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Pulling the Stops on Genocide: The State or the Individual?

Amabelle C. Asuncion*

Abstract

The International Court of Justice's decision on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) has exposed the unforeseen irony in the international consensus on the singular distinction of genocide as the crime of crimes. Defying expectations, this classification coupled with the conception of a 'civil genocide' has magically transformed into a legal shield which protects states from responsibility even as individual convictions are being handed down. Yet, the history of the Genocide Convention easily recalls the objective of preventing the commission of genocide by states and individuals alike. This article thus ponders on the virtue of seeking recourse under the Genocide Convention – whether against the state or the individual. In traversing this inquiry, it embarks on a comparative analysis of selected case law from the International Criminal Tribunal of Yugoslavia, the International Criminal Tribunal of Rwanda, and the International Court of Justice. As it uncovers a counterintuitive clash of jurisprudential outcome and a widening gap between the ideal and the real, the article identifies the legal bolts which need to be adjusted so that the genocide stops can be pulled in the right direction.

1 Introduction

On 26 February 2007, the International Court of Justice (ICJ) came out with the much-awaited decision on the Republic of Bosnia and Herzegovina's (henceforth Bosnia-Herzegovina) charges of genocide against the Federal Republic of Yugoslavia, Serbia, and Montenegro (henceforth Serbia-Montenegro). This is the first ICJ decision on a state's charges of genocide against another state, although four cases (including this) have been filed pursuant to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.[1] To Bosnia-Herzegovina's

* LL.M, Georgetown University Law Center. Member of the New York and Philippine bars. Email: acasuncion@gmail.com.

[1] The other three cases are: (i) *Trial of Pakistani Prisoners of War (Pakistan v. India)* filed in 1973, which was discontinued upon the request of the Parties due to negotiations; (ii) *The Legality of Use of Force Case (Yugoslavia v. NATO Members)* filed on 25 Apr. 1999, which was rejected by the ICJ due to absence of US consent to the ICJ's exercise of jurisdiction; and (iii) *Application by the Republic of Croatia Instituting Proceedings Against the Federal Republic of Yugoslavia* filed on 2 July 1999, which remains pending before the ICJ.

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disappointment, the ICJ held that genocide had not been committed except in Srebrenica and that Serbia-Montenegro's responsibility was for failure to prevent and punish the commission of genocide. Serbia-Montenegro was held not to have committed, conspired to commit, incited to commit, or been complicit in the commission of genocide. The landmark decision led to observations that it would be difficult to make a state responsible for genocide, given the ICJ's stringent requirements.[2] With this development, interesting questions arise: is it worth filing a genocide claim against a state or is it more judicious to prosecute individuals criminally? Then again, who should bear the ultimate responsibility for genocide, the state or individual perpetrators? Or are the responsibilities of the state and its individual agents so intertwined that one is conditioned on the other?

To answer these questions, this article examines the ICJ decision and decisions of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The article posits the view that prosecution before the ad hoc tribunals is more efficient because they take a more balanced approach despite the criminal nature of the proceedings. On the other hand, the ICJ has set up a system of proof which effectively insulates states from responsibility. Section 2 begins with a brief background on the international crime of genocide. Section 3 deals with individual prosecutions under the ICTY and the ICTR and analyses three major decisions from each tribunal. Section 4 analyses and critiques the ICJ decision. Section 5 compares and contrasts the approaches of the three tribunals. Section 6 proposes that the relationship between state and individual responsibilities is not one of dependence but of causality where one can trigger the other. The legal architecture for genocide prosecution, however, is designed for individual convictions and state acquittal. This section argues that the Genocide Convention meant to strengthen state responsibility, so that if the stops are to be pulled, they must be pulled against the state. Accordingly, section 7 suggests a laundry list for overhauling the legal labyrinth which protects the state from responsibility.

2 The International Crime of Genocide: Birth Pains

The Convention on the Prevention and Punishment of the Crime of Genocide is the international community's condemnation of, and penance for, decades of holocausts starting from the 1915 Armenian massacre to the Nazi persecution of the Jews. Dubbed as the crime of crimes, genocide was carved out of 'crimes against humanity' and defined as the 'commission of specific acts[3] with intent

[2] Tosh, 'Genocide Acquittal Provokes Legal Debate', Institute for War and Peace Reporting Tribunal Update No. 491, 2 Mar. 2007, available at: http://iwpr.net/?p=tri&s=f&o=333772&apc_state=henptri.

[3] (a) Killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group: Convention on the Prevention and Punishment of the Crime of Genocide (henceforth the 'Genocide Convention'), GA Res 217A(III), 10 Dec. 1948, and 43(supp.) *AJIL* (1949) 127,Art. II.

to destroy, in whole or in part, a national, ethnic, racial, or religious group as such'. Its key elements are: (i) the constitutive acts; (ii) specific intent to destroy a group as such (*dolus specialis*);[4] (iii) substantial or complete destruction of a group; and (iv) a protected group. The punishable acts are (i) commission of, (ii) conspiracy to commit, (iii) direct and public incitement to commit, (iv) attempt to commit, and (v) complicity in, genocide. The Convention provides for state obligations as well as individual criminal liability. From the Genocide Convention were conceived other instruments: the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,[5] the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda,[6] and the Rome Statute of the International Criminal Court.[7] The ICTY, ICTR, and ICC are mandated to prosecute individual criminal liability while the ICJ has jurisdiction over state responsibility.

4 The special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to carry out the act charged: Case No. ICTR-96-4-T, *Prosecutor v. Akayesu*, 2 Sept. 1998, 37 ILM (1998) 139, at para 498 of the judgment.

5 SC Res 827, UN Doc S/RES/827 (25 May 1993), amended by SC Res 1166, UN Doc. S/RES/1166 (henceforth 'ICTY Statute'), Art. 4.

6 UN Security Council, 8 Nov. 1994; amended 30 Apr. 1998. SC Res 955, UN Doc. S/RES/955; SC Res 1165, UN SCOR, 53 Sess., 3877th mtg., UN Doc. S/RES/1165 (amending Arts 10–12) (henceforth 'ICTR Statute'), Art. 2.

7 UN Doc. A/CONF.183/9, Arts 5 and 6.

3 First Stop: Individual Criminal Responsibility

A *The International Criminal Tribunal for the Former Yugoslavia (ICTY)*

The ICTY was established in 1993 to prosecute individuals for grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide, and crimes against humanity.[8] It has indicted Radovan Karadžić, President of the Bosnian Serbs, for genocide, crimes against humanity, and war crimes; Slobodan Milŏsević, President of the Federal Republic of Yugoslavia (FRY), for crimes against humanity and violation of the laws or customs of war; the Deputy Prime Minister of the FRY; the Chief of Staff of the Yugoslav Army; and the Minister of Internal Affairs of Serbia.[9]

1 *Prosecutor v. Krstić*

During the atrocities in Srebrenica, General Krstić served as the Chief of Staff and then Commander of the Drina Corps, a formation of the Bosnian Serb Army (hereafter 'VRS'). Krstić was charged with genocide (and alternatively complicity to commit genocide) for individual participation[10] and command responsibility[11] over the troops involved in the commission of the crimes. He was convicted by the trial chamber as a participant in the joint criminal enterprise to kill the military-aged Bosnian Muslim men of Srebrenica, knowing that such killings would lead to the annihilation of

8 ICTY Statute, *supra* note 5, Arts 2–5.

9 N.H.B. Jorgensen, *The Responsibility of States for International Crimes* (2000), at 154–155.

10 ICTY Statute, *supra* note 5, Art. 7(1).

11 *Ibid.*, Art. 7(3).

the entire Bosnian Muslim community in Srebrenica.[12] In holding him responsible, the trial chamber noted Krstić's direct involvement in organizing the transport of women, children, and elderly; participation in segregating military-aged men; awareness of the ongoing humanitarian crisis in Potocari; presence in meetings with General Mladić; and constructive or presumed knowledge of executions of Muslim men, inadequacy of basic necessities of captured men, and absence of arrangements for a prisoner exchange.[13] To locate the *dolus specialis*, the trial chamber observed that by virtue of Krstić's knowledge of the executions, he 'could only surmise that the original objective of ethnic cleansing. . . had turned into a lethal plan to destroy the male population of Srebrenica'.[14]

The appeals chamber, however, found unwarranted the trial chamber's reliance on Krstić's presumed knowledge of the executions and his inaction as basis for inference of genocidal intent.[15] It instead held Krstić liable as aider and abettor because, as Commander of the Drina Corps, he knew that by permitting the use of Drina Corps resources he was making a substantial contribution to the executions.[16]

2 *Prosecutor v. Blagojević*

Vidoje Blagojević was a Lieutenant Colonel in the Army of the Socialist Federal Republic of Yugoslavia ('JNA'), and then held several other positions until he eventually became Colonel.[17] Originally charged with the commission of genocide, he was later indicted for complicity to commit genocide for attacks in the Srebrenica 'safe area', killings and mass executions of Bosnian Muslim men, and the forcible transfer of women and children, all of which occurred in his presence and within his area of responsibility.

