

GENOCIDE, TERRITORY, AND THE GEOPOLITICS OF INTERNATIONAL
ADJUDICATION: THE JUDGMENT OF THE INTERNATIONAL
COURT OF JUSTICE IN *BOSNIA AND HERZEGOVINA V.*
SERBIA AND MONTENEGRO

by

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THESIS ABSTRACT

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Human rights advocates have championed the establishment of a regime of international legal accountability for grave violations of human rights, including genocide. Despite recent advances in establishing a regime of responsibility for individuals, when the International Court of Justice pronounced its 2007 judgment on the first case of state responsibility for genocide, *Bosnia and Herzegovina v. Serbia and Montenegro*, it exonerated Serbia of the most serious charges. Key to the Court's judgment was its spatialized definition of genocide as 'destruction in part' and its acceptance of Serbia's calculated strategy of legal immunization of establishing the Bosnian territory it sought to annex as a formally separate political entity. Considering the Court's latitude of interpretation regarding these spatial and territorial factors in light of the law, this thesis argues that geopolitical considerations influenced a judgment that will greatly limit the future possibility of any state or individual being found responsible for genocide.

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In memory of Abigail.

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CHAPTER I

INTRODUCTION

“The enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation.”¹

ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, pg. 36

1.1. The Decision

The 2007 judgment of the International Court of Justice (ICJ) in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) was a landmark decision in the history of international law. For the first time in history, the Court determined that a state could be held responsible for genocide. Yet many humanitarian law scholars and anti-genocide activists greeted its verdict with dismay.² It ruled that in a conflict marked by widespread and systematic ethnically targeted killings, killings that claimed a minimum of 100,000 lives and indeed possibly twice that number,³ only a single massacre of 8,000 constituted genocide. Serbia⁴ was found not responsible for genocide

¹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, 36.

² Cassese, “The Judicial Massacre of Srebrenica”; Luban, “Timid Justice”; Shaw, “The International Court of Justice: Serbia, Bosnia, and Genocide”; Tosh, “Genocide Acquittal Provokes Legal Debate”; Asuncion, “Pulling the Stops on Genocide: The State or the Individual?”; Clearwater, “Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ’s 2007 Decision in Bosnia v Serbia”; Gibney, “Genocide and State Responsibility.”

³ RDC, “Ljudski gubici u BiH 1991-95: Bošnjaci—ubijeni i nestali 91-95”; Tabeau and Bijak, “War-related Deaths in the 1992-1995 Armed Conflicts in Bosnia and Herzegovina.”

⁴ When the case was initiated, Serbia and its formerly autonomous provinces of Vojvodina and Kosovo were a part of federation with Montenegro, the Federal Republic of Yugoslavia (FRY)—later renamed Serbia and Montenegro. When Montenegro declared its independence in 2006, Serbia continued as the sole Respondent. By the time the Judgment was delivered, Kosovo was no longer under the jurisdiction of Serbia but an international protectorate.

or complicity in genocide and found responsible only for failure to prevent and to punish. Bosnia and Herzegovina was not awarded any compensation; the Court only awarded it a declaration that Serbia had breached its obligations under the Convention. Intrinsic to the verdict was the Court's spatialized definition of genocide as destruction “in part” of a targeted group and its treatment of the political geographic structure, the Republika Srpska parastate, that Serbia had established in an attempt to immunize itself for its violations of international law, the formally separate parastate of the Republika Srpska.⁵

Because this case was the first of its kind, the decision of the Court has determined the contours of the international regime of state accountability for genocide by simultaneously realizing and negating the semantic potential inherent in the Convention. The Court determined effectively that genocide as destruction “in part” of a targeted group refers to the total destruction of a part of a group in a limited area, rather than the partial destruction of the group over a wider area. The Court also upheld the principle that a state could be responsible for genocide, not just its leaders and agents as individuals. At the same time, it established standards of evidence and attribution that make it exceedingly difficult, if not impossible, to find a state responsible if it acts through proxy forces—even if only nominally. The relationship between Serbia and the Serb nationalist forces in Bosnia and Herzegovina constitutes a near-limit case of intimacy and identity between a state and proxy force. The Serb nationalist parastate in Bosnia and Herzegovina, the Republika Srpska, was not formally a part of Serbia according to the latter’s internal law, although the constitution of the Republika Srpska

⁵ Liotta, *Dismembering the state*. A parastate is a state-like structure acting within, against, and in place of the officially recognized state. The term for these political structures parallels the descriptor 'paramilitary' often used to identify their armed forces. The prefix in each case indicates a lack. A parastate lacks the full functions and capacities of an official state, and lacks of the legitimacy conferred by international recognition.

declared that it was. Serbia did not just bankroll the separatist parastate. Serbia created the armed forces of the Republika Srpska by transferring Serbs of Bosnian origin into the federal Yugoslav military forces in Bosnia and Herzegovina (and those who were not out) and then it formally transferred those forces to the authority of the Republika Srpska.⁶ Serbia continued to provide essential logistical and other support to the now formally separate Army of the Republika Srpska (VRS). That other support included paying the salaries of its high-ranking officers, who retained their rank in the federal army and whose personnel matters it continued to administer.⁷

In this case, the Court found that even in those instances where genocide has been unambiguously committed, if a force committing genocide exhibited any margin of independence from its sponsor, its sponsor would escape attribution for genocide. Even if the forces of the sponsor state had participated directly in that genocide, the Court ruled that it would assume, unless proven otherwise, that those forces acted under the direction and control of the proxy force and, again, the sponsor would escape attribution. For complicity in genocide, the Court found that a state could not be held responsible even if it provided aid and assistance with knowledge of the grave risk of it being used to commit genocide; it would only be responsible if it provided that aid or assistance with certain knowledge that it would be so used. The Court relaxed its rules of attribution for failure to prevent. To be found responsible for breach of this responsibility, the Court upheld that knowledge of the grave risk that aid or assistance would be used in the commission of genocide was sufficient. However, when it came to the award of financial compensation as reparation for failure to prevent, the Court reversed the standard of knowledge and

⁶ Cigar, *Genocide in Bosnia: The Policy of "Ethnic Cleansing."*

⁷ ICJ, *Bosnia v. Serbia, Dissenting Op. Al-Khasawneh.*

required certain knowledge. Absent that, the Court would simply issue a declaration affirming the failure to prevent by the responsible state.

Close attention to how the Court achieved its judgment is needed to reveal precisely the extent to which this case has established parastate formation as an effective strategy of legal immunization for territorial acquisition achieved through the commission of genocide and other grave human rights violations. In pursuit of that end, this thesis identifies the Court's latitude of interpretation, the conscious choices it made about the construction of the Convention's terms and provisions, in order to advance an argument that the outcome of this case, its determination of the legal structure of state accountability for genocide, was profoundly shaped by geopolitical considerations that trumped any desire to advance the aims and purposes of the Genocide Convention. These geopolitical calculations include those that pertain to the direct parties to the dispute, to concerns about potential legal liability for the numerous states that intervened in the conflict, and to broader concerns about the threat a regime of international juridical accountability might pose to the liberty of state power.

The interpretation and application of law is a creative act whereby the justices of a court act upon the very law they are called upon to employ as a measure or standard. The creativity of adjudication is an elaboration, a further development of the coming-into-being of the law itself.⁸ Law contains an inherent potentiality, a range of possible meanings. Adjudication establishes precedent that determines which of those possible meanings can or will likely be upheld in subsequent jurisprudence. Hart observes that "neither in interpreting statutes nor precedents are judges confined to the alternatives of

⁸ Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*.

blind, arbitrary choice, or ‘mechanical’ deduction from rules with predetermined meaning;” judges instead weigh and balance different interests.⁹ Genocide as a legal term is a discursive construct, a particular partitioning of the socio-material universe of events that works to group together that which is dissimilar as similar by selectively emphasizing particular traits and particular ranges of variation of those traits.¹⁰ Hence there is no singular definition of what genocide is, but rather a multiplicity of possible definitions. Each definition is the product of particular power relations, each is an attempt to exert power through the word, the concept.¹¹ The definition of genocide in international customary law precedes and departs from the definition agreed upon by the assembly of state representatives during the drafting of the Convention.¹² The findings of the Court in this case must be understood as an instantiation of politics, of geopolitics.

1.2. Geopolitics

This thesis analyzes the decision and its legal constructions in a geopolitical frame. That is, I treat the International Court of Justice as a forum of struggle where fundamental norms of the international system and the rules of their application are negotiated and contested in a process guided by the geopolitical calculations of its members. The term geopolitics is widely used in contemporary discourses with a multiplicity of varying definitions.¹³ Because the international adjudication of a territorial

⁹ Hart, *The Concept of Law*, 204; Dawson and Boynton, “Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals,” 279.

¹⁰ Derrida, *Of Grammatology*.

¹¹ Tyner, *The Killing of Cambodia: Geography, Genocide and the Unmaking of Space*.

¹² Quigley, *The Genocide Convention: An International Law Analysis*.

¹³ Mamadouh, “Geopolitics in the nineties.”

conflict invokes a multiplicity of scales, the term as I use it has several simultaneous inflections. The geopolitical calculations of the immediate parties to the dispute, Bosnia and Herzegovina and Serbia, fit into the most classical conception of geopolitics as the product of state interests in the relationship of power and territory.¹⁴ These concerns pertain to the perceived strategic value of certain territories to the state as well as the way particular territories are bound up with issues of identity and affect, issues that can be politically mobilized by political actors.

The determinative geopolitics of the decision, however, were those of justices whose countries were not direct parties to the case. Although the Statute of the Court provides that each party to the dispute may appoint an *ad hoc* judge to the bench to hear the case if they do not already have a judge as a sitting member of the Court,¹⁵ their votes will cancel each other on important matters in dispute. The geopolitical considerations of states other than Bosnia and Herzegovina and Serbia can be divided into calculations of the impact of the decision upon the two parties to the dispute, the implications of a decision for those states that intervened in the conflict—several of whom had judges on the Court—and the broader implications for states involved in conflicts unrelated to the former Yugoslavia. First, the impact of an adverse decision could have had, at least in the near term, a negative effect on European and US efforts to stabilize the Balkans and on their efforts to extricate themselves from the military, diplomatic, and financial investment needed to assist the region in transitioning to a post-socialist economy. The domestic political situation in Serbia was fairly balanced between those who favored a more Western European orientation for Serbia, aspiring to EU membership, and more

¹⁴ Ibid.; Ó Tuathail, *Critical Geopolitics: The Politics of Writing Global Space*.

¹⁵ United Nations, “Statute of the International Court of Justice.”

radical nationalists who favored an aggressive posture toward Serbia's neighbors and integration into the Russian sphere of influence. An adverse judgment could have resulted in billions in reparations. Assuming Serbia attempted to pay it would have complicated efforts at economic transition and would have bolstered the radical nationalist opposition of Milošević's former party and their far right allies. Even if Serbia had not attempted to pay, an adverse judgment would still have bolstered anti-Western European forces. Its refusal to pay would have served as an impediment to clearing the country's way to EU membership. If the more radical nationalist forces were able to ride a wave of popular anger over an adverse decision to power, Serbia would again threaten to assert control by force over the breakaway region of Kosovo—now an international protectorate—and support the final secession of the Republika Srpska from Bosnia and Herzegovina. Given the existing relations of power in the region, a decision more amenable to Serbia, the stronger party, would pose fewer difficulties for enforcement than one for Bosnia and Herzegovina.

Beyond these concerns for the impact of a decision upon the stabilization of the region, the politics of the Judgment may reflect a post-conflict juridical manifestation of the same geopolitical considerations that guided the military and diplomatic intervention during the conflict. The history of that intervention is one of the bleakest chapters in the history of the United Nations.¹⁶ After the outbreak of war in Croatia and before that state's international recognition, the British government suggested to the Milošević regime that it request the imposition of a blanket arms embargo over the whole of

¹⁶ UN General Assembly, 54th session, *Report of the Secretary-General Pursuant to General Assembly resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999.*

Yugoslavia.¹⁷ At the time, Serbia and Serbian nationalists, who dominated the federal army that had disarmed the Territorial Defense forces of Bosnia and Herzegovina in preparation for war, possessed an overwhelming advantage in heavy weaponry. The arms embargo locked in that overwhelming military advantage. Given low morale and problems with desertion, the arms embargo was critical to maintaining the ability of the Serb nationalists to hold their own and prevail in the field.¹⁸ In Operation Sharp Guard, NATO and WEU naval forces in the Adriatic enacted a blockade to enforce the arms embargo. The arms embargo itself was of profoundly dubious legality and became the focus of international outrage, the UN General Assembly twice voted with crushing majorities to repeal the Security Council's embargo.¹⁹ But Great Britain staunchly defended the arms embargo until the very end, dispatching its diplomats to persuade other Security Council members to stay their opposition and vociferously threatening to veto any effort to overturn it.²⁰ In addition to the arms embargo, the UN brokered and dispatched troops to monitor and enforce a peace agreement between Croatia and Serbia that allowed the latter to withdraw its heavy weaponry to Bosnia and Herzegovina and prosecute war there unhindered.²¹ At the same time it refused a request by the leader of Bosnia and Herzegovina to dispatch peacekeeping troops to prevent the outbreak of violent conflict there.²² It did honor a request from Macedonia for the dispatch of UN troops to its borders with Serbia, deflecting any attempt by Serbia to assert its irredentist

¹⁷ Hodge, *Britain and the Balkans*.

¹⁸ Cigar, *The Right to Defence: Thoughts on the Bosnian Arms Embargo*.

¹⁹ Ibid.

²⁰ Hodge, *Britain and the Balkans*; Simms, *Unfinest Hour: Britain and the Destruction of Bosnia*.

²¹ Hodge, *Britain and the Balkans*.

²² Silber and Little, *Yugoslavia: Death of a Nation*.

claims there, concentrating (containing) Serb nationalist violence in Bosnia and Herzegovina.

