to stop or prevent; Article V, ensuring that the authorities take the responsibility to impose "the necessary legislation to give effect" to the Convention, and "in particular to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III", relates, among other things, to the oppressive side of prevention as far as the deterring purpose of punishment is concerned; Articles IV–VII concentrate on criminal proceedings in connection with the responsibility to punish.

Looked at from a structural angle, Article I therefore serves as both a source and a shelter for other provisions that derive from Article I but do not overtax it. This point was underlined, in fact magnified, by the ICJ in the *Bosnian Genocide* case. "Article I", confirmed the Court, "does impose distinct obligations *over and above* those imposed by other articles of the Convention" (ICJ 2007a, § 165; emphasis added). The essential attributes and extent of these obligations are the central point of this chapter.

On the awareness of the drafters of the Convention that combating genocide requires a coordinated international response, see Robinson (1960, 122).

[44] The categorization of genocide as an international crime not only in times of war but also in times of peace was a progressive step in comparison to the text of the IMT Charter (Art. 6).

7.1 The Relationship between the Obligation to Prevent and the Obligation to Punish Genocide

The missing link between prevention and punishment is commission. Situated on a timeline, punishment gives evidence to commission which, in turn, indicates the failure of prevention.[45] However, the relationship between prevention and punishment has a more resonant meaning than that. At one end of the spectrum, these respective obligations may be conceived as unrelated *ratione temporis*, *ratione materiae* and *ratione loci*, while at its other end, to the extent that prevention is provided for only by means of the repressive function of punishment, prevention is subsumed into punishment and loses any independent existence. The text of the Genocide Convention appears to situate the relationship between prevention and punishment closer to the latter end. Obligations to prevent and to punish are both referred to in the title of the Convention as well as in Article I. However, while punishment and the criminal proceedings are the focus of Articles III–VII, prevention, on the other hand, is explicitly referred to only in Article VIII. The latter provides: "Any Contracting Party may call upon the competent organs of the UN to take such action under the Charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III".

Implicit allusion to prevention does exist in the reference to some of the "other acts" of genocide in Article III[46] and in the obligation in Article V to enact the necessary legislation to give effect to the provisions of the Convention, in particular to provide effective penalties for persons responsible for genocide or any of the other acts enumerated in Article III. The references above, however, underscore a clear preference for repression through punishment, rather than for prevention through political and military means (Schabas 2009, 447–52).

Given that the eradication of this "odious scourge" requires the willingness, indeed the commitment, to set up strong preventive mechanisms engaging, when necessary, the use

[45] On the nexus between the obligation not to commit and the obligation to prevent see ICJ 2007a, §§ 166–79. Note that there was a divergence of opinions pertaining to the relationship between prevention, commission and punishment among the judges. See Separate opinion of Judge *ad hoc* Kreća (ICJ 2007d, §§ 111–22 and §§ 131–7); Separate opinion of Judge Owada (ICJ 2007f, §§ 38–73); Declaration of Judge Skotnikov (ICJ 2007g, §§ 4–11); Separate opinion of Judge Tomka (ICJ 2007h, §§ 40–5).

[46] Article III specifies prosecution for the following "other acts": conspiracy; direct and public incitement and attempt to commit genocide as well as complicity in genocide.

of force, the preference for post-factum criminal processes, while not surprising,[47] is disappointing. Insofar as punishment indicates the failure of prevention, it would appear that the drafters inserted a duty to prevent that was designed to be honoured by its breach. The point was made with realist terseness by Sir Hartley Shawcross, the British Delegate to the Sixth Committee: "The only real sanction against genocide is war" (ECOSOC 1948d, 35).

The drafting history of the Genocide Convention, while providing an insight regarding the heat of the debate, failed to clear this matter. Neither the obligation to prevent nor the obligation to punish, as formulated in Article I, received much attention during the entire *travaux préparatoires*. This was *a fortiori* the case of a specific legal issue related the relations between the two duties. The drafters did not primarily emphasize the obligations to prevent and to punish, but rather considered the criminalization of genocide in times of peace and of war as the main objective of Article I. A focal point of the discussions during different legislative processes was whether Article I should be part of the Preamble or adopted as a separate operative provision.[48] While the latter option was accepted, it did not generate any further discussion on the substance of the obligation to prevent. Considering the *travaux*, there was a clear preference of most of the delegates for criminal repression over other means of prevention (ECOSOC 1948b, 4). A preference for prevention over punishment was a minority position advanced by the Soviet Union (ECOSOC 1948c, 5), which was, rather than by the principle itself, prompted by political wishes such as give the UNSC, rather than courts, controlling power.

Paying attention to the history of the Genocide Convention preparation, the Court's decision of 1993 that it had jurisdiction over the provisional measures phase of the case brought by BiH against the FRY is far from self-evident. The ICJ could have interpreted the Convention in a restrictive way, and concluded that the obligation to prevent has been subsumed into the obligation to punish (Toope 2000, 192). Had it followed that approach, compliance with the duty to prevent as such would not have been a subject of the judgement, and the Court could not have insisted on its right to order provisional

[47] Other international conventions also failed to specify the meaning, content and scope of the obligation to prevent. See e.g. Art. 1 of the International Convention for the Suppression of Counterfeiting Currency.
[48] Pursuant to a Belgian and Iranian proposal the reference to the pledge to prevent and repress genocide was moved from the preamble to Art.I (ECOSOC 1948b, 44). On the genealogy of the Convention see Robinson 1960 and Schabas 2009.

measures requiring the FRY to "take all measures within its power to prevent the commission of the crime of genocide" (ICJ 1993b, 13). The Court's affirmation that the duty to prevent is autonomous from the duty to punish embraces the teleological interpretative method that the Court had already taken in its 1951 Advisory Opinion.[49] The latter constitutes its first meaningful contribution to the discourse on the prevention of genocide.

This judicial reasoning was elaborated by Judge *ad hoc* Lauterpacht (ICJ 1993b, 443) in his Separate opinion:

> The statement in Article I is comprehensive and unqualified. The undertaking established two distinct duties: the duty 'to prevent' and the duty 'to punish'. Thus, a breach of duty can arise solely from failure to prevent and solely form failure to punish and does not depend on there being a failure both to prevent and to punish. Thus the effect of the Convention is also to place upon State duties to prevent and to punish genocide at the inter-state level. This is the plain meaning of the words of Article I and is confirmed to some extent by Article VIII and most clearly by Article IX.

The 2007 Judgment made a further articulation of the relationship between the obligation to prevent and the obligation to punish. While the Court did acknowledge that "simply by its wording, Article I of the Convention brings out the close link between prevention and punishment", and that "although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII" (ICJ 2007a, § 426). In addition, the ICJ ruled that "one of the most effective ways of preventing criminal acts … is to provide penalties …, and to impose those penalties effectively on those who commit the acts one is trying to prevent" (*Ibid.*). However, the Court stressed the following:

> [I]t is not the case that the obligation to prevent has no separate legal existence of its own … The obligation on each contracting State to prevent genocide is *both normative and compelling*. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can

[49] As already noted in Chapter 4, the Court highlighted the "humanitarian and civilizing purpose" of the Convention (ICJ 1951, 23).

> to prevent genocide form occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs…(*Ibid.*, § 427).

Coming to the conclusion that "[d]espite the clear links between the duty to prevent genocide and the duty to punish", these are "two distinct yet connected obligations" (*Ibid.,* § 425), the Court continued with first considering the obligation to prevent genocide and then the obligation to punish it (*Ibid.*, § 427).

7.2 The Obligation to Prevent Genocide

When the Genocide Convention was concluded, the 'obligation to prevent' in Article I was a morally expectant, but as a concept, normatively empty.[50] However, an empty concept should not be confused with empty ideas. Conversely, it shows capability and holds out an 'opportunity' for imaginative development. The ICJ first and foremost, although not solely, took this opportunity and its system of law has brought about the process of development that is the topic of this section.

The friction between universality (manifested in the acceptance that the elimination of genocide necessitates shared action) and state sovereignty (manifested in the territorial extent of the Convention and in the impreciseness) is both the symbol of the human rights debate and the beginning of the activity to change the 'obligation to prevent' into a significant legal commitment. The first step in this process of change was taken, rather indirectly, by the ICJ in its 1951 Advisory Opinion.

The importance of the 1951 Advisory Opinion originates not so much from its substance but rather from its interpretation. The expression of the "humanitarian and civilizing purpose" of the Convention, its anchoring in the "common interest" which necessitates "universal" action, the building of the link between its provisions and the "elementary principles of morality", and the classification of the banning of genocide not only in accordance with the Convention but also with custom (ICJ 1951, 23), were to become the beacon for interpretation in the future and generate a teleological reading of the Convention and the essential responsibilities that states are to assume to achieve

[50] The reading of the Convention by Judge Kreća, based on the *travaux préparatoires*, led him to conclude that the "[m]ain function of the Convention lies in protection rather than prevention; that the duty to prevent was merely an expression of a moral and a social but not a legal obligation, and that the majority's conclusion regarding a duty to act to prevent appears to be a pure creation of the so-called judicial legislature ... it is a demonstration of the revision of the Convention rather than its proper interpretation (ICJ 2007d, § 113 and § 120).

their goal. However, it was not until 1993 that the specific responsibility to stop genocide was to be understood in this way.

In the years that have gone by, although human catastrophes that seemingly could have been understood as genocide bedevilled the people of Tibet and the Kurds in Iran and Iraq, as well as specific groups in many countries, for example Paraguay, Argentina, East Timor, Burundi, Bangladesh, Cambodia, Uganda, and Sri Lanka, neither the Genocide Convention nor the customary banning on genocide have been turned to stop them (Fein 1992; Schabas 2009). In fact, the responsibility to prevent or stop attracted no attention in the practice of the UN (Schabas 2009, 454–60). Judicial attempts taken on to present the standard patterns of the Genocide Convention did not incorporate any expansion on the obligation to prevent,[51] though the banning of hate propaganda and the breaking up of racist factions, both deterrent activities not incorporated in the Convention, were included in ensuing human rights conventions.[52] It would take another European war, the Balkans war, to restore the obligation to stop genocide from the obscurity of ethical aspirations to the feasibility of legal responsibilities. The source of this progression can be found in a number of General Assembly resolutions on the Balkan problem endorsed in 1992, which called to mind the significance of stopping genocide (General Assembly 1993; 1994; 1996). The UNSC's founding of the ICTY and ICTR, charged with the authority over genocide, was a further step created to contain a preventive element (Statute of the ICTY, Statute of the ICTR).[53] However, it was the ICJ, which determined the extent of and added distinct normative subject matter into the commitment to prevent genocide in different stages of the case presented by BiH against the FRY (ICJ 1993a, 3; 1993b, 325; ICJ 1996a, 595; ICJ 2007a, § 165).

The beginning of this captivating legal epic began in April 1993, when BiH filed a motion for provisional measures against the FRY, claiming that acts of genocide had been perpetrated by former members of the Yugoslav People's Army and the Serb military and paramilitary forces, helped and controlled by Yugoslavia (ICJ 1993a, 3–4,

[51] The only legislative effort was the long process which culminated in the Draft Code of Crimes against Peace and Security of Mankind (see ILC 1996).

[52] Hate propaganda is prohibited under Art. 19(3) of the International Covenant on Civil and Political Rights. The same prohibition and the obligation to disband racist organizations are included in Art. 4 of the Convention on the Elimination of all Form of Racial Discrimination. Note that during the preparatory work for the Genocide Convention, Soviet proposals to include said prohibitions were rejected, ostensibly on the grounds of freedom of speech and association (Schabas 2009, 480–2).

[53] The last legislative effort in respect of genocide is the Rome Statute of the ICC. These Statutes reproduce the definition of genocide as it appears in the Genocide Convention.

7 and 21). In an unparalleled action, the Court, having concluded that it had *prima facie* authority to safeguard the entitlements of the parties, pointed out three provisional measures preventing Yugoslavia from the commission of genocide. In this situation it concluded that Article I of the Convention enforces "a clear obligation" on both parties "to do all in their power to prevent the commission of any such acts in the future" (*Ibid.*, 22). In its ruling on the advantages, the Court found that the respondent state (the FRY), which had since become the Republic of Serbia, was in violation of its duties to stop and penalize genocide under Article I of the Convention (ICJ 2007a, § 438), and that it had contravened its commitment to abide by the provisional measures the Court had directed in 1993, "inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995" (*Ibid.*, §§ 161–2). Consequently, the case from the very beginning recognized the commitment to prevent as a legal obligation, and the different decisions rendered in the case's context have articulated the nature, range, and essential content of the commitment.

7.3 The Character, Scope and Normative Substance of the Obligation to Prevent Genocide

The prohibition of genocide has been accepted as a peremptory norm of international law (*Ibid.*, §§ 161–2). The *jus cogens* character of the norm attached to the duty to prevent, otherwise the normative status of the prohibition, and its legal implications, would be rendered meaningless. In addition, the obligation to prevent has also been recognized as an obligation *erga omnes* (Bassiouni 1996, 271), which imposes on states a positive duty and is breached by omission (ICJ 2007a, § 432). The determination of the extent and normative substance of the obligation derives from its character.