Before determining his responsibility, the tribunal first examined whether genocide was committed. It concluded that the criminal acts committed by the Bosnian Serb forces were part of a single scheme to commit genocide.[18] It inferred the intent to destroy from the fact that the Bosnian Serb forces knew the inevitable result of the killings, the forcible transfer of women, children, and elderly, the separation of able-bodied men, the destruction of property, and the execution of the segregated men.[19] While the tribunal did not examine whether the intent to destroy existed in each act, it derived the intent from the pattern of acts evidencing a genocidal scheme.

Having established the commission of genocide, the tribunal evaluated Blagojević's responsibility for complicity in genocide and command responsibility. The tribunal clarified that complicity in genocide is not a separate crime but a form of liability subsumed under the crime of genocide.[20] The tribunal adopted the

[12] Case No. IT-98-33, *Prosecutor v. Krstić,* Nov. 2001, 40 ILM (2001) 1346, at para. 644 of the judgment, available at: www.un.org/icty/krstic/TrialC1/judgement/index.htm.

[13] *Ibid.*, at paras 609 and 621.

[14] *Ibid.*, at para. 621.

[15] Case No. IT-98-33, *Prosecutor v. Krstić,* Judgment, Appeals Chamber, 19 Apr. 2004, available at: www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf, at para. 134.

[16] *Ibid.*, at paras 137–140.

[17] Case No. IT-02-60-T, *Prosecutor v. Blagojević,* Trial Chamber Judgment, 17 Jan. 2005, available at: www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf.

[18] *Ibid.*, at para. 674.

[19] *Ibid.*, at paras 674–647.

[20] *Ibid.*, at para. 684.

distinction made by the ICTR[21] between commission and complicity where the former refers to principal liability which attaches to a principal and the latter is a form of secondary liability which attaches to an accomplice.[22] The tribunal likewise adopted the ICTR's three forms of complicity based on the Rwandan Criminal Code: procuring means, aiding and abetting, and by instigation.[23] Command responsibility, on the other hand, is a specific form of liability arising from the failure of a superior to exercise his duty of control over his subordinates.

The tribunal found Blagojević guilty of aiding and abetting genocide: (i) by permitting use of the Bratunac Brigade's resources in committing murder, cruel and inhuman treatment, terrorizing the civilian population, and forcible transfer, other inhuman acts, which had substantial effect on the commission of genocide; (ii) knowing that by allowing the use of these resources he was contributing substantially to the killing and infliction of serious bodily or mental harm on the Bosnian Muslim population; and (iii) knowing that the principal perpetrators' intent was to destroy in whole or in part the Bosnian Muslim group as such. The tribunal inferred the *mens rea* from Blagojević's knowledge of certain facts, namely, the objectives of the Krivaja 95 operation, the expulsion of the Bosnian Muslim population from Srebrenica, the segregation of Bosnian Muslim men, the forcible transfer of Bosnian Muslim women, children, and elderly, the detention of Bosnian Muslim men in inhumane conditions, the contribution of members of the Bratunac Brigade to the murder of detained Bosnian Muslim men, and operations to capture and detain Bosnian Muslim men.[24]

As regards Blagojević's alleged liability arising from command responsibility, the tribunal examined the following elements: (i) the existence of a superior–subordinate relationship; (ii) knowledge or presumed knowledge by the superior that the criminal act was about to be or had been committed; and (iii) failure of the superior to take necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.[25] The existence of a superior–subordinate relationship required proof of 'effective control' which refers to the 'material ability to prevent or punish the commission of the offences'[26] as opposed to mere 'substantial influence'. The relationship may be either *de jure* or *de facto*, informal or indirect.[27] Establishing the *mens rea* requires proof of: (i) the commander's actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the ICTY's jurisdiction; or (ii) the commander's possession of information which would put him on notice of the risk of such offences, alerting him to investigate whether such crimes had been or were about to be committed by his subordinates. Command responsibility is not a form

21 *Prosecutor v. Akayesu,supra* note 4, at para. 527 of the judgment.

22 *Prosecutor v. Blagojevic, supra* note 17, at para. 776.

23 *Prosecutor v. Akayesu, supra* note 4, at paras 533–537.

24 *Prosecutor v. Blagojević, supra* note 17, at paras 784–786.

25 *Ibid.*, at para. 790.

26 *Ibid.*, at para. 791, citing Case No. IT-96-21-T, *Prosecutor v. Delalic*, 16 Nov. 1998, available at: www.un.org/icty/celebici/trialc2/judgement/index.htm, at para. 378 of the judgment.

27 *Prosecutor v. Blagojevic, supra* note 17, at para. 791.

of strict liability; a commander may be criminally responsible if he 'knew or had reason to know' that his subordinate was about to commit or had committed a crime.[28]

Applying the foregoing principles, the tribunal held that it was not sufficiently proven that Bratunac Brigade members participated in the commission of murder or extermination, making it difficult to identify the perpetrators whom Blagojević had the duty to punish. On the other hand, although it was proven that one of his subordinates committed crimes, it was not shown that Blagojević had effective control over him.[29] Blagojević was absolved of liability based on command responsibility.

3 *Prosecutor v. Goran Jelisić*

Introducing himself as the 'Serb Adolf', Goran Jelisić openly hated the Muslims and participated in the offensive against the civilian Muslim population in Brčko. For such acts he was charged with aiding and abetting genocide. The tribunal first examined whether genocide was committed and found the evidence insufficient to establish a plan to destroy the Muslim group in Brčko or elsewhere within which the murders committed by the accused could fit. In the absence of such a plan, the only way that Jelisić could be liable for genocide was if he himself was guilty of genocide.[30]

The trial chamber found that the *dolus specialis* to annihilate the Muslim population or part thereof was not proven beyond reasonable doubt. Viewing Jelisić as a disturbed person, it found his acts random enough to negate a resolve to destroy a group as such; and the killings were rather too arbitrary to be motivated by intent to commit genocide.[31] The trial chamber reiterated that discriminatory intent did not equate to genocidal intent.

The appeals chamber, however, found that the evidence could have supported a finding of genocidal intent. Observing that there was neither a plea of insanity nor a finding of mental imbalance, it pointed out that the 'borderline unbalanced personality. . .is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual personality defects'.[32] The appeals chamber further noted that sparse displays of randomness did not negate the totality of the evidence supporting Jelisić's enunciated intent to kill majority of the Muslims.[33]

B *International Criminal Tribunal for Rwanda (ICTR)*

The International Criminal Tribunal for Rwanda was established on 8 November 1994 to prosecute persons responsible for genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and the Additional Protocol[34] during the period from 1 January 1994 to 31 December 1994. It holds the record of handing down the first genocide conviction (Jean-Paul Akayesu)

28 *Ibid.*, at para. 792.

29 *Ibid.*, at paras 794–795.

30 Case No. IT-95-10, *Prosecutor v. Jelisić,* 14 Dec. 1999, www.un.org/icty/jelisic/trialc1/judgement/index.htm, at paras 98–99 of the judgment.

31 *Ibid.*, at paras 105 and 108.

32 Case No. IT-95-10, *Prosecutor v. Jelisić*, 5 July 2001, Judgment, Appeals Chamber, available at: http://www.icty.org/x/cases/jelisic/acjug/en/jel-aj010705.pdf, at para. 70.

33 *Ibid.*, at para. 71.

34 ICTR Statute, *supra* note 6, Arts 2–4.

and conviction of a Prime Minister (Jean Kambanda).

1 Prosecutor v. Akayesu

Jean-Paul Akayesu was the '*bourgmestre*' of the Taba commune charged with the performance of executive functions and maintenance of public order, with exclusive control over the communal police. During his tenure, at least 2000 Tutsis were killed and Tutsi women were subjected to sexual violence, beating, and murder. He was charged with genocide, complicity in genocide, and direct and public incitement to genocide.

Although it had previously been established that genocide was committed in Rwanda in 1994, the tribunal nevertheless examined whether genocide occurred during Akayesu's tenure. Thereafter, it inquired into the specific liability of Akayesu for genocide and complicity in genocide. The tribunal distinguished these two forms of liability, saying that these are mutually exclusive. Complicity is borrowed criminality, requiring a predicate offence.[35] There are several forms of complicity in genocide: (i) instigation, (ii) aiding and abetting, and (iii) procuring means. The *mens rea* consists in knowing that the assistance was being provided in the commission of the principal offence.[36]

The tribunal found Akayesu directly responsible for genocide because he possessed the *dolus specialis*. He was also found guilty of direct and public incitement to commit genocide.

First, the tribunal held that as *bourgmestre*, Akayesu waited too long before opposing and attempting to prevent the crimes. This failure implied encouragement, which was compounded by his presence during the commission of these acts. The tribunal found Akayesu responsible for ordering, committing, or otherwise aiding and abetting in the preparation or execution of the crimes against members of the Tutsi group.[37]

Secondly, the tribunal said that intent could be inferred from the acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group.[38] The tribunal then inferred Akayesu's genocidal intent from his acts and utterances inciting the public, the systematic and deliberate selection of Tutsis as victims, and the systematic rape of Tutsi women with intent to kill.[39]

2 Prosecutor v. Kambanda

Jean Kambanda was the Prime Minister of the Interim Government of Rwanda and head of the Council of Ministers from 8 April to 17 July 1994, exercising *de jure* authority and control over the members of the government and *de jure* and *de facto* authority over senior civil servants and military officers. He pleaded guilty to genocide, conspiracy, direct and public incitement to commit genocide, and complicity in genocide. He admitted to participation in meetings of the Council of Ministers and *prefets* during which the massacres were discussed, issuing a directive encouraging mass killings of Tutsis by the youth militia, organizing military training for the commission of massacres, supporting a radio station which incited killing and persecution of

[35] *Prosecutor v. Akayesu, supra* note 4, at para. 528.