Immediately after the outbreak of war in Bosnia and Herzegovina, the French government fought successfully for a 'humanitarian' rather than military response to the conflict. The British and French dispatched 'peacekeeping' troops under the UN flag to oversee the provision of food and medicine while fighting to keep the arms embargo in place on the Security Council. However, the UN forces made no effort to use force, available to them under their UN mandate, to protect the delivery of aid, allowing the Serb nationalist forces to plunder and restrict the flow of aid. Under the guise of 'humanitarian relief,' the UN effectively operated a logistical resupply operation for the Serb nationalist forces while depriving the Bosnians of the means to defend themselves. The aid that did reach the enclaves where Bosnian government supporters were holding out served merely to establish them as open air concentration camps. The resulting containment of refugee flows allowed the surrounding countries and Europe as a whole to avoid having to host the displaced populations, a burden that would have served as an incentive to intervene to bring the conflict to a close.²³ These enclaves served also as bargaining chips insofar as the Serb nationalist forces treated their trapped populations as hostages. Whenever the Serb nationalist forces were threatened by Bosnian government military advances elsewhere, they made threatening moves toward the Safe Areas. Throughout, UN military commanders in Bosnia and Herzegovina such as General Lewis Mackenzie of Canada and General Sir Michael Rose of the United Kingdom demonstrated a remarkable partiality toward the Serb nationalists, often making

²³ In contrast, the inability to contain refugee flows in the Kosovo conflict a few years later arguably contributed to the decision to intervene there.

unsubstantiated allegations against the Bosnian government forces and refusing to fulfill their mandate when it would have required the use of force against the Serb nationalists.²⁴ The fulfillment of that mandate and the lives of the Bosnians became hostage to the safety of British and French troops on the ground. Their respective governments justified their opposition to robust measures to stop attacks against Bosnian civilians, both to their own publics and to the wider world, by citing the safety and security of their own troops as their first priority.²⁵ Where the UN itself might have impeded the full execution of British and French interventionist policies, agents on the ground in Bosnia and Herzegovina simply ignored it. As Venezuela's representative on the UN Security Council, Diego Arria, observed with dismay after visiting the Srebrenica enclave, a just declared UN-protected Safe Area in 1993:

That's when we understood perfectly well that there were two United Nations, one in New York and one on the ground, which was not really the United Nations operation. It was British and French. The commanders on the ground were following the directions of their governments, not the UN Security Council, which was theoretically the conductor of the operation. It was very shocking²⁶

The UN mission reached its apogee at Srebrenica in July of 1995 when the Serb nationalist forces overran the enclave and massacred some 8,000 men and boys they were

²⁴ Simms, *Unfinest Hour: Britain and the Destruction of Bosnia*.

²⁵ Silber and Little, *Yugoslavia: Death of a Nation*.

²⁶ Lebor, "Complicity with Evil": *The United Nations in the Age of Modern Genocide*, 42-3.

able to capture. The UN high command had refused to defend a population it had sworn to protect. Dutch UN troops on the ground collaborated in the genocidal massacres by assisting the Serb nationalists to separate the men and women.²⁷

This brief résumé of the conduct of the British and French and other Atlantic powers during the Bosnian conflict is intended to indicate the degree of partisanship and the lengths these powers would go to support the Serbian nationalists in their attempt to realize an anti-Bosnian project of political reterritorialization through war crimes. These policies may have been guided by various geopolitical rationales. Britain, France, and Russia have historically regarded Serbia as an important ally, as a bulwark against German (and Austrian) expansion southeast toward the Mediterranean and Southwest Asia, and against German power within Europe more generally.²⁸ In addition, a geographic imaginary of a Europe as an Enlightenment-reformed Christendom without Muslims—as anything other than a precarious and disenfranchised underclass—appears to have been at work as well. Taylor Branch reports that President Clinton of the US favored a more evenhanded approach but was unwilling to go against the staunch opposition of the British and French leadership. These sought to provide the Serb nationalists with every advantage because “an independent Bosnia would be ‘unnatural’ as the only Muslim nation in Europe.”²⁹ Policy toward Bosnia and Herzegovina must be seen within a larger context of concerns about mass immigration and the social, economic, and political crisis that had beset Europe and that had led to an increasing

²⁷ Rohde, *Endgame: The Betrayal and Fall of Srebrenica, Europe’s Worst Massacre since World War II*.

²⁸ Conversi, *German-bashing and the Breakup of Yugoslavia*.

²⁹ Branch, *The Clinton tapes*, 10.

discriminatory animus toward its Muslim inhabitants.³⁰ The effort to construct a pan-European identity upon which to found the new European polity of the EU around a sense of a shared cultural heritage had contributed to a redrawing of the imaginary boundaries of inside and outside.³¹ Whereas the Bosnian Muslims had been included in—even showcased as central to—the territorial project and geopolitical positioning of Tito’s Yugoslavia,³² they were not welcome in the new conception of Europe.

Beyond evidence of partisanship and interest, this history of intervention meant that numerous international actors, including those represented on the Court, had a fairly direct stake in the outcome of the case. A more expansive definition of genocide as destruction ‘in part’ and less daunting rules of attribution would have resulted in some of these states potentially finding themselves at risk for being found responsible for complicity in genocide. Indeed, shortly after initiating its case against Serbia, counsel for Bosnia and Herzegovina filed a formal declaration of intent with the ICJ to initiate proceedings against the United Kingdom for alleged breaches of its responsibilities under the UN Genocide Convention. Under intense pressure, Bosnia and Herzegovina withdrew that declaration.³³ As the case proceeded, it could not but have been on the mind of the President of the Court, Roslyn Higgins of the United Kingdom. Differences between the US under Clinton and Britain under the Conservatives and France under the Socialists led to a serious rift, and changes of government in both Britain and France enabled a

³⁰ Pred, *Even in Sweden*.

³¹ Balibar, *We, the people of Europe?*; Nowotny, “Ethnos or Demos?: Ideological Implications within the Discourse on ‘European Culture’”; Bialasiewicz, “‘The Death of the West’”; Ó Tuathail, *Critical Geopolitics: The Politics of Writing Global Space*.

³² Ramet, *Balkan babel*.

³³ Boyle and International Court of Justice, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide*.

significant alteration in policy.³⁴ Yet even if subsequent governments had conducted themselves differently, the legal liability of the state remains—and the state interest in avoiding the attribution of responsibility.

These concerns about the implications of the Judgment for the international legal responsibility of states would have been shared more widely. The Judgment was arguably both a response to the immediate concerns presented by the conflict between Bosnia and Herzegovina and Serbia and the larger systemic imperatives of shaping the international legal regime in a way that served to protect the interests of states. These interests are not simply reducible to a desire to bolster and affirm territorial sovereignty as the preeminent norm of the international system against encroachment by an emerging international legal regime of accountability, as the issue is frequently framed.³⁵ After all, Bosnia and Herzegovina, as an internationally recognized state, sought through initiating the case to defend both its population and its territorial integrity and sovereignty. Human rights and territorial sovereignty can, in specific instances, be complementary rather than opposed. Specifically, in instances of territorial aggression by another state, directly or via proxy, humanitarian law is a resource that can be used to defend territorial sovereignty and integrity. It is in instances of what is legally and politically ‘internal repression’ that humanitarian and human rights law enters into conflict with the imperative of territorial sovereignty. Such a legal regime conflicts with the sovereignty of states carrying out external intervention as well. Thus there is a confluence of interest between states carrying out internal repression and states engaged in external intervention. We may speak of the interests of states dividing the international community into four (not

³⁴ Power, *A problem from hell*; Simms, *Unfinest Hour: Britain and the Destruction of Bosnia*.

³⁵ Donnelly, “Human Rights and State Sovereignty.”

necessarily exclusive) camps: states carrying out or concerned to preserve the right to carry out internal repression; states concerned to carry out external intervention in the affairs of other states; states faced with such external intervention that see the legal regime as a means to defend their territorial integrity and sovereignty; and ‘neutral’ states neither engaged in repression of internal challenges to their dominion nor faced with the threat of external intervention. The outcome of the case can, in a strongly but not wholly determinative manner, be traced to the distribution of representation on the Court of judges from states falling somewhere in a field defined by the poles of these camps, a reflection of their distribution within the international system at large.

1.3. Lawfare

A significant aspect of contemporary concerns about the emerging regime of international accountability for humanitarian and human rights law violations within foreign policy is encapsulated by the term ‘lawfare.’ The evolving regime of the international adjudication of the conduct of violent conflict is a matter of concern for military and political elites in many states, including the US.³⁶ The term “lawfare,” conceptualizes law not in terms of the quest for justice and stability but as a means of power for state opponents. The conceptualization of lawfare in a geostrategic sense derives from a publication of two officers of the People’s Liberation Army of China. The term there referred to the role of law within a full spectrum conceptualization of interstate struggle, one that situated law within a broader context of economic and media ‘warfare,’

³⁶ Council on Foreign Relations, “Lawfare, the Latest in Asymmetries”; Dunlap Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts.”

cyberwarfare, and other nonmilitary and military means.³⁷

The term has come to have a more specific and polemical meaning as the use of international humanitarian law to assist militarily weaker states in their confrontations with those stronger, by hobbling superior military capacities with a web of legal prohibition.³⁸ The term has also been used to describe the incorporation of legal expertise in the planning and conduct of military operations, defensively as it were, by powerful states, as well as the use of legal, nonviolent means to obtain, or assist the realization of, military objectives.³⁹ Despite the efforts of polemicists to construct lawfare as a practice only of the weak against the strong, the strong have in fact long used law to obtain military objectives. The US continues to conduct its ‘war on terror’ in part through law.⁴⁰ Nonetheless, concerns about lawfare have led to an attitude of increasing contempt for international law among US policy elites.⁴¹ US concerns to counter the perceived threat of ‘lawfare’ are reflected in the fact that the US is not a signatory of the Rome Treaty establishing the International Criminal Court and by the passing of the US Service Members Protection Act of 2002⁴² that threatened military action if its personnel were to be subject to international trial before a UN court. Indeed, the US did not ratify the UN Genocide Convention until 1986 and did not adopt the required legislation until 1988.⁴³

International concern about a regime of state accountability for genocide is

³⁷ Werner, “The Curious Career of Lawfare.”

³⁸ Scharf and Pagano, “Lawfare!”.

³⁹ Dunlap Jr., “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts”; Dunlap Jr., “Does Lawfare Need an Apologia?”.

⁴⁰ Morrissey, “Liberal Lawfare and Biopolitics.”

⁴¹ Scheffer, “Whose Lawfare Is It, Anyway?”.

⁴² US Congress, *American Service-Members’ Protection Act*.

⁴³ Power, *A problem from hell*.

reflected in the text of the Convention itself. The text is overwhelmingly an international criminal law document. Most of the operative articles deal with measures for the prosecution and punishment of individuals. The contested nature of the principle of state responsibility during the drafting meant that the notion is mentioned in only one article of the Convention, a jurisdictional article at that. The article, Article IX, does however explicitly refer to the responsibility of states for genocide and other offenses such as complicity when it establishes that disputes concerning the interpretation of the treaty fall under the jurisdiction of the International Court of Justice. Of the 132 signatories to the Genocide Convention, 16 have filed reservations to Article IX of the Convention, including the United States and China. Both reject the compulsory jurisdiction of the ICJ, the United States insisting that its special consent is required in each and every case and China simply declaring that it was not bound by Article IX. The United Kingdom is the only Permanent Member of the UN Security Council still subject to the compulsory jurisdiction of the ICJ. The United Kingdom has objected to such reservations by other states, declaring its belief that they are contrary to the aims and purposes of the Convention.⁴⁴

The Court, like the Security Council, was an international institution created as part of the United Nations in order to prevent violent conflict and promote the peaceful resolution of conflict. The lack of support among states for the institution of the Court as a means of resolving international disputes is seen in their reluctance to subject themselves to the Court's jurisdiction. Posner asserts that the International Court of Justice is in decline as an institution as evidenced by the falling number of contentious

⁴⁴ Prevent Genocide International, "Reservations and Declarations to the Genocide Convention."

cases being filed.⁴⁵ Such quantitative analysis is, however, of limited utility. It abstracts the filing of cases from a whole host of contextual circumstances. It tells us nothing about the number of disputes in existence, their type, the functioning of alternate dispute resolution mechanisms, bilateral or otherwise. Convincingly however, Posner backs up his argument by citing the overall decline in the number of states that have filed declarations accepting the compulsory jurisdiction of the Court, from 60% to 34%. Numerous states have also withdrawn previously submitted declarations of submission to the Court's compulsory jurisdiction. In particular, powerful states such as the US, France, and China have all withdrawn; among the permanent members of the Security Council, only the UK remains subject.⁴⁶

1.4. The Court as an Institution of Global Power

As states attempt to advance their interests through the Court, the particular characteristics of the Court as an institution of particular relations of power, exerts an influence upon the jurisprudence that emerges from it. There is the intrinsic interest of the Court itself, one not wholly separate from and not wholly reducible to the stake that states that seek to exert power through the Court have in the power of the Court itself as an institution. The members of the Court must make calculations that take into consideration the Court's limited power in the face of the system of international states upon which it seeks to exert power and influence. Birkland suggests that in this case the Court needed to maintain a perception of legitimacy and so was constrained by the reigning

⁴⁵ Posner, *The Decline of the International Court of Justice*.

⁴⁶ Ibid.

expectations of states.⁴⁷ Shany considers the outcome of the case the product of a particular judicial politics, the effort to promote transactional or conciliatory justice, an attempt to satisfy the interests of all parties to the dispute, something he regards as “under current international conditions a ‘lesser evil.’”⁴⁸ Understanding the outcome of the case thus requires understanding the distribution of power within the Court, and the relative power of the Court as an institution within the overall context of national and international institutions.

First, the International Court of Justice is the highest court within the United Nations judiciary and its principal judicial organ. As nominally the highest-ranking court in the world, it is often referred to as the World Court. By statute, the decisions of the Court are binding only on the states that are party to a given case. However, the Court in practice treats previous decisions by the body as established precedent, and other courts, such as the *ad hoc* international criminal tribunals and the International Criminal Court, will likely treat its interpretations of matters of law as binding precedent.⁴⁹ Unlike the criminal courts, the ICJ was established to resolve disputes between states, and only states can appear before it as either Applicants or Respondents. The Court sees its work as operating in complementary fashion with that of the UN Security Council. Officials of the Court discursively construct the work of the Security Council as political and hence separate from the judicial work of the Court. As the Court has stated, “The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions

⁴⁷ Birkland, “Reining in Non-State Actors.”

⁴⁸ Shany, “Bosnia, Serbia and the Politics of International Adjudication.”

⁴⁹ Gill and Rosenne, *Rosenne’s the World Court: What It Is and How It Works*.

with respect to the same events.”⁵⁰ Fatefully for Bosnia and Herzegovina, which had initiated the case in significant part as an attempt to get the Court to issue provisional measures overturning the UN Security Council imposed arms embargo that had grievously affected its ability to defend itself, the Court does not view its role to include subjecting the decisions of the Security Council to judicial review. At the same time, in the case of noncompliance with a decision of the Court, international efforts to enforce those decisions are the responsibility of the Security Council. Permanent Members of the Security Council retain the right to veto those decisions to enforce.⁵¹

The Court relies to a great extent upon the authority of the work of the International Law Commission (ILC), a body of scholars established by the UN in order to codify and progressively develop international law.⁵² The work of the ILC forms the basis for numerous international conventions adopted by member states of the UN. Both for the interpretation of the crimes of the Convention—the Draft Code on Crimes Against the Peace and Security of Mankind [sic]—and for the principles of international state responsibility—Articles on the Responsibility of States for Internationally Wrongful Acts—the Court deferred to the ILC. However the uncritical reliance upon the work of the ILC is problematic for several reasons. First, members of the ILC are often elected to the ICJ and the resulting “cozy” relationship of the ILC and the ICJ creates a “feedback loop” of reciprocal citation. The ICJ relies on draft articles of the ILC to derive principles of legal interpretation and in turn the ILC utilizes decisions of the ICJ as a source of

⁵⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, sec. 95; ICJ, *Bosnia v. Serbia, Provisional Measures, Order of 8 April 1993*, sec. 33.

⁵¹ Schulte, *Compliance with decisions of the International Court of Justice*.