The Court (ICJ 1993a, 434) limited the extent of the obligation to prevent *ratione materiae* to the "special evil" of genocide, comprising the acts referred to in Articles II and III of the Convention (ICJ 1993b, 345; ICJ 2007a, § 431). The duty to prevent does therefore cover neither the acts directed at territorial changes, including the partition of a state or the annexation of its territory (ICJ 1993a, 433–4; ICJ 1993b, 345), nor is it applicable to the duties to prevent contained in other Conventions (ICJ 2007a, § 429). Its scope *ratione temporis* arises "at the instance that a state learns of, or should have learned of, the existence of a serious risk that genocide will be committed", However, it

is important to note that this duty depends on the actual commission of the acts prohibited under the Convention, and in case in the end they are not carried out, "a State that omitted to act when it could have done so cannot be held responsible *a posteriori*" (*Ibid.,* § 431). It follows that, while a state's international *responsibility* for failure to prevent is only triggered when genocide has actually occurred, the *obligation* to rein in potential perpetrators arises much earlier.

Importantly, the *ratione loci* scope of the obligation to prevent is not territorially limited by the Genocide Convention. Judge Lauterpacht (ICJ 1993a, 444–5) noted in his Separate opinion in 1993 that "an absolutely territorial view of the duty to prevent … would not make sense since it would mean that a party, though obliged to prevent genocide within its territory, is not obliged to prevent it in a territory which it invades and occupies". Accordingly, he concluded that there is an obligation for a state involved in a conflict "to concern itself with a prevention of genocide outside its territory". He further considered that while "on its face, it could be said to require every party to positively prevent genocide *wherever it occurres*", the "limited reaction" of states to acts of genocide that have occurred since the coming into force of the Convention suggests the "permissibility of inactivity" (*Ibid.*, emphasis added). In 1996, the Court reasoned in the line coherent with its past jurisprudence (ICJ 1986, §§ 97–100), and disregarded the actual record of state practice. Stressing the object and purpose of the Convention, the universal character of the condemnation of genocide and the cooperation required to eliminate it, it ruled that "the obligation each state thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (ICJ 1996a, 615–6). The ICJ repeated this position with respect to the obligation to prevent the 2007 Judgement (ICJ 2007a, §§ 432–8). To put it differently, a state may be liable for failing to rein in actors over whom it has influence, even if they are located outside the state's own borders.

In addition, the Court also considered the ambiguous issue of third parties' obligation to prevent, when determining the scope of the obligation *ratione personae*. The first such third party that was at issue was the ICJ itself. When asking for provisional measures, BiH initially referred to Article VIII of the Convention and requested that the ICJ, one of "the competent organs of the United Nations', to act immediately and effectively to do whatever it can to prevent and suppress" the acts of genocide (ICJ 1993a, 23).

However, the ICJ concluded that Article VIII does not confer on it any functions in addition to those stipulated in its Statute (*Ibid.*, 22–4).

Another third party, whose obligation was challenged, was the UNSC. In 1993, BiH asked the Court to declare that its government must have the means to prevent the commission of the acts of genocide against its own people (ICJ 1993b, 332). As a matter of fact, it requested the ICJ for the judicial review of the arms embargo imposed on BiH by the UNSC, since it prevented it from effectively exercising its inherent right to self-defence and of complying with the obligation to prevent genocide. The Court based its decision on the formalistic grounds that in terms of Article 59 of its Statute, the judgment on the merits would bind only the parties before it, and therefore refused to issue provisional measures shading light on the responsibilities of third parties, be they states or other UN organs, under the Convention (*Ibid.*, 344–5).

However, Judge *ad hoc* Lauterpacht began to articulate this issue, drawing on both the *jus cogens* and the *erga omnes* nature of the obligation to prevent in his The Separate opinion (ICJ 1993a, 436). The obligation to prevent, he stated, "rests upon all parties and is … owed by each party to every other" (*Ibid.*). The UNSC's continuous arms embargo imposed on BiH solidified the Serb armed advantage, thereby contributing to the genocide. The UNSC's resolution "in effect called on members of the United Nations … unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*" (*Ibid.*, 441). Having come to a possible legal conclusion that the resolution is *ultra vires* and that member states are therefore allowed to ignore it, he abstained from imposing on them a positive obligation to prevent. "It would be difficult", said Lauterpacht, "to say that they then become positively obliged to provide the Applicant with weapons and military equipment" to enable effective prevention (*Ibid.*). Although having said that, Lauterpacht still offered an important articulation: "The position would, of course, have been somewhat different if, invoking the obligation resting upon all parties to the Genocide Convention to prevent genocide the Applicant had started proceedings against one or more of the other parties to the Convention, challenging their failure to meet this commitment" (*Ibid.*, 442).

The later statement could be interpreted as a carte blanche opportunity to challenge each and every third party for failing to prevent genocide.[54] The ICJ, however, seems to have taken a narrower view in the *Bosnian Genocide* case. The Court noted that the duty to comply with this obligation depends on the State's capacity to influence effectively the action of persons likely to commit, or already committing, genocide, and "varies greatly from one state to another" (ICJ 2007a, § 430).

The specification of the extent of the obligation to prevent imposed on third parties was determined by the ICJ with regard to the specific parameters relevant for determining whether a state discharged its responsibility to prevent or not (*Ibid.*). This specification is important for two reasons. First, herein the normative substance of the 'obligation to prevent' was qualified by the Court. Moreover, it also specified the extent *ratione personae* of the obligation to prevent.

Qualifying the normative substance of the obligation to prevent, the ICJ in the *Bosnian Genocide* case replied to the following related questions. First, is the duty to prevent one of result or of conduct? Furthermore, what are the parameters for assessing whether or not a state complied with the responsibility to prevent?

Responding to the first question, the ICJ articulated that "the obligation to prevent is one of conduct not of result in the sense that a state cannot be under an obligation to succeed". A state is to employ "all means reasonably available" and incurs responsibility if it "manifestly failed to take all measures to prevent that were within its power" (*Ibid.*). Hence, the 'due diligence' approach was adopted by the Court, which adheres with the commentary on the ILC Articles (*Ibid.*, §§ 430–1).[55] It is important to emphasize that the Court ruled further, that even if a state, not preventing the commission of genocide, proves that it had used all the means available at its disposal, it would still have to shoulder the obligation. The ICJ held this view for two reasons. First, the duty to prevent is one of conduct, not of result, and second, "the possibility remains that the combined efforts of several states, each complying with its obligation to prevent, might have achieved the result…" (ICJ 2007a, § 430). The later reasoning by

[54] BiH indeed construed Judge Lauterpacht's articulation as an invitation to bring proceedings against a third party, in this case the UK, a member of the Security Council, for failing in its obligation to prevent genocide, and indicated its intention to thus proceed. It later announced it would not thus proceed (see Boyle 1996, 366–8).

[55] For the commentary see ILC 2001b, 145.

the Court suggests that it regarded the extent *ratione personae* of the duty to prevent to embrace both individual and collective actors.

Furthermore, the material and mental standards for determining whether or not a state had fulfilled its responsibility to prevent have been determined by the ICJ in the *Bosnian Genocide* case. The main element in this assessment is, as noted above, the "capacity to influence effectively the action of relevant persons". The assessment of this capacity covers the following: (*i*) the geographical distance of the state concerned from the scene of events; (*ii*) the strength of political and other links between the state and the main actors in the events; (*iii*) the state's legal position vis-à-vis the situation and the persons facing the danger of reality of genocide; and (*iv*) the state's level of awareness (*Ibid.*). In order to meet this mental requirement, it has to be shown that the state "was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed" (*Ibid.*, § 432). The Court ruled that this element is one of the two distinguishing between a violation of an obligation to prevent genocide and complicity in genocide. As analysed in Section 6.2, complicity, unlike the obligation to prevent, is a negative obligation, and it requires "full *knowledge* of the facts" and *awareness* of "the specific intent (*dolus specialis*) of the principal perpetrator" (*Ibid.*, §§ 418–21, § 432; emphasis added).

To sum up, under the Court's doctrinal framework, the high evidentiary burden and the strict attribution test for commission are offset by a far more lenient test for prevention. In contrast to direct commission, the test for prevention does not contain an element of attribution. As shown above, the emphasis is not on *control* but rather on the *ability to influence*. This test brings not only *de jure* and *de facto* organs within the scope of state responsibility, but any individual or group which the state can, conceivably, rein in. Furthermore, unlike liability for direct commission or complicity, a state may be liable for failing to prevent genocide even when it takes no affirmative action.

7.4 The Still Unclear Contours of the Obligation to Prevent Genocide

The above analysis demonstrates that, during the various stages of the *Bosnian Genocide* case, the ICJ has transformed the obligation to prevent from an empty concept into a substantive legal obligation. Employing the interpretative approach it took already in its 1951 Advisory Opinion, the Court relied the teleological approach to read

Article I broadly, and rejected the view that the main function of the Convention is punishment rather than prevention. It acknowledged the legal nature of the obligation to prevent, and interpreted its scope *rationae loci* and *rationae personae* broadly. The Court's determinations designed to advance the universality of the action that is necessary to meet the objective of the Convention, and shaded light on the normative substance by specifying some particular parameters for determining whether it has been complied with or not. Nevertheless, these developments do not exempt the obligation to prevent from ambiguities.

First, the qualification of the obligation to prevent as one of conduct rather than result, and its scope *ratione temporis* appear to be inconsistent. The Court's conclusion that "a State that omitted to act when it could have done so cannot be held responsible *a posteriori*" (*Ibid.,* § 431) seem to have more a character of an obligation of result than one based on conduct.

Furthermore, the line drawn between the awareness that the act of genocide was committed or underway, required for complicity on one hand, and the awareness that there is a serious risk of genocide, required for the obligation to prevent on the other hand, is far too thin. This view was also taken by the Darfur Commission. The latter found that the Sudanese government was involved in crimes committed by militias to a significant degree, and that senior Sudanese officials failed to prevent crimes committed in Darfur, including 'private crimes' which they either committed or to which they acquiesced. According to these findings, it seems practically impossible to determine whether the government is responsible for having violated its obligation to prevent or for complicity (Darfur Commission 2005, § 191, § 253, § 315, § 422, § 644). Moreover, insofar as domestic criminal legal systems recognize that responsibility for complicity can be attached to omission, and insofar as the threshold of liability for omissions is generally higher than for conduct, the Court's articulation of the distinction is neither clear nor supported by practice (ICJ 2007b, 2007c, 2007e; Toufayan 2005, 255–6; Quigley 2006, 135).

As discussed earlier, according to the Court, the responsibility to abstain from a crime is breached when a state official, or any other individual whose actions are attributable to a state, perpetrates the act of genocide or any other acts enumerated in Article III of the Genocide Convention (ICJ 2007a, § 179). In light of this view, "there is no point in

asking whether [that State] complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated" (*Ibid.,* §§ 382–3).

What then can be done, if a state official, acting in his official capacity, is involved in a genocide perpetrated in another state; that is a genocide that is obviously not planned or organized or sanctioned by the state from which he or she comes, but that his state is in reality actively endeavouring to stop? Let us consider the example of a soldier who is a member of the UN peace-keeping forces abroad, in a country where genocide is obviously taking place, e.g. in Srebrenica in 1993. Acting as a state official, this soldier could, as an individual, take part in the genocide that his or her state is trying to stop using a number of means, including a military operation requested by the UN. In spite of the humanitarian purpose of the military operation, the soldier could hold genocidal intentions and together with other 'local' perpetrators, kill members of the targeted victim-group, with the objective of contributing to the physical annihilation of the victim-group. If we follow the reasoning of the Court, we would come to the conclusion that genocide perpetrated by such a soldier is ascribable to the state he or she belongs, which is therefore responsible for an act of genocide. That would also lead to the unavoidable conclusion that the state had failed to comply with its commitment of prevention in respect of the same act, because, as the Court reasoned, "logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated" (*Ibid.,* § 382). To put it in another way, according to the Court's reasoning, the criminal conduct of one of its soldiers implicates the state to which the soldier belongs to and by this implication should be considered responsible for having committed genocide. In addition, it must be considered responsible for having violated its commitment to prevent genocide, although, for humanitarian purposes, it sent a military operation to a foreign country where acts of genocide were being perpetrated and had no reason to expect that the soldier would participate in genocide, it assumed all the necessary measures to prevent genocide, and on the basis of this legislation arrested the soldier, brought him to trial, and severely punished him.

It does not appear either self-evident or logical to argue, as the Court did, that the responsibility to prevent genocide, being an obligation of conduct, "necessarily implies" the responsibility not to commit it. Quite the contrary, it is only logical to contend that this conduct must inevitably be unlawful when rules are imposed upon some subjects to

prevent a certain conduct from being committed. In fact, the obligation to prevent a certain conduct from occurring is an indication of the existence of a rule specifically forbidding it. Or as Gaeta (2007, 639) points out, it provides an additional safeguard for the rule proscribing the conduct.

However, flows in the legal reasoning of the Court, which might have long-term implications for the interpretation of the state responsibility for genocide, should not deny the importance of its decision overall. Despite its criminal law focus the Court was right in providing that the state responsibility for genocide goes beyond criminalization and punishment. As the next chapter will advocate, the Court could come to the same conclusion through a rather more dynamic approach to the Convention, considering the instrument, and the negative obligation not to 'commit genocide' in particular, from a human rights perspective, not as a criminal law notion.

