Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ's 2007 Decision in Bosnia v Serbia†

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I INTRODUCTION

> 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.[1]

In March 1993, south-eastern Europe was embroiled in the early stages of the Bosnian War. During the same month, Bosnia filed an application with the International Court of Justice ("ICJ") instituting proceedings against Serbia, accusing the State of breaching its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").[2] Included in these responsibilities, Bosnia claimed, was a direct obligation not to commit genocide.[3] Bosnia alleged that Serbia had "killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia ... and [was] continuing to do so".[4] By 1995, when the final shots in the war had been fired, nearly 100,000 lay dead, while thousands more were injured, unemployed, and homeless.[5]

In 2007 — nearly 14 years after Bosnia's initial application — the ICJ delivered its final decision in *Bosnia and Herzegovina v Serbia and*

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1 *United States of America v Göring (Judgment of the International Military Tribunal)* (1947) 1 IMT (Official Documents) 171, 223 ["*Nuremberg Tribunal*"].

2 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951) ["Genocide Convention"].

3 *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)) (Request for the Indication of Provisional Measures)* [1993] ICJ Rep 3 ["*Genocide Case (Provisional Measures)*"]. The Respondent underwent two official changes of name over the course of the proceedings. Initially called the Federal Republic of Yugoslavia, its name was changed in February 2003 to the State Union of Serbia and Montenegro. With Montenegro's secession from the Union in June 2006, the remaining Respondent was the Republic of Serbia. This article hereafter uses 'Serbia'. See also Turns, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide: *Bosnia and Herzegovina v Serbia and Montenegro*" (2007) 8 Melb J Intl L 398, 398 n 1.

4 *Genocide Case (Provisional Measures)*, supra note 3, [135].

5 See Research and Documentation Centre Sarajevo, *The Bosnian Book of Dead* (2007). This reports a figure of 97,207 killed between 1992 and 1995.

Montenegro ("*Genocide Case*"): a 175-page judgment accompanied by a further 392 pages made up of 3 dissenting opinions, 4 separate opinions, and 4 declarations.[6] The *Genocide Case* has since been described as a legal "odyssey",[7] and the "longest and most procedurally complex case the ICJ has ever entertained".[8]

The final position of the majority was that genocide had occurred only at Srebrenica. The most ground-breaking component of the decision was the ruling that a state could be held directly responsible for genocide under the Genocide Convention. However, Serbia was found not to be liable for the wrongs in Srebrenica on the ground that the acts were not committed by State organs or persons attributable to the State.

Initial media reports were mixed and illustrated a lack of understanding of the Court's judgment. While most headlines correctly characterized the ruling as having cleared Serbia of genocide,[9] the *New York Times* announced that the "Court Declares Bosnia Killings were Genocide".[10] More problematically, *The Guardian* printed "Serbia Guilty over Srebrenica Massacre",[11] while another paper published "Serbia Blamed for Genocide".[12]

At the heart of this confusion lies a fundamental issue: was the Court correct in finding that states can be held directly responsible for genocide? This seemingly straightforward question raises a host of political and legal problems. For example, what is meant by responsibility? Is holding a state responsible the same as saying that the state is guilty of genocide in the criminal sense? How do we determine the genocidal responsibility of a state? These are just a few of the questions that the ICJ faced, and it was hoped that the *Genocide Case* would provide a definitive explanation of the mechanics and principles of direct state responsibility for genocide — but the picture is by no means complete. Nevertheless, while the ICJ's final judgment left many questions unanswered and created further legal

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6 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ <http://www.icj-cij.org/docket/files/91/13685.pdf> (at 10 October 2009) ["*Genocide Case (Judgment)*"].

7 Wittich, "Permissible Derogation from Mandatory Rules? The Problem of Party Status in the *Genocide* Case" (2007) 18 EJIL 591, 591.

8 Turns, supra note 3, 425.

9 See eg Corder, "UN Court Clears Serbia of Genocide", *Washington Post*, Washington DC, United States, 27 February 2007; "Serbia Cleared of Genocide", *Daily Post*, Liverpool, United Kingdom, 27 February 2007; McLaughlin, "UN Court Clears Serbia of Genocide", *Irish Times*, Dublin, Ireland, 27 February 2007.

10 Simons, "Court Declares Bosnia Killings were Genocide", *New York Times*, New York, United States, 27 February 2007.

11 "Serbia Guilty over Srebrenica Massacre", *The Guardian*, London, United Kingdom, 27 February 2007; "Srebrenica Massacre: Serbia called to account", *The Guardian*, London, United Kingdom, 27 February 2007. The problem with claiming that Serbia is 'guilty' is that this implies criminal guilt, a concept that the ICJ explicitly rejected in its judgment. See the discussion in Part III of this article.

12 "Serbia Blamed for Genocide", *The Hobart Mercury*, Hobart, Australia, 27 February 2007.

debate, it is the most authoritative statement released on the issue of state responsibility for genocide to date.[13]

Given the political and legal significance of the *Genocide Case*, this article focuses directly on the ICJ's judgment and uses the decision as an analytical lens through which the question of state responsibility for genocide is scrutinized. The substantive analysis focuses on two contentious areas of the ICJ's decision. Part II examines the ICJ majority's reasoning as to whether, in principle, a state may be held directly responsible for genocide under the Convention. Part III considers the majority's analysis of whether acts of genocide were committed, and focuses on the Court's dicta on how to establish genocidal intent when assessing state responsibility. Part II exhibits the highly black-letter approach of the Court, while Part III demonstrates a more principled analysis. Together, these two sections highlight the contrasting legal approaches that have been used by the Court and legal scholars in examining state responsibility for genocide. Part IV concludes the article by considering the major questions and issues arising out of the *Genocide Case* with a look to the future of international law.

It is important to stress from the outset that this article examines state responsibility exclusively in terms of the Genocide Convention, as opposed to general international law, and does so for several reasons. First, in the *Genocide Case,* the ICJ was confined to the Genocide Convention. Secondly, the Genocide Convention is the most likely avenue for actions to be filed alleging state responsibility for genocide: every inter-state case of alleged genocide has been based on the Convention, and with a total of 133 states having ratified the Genocide Convention, the instrument has been unanimously approved by the United Nations General Assembly.[14] As such, an analysis that focuses on the Convention and any ensuing state responsibility will not only be the most topical, but also the most useful in the foreseeable future.

This wide-spread adoption of the Genocide Convention reflects a growing international condemnation of genocide and reiterates the importance of a close analysis of the *Genocide Case*. In *Prosecutor v Krstic*, the International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber expressed that "[a]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium".[15] This statement reflected

13 Seymour, "Jurisdiction and Responsibility by Necessary Implication: Genocide in Bosnia" (2007) 66 CLJ 249, 251. While Pakistan brought a case against India in 1973, it was only on the grounds that India was allegedly breaching the Convention by proposing to transfer Pakistani prisoners of war to Bangladesh for trial: see *Case Concerning the Trial of Pakistani Prisoners of War (Pakistan v India) (Request for the Indication of Interim Measures of Protection)* [1973] ICJ Rep 328. Additionally, that case was discontinued in order to pursue political negotiations. See generally LeBlanc, "The ICJ, the Genocide Convention, and the United States" (1987) 6 Wis Intl LJ 43, 51; Paust and Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience" (1978) 11 Vand J Transnatl L 1.

14 Genocide Convention, supra note 2.

15 *Prosecutor v Krstic (Judgment)* [2004] IT-98-33-A, [36] ["*Krstic Appeals Judgment*"].

the characterization of genocide as the "crime of crimes" in *Prosecutor v Kambanda*.[16] In light of such comments, the prohibition on genocide has been used as an example of jus cogens,[17] and as a peremptory norm acting as an *erga omnes* obligation on states.[18] Yet, despite this wide-spread condemnation, allegations of genocide are still rife, most notably in Rwanda and Darfur. Furthermore, while the global community has attempted to punish the individual perpetrators of these crimes, in none of the cases of alleged genocide has a state been held directly responsible. When the question was finally litigated in the *Genocide Case*, three fundamental issues arose: (a) whether a state can be held directly responsible for genocide; (b) how the ICJ should ascertain if genocide occurred; and (c) what the test is for state responsibility. While the ICJ may have addressed these issues in its decision, as the following analysis indicates, this by no means suggests that these questions have now been settled.

II CAN A STATE BE HELD DIRECTLY RESPONSIBLE FOR GENOCIDE UNDER THE CONVENTION?

The Court's Findings

1 Introduction

Having established that it had jurisdiction to hear the case, the ICJ considered whether state parties to the Genocide Convention are under a direct obligation not to commit genocide. While the Convention clearly requires states to prevent and punish the commission of genocide,[19] there is no explicit obligation on states not to commit genocide. A central question for the Court was whether the Convention encompassed such an obligation, such that states could be held directly responsible for the commission of genocide.

The Court began the discussion by outlining the appropriate rules and principles of treaty interpretation. Determining the obligations placed on states depends on the "ordinary meaning of the terms of the Convention

16 *Prosecutor v Kambanda (Judgment and Sentence)* [1998] ICTR-97-23-S, [16].

17 See eg Schabas, *Genocide in International Law: The Crime of Crimes* (2000), 445; *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction of the Court and Admissibility of the Application)* [2006] ICJ <http://www.icj-cij.org/docket/files/126/10435.pdf> (at 10 October 2009), [52]–[53], [64]; United Nations International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" in *Report of the International Law Commission on the Work of its Fifty-third Session* (2001) 2 UNYB Int'l L Comm'n 26, 112–113 ["ILC Draft Articles on State Responsibility"]; Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?" (2007) 18 EJIL 631, 632. Note that the concept of jus cogens is not universally accepted.

18 See eg *Case Concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase — Judgment)* [1970] ICJ Rep 3; Shackelford, "Holding States Accountable for the Ultimate Human Rights Abuse: A Review of the International Court of Justice's Bosnian Genocide Case" (2007) 14 Hum Rts Brief 21, 25.

19 Genocide Convention, supra note 2, art 1.

read in their context and in the light of its object and purpose".[20] To aid this process, the Court claimed that it was entitled to consider the preparatory work of the Convention and the "circumstances of its conclusion".[21] The Court highlighted that these interpretative tools are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which is well-established as a tool of interpretation under customary international law.[22]

2 *A Direct Obligation on States is Necessarily Implied by Article I*

The first provision the Court focused on was Article I of the Genocide Convention. This states that "[t]he 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".[23] The Court acknowledged that this does not *expressis verbis* require that parties must not commit genocide;[24] however, when viewed in light of the purposes of the Convention, Article I does in fact prohibit states from committing genocide.[25] This was held to be so for two reasons. First, by agreeing to Article I, which categorizes genocide as a "crime under international law", the parties must "logically be undertaking not to commit the act so described".[26] Secondly, responsibility stems from the express obligation to prevent the commission of genocide.[27] It would be paradoxical if states were under an obligation to prevent the commission of genocide by people or groups over whom they had a certain influence, but were not forbidden themselves to commit genocide "through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law".[28] For this final point, the Court asserted (without elaboration) that it had recourse to general rules of international law concerning the responsibility of states for internationally wrongful acts[29] — in this case, dual responsibility and attribution.

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20 *Genocide Case (Judgment)*, supra note 6, [160].

21 Ibid. The same approach was approved in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Separate Opinion of Judge Tomka)* [2007] ICJ <http://www.icj-cij.org/docket/files/91/13699.pdf> (at 10 October 2009) [37] ["*Genocide Case (Separate Opinion of Judge Tomka)*"].

