
On What Conditions Can a State Be Held Responsible for Genocide?

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Abstract

In the Genocide case the ICJ placed a broad interpretation on the obligation to prevent genocide, enshrined in Article I of the Genocide Convention. For the Court, this obligation has an operative and non-preambular nature with respect to the other obligations laid down in the Convention. In addition, it would necessarily imply the obligation for states themselves not to commit genocide. This latter finding is not entirely convincing for it is not in keeping with the historical foundations of the Convention and in addition results from an interpretation that, instead of clarifying the meaning of a treaty rule, infers a new obligation from it. The paper suggests that under international law the criminal liability of individuals and state responsibility for genocide are not triggered by the violation of the same primary rule. The contrary view is not corroborated by state practice and international case law: while the crime of genocide can be committed regardless of the existence of a state genocidal policy, the state's international responsibility necessarily requires such a policy. Also, for the international responsibility of the state to arise there is no need to demonstrate that the state as such, or one or more of its officials, harboured a genocidal intent in the criminal sense. The Court's finding is based on the notion that the state's international responsibility for genocide presupposes that of an individual acting on behalf of the state. This approach is flawed: in criminal matters the presumption of innocence only allows criminal courts to satisfy themselves that a person committed a crime. The Court could have confined itself to interpreting the obligation to prevent and punish genocide set out in Article 1 as endowed with an autonomous content and concluding, as in fact it did, that Serbia had violated both of them. It did not need to embark upon a construction of the Convention substantially marred by a misapprehension of the difference between genocide as an international wrongful act of state and genocide as a crime involving individual criminal liability.

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1 Why the Genocide Convention Does Not Oblige States Not to Commit Genocide

Among the various important issues touched upon by the International Court of Justice (hereinafter the Court) in its judgment in the *Genocide case*,¹ the question whether the 1948 Genocide Convention also obliges states themselves not to commit genocide stands out: it is a fascinating question from the point of view of the relationship of state responsibility with criminal liability of individuals under international law.

Nowadays nobody would dare to deny that customary international law contains a rule prohibiting states from committing genocide. It is generally contended that such a rule not only exists, but also belongs to *jus cogens*.² It is furthermore asserted that its violation gives rise to consequences that exceed those normally stemming from ordinary wrongful acts.³ However, the Court had to rule on the alleged responsibility of Serbia for genocide under the 1948 Genocide Convention, and not under customary international law, and this jurisdictional constraint complicated things significantly. Indeed, one could argue, as did Serbia,⁴ that that Convention does not impose upon contracting states themselves the obligation not to commit genocide, but rather restricts itself to laying down obligations for contracting states in criminal matters. In other words, one could contend that the Genocide Convention is merely a treaty establishing judicial co-operation among contracting states to ensure the prevention and punishment of such a heinous crime through the adoption of appropriate national legislation, the exercise of criminal jurisdiction and the extradition of persons allegedly responsible for genocide.

The Court disposed of this argument by means of a liberal interpretation of Article I of the Convention, whereby contracting states expressly undertake the obligation 'to prevent and punish genocide'. On the one hand, it held that Article I has an operative

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, 26 Feb. 2007, available at: www.icj-cij.org/docket/files/91/13685.pdf (visited 29 April 2007) (hereinafter: 'Genocide judgment').

² The ICJ itself has taken this stand: see *Case Concerning Armed Activities On the Territory of the Congo (New Application: 2002)*, *Jurisdiction of the Court and Admissibility of the Application*, judgment of 3 Feb. 2006, at para. 64. See, also, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), ii, at para. 702 d. and comment n (at 163 and 167, respectively) as well as the commentary on Art. 40 of the Articles on State Responsibility of the International Law Commission (ILC), available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (visited 2 July 2007).

³ In this regard, see Arts 41 and 42 of the ILC Articles on State Responsibility and the commentaries thereto, *supra* note 2.

⁴ See the Counter-Memorial of the then Federal Republic of Yugoslavia of 22 July 1997, available at: www.icj-cij.org (homepage) (visited 7 July 2007), at 312–313, and more specifically the oral pleading of Professor Brownlie, CR 2006/17 (*ibid.*), at 42, who, however, seems to rule out the possibility that states can be responsible for genocide under international law. Professor Brownlie quoted with approval a statement by Mr Markos, the US representative in the Sixth Committee at the time of the elaboration of the Genocide Convention, where he was in disagreement with the opinion of the UK 'that genocide could be committed by juridical entities, such as the State or the Government', since 'genocide was always committed by individuals which was one of the aims of the convention on genocide to organise the punishment of that crime': Doc. A/C.6/S.R.93/ at 319–320, cited by Professor Brownlie in his oral pleading, *ibid.*

and non-preambular character, i.e., 'it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition',⁵ but 'creates obligations distinct from those which appear in the subsequent Articles'.⁶ On the other hand, it also held that Article I – although it does not '*expressis verbis* require States to refrain from themselves committing genocide' has 'the effect ... to prohibit States from themselves committing genocide'.⁷ This is so mainly because, as the Court put it, 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide'.⁸ According to the Court:

It would be paradoxical if States were ... under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.⁹

In sum, for the Court, the Genocide Convention can give rise to both the international responsibility of states and the criminal liability of individuals for genocide; this is so also in light of the notion that the duality of responsibility is and continues to be 'a constant feature of international law'.¹⁰

The reasoning of the Court does not seem entirely persuasive, on two main grounds: the first ground is linked to the historical foundations of the Genocide Convention; the other is of a technical character and mainly pertains to the methods and limits of treaty interpretation. I will briefly deal with these two points in turn.