⁵² UN General Assembly, “Statute of the ILC.”

judicial practice authority from which these principles are derived. This may result in articles that may codify customary international law or, when the ICJ departs from customary international law, it may perpetuate “certain doctrines of uncertain origin or dubious validity.”⁵³ Of course, this ICJ/ILC feedback loop—however significant it may be for an individual article or commentary—is only one influence upon the formulation of the ILC Articles on State Responsibility. Crawford contests the importance of the ICJ/ILC feedback loop by emphasizing that the ILC also took into consideration feedback from some 50 states during the drafting of the articles.⁵⁴ But this merely introduces into the ICJ/ILC feedback loop an awareness of the preferences of some states of the international system—those with the resources and inclination to involve themselves in the process—an awareness that becomes a factor in the geopolitics of adjudication. Second, neither the ILC Articles nor the Draft Code has in fact the force of law. They are merely the proposals of a scholarly commission. After the conclusion of the work of the ILC on the Articles, the UN General assembly did not debate and draft an international convention on state responsibility based on the ILC’s work that would in fact have the force of law.⁵⁵ The General Assembly merely adopted a resolution that welcomed the conclusion of the ILC’s work and commended the Articles to the attention of governments without prejudice to the question of their future adoption or other appropriate action.” Third, the Articles are published in the form of a treaty or convention—which they are not—and the Commentaries associated with them do not always acknowledge the diversity of opinion during the drafting of the articles. Fourth,

⁵³ Bederman, “Counterintuiting Countermeasures,” 819.

⁵⁴ Crawford, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts.”

⁵⁵ Caron, “The ILC Articles on State Responsibility.”

the Articles and their Commentaries do not necessarily reflect customary international law. The task of the ILC was both to codify and progressively develop international law.⁵⁶ The source of authority for individual articles is thus variable. Bederman notes in relation to Article 59 on countermeasures that it is based solely on the “conclusory” pronouncement of the ICJ in one of its recent decisions, a decision that promulgated a particular legal standard that was at variance with decades of prior state practice and the findings of arbitral commissions.⁵⁷ To conclude, given that the ILC articles have not been formally debated by the UN General Assembly and incorporated into an international convention, and because individual articles have a variable relationship with state practice and judicial precedent, to uncritically accept aspects of ICJ decisions that rely solely on the authority of the ILC Articles would amount to tacit acquiescence in the surrender of the legislative functions of the General Assembly and the Security Council to the ICJ.

The process and criteria by which the justices of the Court are selected produces a particular distribution of power within the Court as an institution. The selection process reflects both the provisions of the Court’s statute and a set of tacit, nonstatutory understandings. First, according to the Statute of the Court, justices are to be chosen so as to ensure that there will be representation of the “main forms of civilization and of the principal legal systems of the world.”⁵⁸ In practice, the main forms of civilization are assumed to correspond to major geographic regions, and states organized into regional groupings nominate judges in a manner that distributes membership equally among these

⁵⁶ Crawford and ILC, *The International Law Commission’s articles on state responsibility*.

⁵⁷ Bederman, “Counterintuiting Countermeasures.”

⁵⁸ United Nations, “Charter of the United Nations”; Gill and Rosenne, *Rosenne’s the World Court: What It Is and How It Works*.

regions. In practice, the apportionment parallels that established in Article 22 of the Charter of the United Nations, the article specifying the composition of the Security Council.⁵⁹ Second, a tacit understanding ensures that the five permanent members of the Security Council will always have a representative on the Court.⁶⁰ The five permanent members of the Security Council also exert significant influence through the Court both through representation on the Court and influence over the election of judges. The Statute of the Court specifies that judges must be elected both by the Security Council and the General Assembly by a majority vote. Unlike the Security Council however, justices of the five permanent Security Council members do not have veto power over the decisions of the Court.

The degree of influence over the decisions of the Court conferred upon states that have a judge who is a national sitting on the Court is debated. Justices are in theory elected as individuals and not as state representatives. The Statute of the Court formally insists on judicial independence and provides explicit requirements that attempt to ensure this. Justices must resign any governmental office before assuming their position on the Court.⁶¹ But the degree of judicial autonomy a justice exhibits depends a great deal on the judicial-political culture of the state from which they originate. There can be a divergence on a given matter between a sitting national government and a justice of the Court if there is a difference of party or ideological affiliation. At the same time, regardless of differences in party or ideology certain state interests remain constant, not least the interest in avoiding an adverse judgment that would require the payment of reparations.

⁵⁹ United Nations, "Charter of the United Nations."

⁶⁰ Gill and Rosenne, *Rosenne's the World Court: What It Is and How It Works*.

⁶¹ *Ibid.*

The biographies of the judges who have served on the Court unsurprisingly reveal long histories of service to their respective states.⁶² It is not unreasonable to assert that this is an important filtration mechanism ensuring a degree of consonance between the interests of a state and the positions of a judge.

Researchers conducting empirical and quantitative studies to ascertain whether judges vote for the interests of their respective states have arrived at differing conclusions. Smith asserts that judicial nationalism is overemphasized and that judges vote against the interests of their own state in cases in which that state is a party to the proceeding one-fifth of the time, while cautioning that simply because a judge votes in the interest of her or his own state does not necessarily indicate partiality.⁶³ Posner asserts that only judges from western countries, and infrequently at that, have ever voted against the interests of their own state.⁶⁴ The insistence on the part of the Permanent Members of the Security Council that they always have a representative on the Court suggests that in practice the expectation of judicial independence is limited. Moreover, the assumption of that state interest shapes judicial opinion is incorporated into the Statute of the Court itself. The Statute provides that states that are parties to a case may appoint *ad hoc* justices to the bench if they do not currently have a national on the Court.⁶⁵

Smith suggests that the consideration of national criteria in the appointment of justices, based on an assumption of judicial bias corresponding to nationality, casts the

⁶² Posner, *The Decline of the International Court of Justice*; Smith, “‘Judicial Nationalism’ in International Law: National Identity and Judicial Autonomy at the ICJ.”

⁶³ Smith, “‘Judicial Nationalism’ in International Law: National Identity and Judicial Autonomy at the ICJ.”

⁶⁴ Posner, *The Decline of the International Court of Justice*.

⁶⁵ United Nations, “Statute of the International Court of Justice.”

Court as a judicial institution with as much an arbitral as adjudicative character.⁶⁶ The selection of judges by parties to a dispute is typical of arbitration rather than adjudication. But unlike in adjudication, in arbitration parties can also be free to determine the set of rules by which a matter will be settled. This is not the case with the ICJ. However, Smith's observation provides insight into the nature of international adjudication, at least as represented by the ICJ. The essence of arbitration as a method of resolving disputes is 'mediatory' or 'conciliatory.' The distribution of power on the Court makes it clear that the parties to be conciliated in a given dispute—because of the adjudicative nature of deciding upon a common set of binding norms—are as much or more the great powers seated upon the Security Council as the actual parties to the dispute at hand.

Having a court with an at least partially arbitral rather than adjudicative character can be necessary given the lack of an overarching sovereign to enforce its decisions. Having powerful actors 'on board' is important, if they are powerful enough that they can ignore the Court without facing any serious consequence. Less powerful actors can presumably be subject to a degree of pressure to force compliance; absent that their noncompliance may be less threatening to the overall system of order. Powerful states defying decisions of the Court would fatally undermine its legitimacy and expose the hollowness of an adjudicative pretence in international power politics. A partly arbitral rather than purely adjudicative character also makes sense given the purpose of the Court to serve dispute resolution and the prevention of armed conflict. Even if the Court had the power to impose decisions, the alienation and resentment created could fester and lead to

⁶⁶ Smith, "'Judicial Nationalism' in International Law: National Identity and Judicial Autonomy at the ICJ."

renewed conflict. As with the UN Security Council, the emphasis is on preventing great power conflict.

1.5. Methodology

Taking into consideration these characteristics of the Court as an institution and reading the decision in light of the law and the particular geopolitical circumstances of the case and the broader implications of its interpretation, the basic argument of this thesis is that the outcome of this case was the product in significant part of state interests. I do not proceed from a simplistic assumption of an exact correspondence between the interests of a state and the position of the justice from that state.⁶⁷ Such a correspondence is one factor, albeit an extremely important one. The particular juridical and political culture of a given state can certainly influence the degree of autonomy a judge might exhibit. Further, any socio-biographical analysis of the individual justices is beyond the scope of the present study. The socialization through education that occurs for justices from various parts of the world to obtain the legal competence that allows them to participate in an institution such as an international court of the UN, also problematizes the assumption of a singular determinative causation between the interests of a state and the position of a jurist. Likewise, a micro-sociological or anthropological analysis of the interactions of members of the Court with each other and with the larger communities and bureaucracies of which they are a part is beyond the scope of the present study.⁶⁸ Nor

⁶⁷ For empirical analyses that arrive at different conclusions regarding this correspondence see Posner, *The Decline of the International Court of Justice*; Smith, “‘Judicial Nationalism’ in International Law: National Identity and Judicial Autonomy at the ICJ.”

⁶⁸ For a study of the importance of such interactions for the implementation of geopolitical vision as policy within the European Union bureaucracy see Kuus, “Bureaucracy and Place: Expertise in the European Quarter.”

do I propose to analyze the geopolitics of identity, and consider how the outcome can be explained in terms of affective identification with either the perpetrators or victims or the lack of identification with either or both, except again to note the influence of identity and its role in shaping perceptions of state interest. In terms of the possible influence of territorial imaginaries on the outcome of the case, I simply suggest that the perceptions of state interest are likely influenced by such imaginaries. The territorial imaginary of Europe as an Enlightenment-reformed Christendom, a place where Muslims may exist but cannot enjoy meaningful political power, apparently guided British and French foreign policy toward Bosnia and Herzegovina during much of the conflict.⁶⁹ But the interest of the state in protecting itself from legal accountability that derives from the policies devised to realize those imaginaries remains the same.

The ambition of the current thesis is thus relatively modest. I aim only to make a contribution to a “preponderance of the evidence” argument. My contribution relies on interrogating key features of the decision, the definition of genocide as destruction in part and the findings on state responsibility in light of the potential for the Court to have decided differently. To resort to a mathematical analogy, what I do is sketch out a topology of the definition of genocide within the terms of the Convention. I parse the statement of intent into its constituent elements and examine the range of meanings—values—that could be plausibly attributed to each. Different values for each term in varying combinations produce different states, different points or regions of the definitional manifold. Each state corresponds to a different legal topography ‘on the ground’ of which acts are characterized as genocide and which are not. Each possible

⁶⁹ Branch, *The Clinton tapes*.

topography of genocide as the product of a legal category applied to the specific ontology of the Bosnian conflict corresponds to a different distribution of legal responsibility among the many actors involved in the conflict. Sketching out the range of possibility for a legally justifiable definition of genocide and for the construction of principles of state responsibility establishes a discursive space within which to assert that the decisions made by the Court were the result of a concern to neutralize to the greatest degree possible the Genocide Convention as a tool of state accountability.

In the next chapter, I delineate the Court's findings on the definition of genocide as destruction "in part" of an ethnic group. In doing so I advance an argument that those findings were tailor made to both affirm the judicial precedent of the International Criminal Tribunal for the former Yugoslavia's (ICTY) determination that the massacres of Srebrenica did constitute genocide while denying that other atrocities separately or in the aggregate did. The Court's particular constrained spatialization of the definition of genocide as destruction in part served to delimit the possibility of Serbia in this conflict or other international actors in any other conflict being found responsible for genocide. In the following chapter, I examine how the Court found that the Convention embraced the principle of state responsibility for genocide. How it did, and the staunch opposition of many judges to this finding, demonstrates how profoundly contested the principle remains. In Chapter IV, I lay out the specifics of the Court's criteria for state responsibility for genocide. These are so restrictive as to effectively negate the possibility of a state being found responsible. In Chapter V, I examine how the Court established its criteria for complicity and other ancillary offenses. Again, the Court imposed such strict criterion that states acting through proxy forces can do so almost with impunity. In

Chapter VI, I examine how the Court loosened its standards of attribution for breach of the responsibility to prevent and to punish but reimposed highly restrictive criteria for the reward of financial compensation as reparation for these breaches. In Chapter VII, I conclude the thesis with reflections on the significance of the decision for the international regime of accountability for genocide and its implications for how geographers may contribute to genocide prevention. In Appendix A, I revisit the question of the definition of genocide as destruction in part of a targeted group in light of the work of the originator of the term, Rafael Lemkin, and suggest a definition that differs from the Court.

CHAPTER II

THE COURT'S SPATIALIZED DEFINITION OF GENOCIDE

2.1. Introduction

To address the question of whether Serbia was responsible for genocide as a result of its involvement in the Bosnian conflict, the Court had first to determine whether genocide had in fact been committed. Only then could it proceed to address the question of whether responsibility for atrocities that could be legally characterized as genocide could be attributed to Serbia. The two issues are however inseparable. Genocide is defined in international law as a crime consisting of both physical and mental elements. Those mental elements that together comprise the specific intent of genocide have to belong to someone. Any finding of which acts amounted to genocide would have unavoidable implications for the attribution of responsibility. And that potential attribution of responsibility extended far wider than just to Serbia itself, given the extensive involvement in the conflict of a multitude of actors, including the UN itself.

The Court's resulting determination, its simultaneous affirmation that Srebrenica amounted to genocide as destruction "in part" and denial that the other ethnically targeted acts of killing and related abuses in the conflict did, is at first glance rather astonishing. In the aggregate, these other atrocities claimed a far larger number of victims from the targeted group.⁷⁰ If the massacre at Srebrenica amounted to genocide, these other ethnically targeted killings then seem consistent with a definition of genocide that

⁷⁰ Tabeau and Bijak, "War-related Deaths in the 1992-1995 Armed Conflicts in Bosnia and Herzegovina"; RDC, "Ljudski gubici u BiH 1991-95: Bošnjaci-ubijeni i nestali 91-95." Based on the RDC figures for the minimum number of persons killed, seven times. Once the RDC's study of 'indirect' war deaths is completed the number may double.

conforms to the plain meaning of acts “committed with intent to destroy a group, in whole or in part, as such.”⁷¹ Viewed abstractly, all that would appear to distinguish the Srebrenica massacres from these other killings is the degree of spatiotemporal intensity. But the key to resolving the Court’s seemingly paradoxical ruling, and to understanding its implications for any future case, is to understand how the Court effectively spatialized the legal definition of genocide as destruction “in part” of a targeted group. The determination of whether the destruction of some number of persons from a targeted group amounts to genocide as destruction in part can be viewed as a version of the areal boundary problem. How are boundaries imposed around particular events or constellations of events such that the destruction is regarded as sufficiently substantial? There are the imminent boundaries of the targeted group’s distribution in space and, overlying these, boundaries created by political and military power. Bosnia and Herzegovina’s submissions asserted that genocide as destruction in part of a targeted group can apply to its partial destruction over a given geographic area. Its boundary of what constituted genocide extended to the whole of Bosnia and Herzegovina’s territory for the duration of the conflict. The Court in contrast found that destruction in part refers to the total destruction of a part of a group within a limited geographic area—in this case, only to Srebrenica for a few days in July 1995. The Court’s chosen spatial delimitation of genocide is a result of both how it chose to interpret the Convention and the particular facts ‘on the ground’ of the case at hand. That its spatially constrained definition of genocide served to greatly limit the possibility that Serbia (or any other actor intervening in the conflict) would be found responsible for genocide or complicity in genocide is not,

⁷¹ UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.”

in my view, incidental to the decision. I argue that out of the particular geopolitical circumstances and concerns of this case and those concerning an international juridical regime of accountability for grave abuses of human rights more generally, a definition of genocide as destruction in part has been produced that will influence any future case before the International Court of Justice. To advance my argument, I will parse the interpretive moves made by the Court and make the case that the resulting definition of genocide as destruction in part is not inherently more compelling than the conception advanced by Bosnia and Herzegovina in the case. These interpretive moves concern how the Court constructed the relationship between the intent of genocide and other possible intents, its effective spatialization of the definition of genocide, and its finding regarding the possibility of determining genocidal intent via spatial inference.