22 *Genocide Case (Judgment on the Merits)*, supra note 6, [160]. See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ["Rome Vienna Convention"]. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 174; *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12, 48; *LaGrand Case (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 501.

23 Genocide Convention, supra note 2, art 1.

24 *Genocide Case (Judgment)*, supra note 6, [166].

25 Ibid.

26 Ibid.

27 Ibid.

28 Ibid.

29 Ibid [149].

Put simply, the Court believed that an obligation to prevent genocide "necessarily implies" a prohibition of the commission of genocide,[30] with responsibility activated by the doctrine of attribution.

3 Direct State Responsibility is Supported by Article IX

The Court held that Article IX, which concerns the resolution of disputes over the interpretation, application, or fulfilment of the Convention, adds further weight to the obligation on states not to commit genocide. This is by virtue of the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III".[31] The Court noted that the use of the word "including" confirms that disputes relating to the responsibility of states for genocide and the related offences under Article III are part of a "broader group of disputes relating to the interpretation, application or fulfilment of the Convention".[32] Accordingly, states can be held directly responsible for genocide, not just for failing to prevent or punish genocide.[33]

4 The Inchoate Offences

The Court held that states are also bound not to commit the supplementary or 'inchoate' offences outlined in paragraphs (b) to (e) of Article III.[34] These cover conspiracy to commit genocide, direct and public incitement to commit genocide, attempting to commit genocide, and complicity in genocide.[35] The Court noted that Article IX refers equally to disputes over both genocide proper and the inchoate offences.[36] If states are responsible for genocide, they must also be responsible for the inchoate offences. Furthermore, the "purely humanitarian and civilizing purpose" of the Convention is reinforced by the fact that states are subject to a "full set of obligations".[37]

The Court readily acknowledged that the inchoate offences — particularly complicity in genocide — refer to "well known categories of criminal law" and thus appear "particularly well adapted to the exercise of penal sanctions against individuals" (as opposed to states).[38] The Court concluded, however, that it would not be in keeping with the objects and purposes of the Convention to 'deny' that the international responsibility of

30 Ibid [166].
31 Ibid [168]–[169].
32 Ibid [169].
33 Ibid.
34 Ibid [167].
35 Genocide Convention, supra note 2, art 3.
36 *Genocide Case (Judgment)*, supra note 6, [167].
37 Ibid.
38 Ibid.

a state can also be engaged through the inchoate offences.[39] Nonetheless, the Court added that even though it is theoretically possible for a state to be concurrently responsible for genocide proper, conspiracy to commit genocide, and incitement to commit genocide, there would be no point in investigating the latter offences since responsibility for genocide absorbs responsibility under the supplementary headings.[40]

5 Summary

In relation to the first question of whether the Genocide Convention creates a direct obligation on states not to commit genocide, the Court answered in the affirmative. A state can be held directly responsible for genocide proper and the inchoate offences (but not a combination of the two). This responsibility is engaged via the general international law principles of dual responsibility and attribution. In other words, when an organ or individual attributable to a state commits genocide, the state's responsibility for genocide will be activated.

Analysis

1 Overview

This article identifies three challenges to the Court's ruling that a state can be held directly responsible for genocide. The first argument is that an obligation as onerous as genocide cannot be 'necessarily implied' by Article I of the Genocide Convention. The second argument is that, while states can be held responsible for genocide via the doctrine of attribution, the Court was not free to assert that the Genocide Convention incorporates this principle of customary international law — rather, it must be brought under the Convention through the dispute resolution mechanism in Article IX. The third examines the attacks that resulted from the Court's unsupported assertion of customary international law under the Convention.

2 An Obligation on States Not to Commit Genocide Cannot Simply be Implied by an Obligation to Prevent and Punish Genocide

The first problem with the Court's ruling concerns its initial premise that the obligation on states not to commit genocide is implied in Article I. As Judge Owada observed, given that the Convention is a "solemn compact among sovereign States", such a grave onus on states cannot simply be

39 Ibid.

40 Ibid [380].

read into the instrument.[41] Judge Owada cited the "famous dictum" of the Permanent Court of International Justice, which held that one of the fundamental principles of international law is that "[t]he rules of law binding upon States ... emanate from their own free will" and consequently, "[r]estrictions upon the independence of States cannot ... be presumed."[42]

Judge Owada extended the point, contending that there can be no obligation on states not to commit genocide given that the Convention is "totally silent" on the issue of state responsibility.[43] This takes the argument too far, given that several articles do deal with this matter: Article I provides that contracting states undertake to prevent and punish genocide; Article V requires state parties to enact the necessary legislation in order to punish genocide; and Article VIII requires state parties to extradite offenders. Nonetheless, it is true that there are no provisions contained within the Convention that explicitly bind states not to commit genocide themselves or that require states to assume direct responsibility for genocidal acts.

Gaeta also disagrees with the Court's ruling that the obligation on states not to commit genocide is necessarily implied by the express obligation to prevent genocide under Article I.[44] His argument is more specific and persuasive than Judge Owada's. Gaeta's objection is that the two obligations are of different legal "species".[45] The obligation to prevent genocide is an "*obligation of conduct*", such that if genocide is not committed, "a state cannot be held responsible for not having acted to prevent something which in fact did not occur".[46] In contrast, an obligation not to commit genocide is an "obligation of *result*", which is breached when a state official or organ commits an act of genocide.[47] By way of example, Gaeta points out that the obligation on a police officer to prevent the commission of a crime does not include or imply an obligation on the officer himself or herself not to commit the crime. Rather, a different "class of obligations" imposes upon individuals, including the police officer, the relevant prohibitions.[48] Gaeta concedes that where rules require the prevention of certain conduct, it is logical that the conduct itself will be unlawful; however, the rules requiring prevention would not be the source of prohibition of the conduct.[49] States often conclude treaties requiring parties to prevent serious criminal conduct, but this does not mean that it

41 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Separate Opinion of Judge Owada)* [2007] ICJ <http://www.icj-cij.org/docket/files/91/13697.pdf> (at 10 October 2009) [45] ["*Genocide Case (Separate Opinion of Judge Owada)*"].

42 *The Case of the SS Lotus* (1927) PCIJ Ser A, No 10, 18, cited at *Genocide Case (Separate Opinion of Judge Owada)*, supra note 41, [46].

43 *Genocide Case (Separate Opinion of Judge Owada)*, supra note 41, [45].

44 Gaeta, supra note 17, 637–640.

45 Ibid 637.

46 Ibid (emphasis in original).

47 Ibid 638 (emphasis added).

48 Ibid 639.

49 Ibid.

can be inferred that the states are also automatically held internationally responsible for committing the crimes.[50] For this to be so, a separate law or provision is required which prohibits the actual commission of the crime that states are required to punish. In the case of the Convention, a separate avenue must be found in order to hold states responsible for the acts of individuals or its organs.

Judge Owada is correct in arguing that it is not safe to imply serious obligations on states, especially when the instrument in question is essentially silent on the specific matter. Gaeta's argument combines well with Judge Owada's — it rebuts claims that, because genocide is such a serious crime, states must also be obliged not to commit such acts. Gaeta acknowledges that states may very well be under an obligation not to commit genocide, but if this is so, it cannot be extracted from an obligation of conduct. In this sense, there is nothing wrong with the idea that states can be held directly responsible for genocide. The problem lies with how easily it was inferred by the Court. While such an obligation may or may not exist under customary international law, the Court was bound by the terms and scope of the Genocide Convention.

3 The Court Was Not Free to Assert that the Genocide Convention Incorporates General Principles of International Law

The central tenet of the Court's argument was its claim that states could be held responsible for genocide under the Convention via the principle of attribution. The Court, however, offered no alternative means of showing how the Convention, which ostensibly deals with the criminal responsibility of individuals, could also apply to states. The author contends that while the Court was correct to hold that states can be held responsible for genocide by virtue of the doctrine of attribution, this principle of customary international law could not simply be asserted to exist within the Convention. Instead, the doctrine must be properly raised through Article IX of the Convention.

The same argument was mounted by a group of dissenting judges in the *Genocide Case*.[51] Judge Owada noted that the question was not whether customary international law recognizes the principle of attribution, which it "clearly does", but whether the Genocide Convention recognizes and incorporates the principle.[52] While the Court considered that it had recourse to general international law on state responsibility for wrongful acts, this is a separate issue, independent of the scope of Article I of the Convention.[53]

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50 Ibid.

51 This consisted of Judges Owada, Skotnikov, and Tomka.

52 *Genocide Case (Separate Opinion of Judge Owada)*, supra note 41, [56].

53 Ibid [57]–[58].

Put simply, the Court was not free to assert that its jurisdiction under the Convention automatically included general international law.[54]

Judge Skotnikov was also strongly opposed to the notion that the Convention automatically obliges states not to commit genocide.[55] The Judge focused on the Court's statement that if an organ of a state or an attributable individual commits genocide, "the international responsibility of that State is incurred",[56] which he considered "absolutely true".[57] Judge Skotnikov noted that "as a matter of principle", whenever an act is criminalized under international law, if an individual engaging state responsibility commits that act, the state can be held responsible.[58] Accordingly, there is no need for an "unstated obligation" on states not to commit genocide in order for their responsibility to be incurred through attribution.[59] As the Court was restricted by the scope of the Convention, the fundamental question was whether these principles were somehow incorporated into the instrument.

All those advocating the idea that the doctrine of attribution must be validly incorporated into the Genocide Convention considered that this was to be achieved via Article IX, which provides:

> 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.

Judge Owada offered some preliminary insights on the scope of this provision. In order to ascertain whether the parties to the Convention intended to incorporate principles of dual responsibility, the Judge examined the Convention's *travaux préparatoires*. The Judge noted that after a failed attempt to introduce an amendment to Article IV, the United Kingdom and Belgium proposed Article IX as it now stands.[60] Judge Owada claimed that this proposal was motivated by the continued desire to hold states directly responsible for genocide by linking it to a "standard compromissory provision".[61] Unfortunately, Judge Owada did not elaborate further. While creating direct state responsibility may indeed have been the United Kingdom and Belgium's motivation in proposing

54 Ibid [58].

55 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Declaration of Judge Skotnikov)* [2007] ICJ <http://www.icj-cij.org/docket/files/91/13705.pdf> (at 10 October 2009) 4 ["*Genocide Case (Declaration of Judge Skotnikov)*"].

56 *Genocide Case (Judgment)*, supra note 6, [179].

57 *Genocide Case (Declaration of Judge Skotnikov)*, supra note 55, 4.

58 Ibid 5.

59 Ibid 4.

60 *Genocide Case (Separate Opinion of Judge Owada)*, supra note 43, [64]–[65].

61 Ibid [67].

Article IX, the key question was what the contracting states collectively understood the provision to mean.

Broadly, there are two possible interpretations of Article IX. One view is that the provision only relates to the explicit obligations on states; namely, the obligation to prevent and punish genocide. President Harry Truman, in presenting the Genocide Convention to the United States Senate in 1949, seems to have viewed Article IX in this light:[62]

> I recommend that the Senate give its advice and consent to ratification of the Convention — 'with the understanding that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals'.

Other states, according to Judge Owada, appear to have interpreted Article IX as "constitutive of a new international legal norm" whereby a state can commit genocide and accordingly be held directly responsible under the Convention.[63] Unfortunately, Judge Owada failed to name any of these states, so it is difficult to determine how wide-spread this belief was at the time.