[36] *Ibid.*, at paras 537–538.

[37] *Ibid.*, at paras 704–706.

[38] *Ibid.*, at para 728.

[39] *Ibid.*, at paras 731–734.

Tutsis, ordering roadblocks to identify Tutsis, and failing to prevent and punish the persons committing the crimes.[40]

The tribunal accepted his plea and convicted him of the charges. In determining his sentence, the tribunal considered as an aggravating circumstance the gravity and heinousness of genocide, saying that its commission is inherently aggravating. It further considered Kambanda's position and held that his abuse of authority and the people's trust was also aggravating. He participated in the genocide and failed to take measures to prevent his subordinates from committing crimes. Worse, he neither explained his voluntary participation nor expressed contrition.[41]

3 Prosecutor v. Rutaganda

Georges Rutaganda was a member of the National and Prefectoral Committees of the Mouvement Republicain pour le Developpement et la Democratie and second vice president of the National Committee of the youth militia. He was charged with genocide for ordering roadblocks to identify Tutsis, directing the detention of Tutsis, participating in the attack on a safe haven, conducting house-to-house searches for Tutsis and their families. The tribunal found Rutaganda responsible for committing, ordering, and aiding and abetting in the perpetration of killings and serious bodily and mental harm to the Tutsis.[42] It held that specific intent could be determined on a case-by-case basis, by drawing a logical inference from the material evidence which established a pattern of conduct. There was sufficient evidence that Rutaganda actively participated in the widespread attacks on and killings of the Tutsis and ordered and abetted the commission of crimes by virtue of his position of authority. The tribunal inferred the specific intent from the systematic and deliberate selection of the victims. It held Rutaganda's acts to be part of an overall context within which other criminal acts systematically directed against Tutsis were committed.[43]

The foregoing illustrates the various principles used by the ICTY and the ICTR in deciding cases. The cases show serious efforts by both tribunals to balance the interests of the accused and of the prosecution. It is safe to say that, so far, both tribunals are headed in the same direction, alternately guiding each other along the way.

4 State Responsibility: Next Stop?

A *State Obligations under the Genocide Convention*

Under the Genocide Convention, a state has the following obligations: (i) to prevent and punish genocide;[44] (ii) to punish persons committing genocide;[45] (iii) to enact the necessary legislation;[46] (iv) to prosecute those charged with genocide;[47] and (v) to extradite those charged with genocide.[48] Breach of any obligation engages state responsibility. From this list,

[40] Case No. ICTR-97-23-S, *Prosecutor v. Kambanda*, 4 Sept. 1998, 37 ILM (1998) 1411, at para. 39 of the judgment.

[41] *Ibid.*, at paras 41 and 44.

[42] *Ibid.*, at paras 386 and 389.

[43] *Ibid.*, at paras 398–400.

[44] Genocide Convention, *supra* note 3, Art. I.

[45] *Ibid.*, Art. IV.

[46] *Ibid.*, Art. V.

[47] *Ibid.*, Art. VI.

[48] *Ibid.*, Art. VII.

it may appear that state obligations arise only from another actor's commission of genocide. The words of the Convention leave uncertain whether a state has a primary obligation not to commit genocide. This was one of the preliminary questions in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia-Montenegro)* (henceforth the *Bosnia-Herzegovina Genocide Case*).

B *The Factual History of the Bosnia-Herzegovina Genocide Case*

This case arose from the massive killings and systematic shelling conducted by Serbian military forces in Bosnia-Herzegovina in 1992 after its declaration of independence from the former Yugoslavia. Due to the nature of atrocities throughout the territory, the United Nations passed a resolution[49] saying that the ethnic cleansing against the Bosnians was a form of genocide. Nevertheless, the Serbian forces continued their operations consisting of massacres, ethnic cleansing, severe treatment and torture of prisoners, rape, abuse of civilians in concentration camps, forcible expulsion, and deportation of civilians.

In 1993, Bosnia-Herzegovina filed this case seeking a finding of international responsibility against the Belgrade Government in Yugoslavia for genocide.[50] Among other things, Bosnia-Herzegovina alleged that Serbia-Montenegro had breached its obligations to the People and State of Bosnia-Herzegovina for killing members of a group; causing serious bodily or mental harm; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and imposing measures intended to prevent births within the group, in relation to the attacks in Sarajevo, the Drina River Valley, Prijedor, and Srebrenica.[51] The charges included the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide, and failure to provide effective penalties for those guilty of genocide.

The ICJ found that genocide had not been committed except in Srebrenica because there was insufficient proof of specific intent.[52] In Srebrenica, the ICJ found that there was insufficient evidence that Serbia-Montenegro was involved in the commission, conspiracy to commit, or incitement to commit, or was complicit in the commission of genocide. Serbia-Montenegro had breached only its obligation to prevent and punish the commission of genocide. Apart from this declaration, the ICJ did not grant any other forms of reparation.

C *The Rulings of the ICJ*

1 *Non-criminal Direct Responsibility for the Commission of Genocide*

On the preliminary question whether a state can be made responsible for committing genocide, the ICJ ruled that states

[49] GA Res 47/121, 'The Situation in Bosnia and Herzegovina', UN Doc A/RES/47/121, 18 Dec. 1992.

[50] F.A. Boyle, *The Bosnia People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide* (1993), at 49–57.

[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia-Montenegro)* [2007] ICJ Rep 17.

[52] *Ibid.*, at 131.

are themselves obligated not to commit genocide. In arriving at this conclusion, the ICJ looked to Article I of the Genocide Convention as the source of the obligation. According to the Court, Article I affirms that genocide is an international crime and imposes an obligation on states to prevent and punish it. By agreeing to such categorization of genocide, states have bound themselves not to commit the act. This is fortified by their obligation to prevent genocide, which includes the obligation not themselves to commit genocide.[53] The Court clarified, however, that state responsibility under the Convention is not criminal, but a breach of international obligations.[54]

The ICJ's ruling as a matter of principle is laudable because it would be iniquitous if states had no obligation not to commit genocide. Conceptually, genocide can be committed by a civilian, but in actuality it would be difficult to accomplish without the help of state institutions, structures, resources, and personnel.[55] While state action is not a legal element of the crime – genocide is genocide regardless of who commits it – its perpetration would often involve state participation.[56] At the very least, the state's tolerance of, or inaction in the face of, genocidal killings would involve state cooperation or participation. To exclude states from the obligation not to commit genocide would be to give them a free pass to perpetrate genocide so long as they later complied with the obligations to *prosecute*. The now clear proscription against states committing genocide closes the gap in the Genocide Convention.

Moreover, it would be absurd if state agents incurred responsibility but the state itself did not. An individual acting in an official capacity acts at the behest of his principal – the state – therefore the nature of his acts is merely derivative and reflective of the nature of the state's acts.[57] Thus, if state agents commit genocide, the state must also be responsible. There appears to be 'no juridical reason why the legal quality of the acts of the state should not be identical with that of the acts of the agent'.[58] The International Law Commission's Commentary on the Articles on State Responsibility bears this out, saying that prosecution of state officials does not exempt state responsibility.[59]

The Court's ruling is further supported by Article 40 of the Articles on State Responsibility, which provides for international responsibility for serious breach of an obligation under a peremptory norm. No less a body than the ICJ itself has recognized the *jus cogens* status of

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53 *Ibid.*, at 63.

54 *Ibid.*, at 64.

55 See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), at 248–249.

56 '"State action or policy" can be based on a decision by the head of state, or a common design agreed to by senior officials, who rely on the state's powers and resources, in whole or in part, to carry out such a decision, or when the conduct of low-ranking public officials relying on state powers and resources is committed with the connivance or knowledge of higher-ranking public officials, or when such higher-ranking officials fail to carry out their obligation to prevent the conduct in question or fail to punish perpetrators when the conduct is discovered or reasonably discoverable': *ibid.*, at 257.

57 Jorgensen, *supra* note 9, at 152.

58 *Ibid.*, at 153.

59 Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Art. 58(3).

genocide,[60] and violation thereof constitutes breach of a peremptory norm.

Curiously, the Court expressly limited the applicability of its ruling to genocide,[61] obviating its application to other treaties[62] which impose an obligation to prevent. It also disclaimed setting a precedent imposing a general obligation on states to prevent the commission of acts contrary to norms of general international law.[63] By ruling thus, the Court effectively differentiated genocide and the Genocide Convention from other international crimes and treaties imposing similar obligations (i.e. an express state obligation to punish acts of individuals without a corresponding express state obligation not to commit the same acts itself). While this reinforces the gravity of genocide and its nomenclature as the crime of crimes, the Court's hesitation also seems to indicate its uncertainty about its ruling.