8 The Genocide Convention as a Mechanism for Human Rights

As explained in the previous chapter, the ICJ in the *Bosnian Genocide* case acknowledged that Article I of the Convention, which requires states authorities to stop and penalize genocide, had a supervisory content of its own. While in previous years the Convention was mainly thought of as a criminal law mechanism, this interpretation reveals a new dimension to the treaty, which feasibly was already inserted into the Convention from the very start. Lemkin had put a proposition of a treaty needing states to ban genocide not just in criminal law, but also in constitutional law (Lemkin 1944, 93). In 1946, when the UNGA requested the Economic and Social Council to put together a draft convention it was driven by a wish to persuade states to stop and penalize genocide (General Assembly 1946). Whilst the Convention that was later designated has a strong emphasis on criminal law, the drafting history explained above confirms that the drafters did not intend to completely invalidate state responsibilities that go beyond the assumption of the criminal law provision and the bringing to justice of offenders. France and the US, which had recommended a solely criminal mechanism (ECOSOC 1948c), were not successful in convincing the majority to restrict the Convention correspondingly.[56]

When international criminal law did not have the same function as it has today, the Genocide Convention was generally thought of as a human rights mechanism (Seibert-Fohr 2009, 6). Why this interpretation should entirely disappear with the ascent of international criminal law institutions, is questionable. In reality, the Genocide Convention displays some similarities to other international human rights treaties. One example is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the 'Torture Convention'), which manifests a similar construction. As the Genocide Convention in Article II, the Torture Convention in Article 1 determines the crime. The Article commits state authorities to *prevent* acts of torture.[57] Successive provisions, much the same as Articles V and VI of the Genocide Convention, handle the duty to outlaw torture (Torture Convention, Art. 4), the

[56] See Chapter 3.1.
[57] Torture Convention, Art. 2(1) reads: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

institution of criminal authority (*Ibid.*, Art. 5), and the penalizing and extradition of perpetrators (*Ibid.*, Art. 6–8).[58]

The meaning of the term 'prevention' in the Torture Convention is wide. It does not just mean that states should get involved when ill-treatment is taking place. It first and foremost requires state authorities to abstain from engaging in torture. No state in agreement with the Convention has ever disputed that it is not responsible for torture that had been perpetrated by its authorities. State authorities must not participate in any behaviour amounting to torture.[59] There are good grounds to think about the term prevention appropriately in the Genocide Convention (Wolfrum 2005, 820). Conceivably it does not get involved in third party persecution. A successful safeguard against genocide by states demands, more than anything, that state authorities do not commit genocide.

This equivalent to human rights law is what the ICJ could have been thinking about when it made reference to the "humanitarian and civilizing purpose of the Convention" (ICJ 2007a, § 162).[60] Just as a state can contravene a human rights convention by committing a human rights offence, a state can likewise infringe the Genocide Convention if its authorities are engaged in genocide. This contravention of the Torture Convention could be questioned by another state authority in an inter-state protest before the Torture Committee.[61] Under Article IX of the Genocide Convention, the ICJ is the qualified authority to listen to inter-state grievances.

So that it can be understood what the obligation to prevent means specifically, it could prove useful to take a look at other human rights conventions. Every all-inclusive human rights convention ensures that the contracting parties are committed to ensure the safeguard of human rights. The International Covenant on Civil and Political Rights (ICCPR) uses the expression "respect and ensure";[62] the European Convention for the

[58] Articles 10–11 of the Torture Convention specify non-criminal measures of prevention.

[59] In fact, under the definition enshrined in the Convention, torture can only be committed if there has been any kind of involvement of state authorities.

[60] See also the 1951 Advisory Opinion, which allowed minor reservations to the Convention but excluded reservations affecting this object and purpose (ICJ 1951, 23).

[61] Article 21 of the Torture Convention sets out the procedure for the Torture Committee to consider complaints from one state party that considers another state party is not giving effect to the provisions of the Convention. This procedure applies only to state parties that have made a declaration accepting the competence of the Committee in this regard.

[62] Article 2(1) of the ICCPR reads: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the

Protection of Human Rights and Fundamental Freedoms (ECHR) refers to the term "secure".[63] The competent courts and human rights treaty bodies agree that this does not just mean that state authorities shall not perpetrate wrong-doings; it also requires states to cease from any behaviour that is instrumental, however insignificantly, to human rights abuse. Consequently, human rights law does not just become applicable if state officials are the immediate culprits or if the offender can be linked to the state. The responsibilities under the human rights conventions are wider than the offences themselves.

The fact that state accountability for human rights contraventions goes further than individual criminal accountability has also been recognized by the ECtHR in several cases.[64]In agreement with its system of law, a state may be accountable for a contravention of the entitlement to life, even if the immediate offender is not criminally accountable for murder. This is demonstrated by the 1995 *McCann case*. Although the immediate perpetrators, British soldiers shooting Irish Republican Army suspects, could not be held criminally accountable, the UK was held responsible for infringing the Convention because the planning of the operation was flawed (ECtHR 1995b, § 212).

Taking into consideration the "humanitarian and civilizing purpose" of the Genocide Convention, it is sufficient to structure the primary responsibilities handled by state authorities appropriately. The onus to prevent under Article I is similar to the obligation to respect and make certain under all-embracing human rights treaties. Any kind of involvement in genocide must be rejected. Seen in this light, the duty of states under the Genocide Convention is much wider than merely the commitment not to perpetrate genocide through their authorities or individuals as *de facto* or *de jure* bodies. The duty to prevent - which in Article I stands alongside the duty to punish - requires state authorities to abstain from participation (like the duty to 'respect' in Article 2(1) of the ICCPR), and to actively safeguard against genocide (like the duty to 'ensure' in Article 2(1) of the ICCPR).

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present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status".

[63] Article 1 of the ECHR reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

[64] E.g. Judgement, *McCann and Others v. United Kingdom* (ECtHR,1995b); Judgement, *Selmouni v. France* (ECtHR1999, § 87).

If the ICJ had framed the responsibility of state authorities to the Genocide Convention in this way it could have escaped a lot of criticism. This proposition steers clear of criminal law terminology and makes it quite clear that it is not state crimes that are in question, but *human rights protection*. This explanation essentially gives Article I an independent reading, without the necessity to make reference to the criminal law categories of Article III. The Court could have assumed a more refined assessment of the case instead of focusing on commission, conspiracy and complicity. Bearing in mind the Genocide Convention as a human rights treaty, it provides the chance to realize the responsibility of state authorities below the level of such grave charges.

The argument why the Court restricted itself to the examination of whether the respondent had carried out or taken part in the authorization of genocide was probably the result of an agreement. It admitted that a state can be accountable for genocide, but only with reference to the most extreme violations: commission and participation. Other than this, it was only concerned with Serbia's responsibility for not physically intervening.[65] But it did not consider any further the duty of the FRY for its significant political, military and financial aid to Bosnian Serbs which was still happening even while the massacre in Srebrenica was being perpetrated.

As for what lies ahead, it is better to understand the duty to prevent, dealt with state authorities, as an obligation to abstain and safeguard. In the first place, the issue of whether a state can perpetrate genocide is confusing. It normally suggests the execution of an offence and for that reason conveys the wrong implication. In contrast, the issue emerging under the Convention is whether a state is answerable for not abiding by the banning of genocide. Article I of the Convention requires state authorities to abstain from any sort of participation in genocide, and to take great care not to make any contribution to genocide.[66] Looked at this way, state responsibility for genocide has a scale separate from criminal accountability. Furthermore, it does not necessitate the high level for state responsibility that the ICJ instigated in the *Bosnian Genocide* case.

[65]There is, however, a qualitative difference between responsibility for active involvement and responsibility for the failure to intervene when third parties commit a crime.

[66] The scope of state responsibility should not be determined on the basis of criminal law rules on commission and complicity. Even if an act of genocide cannot be attributed to a state because there is neither direction nor control over the perpetrator, there is still a primary obligation not to help below the level of direction and control in human rights law.

The establishment of the duty to put a stop to genocide, discussed in this chapter, reveals an ever increasing readiness to tackle the "odious scourge" by stressing the universality of human rights rather than the long held notions of state sovereignty, and substantiates the visionary words of Judge Alvarez:

> It is therefore necessary when interpreting treaties … to look ahead, that is to have regard to new conditions, and not to look back and have recourse to *travaux préparatoires*. A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it (ICJ 1951, 175).

As the years have gone by, the duty to prohibit genocide has taken on a life of its own. The "obligation to prevent" in Article I, which was in the beginning a meaningless theory, has developed through time to a significant legal obligation. The interpretive path laid down by the ICJ in its 1951 Advisory Opinion was succeeded in a ensuing resolution which, using a purposeful procedure of interpretation, expressed its normative subject matter and gave rise to an extensive reading of its terms of reference in a way created to legalise the universality of the measures needed to achieve its goal. Although some uncertainties are still affiliated with the extent of this commitment, and mainly to its dealings with the regime relating to the right to wage war, they also represent the advances made since 1948.

9 Concluding Remarks

Today the international legal system has increasingly been concerned for individuals and the role of the individual. However, state remains the pivotal actor, and this fact should not become obscured by the current attention on individual criminal responsibility. Acts of criminal nature, perpetrated by states, are the most serious of all crimes. As Jørgensen remarks (2000, XI), "they belong in a category of their own, beyond Dante's 'Ninth Circle' where the betrayers of their own kindred cause the devil himself to weep tears of bewilderment". It would seem that this is justification enough for undertaking a detailed examination of the concept of state responsibility for genocide in an effort to discover whether international law is impotent in an area where the need for its vitality is self-evident. Although the notion of state crimes did not survive the second reading of the Draft Articles on State Responsibility adopted by the ILC, this did not impede the development of the concept of state responsibility for the crime of genocide in international law, and the questions it raises are both important and urgent.

The 1948 Genocide Convention marked an important development in international criminal as well as human rights law. However, the Convention has been criticized for being a seriously flawed instrument, as channelling to the territorial state, focused on the criminal punishment. Nevertheless, some of the main problems that conflicted the Convention have been redressed over time through acts of interpretation by courts and other deliberative bodies, which broadened and deepened the scope of the Convention's obligations. Hence, for instance, the obligations under the Convention were deemed *erga omnes* and *jus cogens*, and a broad notion of state responsibility has been read into Article 1 of the Convention.

At the same time, a parallel body of customary international law has emerged, which compensated for some of the Convention's other shortcomings. Customary international law, for example, introduced a universal jurisdiction regime and expanded some of legal definitions afforded by the Convention. This has supplemented the rather limited international set of principles designed to prevent and punish acts of genocide that were introduced by the 1948 Genocide Convention.

However, as this thesis demonstrates, the parallel development of treaty and customary law has also generated complicated legal problems, especially in relation to the similarities and differences between the treaty norm, focusing on imposing individual criminal accountability, and the customary international law norm governing state responsibility.

This has been highlighted by the *Bosnian Genocide* case. In its 2007 Judgement, the ICJ defined the scope of state responsibility under the Genocide Convention for the very first time. It asserted that the Convention also prohibits states themselves from committing genocide, as well as their complicity in genocide.

A rather dynamic approach taken by the Court towards the provisions of Article III(e) of the Genocide Convention might have a great potential for prevention of the acts of genocide. The ICJ's view that state can also be an accomplice in genocide may be of a great practical importance. It puts additional pressure on states not to get involved in situations of possible acts of genocide, and at the same time stop the activity of individual perpetrators and prevent potential situations that could result in genocide. In particular, this assessment of responsibility bears important relevance with respect to conducts of private individuals or groups of private genocide perpetrators. Under current rules of attribution - and especially under those identified by the ICJ in the *Bosnian Genocide* case, as this thesis shows - the possibility to hold a state responsible for the acts of individuals who do not have the status of organs of that state under its internal law is subject to demanding criteria which, in most cases, would be extremely difficult to fulfil. Hence, there is a high risk that a state can escape responsibility despite its involvement in the activity of the perpetrators. Potentially at least, by a direct prohibition of aiding or assisting those individuals, Article III(e) holds the assisting state responsible for its contribution to the genocide atrocities.

However, the scope of responsibility for complicity in genocide is limited by the requirement of the assisting state being fully aware that its provision of aid or assistance would be used for the commission of genocide. This prerequisite establishes a high threshold for a state's conduct to amount to complicity in genocide. Therefore, as also being the case in the 2007 Judgement, the state's unlawful conduct, in a connection to individual perpetrators of genocide, would rather be considered under the obligation to prevent genocide, and not under Article III(e).

Although the Court raised onerous evidentiary hurdles for establishing state responsibility for the direct commission of or complicity in genocide, it at the same time imposed upon states a clear duty to rein in non-state actors over whom they exercise influence, by interpreting their obligation to prevent genocide broadly. By broadening states' obligations to rein in non-state actors over whom they have influence, the Court opened the door to imposing liability upon states for failing to prevent acts not otherwise attributable to them, which has implications not only for the Court's own jurisprudence but also extrajudiciously within the customary framework of state responsibility. The expansive reading of Article I and the implicit support it provides to certain humanitarian intervention theories suffices to note that the treaty norm appears to exceed in scope the extant of the customary norm.

The present thesis advanced the proposition that what has usually been lamented as the weakest point of the Convention – the primacy accorded to the obligation to punish when compared to the obligation to prevent – has become, over time, its source of strength. It has provided a space for creative, purposeful interpretation that has transformed a lack of precision and a *prima facie* incongruity between basic requirements for international cooperation on the one hand and specific provisions which failed to provide for it on the other hand, from a liability into an asset. Admittedly, such development is modest. However, while it might be impossible to eradicate the crime of genocide by a legal feat, or indeed, that law replaces politics, this legal development indicates that progress is possible and paves the path for future development.

Survivors of genocide may derive less satisfaction from a Court finding state responsibility to prevent the acts of genocide than from a finding of state direct responsibility, but the duty to prevent is an important alternative, particularly where the state in question is probably responsible for genocide, but direct responsibility cannot be imposed due to procedural or pragmatic reasons – as in the *Bosnian Genocide* case. In other words, the duty to prevent, and its lower evidentiary burden, is an important alternative way to hold states accountable for genocide.