Regardless, given that the debates during the Convention's drafting were confused and divided on the interpretation of Article IX, Judge Owada correctly concluded that the *travaux préparatoires* are "totally inconclusive in shedding a definitive light" on the legal scope of state responsibility under the instrument.[64] It would be tenuous to use the *travaux préparatoires* alone to conclude definitively that the Convention created a new substantive norm, whereby a state could be held directly responsible for genocide.[65]

Judge Owada instead claimed that applying the maxim *ut res magis valeat quam pereat*,[66] in light of the legislative history, suggests that Article IX has the effect of enlarging the Court's jurisdictional scope under the Convention.[67] Judge Owada considered that by virtue of the words "including those [disputes] relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III", the Convention includes, "albeit through a jurisdictional backdoor", the justiciability of state responsibility for genocide under general international law.[68]

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62 President Truman, cited in ibid [69] (reference omitted).

63 Ibid [70].

64 Ibid [68], [71].

65 Ibid [71].

66 This can be roughly translated as "that the thing may rather have effect than be destroyed".

67 *Genocide Case (Separate Opinion of Judge Owada)*, supra note 43, [72].

68 Ibid.

In summary, Judge Owada considered that the Convention *excludes* the notion of direct state responsibility for the commission of genocide as an international crime of the state.[69] Nevertheless, the inclusion in Article IX of justiciability over state responsibility for any of the acts enumerated in Article III (including genocide) constitutes a new mandate for the ICJ, although not a new substantive obligation for the contracting states under the Convention.[70] Article IX thus adds a novel procedural scope to the ICJ's jurisdiction "by including within the Court's purview" the obligations that it would not otherwise have; specifically, "the obligations flowing to the State parties under general international law from the acts of individuals contemplated as punishable under the Convention".[71]

Judge Tomka also focused his attention on Article IX, deliberating extensively over the meaning of "[d]isputes ... including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III". The Judge dismissed the idea that the provision merely endowed the ICJ with the jurisdiction to determine whether a state breached its express obligations to prevent and punish genocide, as such a reading would be "too narrow".[72] According to the Judge, Article IX meant that the ICJ had jurisdiction to determine the responsibility of a state for genocide under the international law principle of attribution.[73] Judge Tomka believed that this interpretation was the most appropriate in light of the "sometimes confused debate" over the draft of the Genocide Convention.[74]

Given that Judge Tomka did not go into any further detail, this point is weak. Nevertheless, he provides useful evidence illustrating that Article IX was not designed to hold states directly responsible for genocide (as opposed to holding states responsible via attribution). Judge Tomka noted that the United Kingdom, Belgium, and the United States had proposed an alternative draft of Article IX:[75]

> Disputes between Contracting Parties relating to the interpretation, application or implementation of this Convention, including *disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in Article III has been committed within the jurisdiction* of *another Contracting Party*, shall be submitted to the International Court of Justice at the request of one of the parties to the dispute.

69 Ibid [73].
70 Ibid.
71 Ibid.
72 *Genocide Case (Separate Opinion of Judge Tomka)*, supra note 21, [54].
73 Ibid [56].
74 Ibid.
75 Ibid [58] (emphasis in original).

Importantly, the three co-author states did not consider this to be substantively different from Article IX.[76] Instead, it was presented as an "alternative drafting", the object of which "was the deletion of the word 'responsibility', which appeared ambiguous to certain delegations".[77] In light of this, Judge Tomka noted that it is difficult to conclude that Article IX was intended to cover a charge that the crime of genocide or any other of the acts enumerated in Article III had been committed by a state, as opposed to a charge that the state is responsible via principles of attribution.[78]

Both Judges Owada and Tomka therefore disagreed with the Court's methodology and reasoning, yet concurred with the ultimate conclusion: the Convention can hold states responsible for genocide via the doctrine of attribution. The fundamental point is that the Court was not free to assert that this principle of customary international law was part of its jurisdiction under the Convention.

4 The Two Main Challenges Resulting from the Court's Assertion that State Responsibility is Activated by the Customary International Law Principle of Attribution

(a) Overview

The Court's unsubstantiated assertion of attribution — a customary international law principle — was problematic not only from a methodological point of view, but also because it left the Court's position open to two significant challenges. First, because the Convention is a criminally-focused instrument, and because states cannot commit crimes, it is not possible to hold states responsible for genocide. Secondly, the Convention is focused on individuals and prima facie does not extend direct responsibility to states.

Both of these arguments were dismissed by the Court. It reiterated that state responsibility for genocide is activated via the doctrine of attribution, which is a concurrent responsibility separate from individual and criminal responsibility.[79] This point is correct and is reflected in Article 25(4) of the Rome Statute for the International Criminal Court,[80] which states that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." Franck explains the difference:[81]

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76 Ibid.

77 Ibid.

78 Ibid [59]–[61].

79 See *Genocide Case (Judgment)*, supra note 6, [170]–[174], [179].

80 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, art 25(4) (entered into force 1 July 2002) ["Rome Statute"].

81 Franck, "Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?" (2007) 6 Wash U Global Stud L Rev 567, 570.

> [M]odern international law distinguishes between the criminal acts of a person — whether prime minister, field commander, prison capo, or leader of a private militia — and the failure of a state to live up to its solemn legal obligations to other states. Although claims in both circumstances may proceed from the same facts, they involve the breach of quite separate obligations.

As such, concurrent individual criminal responsibility and state responsibility does not mean that a state is criminally responsible.[82] The International Law Commission's ("ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles") affirm that "[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State".[83] In its commentary, the ILC emphasized that the question of individual responsibility is "distinct from the question of State responsibility".[84]

As the Court was unable to show convincingly that the doctrine of attribution operates within the Convention, two challenges (based on the criminal and individual focuses of the Convention) gained considerable momentum and cannot be easily rebutted. In light of the Court's limited reasoning, they will be considered more closely. The two arguments highlight why the Court needed to show logically how a customary international law principle can be brought within the auspices of the Convention.

(b) The Convention is a Criminal Law-based Instrument So it Cannot Apply to States

Broadly speaking, commentators advocating this point consider that the only type of direct responsibility for genocide stemming from the Convention is criminal responsibility, and as a state cannot commit a crime, the Convention does not extend to states. Judges Shi and Koroma argued that that the Court was effectively imposing criminal responsibility on a state, a concept which the Convention does not allow for and could not have done when it was adopted, "given that the notion of crime of State was not part of international law".[85] The Judges also noted that even today, general international law does not recognize the notion of criminal responsibility of a state.[86] They reasoned that if a state could commit the

82 Loewenstein and Kostas, "Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ's Judgment in the *Genocide Case*" (2007) 5 JICL 839, 843–844.

83 ILC Draft Articles on State Responsibility, supra note 17, art 58.

84 Ibid commentary on art 58, [3].

85 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Joint Declaration of Judges Shi and Koroma)* [2007] ICJ <http://www.icj-cij.org/docket/files/91/13695.pdf> (at 10 October 2009) [1] ["*Genocide Case (Joint Declaration of Judges Shi and Koroma)*"].

86 Ibid.

crime of genocide, then logically, it would be able to commit other crimes such as murder.[87] Judge Tomka made a similar point. He noted that because Article III provides for the "punishment" of the perpetrator, prohibition of genocide must be restricted to individuals. If not, "one would have to accept that States are subject to punishment *quod non*".[88]

Judges Shi and Koroma considered that, if the Convention intended to "establish an obligation of such grave import as one that could entail some form of criminal responsibility or punishment of a State", the contracting parties would have expressly stated this in the Convention.[89] This is a contentious statement. According to this reasoning, it would be possible for state parties to an international treaty to bind themselves in a criminal sense. Whether or not this is viable, the underlying premise is valid: for states to be bound by such an onerous obligation, criminal or not, the Convention needs to be explicit.

Serbia also submitted that finding a state directly responsible for genocide under the Convention is akin to finding the state criminally responsible, arguing that this is impermissible under the Convention or international law.[90] In support of its position, Serbia cited the fact that the ILC rejected the idea that states could commit crimes in its Draft Articles.[91]

The Court agreed that international law does not generally recognize criminal responsibility of states. However, the majority added that the obligations arising out of the Convention are "not of a criminal nature", but rather, are "obligations and responsibilities under international law".[92] Presumably, the Court meant responsibility via the doctrines of attribution and dual responsibility.

Taking a strictly positivist approach, the Court's clear dictum should end the debate as to whether a state is criminally responsible for genocide under the Convention. Yet there are two problems with this: first, the Court failed to give any further reasoning or explanation as to what type of responsibility ensued; secondly — and of more concern — the Court applied the international law doctrine of attribution to the Convention without valid justification. Given the extensive debate over whether the Convention is solely focused on individual offending, it was not enough for the Court to hold without more that the responsibility in question is not of a criminal nature. The mere assertion that the Convention gives rise to a different genre of responsibility, despite the fact that it provides for the punishment of genocide (a clearly criminal concept) was simply that: an assertion. The arguments on both sides therefore deserve further consideration.

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87 Ibid [4].

88 *Genocide Case (Separate Opinion of Judge Tomka)*, supra note 21, [47].

89 Ibid.

90 See *Genocide Case (Judgment)*, supra note 6, [170].

91 Ibid.

92 Ibid.

Judge Skotnikov also suggested in his separate declaration that the Court cannot simply assert that there is a different, non-criminal genus of state responsibility stemming from the Convention. The Judge contended that the concept of non-criminal state responsibility "comes into conflict with the very foundations of the Genocide Convention since there is no such thing under the Convention as genocide (or any of the other Article III acts) which is not a crime".[93] The Judge noted that the Court, the ratifying parties, and the ILC all agreed that states cannot commit crimes.[94] Judge Skotnikov thought that the only logical conclusion from introducing the concept of a state committing genocide would be to decriminalize genocide and transform it into an internationally wrongful act.[95] This transformation, the Judge concluded, would be "as amazing as it is impossible under the Genocide Convention".[96] Gaeta makes a similar argument, contending that because states cannot be considered criminal, it would not be in keeping with the "historical and theoretical foundations" of the Convention to maintain that states can be held directly responsible for genocide.[97]

Both Judge Skotnikov and Gaeta frequently refer to the legislative history of the Convention. In fact, the *travaux préparatoires* were used liberally in both sides of the argument on the criminal focus of the Convention. Despite this, neither side was able to show conclusively whether or not the Convention's drafting history indicated the creation of state criminal responsibility for genocide. A key focus of the *travaux préparatoires* debate centred on the drafting discussions in the Sixth Committee — specifically, the United Kingdom's proposed amendments to Articles IV and VI, both of which were rejected.[98] The second substantive proposed amendment was to Article VI:[99]

> Where the act of genocide as specified by Articles II and IV is, or is alleged to be the act of the State or Government itself or of any organ or authority of the State or Government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice whose decision shall be final and binding.

Serbia, along with Judges Shi, Koroma, and Tomka, also cited the United Kingdom's proposed amendment to Article IV:[100]

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93 *Genocide Case (Declaration of Judge Skotnikov)*, supra note 55, 4.

94 Ibid.

95 Ibid.

96 Ibid.

97 Gaeta, supra note 17, 635.

98 See *Genocide Case (Judgment)*, supra note 6, [176].

99 UN GAOR, 3rd sess, UN Doc A/C.6/236 and Corr.1 (1948); *Genocide Case (Separate Opinion of Judge Tomka)*, supra note 21, [49].