The Court's stance invites scrutiny. While in harmony with the object of the Genocide Convention, the Court's reasoning is largely characterized by legal gymnastics – the undertaking to prevent includes self-inhibition; individual responsibility does not preclude state responsibility; and the word 'including' in Article IX of the Genocide Convention implies the state obligation. These explanations leave many unanswered questions.

First, the fact remains that nothing in the Convention expressly implicates state responsibility for committing genocide. Where a major part of the Convention is a list of state obligations, it is almost flimsy to locate the obligation not to commit genocide in Article I, which is really more about the characterization of genocide than a state obligation. It states: '[t]he Contracting Parties confirm that genocide. . .is a crime under international law which they undertake to prevent and to punish'. That this provision was moved from the preamble to Article I is not a convincing basis for an obligation. Article II defines genocide but it does not, in itself, impose state obligations just because it is found in the body of the Convention. Since an obligation is an imposition, it must be lodged in a basis stronger than this.

Secondly, the Court also looks to Article IX and its reference to Article III as the basis for state responsibility. Yet, the Court admits elsewhere in the decision that Article IX is really a jurisdictional provision. Article IX refers to dispute settlement and interpretation of the Convention, and the clause 'including those relating to the responsibility of a State for genocide. . .' is to be read in the context of the entire provision and the Convention as a whole. This clause is still about interpretation, application, and fulfillment of the Convention as the obligations are laid out in the other provisions. It does

[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia-Montenegro),* Preliminary Objections [1996] ICJ Rep 45.

[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia-Montenegro), supra* note 51.

[62] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; Convention on the Safety of United Nations and Associated Personnel; and International Convention on the Suppression of Terrorist Bombings.

[63] *Bosnia-Herzegovina v. Serbia-Montenegro, supra* note 51, at 153.

not and cannot be construed to add an obligation.[64]

Thirdly, the non-criminal classification of state responsibility appears to be a compromise which affects the nature of genocide. To ensure that states do not escape responsibility for committing genocide, the Court created a concept of 'civil genocide' to cover states. However, this somehow reduces the gravity of genocide,[65] giving the impression that it is a crime until the state commits it. Yet, the system of individual criminal responsibility shows that the criminal character of an act remains constant regardless of who the actor is.[66]

2 *Proving State Responsibility*

Herein begin the problems with the Court's differentiation of state responsibility for genocide.

(a) Shifting Standards of Proof

First the Court confirms that genocide is an international crime. This poses an obstacle because states have no criminal responsibility. To hurdle this, the Court characterizes state responsibility as non-criminal, but a breach of international obligations. However, to prove this non-criminal responsibility, the standard of proof required is 'evidence fully conclusive' of the *commission* of genocide and *attribution* of the act to the state. In the standards of proof spectrum, this would be closer to the proof beyond reasonable doubt standard for criminal liability. To rationalize such a high standard, the Court cites the exceptional gravity of the charges for which the state is sought to be made responsible.[67]

With respect to the claim that Serbia-Montenegro breached its obligation to prevent genocide and to punish and extradite those charged with genocide, however, the standard is only 'a high level of certainty appropriate to the seriousness of the allegation'.[68] Now it will be recalled that the state's obligation not to commit genocide was only derived from the undertaking to prevent genocide. This being so, it does not seem logical to require different standards of proof for the state's obligation to prevent itself and the obligation to prevent others from committing genocide.

The Court adopts different standards of proof so that the standard to be met in a particular case becomes a guessing game. In the *Corfu Channel Case*,[69] the Court referred to several standards:

> the Court finds that the facts stated by the witness from his personal knowledge are not sufficient to prove what the United Kingdom Government considered them to prove. His allegations . . . do not suffice to constitute *decisive legal proof*. . . . The statements attributed by the

[64] See Declaration of Judge Oda: 'It seems to be quite natural to assume that that reference would not have had any meaningful sense or otherwise would not have added anything to the clause. . . because, in general, any inter-State dispute covered by a treaty per se always relates to the responsibility of a State and the singling-out of a reference to the responsibility of a State does not have any sense with regard to a compromissory clause': *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 60, also cited in W.A. Schabas, *Genocide in International Law* (2000), at 437.

[65] *Ibid.*, at 443.

[66] Jorgensen, *supra* note 9, at 157.

[67] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, citing the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)* [1949] ICJ Rep 4.

[68] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 76.

[69] *Corfu Channel Case*, *supra* note 67.

> witness Kovacic to third parties. . . can be regarded only as allegations falling short of *conclusive evidence*. A charge of such exceptional gravity against a State would require a *degree of certainty* that has not been reached here.
>
> The Court must examine therefore whether it has been established by means of indirect evidence. . . . The proof may be drawn from inferences of fact, provided that they leave *no room* for *reasonable doubt*.[70]

In the *Case Concerning Armed Activities on the Territory of the Congo*,[71] the Court also used various standards. On the allegations relating to Uganda's use of force in the Democratic Republic of Congo (DRC), the Court determined whether it was *proved to its satisfaction* that Uganda invaded the DRC.[72] On the DRC's claims of military action by Uganda, the Court said that it had not received *convincing evidence* of the presence of Ugandan forces in the alleged areas.[73] As to Uganda's claims of self-defence, the Court examined the 'reliability'[74] of Uganda's claims and then rejected the evidence for being unreliable,[75] not persuasive,[76] not weighty and convincing,[77] without probative value,[78] and not satisfactory to the Court.[79] It concluded that there was no satisfactory proof that the attacks were attributable to the Government of the DRC.[80] On the DRC's claims of breach of the principle of non-intervention, the Court concluded that Uganda had violated the sovereignty and territorial integrity of the DRC on the basis of *probative evidence* of military intervention.[81]

In examining the DRC's allegations of violation of international human rights law and international humanitarian law, the Court found *credible evidence sufficient to convince* it of the commission of massive human rights violations and grave breaches of international law. It also found 'sufficient evidence of a reliable quality' proving that the Uganda Peoples' Defence Forces (UPDF) failed to protect the civilian population.[82] There was *persuasive evidence* of incitement to ethnic conflicts, *convincing evidence* of failure to prevent the recruitment of child soldiers, and *credible evidence sufficient to enable one to conclude* that acts of killing, torture, and other forms of inhumane treatment had been committed.[83]

On the further issue of attribution of the illegal use of force, the Court concluded that there was no *credible evidence* that Uganda had created the Congo Liberation Movement and no *probative evidence* that Uganda had controlled or could control the acts of its leader.[84] On the other hand, the Court readily attributed the acts of the UPDF and its officers and soldiers to Uganda as conduct of a state organ.[85] It will be noted that, whereas in the *Bosnia-Herzegovina Genocide Case* the Court

70 *Ibid.* emphasis other than for 'no room' added.

71 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda)*, [2005] ICJ Rep 1.

72 *Ibid.*, at 77.

73 *Ibid.*, at 93.

74 '. . .it is first necessary to examine the reliability of these claims': *ibid.*, at 110. 'The Court observes that it has not been presented with evidence that can be safely relied on in a court of law to prove that there was an agreement. . .': *ibid.*, at 118.

75 *Ibid.*, at 114.

76 *Ibid.*, at 114.

77 *Ibid.*, at 118.

78 *Ibid.*, at 118.

79 *Ibid.*, at 121.

80 *Ibid.*, at 125.

81 *Ibid.*, at 132.

82 *Ibid.*, at 160.

83 *Ibid.*, at 164.

84 *Ibid.*, at132.

85 *Ibid.*, at 168.

required 'evidence fully conclusive' the standard for attribution in *Congo* seems lower.

Certainly, there is a distinction between determining the quality of each piece of evidence and the standard of proof for a claim to prevail. However, the various tests used by the Court in analysing the evidence to reach its conclusion are indicative of the standard of proof actually applied by the Court. As it appears, the only consistent standard is whether the Court was satisfied with the evidence presented – whether this entailed convincing or conclusive evidence would vary depending on the Court's appreciation of the claim or specific issue. In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua,*[86] the Court explained that it is bound under Article 53 of the ICJ Statute to 'satisfy itself. . . that the claim. . . is well founded in fact and law'.[87] It expounded on the phrase 'satisfy itself' thus:

> 29. The use of the term 'satisfy itself' in the English text of the Statute (and in the French text the term 's'assurer') implies that the Court must attain the *same degree of certainty* as in any other case that the claim of the party appearing is *sound in law*, and, so far as the nature of the case permits, that the facts on which it is based are supported by *convincing evidence*.[88]

Thus, whereas the *Corfu Channel Case* teaches that the degree of certainty of the evidence increases as the charge becomes graver, *Nicaragua* says that the real test is whether the Court is satisfied with the evidence. Although combining the rulings in these cases somehow legitimizes the Court's discretion on the standard of proof to apply in the *Bosnia-Herzegovina Genocide Case*, it also provokes the question why the Court chose such a high standard. Did the Court rule that states could be held responsible for an international crime without really intending to make states responsible? Or was it also doubting itself? The shifting standards cause confusion, leaving no concrete barometer for the Court's satisfaction. With the creation of a new species of state responsibility, it remains to be seen what standard of proof the Court will require in the future.