In the author's opinion, the significance of the 2007 Judgement lies predominantly in the Court's decision that it has jurisdiction *ratione materiae* over a dispute between two sovereign nations concerning alleged breaches of the Genocide Convention. By so

doing, the ICJ has made the Convention a potentially potent instrument in the fight against the violation of human rights. It remains to be seen whether this instrument will also prove to be an effective one in practice.

The future case law will need to refine this approach. Avoiding criminal law terminology, such as the terms commission, conspiracy and complicity, in framing the obligation which requires state authorities to abstain from being involved in genocide and to actively protect against genocide, help emphasize the non-criminal nature of state responsibility. Properly understood, it is not the commission of a crime by a state which is at issue under state responsibility, but a serious human rights violation. Criminal analysis would be misplaced in this context. The idea of state criminal responsibility has been rejected persistently since the drafting of the Convention. Therefore, the concept of state responsibility should be retained as a tort-like concept, without overburdening it with strict requirements copied from international criminal law. Though state responsibility and individual criminal responsibility are complementary, they should not be equated.

The dual existence of state responsibility and individual criminal responsibility under the Genocide Convention is not to be criticized as fragmentation. Neither should the concurrent jurisdiction of the ICJ and international criminal courts and tribunals be deplored. The mere fact that several jurisdictions are competent to make pronouncements on the same factual situations does not automatically lead to fragmentation. We know this from domestic law where the same set of facts may become relevant in civil, criminal and even administrative proceedings. National jurisdictions also distinguish between rules of criminal law and rules on government liability. As both sets of rules deal with different legal issues, there is no need for uniformity. Therefore, the fact that international law recognizes different modes of responsibility is not a sign of fragmentation, but evidence of the increasing sophistication of international law. Individual criminal responsibility and state responsibility do not replace each other. Neither do they compete. They belong to different areas of international law, complementing each other in a common desire to effectuate the primary norms of international law, such as the prohibition of genocide.

Analysis of the relationship between state and individual responsibility for genocide also sheds light on the *mens rea* debate. For several years, there has been a

preoccupation with identifying the so-called specific intent or *dolus specialis* of genocide. The Nuremberg judgement was right to insist that crimes are perpetrated by individuals and not by abstract entities, but individual crimes committed separately from abstract entities are of little or no interest at the international level. In truth, in differentiating between individual crimes that belong to national justice systems and international crimes with their special rules and principles concerning authority, immunities, statutory restrictions and defences, the very existence of state policy may be the best point of reference.

The early authorities from the Second World War cases were sure that crimes such as genocide involved leaders who implemented policies, even if those who actually carried them out were unsuspecting participants. According to this view, also being suggested in this thesis, there are two elements of establishing special intent: was there a policy? Did the perpetrator know of the policy and acted with the intent to further it? The gravity level is also of some relevance. As international criminal tribunals focus their attention on a restricted number of offenders, they are being pointed towards the leaders. In practice, the prosecution of genocide cases would entail pinpointing a plan or policy and then prosecuting those most liable for its execution.

The ICJ in the *Bosnian Genocide* case, at least, did not stop analysing the case when it determined that a state genocidal policy could not be established. It went on to consider whether the crime committed by Bosnian Serbs could be attributed to Serbia. This approach does not require a state policy as a *condition sine qua non*. It combines acts and intentions of government officials at all levels as well as of persons attributable to the state, in order to determine state responsibility more comprehensively. This unclear method of establishing the state's 'mental element', attributing an intent either to officials or the organized state policy or plan, represents a confusion over the precise contours of the treaty and customary international law norms on genocide that academics, governments and practitioners should endeavour to resolve in the coming years.

An issue which also requires future consideration are the consequences of state responsibility, particularly the question of who can claim reparation for genocide. The *Bosnian Genocide* case was different because it alleged Serbia's responsibility for crimes committed in BiH. The victims were Bosnian nationals, therefore BiH had a

direct standing in this case. The applicant challenged the violation of an obligation which the respondent owed to the applicant. It was the obligation to abstain from the genocide that was committed on the territory of the applicant. The Court recognized that BiH had a right to reparation in the form of satisfaction, but due to the fact that Serbia and Montenegro had failed to comply with the duty to prevent genocide. The finding of a violation, however, was considered sufficient. Future cases will have to determine which forms of reparation are adequate for actual state involvement in the commission of genocide. Here the jurisprudence of human rights courts may prove useful.

To conclude, legal developments as well as the move ahead with the implementation of human rights made important moves from Lemkin proposals in certain respects. Today international law contains a comprehensive legal prohibition of genocide, which applies at both individual and state level, with increasingly sophisticated means of legal enforcement. However, the real challenge of the 21st century appears to be the same challenge that confronted Lemkin's contemporaries – the need for stronger political will at the international level that could underlie a prompt and robust response to genocide.

Responding effectively to these challenges requires a responsibility regime that reflects the reality of the interconnected and multi-actor world in which we live. The ICJ's advocacy of agency paradigm as the exclusive mechanism for engaging state responsibility for commission of and complicity in genocide presents a restrictive legal rule that is at odds with general principles by which responsibility of one party for the act of another is determined. The Court's approach to the state responsibility to prevent, on the other hand, has the capacity to hold states responsible even in the absence of an agency relationship. This response could provide the 'missing link' in terms of bridging the gap between *ex ante* and *ex post* response to genocide, and over time transform the obligation to prevent genocide from the realm of platitudes into offering real solutions to that old 'odious scourge'.

10 Povzetek v slovenskem jeziku: Odgovornost države za genocid: Razsodba Meddržavnega sodišča (ICJ) v primeru Bosne in Hercegovine

10.1 Uvod

"Država je abstrakten pojem in ne more ukrepati sama po sebi. Dejanja držav tako izvajajo njihovi *de facto* ali *de jure* organi ali osebe, ki delujejo v imenu ali pod nadzorom države" (Sancin 2007, 501–2).

Diplomska naloga preučuje odgovornost države kot države, kjer le-ta lahko dopolnjuje, in bi tudi morala dopolnjevati, kazensko odgovornost posameznika v primeru genocida[67]. Medtem ko uvodna navedba namiguje, da lahko zgolj posamezniki in ne abstraktne entitete izvajajo kazniva dejanja kot je genocid, pa je suverena država, s svojo edinstveno močjo in legitimnostjo v mednarodnem pravu, še vedno tista, ki ima nalogo nadzorovati ravnanja posameznih storilcev. Le-to je bilo še posebej jasno izraženo v primeru uporabe Konvencije o preprečevanju in kaznovanju zločina genocida (Bosna in Hercegovina proti Jugoslaviji (Srbija in Črna gora)) (v nadaljevanju »primer genocida v Bosni«) pred Meddržavnim sodiščem (v nadaljevanju »ICJ« ali »Sodišče«), kjer je Bosna in Hercegovina (BiH) tožila tedanjo Zvezno republiko Jugoslavijo (FRY) (kasneje Srbija in Črna gora, zdaj Srbija) za kršitve Konvencije o genocidu v času vojne v Jugoslaviji. Sodna praksa Mednarodnega kazenskega sodišča za nekdanjo Jugoslavijo (ICTY) se je na področju zločina genocida v veliki meri razvila še pred sprejemom odločitve ICJ v primeru genocida v Bosni februarja 2007. Kljub temu pa je Meddržavno sodišče, ki je prevzelo pristojnost presojanja odgovornosti vpletene države za genocid v BiH, prvič postavilo vprašanje glede opredelitve obsega in narave odgovornosti države v okviru Konvencije o genocidu.

Namen diplomske naloge je bil predstaviti v kolikšnem obsegu Konvencija o genocidu, razen odgovornosti držav preprečevati in kaznovati dejanja genocida, zgrešena s strani posameznikov, določa druge obveznosti države, katerih kršitev bi posledično pomenila mednarodno odgovornost države. Ali je lahko država odgovorna za genocid in kaj to pomeni? Ali niso mednarodni zločini, glede na slovite besede sodišča v Nürnbergu, zagrešeni s strani ljudi in ne abstraktnih entitet? Ali ima lahko tudi sama država

[67] Slovensko rodomor.

genocidni namen, kar je temeljni element zločina genocida? Kakšna je vloga Konvencije o genocidu v povezavi z varovanjem mednarodnih človekovih pravic in kako je narava dokumenta, ki poudarja ohranitev in varovanje človekovih pravic, vplivala na razumevanje Meddržavnega sodišča glede dolžnosti in odgovornosti države v skladu s Konvencijo v okviru primera genocida v Bosni?

10.2 Metodologija

Celotna naloga je osnovana na kritični analizi uporabe metodologije, primerne za preučevanje mednarodne odgovornosti držav, s poudarkom na ohranjanju razlikovanja med primarnimi in sekundarnimi pravili mednarodnega prava.68 Vsak pravni sistem, pravi Hart (v Pavčnik 1999, 471), je splet primarnih in sekundarnih pravil prava. Medtem ko je teoretični vidik odgovornosti držav, ki se osredotoča na strogo ločitev med lex specialis in splošnim mednarodnim pravom, služil kot zaželena praksa, pa je uporaba Konvencije o genocidu v primeru genocida v Bosni pokazala, da obe veji prava dejansko ne moreta biti strogo ločeni, ter nakazala tiste pravne ovire, s katerimi se je ICJ soočal pri uporabi te metodologije.

Povezava Konvencije o genocidu z odgovornostjo države za genocid je dvosmeren proces med splošnim mednarodnim pravom in mednarodnim pravom človekovih pravic. Medtem ko je bil namen uporabe splošnega mednarodnega prava opredeljenega v *Dunajski konvenciji o pravu mednarodnih pogodb* (v nadaljevanju Dunajska konvencija) in prava o odgovornosti države kot je zapisan v *Osnutku pravil o odgovornosti držav za mednarodna protipravna dejanja* (v nadaljevanju ARSIWA ali ILC členi) predvsem določiti ustrezen standard za pripis dejanja državi, pa so odgovori glede pristojnosti Meddržavnega sodišča, naklepa ali dokaznega bremena opredeljeni v osnovnih določilih Konvencije o genocidu. Naloga tako obravnava tudi vprašanje glede razlikovanja metod in pravil, ki veljajo pri tolmačenju 'običajnih' mednarodnih pogodb ter tistih metod in pravil, ki se uporabljajo za tolmačenje mednarodnih pogodb o človekovih pravicah, kot je Konvencija o genocidu. Le-to je vključevalo primerjalni pregled različnih mehanizmov mednarodnega prava.

[68] Podoben metodološki pristop, ki razlikuje med primarnimi in sekundarnimi pravili mednarodnega prava, je v svoji analizi mednarodne odgovornosti države uporabil tudi Marko Milanović (2006).

Poleg tega je bila analiza izvedena tudi iz zgodovinske perspektive, in sicer je prikazan razvoj pravnih norm na področju mednarodne odgovornosti države. Tako pripravljalna dela za ARSIWA in Konvencijo o genocidu, kot tudi zapuščina Mednarodnega vojaškega sodišča v Nürnbergu (IMT) sta pripomogla pri opredelitvi koncepta državne odgovornosti za zločin genocida. V okviru raziskovanja so bile uporabljene različne knjige, pravne ocene, članki in relevantna sodna praksa *ad hoc* sodišč.

10.3 Koncept odgovornosti države: razvoj doktrine

Pred nadaljnjim razmišljanjem glede obsega odgovornosti države za genocid v okviru Konvencije o genocidu, se drugo poglavje diplomske naloge posveča razvoju pravnega okvira, ki ureja področje mednarodne odgovornosti države. Suverena država, ki se je sčasoma razvila na podlagi post-Vestfalskega miru, je uživala neprimerljivo dominanten položaj na svetovnem prizorišču in se je kot pravni subjekt razlikovala od svojih državljanov. Vidik odgovornosti skozi prizmo principala in agenta (ang. »principal-agent«)[69] oziroma teorijo posrednika je morda naravna posledica, kot je to že pred desetletji predvidel Robert Ago, in je sedaj dejansko vpet v ILC člene sprejete v letu 2001. Člani ILC, ki so bili v pripravi petdeset let, ne poskušajo opredeliti »primarnih pravil«, katerim so države zavezane v skladu z mednarodnim pravom. Nasprotno, posvečajo se »sekundarnim pravilom«, ki nastopijo v trenutku, ko država stori mednarodno protipravno dejanje, in s tem prekrši primarna pravila (Milanović 2006, 553; Sancin 2007, 502; Türk 2007, 284–5).

ARSIWA se razhaja od predpostavke, da »vsako mednarodno protipravno dejanje s strani države pomeni mednarodno odgovornost te države« (ILC 2001a, 1. člen). Nujni predpogoj je obstoj mednarodne pravne obveznosti med državami, katero država prekrši z določenim dejanjem ali opustitvijo dejanja (prav tam, 2. člen). Dejanje ali opustitev dejanja države je kvalificirano kot mednarodni delikt v primeru, da sta izpolnjena dva pogoja. Določeno dejanje ali opustitev dejanja predstavlja kršitev mednarodnopravne norme, ali, kot je zapisano v ILC členih, »ni v skladu s tem, kar je zahtevano« v okviru mednarodne obveznosti (prav tam, 12. člen). Posledično mora obravnavana obveznost

[69] Teorija agenta izvira iz ekonomske teorije, a se pogosto uporablja za analizo razmerij med akterij v sferi politike. Teoretični pristop izhaja iz razmerja med principalom (naročnikom) in agentom (izvajalcem), pri čemer principal želi, da agent deluje v njegovem interesu (Padilla 2003, 4). V diplomski nalogi kot principala pojmujem državo, za agenta pa posamezne akterje oziroma izvajalce akta genocida.

državo zavezovati že v času ravnanja države, ki predstavlja kršitev mednarodne obveznosti. Poleg tega mora biti dejanje ali opustitev dejanja mogoče državi tudi pripisati (prav tam, 2. člen).