100 UN GAOR, 3rd sess, UN Doc A/C.6/236 (1948); *Genocide Case (Separate Opinion of Judge Tomka)*, supra note 21, [49]; *Genocide Case (Judgment)*, supra note 6, [176].

> 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, by whom such acts are committed. Such acts committed by or on behalf of States or Governments constitute a breach of the present Convention.

Ultimately, these narrow and isolated snapshots of the *travaux préparatoires* are not decisive. On the one hand, those opposed to the Court's decision have used the failure of these amendments as evidence that the drafters did not intend to create direct state responsibility for genocide.[101] On the other hand, the Court held that the failure of the two amendments indicated a rejection of the notion that states could be criminally responsible for genocide under the Convention, but not a rejection of the idea that states could be held responsible for genocide via the doctrine of attribution.[102]

With the drafting history inconclusive, some scholars have attempted to distinguish criminal responsibility from the state responsibility that would stem from the Convention. Cassese implies that individual criminal responsibility and state responsibility under the Genocide Convention were different due to their differing approaches to the inchoate offences.[103] As noted earlier, the Court held that if a state is found directly responsible for genocide, it is not necessary to consider liability for conspiracy or incitement, as direct responsibility absorbs the inchoate offences.[104] In contrast, criminal responsibility for genocide does not absorb conspiracy or incitement.[105] Instead, when committed by individuals, the supplementary offences are deemed crimes that "on account of their great danger to society are punished on their own, regardless of whether or not they have led to the consummation of the major offence".[106] In other words, the Convention specifically provides for the ability to punish an individual for both conspiring to commit genocide and genocide proper.[107] This is clearly supported by international law.[108] According to Cassese, state responsibility must be different from individual criminal responsibility as it does not permit this.

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101 *Genocide Case (Separate Opinion of Judge Tomka)*, supra note 21, [48]; *Genocide Case (Judgment)*, supra note 6, [176]; *Genocide Case (Joint Declaration of Judges Shi and Koroma)*, supra note 85, [4].

102 *Genocide Case (Judgment)*, supra note 6, [167], [178].

103 Cassese, "On the Use of Criminal Law Notions in Determining State Responsibility for Genocide" (2007) 5 JICJ 875, 880.

104 *Genocide Case (Judgment)*, supra note 6, [380].

105 Cassese, supra note 103, 880.

106 Ibid.

107 Ibid.

108 Cassese notes that various decisions of the International Criminal Tribunal for Rwanda have held that conspiracy to commit genocide and genocide proper are concurrently punishable: Cassese, supra note 103, 880. See eg *Prosecutor v Nahimana et al (Judgement and Sentence)* [2003] ICTR-99-52-T, [1091]–[1093], where the Trial Chamber found Nahimana, Barayagwiza, and Ngeze simultaneously guilty of conspiracy to commit genocide, public and direct incitement of genocide, and genocide.

This argument is, however, subject to the same assertions as the point it addresses. It claims that criminal and state responsibility treat the inchoate offences differently, and thus must be different types of responsibility. Yet why, if state responsibility for genocide is based on the Convention, should the Court be able to treat the application of the Convention's rules more loosely? This question hints at an important issue: if a state is actually found responsible for genocide proper, should this really preclude a ruling on the state's involvement in conspiracy to commit genocide? If genocide is to be given the full opprobrium of the international community, it should be possible for states to be liable for the full range of offences relating to genocide, regardless of whether some are inchoate offences or not. These questions aside, the Court's unsupported claim that genocide absorbs the inchoate offences when dealing with state responsibility does not prove that the responsibility is different from that which attaches to individuals.

Turns offers another speculative explanation as to why the Court was able to assert that state responsibility for genocide is not criminal responsibility. He emphasizes that finding a state responsible for the acts of its agents is not the same as finding the state 'guilty' in the criminal sense.[109] Turns considers that the ICJ's interpretation of Article I was "surely correct".[110] In support, he uses the example of Germany, which was not considered legally 'guilty' as a state in respect of the Nazi atrocities of World War II.[111] Nonetheless, as Germany was never charged with responsibility for the World War II atrocities and the Genocide Convention did not then exist, Turns' argument is technically void. Despite this, the underlying point is correct: the Convention may be primarily a criminally-focused document, but it does not mean that a different type of responsibility, activated by attribution, cannot be extracted from the text.

Ultimately, if the Court had validly shown how the doctrine of attribution could operate within the Convention to create state responsibility, these challenges concerning the criminal focus of the Convention could not have been maintained (assuming they would have even been offered in the first place). It is well-established under international law that state responsibility via attribution is separate from any criminal responsibility falling upon individuals. By failing to explain how the Convention incorporated the doctrine of attribution, the Court was ostensibly contending that state responsibility was the same as individual responsibility under the Convention, and that in this sense, both were criminal in nature.

In light of the debate on this issue, Turns considers that the Court's decision has reopened the debate as to whether states can commit a crime.[112] Yet while the topic and the discussion may bear some consideration, the Court's decisive statement, albeit lacking in reasoning, has settled the

109 Turns, supra note 3, 412.
110 Ibid.
111 Ibid.
112 Ibid 411–412.

debate: states can commit crimes and be criminally responsible when found accountable for genocide under the Convention. This position is even stronger, given that the underlying premise of the dissenting Judges was only that states cannot commit crimes, not that state responsibility via attribution cannot constitute criminal responsibility. Assuming that the doctrine of attribution can be shown to exist through Article IX, the only genuinely contentious issue here is whether a criminal law-focused instrument can give rise to unstated and concurrent non-criminal state obligations.

(c) The Convention is Concerned with Individuals, not States

The second challenge centres on the notion that the nature of the Convention excludes state responsibility for genocide.[113] Serbia argued that the Convention is essentially concerned with the criminal prosecution and punishment of individuals, not with the responsibility of states.[114] Articles III and IV refer to the punishment of individuals; Article V demands legislation for effective penalties for persons guilty of genocide; Article VI provides for the prosecution of persons charged with genocide; and Article VII provides for the extradition of offenders. This emphasis, according to Serbia, precludes state liability for genocide.[115] While this argument can be circumvented by the doctrine of attribution, the debate will be considered in light of the Court's unsupported assertion of this international law principle.

Judges Shi and Koroma reached the same conclusion as Serbia on a textual analysis. The Judges began by pointing out that, according to the principles of interpretation in Article 31 of the Vienna Convention, "a treaty should be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose".[116] Accordingly, the object and purpose of the Convention is to prevent and punish genocide, and is directed against individuals, not states.[117] Articles V through VIII indicate that the provisions relating to a state's obligations are aimed at preventing and punishing *individuals* who commit the crime of genocide.[118] Notably, Article IV provides that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". This places responsibility for the actual crime of genocide solely on the individual.[119] In terms of the Convention's purpose, the Judges noted that

113 *Genocide Case (Judgment)*, supra note 6, [171].
114 Ibid.
115 Ibid.
116 *Genocide Case (Joint Declaration of Judges Shi and Koroma)*, supra note 85, [2].
117 Ibid [3].
118 Ibid [3]–[4].
119 Ibid [4].

there is no evidence of an intention "that a State party should punish itself for the crime of Genocide".[120]

Judge Skotnikov reflected a similar sentiment, based also on the wording of the Convention. The Judge explained that substantively, the Convention is only concerned with the culpability of individuals.[121] As such, the Court's attempt to reconcile this with a state's obligation not to commit genocide was "not persuasive", since it was "simply not what the Convention actually says".[122] According to Judge Skotnikov, "the very idea of an unstated obligation is objectionable in general".[123]

Judge Owada also sided with Serbia on this point after briefly considering the legislative history of the Convention. The Judge thought that this clearly showed that the aim of the Convention is to punish and hold to account the individuals responsible for criminal acts of genocide.[124] The International Military Tribunal at Nuremberg, "which formed the crucial background for the Genocide Convention", declared that "[c]rimes against international law are committed by men, not by abstract entities".[125] This suggests that individuals are punishable for genocide, but not states.[126]

The Court acknowledged that this oft-quoted statement appears to support the argument that only individuals can be held directly responsible under the Genocide Convention.[127] However, the Court noted that the Tribunal was responding to the argument that "international law is concerned with the actions of sovereign States, and provides no punishment for individuals".[128] Accordingly, the Tribunal went on to explain that the notion that "international law imposes duties and liabilities upon individuals as well as upon States has long been recognized".[129] The Court added that the "duality of responsibility" considered to exist under the Convention has been a constant feature of international law.[130] An individual can thus be criminally responsible at the same time as the state is responsible under international law.[131]

Once again, the problem with the Court's reasoning is that it relies on its unsubstantiated claim that the Convention incorporates the notions of attribution and dual responsibility. If this is true, the criticisms based on the Convention's focus on individuals do not hold. However, as the Court's reasoning was tenuous, these attacks must still be examined.

Judge Tomka considered that the Convention is squarely targeted

120 Ibid. See also Lauterpacht, *International Law and Human Rights* (1950) 44.
121 *Genocide Case (Declaration of Judge Skotnikov)*, supra note 55, 4.
122 Ibid.
123 Ibid.
124 *Genocide Case (Separate Opinion of Judge Owada)*, supra note 41, [48]–[49].
125 *Nuremberg Tribunal*, supra note 1, 223.
126 *Genocide Case (Separate Opinion of Judge Owada)*, supra note 41, [50].
127 *Genocide Case (Judgment)*, supra note 6, [172].
128 Ibid, citing *Nuremberg Tribunal*, supra note 1, 222.
129 *Nuremberg Tribunal*, supra note 1, 223; *Genocide Case (Judgment)*, supra note 6, [172].
130 *Genocide Case (Judgment)*, supra note 6, [173].
131 Ibid [174].

at individuals, not states, and introduced two arguments addressing this issue. First, he pointed out that as states are abstract entities, they cannot 'act' without a concrete person performing an act.[132] Consequently, the Convention is focused solely on individuals, as they are the actors who actually commit genocide. Yet the fact that a state must act through individuals by no means precludes a finding of state responsibility. Judge Tomka reasoned that by precluding state responsibility, it is less likely that individuals would disregard the obligations of the Convention, because they could not excuse their actions as an "act of State".[133] This argument misapplies the principle of dual responsibility. The fact that a state may be responsible via its organs or officials by no means precludes a concurrent finding of guilt against those very individuals who perpetrated the wrongful acts.

Gaeta similarly appears to miss the Court's point. He notes that the "novelty" of the Genocide Convention and what sets it apart from other international conventions on criminal matters is that the instrument is aimed at punishing individual perpetrators of genocide, despite the fact that those individuals are typically state officials acting pursuant to a state policy.[134] Prior to World War II, states had concluded conventions in criminal matters only to deal with crimes committed by 'private individuals', such as counterfeiting, or trafficking in women and children.[135] Therefore, Gaeta argues, what the Convention aims to achieve is the "enforcement, through the threat and imposition of national criminal sanctions, of fundamental values of international law regardless of whether they are violated by individuals acting on behalf of a State".[136] To argue that a state can also be responsible for genocide under the Convention is to completely undermine its purposes and goals. It is "at odds with the historical legacy of Nuremberg that inspired its drafters".[137] According to Gaeta, the focus is squarely on the private individual, as evidenced by the explicit obligation on states to "prevent the commission of genocide as an instance of individual criminality".[138] However, Gaeta fails to show how concurrent state responsibility would undermine this goal of prosecuting individual perpetrators of genocide. In fact, concurrent state responsibility would add further weight to the prohibition against genocide, sending a

132 *Genocide Case (Separate Opinion of Judge Tomka)*, supra note 21, [42].