A *The Nuremberg Legacy and the Genocide Convention*

It is common knowledge that the Genocide Convention was drafted in the aftermath of the Nuremberg trial to give flesh and blood to the well-known dictum of the International Military Tribunal, according to which '[c]rimes against international law are committed by men, not by abstract entities, and *only by punishing individuals* who commit such crimes can the provisions of international law be enforced'.¹¹

Indeed at Nuremberg, for the first time in history, senior state officials who had committed heinous crimes acting on behalf of or with the protection of their state were brought to trial and held personally accountable regardless of whether they acted in

⁵ *Genocide* judgment, *supra* note 1, at para. 162.

⁶ *Ibid.*

⁷ *Ibid.*, at para. 166.

⁸ *Ibid.* The Court also found that Art. IX of the Convention, whereby the Contracting Parties confer on the Court jurisdiction over disputes 'including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III' would confirm that under the Convention 'States themselves are obliged not to commit genocide': *ibid.*, at paras 168–169. The full text of the Genocide Convention is available at: www.unhchr.ch/html/menu3/b/p_genoci.htm (visited 7 July 2007).

⁹ *Genocide* judgment, *supra* note 1, at para. 166 (emphasis added).

¹⁰ *Ibid.*, at para. 171.

¹¹ Emphasis added. The judgment of the Nuremberg Tribunal is available at: www.yale.edu/lawweb/avalon/imt/proc/judcont.htm (visited on 14 July 2007).

their official capacity and of their seniority as state officials.¹² It was only natural for the drafters of the Convention on Genocide to hold to the Nuremberg legacy and conceive of a mechanism to ensure in the future the criminal accountability of whomsoever, including persons acting *qua* state officials, had committed a crime so appalling as that of genocide. For the repression of genocide at the international level, they envisaged a criminal court endowed with jurisdiction over this crime.¹³ As regards criminal repression at the national level, they were inspired by previous conventions in criminal matters, such as those on counterfeiting,¹⁴ slavery,¹⁵ and the traffic in women and children.¹⁶ Therefore, they imposed on contracting parties the obligation to criminalize genocide, as defined by the Convention itself, within their legal orders, to punish it when committed on their territories, and to extradite alleged *génocidaires* to another contracting state. The novelty of the Genocide Convention – and this is the main and very significant difference from the previous (and also most of the subsequent) international conventions in criminal matters – is that it aimed at ensuring punishment of criminal acts that are normally and indeed had been historically committed by state officials pursuant to a state policy¹⁷ (or at least by private individuals who took advantage

¹² Art. 7 of the Statute of the Nuremberg Tribunal provided: '[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.

¹³ Art. VI of the Genocide Convention (*supra* note 8) provides: '[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried ... by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

¹⁴ See the 1929 Convention for the Repression of Counterfeiting Currency, 112 LNTS 371.

¹⁵ See the 1926 Convention on Slavery, Servitude, Forced Labour and Similar Institutions and Practices, 60 LNTS 53, also available at: www.ohchr.org/english/law/slavery.htm (visited 7 July 2007).

¹⁶ See the 1910 Convention for the Suppression of the 'White Slave Traffic', available at: www1.umn.edu/humanrts/instreet/whiteslavetraffic1910.html (visited 7 July 2007); the 1921 Convention for the Suppression of the Traffic in Women and Children, available at: www.austlii.edu.au/au/other/dfat/treaties/1922/10.html (visited 7 July 2007); and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age, available at: www1.umn.edu/humanrts/instreet/women-traffic.html (visited 7 July 2007).

¹⁷ Since genocide is normally committed by state officials pursuant to a state policy, it may be surprising that, under Art. VI of the Genocide Convention (*supra* note 8), the obligation to punish persons charged with genocide only concerns the state of the *locus commissi delicti*, namely the state under the authority, approval, or at least acquiescence of which acts of genocide are normally committed. However, according to the UN Sixth Committee's Report '[t]he first part of Article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State. The words "in particular" were inserted to leave open the question of the possible exercise of national criminal jurisdiction in accordance with the so-called passive personality principle and the universality principle.' (See N. Robinson, *The Genocide Convention. A Commentary* (1960), at 82–83). Therefore, it is clear that under Art. VI of the Genocide Convention, the territorial state is under the obligation to try persons allegedly responsible for genocide, even if they were acting as state organs. However, under the Convention, other states are not barred from bringing those persons before their own tribunals in accordance with other grounds of jurisdiction such as the active nationality principle, the passive personality principle, and even the universality principle. One can even argue that in fact Art. I of the Convention (provided that it is not preambular in nature, as the Court stated in its judgment) obliges each contracting States, and not only the territorial one, to punish the perpetrators of genocide on the basis of other grounds of criminal jurisdiction if available and legitimate under international law. In other words,

of the state apparatus and its official policy). It therefore comes as no surprise that the Convention itself, again following in the Nuremberg Tribunal's footsteps, contains a rule establishing the irrelevance of acts of genocide committed by individuals acting *qua* state officials.¹⁸ As I have just pointed out, this was an innovative development, for prior to World War II states had concluded conventions in criminal matters only to deal with transnational private criminality, such as counterfeiting or trafficking in women and children, namely crimes which are committed by private individuals and have a transnational dimension, and as such jeopardize the collective interests of states.