2.2. Genocidal Intent and ‘Persecution’ as a Crime Against Humanity

The first interpretive move by the Court was to partition crimes against humanity on the basis of additional intent. This partitioning interpolated the category of the crime of persecution between ordinary crimes against humanity and genocide. The Court adopted the interpolation of the crime of persecution between ordinary crimes against humanity and the crime of genocide from the ICTY Trial Chamber decision in *Kupreškić et al.*⁷² Crimes against humanity, as defined by the Statute of the Court and the Charter of the International Military Tribunal at Nürnberg from which it is derived, consist of the following acts: murder, extermination, enslavement, deportation, imprisonment, torture, rape, and other inhumane acts committed in a widespread or systematic manner during an

⁷² ICTY Trial Chamber, *Kupreškić et al.*, sec. 636., cited in ICJ, *Bosnia v. Serbia*, Judgment, sec. 188

armed conflict and targeting a civilian population.⁷³ For the Trial Chamber, the crime of persecution as a crime against humanity occurs when such acts are committed in a manner that specifically targets political, racial, and religious groups. Discrimination is the additional intent that defines persecution as a special category of crimes against humanity. The crime of genocide occurs when acts of persecution are committed, but with an additional intent beyond discrimination, that of seeking to destroy the targeted groups “in whole or in part” “as such.” Genocide is an extreme form of persecution for *Kupreškić et al.* The Trial Chamber admitted that this construction of persecution as a war crime was its own and that no authoritative definition of persecution as a war crime existed in customary international law. Persecution in terms of the Charter could be constructed instead to refer to discriminatory acts other than murder, extermination, and the like committed in support of those acts.⁷⁴ Advisedly, if one takes aboard this construction of genocide and persecution, one must remember that persecution as a crime against humanity and genocide overlap only partially. They are materially distinct crimes; each requires a finding of fact that the other does not.⁷⁵ Regarding the potential overlap, it should be noted that *Kupreškić et al.* had mentioned murder but not extermination among the acts that could amount to persecution if committed with discriminatory intent.⁷⁶ But when taking this aboard, the Court held that even ‘persecutory’ extermination, deliberately massacring members of a group on the basis of their membership in the group, did not necessarily amount to genocide.

⁷³ UN Security Council, “ICTY Statute”; United Nations, “Charter of the International Military Tribunal (IMT).”

⁷⁴ ICTY Trial Chamber, *Kupreškić et al.*, sec. 567.

⁷⁵ ICTR Appeals Chamber, *Musema*; ICTY Appeals Chamber, *Krstić*.

⁷⁶ ICTY Trial Chamber, *Kupreškić et al.*, sec. 636.

A construction that interpolates persecution between ordinary crimes against humanity and genocide is further made possible by the fact that codifications of international law incorporate definitions of international crimes that derive from diverse sources, without any effort to reconcile them. The UN International Law Commission's Draft Code on Crimes against the Peace and Security of Mankind, upon which the ICTY Statute is based, incorporates two overlapping and discrepant definitions of serious crimes.⁷⁷ The article defining Crimes against Humanity is adopted almost verbatim from the 1945 London Charter of the International Military Tribunal at Nürnberg.⁷⁸ The article on genocide is adopted almost verbatim from the 1948 UN Genocide Convention.⁷⁹ Crucially, the term genocide appears neither in the London Charter of the International Military Tribunal at Nürnberg nor in the Judgment of the International Military Tribunal for the Trial of German Major War Criminals.⁸⁰ The Judgment of the Nürnberg Tribunal repeatedly uses the terms extermination and persecution to refer to what would be defined a couple of years later in international law as genocide.

Still, the Court affirms that the crimes through which 'ethnic cleansing' is committed may be subsumed under the category of either persecution or genocide. The Court maintains that the *actus reus* of genocide, the deliberate and selectively targeted killing of a substantial number of members of the group, may be committed in pursuit of 'ethnic cleansing,' yet lack the requisite intent to destroy part of the group as such. On the

⁷⁷ ILC, "Draft Code of Crimes against the Peace and Security of Mankind"; UN Security Council, "ICTY Statute."

⁷⁸ United Nations, "Charter of the International Military Tribunal (IMT)."

⁷⁹ UN General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide."

⁸⁰ United Nations, "Charter of the International Military Tribunal (IMT)"; International Military Tribunal, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the Dissenting Opinion of the Soviet Member) Nuremberg 30th September and 1st October, 1946.*

face of it, this is a very problematic assertion. Genocide can be, and often is, committed as a means to some other end; it is not merely committed as an end in itself. Securing control over territory is an intrinsic motive for the crime of genocide.⁸¹ The destruction of a substantial number of persons, even if committed to render an area ‘ethnically pure,’ and even if falling short of an intent to destroy the whole group, would appear to be consistent with an intent to destroy the targeted group “in part.” The aim of seizing and retaining control over territory would appear to be a motive for the crime of genocide or a further intent to be achieved through the commission of genocide as destruction in part, not a wholly distinct intent.⁸² So how then does the Court determine when persecutory extermination in pursuit of territorial ‘purification’ amounts to genocide and when it does not? Answering this question requires examining closely the Court's particular spatialized construction of the intent to destroy a group, in part, as such.

2.3. Spatializing the Definition of Genocide

If the interpolation of the crime of persecution between ordinary crimes against humanity and the crime of genocide creates the possibility that the deliberate widespread or systematic extermination of members of a group might not amount to genocide, the next construction allows the Court to determine when it does and when it doesn't. Or rather, it allows the Court to determine when the requisite intent can be inferred from the

⁸¹ Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress; Moses, Empire, colony, genocide : conquest, occupation, and subaltern resistance in world history*.

⁸² See Oglesby and Ross, “Guatemala’s Genocide Determination and the Spatial Politics of Justice.” They cite counterinsurgency as a motive for genocide rather than a distinct intent. Both counterinsurgency and ‘ethnic cleansing’ are efforts to secure control over territory that may be effected by ethnically targeted massacres. Indeed, the forcible displacement of targeted groups to areas where they may be more effectively monitored and controlled by the state security forces can be part of a counterinsurgency campaign.

acts of destruction themselves and when it cannot. To answer the question of when such persecutory extermination would amount to genocide requires examining the particular meanings the Court attributes to “to destroy,” “a group,” “in whole or in part,” and “as such” and how these are combined to produce a spatialization of the definition of genocide as destruction in part.

Genocide in the Convention is formulated in terms of a criminal offense. As with any criminal offense it is composed of both material and mental elements: material acts, the *actus reus*, and a requisite intent, the *mens rea*. Both material and mental elements as specified by the Convention must be present to find that acts amount to genocide. Acts that are not enumerated under the Convention as acts of genocide, even if committed with genocidal intent, do not amount to genocide. Conversely, acts that are among those enumerated in the Convention, when not committed with the requisite intent, do not amount to genocide. Or rather they do not legally if it cannot be proven that they are committed with the requisite intent. Genocide is defined in Article II of the Convention and it contains both the exhaustive enumeration of acts of genocide and a complex statement of intent.

2.3.1. Material Element

Article II of the Convention, which specifies the material and mental elements of the crime of genocide, reads in its entirety:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (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;
- (e) Forcibly transferring children of the group to another group.

The enumerated list of acts includes both measures that result in the death of members of the group, (a) and (c), and measures that harm the ability of the group to biologically reproduce, (d) and (e). Subheading (b) may have both effects and it may have neither, at least upon individuals. The inclusion of “mental harm” in the Convention during the drafting was at the behest of the Indian and Chinese delegations that sought thereby to include the distribution of opium and other drugs by colonial occupiers as an act of genocide.⁸³ Measures that impair the functioning of members of a group, falling short of causing their death, can thus serve as a means to destroy a group.

2.3.2. Mental Element

The chapeau of the Article contains the statement of the mental elements of the crime of genocide, the special intent or *dolus specialis*. The purpose of an intent requirement for any crime exists to affirm that the wrongful act was committed deliberately. The crime of genocide however has a specific intent. It is not enough that the *actus reus* of genocide be committed deliberately—that is with general intent; it must be committed deliberately with a specific end in mind, the destruction of a group, in

⁸³ Quigley, *The Genocide Convention: An International Law Analysis*.

whole or in part, “as such.” The question of intent however must be distinguished from motive. The reason a group of people is targeted for destruction is the motive of the crime. That they are deliberately targeted for destruction as a group is the intent, regardless of the reason or motive. Some scholars maintain that the fourth element, “as such,” is a motive requirement, genocide’s ‘special motive’ if you will, a point I will return to below.⁸⁴ The specification of the requisite intent of the crime of genocide in the Convention is a complex articulated structure composed of four constituent parts. Each can be considered in turn, but not without reference to other constituent parts. The determination of the meaning of each part from the set of possible interpretations enables and constrains the possible meanings of the other components. Below I consider each constituent part in turn, an exercise that is comparable to rotating a structure to foreground a particular component without losing reference to the whole of which it is only a part.

2.3.2.1. “To Destroy”

This enumeration of acts of genocide in Article II, the inclusion of certain measures through which a group might be destroyed and the exclusion of others, is the basis for arguments and interpretations concerning the first of the four mental elements of the crime: what it means “to destroy” a group.⁸⁵ The question of what it means “to destroy” a group within the terms of the Convention actually encompasses two

⁸⁴ Robinson, *The Genocide Convention: A Commentary*; Schabas, *Genocide in international law*; Quigley, *The Genocide Convention: An International Law Analysis*; Lippman, “The drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.”

⁸⁵ Schabas, *Genocide in international law*.

intrinsically related questions—to destroy by what means and in what manner. Broadly speaking, both the means of that destruction and the manner of that destruction might be either socio-cultural or biological and physical. Groups exist and reproduce themselves both socially and culturally as well as physically and biologically.⁸⁶ That they exist and reproduce socially and culturally is implicit in the very groups that the Convention protects. Indeed, the social cohesion of the group is the necessary prerequisite of its biological reproduction. But the question is, does the Convention restrict destruction solely to the physical or biological destruction of a group or can it embrace the destruction of the group through its social dissolution? And must the means used to effect either form of destruction be restricted exclusively to physical and biological means or can it also include social means? Posing the question in this way gives rise to a quadripartite distinction of the means and manner in which a perpetrator might destroy a group, not each of which would fall under the legal definition of genocide.

What is most clearly recognizable as genocide for many is the first, the use of physical and biological means to effect a physical and biological destruction of a group. That is, direct attacks upon the bodily integrity of members of the group that evince an intent to prevent the group, in whole or in part, from being able to physically exist or biologically reproduce. The effort of the Nazi-controlled German state to use mobile execution squads and gas chambers to liquidate occupied Europe's Jewish population is an unmistakable instance.

The second form of destruction would be to use physical and biological attacks upon members of a group in order to effect its social dissolution through its dispersal and

⁸⁶ 'Physical' in the interpretation of the Convention refers to the bodily survival of members of the group. 'Biological' refers to the sexual reproduction of the group.

eventual disappearance through assimilation. This could be achieved through measures designed to terrorize members of a group into fleeing a territory where they were concentrated or through killings that target the socio-cultural reproduction of the group, by killing those members of the group that have a role in such reproduction: the intelligentsia, cultural figures, elders, and the like. By placing emphasis on killings in the camps, Bosnia and Herzegovina was effectively making this argument. Persons were selected for the camps often on the basis of their membership in the perceived leadership of the targeted group.⁸⁷

The third form of destruction would be to use social or cultural means to effect the physical or biological destruction of a group. The forcible transfer of children from the group is clearly an instance of this. The removal of children clearly affects the biological viability of the group. But because this form of destruction is effected through the integration of the children into another group, that is, their forcible assimilation, it blurs the distinction between the third and the fourth type of destruction.

The fourth type of destruction is the social dissolution of the group through social means. Although the effect upon the group is biological, this biological effect is a consequence of the partial social dissolution of the group. Hence, through the *actus reus* of the Convention it is possible to conclude that the Convention does in fact embrace a notion of the destruction of a group as socially and culturally (as well as biologically) reproducing entity.⁸⁸ This view supports Bosnia and Herzegovina's submissions. But the transfer of children may be a special case of a social means to effect the destruction of a group, whether conceived as social or biological; the transfer of children illustrates the

⁸⁷ Cigar, *Genocide in Bosnia: The Policy of "Ethnic Cleansing."*

⁸⁸ Schabas, *Genocide in international law.*

difficulties of conceptually attempting to completely separate the two, given the inherent biologically *and* socio-culturally reproducing nature of such groups as those protected by the Convention.

A more general case illustrative of employing social means to effect a social form of destruction would be ‘cultural genocide.’ Cultural genocide is the destruction of a group through an attack upon its distinctive social characteristics such as its language or religion. What makes such a policy of suppression and substitution genocide for the advocates of the concept is the intent to use such measures to destroy the group. But since it is effected through means other than those enumerated in Article II, it is not genocide in terms of the Convention. The drafters of the Convention consciously rejected any amendments that would have categorized this manner of group destruction as genocide, despite the advocacy of some states.⁸⁹ Although the loss of the distinct social and cultural characteristics of a group could eventually lead to its disappearance as a distinct biologically reproducing collectivity, this is not an immediate consequence. Of course the loss of some or many of a group’s distinctive cultural characteristics might not lead to the disappearance of the group as such, despite its profound transformation. An example would be the continued existence of the Irish people despite the successful past efforts of the British government to suppress their language. Whether the destruction of distinguishing aspects of a group’s identity leads to the social dissolution of the group in its entirety is clearly a matter of specific context related to such factors as the size of the group, its concentration and predominance within specific territories, etc. Some indigenous rights activists have referred to the coerced transfer of native children to

⁸⁹ Ibid.; Lippman, “The drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.”

boarding schools as an example of cultural genocide.⁹⁰ This is clearly something of an intermediate case and exposes the difficulty of currently formulated law to grapple with situations of degree (or intensity in the language certain strands of contemporary theory⁹¹) rather than categorical type, a matter that pertains to the Irish example as well. But it is one that would fall outside the definition of the *actus reus*, as the children are returned to the biologically reproducing community eventually, even if shorn of their cultural identity (to a degree).