Pravna odgovornost države se tako sproži s protipravnim ravnanjem države preko njenih uradnih organov in predstavnikov, ki delujejo na podlagi navodil ali po usmeritvah države (Türk 2007, 284–5). V skladu s tem lahko neposredno odgovornost države za dejanja posameznikov pripišemo le v primeru, ko lahko slednje, iz enega ali drugega razloga, obravnavamo kot delovanje v imenu države. Na ta način so načela pripisljivosti in odgovornosti, zajeta v ILC členih, splošno gledano tesno povezana s konceptom principala in agenta. Z drugimi besedami, *de facto* ali *de jure* organi so glavne izjeme pri strogi delitvi javnega in zasebnega področja, kot ju opredeli ILC.

Ob upoštevanju dejstva, da je država pravno odgovorna le za svoja protipravna dejanja, je ravnanje zasebnega storilca posledično v celoti nepovezano z državo in zato ne more sprožiti njene odgovornosti. To pravno doktrino podpirajo tako ILC členi, kot tudi dolga zgodovina sodne prakse in se imenuje »teorija ločenega delikta« (Shelton 2005b, 62). Temelji na splošnem načelu ne-pripisovanja zasebnih dejanj državi, ki je, kot je prikazano zgoraj, implicitni del ARSIWA. Takšno dojemanje države, ki deluje preko svojih organov in ljudi, ki delujejo po njenem pooblastilu, kot glavnih nosilcih pravic, dolžnosti in odgovornosti, je pomembno vplivalo na mednarodni pravni sistem. Poudarja strogo ločitev med javno in zasebno sfero, ter se posledično izogiba nepotrebni regulaciji in nadzoru nad slednjo. Ob tem je potrebno opozoriti, da ta model države in njene odgovornosti ni bil vedno prevladujoč.

Razvoj v smeri teorije posrednika je bil postopen, vendar jasen. Identiteta vladarja in podanikov, ki je bila značilna v srednjem veku, je priporočala teorijo kolektivne odgovornosti (Hessbruegge 2004, 276–9). Tudi IMT je kljub svojemu uveljavljenemu stališču o individualni krivdi omogočal neke vrste kolektivno kaznovanje skupin ali organizacij. Kot izhaja iz sodbe Nürnberškega sodišča, so za hudodelske razglasili skupino visokih političnih voditeljev nacistične stranke, Gestapo, SA[70], SS[71] (Bavcon in drugi 1997, 64). Vendar pa je šel razvoj mednarodnega prava po drugi poti, in sicer, kot prikazujejo tudi ILC členi zgoraj, v smeri objektivne odgovornosti države. V skladu s

[70] Jurišni oddelki nacistične stranke.
[71] Zaščitni oddelki nacistične stranke.

tem razvojem doktrine posledica mednarodnega delikta države ni sankcija oziroma kazen, temveč odškodninska obveznost (Türk 2007, 281–2). Toda kljub temu, da je bila sčasoma določena meja med javno in zasebno sfero, so v času 19. in začetku 20. stoletja zasebna dejanja še vedno spodbudila narode k vojni. Dejanja države in dejanja njenih subjektov tako ostajajo medsebojno povezana. Teorija sostorilstva je države začela spodbujati k izpolnjevanju svojih mednarodnopravnih obveznosti, da ne bi bile vpletene v kazenska dejanja individualnega storilca.

Z vzpostavitvijo načel, ki naj bi se običajno nanašala na odgovornost države, diplomska naloga razpravlja ali bi se bilo potrebno na ta načela sklicevati v primerih genocida, kot primer genocida v Bosni. Tretje poglavje se tako podrobno posveča odgovornosti držav v okviru Konvencije o genocidu.

10.4 Koncept odgovornosti države v skladu z določili Konvencije o genocidu

Konvencija o genocidu ne zagotavlja natančnih določil glede obsega odgovornosti države in pripravljalna dela[72] Konvencije kažejo na dejstvo, da pripravljalci Konvencije nikoli niso dosegli skupnega dogovora glede obsega odgovornosti države. Posledično naj se Konvencija ne bi uporabljala za genocidna dejanja storjena s strani držav kot takšnih, temveč se osredotoča na genocid kot kaznivo dejanje posameznika in tako zahteva kazensko odgovornost posameznika.

Vendar pa besedilo Konvencije predstavlja nezadovoljiv kompromis, vključen v dveh členih, katerih ni enostavno uskladiti. IV. člen pravi: »Osebe, ki so zakrivile dejanje genocida ali kateregakoli od dejanj navedenih v III. členu, se mora kaznovati ne glede na to ali so ustavno odgovorni vladarji, javni uslužbenci ali pa posamezniki«. Čeprav ta določba namiguje, da odgovornost velja zgolj za fizične osebe, pa IX. člen, in sicer na podlagi podelitve pravnega pooblastila ICJ, narekuje, da se v skladu s Konvencijo lahko

[72] Na podlagi Dunajske konvencije o pravu mednarodnih pogodb, ko je običajni pomen jezika pogodbe dvoumen, se lahko opremo na »dopolnilno sredstvo pri razlagi, vključno s pripravljalnimi deli pogodbe in okoliščin njene sklenitve« (32. člen). V mednarodnem pravu je to pripravljalno delo, in sicer zakonodaja ali zgodovina priprave pogodb. Običajno se uporablja francoski izraz"*travaux préparatoires*." Garner (2009, 1638) opredeli pripravljalna dela kot »[m]ateriali, ki se uporabljajo pri pripravi končne oblike sporazuma ali statuta in zlasti mednarodne pogodbe».

zahteva odgovornost držav: »Spori med pogodbenimi članicami v zvezi z interpretacijo, uporabo ali izpolnjevanjem obravnavane Konvencije, vključno s spori, ki se nanašajo na vprašanje odgovornosti države za genocid ali kateregakoli od drugih dejanj navedenih v III. členu se predložijo Meddržavnemu sodišču na podlagi zahteve s strani katerekoli od strank v sporu«. Ta določba odpira zanimiva vprašanja v zvezi z *ratione materiae* pristojnostmi Meddržavnega sodišča, razsežnostjo uporabe Konvencije, kakor tudi z razsežnostjo same razlage obravnavanega načela.

Leta 1951 je ICJ v svojem svetovalnem mnenju *Pridržki glede Konvencije o preprečevanju in kaznovanju zločina genocida* (v nadaljevanju »Svetovalno mnenje 1951«) zapisal, da so »osnovna načela Konvencije tista načela, ki jih priznavajo civilizirani narodi, zavezujoča celo za države, katerih pogodbene obveznosti ne zavezujejo« (ICJ 1951, 23). Ta pomembna navedba se pogosto navaja kot pravno priznanje prepovedi genocida kot običajno-pravne norme, čeprav ICJ tega ne navaja neposredno. Kljub temu pa je to dokaz, da se lahko pri tolmačenju pogodb, kot je to storilo Sodišče, upošteva tudi druge vire mednarodnega prava.

Poleg mednarodnih pogodb 38. člen Statuta ICJ kot formalne vire mednarodnega prava priznava še sledeče: mednarodni običaji, splošna načela in sodne odločbe.[73] V teoriji hierarhija med temi poglavitnimi formalnimi viri mednarodnega prava sicer ne obstaja (Türk 2007, 53), vendar pa morajo v praksi mednarodni pravniki določiti, kateri vir bo prevladal v posamičnem primeru spora, kar je pokazal tudi primer genocida v Bosni.

V primeru genocida v Bosni je Sodišče vztrajalo pri svoji pristojnosti izključno na podlagi Konvencije o genocidu, v nasprotju s splošno pristojnostjo, ki se ukvarja z drugimi področji mednarodnega prava. Posledično je ICJ poudaril, da je v skladu s kompromisno klavzulo (IX. člen Konvencije o Genocidu) njegova stvarna pristojnost omejena na pritožbe za genocid, ne more pa razsojati o drugih mednarodnih pravnih

[73] 38. člen Rimskega statuta Meddržavnega sodišča je obravnavan kot najbolj veljavna izjava glede virov mednarodnega prava, med katerimi ni nobenega hierarhičnega zaporedja:

1. Sodišče, katerega naloga je odločati v skladu z mednarodnim pravom v sporih, ki se mu predložijo, naj uporablja:
   a) meddržavne dogovore, bodisi splošne bodisi posebne, s katerimi so postavljena pravila, ki jih države v sporu izrečno prepoznavajo,
   b) mednarodni običaj kot dokaz obče prakse, ki je sprejeta kot pravo,
   c) obča pravna načela, ki jih prepoznavajo civilizirani narodi,
   d) sodne odločbe, s pridržkom določbe 59. člena, in nauk najbolj kvalificiranih pravnih strokovnjakov različnih narodov, kot pomožno sredstvo za ugotavljanje pravnih pravil.

zločinih na področju človekovih pravic ali mednarodnega humanitarnega pravom (celo tipa *erga omnes* ali *jus cogens*), v kolikor slednji niso neposredno povezani s katerokoli določbo Konvencije (ICJ 2007a, § 147). Toda glede na splošen vidik, ki ga je ICJ zavzel glede razsežnosti tako kompromisne klavzule, kot tudi I. člena Konvencije, tega ne moremo percipirati kot odklonitev drugih virov mednarodnega prava, ki bi lahko podali pravno podlago za mednarodno odgovornost države za genocid. Nasprotno, zdi se kot opozorilo, da se IX. člen Konvencije o genocidu primarno nanaša na vsebino Konvencije, ter da se morajo katerikoli drugi viri mednarodnega prava obravnavati v okviru le-tega na podlagi natančne analize. Čeprav je izrecno navedeno, da naj bi bila sodba ICJ v primeru genocida v Bosni osnovana izključno na podlagi Konvencije o genocidu, pa pravna argumentacija Sodišča vsebuje nadaljnje implikacije o odgovornosti države za genocid, ki presegajo tako časovni, krajevni kot tudi normativni obseg obveznosti kot jih navaja Konvencija sprejeta leta 1948.

Pristojnost Meddržavnega sodišča je neposredno povezana s tolmačenjem, ki je implicirano v uporabi Konvencije. V primeru genocida v Bosni je Sodišče navedlo, da naj bi interpretiralo odgovornost države, kot jo navaja Konvencija o genocidu, v skladu z načeli Dunajske konvencije (prav tam, § 160). Ob upoštevanju tako splošnega pravila interpretacije, določenega v 31. členu, kakor tudi »dopolnilnih sredstev za interpretacijo« (32. člen Dunajske konvencije), lahko opredelimo splošno pravilo pri interpretaciji Konvencije o genocidu, in sicer, da mora Sodišče pri izvajanju določb Konvencije opredeliti okvir svoje operativne razlage Konvencije. Ta predpogoj pa postavlja vprašanje glede same metode interpretacije: objektivna, s poudarkom na razlogu za pogodbo (Sinclair 1984, 114–5); subjektivna, s poudarkom na namenu oblikovalcev Konvencije (Pavčnik 1998, 73); teleološka, s poudarkom na predmetu in cilju pogodbe (Shaw 2008, 479); ali pa dinamična, s preučevanjem pomena pogodbe in njenih ciljev glede na trenutno situacijo (ECtHR 2006, 5). Eden izmed ciljev te naloge je bil, ob upoštevanju obsega in bistva Konvencije, izpostaviti in objektivno oceniti metode interpretacije Konvencije o genocidu, katere je ICJ uporabil v primeru genocida v Bosni.

10.5 Odgovornost države za genocid: Analiza presoje ICJ glede primera genocida v Bosni

Trditev, da so države v okviru Konvencije o genocidu odgovorne za dopuščanje genocida, je bila pred ICJ izpostavljena v številnih primerih.[74] Takšni so jugoslovanski primeri, ki so bili pred Meddržavnem sodiščem predstavljeni v 1990-tih in kasneje primeri, ki jih vložila Demokratična republika Kongo proti Ruandi, Ugandi in Burundiju. Medtem ko je Sodišče slednje primer razglasilo za nedopustne, pa je bila razsodba iz leta 2007 glede primera genocida v Bosni prva pomembna rasodba na podlagi Konvencije o genocidu, izrečena s strani Meddržavnega sodišča. Srbija in Črna gora sta trdili, da Konvencija od odgovornih posameznikov na strani države zahteva zgolj preprečitev in kaznovanje dejanj zločina genocida, kot na primer izvajanje kazenskih določb ali sojenje in kaznovanje, ali izročitev storilcev. Razen tega pa naj, po mnenju obtoženega, ne bi bilo nobene druge mednarodne odgovornosti države za dejanja genocida kot takega (ICJ 2007a, § 176). Sankcioniranje genocida naj bi bilo tako stvar individualne kazenske odgovornosti (prav tam, § 156).

Toda Sodišče je to stališče zavrnilo, in sicer z razlago, da I. člen, ki zahteva, da državne oblasti preprečijo genocid in odgovorne posameznike privedejo pred sodišče, ni zgolj potrditev odgovornosti opredeljenih v nadaljnjih členih (prav tam, § 162), temveč ima svoj nadzorni vidik, ki prav tako državam prepoveduje zagrešitev genocida s pomočjo svojih organov (prav tam, § 166). Sodišče je dodatno pojasnilo: »... pogodbenice so na podlagi odgovornosti, ki izhajajo iz Konvencije, zavezane, da preko svojih organov, posameznikov ali skupin, katerih ravnanje se jim lahko pripiše, ne bodo izvršile genocida in drugih dejanj opredeljenih v III. členu« (prav tam, § 179). Ob upoštevanju navedbe IX. člena, ki se glasi: »vključno s tistimi [spori], ki se nanašajo na odgovornost države za genocid ali za katerokoli drugo dejanje navedeno v III. členu«, je zelo jasno, da je ICJ slednji člen, ki je navsezadnje opredelil njegovo pristojnost v primeru, interpretiral dobesedno. V skladu z navedbo Sodišča je »uporaba besede »vključno« pomenila naklonjenost potrditvi, da je odgovornost države vključena v širšo skupino razprav glede interpretacije, uporabe ali izpolnjevanja Konvencije« (prav tam, § 161).