In short, I believe that under the Genocide Convention states are mandated to prevent the commission of genocide as an instance of individual criminality, regardless of whether these acts are committed by state officials belonging to any state. To contend, as the Court did, that the Genocide Convention also obliges states themselves not to commit genocide through their organs is at odds with the historical legacy of Nuremberg that inspired its drafters: what the Convention wanted to achieve was the enforcement, through the threat and imposition of national criminal sanctions, of fundamental values of international law regardless of whether they are violated by individuals acting on behalf of a state. As states cannot be considered 'criminal' ('crimes are committed by men and not by abstract entities'), it is not in keeping with the historical and theoretical foundations of the Genocide Convention to maintain that that Convention, because it imposes upon states the obligation to prevent and punish genocide as a crime, also constitutes the conventional legal foundation of the responsibility of states for genocide as an international wrongful act.¹⁹

In addition, as internationally wrongful acts are committed, by definition, by collective entities such as states, it is also difficult, if not impossible, to establish the international responsibility of states for genocide by applying a legal definition, such as that enshrined in Article II of the Genocide Convention, which was drafted with regard to the criminal liability of persons. The difficulties that one inevitably encounters in establishing whether a state possesses the *dolus specialis* of genocide, or the debate concerning whether or not the crime of genocide can be committed only when there is a state policy or campaign of genocide, are emblematic in this respect and have given rise to a protracted debate.²⁰

Nonetheless, it would be wrong to maintain that since the Genocide Convention is an international criminal law treaty that has nothing to do with the international

although Art. VI may appear a rather naïve provision, there is room to argue that under the Convention states other than the territorial one are obliged to punish genocide committed by their nationals or even by foreigners abroad. For an analysis of the implication of the judgment of the Court in the *Genocide* case on the obligation of Contracting Parties to punish genocide see Ben-Naftali, Sharon, 'What the ICJ did not say about the Duty to Punish: The Missing Pieces in a Puzzle', 5 *JICJ* (2007) 875.

¹⁸ Art. IV of the Convention, *supra* note 8, provides: '[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'.

¹⁹ A similar stand was taken by Judges Shi and Koroma in their joint declaration attached to the judgment of the Court.

²⁰ See in this regard elsewhere in this issue Kress, 'The International Court of Justice and the Elements of the Crime of Genocide'.

responsibility of states for committing genocide, such form of international responsibility does not exist at all! What I maintain here has nothing to do with the theory according to which individual criminal accountability for international crimes substitutes for international state responsibility.²¹ On the contrary: the notion of individual criminal responsibility under international law has gradually evolved to complement that of state responsibility, but – as I will try to demonstrate below – only when individual criminality runs alongside a systemic pattern of criminality organized, tolerated, or acquiesced in by the state. However, absent a pattern of ‘state criminality’, individuals can incur criminal responsibility under international law without the state being directly responsible for their criminal acts when committed by its agents or representatives.²² Consider, for instance, a policeman who kills a foreign diplomat. That policeman, under national law, can be held criminally liable for murder. In addition, if there is an international treaty specifically obliging states to prevent and punish killings of foreign diplomats, to criminalize those killings, and to punish their perpetrators as well as – if requested – to extradite them to another contracting party, one can say that that policeman has in fact committed an international crime, i.e., the crime of ‘murder of a foreign diplomat’. If the obligation on states to criminalize and punish instances of murder of foreign diplomats becomes so essential for the international community as to acquire a customary nature, one can also say that that policeman has committed a crime which is truly international, because the values it protects are of universal concern. However, when it comes to the state to which the policeman belongs and its international responsibility, one could find that state responsible for various wrongful acts: for instance, for not having duly protected the foreign diplomat, or punished the policeman, or for not having extradited the policeman to a requesting state. The fact that, under international law, the policeman had killed a person, coupled with the fact that – under the applicable rules of attribution – the conduct of the policeman can be considered state conduct, does not enable one to say that that state itself had committed a murder! The state can incur international responsibility for murder only if, alongside the international criminal rule, there exists a corresponding rule that is addressed to states and has exactly the same content as the criminal one, i.e., an international rule that provides in the same terms for the criminal responsibility of individuals and the international responsibility of states for murder. This will hardly be the case if individual criminal responsibility under international law can arise regardless of the existence of a pattern of criminality organized, tolerated, or acquiesced in by the state authorities. Let me give a paradoxical example: let us imagine that a state official of a country, say Italy, acting in his official capacity, participated in the perpetration of the terrorist attacks of 11 September 2001. This official can certainly

²¹ See, for instance, the stand taken by counsel for Serbia, Professor Brownlie, quoted *supra*, at note 4. For the rejection of the notion that allocation of individual criminal responsibility is alternative to state responsibility see Nollkaemper, ‘Concurrence Between Individual Responsibility and State Responsibility in International Law’, 52 *Int’l Comp LQ* (2003) 615.

²² In this regard, see the apposite remarks of Dupuy, ‘International Criminal Responsibility of the Individual and International Responsibility of the State’, in A. Cassese, P. Gaeta, and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (2002), ii, at 1085, 1091 ff, where the author points to the growing autonomy of individual responsibility from state responsibility.

be charged with terrorism and be considered responsible for a very serious international crime. But can anybody argue that Italy as such is responsible for having perpetrated the 11 September attacks and therefore for being 'a terrorist state'?

The same reasoning can apply to genocide. Indubitably, the Genocide Convention prohibits the crime of genocide, and provides for the individual criminal liability of its perpetrators. Indubitably, this prohibition and the individual criminal liability attaching to it can also be found in customary international law. Nothing, however, warrants the conclusion that for states the prohibition of genocide has exactly the same content as the international prohibition at the criminal level, as instead the Court has simply assumed in its judgment. It is certainly possible to conceive of two forms of responsibility, but – exactly because they have a profoundly different nature – these two forms of responsibility (the criminal responsibility of individuals and that of the state) can be triggered by the infringement of two different primary rules, each one shaped upon the particular nature of their addressees and the consequences of the illegal conduct attributed to them.²³ This is an issue, however, that I will briefly address below.²⁴

B The Obligation to Prevent the Commission of the Crime of Genocide Does Not Give Rise to an Obligation for States Not to Commit Genocide