The Court's position on the means and form of destruction is not clearly specified at the outset but buried in its Judgment. It is only in rejecting Bosnia's submissions that the destruction of cultural monuments amounted to genocide that it expressed its position. It cited both the ILC Commentary on the Draft Code of Crimes Against the Peace and Security of Mankind [sic] and the position of the ICTY Trial Chamber in *Krstić* to refute the position that "to destroy" can refer to the destruction of the group as a socially reproducing entity.⁹² *Krstić* stated that the *form* of destruction of the targeted group must be physical and biological, citing the ILC Commentary. It dismisses the material destruction of part of the group intended to effect its social dissolution as merely an attempt to "annihilate these elements which give to that group its own identity," that is as

⁹⁰ See Churchill, *Kill the Indian, save the man*.

⁹¹ DeLanda, *Intensive Science & Virtual Philosophy*.

⁹² ICJ, *Bosnia v. Serbia, Judgment*, sec. 344; ILC, "Draft Code of Crimes against the Peace and Security of Mankind," 45-46; ICTY Trial Chamber, *Krstić*, sec. 580.

‘cultural genocide.’⁹³ But the ILC Commentary it cites concerns only the rejection of the notion of ‘cultural genocide’ when it states:

the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word “destruction”, which must be taken only in its material sense, its physical or biological sense.⁹⁴

The passage, like many others, drops reference to “in whole or in part” in its discussion of destruction and is therefore open to interpretation. The material destruction of a part of the group, through physical or biological means, is quite different from the destruction of the group’s identity through acts other than those enumerated in the Convention. Yet it is intrinsic to the Court’s assertion that persecutory extermination need not amount to genocide, and its spatialization of when it does, that “to destroy” refer to both physical or biological means *and* form of destruction.

The *Krstić* passage cited by the Court asserted that this was the position of customary international law. However, this is not necessarily the case. The passage was refuting several cases in which German courts have convicted individuals for genocide, complicity in genocide, and aiding and abetting genocide for crimes committed elsewhere than Srebrenica.⁹⁵ Such jurisprudence is an indication of state practice and *opinio juris*; the ILC Commentary is a scholarly work not to be automatically considered a

⁹³ ICTY Trial Chamber, *Krstić*, sec. 580.

⁹⁴ ILC, “Draft Code of Crimes against the Peace and Security of Mankind,” 45-46.

⁹⁵ Quigley, *The Genocide Convention: An International Law Analysis*.

codification of customary international law.⁹⁶ The German Federal Supreme Court, in upholding the conviction of one individual, explicitly affirmed that “to destroy” can refer to the destruction of the group as a “distinct social unit, and is not necessarily confined to its physical or biological elimination.”⁹⁷ As an indicator of the diversity of opinion even within the UN court system, ICTY Trial Chambers have twice affirmed that “to destroy” can refer to the social destruction of a group, as did Justice Shahabuddeen in his Dissenting Opinion in *Krstić*.⁹⁸

2.3.2.2. “A Group”

Article II defines four categories of groups protected by the Convention: national, ethnical, racial, and religious. It is an exhaustive list and notably excludes political and economic groups. Questions arise though in applying these abstract categories to the complexities of actually existing groups and the multiplicity of ways they are distinguished. It is obvious for example that some overlap can exist between the four groups. An ‘objective’ approach would insist upon general criteria precisely defining what a group is while a subjective approach would uphold that it is the perceptions of the perpetrators or victims that matter.⁹⁹ Reference to the *travaux préparatoires* to clarify the meaning of the particular terms is not helpful. In the case of ethnic groups, the term was proposed in order to clarify that groups that did not have a titular state were protected.

But it passed by a margin of one vote and states both for and against differed in their

⁹⁶ Caron, “The ILC Articles on State Responsibility.”

⁹⁷ Quigley, *The Genocide Convention: An International Law Analysis*.

⁹⁸ Schabas, *Genocide in international law*; ICTY Trial Chamber, *Krajišnik*, sec. 854; ICTY Trial Chamber, *Blagojević and Jokić*, sec. 659-60; ICTY Appeals Chamber, *Krstić, Dissenting Opinion Shahabuddeen*, sec. 51.

⁹⁹ Schabas, *Genocide in International Law: The Crimes of Crimes*.

opinion as to what the word meant.¹⁰⁰ Robinson asserts that ‘ethnicity’ was added so that national would not be interpreted to mean political groups.¹⁰¹ Schabas helpfully suggests that the four terms be considered “corner posts” defining a field within which protected groups fall.¹⁰²

Bosnia’s submissions referred to genocide against the “non-Serb” group in Bosnia and Herzegovina, meaning not only Bosniaks but Croats, Hungarians, Albanians and others. The Court rejected Bosnia and Herzegovina’s submissions however and insisted that the group had to be defined according to positive characteristics.¹⁰³ Accordingly, it proceeded to consider almost solely crimes against the Bosniak (Bosnian Muslim) group. Given that this group had been overwhelmingly targeted, most of Bosnia and Herzegovina’s submissions related to it. The Court could have chosen to disaggregate the ‘non-Serb’ group into its constituent ethnicities and to consider each separately. However it did not; it restricted itself to considering crimes targeting members of the Bosniak ethnic group. Again, taking into consideration the nature of Bosnia’s submissions, the Court effectively treated the Bosnian government as the representative of the Bosniak ethnic group. There is a political context for this move by the Court. During the conflict, international mediators and forces insisted on referring to the Bosnian government as the “Bosnian Muslims,” undercutting its claims to stand for, represent, and defend a multi-ethnic Bosnia and Herzegovina, and thus reproducing the ethnicist logic of the Serb and Croat nationalists who sought to divide and annex Bosnia and Herzegovina’s territory.

¹⁰⁰ UN Economic and Social Council, “UN Doc. A/C. 6/SR.75.”

¹⁰¹ Robinson, *The Genocide Convention: A Commentary*, 59.

¹⁰² Schabas, *Genocide in International Law: The Crimes of Crimes*, 111.

¹⁰³ ICJ, *Bosnia v. Serbia, Judgment*, sec. 196.

The Bosnian government's civic conception of the Bosnian nation had its own concomitant territorial dimension, a sovereign and undivided Bosnia and Herzegovina within its republican borders.

But even Bosnia and Herzegovina's own submissions defining the targeted group as 'non-Serb' reproduced an ethnicist approach to the conflict. Had Bosnia and Herzegovina attempted to define the targeted group as 'Bosnians,' as a civic nation rather than an ethnic nation, it would have offered an opportunity to establish this definition as an acceptable way of interpreting what was meant by a 'national' group under the Convention. Such a definition would be clearly appropriate to efforts to multiethnic societies where the fault lines defining the targeted victims include members of the perpetrators' group who resist ethnonationalist projects of reterritorialization. It will be for a future case before the Court to determine if a civic nation is a political group and hence not protected.

2.3.2.3. "In Whole or in Part"

The amendment to include partial destruction of a group within the definition of genocide passed almost unanimously and is thus, at least in terms of the drafting history, one of the least controversial. Yet the Convention provides no guidance on exactly what it means. The International Law Commission Commentary on its article on genocide in the Draft Code of Crimes Against the Peace and Security of Mankind [sic] states rather simply that: "It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature

requires the intention to destroy at least a substantial part of a particular group.”¹⁰⁴ The Court takes up the two main points here, the implication that destruction in part can refer to a geographically delimited portion of a group—derived from a rather literal reading of the first provision’s language—and that the destruction must be substantial when it appropriates its threefold criterion for destruction “in part” from the ICTY Appeals Chamber ruling in *Krstić*.¹⁰⁵ In rank order of importance they are: substantiality, opportunity, and qualitative criteria. The substantiality requirement is an implicitly quantitative assessment of the size of the portion of the group destroyed as a measure of the impact of its destruction on the group as a whole.¹⁰⁶ The second, opportunity, allows that genocide may be perpetrated in a geographically limited area, the area defined by the perpetrator’s effective control.¹⁰⁷ The Court insists that this criterion must be weighed against the first criterion of substantiality. If the portion of the targeted group falling within the perpetrator’s effective control is too small, its destruction does not amount to genocide as destruction “in part.” And the third, qualitative criteria, suggests that the symbolic or functional importance of the portion of the group targeted, rather than its numerical size, may allow it to meet the substantiality criterion.¹⁰⁸ With characteristic vagueness, the Court finishes by stating that this list is not exhaustive and that: “Much will depend on the Court’s assessment of those and all other relevant factors in any particular case.”¹⁰⁹ In regard to the tripartite criteria explicitly articulated, it should be

¹⁰⁴ ILC, “Draft Code of Crimes against the Peace and Security of Mankind,” 45.

¹⁰⁵ ICTY Appeals Chamber, *Krstić*.

¹⁰⁶ ICJ, *Bosnia v. Serbia, Judgment*, sec. 198.

¹⁰⁷ *Ibid.*, sec. 199.

¹⁰⁸ *Ibid.*, sec. 200.

¹⁰⁹ *Ibid.*, sec. 201.

noted that the ICTY Trial Chamber in *Krstić*, whose reasoning that the massacres at Srebrenica constituted genocide was upheld by the Appeals Chamber, interpreted “in part” to refer to a “distinct part” rather than “an accumulation of isolated individuals.” And it interpreted this “distinct part” in spatial-geographic terms rather than social-functional terms, articulating the position later adopted by the Court in the present case:

A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such.¹¹⁰

Conversely, in ruling that the attempt to eliminate almost the entire adult and adolescent male population at Srebrenica amounted to genocide, the Court found that it met all three criteria to meet “in part” as an element of the specific intent. Within a territorially delimited area defined by the perpetrator's effective control, the destruction was substantial and the community at Srebrenica was emblematic of the Bosniak group as a whole.¹¹¹

2.3.2.4. “As Such”

The fourth mental element, “as such,” is distinguished from the other three, in the opinion of many scholars, in that it is an element of motive rather than intent.¹¹² That is, it

¹¹⁰ ICTY Trial Chamber, *Krstić*, sec. 590; Schabas, *Genocide in international law*, 280.

¹¹¹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 296.

¹¹² Robinson, *The Genocide Convention: A Commentary*; Quigley, *The Genocide Convention: An International Law Analysis*; Schabas, *Genocide in international law*; Lippman, “The drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.”

is an element of why something is done, rather than the intent to do something. “As such” was incorporated as a part of the mental element of genocide in the Convention as a compromise measure between those who insisted that the Convention include a specification of motives for destruction to qualify as genocide and those who staunchly opposed the inclusion of any mention of intent, fearing it would enable states or individuals to avoid the attribution of responsibility by simply claiming that they targeted a group for destruction, in whole or in part, for other motives.¹¹³ Given how the Court distinguishes ‘ethnic cleansing’ and genocide on the alleged basis of intent, that is arguably what has happened. States differed profoundly on whether “as such” included or excluded motive when voting for or against its inclusion and hence its meaning remained to be determined by subsequent state practice or jurisprudence.¹¹⁴ What is clear from the debate on the phrase in the *travaux préparatoires* is that the stakes of this debate are nothing less than the meaning of genocide and the power of that word to stigmatize and render unlawful forms of state violence different from the Nazi Holocaust of the Jews, Roma, and others. New Zealand insisted on an enumeration of motives in order to avoid rendering unlawful military violence directly and deliberately targeting civilian populations, such as nuclear weapons or ‘strategic bombing.’ The United Kingdom, which incidentally had engaged in strategic bombing against Germany on a massive scale, insisted that military action targeting civilians with the intent to destroy a group in whole or in part would in fact amount to genocide; the UK thus opposed an enumeration of motive.¹¹⁵

¹¹³ Robinson, *The Genocide Convention: A Commentary*.

¹¹⁴ Ibid.

¹¹⁵ Quigley, *The Genocide Convention: An International Law Analysis*.

Scholars are as divided as the states were when they adopted the phrase. One scholar interprets “as such” as an element of motive referring to the targeting of members of the group on the basis of their membership within the group, that is, on the basis of their identity. The motive of genocide is a discriminatory motive targeting the group through, necessarily, attacks upon its members.¹¹⁶ Another interprets “as such” merely to require that the intent be directed toward the group, without requiring any specific motive.¹¹⁷ The International Law Commission Commentary on the phrase however has this to say: “The intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.”¹¹⁸ This reading introduces difficulties into the determination of the intent to commit genocide on the basis of inference. For what can distinguish an attempt to destroy “some individuals because of their membership in a particular group” and the intent to destroy a group “in part”? What pattern of manifest actions could demonstrate such an additional mental requirement? Substantiality? Qualitative significance? What is the group “as a separate and distinct entity” apart from the individuals that compose it?

The Court’s adoption of this interpretation of the ILC opens the door to finding that genocide can consist of the total destruction of a group of people in a limited geographic area but not its partial destruction within an area defined by the opportunity of the perpetrator. The Court states that:

It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory

¹¹⁶ Schabas, *Genocide in international law*.

¹¹⁷ Quigley, *The Genocide Convention: An International Law Analysis*.

¹¹⁸ ILC, “Draft Code of Crimes against the Peace and Security of Mankind,” 45.

intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.¹¹⁹

The Court nods toward the fact that the intent of genocide embraces destruction in part. But when it here restates the intent of genocide to emphasize the determination of its meaning effected by the phrase “as such,” it drops the language of “in part.” This is in fact a constant of the discourse of those who support the Court’s interpretation of the meaning of genocide.¹²⁰ The interpretation effectively becomes one of intent not to target individuals on the basis of their membership in the group and thereby to target the group itself on the basis of its identity, but to target the group in its totality. The way this interpretation avoids the legal error of rendering the language of “in part” superfluous and “in whole” redundant is to introduce a purely spatialized interpretation of “to destroy... in part,” i.e. that genocide as destruction “in part” is the total destruction of a group within a limited geographic area rather than its partial destruction over a wider area. And that interpretation itself depends on a requirement that “to destroy” refers to the physical and biological destruction of the targeted group both in means and form.

2.3.3. Putting It Together

The Court had latitude of interpretation in how it could construct the intent of genocide, “to destroy a group, in whole or in part, as such.” The way it chose to construct each of the four elements, when taken together, enabled it to produce its finding that

¹¹⁹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 187.

¹²⁰ See Milanović, “State Responsibility for Genocide,” 559; Milanović, “State Responsibility for Genocide: A Follow-Up,” 672.

genocide as destruction “in part” of a targeted group refers to the total destruction of a part of a group within a limited geographic area rather than the partial destruction of the group over a wider geographic area. First, the Court chose to interpret “to destroy” to refer exclusively to the physical or biological destruction of a group. Judgments of the ICTY had differed on whether the destruction of the group could also refer to its social dissolution effected through its partial physical, biological destruction. German national courts had embraced this latter interpretation; the Court insisted on the former. Second, the Court rejected Bosnia and Herzegovina’s submissions regarding a negative construction of the targeted group as non-Serbs. The positive definition of Bosniaks and Croats as groups falling within the definition of protected groups under the Convention was not however a matter of dispute between the parties, but the particular nature of the multiethnic Bosnian group would have implications for the Court’s interpretation of “to destroy.” Third, the Court interpreted “in part” according to a tripartite criterion of substantiality, opportunity, and significance that referred to a spatially delimited portion of the group sizable enough, or symbolically or functionally significant enough, to impact the group a whole. Fourth, the Court interpreted “as such” to refer to an intent to destroy the group as a separate and distinct entity rather than to a discriminatory motive targeting the group on the basis of its identity. When these are combined, “as such,” referring to “as a separate and distinct entity,” operates upon “in part” to require the (total) destruction of a geographically delimited portion of that group, biologically and physically as the Court insists. At Srebrenica, the targeting of the male population destroyed the ability of the community at Srebrenica as a distinct entity to biologically reproduce, thus meeting the Court’s definition of genocide. Had an equal or greater

number of persons been targeted, but not in the calculated, gender selective manner they had been, the Court would likely not have considered this genocide.