(b) Evidentiary Effect of Individual Responsibility

To its credit, the ICJ unequivocally ruled that prior individual conviction is not a condition *sine qua non* for state responsibility.[89] This would address a situation where no proceedings are commenced because the individuals responsible are still in control of the state. Nevertheless, the ICJ relied heavily on the ICTY's findings. In concluding that there was no genocide, it said:

> 277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such. *The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, as cited above, and observes that none of those convicted were found to have acted with specific intent* (*dolus specialis*). [90]

[86] *Military and Paramilitary Activities in and Against Nicaragua Case (Nicaragua v. United States of America (US))* [1986] ICJ Rep 4.
[87] *Ibid.*, at 25.
[88] *Ibid.*, at 26, emphasis added.
[89] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51.
[90] *Ibid.*, at 98, emphasis added.

On the other hand, in finding that genocide was committed in Srebrenica, the Court referred to the ICTY's finding in *Krstić*, saying that it had no reason to depart from the Tribunal's determination on when the *dolus specialis* was established and identification of the protected group.[91] Indeed, the Court concluded that it would accept as highly persuasive relevant findings of fact made by the ICTY and give due weight to any evaluation of the existence of the required intent from such facts.[92] It thus appears that 'conclusive evidence' lies to a great extent in the findings of the criminal courts. However, the standard of proof in criminal cases is beyond reasonable doubt. This means that although the standard of proof before the ICJ is only conclusive evidence, discharging this burden is conditioned upon satisfying a higher standard.

(c) Attribution

The state incurs international responsibility if the illegal acts can be attributed to it. Since the state as a legal construct can act only through natural persons, the nexus between the natural persons and the state to which the acts are being attributed needs to be established.[93] Article 8 of the Articles on State Responsibility provides that individual acts can be attributed to the state if: (i) such individual is an organ of the state, or (ii) his conduct is under the direction or control of the state. This provision expands the coverage of state agents beyond *de jure* officers. Whether one can be considered a state organ thus becomes a question of fact.[94] By increasing a state's liability potential, this provision reflects the breadth of the state's responsibility for the actions of those acting under it. It further indicates intent to allocate responsibility between the individual and the state.[95]

In applying Article 8, the Court required evidence fully conclusive in the *Bosnia-Herzegovina Genocide Case*, a higher standard compared to that in *Democratic Republic of the Congo v. Uganda*. Based on this, the Court found that the Republika Srpska, the VRS, and General Mladic were not *de jure* organs of Serbia-Montenegro (FRY), saying that Serbia-Montenegro's financial support for the Republika Srpska through payment of salaries and benefits to VRS officers did not make those officers state organs. It further said that in the absence of evidence it is to be presumed that these officers took their orders from the Republika Srpska, not Serbia-Montenegro.[96] The Court also found that the paramilitary militia's acts could not be attributed to the state because the evidence was insufficient to show complete dependence on and strict control by Serbia-Montenegro.[97] In making this conclusion, the Court applied the effective control test in *Nicaragua.*[98]

3 *'Effective Control' Test*

In *Nicaragua*, the Court held that the United States' participation in financing, organizing, training, supplying, and equipping the *contras*, selecting targets, and planning the whole operation was insufficient to attribute the *contras*' acts to the United States. The Court required effective control of the military

[91] *Ibid.*, at 107.

[92] *Ibid.*, at 80.

[93] Cherif Bassiouni, *supra* note 55, at 379.

[94] I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (1983), at 132.

[95] See Cherif Bassiouni, *supra* note 55, at 380.

[96] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 138–139.

[97] *Ibid.*, at 140.

[98] *Nicaragua v. US*, *supra* note 86, at 164.

or paramilitary operations during which the alleged violations were committed.[99] The Court in the *Bosnia-Herzegovina Genocide Case* further required effective control over *each* operation in which the alleged violations occurred.[100]

The problem with this test is the lack of definition of 'effective control'. In *Nicaragua*, the Court refused to recognize the United States' participation as the exercise of effective control because the *contras* could still have committed the acts without the control of the United States. Complete dependence is a tough test because it implies the indispensability of the state's participation. At the same time, it opens the floodgates to state impunity, almost a licence to participate as long as such participation is not indispensable. The truth is, the Court in *Nicaragua* confused control and direction, lumping them into one source of attribution. Although the Court emphasized the degree of control, the Court's conclusion actually turned on the lack of proof of direction:

> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, *without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.* [101]

Mimicking this analysis, the Court in the *Bosnia-Herzegovina Genocide Case* said that in the absence of evidence to the contrary the officers must be assumed to have received their orders from the Republika Srpska or the VRS, not from the FRY.[102] This suggests that the only way to prove effective control is to show that the state gave directions to the perpetrators. However, the Articles on State Responsibility treat control and direction as two possible sources of attribution: '[t]he conduct of a person or group of persons shall be considered an act of a State . . . if the person or group of persons is in fact acting . . . under the direction *or* control of, that State in carrying out the conduct'.[103] If 'effective control' requires direction, there appears to be a gap between *Nicaragua* and Article 8 which puts in doubt whether *Nicaragua* (decided prior to the adoption of the Articles on State Responsibility[104]) is squarely applicable to *Bosnia-Herzegovina*.

The Court also implicitly distinguished between influence and control. While it ruled against attribution of the militia's acts to Serbia-Montenegro for lack of effective control, it found that Serbia-Montenegro had failed in its obligation to prevent the militia from committing genocide. It noted that Serbia-Montenegro was 'in a position of influence' over the Bosnian Serbs. It also added that the Court's Orders for provisional measures required Serbia-Montenegro to ensure that all persons and entities over which it had influence did not commit genocide. The Court emphasized that these Orders pertained not only to those whose acts could be attributed to Serbia-Montenegro but also to those with whom it had close links and on which it could exert a certain

[99] *Ibid.*, at 124.

[100] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 143.

[101] *Nicaragua v. US*, *supra* note 86, at 124, emphasis added.

[102] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 139.

[103] Articles on State Responsibility, *supra* note 59, Art. 8.

[104] The Articles on State Responsibility were adopted in 2001.

influence.[105] In effect, the Court's ruling means that different obligations would result depending on whether the state has control over or influence on the perpetrators. However, the Court does not provide a way of determining when influence graduates into control such as to change the nature of the state's responsibility.

4 *Proving Specific Intent*

In criminal law, the element of intent is the most difficult to prove. It is even harder to prove in genocide, where the specific intent to annihilate a group as such must be established. Where state responsibility is engaged, this entails finding specific intent in an inanimate entity. Unfortunately, the Court makes *dolus specialis* even more elusive, as it fails to disclose how it found the intent to exist in Srebrenica but not in the other places. After reciting the facts, the Court simply finds that there is no conclusive proof of specific intent, then shifts the burden by referring to the ICTY's decisions determining the non-genocidal nature of the acts of the Bosnian Serbs[106] and the Prosecutor's decisions not to charge genocide offences.[107] While such reliance may contribute to consistency in result, the difference in the applicable standards of proof raises questions of fairness.

The Court also rejected the theory that the very pattern of the atrocities committed in many communities, over a lengthy period, focused on Bosnian Muslims, demonstrates the necessary intent.

> The *dolus specialis*. . .has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be *such that it could only point to the existence of such intent*.[108]

This standard is, at best, circular. The Court did not even bother to expound on what was lacking in the pattern of acts that prevented it from making an inference of the *dolus specialis*.

5 *Reparation*

At the end of the lengthy decision and laborious analysis, the Court decided that the appropriate reparation for Serbia-Montenegro's failure to prevent and punish genocide in Srebrenica was a declaration to that effect. The Court ruled out guarantees and assurances of non-repetition and compensation of any kind.[109] To arrive at this conclusion, the Court used the nexus test: whether there is a sufficiently direct and causal nexus between the wrongful act and the injury suffered. The Court's response to this question was in the negative. The facts did not give rise to a conclusion with a sufficient degree of certainty that genocide would have been averted if Serbia-Montenegro had complied with its obligations.[110]

[105] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 156.

[106] The Court cites Case No. IT-99-36-T, *Prosecutor v. Brdanin*, Trial Chamber Judgment, 1 Sept. 2004, available at: www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf, at para. 303; Case No. IT-97-24-T, *Prosecutor v. Stakić*, Trial Chamber Judgment, 31 July 2003, available at: www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf, at paras. 546–561.

[107] The Court cites Case No. IT-00-40 *Prosecutor v. Plavšić*, 27 Feb. 2003, available at: www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf, and Case No. IT-95-8, *Prosecutor v. Sikira et al.*, 3 Sept. 2001, available at: www.icty.org/x/cases/sikirica/tjug/en/sik-tsj011113e.pdf.

[108] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 133, emphasis added.

[109] *Ibid.*, at 165–166.

[110] *Ibid.*

Thus, while the Court strictly interprets the obligation to prevent by categorizing it as an obligation of conduct rather than of result, it makes reparation difficult. It reintroduces the non-criminal nature of the state's responsibility by requiring the nexus test.