As I noted above, in a central passage of its judgment the Court holds that the obligation on states not to commit genocide can be inferred from the obligation to prevent genocide, which is expressly provided for in Article I of the Convention. However, one can easily notice that these two obligations belong to different 'species'. The latter (the obligation to prevent) is clearly – as the Court itself put it in plain words elsewhere in the judgment – an *obligation of conduct*, 'in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide'. This obligation requires states 'to employ the means reasonably available to them, so as to prevent genocide as far as possible'.²⁵ In addition, as the Court pointed out, a state breaches the obligation to prevent if it fails to act once the perpetration of the crime has commenced, or once 'the State learn[ed] of, or should normally have learned of, the existence of a serious risk that genocide will [have been] committed'.²⁶ However, as the Court made it abundantly clear, if genocide is not committed, a state cannot be held responsible for not having acted to prevent something which in fact did not occur.²⁷

²³ See again the apposite remarks by P.-M. Dupuy, who rightly stresses: that '[o]ne ought to note a radical difference in foundation between individual criminal responsibility, founded on fault and intention, and the State's international responsibility, founded on the wrongful act': *ibid.*, at 1095. However, for the reasons explained below, in section II, I disagree with this author when he contends that 'intention indeed constitutes a constitutive element in the State's international responsibility': *ibid.*

²⁴ See *infra*, II.

²⁵ *Genocide* judgment, *supra* note 1, at para. 430.

²⁶ *Ibid.*, at para. 431.

²⁷ '[I]f neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which ... must occur for there be a violation of the obligation to prevent': *ibid.*, at para. 431.

In contrast, the former obligation (that not to commit genocide) is clearly an obligation of result. According to the Court this obligation is breached when a state official or another individual whose acts are attributable to a state perpetrates an act of genocide or any of the other acts listed in Article III of the Genocide Convention.²⁸ In this case, for the Court ‘there is no point in asking whether [that State] complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated’.²⁹

What, then, when a state official – acting in his official capacity – takes part in a genocide perpetrated abroad, in another state, namely a genocide that is clearly not planned or organized or tolerated by the state to which he belongs, but that his state is in fact actively trying to prevent? Think, for instance, of a soldier who is a member of a UN peace-enforcing operation abroad, i.e., in a country where a genocide is clearly occurring (say, Rwanda in 1994). This soldier could individually, acting however *qua* state official, take part in the genocide that his state is endeavouring to halt by various means, including by sending a military operation at the request of the UN. Despite the humanitarian aim of the military operation the soldier could harbour a genocidal intent and himself kill members of the targeted victim-group, along with the other ‘local’ perpetrators, with the aim of contributing to the physical destruction of the group. Should we follow the reasoning of the Court, we would inevitably conclude that the state to which the soldier belongs is ‘responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State)’. We also would inevitably conclude that that state had failed to comply with its obligation of prevention in respect of the same act, because, as the Court reasoned, ‘logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated’.³⁰ In other words, according to the reasoning of the Court, the state to which the soldier belongs is to be considered responsible for having committed genocide, only on account of the criminal conduct of one of its soldiers. In addition, it must be considered responsible for having breached the obligation to prevent genocide, although it sent a military mission to the foreign country where acts of genocide were being committed, it had no reason to believe that the soldier would participate in the genocide, it had adopted all the necessary measures to criminalize genocide, and on the basis of this legislation had arrested the soldier, brought him to trial, and severely punished him. Is this not too much?

True, treaties in contemporary international law can be construed more liberally than in the past, when the dogma of state sovereignty was a dominant feature in

²⁸ As the Court put it, ‘the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III [of the Genocide Convention]. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the act proscribed by Article III of the Convention, the international responsibility of that State is incurred’: *ibid.*, at para. 179.

²⁹ *Ibid.*, at para. 382. See also para. 383, where the Court points out that ‘a State’s responsibility deriving from any of [the acts enumerated in Article III of the Convention] renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct’.

³⁰ *Ibid.*, at para. 382.

the international community. Nowadays the application of the principle of restrictive interpretation, whereby limitations on state sovereignty cannot be presumed or inferred by implication (*in dubio mitius*),³¹ is subject to other, more liberal principles and criteria (i.e. it may be applied only when resort to those other principles and criteria have failed).³² However, the stand taken by the Court seems to go too far, and reaches the point where liberal methods or principles of interpretation, instead of being used to clarify the meaning of a rule, are applied so as to infer new obligations from those already provided for in a given treaty.³³

By the same token it does not seem at all evident or even logical to contend – as the Court did – that the obligation to prevent genocide, being an obligation of conduct, ‘necessarily implies’ the obligation not to commit it. Two different sets of obligations, each with its specific content, are required in this regard. The obligation of policemen to prevent the commission of crimes does not include or imply that they are obliged themselves to not commit the crimes they have to prevent. Another class of obligations has this scope and content, and imposes upon individuals, including members of the police, the relevant prohibitions.

Plainly, it is only logical to contend that when rules are imposed upon some subjects to prevent certain conduct from being perpetrated, that conduct must inevitably be unlawful. Indeed, the obligation to prevent certain conduct from occurring is a sign of the existence of a rule specifically prohibiting it. It provides an additional safeguard for the rule proscribing the conduct (normally because of the fundamental values the latter protects). However, it certainly is not the source of the prohibition of the conduct itself! This is also true in international law, particularly in the field of international criminal law. States can find it necessary to conclude treaties in order to organize their cooperation to repress forms of criminality that seriously jeopardize their collective interests or offend values of particular importance to the international community. By virtue of such treaties, they can oblige themselves both to criminalize a given conduct within their legal orders, in order to punish the individuals who carry it out, and to do whatever they can to prevent it. Why should one infer from that that contracting states, by virtue of those treaties, are also meant to be held internationally responsible for having committed conduct they wanted to prevent and punish as a crime? Crimes can be committed not only by private individuals, but also by state officials acting in their official capacity. However, when a state official perpetrates a criminal offence (for example, murder, robbery, and so on) – even if it is an offence the criminalization and punishment

³¹ This principle of interpretation was affirmed by the Permanent Court of International Justice in *Mossul* (Interpretation of Art. 3, para. 2 of the Treaty of Lausanne). Series B, no. 12, at 25. See among others D. Anzilotti, *Corso di diritto internazionale* (4th edn., 1928, reprinted 1955), at 103; A. Verdross and B. Simma, *Universelles Völkerrecht – Theorie und Praxis* (3rd edn., 1984), at 493. On the historical foundations of the principle see A. Cassese, *International Law* (2nd edn., 2005), at 178–179.