Had the Court interpreted destruction to refer to an intent to destroy a group as a socially reproducing entity, it may have been able to find that the killings and other abuses targeting other localized communities, and indeed of the Bosniak group as a whole, amounted to genocide. As it stands, the position taken by the Court runs counter to that of one of the most oft-cited scholars of the Convention. Robinson had this to say about the meaning of “to destroy” a group “in part”:

Genocide is not necessarily characterized by the intent to destroy a whole group; it suffices if the purpose is to eliminate portions of the population marked by specific racial, religious, national, or ethnic features.... the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial.¹²¹

Even subsequent to the Judgment, its implications for what genocide is are not fully appreciated. For example, Jessberger upholds the position that “in part” can refer to the destruction of the intellectual or spiritual leaders of a group and can be considered genocide in some circumstances.¹²² Yet the ruling made it very clear that the form of the destruction of the group must be physical and biological. Destruction of the elite may contribute to the social dissolution of the group, but this would not be genocide in the

¹²¹ Robinson, *The Genocide Convention: A Commentary*, 63.

¹²² Jessberger, “The Definition and Elements of the Crime of Genocide,” 109.

Court's view. The Court had considered Bosnia and Herzegovina's submissions concerning killings in the camps and in towns other than Srebrenica that were overrun, places where the atrocities often specifically targeted at the social, political, intellectual, cultural, and religious elite of the Bosniaks and Croats, but rejected the argument that these atrocities amounted to genocide. Consequently, the Court has put forth its view that such targeted killings designed to weaken a group by impacting its social functioning and reproduction should be considered to instead amount to 'persecution' as a crime against humanity. For the Court, the intent to destroy a group in part as such is revealed by acts on a small scale that, if reproduced on a larger scale, must lead to the imminent physical, biological destruction of the group as a whole.

2.4. Inferring Genocidal Intent

Bosnia and Herzegovina's submissions asserted that genocidal intent could be inferred on the basis of the overall pattern of atrocities committed during the conflict. By implication, it asserted that even if genocidal intent could not be inferred from the manifest pattern of acts that, in their relation to each other, constitute specific events, when these events are considered in relation to each other genocidal intent could be inferred. Spatially and temporally, Bosnia and Herzegovina argued that the similarity of acts dispersed in space and time could prove the existence of a conscious plan or policy. By adopting this line of reasoning, Bosnia and Herzegovina's submissions were consistent with the jurisprudence of the ICTY. In its Rule 61 hearing on the indictment issued by the Prosecutor, a hearing to determine if there was a reasonable chance that the evidence available supported the Prosecution's accusations, the ICTY Trial Chamber in

Prosecutor v. Karadžić and Mladić held that there were reasonable grounds to believe that the two indicted officials may have been guilty of genocide.¹²³ The initial indictment was restricted to crimes committed in the camps. The Trial Chamber encouraged the Prosecutor to broaden the indictment, based on its belief that the specific intent of genocide could be inferred from the “totality” of the acts of ethnic cleansing.¹²⁴ Because it was concerned with command responsibility, the Trial Chamber asserted that it had to examine whether “the pattern of conduct of which it is seised, namely “ethnic cleansing,” taken in its totality, reveals such a genocidal intent.”¹²⁵ And that:

The intent which is peculiar to genocide need not be clearly expressed. As this Trial Chamber has noted in the above mentioned *Nikolić* case, the intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the ICTY Statute, on genocide], or the repetition of destructive or discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group—acts which are not covered by the list of [enumerated acts]...¹²⁶

In several rulings, the ICTY has upheld the reasoning expressed by the Trial Chamber in *Mladić and Karadžić*.¹²⁷ Indeed, the ICTR and the ICTY have often determined the

¹²³ ICTY Trial Chamber, *Karadžić and Mladić*, Rule 61 Review.

¹²⁴ Lippman, “Genocide.”

¹²⁵ ICTY Trial Chamber, *Karadžić and Mladić*, Rule 61 Review, sec. 94.

¹²⁶ Ibid.

¹²⁷ ICJ, *Bosnia v. Serbia*, *Dissenting Op. Al-Khasawneh*, sec. 43-44; ICTY Trial Chamber, *Jelisić*, sec. 73; ICTY Appeals Chamber, *Jelisić*, sec. 47; ICTY Appeals Chamber, *Krstić*, sec. 34.

criminal liability of individuals by first establishing a general criminal context of genocide before determining whether the accused's conduct contributed to that genocide.¹²⁸ It is consistent also with the Elements of Crimes adopted by the International Criminal Court. The elements of the crime of genocide for each *actus reus* includes: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."¹²⁹

The Court however rejected Bosnia and Herzegovina's arguments that genocidal intent could be inferred from the pattern of atrocities, from individual acts considered within their broader context. It did so both because of the way it examined particular incidents and because of the way that it constructed the relationship between the intent of genocide and that of "ethnic cleansing." The Court took three lines of approach to rejecting Bosnia and Herzegovina's arguments. First, the Court considered some evidence of the general political doctrine of the Serb nationalist forces. There was no explicit official statement of an intent to commit genocide (unsurprisingly) so the Court took into consideration a statement of strategic goals of the Serb nationalists in Bosnia and Herzegovina.¹³⁰ This statement called for the territorial separation of different ethnic groups. The Court's reasoning is however less than convincing when it dismisses this as evidence of intent. It states that separating populations through forceful expulsion need not involve an intent to commit genocide. The statement is thus abstracted from its context and its content analyzed, again, abstractly. Simply because a plan of 'ethnic purification' need not necessarily involve genocide is no argument that an actually

¹²⁸ Bonafè, *The relationship between state and individual responsibility for international crimes*.

¹²⁹ ICC Assembly of States Parties, "Elements of Crimes."

¹³⁰ ICJ, *Bosnia v. Serbia, Judgment*, sec. 372.

existing one did not.¹³¹ The Court sidesteps the essential issue when it constructs the terms with which the statement should be evaluated as a binary opposition of forcible expulsion and destruction (unqualified) of the targeted group.¹³² The question in this case is one of partial destruction as a means of forcible expulsion. The Court again indicates a propensity to efface the “in part” element of the special intent of genocide; as noted above, one it reintroduces only as total destruction in a limited area. Evidence the Court did not take into consideration during its discussion are the numerous statements of the political leader of the Serb nationalists in Bosnia and Herzegovina, Radovan Karadžić, and the top military commander, Ratko Mladić. The former publicly threatened the Bosniak population with annihilation in the event of war and the latter, again publicly, explicitly used the term “genocide” to describe the political-territorial project of the Serb nationalists in the event of war, advising the political leadership of the necessity of disguising their genocidal intent from the international community.¹³³

Second, after dismissing evidence of intent in the form of written or verbal expressions, the Court addressed the question of inferring intent on the basis of the manifest pattern of acts.¹³⁴ The Court had inferred intent in the case of the massacres at Srebrenica. The spatial and temporal intensity of the acts, considered in relation to their effect upon the targeted population, was enough for the Court to ascribe genocidal intent to the perpetrators. Bosnia and Herzegovina’s submissions concerning the overall pattern of atrocities committed during the duration of the conflict indicated a different line of

¹³¹ ICJ, *Bosnia v. Serbia, Dissenting Op. Al-Khasawneh*.

¹³² ICJ, *Bosnia v. Serbia, Judgment*, sec. 372.

¹³³ Bećirević, “The Issue of Genocidal Intent and Denial of Genocide.”

¹³⁴ ICJ, *Bosnia v. Serbia, Judgment*, sec. 207, 242, 277, 369, 373.

argument concerning spatiality and temporality. It was the similarity of acts dispersed in space and time that gave evidence of a conscious plan or policy evidencing intent to destroy the Bosniaks, in whole or in part, as such. The Court's rejection of Bosnia and Herzegovina's submissions states:

Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focussed on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; 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.¹³⁵

The Court indicates its acceptance of at least some of what the Trial Chamber upheld in *Karadžić and Mladić*. The ICJ affirmed that "ethnic cleansing" could amount to genocide and that whether it did or not could be determined via inference on the basis of the manifest pattern of acts. It did not however simultaneously take into consideration important contextual evidence such as the repetition of discriminatory acts or the commission of acts falling outside the *actus reus* as proof of intent. By insisting that genocidal intent be proven in regard to "particular circumstances," the Court reasserted its approach to the question of genocide of analyzing specific incidents in isolation from

¹³⁵ Ibid., 373.

each other.¹³⁶ Its allowance that the manifest pattern could provide evidence of specific intent only if it could point to such intent bears scrutiny for it relates to how the Court constructed the relationship of the specific intent of genocide to other intents. In short, the Court considered an intent to secure control over territory by targeting members of a particular protected group, even if those measures include the destruction of substantial numbers of the targeted group, as a separate intent—potentially—from the intent to destroy in whole or in part. Except in cases conforming to the Court’s definition of total physical or biological destruction in a limited area, killing and other crimes in the service of terroristic expulsion constitutes acts committed with a separate rather than further intent. Or, at the very least, the two intents in such cases cannot be distinguished solely on the basis of the manifest pattern of acts. The total destruction of a localized community does not inherently demonstrate an intent to destroy the group as a whole, as opposed to merely forcibly expelling it, more than more spatially dispersed killing does. It does however demonstrate an intent to destroy that (geographically defined) part as a distinct entity.

The Court’s third line of argument, that in numerous cases the ICTY had failed to indict or convict officials and agents of the Serb nationalist forces for genocide, is particularly problematic as a refutation of the argument from pattern.¹³⁷ The personal sphere of responsibility of particular individuals cannot be confused with the overall pattern of acts in the service of the Serb nationalist project.¹³⁸ A detailed examination of each case would be required to determine how much of the overall context of the conflict

¹³⁶ See *Ibid.*, sec. 370.

¹³⁷ *Ibid.*, sec. 374.

¹³⁸ ICJ, *Bosnia v. Serbia*, *Dissenting Op. Al-Khasawneh*, sec. 42.

each took into consideration, in conjunction with the scope of the individual's own acts. The fact that the Court has reached judgment in this case prior to any verdict by the ICTY on the responsibility for genocide of the two paramount leaders, Karadžić and Mladić, both indicted for genocide in relation to acts committed elsewhere than at Srebrenica in July 1995, cannot be ignored.¹³⁹ The Court's particular spatialization of the definition of genocide reached in this Judgment may very well eventually influence the ICTY in that case.

In conclusion, although the Court affirms that contextual evidence can be probative for establishing the requisite intent of genocide, the Court considers each contextual element in isolation from the others. The explicit statements of officials of the Serb nationalist forces are considered abstractly or not at all. And it considers the manifest pattern of acts in isolation from other evidence. The Court's spatialized construction of the specific intent of genocide, arrived at before it considers the argument from pattern, runs directly counter to Bosnia and Herzegovina's submissions. That the Court considers persecutory extermination as, except in very specific circumstances, evidence of an intent separate from that of genocide (that of forcible expulsion as a crime against humanity) serves to negate any possibility of inference, given the Court's exclusive standard of inference.

2.5. Implications and Further Questions

Not to put too fine a point on matters, but as this was a legal proceeding the Court's findings are not a verdict on the ontology of genocide as a social and material

¹³⁹ ICTY Office of the Prosecutor, *Karadžić, Third Amended Indictment*, sec. 38; ICTY Office of the Prosecutor, *Mladić, Second Amended Indictment*, sec. 37.

event as such, but a finding on genocide as a legal construct. Genocide is something that exists outside of the law, but the discussion of genocide within the Court's decision, and how it exists within the Convention, is precisely as a legal construct. Obviously this legal construct is not without social and material effects, either for the punishment of individuals or the assessment of reparations for states or the obligations to intervene it imposes upon third parties, but these do not exhaust its socio-material aspects. When taken into the realm of law, the question of genocide is a question of what can be proven within the evidentiary requirements of particular institutions, those imposed by particular courts in particular cases, and those of particular legal regimes more generally.

That said, insofar as the Court pronounced judgment in this case on genocide as a legal construct, I will venture some conclusions based on the Court's findings as to its views on what genocide is, grounded in a consideration of the concrete spatiality of the events in Bosnia and Herzegovina. The Court's findings were not just a reflection of what happened in the Bosnian conflict but, importantly, of what evidence the Applicant and the Respondent submitted in this case and the probative value the Court chose to accord that evidence. Keeping in mind these dually intertwined aspects of ontology and epistemology forces one to recognize a degree of tentativeness in any conclusions, a tentativeness that derives from the Court's vague, 'oracular' mode of pronouncement.¹⁴⁰ The Court simply summarized briefly the conflicting submissions of the parties to the case and then affirmed that the *actus reus* of genocide had been committed on a massive scale but that it had not been proven with the requisite intent. Though it demanded that genocidal intent be proven in regard to "particular circumstances," it did not pronounce

¹⁴⁰ Cassese, "On the Use of Criminal Law Notions in Determining State Responsibility for Genocide."

judgment on specific incidents. For example, Bosnia and Herzegovina presented evidence that Serb nationalist forces had perpetrated massacres elsewhere than at Srebrenica in July 1995 that those massacres exceeded the Srebrenica crime in the total number of victims relative to the size of the population affected. It did this specifically in relation to Hambarine, a community of 3,000 where 1,000 people were allegedly killed, and Kozarac, a community of 15,000 where evidence showed that 5,000 may have been killed.¹⁴¹ When the Court rejected Bosnia and Herzegovina's submissions that these evidenced genocidal intent, it did not specify whether it was not satisfied that the casualty figures were satisfactorily proven, or, if proven, that they failed to meet its spatialized definition of destruction.

What the Court may have found in this case, assuming it accepted as proven that killings to such an extent actually occurred—and again it gives no clear indication either way—is the following: First, that killings and other atrocities that may have totally destroyed smaller communities do not amount to genocide because each locality was itself too small for its destruction to be regarded as substantial, even if the number of victims in the aggregate equals or outnumbered that at Srebrenica. The Court demands that genocidal intent be proven in regard to specific events, not events taken in their aggregate as Bosnia and Herzegovina had argued.