In sum, the ICJ's decision is a concrete landmark of a paradoxical situation – where classifying genocide as a crime of crimes has made it even harder to make states responsible. Whereas the ICJ gallantly proclaims that a state can be held responsible for committing genocide, it conservatively defines the requisite elements for responsibility and confusingly imposes multi-level standards of proof.

5 ICTY, ICTR, and ICJ: Crossing Diverging Paths

Although the ICTY, the ICTR, and the ICJ all deal with genocide, the difference in appreciation of elements and principles is patent. Whereas the ICTY and ICTR tend to view these similarly, the ICJ has a different approach. The divergence is understandable considering the difference in *ratione personae* and the type of liability involved. While the ICTY's and the ICTR's personal jurisdiction is over individuals, the ICJ's personal jurisdiction is over states. While individuals have criminal liability, states have non-criminal liability. Two points stand out, however. First, the resulting divergence is counter-intuitive – the ad hoc tribunals are handing down convictions while the ICJ does not seem poised to find a state directly responsible. Secondly, while the ICJ draws from the principles followed by the ad hoc tribunals, it ends up applying them differently. These observations are better illustrated by a comparison of some principles used by the tribunals.

A *Standard of Proof; Presumption of Innocence*

While the ad hoc tribunals apply the standard in criminal proceedings, the ICJ has stated that state responsibility for the commission of genocide is non-criminal. Yet, the standard of proof is almost as high as that required by the two tribunals. Does this mean that states are also entitled to a presumption of innocence and other rights accorded to an accused? This seems to be the underlying assumption in the *Bosnia-Herzegovina Case*. While the adoption of this principle by the ad hoc tribunals is reasonable, the same cannot be said of the ICJ. The situation becomes even more distorted with the other elements.

1 *Dolus specialis*

Dolus specialis is a defining element which distinguishes genocide from other crimes, and all three tribunals exercise caution in evaluating its existence in every case. The nature of this intent is quite settled; it is in the nuances of evidentiary standards and factual appreciation where the roads between the ad hoc tribunals and the ICJ diverge.

The ad hoc tribunals require proof beyond reasonable doubt, while the ICJ requires fully conclusive evidence. The ad hoc tribunals share the view that this intent should be discernable from the acts. The ICJ makes it clear that it is not necessary to examine each incident; it is sufficient to look at the facts which would evidence intent.[111] Despite this similarity in principle, the results are different.

[111] *Ibid.*, at 88.

When the trial chamber in *Krstic* inquired into the general question whether genocide had been committed, it found genocidal intent from the widespread and swift systematic massacre of Bosnian Muslim men of military age in Srebrenica and forcible transfer of the remainder of the population, which effectively destroyed the community and obviated the possibility of re-establishing it in that territory.[112] On the other hand, while the ICJ found overwhelming evidence of massive killings of members of a protected group throughout the territory of Bosnia-Herzegovina, it was not satisfied that there was specific intent. The factual circumstances in the two cases are very similar, yet the conclusions on intent were the opposite. Considering that the ICTY and the ICJ were examining the existence of genocide in general, it is surprising that it was the ICTY's standard of proof beyond reasonable doubt that was met.

An alternative theory for establishing intent is its inference from the pattern of acts. Through this approach, the ad hoc tribunals prevent perpetrators from escaping liability on the ground of absence of explicit intent. They are able to bridge the gap between a mental element and recognizable realities. *Rutaganda*, *Akayesu*, and *Jelisić* demonstrate that genocidal intent can be deduced from the general context of the 'perpetration of other culpable acts systematically directed against the same group'.[113] The factors considered include the scale of atrocities, their general nature, and the deliberate and systematic targeting of victims on account of group membership.[114] In *Rutaganda*, the numerous atrocities against Tutsis throughout the Rwandan territory and the fact that the victims were systematically and deliberately chosen for their membership of the Tutsi group were construed as part of an overall context within which all other criminal acts systematically directed against the Tutsis were committed.[115]

On the other hand, the ICJ applies the inference theory in a more limited manner, requiring stringent proof. In *Corfu Channel*, it recognized the admissibility of circumstantial and indirect evidence from which inferences may be drawn. However, it set a high standard – no room for reasonable doubt.[116] In the *Bosnia-Herzegovina Genocide Case*, it reiterated that intent must be convincingly correlated with particular circumstances unless a general plan can be convincingly shown. It then refused to infer intent because genocide was not the only possible purpose of the consistent destructive and inhuman camp practices throughout Bosnia-Herzegovina. Whereas the inference approach is supposed to facilitate evidence of an otherwise undiscoverable mental state, the ICJ made it just as difficult as finding intent per se.

2 *Forms of Liability*

The ad hoc tribunals agree on the following heads of individual criminal liability: (i) planning; (ii) instigating; (iii) ordering; (iv) committing; (v) aiding and abetting; and (vi) joint criminal exercise. On the

[112] *Prosecutor v. Krstić*, *supra* note 12, at paras 594–597.

[113] *Prosecutor v. Akayesu*, *supra* note 4, at para. 523.

[114] *Ibid.*

[115] Case No. ICTR-96-3, *Prosecutor v. Rutaganda*, Judgment, 6 Dec. 1999, 39 ILM (1999) 557.

[116] *United Kingdom v. Albania*, *supra* note 67, at 4.

other hand, states may incur responsibility for: (i) commission; (ii) conspiracy to commit; (iii) direct and public incitement to commit; (iv) attempt to commit; and (v) complicity in genocide. Apart from liability for commission, the two lists reveal parallels: planning and conspiracy, instigating and incitement, ordering and complicity, and aiding and abetting and complicity.

As to the relationship among the modes of liability, the ad hoc tribunals subscribe to the principle that an accused cannot be convicted both as principal and accomplice for the same set of facts. On the other hand, the ICJ elucidates that where the acts are attributable to the state, the state will be found responsible for committing genocide, which will absorb acts of conspiracy and incitement.[117] Conversely, a finding of non-attribution does not preclude inquiry into responsibility for conspiracy and incitement.

The ICJ also makes it clear that 'complicity' in the sense of directing or effectuating genocidal acts does not exist, since such would graduate into the commission of genocide itself because then the acts would be attributable to the state. It recognized complicity only in the form of providing aid or assistance, although it refrained from answering the question whether complicity by state organs in this sense can be attributed to the state.

3 Complicity/Aiding and Abetting

The ICTY and the ICTR view complicity as 'borrowed criminality' wherein the criminality of the act of the accomplice depends upon the consummation of a predicate offence.[118] While the ICJ equates complicity only with aiding and abetting, the ad hoc tribunals recognize three forms: procuring means used to commit genocide, aiding or abetting a perpetrator of genocide, and instigation. All three tribunals agree, however, that the abettor need not possess genocidal intent; he must only know that he is aiding genocide.[119]

Still, the elements are not exactly the same. Individuals can be liable for aiding and abetting genocide if they: (i) render practical assistance, encouragement, or moral support to the principal which had substantial effect on the commission of the crime; (ii) knowing that the acts assisted in the commission of the specific crime; and (iii) knowing that the crime was committed with specific intent.[120] On the other hand, the ICJ inquires into the following elements: (i) furnishing aid or assistance with knowledge of the perpetrators' specific intent; and (ii) that the act is wrongful. Notably, the ICJ does not elaborate on the type of aid or assistance. Case law shows, however, that while the ICTY and the ICTR construe 'assistance' to include encouragement and moral support,[121] the ICJ limits it to political, military, and financial aid.[122]

Another significant difference is the value of the assistance to the perpetration of the act. To the ad hoc tribunals, the assistance must be substantial but need not be a condition precedent for the perpetration of the crime, and it may occur before, during, or after the crime.

[117] *Bosnia-Herzegovina v. Serbia-Montenegro, supra* note 51, at 136.

[118] *Prosecutor v. Akayesu, supra* note 4, at para. 530.

[119] *Ibid.*, at para. 540.

[120] *Prosecutor v. Blagojević, supra* note 17, at para. 782.

[121] *Ibid.*, at para. 779.

[122] *Bosnia-Herzegovina v. Serbia-Montenegro, supra* note 51, at 151.

It may include a commander permitting the use of resources under his control.[123] Conversely, substantiality of support was insufficient to engage the FRY's responsibility. Despite the ICJ's finding that the FRY's military and financial support for the Republika Srpska was so considerable that its withdrawal would have compromised the latter's operations,[124] the FRY's responsibility turned on two questions: whether the acts of the Republika Srpska and its organs were attributable to the FRY; and whether the FRY had knowledge of the Republika Srpska's intent.