³² See in this regard Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ [1949] *British Yearbk Int’l L* 61.

³³ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), i, at 42, 60; Skubiszewski, ‘Implied Powers of International Organizations’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (1989), at 855, 859.

of which is imposed by international treaties (counterfeiting, or slavery, or trafficking in human beings) – it does not necessarily follow that the state is internationally responsible for having itself committed that crime! Under the international rules of attribution, the conduct of a state official or representative constitutes state conduct; but – as I have already pointed out above³⁴ – for the international responsibility of the state to arise, the criminal offence must also constitute illegal state conduct. It is not logical to contend that the obligation of states to prevent the commission of a crime, i.e., the obligation to prevent the criminal conduct of individuals, necessarily implies the international obligation of states not to undertake that conduct as states (i.e., through their agents and representatives). Think, for instance, of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This convention obliges states to punish any person who forces another into prostitution. In addition, Article 16 of the Convention expressly obliges contracting states ‘to take ... measures for the prevention of prostitution’.³⁵ Would anybody be ready to contend that a state is internationally responsible for exploiting prostitution just because one or some of its agents, acting in their official capacity, have engaged in such a criminal act? Should one apply the reasoning of the Court, one could go so far as to answer in the affirmative, and to infer from the obligation of states to take measures to prevent prostitution and the international obligation for them not, through their agents, to commit acts of exploitation of prostitution; and to conclude that, on account of the criminal behaviour of one of its officials, the state is internationally responsible for itself having, as a state, prostituted a human being!

In sum, I think that under a proper interpretation of the Genocide Convention the obligation to prevent genocide, set out in Article I, ‘merely’ serves to impose upon contracting states a special duty of care and diligence, making them the guardians of a rule (that prohibiting the commission of the crime of genocide by any person) which they consider of fundamental importance, and consequently accountable when they do not take their role seriously. In the Convention, the duty of prevention clearly obliges states parties to do everything they can whenever genocide is committed by whomever, i.e., regardless of whether the person acts as a private individual or *qua* state official. Instead, the Court postulated that the obligation of the contracting parties to prevent genocide only applies to the conduct of ‘persons over whom they have a certain influence’, and argued that hence it would be preposterous to contend that states are allowed to commit genocide through their organs. For the Court, the obligation to prevent is pointless with regard to the conduct of state officials and representatives, since – when they engage in genocide – the state itself is responsible for having committed it, and cannot by definition have complied with the obligation to prevent. However, this is in essence tautological reasoning: it takes for granted what instead must be demonstrated, namely that the obligation to prevent the crime of genocide applies only to the conduct of private individuals, and does not concern the conduct of state agents since states – by virtue of this obligation of prevention – cannot commit genocide through their agents.

³⁴ *Supra*, Section 1.A.

³⁵ Emphasis added.

2 Not Just a Question of Attribution: The Content of the Primary Rule Obliging States Not to Commit Genocide

When one deals with acts that can engage the personal responsibility of individuals under international law, one is tempted to believe that the same primary rule – once breached by a state official or person acting on its behalf – can give rise to the state's international responsibility for the corresponding wrongful act. This, however, is an assumption not fully supported by international practice. On the contrary: there are reasons to believe that the two forms of responsibility are *fully independent of each other* from the start, i.e. because they are triggered by the *violation of non-identical primary rules*.

Consider, for instance, war crimes, and in particular the grave breaches provisions enshrined in the 1949 Geneva Conventions and their relationship with state responsibility. If a soldier kills a prisoner of war, the responsibility of the state for the violation of the rules on the treatment of prisoners of war would automatically follow, unless that state can demonstrate the absence of fault on the part of the soldier. Nobody would contend that for state responsibility to arise it is also necessary to prove that the soldier intended to kill or that he acted out of recklessness. However, to establish the criminal liability of the soldier for the corresponding war crime or grave breach, such proof will be necessary and the burden of proof will rest upon the prosecution.

Moreover, nobody would contend that a state is responsible for war crimes on the basis of a single case or a host of cases of killings of prisoners of war, unless it is established that these crimes are committed on a large scale, i.e., because they constitute what Röling defined as 'system criminality'.³⁶ When there is evidence of this system criminality, one could argue that to establish the responsibility of the state for war crimes one can avoid inquiring whether, in every single instance, the individual who acted on behalf of the state had a criminal mental attitude (*mens rea*). What suffices here is proof of the existence of a pattern of violence and the possibility of inferring from this pattern the acquiescence by the state's military and political authorities in or even approval of the criminal behaviour of their subordinates.³⁷

Arguably, *mutatis mutandis* similar reasoning can be applied to genocide. If one contends, contrary to what the Court held, that the Genocide Convention is a treaty that obliges states to prevent and punish genocide as a criminal act committed by individuals, there is no reason to believe that the definition of genocide contained in the Convention also applies to state responsibility. Clearly, as I have endeavoured to

³⁶ Röling, 'The Significance of the Laws of War', in A. Cassese (ed.), *Current Problems of International Law* (1975), at 137–139.