Second, killings that destroy only a portion of a population within a given locality, even localities of a size equivalent to Srebrenica and even killings targeting a portion larger than that targeted there, would not amount to genocide if they were not gender or age-targeted in a manner evincing an intent to destroy the community as a biologically

¹⁴¹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 257-9.

reproducing collectivity. Otherwise some members would remain, able to biologically reproduce and reestablish the community. The question of where a line might be drawn in such cases where even non-biologically selective killing would inflict such massive damage on an affected localized community as to be considered genocide perhaps remains to be seen. The Court did affirm in this case that the destruction of a part of a population must be physical and biological to qualify as genocide without allowing that the portion of the population might be partially destroyed, biologically. In a future hypothetical case, where perhaps as many as nine out of ten persons of a community were destroyed, the Court might choose to find that the remnant that remains is enough to find the community had not been biologically destroyed. The community might have been rendered economically unviable, perhaps no longer able to defend their possession of land from others, perhaps socio-naturally unviable in the case of communities that must wrest their existence in direct struggle with the forces of nature, but this may not amount to genocide in the view of the Court. If such destruction did not result in the displacement of persons from the community into conditions where the physical biological existence of its members could not be secured, it may, in the Court's view, amount only to persecution as a crime against humanity.¹⁴²

Third, given that the Court did not find genocidal intent proven in relation to killings and other crimes at the camps, it is fairly certain that the Court has adopted the view that interpreting "as such" to refer to a distinctive part of a group means that the distinctive part refers to a spatially or geographically defined subset of the population and not to a socially defined subset of the population. Thus liquidating 8,000 persons from a

¹⁴² Ibid., sec. 190.

targeted group numbering in the millions within a restricted geographic area amounts to genocide if it totally destroys the group within that area but killing 80,000 members of the group's perceived leadership distributed over the group's territory does not. The Court provides some latitude for its future judgments when it affirms that "in any particular case" it would examine its threefold criterion of substantiality, opportunity, and importance to meet the "in part" requirement along with "all other relevant factors."¹⁴³ On its requirement that the destruction of the targeted group be physical and biological in its form and not just physical and biological in its means there appears little room for movement.

2.6. Conclusion

The answer to the question of how the Court could rule a single massacre genocide, but not the larger campaign of violence claiming many times more lives, has two parts. First, the Court, using precedent established by the ICTY, takes advantage of the overlap between the definition of crimes against humanity in the 1945 Charter of the IMT-Nürnberg and the definition of genocide in the 1948 UN Genocide Convention. Its construction of the crime against humanity of "persecution" allows it to rule that the deliberate and systematic extermination of a part of a group as such need not constitute genocide. Ethnically, nationally, or religiously discriminatory extermination, the willful destruction of a part of a group, may only amount to the lesser crime of persecution. What enables the Court to get around the apparent contradiction of denying that the deliberate destruction of part of a group amounts to genocide, an act that appears to

¹⁴³ Ibid., sec. 201.

conform to the plain meaning of to destroy a group in whole or in part, is the Court's particular spatialization of the definition of to destroy "in part." The Court maintained that killing in a geographically limited area may qualify as genocide. And that genocidal intent can be inferred only if that killing wholly destroys a geographically delimited part of the group as a biologically reproducing collectivity. Acts committed with the intent to physically, biologically destroy a part of the group in order to effect the disappearance of the entire group as a biologically *and* socio-culturally reproducing entity did not, for the Court, constitute genocide. This then is how the Court established that genocide as destruction in part means the total destruction of a part of the group within a geographically limited area, rather than the partial destruction of the group over a wider geographic area. This construction of the intent of genocide obviously contributed to the Court's finding on Bosnia and Herzegovina's submissions that the overall pattern of crimes could give evidence of genocidal intent. The overlap in the manifest pattern of acts of persecution as a crime against humanity and genocide allows the Court to assert that, in regard to killings and other crimes other than at Srebrenica, genocidal intent cannot be exclusively inferred. The aim of "ethnic cleansing," even if implemented in part through persecutory massacre, serves as a separate intent rather than a motive of genocide as destruction of a group in part as such. Finally the Court's 'oracular' mode of pronouncement renders any conclusions about its implications for future cases tentative. Yet the Court's insistence that the form of a targeted group's destruction and its insistence on considering incidents of possible genocide in isolation from each other likely means that genocide as destruction in part in its future judgments will refer to large, localized massacres and not to entire campaigns of atrocity. The precedent

established will likely prove binding upon all subsequent international jurisprudence and has further determined the legal structure of opportunity and constraint for states resolved to use human rights abuses to further territorial objectives. It also profoundly affected the ability of the Court to find Serbia responsible for genocide and related crimes, a matter we turn to in subsequent chapters.

CHAPTER III

ESTABLISHING THE PRINCIPLE OF STATE RESPONSIBILITY

3.1. Introduction

One of the most groundbreaking aspects of the decision of the Court in this case was that it upheld for the first time the principle that a state could be held responsible for genocide. The Court however was forced to derive the obligation of a state not to commit genocide from the text of the Convention via inference. Under the Convention signatories explicitly undertake to prevent and to punish genocide, but not to refrain from committing it themselves. Most of the substantive articles of the Convention address the criminal punishment of individuals; state responsibility is mentioned in only one article, an article of a jurisdictional rather than a substantive nature. This characteristic of the text enabled Serbia to mount several counterarguments to the position ultimately taken by the Court. In a measure of how contested the principle of state responsibility for genocide remains, a large minority of justices were moved to author separate opinions voicing their disagreement with the majority and endorsing one or more of Serbia's arguments. To the extent that justices attempted to fashion a decision that would enjoy a modicum of consensus among the great powers and other states of the world, the scale of this dissent has implications for the stringency of the requirements for attribution in the rest of the decision.

3.2. State Responsibility in the Judgment of the Majority

The jurisdiction of the International Court of Justice in the case had been established precisely because the two parties to the case, both signatories of the Genocide Convention, differed on whether the Convention embraced the principle of state responsibility. Bosnia and Herzegovina argued that the Convention did not exclude any form of state responsibility, including for the commission of genocide.¹⁴⁴ In contrast, Serbia argued that a state itself could not commit genocide. It could only be legally held responsible for breach of its obligations to prevent and punish genocide committed by individuals, obligations set forth in Articles V through VII of the Convention.¹⁴⁵ It rather tellingly excluded from its argument Article IV that requires states to punish “constitutionally responsible rulers.”¹⁴⁶ The principles of international responsibility encoded in the ILC Articles on State Responsibility assert that state responsibility is engaged by the official acts of its rulers.¹⁴⁷ Recognizing this established principle of international responsibility, Serbia offered a subsidiary argument that state responsibility could only be established through the international criminal conviction of an individual whose position of responsibility could engage state responsibility.¹⁴⁸ Serbia further argued that the only sanction states faced were declaratory judgments to the effect that they had violated their obligations.¹⁴⁹

¹⁴⁴ Ibid., sec. 150.

¹⁴⁵ Ibid., sec. 156.

¹⁴⁶ UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.”

¹⁴⁷ Crawford and ILC, *The International Law Commission’s articles on state responsibility*.

¹⁴⁸ ICJ, *Bosnia v. Serbia, Judgment*, sec. 157.

¹⁴⁹ Ibid., sec. 150.

As an international agreement the Convention consists mainly of provisions relating to the legal sanction of individuals. But there is an explicit mention of state responsibility for genocide in one article of the Convention. That is in Article IX, the compromissory clause establishing the Court's compulsory jurisdiction for disputes between signatories. The Article strongly supports Bosnia and Herzegovina's position as it reads in its entirety:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, *including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III*, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. [emph. added]¹⁵⁰

The Article endorses the notion of state responsibility for both genocide and its ancillary offenses such as conspiracy or complicity. However the Court took the position that the article was of a jurisdictional nature and so it alone could not establish that a state could be held responsible for committing genocide. It found the source of the obligation not to commit genocide in Article I of the Convention, by which contracting parties commit themselves to prevent and to punish genocide. The Court held that, by necessary inference, it would be "paradoxical" for a state to be obligated to punish and prevent but not to commit that same wrongful act.¹⁵¹ In locating the obligation not to commit genocide in Article I, the Court asserted that Article I was of an operative and not merely preambular nature. As a result, the Court also held that the obligation of states to prevent

¹⁵⁰ UN General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide."

¹⁵¹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 166.

the crime of genocide was not limited to those imposed by Articles IV through VII relating to the punishment of individuals.

3.3. Serbia's Counterarguments

Even though the Convention explicitly mentions state responsibility for (committing) genocide, Serbia produced three arguments on behalf of its contention that the Convention did not in fact embrace state responsibility. It is worth reviewing these arguments because fully one third of the justices of the Court were moved to write separate or dissenting opinions that would endorse various among them. First, Serbia appealed to the nature of genocide as a crime and reigning principles of international responsibility. It asserted that to hold a state responsible for genocide under the Convention would amount to holding it *criminally* responsible and that international law did not provide for the criminal responsibility of states. In rejecting this argument, the Court agreed that international law did not uphold that form of responsibility for states but that a state would still be held responsible for violations, that responsibility would simply consist of ordinary international responsibility, not criminal.¹⁵² Second, Serbia appealed to the preponderant focus of the substantive provisions of the Genocide Convention as an agreement. It argued that the Convention was solely an instrument of international criminal law, intended for the punishment of individuals. The bulk of the articles specifying state obligations do in fact refer to measures for the prosecution, extradition, and punishment of individuals. The Court however rejects this argument on the basis of the duality of state and individual responsibility recognized in the Rome

¹⁵² ICJ, *Bosnia v. Serbia*, *Joint Dec. Shi and Koroma*, sec. 170.

Statute of the International Criminal Court and the ILC Articles on State Responsibility. The Commentary of the ILC on Article 58 of its Articles on State Responsibility asserts that:

[T]he question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.¹⁵³

The Court insisted upon its reading of Article I as an operative and not preambular article. When Article I is read in conjunction with Article III, the Convention imposes obligations on states that are distinct from those it imposes on individuals. Serbia's argument failed on the basis of the text of the Convention read in light of established rules of state and individual responsibility. Third, it attempted the same argument as above only attempting to ground it this time in the drafting history of the Convention, the *travaux préparatoires*.¹⁵⁴ The Court noted that in the drafting history the rejection of certain amendments concerning state responsibility did not indicate a rejection of state responsibility as such, but only the rejection of the criminal responsibility of states.¹⁵⁵ Serbia's arguments were thus rejected and the Court affirmed that the Convention embraced a non-criminal notion of state responsibility.

In conclusion, the Court rejected Serbia's arguments against the responsibility of states for the commission of genocide and ancillary offenses,

¹⁵³ ICJ, *Bosnia v. Serbia*, Dec. Keith, sec. 173.

¹⁵⁴ ICJ, *Bosnia v. Serbia*, Judgment, 175.

¹⁵⁵ Ibid., 176-8.

based on the text of the Convention and principles of international responsibility. In doing so, it affirmed that as a document the Convention established both individual and state responsibility and that the state responsibility it established was noncriminal in nature. Serbia attempted to exploit the fact that state responsibility is only alluded to in one article of the Convention. Its presence in only one article is a measure of how contested the notion of state responsibility was during the drafting process.¹⁵⁶ How contested it remains is reflected in the support for Serbia's arguments by judges opposed to the majority's ruling. Since their opinions incorporate the notion of an as yet not existing international regime of state criminal responsibility, I will next address what distinguishes such a regime from the one that currently exists.

3.4. The Criminal Responsibility of States Versus Ordinary State Responsibility

Even though state criminality is not currently an accepted feature of the international regime of state responsibility, it is a notion that has at times had significant support among states. These states have supported the idea that whether considered as violations of norms so fundamental that no derogation is ever permitted (*jus cogens*)¹⁵⁷ or violations of universal obligations (obligations *erga omnes*)¹⁵⁸ there are certain wrongful acts that are of such gravity that they are fundamentally different than other wrongful acts. These acts concern not only the states directly involved but the international community as whole because they pose a fundamental challenge the normative structure

¹⁵⁶ Bonafè, *The relationship between state and individual responsibility for international crimes*.

¹⁵⁷ Lehman and Phelps, *West's Encyclopedia of American Law*.

¹⁵⁸ Ragazzi, *The Concept of International Obligations Erga Omnes*.

of the international order. Genocide is an example.¹⁵⁹ A provision for state criminal responsibility had been included as Article 19 of the ILC's 1996 Draft Articles on State Responsibility, but the ILC dropped this article in subsequent drafts and it does not appear in the final text officially adopted by the UN in 2001, the ILC Articles on the Responsibility of States for Internationally Wrongful Acts. The inclusion of the Article was so strenuously opposed by some states that it threatened to undermine the entire project of drafting articles on state responsibility.¹⁶⁰

The ILC's final Special Rapporteur on State Responsibility, James Crawford, intervened in the debate over the article to assert that it did not establish a true regime of criminal responsibility and that in fact there was no support even among proponents of Article 19 to establish such a regime.¹⁶¹ According to Crawford, a true international regime of criminal responsibility for states would have to include five elements: First, there would have to be properly defined international crimes in accord with the principle of *nullem crimen sine lege*. Second and third, there would have to be an adequate procedure for investigation and a system of due process. Fourth, there would have to be sanctions that would exist "over and above any 'tortious' or 'civil' liability" owed to particular persons or entities.¹⁶² And fifth, there would have to be a system by which state could expunge itself of guilt and revert to a noncriminal status. The proposed Article 19 had lacked any of these elements and so the question remained whether it was simply using the term "crimes" to refer to very serious breaches of obligations owed to the

¹⁵⁹ Pellet, "Can a State Commit a Crime?".

¹⁶⁰ Crawford and ILC, *The International Law Commission's articles on state responsibility*.

¹⁶¹ Jørgensen, *The Responsibility of States for International Crimes*.

¹⁶² Crawford and ILC, *The International Law Commission's articles on state responsibility*, 18.

international community of states rather than only wrongs toward a particular state or states.¹⁶³

Even though the notion of state criminality proved divisive enough to potentially sabotage the entire project of drafting agreed upon principles of international state responsibility, the concept of recognizing breaches of obligations of extraordinary seriousness was not entirely abandoned. The final draft of the ILC Articles contains two paired articles, 40 and 41, that establish the obligations that arise from serious breaches of peremptory norms of international law. These no longer include any notion of punitive sanction upon the state committing such a breach, but instead impose obligations upon the members of the international community of states in regard to such violations. States must endeavor to lawfully bring an end to and to not recognize as lawful any situation created by a serious breach of a peremptory norm.¹⁶⁴ This goes beyond the obligation imposed by Article 16 not to provide aid or assistance in the commission of an internationally wrongful act. A state not directly involved in bringing about an unlawful state of affairs still has obligations in regard to such situations.

Crawford maintains that there is no inherent problem with the concept of “international crimes.” He notes in particular that the crime of genocide is almost always carried out by states. The problem is rather a lack of appropriate institutions to enforce such a regime of international responsibility.¹⁶⁵ Be that as it may, questions remain as to how suitable it is to apply the regime of ordinary international responsibility to a crime such as genocide. One author has remarked that the Court in upholding such an

¹⁶³ Crawford and ILC, *The International Law Commission’s articles on state responsibility*.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

application has created the notion of “civil genocide.”¹⁶⁶ As will be seen below in Chapter IV on reparations, a civil regime of liability for genocide given existing principles of international responsibility had direct implications for Bosnia and Herzegovina’s ability to obtain financial compensation as reparation for Serbia’s breaches of its obligations under the Genocide Convention.