[74] Leta 1973 je bil s strani Pakistana na ICJ vložen prvi primer v zvezi s kršitvijo. V postopku proti Indiji pa ni šlo za vprašanje ali je bila Indija odgovorna za genocid, temveč le za vprašanje ali je bila premestitev domnevnih storilcev v Bangladeš za namen sojenja v nasprotju s Konvencijo o genocidu (Schabas 2009, 499–502).

Po mnenju Sodišča naj bi odgovornost preprečevanja genocida hkrati pomenila prepoved izvršitve tega kaznivega dejanja. Ta prepoved pa vključuje tudi prepoved zarote, neposredno in javno pozivanje k storitvi genocida ter poskusa in udeležbe v genocidu (prav tam, § 167). Takšen pristop se nanaša na koncept, katerega je Sodišče uporabilo že v svojem Svetovalnem mnenju 1951, kjer je poudarilo »humanitarni in civilizirajoči namen« Konvencije, in katerega je potrebno upoštevati pri razlagi (ICJ 1951, 23). V sodbi leta 2007 je takšno razmišljanje Sodišče vodilo k splošni obravnavi odgovornosti navedenih v okviru Konvencije (ICJ 2007a, § 373). Vendar pa metoda interpretacije dejansko ni v celoti objektivna, kajti subjektivna mnenja, zlasti z uporabo ocene pripravljalnih del za Konvencijo o genocidu, so nedvomno igrala pomembno vlogo pri pravni argumentaciji Sodišča, poleg tega pa je ICJ, v okviru svoje analize I. člena Konvencije o genocidu, uporabil tudi teleološki pristop. Izpostavljena sta bila cilj in namen Konvencije (prav tam, § 167) ter sklicevanje na kontekst in namen Konvencije kot celote (prav tam, § 175). Naj povzamem, čeprav je besedilo določb Konvencije služilo kot osnova za razlago, pa sta cilj in namen pogodbe prevladala nad striktno dobesedno razlago. Poleg tega je, sklicujoč se na trenutni kontekst Konvencije (prav tam, § 169), Sodišče sprožilo nekaj zelo podobnega dinamičnemu pristopu.

Dandanes si nihče ne bi upal zanikati, da obče mednarodno pravo vsebuje pravilo, ki državam prepoveduje zagrešitev zločina genocida. Poleg tega na splošno velja prepričanje, da takšno pravilo spada v *jus cogens* (Bassiouni 1996, 270; Bavcon in drugi 1997, 95; ICJ 2007a §§ 161–2). Nadalje velja prepričanje, da takšna kršitev povzroči posledice, ki presegajo posledice navadnih nezakonitih dejanj. Ob tem se postavlja zanimivo vprašanje z vidika razmerja med odgovornostjo države in kazensko odgovornostjo posameznika v mednarodnem pravu, in sicer če Konvencija o genocidu dejansko zavezuje tudi same države, da ne zakrivijo genocida.

10.6 Povezava odgovornosti države in kazenske odgovornosti posameznika v mednarodnem pravu

Pričujoče delo je pokazalo, da ne glede na natančen obseg in naravo odgovornosti države, danes obstaja rastoče prepričanje, da država nosi odgovornost za genocid. S tega stališča je individualna kazenska odgovornost pomemben, vendar ne edini vidik uveljavljanja mednarodnega prava. Dopolnjuje ga mednarodna odgovornost države,

koncept, ki je dejansko starejši od nedavnega pospešenega razvoja mednarodnega kazenskega prava. V času ustanovitve IMT v Nürnbergu je bil obstoj odgovornosti države več ali manj trdno uveljavljen. Sloviti razglas IMT, da »/h/udodelstva proti človečnosti zagrešijo ljudje, ne abstraktne entitete" (IMT 1946, 41), naj bi pojasnil, da so posamezniki lahko odgovorni, kljub temu, da se je mednarodno pravo takrat prvenstveno ukvarjalo z dolžnostmi države. Vseeno pa IMT ni nameravalo negirati odgovornosti države (Dupuy v Cassese in drugi 2002, 1086; Nollkaemper 2003, 625; ICJ 2007a, § 172).

ICJ se je v primeru genocida v Bosni, razlikujoč med individualno kazensko odgovornostjo in odgovornostjo države, skliceval na koncept »dvojne odgovornosti« (ICJ 2007a, § 173). Dvojni obstoj odgovornosti države in individualne kazenske odgovornosti so priznala tudi mednarodna kazenska sodišča. Mednarodno kazensko sodišče za območje nekdanje Jugoslavije (ICTY) je v svoji sodbi v primeru *Furundžija* pojasnil: »Pod obstoječim mednarodnim humanitarnim pravom lahko, poleg individualne kazenske odgovornosti, odgovornost države izhaja kot posledica tega, da uradniki države sodelujejo pri mučenju oziroma ne preprečijo oziroma kaznujejo mučenja« (ICTY 1998, § 142).

25. člen (4) Rimskega statuta pojasnjuje, da nobena izmed določb statuta, ki se nanašajo na individualno kazensko odgovornost, ne vpliva na odgovornost držav pod mednarodnim pravom. Po drugi strani, 58. člen ARSIWA potrjuje, da so členi brez škode za katerokoli vprašanje glede individualne odgovornosti pod mednarodnim pravom (ILC 2001b, 363–5). Obe določbi poudarjata avtonomnost vsake izmed obeh oblik odgovornosti.

Oba koncepta sta osnovana na istem temeljnem materialnem pravilu: prepovedi genocida. To je razlog, zakaj sta individualna kazenska odgovornost in odgovornost države v sorodu ter se do neke mere prekrivata (Nollkaemper 2003, 615–40). Obe zahtevata kršitev mednarodnega prava, zatorej obstajajo dobri razlogi za osnovanje obeh konceptov na poenoteni definiciji genocida kot materialnem bistvu. Vendar, medtem ko mednarodno kazensko pravo zahteva, da tovrstna kršitev prinese individualno kazensko odgovornost, koncept odgovornosti države sledi svojim lastnim pravilom pripisovanja in reparacije. Odgovornost države ni odvisna od kazenske odgovornosti (Gaeta 2007, 628). Za razliko od mednarodnega kazenskega prava, tradicionalno pravo odgovornosti države nima za cilj kaznovati državo, temveč

primarno poskrbeti za reparacijo (Bohinc in drugi 2006, 133; Ignjatović 1991, 106; Dupuy v Cassese drugi 2002, 1097; Nollkaemper 2003; 620; Sancin 2007, 502).[75] Razlika v namenu upravičuje avtonomna pravila, ki regulirajo različne oblike odgovornosti (Cassese, 2007, 875).[76] Pravila o potrebnih predpogojih za odgovornost ter o pravnih posledicah so zatorej različna (Nollkaemper 2003, 627). To se nanaša tudi na postopek ugotavljanja odgovornosti (Dupuy v Cassese in drugi 2002, 1097). Na primer, merilo dokaza je ponavadi višje za kazensko obsodbo kot za ugotovitev odgovornosti države (Gaeta 2007, 646; Nollkaemper 2003, 630). Čeprav genocid vključuje hudo obliko odgovornosti države in zatorej zahteva dokončen dokaz, je vprašljivo, ali naj se uporabi strog kazenskopravni standard 'onkraj razumnega dvoma' (Bavcon in drugi 2009, 142; Shapiro 2001, 22). To lahko vodi k pretirano visokemu pragu za ugotavljanje odgovornosti države.

Kljub temu, da je bila, kot pojasni drugo poglavje, določena meja med zasebnim in javnim področjem, so tekom 19. in zgodnjega 20. stoletja zasebna dejanja še vedno pognala narode v vojno. Teroristična dejanja, na primer dogodki 11. septembra, kot tudi dejanja genocida, ki so jih izvajali vojaki Republike Srbske (VRS), služijo kot dober primer. Dejanja države in dejanja njenih podanikov ostajajo med seboj povezana, tako da, medtem ko 'teorija ločenega delikta' oziroma 'dvojna odgovornost' odražata ločena pravna pravila na katerih sta osnovani individualna odgovornost in odgovornost države, sodobni izzivi zasebnega nasilja morda zahtevajo režim odgovornosti, ki odraža resničnost povezanosti različnih akterjev po svetu. Strogo ločenost kazenske odgovornosti posameznika na eni strani in odgovornosti države na drugi bi bilo posledično morda težko ohraniti. Ta neskladnost med teorijo in prakso, z namenom boljšega razumevanja pravnih in konceptualnih pomanjkljivosti obstoječih pristopov, je v jedru analize podpoglavja 5.2.

[75] Nollkaemper (2003, 625−6) trdi, da huda odgovornost lahko zahteva iti prek reparacije, da se prepreči ponovitev. Reparacija lahko vključuje celo kazensko odškodnino, z namenom odvračanja ponovitve (Shelton 2005b, 103).

[76] Dupuy (v Cassese in drugi 2002, 1094−9) navaja dve različni vrsti odgovornosti, ki spadata pod vzajemno avtonomna pravna režima. Glej tudi Gaeta (2007, 637), ki trdi, da sta obe obliki odgovornosti različni po naravi.

10.6.1 Razsodba sodišča glede pripisovanja odgovornosti države: model posredovanja

V podpoglavju 2.1 je bilo zatrjeno, da se lahko dejanje ali opustitev obravnava kot ravnanje države preko delovanja načel pripisovanja. Konceptualno le-ta zajemajo sistem pravne odgovornosti, ki je v precejšnji meri osnovan na tem, kar smo oklicali za model principala in agenta. Po utemeljitvi teh načel, za katera se v splošnem privzema, da veljajo pri dejanjih individualnih storilcev, smo zatem preučili, kako se je Meddržavno sodišče zanašalo na ta načela pri odgovornosti države v primeru genocida v Bosni. Poleg tega je bilo potrebno preučiti, ali omejevanje tovrstne odgovornosti na zgolj protipravno ravnanje akterjev, ki se jih lahko obravnava kot zastopnike države, ustrezno pojasnjuje zapleteno naravo interakcij med državo in ne-državnimi individualnimi (genocidnimi) akterji.

V svoji analizi odgovornosti tožene stranke za izvršitev genocida je Sodišče razvilo visok prag v primeru genocida v Bosni. Najprej je preučilo, ali so genocid izvršili vodilni storilci, zatem pa vprašalo, ali se ga lahko pripiše državi. Sodišče se je jasno osredotočilo predvsem na ravnanje najbližjih storilcev. Oblikovalo je visok prag za genocidni namen, zahtevajoč prepričljiv prikaz namena, za katerega vzorec ravnanja ni zadoščal (ICJ 2007a, § 373).

Le pokol v Srebrenici je zadostil temu pogoju, toda čeprav je bil označen za genocid (prav tam, § 297), je Sodišče zanikalo odgovornost FRY iz sledečih razlogov. FRY ni sodelovala v pokolu, prav tako pa se toženi stranki ne more pripisati ravnanje Republike Srbske ali VRS, saj slednji nista bili niti *de jure* niti *de facto* organa FRY (prav tam, § 395).

Sodišče je priznalo, da je FRY dala na voljo »znatno vojaško in finančno podporo Republiki Srbski« ter da bi »v kolikor bi umaknila to podporo, znatno omejila možnosti, ki so bile na voljo oblastem Republike Srbske« (prav tam, § 241). Kljub temu vzročnemu odnosu pa Republika Srbska in VRS nista bili *de jure* organa FRY, kot jih določa notranje pravo FRY (prav tam, § 386), tako da je Sodišče izhajalo iz mednarodnega prava pripisovanja za določitev, ali je obstajal *de facto* odnos.

Poglavitno vprašanje, s katerim se v tem oziru ukvarjajo pravniki, se ne nanaša na samo načelo, temveč na naravo povezave, katero jo je potrebno ugotoviti, da se dejanja zasebnih posameznikov prelevijo v dejanja *de facto* zastopnikov države. Preko

aplikacije prakse sodišča iz primera *Nicaragua* na konflikt v nekdanji Jugoslaviji, je ICJ uporabil enak kriterij kontrole kot v primeru *Nicaragua*, ter potrdil svojo razsodbo iz tega primera, da pripisovanje ravnanja tretje strani (ne-državnega akterja) zahteva »dejanski nadzor« operacije s strani države nad vsemi ne-državnimi silami »na vseh področjih« (prav tam, §§ 109–15).[77] Na osnovi tega preizkusa je Sodišče zaključilo, da VRS ni mogoče označiti za *de facto* organ FRY, ker ni bila v odnosu »popolne odvisnosti«, niti ni bila »le orodje« FRY (prav tam, § 392). Z drugimi besedami, ravnanje VRS ni bilo niti usmerjeno niti nadzorovano s strani tožene stranke. Čeprav ključna za genocidno kampanjo, finančna podpora, ki jo je prejela FRY, ni zadoščala za namene pripisovanja (prav tam, § 388). Z drugimi besedami, čeprav so bili pokoli v Srebrenici označeni za genocid (prav tam, § 297) in je FRY znatno prispevala k tem pokolom,[78] država v skladu s Konvencijo še vedno ni odgovorna.