³⁷ Another example is that of the crime of torture as a discrete crime. If one accepts the view that the crime of torture, as defined in the 1984 UN Convention, is also prohibited in customary international law, it would, however, be at odds with state practice to contend that a state, by virtue of customary law, can be considered responsible for having committed torture by reason of only a single occurrence of the crime. A pattern of state criminality is required to this effect. See, for instance, the obiter dictum of the ICTY Trial Chamber II in the judgment delivered on 10 Dec. 1998 in *Furundžija*, IT-95-17/1-T, at para. 141, where it held: '[i]f carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human beings, this constituting a particularly grave wrongful act generating State responsibility'.

demonstrate above, the Genocide Convention aims at ensuring the punishment of individuals engaging in genocide regardless of whether or not they acted *qua* state officials. Genocide is defined in the Convention in criminal terms, and this comes as no surprise, since this definition had to be adopted by contracting states within their own criminal legal systems to prevent and punish genocide. Why, then, maintain that the same definition describes the prohibition of genocide incumbent upon states?

In fact, to my mind the obligation on states not to perpetrate genocide, far from being rooted in the Genocide Convention, originates in customary international law. It evolved from the emergence in contemporary international law of a set of international obligations of fundamental importance for the whole international community that constitute the so-called *jus cogens*. This customary rule on the obligation of states not to engage in genocide ‘attracted’, as it were, many elements of the definition of genocide enshrined in the 1948 Convention, but remained independent of that Convention. It is a fact that, when referred to state responsibility, genocide has generally been considered as a wrongful act requiring a systematic attack on human rights. For instance, back in 1976, the ILC – when commenting upon the former Article 19 on the so-called crimes of states – considered that a telling example of international crime was ‘a large-scale or systematic practice adopted in contempt of the rights and dignity of the human being’, such as ‘genocide’, thereby recognizing that genocide – as a particularly serious wrongful act of state – always presupposes systematic practice.³⁸ The ILC took a similar position in 2001, when it explicitly said that ‘the prohibition of ... genocide, by [its] very nature require[s] an intentional violation on a large scale’.³⁹ In addition, there has never been an attempt to maintain that a state was responsible for genocide without an allegation that that state was pursuing a genocidal policy against a particular group. Whenever it has been maintained that a state has engaged in genocide, there has always been a systematic attack on a particular group allegedly in pursuance of a governmental plan or policy. This was the case with the attacks against the Kurds by the Ottoman Empire, or on the Jews by the Nazis, or on Tutsis in Rwanda. As regards Darfur, the UN Commission of Inquiry found that attacks against the so-called African tribes could not be categorized as acts of genocide committed by Sudan precisely because the Commission was unable to find evidence of the genocidal intent of the supreme political authorities of the state, thereby implying that there was no proof of a plan or policy of genocide.⁴⁰

On the contrary, with respect to genocide as an act of individual criminality, one can easily notice that Article II of the Genocide Convention (and the corresponding rule of customary international law) does not expressly require the existence of a state

³⁸ See Yearbook of the International Law Commission at 121, para. 70, Vol. II, Pt Two (1976).

³⁹ See the commentary on Art. 40 of the Arts on State Responsibility, quoted *supra*, at note 2.

⁴⁰ Report of the International Commission of Inquiry on Darfur to the Secretary General, Pursuant to SC Res. 1564, 18 Sept. 2004, Annex to Letter of 31 Jan. 2005 from the Secretary-General to the President of the Security Council, S/2005/60, at para. 518.

plan or policy of genocide in order for the crime to be committed.⁴¹ At the level of individual criminal responsibility, the ICTY and the ICTR have also taken this stand. The two ad hoc Tribunals considered that the existence of a plan or policy of genocide can constitute a useful element demonstrating the genocidal intent of a specific individual; but they have clearly ruled out that such plan or policy is a legal constitutive ingredient of the crime of genocide.⁴²

In sum, it is possible to argue that states are certainly bound not to commit genocide, but in terms not identical to those embodied in the Genocide Convention. As a crime, genocide requires a special intent (*dolus specialis*) of the perpetrator; furthermore, in some instances it can also be committed absent a state genocidal policy or even a collective act of violence.⁴³ In contrast, as a wrongful act of states of exceptional seriousness, genocide always requires the existence of a genocidal policy and hence a pattern of widespread and systematic violence against a given group. For the international responsibility of the state to arise, however, there would be no need to demonstrate that the state as such – or one or more of its officials – harboured a genocidal intent in the criminal sense. This is a requirement that only pertains to the criminal liability of individuals. Absent direct evidence of the existence of a genocidal policy, it would be necessary only to prove that, because of the overall pattern of violence, the ultimate goal of the policy of the state cannot but be that of destroying the targeted group as such.

Only by recognizing that criminal responsibility is one thing and state responsibility is quite another is it possible fully to bring to fruition the notion that there is – under international law – a dual regime of responsibility for serious violations of human rights and other norms of concern for the international community as such. These two distinct legal regimes aim to protect the same values, but from different perspectives, and in addition they apply to different subjects. It is only natural that they are triggered by rules that, although pursuing the same objectives, are not identical in content because they operate at a different level. Since states are abstract entities and have a collective dimension, it is not unrealistic or absurd to maintain that they can commit genocide only when there is a policy or plan against a targeted group.

⁴¹ See, however, the apposite remarks of A. Cassese, *International Criminal Law* (2nd edn. (2007), who argues that a contextual element (i.e., a policy or a collective activity of the state or of an entity or group) is not required by the customary and treaty rules for the individual criminal responsibility for genocide to arise only for two categories, namely: killing members of a protected group and causing serious bodily or mental harm to members of the group. Contra, C. Kress, who on many occasions has argued that for the crime of genocide to be perpetrated a state policy, or at least a collective destructive act, is always required: see, for instance, Kress, 'The Crime of Genocide under International Law', 6 *Int'l Criminal L Rev* (2006) 461, but also his contribution to the present issue. See in the same vein Dupuy, *supra* note 22, at 1092; and Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', 18 *Leiden J Int'l L* (2005) 877.