133 Ibid.

134 Gaeta, supra note 17, 634–635.

135 Ibid 635. Examples given by Gaeta include: International Convention for the Suppression of Counterfeiting Currency, opened for signature 20 April 1929, 112 LNTS 371 (entered into force 22 February 1931); Convention on Slavery, Servitude, Forced Labour and Similar Institutions and Practices, opened for signature 25 September 1926, 60 LNTS 53 (entered into force March 9 1927); Convention for the Suppression of the White Slave Traffic, opened for signature 4 May 1910, 211 Consol TS 405 (entered into force 21 June 1951); Convention for the Suppression of the Traffic in Women and Children, opened for signature 30 September 1921, 9 LNTS 415 (entered into force 15 June 1922); International Convention for the Suppression of the Traffic in Women of Full Age, opened for signature 11 October 1933, 150 LNTS 431 (entered into force 24 August 1934).

136 Gaeta, supra note 17, 635.

137 Ibid.

138 Ibid.

clear message that it is an offence that will not be tolerated when committed by states *or* individuals.

While these arguments, particularly by Gaeta, seem to misinterpret the principle of state responsibility via attribution, it is more likely that they have been raised due to dissatisfaction with the Court's explanation of this international law principle. Had the Court been more convincing in its explanation of how dual responsibility exists within the Convention, these challenges would have had much less force, assuming that they would have been raised at all.

5 Summary

While the Court was correct in ruling that a state can be held directly responsible for genocide under the Convention, its methodology was problematic. Essentially, the Court was too quick in finding a direct obligation on states, beginning with its claim that responsibility is necessarily implied by the Convention. As this article shows, such an onerous obligation cannot be presumed to bind states in the absence of further evidence. Moreover, the Court simply asserted that the customary international law principle of state responsibility via attribution operated within the Convention. For the doctrine of attribution to apply to the Convention, it must be incorporated through Article IX. Had the Court adopted the latter approach, it would have avoided the two resulting challenges: that the Convention only creates criminal responsibility for genocide such that it cannot apply to states, and that the Convention is focused on individuals, not states. The Court would have been on solid legal ground when responding that neither issue is a problem given that responsibility via attribution is still activated by individuals, and does not equate to state criminality.

Hence, while the author disagrees with the Court's approach, the correct answer to this first question — whether a state can be held directly responsible for genocide under the Convention — is as follows: "if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred".[139]

139 *Genocide Case (Judgment)*, supra note 6, [179].

III HOW SHOULD THE COURT DETERMINE GENOCIDAL INTENT FOR THE PURPOSES OF STATE RESPONSIBILITY?

The Court's Ruling

The second key aspect of the *Genocide Case* that this article examines is the Court's ruling on genocidal intent. Having established that Serbia, as a state, could in principle be held responsible for genocide, the subsequent question was whether genocide, as defined in the Genocide Convention, had been committed.[140] In discussing the standard of proof, the Court held that it must be "fully convinced" that allegations of genocide have been "clearly established",[141] "beyond any doubt".[142] After examining each alleged event individually, the Court found that there was the requisite genocidal intent, and thus the commission of genocide, solely at the massacres in Srebrenica.[143]

In determining whether genocide was committed, the Court considered each alleged event in isolation. This involved a two-stage inquiry: first, whether the genocidal acts had actually taken place, targeting a specific group; and secondly, whether the perpetrators exhibited the requisite special intent, also known as *dolus specialis,* in terms of each incident.[144] The Court explained that for there to be specific intent, "[i]t is not enough that the members of the group are targeted because they belong to that group.... Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part."[145]

The most contentious issue within this second stage of the investigation is how to determine genocidal intent for the purposes of state responsibility. Bosnia contended that once it was shown that genocidal acts had been committed within the state, the existence of an "overall plan to commit genocide", evidenced by a "pattern of genocidal or potentially [genocidal] acts of genocide" should be sufficient proof of specific intent.[146] Bosnia pointed to the period during 1991 to 1995 and submitted that the alleged genocidal acts "were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group".[147] In other words, Bosnia claimed that the totality of all crimes committed by the Bosnian Serbs during the conflict

140 Ibid [180].

141 Ibid [209].

142 Ibid [422]. For further information on the ICJ's ruling on the burden and standard of proof, see generally Gattini, "Evidentiary Issues in the ICJ's *Genocide* Judgment" (2007) 5 JICJ 889.

143 *Genocide Case (Judgment)*, supra note 6, [376].

144 Ibid [242].

145 Ibid [187].

146 Ibid [370].

147 Ibid.

constituted genocidal intent, while specific events, such as the siege of Sarajevo, served as illustrations of this genocidal pattern.[148]

The Court rejected Bosnia's proposal, noting that the submission was not consistent with the factual findings of the ICTY.[149] The Court offered two alternative means of establishing the requisite specific intent. The first alternative was that genocidal intent could be based on a "concerted plan".[150] This effectively required Bosnia to produce an official statement of aims from Serbia, clearly indicating genocidal intent.[151] The second alternative was that specific intent could be established on the basis of a "consistent pattern of conduct".[152] While this appeared to accord with Bosnia's submissions, the standard of proof was set prohibitively high. The Court stressed that the pattern of conduct "would have to be such that it could *only* point to the existence of such intent".[153] As no clear statement evidencing a genocidal plan was provided, and because the Court could not find a pattern of crimes that had to be treated as overall genocidal intent, the Court reaffirmed its decision that only the Srebrenica massacres constituted genocide.[154]

Jurisprudential Context: The Natural versus Positive Law Debate

In order to appreciate the arguments, it is useful to frame the debate in its jurisprudential context. The Court's decision to reject Bosnia's broad intent submission has provoked a series of acrimonious responses that at their heart draw on natural law rhetoric. For example, Wedgewood laments the situation in Bosnia:[155]

> [T]he ethnic conflagration [in Bosnia] had already raged for three years, with countless acts of nationalist violence aimed at expelling Muslims from the north, south and east of Bosnia. Yet the International Court of Justice shrinks from recognition, failing to explain why the deliberate slaughter of civilians in the riverside town of Brcko in 1992, or the torture and execution of Muslim civilians in Foca, were legally different in kind from the Srebrenica murders.

Vice-President Al-Khasawneh also strongly disagreed with the majority's ruling on this point, asking, "what other inference is there to draw from

148 Milanovic, "State Responsibility for Genocide: A Follow-Up" (2007) 18 EJIL 669, 672.

149 *Genocide Case (Judgment)*, supra note 6, [373]–[376].

150 Ibid [376].

151 Scheffer, "The World Court's Fractured Ruling on Genocide" (2007) 2 Genocide Studies and Prevention 123, 126.

152 *Genocide Case (Judgment)*, supra note 6, [376].

153 Ibid [373] (emphasis added).

154 Ibid [372]–[373].

155 Wedgwood, "Slobodan Milosevic's Last Waltz", *New York Times*, New York, United States, 12 March 2007, cited in Milanovic, supra note 148, 672; see eg Scheffer, supra note 151, 128.

the overwhelming evidence of massive killings systematically targeting the Bosnian Muslims than genocidal intent?"[156] The Vice-President believed that the Court should have been free to rely on the broad facts and conditions in Bosnia.[157] SáCouto, the director of the War Crimes Research Office, also supports this position, finding the Court's refusal to consider the evidence in a "holistic or collective manner" very disconcerting.[158] SáCouto considered that the Court should have focused on the broader facts in determining whether the wide-spread mistreatment that occurred in areas outside Srebrenica, particularly in the detention camps, illustrated a genocidal intent.[159]

Sivakumaran best illustrates the natural law appeal to morality, asking why the Court was unable to find clear genocidal intent based on the "massive killings", "massive mistreatment, beatings, rape and torture causing serious bodily and mental harm", the "deportations and expulsions of members of the protected group" and the "terrible conditions ... inflicted upon detainees of the camps".[160] The aforementioned critics put aside the technical criteria needed to prove genocidal intent, and instead emphasized that the wide-spread atrocities that occurred throughout the conflict should be sufficient evidence of a specific intent to destroy the targeted group. By appealing to moral outrage as opposed to technical requirements, the commentators resonate strongly with natural law rhetoric.

While from a humanitarian point of view it would perhaps have been ideal if the Court could have considered a wider pattern of intent, from a positivist stance, this was not feasible. The relevant legal difference between the events at Srebrenica and other incidents is that in all of the latter events, there was insufficient proof of genocidal intent.[161] Milanovic considers that the Court reached the correct decision, "short of misinterpreting the Genocide Convention".[162] For genocidal intent to be proven, it must be established that not only were people being killed because they were Bosnian Muslims, but also that they were being killed in order to destroy Bosnian Muslims as a group.[163] Milanovic's approach rightly emphasizes that this distinction is the legal difference between genocide and crimes

156 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Dissenting Opinion of Vice-President Al-Khasawneh)* [2007] ICJ <http://www.icj-cij.org/docket/files/91/13689.pdf> (at 10 October 2009) [41] ["*Genocide Case (Dissenting Opinion of Vice-President Al-Khasawneh)*"].

157 Ibid.

158 SáCouto, "Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case against Serbia and Montenegro" (2007) 15 Hum Rts Brief 2, 4.

159 Ibid.

160 Sivakumaran, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*)" (2007) 56 ICLQ 695, 699, citing *Genocide Case (Judgment)*, supra note 6, [276], [319], [334], [354].

161 Milanovic, supra note 148.

162 Ibid.

163 Ibid.

against humanity, "even if such legal distinction sometimes leads to morally absurd results".[164] He continues:[165]

> The *Genocide* case was not about the 'ethnic conflagration' in Bosnia, but about the *genocide* in Bosnia. The fact that there was a pattern of crimes committed by the Bosnian Serbs changes little or nothing when it comes to the legal qualification of those crimes.

It is worth adding that in adopting a positivist stance, the Court may have simply been following its own dictum in *The Corfu Channel Case*, in which it stated that "proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt".[166]

Milanovic also draws attention to the findings of the United Nations Commission of Inquiry for Darfur ("Darfur Inquiry"), which found that there was insufficient evidence that the ongoing atrocities were being committed with genocidal intent, to the extent that they could be classified as genocide.[167] If Darfur was not genocide within the meaning of Article II of the Convention, "how could Bosnia as a whole possibly be"?[168] The same natural–positive law debate exists in terms of Sudan's responsibility for genocide in Darfur.[169] Nevertheless, Milanovic's point stands. The Court's refusal to define the wider events in Serbia and Bosnia as genocide is not part of a legal conspiracy or a failure to act. As the Darfur Inquiry illustrated, finding state responsibility for genocide is notoriously difficult.

An Analysis of the ICJ and the Ad Hoc Tribunals

1 The Decisions of the ICJ and the Tribunals on Genocidal Intent are Consistent

Almost all of those who have opposed the Court's position have pointed to the ad hoc Tribunals in support of their position. Nonetheless, this article contends that when it comes to establishing genocidal intent, the decisions of the Tribunals and the ICJ are compatible. Still, the extensive

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164 Ibid.

165 Ibid 672–673 (emphasis in original).

166 *The Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18 (emphasis in original).

167 Milanovic, supra note 148, 673; International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (2005) ["*Darfur Report*"].