S to smerjo analize je ICJ v primeru genocida v Bosni neizogibno razvilo preizkus odgovornosti države, ki tesno sledi standardom kazenskega prava. Kot nakazano zgoraj, je bilo uporabljeno merilo dokaza tako zahtevno kot v kazenskem postopku, z namenom, da odraža izjemno resnost domneve (prav tam, § 181). Uporabljajoč standard onkraj razumnega dvoma, ki očitno izhaja iz mednarodnega kazenskega prava, Sodišče ni sledilo standardom pogodb o človekovih pravicah, ki odgovornost države raje obravnavajo na osnovi standarda brezbrižnosti. Vredno omembe je, da Sodišče, ki se je zanašalo na svojo sodno prakso iz primera *Nicaragua*, ni sledilo metodi dinamičnega tolmačenja, ki bi predlagala upoštevanje dandanašnje med-prežemanje javnih in zasebnih sfer za delujoči model odgovornosti države. Ključni problem pri zanašanju na »popolni nadzor« je, da je zelo težko dokazati odgovornost države za ne-državne akterje, ter da morda ni primeren za razpoloženje 21. stoletja, kjer imajo zasebni akterji lahko moč podobno državam.

Zaključek Sodišča nudi sodobno avtoriteto za predpostavko, da je obstoj odnosa delovanja med državo in ne-državnim akterjem ključen za določitev obsega

[77] Čeprav je Sodišče priznalo, da je bila pomoč ZDA »ključna za izvajanje dejavnosti pripadnikov Kontre,« ta podpora »ni zadoščala za prikaz njihove popolne odvisnosti od pomoči Združenih držav« (prav tam, § 110; poudarek dodan). Sodišče na koncu ni hotelo naložiti odgovornosti, čeprav je bilo jasno, do so bile sile Kontra »vsaj na eni točki … tako odvisne od Združenih držav, da niso mogle izvajati svojih ključnih oziroma najbolj pomembnih vojaških in paravojaških dejavnosti brez večplastne podpore Združenih držav« (prav tam., § 111).

[78] »Sodišče je ugotovilo, da je tožena stranka tako dala svojo znatno vojaško in finančno podporo na voljo Republiki Srbski, ter da, v kolikor bi umaknila to podporo, bi s tem bi znatno omejila možnosti, ki so bile na voljo oblastem Republike Srbske« (prav tam, § 241).

odgovornosti države. Ob pomanjkanju tovrstnega odnosa je država lahko odgovorna za svoje lastne kršitve, vendar ne za samo zasebno ravnanje. Rezultat je, da se združi načela pripisovanja in načela odgovornosti z uporabo *de facto* izjeme delovanja in omeji odgovornost, ki jo lahko pritegne protipravno ravnanje države. Slednje hkrati potrjuje, da so primarna in sekundarna pravna pravila med seboj povezana, oziroma, kot pravo Pavčnik (1999, 278), se med seboj dograjujejo in nadgrajujejo.

10.6.2 Mentalni pogoj oziroma *Mens Rea* za odgovornost države za genocid

Po analizi odnosa med odgovornostjo države in individualno kazensko odgovornostjo sem se nato posvetila vprašanju, ki je verjetno najbolj specifičen za genocid, namreč, ali gre za hudodelstvo, ki se ga lahko loči od drugih mednarodnih hudodelstev le po določnem, genocidnem namenu uničiti zaščiteno skupino kot tako, v celoti ali delno (Bavcon in drugi 1997, 95; Wald 2007, 623). Ta mentalni pogoj je del temeljne norme in zaradi tega postane relevanten za določitev odgovornosti države. Torej, če je država lahko dogovorna za genocid, kako naj postopamo pri prispevanju genocidnega namena državi? Ima država sploh lahko namen in kaj pomeni, da država ima ali nima namena?

Da lahko uporabimo definicijo genocida po II. členu Konvencije o genocidu, je potrebno ugotoviti, če so bila grozodejstva storjena z »določenim naklepom« (*dolus specialis*). Medtem ko kršitve človekovih pravic ponavadi ne zahtevajo specifičnega mentalnega namena (ILC 1993, 25), je zadeva pri genocidu vsekakor drugačna (Dupuy v Cassese *in* drugi 2002, 1095). Vprašanje, ali je pogoj 'mentalnega namena' za pripisovanje dejanj genocida državi isti pogoju 'mentalnega namena', uporabljen v primerih kazenske odgovornosti, ostaja. Potrditev le-tega bi pomenilo domnevanje, da sta kazenska odgovornost in odgovornost države pod Konvencijo o genocidu po naravi identični. To bi, kot ugotovljeno v podpoglavju 2.4, pomenilo napačno razumevanje tako načela kazenske odgovornosti kot tudi odgovornosti države. Oziroma, kot izpostavi Ainley (v Perry 2006, 144), nič v kazenskem pravu nam ne dopušča, da si predstavljamo, da države posedujejo *mens rea*, saj gre za psihološko lastnost, ki jo lahko poseduje le zastopnik z umom.

Kljub temu, tudi ob upoštevanju pogleda Gaeta (2007, 642), da je državi prepovedano izvrševanje genocida pod običajnim mednarodnim pravom, vendar ne pod Konvencijo o genocidu, pride do istega vprašanja namena. Ob zanikanju pogoja določenega namena

za odgovornost države ne bi bilo odgovornosti države za genocid v običajnem pravu. In ker tovrstna odgovornost obstaja, pogoj namena ne bi smel predstavljati ovire. Ker je za katerikoli subjekt dolžnosti pod Konvencijo, vključno z državo, zahtevan mentalni element oziroma genocidni namen, se poraja vprašanje, s katero metodo naj bi se to določilo. Drugače rečeno, kaj se skriva za *dolus specialis*, ko govorimo o odgovornosti države za genocid?

Tako Mednarodna preiskovalna Komisija za Darfur (Komisija za Darfur) kot tudi ICJ sta iskala *dolus specialis* države, kot na primer Sudana, oziroma državi-slične entitete, kot na primer bosanski Srbi. Vendar pa države nimajo določenega naklepa. Slednjega imajo zgolj posamezniki. Države imajo po drugi strani politiko. Izraz genocidni naklep se uporablja za opis iskanega dokaza, vendar je njegov dejanski predmet državna politika. Zdi se predstavljivo, celo precej verjetno, da v kampanji etničnega čiščenja, ki se izvaja v velikem obsegu na ukaz države, obstajajo posamezniki, ki jih rasno sovraštvo tako prevzame, da bi želeli fizično iztrebiti preganjano skupino. Z drugimi besedami, dejanja, katerih namen ni genociden, lahko izvršijo skupine posameznikov, med katerimi jih nekaj ima genocidni naklep. Zelo očitno je, da ko so vprašana, ali so bila izvršena dejanja genocida, telesa kot so Komisija za Darfur in ICJ ne iščejo oziroma naj ne bi iskala teh marginalnih posameznikov. Namesto tega se usmerijo (naj bi se usmerila) na politiko.

Odnos med odgovornostjo države in individualno kazensko odgovornostjo predstavlja pomembno pravno zadrego. Komisija za Darfur in ICJ se tega očitno lotevata prek koncepta, da država lahko ima genocidni namen. Morda bi bilo bolj plodno obrniti to logiko okoli. Namesto neosebnega in neizpolnjujočega poizkusa vsiliti koncepte, ki spadajo k individualni kazenski odgovornosti, na obnašanje države, bi bilo bolje vzeti državno politiko kot osnovo in poskusiti slednjo uporabiti pri individualni krivdi. Ostajajoč pri tem pristopu, bi bilo prvo vprašanje, ki bi ga bilo potrebno razrešiti pri ugotavljanju ali se izvršuje genocid, ali obstaja državna politika. Če je odgovor da, se preiskava nato premakne na posameznika, pri čemer ključno vprašanje ni posameznikov naklep, temveč njegovo ali njeno poznavanje politike. Do individualnega naklepa vseeno pride, ker imajo specifična dejanja genocida, kot je ubijanje, svoj lastni psihološki element, vendar je, kar se tiče načrta oziroma politike, *znanje* ključ do kriminalitete (Schabas 2008b, 971; poudarek dodan).

Pomemben problem, ki ga ta dinamični pristop pomaga razrešiti, je možnost različnih izidov kar se tiče odgovornosti države in individualne kazenske odgovornosti, hkrati pa pomaga tudi pri naslavljanju druge zadrege, ki je begala sodnike in mednarodna sodišča: sostorilstvo pri genocidu. Sostorilstvo se je naslavljalo z obsojanjem tistih, ki sodelujejo pri izvrševanju hudodelstva do te mere, da se obtoženi povsem zaveda naklepa storilca (ICTY 2004a*,* §§ 119–24). Še enkrat, ni preveč praktično pričakovati od enega posameznika, da ve naklep drugega, zlasti ko se preučuje specifični namen. Celo sodišča le domnevajo naklep iz storilčevega obnašanja. Ko je vprašanje, ali je sostorilec vedel za politiko, je preiskava daleč bolj logična in povezana. General Krstić je bil obsojen sostorilstva, ker je pritožbeni senat bil mnenja, da se je zavedal politike, za katero si je prizadeval General Mladić, ne ker je senat verjel, da je Krstić prebral Mladićeve misli in se zavedal njegovega genocidnega naklepa (ICTY 2004b, § 87). Podobno je ICJ ugotovil v splošnem, da ni materialne razlike med sostorilstvom pri genocidu ter pomoči in podpori pod 16. členom ARSIWA (ICJ 2007a, § 151). Ugotovilo je, da z ozirom na dogodke v Srebrenici, ni bilo dokazano, da je Srbija posedovala vedenje, da se bo priskrbljena pomoč uporabila za izvrševanje genocida (prav tam, §§ 422–3).

To resda vključuje obširen premislek definicije genocida. Pri branju definicije, sprejete leta 1948 s Konvencijo o genocidu, obsega dojemanje komponente, ki je tam v najboljšem primeru le nakazana. Z vidika tolmačenja pogodbe ni v tem nič nesprejemljivega. Morda ni podkrepljena s sklicevanjem na *travaux préparatoires*, vendar, kot je zabeležil sodnik Shahabuddeen s pritožbenega senata ICTY v svojem nasprotujočem mnenju v *Krstić*, se ne sme polagati preveč zaupanja v zgodovino osnutkov (prav tam, § 52). Potrditev pomembnosti državnega načrta ali politike kot komponente hudodelstva genocida ima številne prednosti kar se tiče konsistentnosti in sodne politike. Slednji pristop hkrati potrjuje dejstvo, da je dejanje genocida v mednarodnem pravu obenem naslovljeno na posameznike in na države (Bavcon in drugi 1997, 63). Vendar pa je hkrati kazenska odgovornost vedno individualna, in vsakemu storilcu in udeležencu se presoja samostojno (Bohinc in drugi 2006, 321).

Drugi dejavniki znotraj razvijajoče se discipline mednarodnega kazenskega prava prav tako zagovarjajo obnovitev vloge državne politike kot elementa mednarodnih hudodelstev. Rimski statut Mednarodnega kazenskega sodišča (ICC) ter Elementi

hudodelstev, ki dopolnjujejo njegovo tolmačenje, predlagajo vlogo državne politike, ki je nekoliko okrepljena s primerjavo s sodno prakso *ad hoc* sodišč. Poleg tega bi ob rastoči osredotočenosti na »resnost« kot preizkus za določitev primerov, ki so vredni pozornosti mednarodnih sodišč, pogoj državne politike lahko bil uporaben pri določanju, ali se je zgodil genocid (Schabas 2008b, 955). Ko je pomembna doktrina 'skupnega kriminalnega delovanja' uporabljena v tako imenovanih velikih primerih, element državne politike postane odločilen. Skupni kriminalni podvig se v mednarodnem kazenskem pravu uporablja za opis tega, kar je bolje znano državnim pravosodnim sistemom kot sostorilstvo s skupnim namenom (Fiori 2007, 61). Morda še najbolj zanimivo, pogoj državne politike za določena mednarodna hudodelstva, predvsem genocid in hudodelstva proti človečnosti, spodbuja usklajevanje vidikov individualne kazenske odgovornosti z vidiki odgovornosti držav.

Nadalje, Elementi hudodelstev, ki jih je sprejela Skupščina držav članic ICC septembra 2002, vključuje sledeči element genocida: »Ravnanje se je zgodilo v okviru manifestnega vzorca podobnega ravnanja, usmerjenega proti tej skupini, oziroma je bilo ravnanje, ki bi lahko samo povzročilo tako uničenje« (6. člen (a)). Elementi se ognejo besedama načrt ali politika in raje zahtevajo »manifestni vzorec podobnega ravnanja«, vendar se kakršnakoli razlika med izrazoma zdi predvsem semantična. Presenetljivo, pritožbeni senat ICTY sploh ni upošteval, niti v *Jelišić* niti v *Kunarac*, tega precej prepričljivega dokaza o obstoju *opinio juris* za prisotnost komponente državne politike z ozirom na genocid ter, po analogiji, s hudodelstvi proti človečnosti. V kasnejših sodbah je pritožbeni senat opazil, da definicija genocida, sprejeta v Elementih hudodelstev, »ni odražala običajnega prava, kot je obstajalo v času, ko je Krstić izvršil svoja hudodelstva« (ICTY 2004b, § 224).