⁴² See the judgment delivered on 5 July 2001 by the ICTY Appeals Chamber in *Jelisić*, IT-95-10-A, at para. 48, where it held that '[t]he existence of a plan or policy is not a legal ingredient of the crime, although it may facilitate proof of the crime'. See also, from the same Chamber, the judgment of 12 June 2002 in *Kunarac et al.*, IT-96-23&IT-96-23/1-A, at para. 98.

⁴³ Cassese, *supra* note 41.

This requirement is unnecessary if one wants to ensure that, at the individual level, genocide is not committed. If one shifts from the collective/state dimension to that of individuals, it is only logical to focus upon the frame of mind of those who have a criminal mental attitude towards a particular group, and intend to pursue its destruction – with or without any state support.

3 Some of the Reasons Why State Responsibility for Genocide Cannot Be Grounded in Individual Criminal Liability for Genocide

If one accepts the stand taken by the Court and thus maintains that – under the Genocide Convention – a state is responsible for genocide or any of the other acts listed in Article III where ‘a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention’,⁴⁴ criminal responsibility for genocide becomes a sort of prerequisite of state responsibility. Hence, there arises the need to establish that persons or groups acting on behalf of the state have indeed committed the crime of genocide, thereby making their state internationally responsible for its perpetration.

Before the Court, counsel for Serbia contended that to establish the international responsibility of a state for genocide it is necessary for a competent criminal tribunal to have previously established the responsibility for genocide of the individual acting on behalf of that state. The Court rejected this argument. It held that it ‘could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances’, namely when genocide has allegedly been committed by the leaders of a state and ‘they have not been brought to trial because, for instance, they are still very much in control of the powers of the State ... and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes’.⁴⁵ What the Court rejected is the idea that the exercise of its judicial function be contingent upon the exercise of criminal jurisdiction by a national or an international tribunal. On this point, the Court could not have been clearer:

The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity.⁴⁶

In essence, the Court considered that it was not only competent to ascertain the international responsibility of states for genocide, but also to establish whether individuals had committed genocide or any of the other acts listed in Article III. According

⁴⁴ *Genocide* judgment, *supra* note 1, at para. 179.

⁴⁵ *Ibid.*, at para. 182.

⁴⁶ *Ibid.*, at para. 181.

to the Court, to determine whether Serbia had violated the Genocide Convention by committing genocide it had to establish whether 'an organ of the State, or a person or group whose acts [were] legally attributable to the State, commit[ted] any of the acts proscribed by Article III of the Convention'.⁴⁷ Thus it was only natural for the Court to assert that it was empowered to satisfy itself, although necessarily incidentally, that a given individual whose conduct was attributable to the state had committed genocide.

The approach taken by the Court has at least the merit of making it clear – although indirectly – that acts constituting international crimes, such as genocide, when perpetrated by state organs in their official capacity cannot be considered as acts of a private nature. The view that international crimes must always be deemed to pertain to the private sphere was propounded in national case law with regard to the question of immunity from foreign criminal jurisdiction of individuals accused of committing an international crime while acting in their official capacity. It served the purpose of denying the applicability of the so-called 'immunity *ratione materiae*': in sum, national courts and tribunals maintained that a state official cannot enjoy any immunity from foreign criminal jurisdiction by reason of having acted *qua* state official, since international crimes are necessarily committed in a private capacity. This view has been taken, for instance by some of Their Lordships in the *Pinochet* case,⁴⁸ and was even echoed by the Court itself in the *Arrest Warrant* case.⁴⁹ However, as has been aptly noted by a commentator, this legal construct entails that the international crimes perpetrated by state officials, being considered acts of a private nature, cannot be attributed to the state as such and cannot entail its international responsibility.⁵⁰ In the present case, the Court, by assuming that persons who committed genocide can entail the state's international responsibility for their conduct if they acted *qua* state officials, implicitly – but indisputably – rejected the notion that the international crimes are, by their very nature, instances of private criminality, and hence can never be attributed to a state.

The approach taken by the Court, however, is not flawless. The most relevant deficiency concerns the notion that an inter-state tribunal, which clearly is not endowed with criminal jurisdiction, can in fact find that a given individual has committed an act of genocide or any other of the criminal acts listed in Article III of the Genocide Convention. In criminal law, it is crystal clear that no one can be considered responsible for having violated a criminal rule until a competent criminal tribunal has so found. This is so because of the basic principle of the presumption of innocence, which mandates that the criminal behaviour of an individual be established at trial, and with all the guarantees and safeguards of a fair trial.

⁴⁷ *Ibid.*, at para. 179.

⁴⁸ *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex Parte Pinochet*, House of Lords Judgment of 24 Mar. 1999, available at: www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (visited 7 July 2007). For an account of the various position taken by Their Lordships, and for a critical assessment of the House of Lords decision in the *Pinochet* case, see Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', 10 *EJIL* (1999) 237.

⁴⁹ In this regard, see the criticism set out by Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 853, at 866–870.

⁵⁰ Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur?*', 13 *EJIL* (2002) 895.

It is for this reason that, with all due respect, I consider the approach taken by the Court inherently flawed. I doubt that the Court had the power and the competence to make a finding – and previously Bosnia and Herzegovina the possibility to prove and Serbia to contest – on the possible commission by individuals, during the unfolding of the armed conflict, of international crimes including the crime of genocide. How can an inter-state tribunal ascertain, and a state successfully prove or disprove before it, that one, some, or even many persons engaged in criminal conduct without a proper criminal trial? They simply may not, not only legally, but also practically.