The first issue appears to require 'control' over the organs benefiting from the aid, which the ICJ interprets to mean 'complete dependence'.[125] Assistance unaccompanied by this control will not imply responsibility. The second issue presents an alternative theory for state responsibility based on rendering assistance, and that is knowingly extending assistance for the commission of genocide. This theory relies on the factual appreciation of the element of 'knowledge', and the ICJ requires 'full awareness' that the aid supplied would be used for genocide. The ICJ thus ruled that it was not established beyond doubt that the FRY was *clearly aware* that genocide was about to be committed because the decision to commit the same was not brought to the FRY's attention.[126] Yet, in a later paragraph, the ICJ admits that despite the absence of actual knowledge, the circumstances could suggest intent to commit genocide:

> Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milŏsević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica.[127]

In contrast, the ICTR inferred Blagojević's knowledge of the perpetrators' intent from the surrounding circumstances: the evacuation of the entire Bosnian Muslim population from Srebrenica; the separation of Bosnian Muslim men from the rest of the population; the forcible transfer of women and children; and the detention of Bosnian Muslim men in inhumane conditions. Although knowledge is an important element in aiding and abetting, the ICTR appreciates that it is to a certain extent a mental state like intent, so it also applied the inference theory. The ICJ, however, chose to apply a strict standard of proof such that the FRY was held free of responsibility for financing the Republika Srpska's operations.

4 *Command Responsibility*

Although command responsibility is not a form of liability under Article 4(3) of the Genocide Convention, the ICTY and ICTR Statutes provide for this form of liability for all crimes within the ad hoc tribunals' jurisdiction, including genocide. It therefore supplies the basis for genocide conviction on ground of command responsibility.[128] It is, however, different

[123] *Prosecutor v. Blagojević, supra* note 17, at para. 127.

[124] *Bosnia-Herzegovina v. Serbia-Montenegro, supra* note 51, at 87.

[125] *Nicaragua v. US, supra* note 86, at 164.

[126] *Bosnia-Herzegovina v. Serbia-Montenegro, supra* note 51, at 151.

[127] *Ibid.*, at 158.

[128] *Prosecutor v. Blagojević, supra* note 17, at para. 682.

from complicity in genocide under Article 4(3)(e) of the Genocide Convention. It is premised on a superior's failure to fulfil his duty to take necessary and reasonable measures to prevent or punish the crimes of his subordinates.[129] Unlike complicity, which is a form of liability, command responsibility is considered a crime, and when it relates to genocide it refers to the crime of genocide itself under Article 4(3)(a) of the Genocide Convention. The *mens rea* for command responsibility is knowing or having reason to know that the subordinates were about to commit or had committed genocide and that the subordinates had specific intent.

As thus described, command responsibility is akin to state responsibility for failure to prevent or punish genocide. The duty to prevent genocide is breached when the state manifestly fails to take all measures to prevent genocide which were within its power and which might have contributed to preventing the genocide. Neither command responsibility nor the duty to prevent exacts the impossible, both limiting the obligation to take only those measures which are reasonably within their power to employ. In the same vein, it is not expected or required that such intervention actually succeed in preventing genocide. Nevertheless, failure in both obligations cannot be cured by performance of the duty to punish the perpetrators later. Like command responsibility, the duty to prevent is also differentiated from 'complicity', in that it is a sin of omission rather than of commission. Another common element is knowledge or presumed knowledge of the commission or serious risk of the commission of genocide. Unlike command responsibility, however, which arises when the superior has 'effective control' over the perpetrator, the obligation to prevent is called upon when the state has the 'capacity to influence' the acts of the perpetrator or would-be perpetrators. Thus, the requirements for command responsibility to attach are more stringent than the state duty to prevent/punish genocide.

5 *'Effective Control'*

Defined as 'material ability to prevent or punish the commission of offenses', 'effective control' is used by the ICTY and the ICTR as a yardstick for the existence of a *de jure* or *de facto* superior–subordinate relationship. While effective control means more than just influence, it also does not entail complete control over each action of the subordinate. As to the *mens rea*, the tribunals allow for that to be inferred.

On the other hand, the ICJ uses this as a test for attribution of an individual's act to the state. As in command responsibility, the organs the acts of which are sought to be attributed to the state could either be *de jure* or *de facto* state organs, the material element being the existence of 'complete dependence', 'strict control', or 'direction and control' of the state. Whereas 'effective control' within the context of command responsibility does not require complete control over each action, the ICJ interprets 'effective control' as control by the state over the operations during which each act was perpetrated. It rejected the ICTY's proposition in *Prosecutor v. Tadić*[130] that 'overall control' should

[129] *Ibid.*, at para. 683.

[130] ICTY-94-1, *Prosecutor v. Tadić*, Judgment, 15 July 1999, available at: www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf, at para. 120.

suffice, saying that this unreasonably extends state responsibility for actions of state organs beyond the contemplation of the law on international responsibility.[131] The ICJ further required proof of directions from the state to the perpetrator in order to show the state's effective control. There is scope to argue that the ICJ must interpret the test strictly because it is a means of imputing acts of others to the state. A counter-argument to this, however, is that command responsibility is an analogous situation, in that a superior's liability arises from the acts of his subordinates. The state and the superior are acting in a similar capacity in this respect, and there appears to be no cogent reason why the test must be interpreted so differently.

6 *Sentencing/Reparation*

The ad hoc tribunals mete out sentences as penal sanctions for individual criminal responsibility. In determining the appropriate sentence, they apply the principle of proportionality and inquire into attendant aggravating and mitigating circumstances. On the other hand, the consequence of state responsibility is reparation in the form of restitution, compensation, and satisfaction.[132] In the *Bosnia-Herzegovina Genocide Case*, the ICJ held that the very declaration that Serbia-Montenegro was in breach of its obligation to prevent the commission of genocide was sufficient penalty. It reasoned that the nexus between the breach and the injury sustained was not established so as to justify a higher penalty. This principle follows the rule in torts where causation between the breach of duty and the injury sustained must be proven as a condition for recovery. In criminal cases, however, there is no need to prove this nexus over and above proof of the criminal responsibility of the accused. Once it is determined that the accused committed the crime, the appropriate sentence is handed down. This exposes the double standard in the ICJ's construction of state responsibility: classifying it as a civil liability conditioned on proof of nexus between breach and injury but a high standard of proof that approximates that in criminal proceedings.

The cases illustrate that while there are substantial similarities between the modes of participation for which individuals and states can be made responsible, the ad hoc tribunals have been more successful in balancing the competing interests of the prosecution and the accused. Despite the criminal nature of the proceedings and the higher standard of proof before the ad hoc tribunals, the prosecution of individuals has been relatively efficient. In contrast, the ICJ displays a strong reluctance to hold a state directly responsible. Its stance manifests liberality in thought but conservatism in practice.

6 Pulling the Stops: The Individual or the State?

The dynamics between the state and its agents and the interplay between the ad hoc tribunals and the ICJ in the genocide theatre prompt one to ask for the manuscript of the play. What is the role of each? Who is the real lead, the state or its agents? There is no question that the state can act only through its agents.

[131] *Bosnia-Herzegovina v. Serbia-Montenegro*, *supra* note 51, at 144.

[132] Articles on State Responsibility, *supra* note 59, Art. 34.

On the other hand, the agents, if acting within their powers, are acting only for and on behalf of the state. When genocide is committed, upon whom then must the curtain fall? Is the responsibility of one dependent on the other?

The ICJ has stated that state responsibility is not dependent on individual convictions. In the light of the Nuremberg principles and the moorings of the Genocide Convention this is a good starting point. There is no necessary dependence in the responsibilities of the state and the individuals, a principle best illustrated by the existence of separate tribunals determining state and individual responsibility.

If there is one at all, the relationship between these two is one of causality, wherein one may trigger the other. It has been suggested that due to the resources required it is practically difficult for individuals to commit genocide without some type of state participation.[133] Where a group of individuals acting on behalf of the state is made responsible on various grounds – from direct participation to command responsibility to mere presence in meetings – there must be some state action implicated. Conversely, when the state is found responsible, there must be individuals who are also liable. State responsibility is based on the acts or omissions of state organs which are inconsistent with treaty or customary international law.[134] Thus, while state responsibility and individual responsibility are independent of each other, one can give rise to the other. Given this unique relationship, which is the more effective strategy when prosecuting genocide? Should the stops be pulled *first* on the state or on individuals?

The comparative case history of the ICTY, ICTR, and the ICJ suggests that the stops have to be pulled on individuals in order to catch the reins of the state. The ICJ's reliance on the ICTY's findings illustrates that state responsibility is predicated upon a finding of individual responsibility. Still, the *Bosnia-Herzegovina Genocide Case* not only demonstrates the arduousness of making states responsible where individuals have already been found liable; it also hints at the improbability of engaging state responsibility if no individual has been found liable. Contrary to the principle enunciated by the ICJ, state responsibility seems dependent upon individual responsibility, but individual responsibility can exist without state responsibility.

The legal map for inquiring into liability for genocide appears to have been drawn – deliberately or not – for individual conviction and state acquittal. The standards of proof, appreciation of evidence, and method of analysis for determining individual liability give the prosecution a better chance at victory compared to those for determining state responsibility which are nebulously stricter. The standard of proof for finding state liability is very high considering that the liability is non-criminal. It even appears to be higher than the standard in criminal cases because, while it relies on the existence of individual convictions, it requires proof beyond individual convictions. The ICJ is more inclined to give greater leeway to the state while the ad hoc tribunals will not set free an individual who participated in some way, no matter how

[133] See Ago, 'Remarks on Some Classes of Crimes by States', in J.H.H. Weiler *et al.* (eds), *International Crimes of State* (1988), at 215.