10.7 Dolžnost preprečevanja genocida in nejasni obrisi

Raziskovanje pri pisanju tega dela je nakazalo, da je tekom raznih stopenj primera genocida v Bosni ICJ preobrazil dolžnost preprečevanja iz praznega koncepta v materialno pravno dolžnost. Izhajajoč iz hermenevtične drže, ki jo je zagovarjalo v svojem Svetovalnem mnenju leta 1951, je Sodišče uporabilo teleološko interpretacijo za široko tolmačenje I. člena in zavrnilo pogled, da je poglavitna naloga Konvencije kaznovanje namesto preprečevanja. Priznalo je pravno naravo dolžnosti preprečevanja,

tolmačilo njen obseg *rationae loci* in *rationae personae* na razsežen način, oblikovan z namenom podpreti univerzalnost dejanja, ki je potrebno za zadoščenje ciljev Konvencije, ter razjasnilo svojo normativno vsebino s specificiranjem določenih parametrov za ugotavljanje, ali se je ravnalo po njej ali ne. Iz tega pa ne sledi, da je dolžnost preprečevanja od tedaj brez nejasnosti.

Prvič, zdi se, da obstaja nekonsistentnost med določitvijo dolžnosti preprečevanja kot dolžnosti ravnanja namesto dolžnosti izida, ter njenim obsegom *ratione temporis*. Ugotovitev, da »država, ki ni ukrepala, ko bi lahko, ne more biti odgovorna *a posteriori*« (ICJ 2007a, § 431), se zdi bolj skladna z dolžnostjo osnovano na izidu, kot pa na ravnanju.

Drugič, razlika med 'sostorilstvom' in 'neizvedbi preprečevanja' se zdi težavna. Meja med zavedanjem, da se je genocid dogajal ali da se bo dogodil (pogoj za sostorilstvo) ter zavedanjem, da obstaja resna nevarnost genocida (pogoj za dolžnost preprečevanja), je daleč pretanka. To je poudarjeno tudi v poročilih Komisije za Darfur, ki je ugotovila, da je bila sudanska vlada v znatni meri vpletena v hudodelstva, ki so jih izvršile milice, ter da višji sudanski uradniki niso preprečili hudodelstev, storjenih v Darfurju, vključno z 'zasebnimi hudodelstvi', ki so jih ali izvršili ali v njih privolili (Komisija za Darfur 2005, § 253, § 315, § 422). V luči teh spoznanj se zdi praktično nemogoče ugotoviti ali je vlada odgovorna za kršitev svoje dolžnosti preprečevanja ali za sostorilstvo (prav tam, § 644). Nadalje, kolikor domači kazenski pravosodni sistemi priznajo, da se odgovornost za sostorilstvo lahko priključi opustitvi, in kolikor je prag odgovornosti za opustitev v splošnem višji kot za ravnanje, sklep Sodišča o razliki ni niti jasen, niti podprt s prakso (ICJ 2007b, 2007c, 2007e; Toufayan 2005, 255–6; Quigley 2006, 135).

Kot obravnavano v tem delu, je po mnenju sodišča odgovornost ne izvršiti hudodelstva kršena, ko državni uradnik ali kateri koli drugi posameznik, katerega dejanja se lahko pripiše državi, izvrši dejanje genocida ali katerokoli drugo dejanje, navedeno v III. členu Konvencije o genocidu (ICJ 2007a, § 179). V tem primeru »nima smisla spraševati, ali je /ta država/ ravnala v skladu s svojo dolžnostjo preprečevanja v oziru na ta ista dejanja, saj logika narekuje, da država ni mogla zadostiti dolžnosti preprečevanja genocida, v katerem je dejavno sodelovala« (prav tam, §§ 382–3).

Ne zdi se niti razvidno samo po sebi niti logično trditi, kot je Sodišče, da odgovornost za preprečevanje genocida, dolžnost ravnanja kot je, »neizogibno kaže na« odgovornost

ne izvršiti ga. Ravno nasprotno, edino logično je trditi, da je to ravnanje neizogibno protipravno, ko so na neke subjekte vsiljena pravila za preprečitev izvršitve določenega ravnanja. Dolžnost preprečevanja pojavljanja določenega ravnanja je dejansko pokazatelj obstoja pravila, ki to ravnanje izrecno prepoveduje, oziroma, kot izpostavi Gaeta (2007, 639), nudi dodatno varovalo za pravilo, ki prepoveduje to ravnanje.

Vendar pa pomanjkljivosti v pravni argumentaciji Sodišča, ki ima lahko daljnosežne posledice za tolmačenje odgovornosti države za genocid, ne smejo zmanjševati pomembnosti njegove odločitve v splošnem. Kljub osredotočenosti na kazensko pravo, je imelo Sodišče prav, ko je določilo, da gre odgovornost države za genocid onkraj kriminalizacije in kaznovanja. To delo zagovarja, da bi Sodišče lahko prišlo do istega sklepa prek precej bolj dinamičnega pristopa h Konvenciji, ter obravnavalo dokument in predvsem negativno dolžnost ne »izvršiti genocid« z vidika človekovih pravic, ne kot kazenskopravni pojem.

10.8 Konvencija o genocidu kot mehanizem za človekove pravice

Ob upoštevanju »humanitarnega in civilizirajočega namena« Konvencije o genocidu je zadostno primarno strukturirati glavne zadolžitve državnih oblasti. Obveznost preprečevanja pod I. členom je podobno dolžnosti spoštovanja in zagotavljanja pod vseobsegajočimi pogodbami o človekovih pravicah. Kakršnakoli vpletenost v genocid mora biti zavrnjena. V tej luči je dolžnost držav pod Konvencijo o genocidu mnogo širša kot le zaveza ne vršiti genocida prek svojih oblasti ali posameznikov kot *de facto* ali *de jure* teles. Dolžnost preprečevanja – ki v I. členu stoji ob dolžnosti kaznovanja – zahteva, da državne oblasti ne sodelujejo (kot dolžnost 'spoštovati' v 2. členu (1) ICCPR), ter da aktivno varujejo pred genocidom (kot dolžnost 'zagotavljati' v 2. členu (1) ICCPR).

V kolikor bi Meddržavno sodišče oblikovalo obveznosti državnih oblasti iz Konvencije o genocidu na ta način, bi se lahko izognilo veliko kritikam. Ta predlog se ogne terminologiji kazenskega prava in razjasni, pod vprašajem niso hudodelstva držav, temveč *varstvo človekovih pravic*. S to razlago se I. člen v bistvu lahko tolmači samostojno, brez potrebe po navezovanju na kazenskopravne kategorije III. člena. Sodišče bi lahko privzelo bolj prefinjeno presojo primera, namesto da se je osredotočilo na izvršitev, zaroto in sostorilstvo. Dojemanje Konvencije o genocidu kot pogodbe o

človekovih pravicah nudi možnost za realizacijo odgovornosti državnih oblasti pod ravnjo tako resnih obtožb.

Razlog, zaradi katerega se je ICJ omejil na preučitev, ali je tožena stranka izvršila ali sodelovala pri avtorizaciji genocida, je bil verjetno izid dogovora. Priznalo je, da je država lahko odgovorna za genocid, vendar le z ozirom na najbolj ekstremne kršitve: izvršitev in sodelovanje. Izven tega se je ukvarjalo le z odgovornostjo Srbije za odsotnost fizične intervencije.[79] Ni pa nadalje obravnavalo dolžnost FRY za njeno znatno politično, vojaško in finančno pomoč bosanskim Srbom, ki je potekala celo v času izvajanja pokola v Srebrenici.

Dolžnost preprečevanja, kot se nanaša na državne oblasti, je bolje razumeti kot dolžnost ne-vpletanja in varovanja. Najprej, vprašanje, ali država lahko stori genocid, je nejasno. Ponavadi predpostavlja izvršitev kaznivega dejanja in iz tega razloga posreduje napačno implikacijo. Nasprotno je vprašanje, ki se poraja pod Konvencijo, ali je država odgovorna za neupoštevanje prepovedi genocida. I. člen Konvencije zahteva od državnih oblasti, da se odvrnejo od kakršnegakoli sodelovanja v genocidu, ter da skrbno pazijo, da nikakor ne prispevajo k genocidu.[80] Gledano s tega stališča ima odgovornost države za genocid merilo ločeno od kazenske odgovornosti. Nadalje, ne zahteva visoke stopnje za odgovornost države, ki jo je Sodišče sprožilo v primeru genocida v Bosnia.

Uveljavitev dolžnosti ustaviti genocid, ki je obravnavana v tem poglavju, razkrije vedno večjo pripravljenost za spopad z »odvratno nadlogo« preko poudarjanja univerzalnosti človekovih pravic, raje kot pa preko dolgo časa obdržanih idej suverenosti države, ter podkrepi vizionarske besede sodnika Alvareza:

> Pri tolmačenju pogodb je zatorej potrebno … gledati naprej, torej upoštevati nove okoliščine, in ne gledati nazaj in se obračati na *travaux préparatoires*. Pogodba oziroma besedilo, ki je bilo enkrat uveljavljeno, dobi svoje lastno življenje. Posledično se moramo pri njegovem tolmačenju ozreti na potrebe sodobnega življenja, raje kot pa na namene tistih, ki so ga oblikovali (ICJ 1951, 175).

Tekom let je dolžnost prepovedi genocida dobila svoje lastno življenje. »Dolžnost preprečevanja« v I. členu, ki je na pričetku bila teorija brez pomena, se je skozi čas

[79] Obstaja pa kvalitativna razlika med odgovornostjo za aktivno vključenost in odgovornostjo za neposredovanje, ko tretje strani izvršijo hudodelstvo.

[80] Obseg odgovornosti države ne bi smel biti določen na podlagi kazenskopravnih pravil o izvršitvi in sostorilstvu. Tudi če se dejanja genocida ne more pripisati državi, ker ni niti usmerjanja niti nadzora nad storilcem, še vedno obstaja primarna dolžnost ne pomagati pod ravnjo usmerjanja in nadzora v pravu človekovih pravic.

razvila v pomembno pravno dolžnost. Interpretativno pot, ki jo je v svojem Svetovalnem mnenju leta 1951 določilo Meddržavno sodišče, je nasledila resolucija, ki je z uporabo namenskega postopka tolmačenja izrazila njeno normativno vsebino, ter povzročila obširno branje njenih pogojev sklicevanja, na način, ustvarjen za uzakonjenje ukrepov, potrebnih za doseganje njenega cilja. Čeprav še vedno ostajajo nekatere nejasnosti povezane z obsegom te zaveze, predvsem v povezavi z režimom pravice do vodenja vojne, pa slednje hkrati predstavljajo napredek po letu 1948.

10.9 Sklepi

Tako pravni razvoj kot tudi korak naprej z vpeljavo človekovih pravic sta bila v določenih pogledih pomembna koraka od Lemkinovih predlogov. Danes mednarodno pravo vključuje izčrpno pravno prepoved proti genocidu, ki velja tako na individualni kot državni ravni, z vedno bolj prefinjenimi načini pravnega izvajanja. Vendar pa se zdi, da je resnični izziv 21. stoletja isti, s katerim so se soočili Lemkinovi sodobniki – potreba po močnejši politični volji na mednarodni ravni, ki bi lahko tvorila osnovo za takojšen in krepak odziv na genocid.

Učinkovit odgovor na ta izziv zahteva režim odgovornosti, ki odraža resničnost povezanega sveta z več akterji, v katerem živimo. ICJ-jevo zagovarjanje paradigme posredovanja, kot edinega mehanizma za vpeljavo odgovornosti države za izvršitev in sostorilstvo v genocidu, predstavlja omejujoče pravno pravilo, ki je v nasprotju s splošnimi načeli, po katerih je določena odgovornost ene strani za dejanje druge. Pristop Sodišča k odgovornosti države za preprečevanje ima po drugi strani možnost obravnavati države kot odgovorne tudi ob pomanjkanju odnosa posredništva. Ta odziv bi lahko pomenil 'manjkajoči člen' pri premostitvi vrzeli med *ex ante* in *ex post* odzivom na genocid, čez čas pa preoblikoval dolžnost preprečevanja genocida iz domene praznih besed v nudenje resničnih rešitev za to staro 'odvratno nadlogo'.

Po mnenju avtorice se pomembnost razsodbe iz leta 2007 nahaja predvsem v odločitvi Meddržavnega sodišča, da ima, kar se tiče domnevnih kršitev Konvencije o genocidu, pristojnost *ratione materiae* nad sporom med dvema suverenima državama. S tem je ICJ iz Konvencije naredil potencialno močan instrument v boju proti kršenju človekovih pravic. Videli bomo, ali bo ta instrument nadalje učinkovit tudi v praksi.

Prihodnja sodna praksa bo morala izpopolniti ta pristop. Izogibanje kazenskopravni terminologiji, kot so na primer izrazi izvršitev, zarota in sostorilstvo, pri oblikovanju dolžnosti, ki od državnih oblasti zahteva, da niso vpletene v genocid, ter da dejavno nasprotujejo genocidu, pomaga poudariti ne-kazensko naravo odgovornosti države. Pravilno razumljeno, pod vprašajem pri odgovornosti države ni izvršitev hudodelstva s strani države, temveč resna kršitev človekovih pravic. Kazenska analiza v tem kontekstu ne bi bila na mestu. Ideja o kazenski odgovornosti države je bila od osnovanja Konvencije vztrajno zavrnjena, zato bi se moralo koncept odgovornosti države ohraniti kot koncept sličen oškodovanju, ne da bi se ga preveč obremenilo s strogimi pogoji, kopiranimi iz mednarodnega kazenskega prava. Čeprav se odgovornost države in individualna kazenska odgovornost dopolnjujeta, ne smeta biti enačeni.

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