It is perhaps on account of the inevitable practical difficulties it had to face that the Court, in order to adjudicate on the dispute brought before it, relied so heavily upon the case law of the ICTY. This perhaps explains why the Court eventually found, as hitherto the ICTY had done, that only the killing of 7,000 men in Srebrenica – coupled with the mass expulsion of women and children – constituted genocide. This perhaps also explains why the Court eventually adopted a standard of proof similar to that used by criminal tribunals (i.e., the ‘beyond reasonable doubt’ standard), without taking advantage of some measures that other courts, such as the European Court of Human Rights or the Inter-American Court of Human Rights, had resorted to when faced with a lack of cooperation by the respondent state with regard to allegations of serious violations of human rights. In such circumstances, those tribunals adopted a standard of proof less strict and formal than that required in criminal matters, and in some instances went so far as to maintain that the principle *actori incumbit probatio* was not applicable in favour of the respondent state. The rationale behind the adoption of less stringent standards of proof is that, when state organs are accused of committing very serious violations of human rights, they may not simply deny the facts or dismiss the allegations. This is true in particular when, in order to verify the truthfulness of the allegations, one must rely upon the full cooperation of the state in question.⁵¹ The Court, however, decided not to follow this approach, without explaining the reasons for such decision. It even decided not to require Serbia fully to disclose some redacted documents that, according to Bosnia, were essential to prove Serbia’s responsibility for the Srebrenica massacre. By doing so, the Court missed a unique opportunity to take into account and act upon – also from the point of view of the standard of evidence – the substantial differences that exist between state responsibility and individual criminal liability.

4 Was it Necessary for the Court to Find that the Genocide Convention Obliges States Not to Commit Genocide?

The Court found that Serbia was not responsible for genocide or any other of the acts listed in Article III, but only for failing to prevent the commission of genocide

⁵¹ In this regard, and for the case law of the European Court of Human Rights and of the Inter-American Convention of Human Rights, see F. Bestagno, *Diritti umani e impunità. Obblighi positivi degli Stati in materia penale* (2003), at 159 ff.

in Srebrenica and failing to punish its alleged perpetrators by not handing them over to the ICTY. In other words, after stating that the Genocide Convention also obliges states themselves not to commit genocide or the other acts listed in Article III, the Court was unable to conclude that Serbia was internationally responsible in this regard. Eventually the Court applied the Genocide Convention as a 'mere' instrument of international criminal law, requiring states to prevent individuals from engaging in genocide and obliging them to hand over alleged *génocidaires* to a competent international criminal tribunal.

It is plausible that the Court wanted to expand all the potentialities of the Genocide Convention, thereby taking a progressive stand in the field of protection of human rights. Arguably the aim was to assert clearly that states bear international responsibility for the criminal attitude of their organs. However, the Court did so by dint of legal reasoning which is not entirely persuasive. Instead of shedding some light on the complex relationship, in contemporary international law, between individual criminality and state responsibility, the Court took the wrong path. It failed to grasp the fact that the former form of responsibility was becoming autonomous from the latter, and the proper meaning of the notion of state responsibility for serious violations of obligations of fundamental importance for the international community as a whole. As I have stressed above, individual criminal liability for crimes such as genocide can arise regardless of the existence of a state genocidal policy or campaign. In circumstances where that policy is lacking, to hold a state responsible for genocide merely because a state official demonstrated a genocidal attitude or performed a genocidal act, is tantamount to trivializing the notion of genocide as an international wrongful act of serious concern to the international community as a whole.

All things considered, one is left with the impression that the Court took that path because it read the Genocide Convention through the lens of the historical facts that had occurred in Bosnia and Herzegovina during the armed conflict and, in a way, subsumed the Convention under the specific facts of the case. In Bosnia and Herzegovina, the mass killings had been perpetrated by individuals and groups of individuals that were not *de jure* organs of Serbia, but could have been found to be its *de facto* organs. In addition, Serbia had provided substantial military and financial aid to the Bosnian-Serb leadership, and – on the face of it – could have been responsible for having aided and abetted the perpetration of genocide. Unfortunately, under the express wording of the Genocide Convention, which was the only instrument conferring on the Court jurisdiction over the case, states are not duty bound to refrain from engaging in genocide or giving aid and assistance to the perpetrators of genocide. The eagerness of the Court to rule on the horrific crimes perpetrated in Bosnia and Herzegovina and provide a judicial response to their commission probably forced it to construe the Genocide Convention beyond its proper scope and content. It also fatally led it unsuccessfully to try to apply criminal law notions to establish the alleged international responsibility of a state for genocide.

It is ironic that the Court, after stating that the Genocide Convention also obliges states not to commit genocide, was only able to find that Serbia had breached the obligation to prevent and punish genocide. Clearly, the Court could have achieved

the same result by simply interpreting the Convention as an international treaty that provides for judicial cooperation, after requiring contracting parties to prevent and suppress genocide. As already noted above, the Court was not authorized to apply the customary international rules requiring states to refrain from practising or encouraging genocide: its jurisdiction *in casu* was limited to the Convention on Genocide. However, the Court could have confined itself to construing the obligation to prevent and punish genocide enshrined in Article 1 of the Convention as a provision that is not merely a prologue and an introduction to the provisions that follow, but lays down an independent obligation. Thus, the Court could have concluded that the respondent state was in breach of Article I of the Convention, for it had failed to prevent genocide by persons over which it exercised authority and influence, and in addition, once acts of genocide had been performed, failed to punish the persons responsible, who happened to be within its jurisdiction. This is exactly what the Court in the event held. It could have arrived at the same conclusion without embarking upon a construction of the Convention substantially marred by a misapprehension of the difference between genocide as an international wrongful act of a state and genocide as a crime involving individual criminal liability.