168 Milanovic, supra note 148, 673.

169 For a naturalist view advocating the labelling of the Sudan situation as genocide, see eg de Waal, "Reflections on the Difficulties of Defining Darfur's Crisis as Genocide" (2007) 20 Harv Hum Rts J 25. For a positivist view and support for the Darfur Inquiry's refusal to find state commission of genocide, see eg Schabas, "Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide" (2005) 18 LJIL 871. See generally Bunk, "Dissecting Darfur: Anatomy of a Genocide Debate" (2008) 22 Intl Rel 25; Quénivet, "The Report of the International Commission of Inquiry on Darfur: The Question of Genocide" (2006) 7 HR Rev 38; Byron, "Comment on the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General" (2005) 5 HR L Rev 351.

comparisons that have been made between these judicial bodies warrant further analysis.

Vice-President Al-Khasawneh considered that both the International Criminal Tribunal for Rwanda ("ICTR") and the ICTY showed that genocidal intent may be inferred from the broad circumstances.[170] For example, in *Prosecutor v Rutaganda*,[171] the ICTR Appeals Chamber held that it was possible to deduce genocidal intent 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".[172] The Appeals Chamber also approved the Trial Chamber's use of other factors, such as the scale of atrocities committed or their general nature, to infer the genocidal intent connected with a particular act.[173] Additionally, the Trial Chamber in *Prosecutor v Rutaganda* held that "in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused".[174] Finally, in *Prosecutor v Kayishema*, it was held that "[t]he perpetrator's actions, including circumstantial evidence ... may provide sufficient evidence of intent".[175]

Those advocating a wider inference of intent have also looked to the ICTY:[176]

> [Proof of specific genocidal intent] may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.

Relying on this decision, the Appeals Chamber in *Prosecutor v Krstic* held that "[w]here direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime".[177] SáCouto points out that in *Prosecutor v Karadzic*,[178] the ICTY concluded that, in combination with other factors, the systematic rape of the kind perpetrated

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170 *Genocide Case (Dissenting opinion of Vice-President Al-Khasawneh)*, supra note 156, [43].

171 *Prosecutor v Rutaganda (Judgment)* [2003] ICTR-96-3-A, [528] ["*Rutaganda Appeals Judgment*"].

172 Ibid.

173 Ibid; affd *Prosecutor v Rutaganda (Judgment and Sentence)* [1999] ICTR-96-3, [398] ["*Rutaganda Tribunal Judgment*"]; affd *Prosecutor v Akayesu (Judgment)* [1998] ICTR-96-4-T, [523] ["*Akayesu Tribunal Judgment*"].

174 *Rutaganda Tribunal Judgment*, supra note 173, [63].

175 *Prosecutor v Kayishema (Judgment)* [1999] ICTR-95-1-T, [93]; affd [2001] ICTR-95-1-A, [148].

176 *Prosecutor v Jelisic (Judgment)* [2001] IT-95-10-A, [47]. See also Sivakumaran, supra note 160, 699.

177 *Krstic Appeals Judgment*, supra note 15, [34].

178 *Prosecutor v Karadzic (Trial Chamber Review)* [1999] IT-95-5-R61, [94]–[95]

during the Bosnian conflict could provide circumstantial evidence of genocidal intent.[179]

The ICTY has repeatedly warned that when broader evidence is used to infer genocidal intent, that "inference must be the only reasonable inference available on the evidence".[180] This is closely aligned with the Court's declaration, discussed above, that intent can only be inferred when no other inference is possible. In response to this, SáCouto stresses that the ICTY was still willing to consider such evidence as proof of intent.[181] This argument is far from convincing, given that the ICJ in the *Genocide Case* also investigated whether there was an overall pattern evidencing genocidal intent.[182]

Perhaps the most valid criticism on this point comes from Sivakumaran, who protests that it is unacceptable for the Court in the *Genocide Case* to reach a conclusion "without elaboration to the facts before it".[183] He points out that in contrast, the ICTY and the ICTR conducted in-depth investigations into the factors from which intent may be inferred.[184] Even so, the Court did consider the issue and made a clear ruling on the matter. While a detailed explanation may have been useful for academics, it does not negate the fact that the Court considered, and dismissed, the idea.

More importantly, even though the ICTY considered the concept of wide-spread intent, it ultimately found that genocide had occurred only at Srebrenica.[185] In both *Prosecutor v Brdjanin*[186] and *Prosecutor v Stakic*,[187] for example, the Tribunal tried the highest-ranking members of the Bosnian Serb leadership in the relevant areas, with evidence of a comprehensive pattern of atrocities; yet in neither case could the ICTY infer the existence of genocidal intent from the wide-spread pattern of atrocities.[188] Thus, in both methodology and in result, the ICJ and the Tribunals have been consistent when establishing genocidal intent.

2 The Test for Genocidal Intent Does Not Vary with the Type of Trial

Critics have contrasted the Tribunals and the Court in order to suggest that the test for genocidal intent varies depending on whether the trial is of an individual criminal offender, or of a state for the purposes of establishing

179 SáCouto, supra note 158, 4.

180 *Krstic Appeals Judgment*, supra note 15, [41]; *Prosecutor v Brdjanin (Tribunal Judgment)* [2004] IT-99-36-T, [970] ["*Brdjanin Tribunal Judgment*"].

181 SáCouto, supra note 158, 4.

182 See *Genocide Case (Judgment)*, supra note 6, [373].

183 Ibid; Sivakumaran, supra note 160, 699.

184 See eg *Krstic Appeals Judgment*, supra note 15, [21]; *Akayesu Tribunal Judgment*, supra note 173, [523].

185 Milanovic, supra note 148, 672.

186 *Brdjanin Tribunal Judgment*, supra note 180, [984].

187 *Prosecutor v Stakic (Judgment)* [2003] IT-97-24-T, [546].

188 Milanovic, supra note 148, 673.

state responsibility for genocide. This article contends that the test does not, and should not, vary based on the situation.

Vice-President Al-Khasawneh agreed that the ICTY has never found genocide based on a wide-spread pattern of conduct, and suggested that this is "not in the least surprising".[189] The Vice-President pointed out that the ICTY only has jurisdiction to determine the criminal liability of individuals appearing before it, such that the relevant evidence is always limited to the investigation at hand.[190] The Vice-President was concerned that the majority in the *Genocide Case* was "intent on adopting the burden of proof relevant to criminal trials" and was unwilling to recognize that there is a "fundamental distinction" between the criminal trial of an individual and a case involving state responsibility for genocide.[191] Put simply, Vice-President Al-Khasawneh considered that because the Court was ultimately concerned with state responsibility, it could have looked at "patterns of conduct throughout Bosnia", unconstrained by "the sphere of operations" of any particular individual.[192]

Even Gattini — a strong advocate of the Court's position — supports this argument. He notes that the ICTY has to concentrate on the specific charges relating to the individual accused, such that in most cases it is "impossible" to take into account the broader picture.[193] Scheffer echoes this argument, emphasizing that the investigation and standard of intent should have been different because the Court was considering the responsibility of a state.[194] He suggests that the Court could have considered the "actions, events, circumstances, policies, omissions, and rhetoric of a government acting in its collective capacity", irrespective of any individual's intention.[195] He then scathingly observes:[196]

> [O]ne would have expected the ICJ to make a serious effort to determine any such inferential intent, even if that meant traversing new terrain in ICJ jurisprudence to create a methodology that not only is faithful to the totality of facts but also understands that there is a distinction between how one judges a government's performance and how one judges that of an individual perpetrator.

Ultimately, these arguments appeal to the same natural law rhetoric discussed above. While frustration with the Court's ruling in light of the atrocities committed is understandable, the Court was not free to depart from the definition of genocidal intent. In other words, the Court was confined to the definition of genocide under the Convention.

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189 *Genocide Case (Dissenting Opinion of Vice-President Al-Khasawneh)*, supra note 156, [42].

190 Ibid.

191 Ibid.

192 Ibid.

193 Gattini, supra note 142, 902.

194 Scheffer, supra note 151, 125–126.

195 Ibid 126.

196 Ibid 128–129.

More importantly, the commentators and Judges seeking a separate possible category of wide-spread intent for states seem to overlook the fact that state responsibility is achieved via the doctrine of attribution. This means that the focus is on the individual, with state responsibility attaching as a result. Admittedly, the focus is only on the individual in order to determine state responsibility, but completely shifting the focus away from the individual and onto state-wide activities would be too far removed from the underlying principle of attribution, whereby state responsibility attaches only by virtue of an individual or organ having committed genocide.

3 Summary

Comparisons between the ICJ and the two ad hoc Tribunals featured extensively in the debate over how to determine genocidal intent. While these comparisons deserve close consideration, ultimately, the ICJ and the Tribunals are consistent in their decisions on genocidal intent. Furthermore, the appropriate test for genocidal intent should not vary depending on the alleged perpetrator in question.

The Relationship between Intent and the High Standard of Proof

1 General Discussion

The claim that there is a difference between individuals and states leads into the final focus of this Part: namely, the relationship between genocidal intent and the standard of proof. Scheffer concedes that because the ICTY and ICTR were considering whether an individual committed genocide, it was appropriate to require a higher standard of intent, largely because the individual faces a loss of liberty or possibly even a death sentence as punishment.[197] In contrast, the standard of proof for state responsibility is of a "different character" and does not require such a strict test.[198] Scheffer concludes that a "mystery tour through the psyches of political or military leaders" in relation to a single incident is not essential when examining state responsibility.[199] Yet this notion that inferring intent for state responsibility should have a lower test is completely at odds with the Court's aforementioned statement that an investigation into state responsibility for such serious events demands an even higher standard of proof.[200]

The Court's general dictum on the standard of proof — notably, the requirement of a finding beyond *any* reasonable doubt — features extensively in the 'intent' debate. Sivakumaran contends that because the

197 Scheffer, supra note 151, 125.

198 Ibid.

199 Ibid.

200 See *Genocide Case (Judgment)*, supra note 6, [209].

Court adopted such a high general standard of proof, it did not need to apply strict limits when inferring intent from the broader circumstances.[201] Accordingly, Sivakumaran considers that the test for intent and the ICTY's previous findings are "inextricably linked with the standard of proof".[202] He points out that the ICTY uses the lower standard of proof of 'beyond reasonable doubt', which "necessarily" requires a higher standard when inferring intent.[203] Concomitantly, the Court is not bound in the same way, because it is applying the much stricter standard of 'beyond any reasonable doubt'.[204] Sivakumaran thus concludes that the Court should have been free to consider wider circumstantial evidence.

This logic is, however, flawed. The fact that the Court adopted a high standard of proof is not grounds to lessen the requisite standards in other areas. By demanding such a high standard of proof, the Court signalled the gravity of finding a state responsible for genocide. If anything, this heralds a need for a higher standard of proof when inferring intent. Gattini, who supported the Court's decision regarding wider evidence of intent, considered that the high bar was "but another way to express the same standard of 'proof beyond any reasonable doubt'", which the Court consistently applied throughout its decision.[205]

2 It is Not Essential for the Court First to Establish Wide-spread Evidence of Intent

Several commentators have extended the premise that the Court should place greater emphasis on wider evidence of intent, arguing that the Court must establish that the state exhibited wide-spread evidence of genocidal intent in order to be held responsible under the Convention. Gaeta, for example, contends that a state can only be considered responsible for an individual's international crime when there is an accompanying "systemic pattern of criminality organized, tolerated, or acquiesced in by the state".[206] He gives the example of a policeman who kills a foreign diplomat, arguing that just because the policeman has committed murder (and assuming that the policeman's actions were attributable to the state), it does not enable one to say that the state is responsible for the international crime.[207] Yet this completely contradicts the premise of the Draft Articles and well-established international law principles of attribution, whereby a state would be held directly responsible in that situation. As noted in Part II, state responsibility for genocide is achieved through the doctrine of attribution.