[134] Brownlie, *supra* note 94, at 132.

small, in the crime. Although all three tribunals presume the innocence of the accused/state, this presumption appears easier to overcome before the ICTR and the ICTY. By setting a high yet unclear standard for state responsibility, the ICJ created a shield which far removes the state from liability such that genocide can be imputed to the state only after the prosecution of layers of state officials. In fact, proving individual *dolus specialis* may negate the state's *dolus specialis*. When an individual is found to have genocidal intent, an escape door is held open for the state to say that the intent was purely individual and unshared by the state. Then again, how else can state intent be proven if not through some showing of the intent of its agents? Similarly, the multiplication of the modes of individual liability has made attribution more difficult. Thus, the spotlight turns back to the individual from whom all intentions and actions emanate, with the state's shadow tucked safely away behind the curtain. The legal system views the individual as the real mind and muscle of genocide, and the state as an innocent entity which incurs liability only because of the principle of *respondeat superior*.

Yet, is this what the Genocide Convention contemplated? Recalling its *raison d'être*, which is to ensure that genocide will not be committed, points to the contrary. Between the state and individuals, the state is the more logical, legal, and moral bearer of this kind of responsibility. On many levels there is greater significance and deterrent effect in pinning the ultimate responsibility on the state.

First, the state has the power, actual or virtual, to control the acts of its agents and individuals within its borders. Therefore, what happens within its jurisdiction is its responsibility, regardless of whether it has direct involvement or not. If something as grave as genocide happens within its territory, there must be some fatal omission on the part of the state. This is similar to the principle of command responsibility – the state as the superior must be liable if it had actual or *presumed* knowledge that genocide was being or about to be committed by those under its command and failed to act accordingly.

Secondly, the gravity of genocide requires the intervention of no less a body than the state to prevent it from happening. The magnitude of this crime is such that repressing it summons the powers and resources of the state. In recognition of this undeniable reality, the Genocide Convention provides for state liability for failure to prevent and punish genocide. This entails a higher obligation, requiring states to be proactive in the campaign against genocide.

Thirdly, it is states which have the capacity to commit the crime repeatedly. States can commit genocide or fail to prevent the commission of genocide of hundreds of future generations. Individuals, on the other hand, lose such capacity upon imprisonment or death. As opposed to individuals, states are the constant actors which will survive for centuries. It is therefore important to stop the occurrence of genocide at the state level.

Fourthly, the deterrent effect, although also directed at individual actors, is addressed more to states. Individuals with genocidal intent are not likely to be deterred by the threat of future punishment in the same way as a state would hesitate to imperil its reputation and relationship with the international community. By making genocide an international sin, the Genocide Convention

primarily intends to deter states from violating any of their obligations under the Convention and incurring international condemnation. More than individual prison sentences, it is the ruin of this condemnation of a state which could prevent future genocides.

Fifthly, holding states responsible involves the liability of culpable individuals. At the same time, it redresses situations where responsible individuals cannot be prosecuted because they remain in power. When a state is held responsible, the wronged people can feel vindicated even if individuals are not brought to justice. This may not necessarily be true if only individuals are held liable while the state is declared without fault.

Finally, the Genocide Convention was adopted not to strengthen state immunity or provide a protective veil for states. Individual liability is not a substitute for state responsibility; the state cannot cleanse itself by simply pointing fingers at individuals. It goes against the tenets of justice if the state is absolved through the prosecution of a few individuals.[135]

Thus, it can be gleaned that the Genocide Convention intended in every way to pull the stops on states. From a larger perspective, the state is the real protagonist in the genocide drama and individuals are merely supporting actors. The ultimate responsibility of ensuring that genocide will not occur lies on the state – by preventing itself or anyone else from committing genocide. Humanity's history on genocide is not so much a lesson for individuals as it is for states. Genocide happened because states stood and watched it happen. If genocide still happens years after the Genocide Convention, that means states have not learned their lesson of old. If only for this, the stops must be pulled against the state.

7 Catching the Reins of the State

Coming to the conclusion that responsibility for genocide should ultimately fall on the state, the *Bosnia-Herzegovina Genocide Case* can be viewed in two ways: as a wasted opportunity or as a lesson for the future. The first could be seen as wasting a rare chance to hold a state responsible for the crime of all crimes and give flesh to the underlying principles of the Genocide Convention, while the second could be seen as a legal – and political – stocktaking of the implications of and gaps in the Genocide Convention. The first view is as valid as the second, for indeed the ICJ could have made better use of this opportunity; but in terms of moving forward the latter view provides the tool for catching the reins of the state.

Although the ICJ's analysis rests on fragile premises, there is reason to say that the ICJ decided the *Bosnia-Herzegovina Genocide Case* in the way it did because it had to arrive at a politically correct conclusion on the question whether states are prohibited from committing genocide themselves, while treading the sensitive route to holding a state liable. Whereas it is logical to conclude that states are not themselves legally permitted to commit genocide, it is not as easy to hold a state liable for breach of an obligation to which it did not expressly and unequivocally bind itself when it acceded to the Convention. Here, the obligation not

[135] Drumbl, 'Looking Up, Down and Across: The ICTY's Place in the International Legal Order', 37 *New Eng L Rev* (2003) 1048.

to commit genocide was derived post-ratification of the treaty. Accordingly, the ICJ also had to be cautious not to violate Serbia-Montenegro's due process rights. In the end, the ICJ based its ruling on an explicit obligation to which all ratifying states agreed. In other words, while the ICJ found an implied obligation of states not to commit genocide, it was not ready to enforce this obligation in the same case where the ICJ first decided that such an obligation exists. Thus, it turned to the other obligations which have always been there and of which states could not claim ignorance. In this sense, the *Bosnia-Herzegovina Genocide Case* served as a stock-taking and gap-filling mechanism. Having said this, however, the obstacle course built by the ICJ between the Genocide Convention and state responsibility must be dismantled.

The Genocide Convention places the burden on the state to ensure that genocide is not committed. The ICJ must therefore approach issues of state responsibility in this light. This is not to say that the ICJ should make it easy to hold a state responsible, but it must also not make it unattainable. The standards must be clear and coherent, appropriate to the type of liability, the legal elements involved, the evidence procurable, and the realities of genocidal situations. The ICJ should re-examine the appropriateness of the 'evidence fully conclusive' standard in accordance with the civil nature of state responsibility and its relationship with the obligation to prevent genocide. It must also define this standard, especially in relation to 'beyond reasonable doubt'. In determining *dolus specialis*, the ICJ must relax rather than exact stringent proof, considering that the state is an inanimate juridical personality. Similarly, the ICJ must loosen its standard for inferring specific intent from the general pattern of acts. State responsibility for rendering assistance should work to prevent states from giving *any* support to genocidal activities rather than draw a thin line which states need only take care not to cross. The concept of 'effective control' must also be revisited *vis-à-vis* the interpretation of this principle in command responsibility. The ICJ should strive to stabilize these legal principles, instead of having vague guidelines or avoiding setting precedents.

The ICJ must likewise establish a rule on the effect of ICTY and ICTR case law on factual and legal findings of the ICJ pertaining to the same set of circumstances. Throughout the decision, the ICJ makes numerous references to the ICTY's findings as the basis for the ICJ's own findings, saying that relevant ICTY findings of fact have highly persuasive effect. The ICJ has recognized ICTY findings as 'evidence obtained by examination of persons directly involved' and therefore merit special attention,[136] but it seems prone to take the 'pick-and-choose' approach where it alternately respects and ignores ICTY findings at will. It would be more useful to identify what types of findings can be adopted by the ICJ. In engaging in this exercise, the ICJ must take note that the ICTY and ICTR are criminal tribunals which apply the highest standard of proof. Adopting the ad hoc tribunals' findings should neither raise nor lower the standard of proof which is appropriate for evaluating civil state responsibility. Extracting a principle along these lines should contribute to

[136] *Bosnia-Herzegovina v. Serbia-Montenegro, supra* note 51, at 78.

consistency and avoid situations where an agent is convicted of genocide but the state is held free of responsibility.

Likewise, the ICJ could inscribe a standard for evaluating the probative value of United Nations documents and findings. Whereas the ICTR takes judicial notice of United Nations reports,[137] the ICJ applies the uniform standard of treating with caution evidentiary materials prepared for the case and materials emanating from a single source.[138] Considering the status of the United Nations in the international community and its role in dealing with international issues like genocide, a more specific standard in evaluating its findings would be helpful in ensuring consistency in factual findings and addressing the political ramifications of ICJ decisions.

The foregoing is an initial laundry list for moving forward, past the *Bosnia-Herzegovina Genocide Case*. This list aims to arrest the developing irony that the characterization of genocide as the crime of crimes and the adoption of the Genocide Convention have made it more difficult to engage state responsibility. The Genocide Convention counts upon states to ensure that genocide remains but a history of a lesson hard learned. The ICJ is in a unique position to carry this goal through as it holds the very reins which could prevent future genocide. All it needs is the resolve to pull the stops hard, as the ICTY and the ICTR are pulling the stops on individuals.

[137] *Prosecutor v. Akayesu*, *supra* note 4, at para. 165.

[138] Bosnia-Herzegovina v. Serbia-Montenegro, supra note 51, at 77.