One explanation, while not explicitly stated by Gaeta, is that his

201 Sivakumaran, supra note 160, 699.
202 Ibid.
203 Ibid.
204 Ibid.
205 Gattini, supra note 142, 903.
206 Gaeta, supra note 17, 636.
207 Ibid.

logic is restricted to the attribution of serious crimes, as opposed to wrongful acts in general. Indeed, Gaeta's examples are restricted to criminal law. Furthermore, the final example given by Gaeta highlights his concern that a state would be held responsible for a criminal offence: under the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others,[208] if an official committed acts of prostitution exploitation, according to the Court's reasoning, the state would be responsible for having "prostituted a human being", which is absurd.[209] This would, however, be a question of politics and litigation strategy. Technically, if an official acting in his official capacity engaged the services of a prostitute, state responsibility could attach. Whether a state would ever be sued for this is a completely different question. Furthermore, even if the state were sued, it would not be on the ground that the state actually solicited a prostitute, only that it was responsible for the act.

A further explanation is that Gaeta is proceeding from a quasi-political standpoint. He provides another example, this time of an Italian state official acting in his official capacity, participating in the terrorist attacks of 11 September 2001.[210] Gaeta surmises that the official can be charged with terrorism and be held responsible for a very serious international crime. "But can anybody argue that Italy as such is responsible for having perpetrated the 11 September attacks and therefore for being 'a terrorist state?'"[211] Continuing this argument, Gaeta asserts that "nobody would contend that a state is responsible for war crimes on the basis of a single case ... of killings of prisoners of war, unless it is established that these crimes are committed on a large scale".[212] Gaeta argues that the focus is not whether an attributable individual had the requisite mens rea; rather, the key requirement is "proof of the existence of a pattern of violence and the possibility of inferring from this pattern the acquiescence by the state's military and political authorities in or even approval of the criminal behaviour of their subordinates".[213]

Gaeta applies the same logic to the Convention, arguing that genocide is defined in individual criminal terms that cannot simply be translated to an obligation on states.[214] He contends that state responsibility for genocide requires a "pattern of widespread and systematic violence against a given group".[215] As evidence of this, Gaeta notes that whenever it has been alleged that a state has engaged in genocide, it has always

208 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, opened for signature 21 March 1950, 96 UNTS 271 (entered into force 25 July 1951).

209 Gaeta, supra note 17, 640.

210 Ibid 636.

211 Ibid 636–637.

212 Ibid 641.

213 Ibid.

214 Ibid 642.

215 Ibid 643.

been due to a systematic attack on a particular group in accordance with a governmental plan, as with the Nazis' attacks on Jews, or the attacks on the Tutsis in Rwanda.[216] This is supported by the fact that the Darfur Inquiry reported that the atrocities could not be categorized as acts of genocide by Sudan because there was no evidence of a wide-spread state policy of genocide.[217]

The critical flaw in Gaeta's reasoning is that it moves too far beyond the Genocide Convention and ignores the underlying principle that state responsibility only exists through the actions of individuals and the principle of attribution. This departure from the Convention is clearest in Gaeta's contention that for the international responsibility of a state to arise, there is no need to demonstrate that "the state as such — or one or more of its officials — harboured a genocidal intent in the criminal sense".[218] Gaeta concludes that "[t]his is a requirement that only pertains to the criminal liability of individuals".[219] However, if state responsibility is to be activated, it must be through the criminal actions of individuals.

Gaeta offers further justification for his theory, based on the Convention itself. He is concerned that, according to the Court's reasoning, when genocide is committed by an individual that can be attributed to the state, there is no point in asking whether that state complied with its obligation to prevent genocide,[220] "because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated".[221] This has the potential to be extremely problematic. Gaeta gives the example of a state official, acting in his official capacity, who takes part in genocide perpetrated abroad that is clearly not planned or tolerated by his home state and that his home state is actively trying to prevent.[222] According to the reasoning of the Court, the state would be responsible for genocide, despite its best intentions and efforts to prevent the commission of the crime.[223] Yet no one would ever realistically suggest that the home state (assuming that it did not have anything to do with the offences) was responsible for the genocide. It is possible that the obligation under the Convention to extradite offenders may be engaged, but nothing more. Gaeta's argument is based on a combination of political and legal factors. While he takes the argument too far in suggesting that individual intent is irrelevant, he is, at least from a natural law position, on firmer ground in arguing that a myopic focus on isolated events risks trivializing the notion of genocide.[224]

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216 Ibid 642.

217 *Darfur Report*, supra note 167, [518], cited in Gaeta, supra note 17, 642.

218 Gaeta, supra note 17, 643.

219 Ibid.

220 Ibid 638.

221 *Genocide Case (Judgment)*, supra note 6, [382].

222 Gaeta, supra note 17, 638.

223 Ibid.

224 Ibid 647.

Schabas also concludes that for a state to be held directly responsible under the Convention, there has to be a wide-spread pattern of genocide. He provides an apt continuation of Gaeta's argument, explaining in greater detail why it is essential to focus on a wider pattern of events when establishing state responsibility for genocide. Schabas' first reason resembles Gaeta's, noting that focusing on an individual perpetrator could force the Court to establish state responsibility on the basis of a single individual acting alone.[225] Secondly, Schabas explains that considering the wider circumstances effectively amounts to considering whether the state had the "mental element" for the commission of genocide.[226] As Schabas notes, the analogy between individual criminal responsibility and state responsibility is only "very approximate".[227] He argues that it is not applicable to consider the state's mens rea in the same sense as when investigating an individual. Accordingly, looking at the wider pattern of evidence is effectively an investigation into whether there was a state plan or policy of genocide.[228]

Even if it was assumed that one individual could commit acts of genocide and that a state was accordingly sued, the problem with Schabas' explanation is that the Court explicitly accepted the notion of a state policy or plan as an alternative to finding genocidal intent on behalf of an individual.[229] It is possible that Schabas persists with this argument in the belief that when the Court referred to a state policy or plan, the Court meant a tangible document, such as a policy statement.[230] Thus what Schabas is possibly suggesting, not unreasonably, is that the investigation into the wider circumstances would effectively be an attempt to infer a state policy or plan of genocide.

Whilst advocating the search for slightly different reasons, Schabas and Gaeta both confirm that in practice (be it quasi-politically or legally), state responsibility for genocide requires a wider state policy of offending and cannot simply be activated by an attributable individual.

Kress begins by arguing in the same vein as Gaeta and Schabas, insisting that genocide requires wide-spread intent. He examines the Court's decision not from the point of view of state responsibility, but in terms of the requisite intent for the crime of genocide generally. Kress, however, takes the argument too far. He states that labelling the conduct of a lone individual's acts as genocide would "disconnect the crime of genocide from its historical roots as a crime against humanity", because the latter crimes "must occur as part of a systematic or widespread attack against any civilian

225 Schabas, "Whither Genocide? The International Court of Justice Finally Pronounces" (2007) 9 Journal of Genocide Research 183, 189 ["Whither Genocide?"].

226 Ibid 188.

227 Ibid.

228 Ibid.

229 *Genocide Case (Judgment)*, supra note 6, [370].

230 Scheffer interpreted the exception in this way, seeing it as requiring Bosnia to produce an official statement of aims reflecting a genocidal intent: Scheffer, supra note 151, 126.

population".[231] He is correct in arguing that "it is clear that a single human being will not, except in the most exceptional circumstances, be capable of destroying a protected group".[232] However, he is incorrect in contending that the status of genocide as a crime under general international law suggests that there must be a clear 'international' or state-wide dimension for any type of genocide, even when perpetrated by individuals.[233] Kress believes that the Court erred in deeming it possible for certain individuals to act with genocidal intent, irrespective of the existence of a "collective genocidal act".[234] He explains that without a national genocidal campaign to be an "objective point of reference", an individual will lack the means to single-handedly destroy a group as per the definition of genocide, and thus cannot have a "*realistic* genocidal intent".[235] Instead, the perpetrator only entertains a "vain genocidal hope".[236]

Kress's jurisprudential support is tenuous at best. He points out that the District Court of Jerusalem inquired into the "overall genocidal campaign masterminded by the Nazi leadership",[237] but overlooks the fact that the action was brought against individuals. It was on these individuals that the Court's investigation was focused. Kress also looks to the Tribunals. He notes that the ICTR investigated whether there was "nationwide" genocide in Rwanda,[238] and that the ICTY considered it necessary to make a determination regarding the overall "criminal enterprise".[239] Again, Kress ignores that while the Tribunals considered the overall situation and context, the focus of the trials remained on the individuals. Furthermore, there was no suggestion in any of the cases that the lack of a state policy or wider evidence of genocidal intent would exclude the possibility of an individual being convicted of genocide. As further evidence, Kress cites a passage from the *Prosecutor v Krstic* Tribunal Judgment:[240]

> [T]he Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and scale of the crime of genocide ordinarily presume that several protagonists were involved in its preparation. Although the motive of each participant may differ, the objective of the enterprise remains the same. In such cases of joint participation, the intent to destroy, in

231 Kress, "The International Court of Justice and the Elements of the Crime of Genocide" (2007) 18 EJIL 619, 621.

232 Ibid 620.

233 Ibid 621.

234 Ibid 623. See also the *Darfur Report*, supra note 167, [520].

235 Kress, supra note 231, 622 (emphasis in original).

236 Ibid.

237 Ibid 621; *Attorney-General of the Government of Israel v Eichmann* (1961) 36 Intl L Rep 79.

238 Kress, supra note 231, 621; *Akayesu Tribunal Judgment*, supra note 173, [469].

239 Kress, supra note 231, 621; *Prosecutor v Krstic (Tribunal Judgment)* [2001] IT-98-33-T, [549] ["*Krstic Tribunal Judgment*"].

240 *Krstic Tribunal Judgment*, supra note 239, [549]; Kress, supra note 231, 621.

> whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators.

What Kress fails to appreciate is that the Tribunal is speculating on allegations of joint commission of genocide, as evidenced by the last sentence. In such a case, the focus will not be on each individual's intent, but on the group's intent instead. At best, Kress is correct in implying that the crime of genocide is not usually committed by a single individual.[241] Therefore, although Kress joins a chorus of scholars in admonishing the Court for focusing on individual intent instead of a wider state policy, his reasons are unconvincing. Whereas Gaeta and Schabas demanded that the Court look for a wider policy of intent because the focus was on state responsibility, Kress attempts to argue more fundamentally, that without broad evidence of collective genocide, an individual cannot be guilty under the Convention, as they would not have "realistic" intent.[242]

Concluding Remarks

Although Kress's argument takes Bosnia's position too far, it completes the spectrum of attitudes towards the Court's ruling on investigating wide-spread evidence of genocidal intent. At the other end of this spectrum, Gattini concludes that "one of the main merits of the Judgment lies in not having followed Bosnia's presentation" of a "single, all-embracing case of genocide attributable as a whole to Serbia".[243]

Milanovic, while agreeing with Gattini, offers an explanation as to why Bosnia argued for wide-spread genocide and did not focus on proving genocidal intent in each specific incident. He suggests that Bosnia was acutely aware that the ICTY had found genocide only in Srebrenica.[244] By making the case one of genocide in the Bosnian War as a whole, Bosnia hoped to increase its chances of success.[245] Furthermore, describing the entirety of the Bosnian War as genocide was the only approach which would have been acceptable to Bosnian politicians, who would have been "unable to explain to their electorate how the dead of Srebrenica were victims of genocide, while the dead of Sarajevo were not".[246]

Although some academics have suggested that the 'blame' lies with Bosnia for attempting to argue for wider evidence of intent, other commentators are more critical of the Court. Shackelford writes that, by applying the specific intent requirement in such a stringent manner, the ICJ has set an "extraordinarily high bar" for finding states responsible, effectively limiting it to situations where there is "smoking-gun" evidence

241 See Gattini, supra note 142, 902.
242 Kress, supra note 231, 622.
243 Gattini, supra note 142, 902.
244 Milanovic, supra note 148, 672.
245 Ibid.
246 Ibid.

of genocidal intent.[247] Scheffer is equally scathing, noting that "[i]f one were to search for an easy way for judges and lawyers to avoid the reality of state responsibility for genocide", the ICJ has "discovered it in spades — to the detriment of genocide studies ... and genocide prevention for years to come".[248]

Underpinning these arguments — and indeed much of the debate over the *Genocide Case* — is the recurrent clash of natural and positive law rhetoric. While it may be frustrating for some that the Court did not look at the overall picture of the atrocities that were committed, the case at hand was clearly placed in the legal confines of the Genocide Convention. This meant that the Court could only find responsibility via attribution. Yet while the Court's focus had to be on individuals, in practice, the bar for state responsibility has been placed no higher than it was when applied to individuals by the ICTR and ICTY.

IV CONCLUSION

As Goldstone and Hamilton observe, irrespective of the actual outcome of the *Genocide Case*, the decision represents an "historic moment in international law".[249] Despite this, or perhaps because of this, the Court's ruling has been the subject of intense political and academic scrutiny. Many commentators have praised the decision. Schabas notes that the ruling will disappoint many observers and is sure to lead to criticisms that the ICJ is "innately conservative, a club of former legal advisers and ambassadors zealous to protect the interests of States".[250] Such criticism, he counters, would be unfair. With the exception of Srebrenica, the claims of genocide never quite "added up", and the Court had the "wisdom and integrity to say as much, even if it might make the judges unpopular in some circles".[251]

There are also notable commentators who believe that the Court went too far in finding that states can be held responsible for genocide, even if Serbia was ultimately 'acquitted'. Gaeta believes that the eagerness of the Court to rule on the atrocities perpetrated in Bosnia meant that the ICJ construed the Genocide Convention "beyond its proper scope and content", resulting in a construction "substantially marred by a misapprehension of

247 Shackelford, supra note 18, 22.

248 Scheffer, supra note 151, 126.

249 Goldstone and Hamilton, "*Bosnia v Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia" (2008) 21 LJIL 95, 111.

250 Schabas, Whither Genocide?, supra note 225, 190.

251 Ibid. Other supportive commentators include Scheffer, who writes that he is "relieved" at the ICJ's decision, which he hopes will inspire national legal systems to hold their own governments to the high standards espoused by the Court: Scheffer, supra note 151, 124.

the difference between genocide as an international wrongful act of a state and genocide as a crime involving individual criminal liability".[252]

Still, most commentators believe that the Court did not go far enough in its decision against Serbia. Vice-President Al-Khasawneh commented that absolving Serbia from responsibility for genocide was an "extraordinary result in the face of vast and compelling evidence to the contrary".[253] Gibney also bemoans that the *Genocide Case* sends a "disturbing message" regarding state responsibility.[254] Rather than guiding states in terms of ensuring that their actions are lawful under the Convention, "the case reads much more like a primer on how to avoid responsibility altogether".[255] Gibney's point is part of a recurrent theme running throughout the scholarship. Goldstone and Hamilton speculate that "the Court's fact-finding approach in this test case raises doubts as to whether, in practice, a state will ever be held responsible for genocide outside the parameters of the prior convictions of individual perpetrators".[256] Turns concludes that Bosnia has "undoubtedly been left feeling very short-changed by this decision", with the "widespread perception" that Serbia has been "allowed to commit murder — literally — and 'get away with it'".[257]

While many scholars remain embroiled in a bitter academic battle, it is impossible to understand and critique the *Genocide Case* judgment without appreciating the legal constraints within which the Court had to operate.[258] The most notable of these was the strict definition of genocide under the Genocide Convention and the Court's limited jurisdiction.[259] As Dimitrijevic and Milanovic note, if the Court had jurisdiction over the various violations of the *jus ad bellum*, humanitarian law, and human rights law, the overall outcome of the case may have been very different.[260] Instead, the Court lost jurisdiction whenever it was established that a particular atrocity, no matter how heinous, did not qualify as genocide.[261] Scheffer echoes the same idea. He notes that "good-faith analysis abounds in both the majority's and the dissenting judges' writings", and it is vital to remember that the Court was bound by the "exceptionally narrow prism of genocide through which all responsibility was judged".[262]

Perhaps the greatest constraint for the Court was created by Bosnia's lawyers, who argued that the totality of the Bosnian War was genocide perpetrated by Serbia. Bosnia's litigation strategy was a failure: they played

252 Gaeta, supra note 17, 647–648.

253 *Genocide Case (Dissenting Opinion of Vice-President Al-Khasawneh)*, supra note 156, [62].

254 Gibney, "Genocide and State Responsibility" (2007) 7 HR L Rev 760, 771.

255 Ibid.

256 Goldstone and Hamilton, supra note 249, 103.

257 Turns, supra note 3, 427.

258 Milanovic, supra note 148, 693.

259 Ibid.

260 Dimitrijevic and Milanovic, "The Strange Story of the Bosnian *Genocide* Case" (2008) 21 LJIL 65, 84.

261 Ibid, citing *Genocide Case (Judgment)*, supra note 6, [147], [277], [319], [328], [334], [354].

262 Scheffer, supra note 151, 124.

a game of "all or nothing", offering "no truly alternative solution to the Court in the event that their primary case, that all of Bosnia was engulfed in genocide and that Serbia was responsible for all of it, should fail — as it did, and as was in fact most likely".[263] This ambitious argument, concludes Milanovic, was the Court's "first and ... final constraint".[264]

Unfortunately, given the complex legal constraints in operation, the *Genocide Case* has been misunderstood by large parts of the public and the media. Dimitrijevic and Milanovic blame the misinformation on a "particularly malignant combination of near-total ignorance of international law" and "the disparity between the lay concept of genocide and the legal notion of genocide".[265] Accordingly, he contends that the people of Bosnia and Serbia did not, and cannot, understand the ICJ's judgment for what it was.[266] As Milanovic notes, a large part of the problem for Bosnia was that so many had hoped that the *Genocide Case* would serve as an "adjudication on the totality of the Bosnian conflict, which it simply was not and could not have been".[267]

Even academics have struggled to divorce the politics of the *Genocide Case* from the legal arguments. Gibney objects to the Court's treatment of state responsibility as an "either/or proposition",[268] which meant that the final result was that "Serbia is no more 'responsible' for genocide in Bosnia than, say, Paraguay, or any other country that had absolutely no relationship with the Bosnian Serbs". While this may be a difficult concept to stomach, it is not "totally absurd".[269] It is the same as any other trial: a party is either guilty or not guilty; liable or not liable; responsible or not responsible. Even though Serbia attracted responsibility for failing to prevent genocide, Gibney's point still stands: at the conclusion of the case, Serbia was absolved of any direct responsibility for genocide.

Beneath criticisms of Bosnia and the Court is a growing preoccupation with the label 'genocide', and an expanding fissure between the legal and political understandings of the term. Why does genocide receive so much political and legal emphasis? Is it because genocide is considered the 'crime of crimes'? On this point, Milanovic asks: "[s]ince when ... are war crimes and crimes against humanity, such as persecution and extermination, to be treated morally as mere misdemeanours, with genocide supposedly being the only word which can adequately describe mass atrocities?"[270] As he concludes, "[t]he victims of these crimes are victims no less than those of genocide".[271] On top of this, it is somewhat ironic that large parts of the

263 Milanovic, supra note 148, 694.
264 Ibid.
265 Dimitrijevic and Milanovic, supra note 260, 85.
266 Ibid.
267 Milanovic, supra note 148, 693.
268 Gibney, supra note 254, 771.
269 Ibid.
270 Milanovic, supra note 148, 673.
271 Ibid.

global community clamour for states such as Sudan to be charged with genocide, despite the fact that the crime has proved to be elusive in the courts and tribunals.

Exactly where the *Genocide Case* will sit in the annals of history may be unclear at this stage, but the decision suggests that the post-World War II ideal of holding individuals to account for atrocities is giving way to a more traditional notion, whereby responsibility for internationally wrongful acts ultimately lies with states. Or, rather than being part of an international trend, perhaps it is just a realization of the naïve optimism of the Convention's drafters and their ill-fated beliefs regarding the future shape of state behaviour:[272]

> [A]fter the horrendous genocide of European Jews in the Second World War and the stiff punishment of many of its planners and perpetrators at the hands of criminal courts, contracting states themselves would not dare to engage in genocide, or ... go so far as to soil their hands with such horrible behaviour.

Whatever the reason, the Court's decision is a much-needed enunciation on state responsibility for genocide. Although the ruling has suffered intense criticism, it has filled a gaping lacuna in international jurisprudence. Shackelford comments that in the "convoluted history of state accountability for human rights abuses, [the decision] represents a step forward, one which could, in time, overshadow the shortcomings in the Court's final ruling".[273]

The decision becomes even more pertinent in light of the cases currently before the ICJ concerning allegations of state commission of genocide. In April 1999, an application under Article IX was filed by Yugoslavia against ten Member States of the North Atlantic Treaty Organization concerning their conduct during the Kosovo bombing campaign.[274] Not surprisingly, the Court refused even provisional measures given its lack of prima facie jurisdiction on the merits.[275] More realistically, in July 1999, Croatia filed its own suit against Yugoslavia for the alleged commission of genocide during the invasion of parts of Croatia in 1991.[276] The Court delivered its judgment on the preliminary objections in November 2008, ruling against Serbia's three objections to the case.[277] Now, at least, such cases will have

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272 Cassese, supra note 103, 877.

273 Shackelford, supra note 18, 26.

274 See eg *Case Concerning Legality of Use of Force (Yugoslavia v Belgium) (Request for the Indication of Provisional Measures)* [1999] ICJ Rep 124.

275 See Gray, "Legality of Use of Force (*Yugoslavia v Belgium*) (*Yugoslavia v Canada*) (*Yugoslavia v France*) (*Yugoslavia v Germany*) (*Yugoslavia v Italy*) (*Yugoslavia v Netherlands*) (*Yugoslavia v Portugal*) (*Yugoslavia v Spain*) (*Yugoslavia v United Kingdom*) (*Yugoslavia v United States of America*): Provisional Measures" (2000) 49 ICLQ 730, 736.

276 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Yugoslavia)* [1999] ICJ Rep 1015.

277 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Preliminary Objections)* [2008] ICJ <http://www.icj-cij.org/docket/files/118/14891.pdf> (at 10 October 2009).

a jurisprudential framework within which to proceed. Yet, as Schabas soberly reminds us: "[t]o the extent that we quarrel about whether genocide has taken place after the atrocities have been committed, it is already too late."[278]

278 Schabas, Whither Genocide?, supra note 225, 185.