3.5. Separate and Dissenting Opinions on State Responsibility

The finding of the Court that a state itself could be held responsible for genocide was one of its most contested findings. Fully one-third of all the Judges issued separate or dissenting opinions voicing their disagreement. Each of these contrary opinions embraced one or more of the arguments propounded by Serbia. The bases of the arguments put forth, their soundness even, is a measure of the commitment of the justices to the aims and purposes of the Convention relative to other concerns. In addition, the justices in these separate and dissenting opinions also make important points about the inherent limitations of the Genocide Convention and the International Court of Justice for implementing a regime of state accountability for genocide.

In his Separate Opinion Judge Owada endorses Serbia’s argument that the Convention is only an international criminal law document establishing individual and not state responsibility. Judge Owada agrees with the majority that a state is obligated not to commit genocide but that since this obligation is not explicitly stated in the text of the Convention it falls outside the jurisdiction of the Court, under the Convention at least. The principle of attribution that establishes state responsibility for genocide is a matter of

¹⁶⁶ Asuncion, “Pulling the Stops on Genocide: The State or the Individual?”.

customary international law and not of the Convention. He acknowledges that Article IX refers to state responsibility, but because Article IX is compromissory and not substantive in nature, its reference to state responsibility is merely declaratory.¹⁶⁷ Article IX only refers to state responsibility but it does not establish it. Judge Owada's argument is that it is an unjustified infringement on state sovereignty to read into a treaty an obligation that is not explicitly stated. However, if states are not free to commit genocide as a matter of customary international law and that this understanding preceded and underwrote the Convention, it is difficult to understand how it would be an unjustified infringement of state sovereignty to interpret the Convention in light of this. The Convention cannot be understood to take away a right that does not exist. He refers to the *travaux préparatoires* to suggest that states did not understand that agreeing to the Convention with the language of Article IX would commit them not to commit genocide and to assume responsibility for it under the Convention. Instead he asserts that the reference establishes the jurisdiction of the Court in matters of state responsibility for genocide under customary international law and not under the Convention itself.¹⁶⁸

Judge Skotnikov for his part also endorses the majority opinion that a state can be held responsible for genocide. Like Owada he rejects the notion that a state can be held responsible for directly committing genocide, but that he maintains that it can be found responsible via attribution. Unlike Owada, he does not argue that state responsibility via attribution falls outside the scope of the Convention. His insistence that there is no obligation on states not to commit genocide, only an obligation on individuals not to commit genocide and if they do and are state officials the responsibility of the state is

¹⁶⁷ ICJ, *Bosnia v. Serbia*, *Sep. Op. Owada*, sec. 73.

¹⁶⁸ *Ibid.*

engaged, may sound like a distinction without a difference. But it enables Judge Skotnikov to proceed with an argument about the proper international legal division of labor between the ICJ and international criminal tribunals. He argues ultimately that it is impossible to find that genocide has been committed without an individual being convicted of genocide or a related offense as defined by the Convention.¹⁶⁹

His argument is based on the nature of genocide as a crime. He upholds Serbia's argument that genocide is intrinsically a crime and that to hold that a state could commit an act that in terms of individual responsibility would be a crime is to endorse the notion of state criminal responsibility. No such form of state responsibility is generally held to exist. Therefore, to uphold state responsibility for genocide as a general form of international responsibility would be to "decriminalize" genocide. Because genocide as a crime necessitates the finding of individual responsibility, determining that genocide has in fact been committed lies outside the jurisdiction of the ICJ. Only the International Criminal Court or *ad hoc* tribunals established by the Security Council are competent to determine that genocide has been committed. Only if an international criminal tribunal has established that genocide has been committed by individuals can the ICJ then use such a finding to determine whether the international responsibility of a state is engaged or not. He thus endorses another of Serbia's arguments, that the Court may not find a state responsible for genocide in the absence of the conviction of an individual for genocide or a genocide related offense. However, Judge Skotnikov insists the ICJ must not simply accept the findings of the ICTY but must subject them to judicial review and

¹⁶⁹ ICJ, *Bosnia v. Serbia*, Dec. Skotnikov.

reject them if it determines that they do not adequately conform to the requirements of the Genocide Convention as the Court interprets it.¹⁷⁰

For Skotnikov this review is necessary because the jurisdiction of the ICJ is limited to the application of the Genocide Convention. The statutes of the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia incorporate Articles II and III of the Convention verbatim into their articles on the crime of genocide, but the statutes also contain additional provisions not found in the Convention. These statutory provisions have been applied to the crime of genocide and thus have given rise to jurisprudence that could not have been derived from the application of the Convention alone. In the two convictions for genocide related offenses that the Court cites as proof that genocide had been committed at Srebrenica, those of General Krstić and Radovoje Blagojević, both individuals convicted were convicted of aiding and abetting genocide, a crime that does not exist among the ancillary offenses of Article III of the Convention.¹⁷¹

Why it should matter if an individual's liability is characterized as aiding and abetting or complicity is not immediately evident. In either case it is established that genocide has been committed. Skotnikov makes clear his reasoning however when he states that the intent necessary for a crime to constitute genocide is a mental element that must be established in relation to an individual perpetrator, not to acts or events themselves. Thus the absence of a conviction of any individual for genocide means that an event itself cannot be characterized as genocide. And further, a conviction for an ancillary offense not found in the Genocide Convention places its affirmation that genocide had been committed outside the scope of the Court's jurisdiction. Aiding and

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

abetting in the ICTY and ICTR jurisprudence is essentially a conviction for complicity where the Tribunals were not satisfied that it had been proven that the convicted shared the specific intent of genocide with those who committed the physical acts of genocide.¹⁷² Skotnikov takes this roundabout way to denying one of the central tenets of the Judgment of the majority, that a state can be found responsible for genocide in the absence of an individual criminal conviction for genocide.¹⁷³ The ICJ was highly dependent upon the ICTY and its findings of fact in the current case. Enormous resources and a particular power relationship between Serbia and the international community enabled the ICTY to operate. Imposing this requirement, while in many respects sensible given the limitations of the Court, makes it even more difficult to find a state responsible for genocide.

Judge Tomka in contrast endorses Serbia's argument that the principle of state responsibility is wholly excluded from the Convention. He insists that the Convention is solely an international criminal law instrument. He upholds Serbia's argument that a state's obligations under the Convention extend only to fulfilling measures relating to the punishment of individuals as specified in Articles IV through VII. Like Serbia he supports his position with reference both to the fact that the bulk of its substantive provisions concern only individual responsibility and through reference to the drafting history. He notes that during the drafting, amendments incorporating the notion of state (criminal) responsibility were repeatedly rejected.¹⁷⁴

¹⁷² Dawson and Boynton, "Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals"; Eboe-Osuji, "Complicity in Genocide versus Aiding and Abetting Genocide: Construing the Difference in the ICTR and ICTY Statutes."

¹⁷³ See ICJ, *Bosnia v. Serbia, Judgment*, sec. 180-2.

¹⁷⁴ ICJ, *Bosnia v. Serbia, Sep. Op. Tomka*.

How then does Tomka deal with the reference to state responsibility in the compromissory clause? Tomka makes a point deriving from consideration of the precise moment in the drafting history that the amendment for what became Article IX was proposed, discussed, and adopted. This occurred only when the statutory provision for an international tribunal, as opposed to relying solely on national courts of the state upon whose territory genocide had been committed, had been removed from the draft convention. Some states supported the language in Article IX because it represented a compromise on their desire to incorporate a notion of state criminal responsibility (the United Kingdom and Belgium), while for others it was acceptable as a substitute only for an international criminal tribunal judging individual responsibility (France and Brazil). His argument is that since the provision for an international tribunal was later added back in, the inclusion of the notion of state responsibility in Article IX cannot be interpreted as assent on the part of signatories to the principle.¹⁷⁵ Although his argument is invaluable for suggesting that the amount of support that existed among states in 1947 for state responsibility was even less than it might first appear, the fact remains that these states signed and ratified the treaty as written.

Judges Shi and Koroma in their Joint Declaration also support Serbia's argument that the Convention wholly excludes state responsibility for genocide. They endorse Serbia's arguments that the Convention is an international criminal law instrument, the provisions of which are directed solely toward the punishment of individuals. They even interpret the commitment in Article IV to punish state leaders as a conscious attempt to

¹⁷⁵ Ibid.

exclude the possibility of state responsibility via attribution.¹⁷⁶ Genocide moreover is a crime and to hold a state responsible would be to hold it criminally responsible. Even though the majority Judgment made it clear that Serbia's responsibility was civil or tortious they repeatedly insist on this point. When rejecting the possibility of reparations for genocide, Judges Shi and Koroma even refer to punitive damages, an essential component of an international regime of criminal responsibility but one the majority on the Court did not contemplate. The majority went to great lengths to apply civil or tortious standards to the award of reparations, but the Judges are loathe to give the notion of civil responsibility even scant consideration. Unlike Tomka however, they support the majority's conclusion that the Convention imposes an obligation to prevent genocide that is not limited to the measures to punish individuals specified in Articles IV through VII.¹⁷⁷

Finally, Judge *ad hoc* Kreća, appointed to the Court to represent Serbia, endorses the Respondent's position that the Convention excludes state responsibility and echoes Serbia's main arguments. He rejects the possibility of inferring a state responsibility not to commit genocide from Article I of the Convention, arguing that it is impermissible on the basis of general rules of international legality because doing so would impose on states an obligation that they have not explicitly agreed to. The Convention in his interpretation provides only for the prosecution of individuals. He also argues that since genocide is a crime, to hold a state responsible would be to hold it criminally responsible.¹⁷⁸

¹⁷⁶ ICJ, *Bosnia v. Serbia*, *Joint Dec. Shi and Koroma*, sec. 4.

¹⁷⁷ ICJ, *Bosnia v. Serbia*, *Joint Dec. Shi and Koroma*.

¹⁷⁸ ICJ, *Bosnia v. Serbia*, *Sep. Op. Kreća*.

To summarize, six judges of the fifteen on the bench disagreed with the finding of the majority that the Convention established a direct obligation on states not to commit genocide. Four of these six judges concurred with Serbia that state responsibility as such was wholly excluded from the Convention. For these judges the Convention is solely an instrument of individual criminal accountability. Two of the six, Skotnikov and Owada, repudiated direct state responsibility but accepted the possibility of state responsibility via attribution. However, Judge Owada argued that the mention of state responsibility in the jurisdictional clause established that the International Court of Justice could adjudicate state responsibility for genocide, but under customary law rather than the Convention, placing it outside the Court's compulsory jurisdiction. For his part, Judge Skotnikov ruled that the Court could under the Convention adjudicate state responsibility, but that it could not establish that genocide had occurred. Only the conviction of an individual for genocide or a related offense under Article III of the Convention by an international criminal tribunal such as the ICTY could. Given the Court's limitations and the nature of genocide as a crime, only a criminal tribunal could through convicting an individual. Though these judges did not prevail in their efforts to exclude or severely curtail the possibility of the Court finding a state responsible for genocide, they would be able to carry their opposition into the Court's efforts to establish Serbia's responsibility by supporting standards of evidence and attribution that would make it very difficult, if not impossible, to find a state responsible for genocide. Insofar as justices less opposed to the principle than these would seek to craft a ruling that would enjoy a modicum of international consensus, the strenuousness of this opposition cannot but have had an effect.

3.6. Conclusion

The finding of the Court that a state itself could be held responsible for genocide was an important advance in fulfilling the aims and purposes of the Convention. Genocide is almost always committed by and through a bureaucratic state apparatus. The distribution of culpability within such structures is not adequately captured by a singular focus on individual responsibility.¹⁷⁹ Adjudicating state responsibility can play an important role in transitional justice. Judicial processes could serve the purpose of establishing a narrative of events that would capture more than could be achieved solely through a focus on individuals.¹⁸⁰ The possibility of reparations can serve as a deterrent and sanction for culpable structures that would remain in place even if some responsible officials were prosecuted and punished. It is too easy at present for a state to simply hand over an individual leader while leaving the organizational structures responsible for genocide in place. Reparations can also redress some of the damage inflicted upon a targeted group. Moreover, the stigma of being judged responsible for genocide can also serve as an important deterrent for a state.¹⁸¹

The Court in this case found that a state could be directly responsible for genocide in addition to attribution from the criminal conviction of an individual. However it was forced to establish the state's obligation not to commit genocide and related offenses via inference rather than via any explicit reference in the text of the Convention. The obvious unease of many states during the drafting of the Convention, the concern that they themselves and not just the defeated Axis powers could be found responsible for

¹⁷⁹ Bauman, *Modernity and the Holocaust*.

¹⁸⁰ Mohamed, "A Neglected Option."

¹⁸¹ Asuncion, "Pulling the Stops on Genocide: The State or the Individual?"

genocide, finds expression in the Convention's lack of specificity or substantive engagement with the matter of state responsibility. That unease still exists and finds expression in the numerous opinions dissenting from the majority's ruling on state responsibility. That unease would carry forward and influence the Court's application of the principle of responsibility, the matter we turn to next.

CHAPTER IV

STATE RESPONSIBILITY FOR GENOCIDE ITSELF

4.1. Introduction

The Court was tasked with determining whether Serbia was responsible for breaches of the Genocide Convention as a result of its involvement in the conflict in Bosnia and Herzegovina. It therefore had to grapple with Serbia's conscious political-territorial strategy of attempted legal immunization, the formation of the Republika Srpska and its army, the VRS, as formally separate entities. The Court had determined that only the Srebrenica massacres amounted to genocide, so its inquiry into the attribution of responsibility was restricted solely to those events. Based on its interpretation of Article I, the Court had determined that a state's obligations included obligations not to commit genocide, to refrain from committing any of the ancillary genocidal offenses, and to undertake measures to prevent genocide beyond those relating to the punishment of individuals. Genocide and the ancillary offenses in Article III of the Convention were formulated in terms of criminal law. The Court therefore had to translate these into appropriate standards of international responsibility. Because the responsibility to prevent had to be inferred, the Convention offered no specific guidance as to what this responsibility might consist of. The Court was therefore on very novel legal ground. However the Court would proceed, its findings were bound to be the subject of controversy.

The Court took a stepwise approach to examining the question of Serbia's responsibility: first for the crime of genocide itself, then the other genocidal offenses of

Article III such as complicity, and then the obligations to prevent and to punish genocide. In the Court's view, a positive finding of responsibility for genocide would obviate the need to determine whether Serbia had committed ancillary genocidal offenses of Article III. It reasoned that conspiracy and incitement would be subsumed by responsibility for genocide and that attempt and complicity would each logically contradict it. It did not find Serbia responsible for either genocide or the ancillary offenses; regardless of how it would have determined Serbia's responsibility for offenses under Article III, it would have addressed whether Serbia had complied with its concurrent obligations to prevent and punish the crime of genocide under Article I. The Court found Serbia responsible for failure to prevent and failure to punish. Yet it did not award Bosnia and Herzegovina reparations in the form of monetary compensation; it offered only declaratory satisfaction. In this chapter I will consider how the Court addressed the question of Serbia's responsibility for genocide itself. In subsequent chapters I will consider how it addressed the secondary forms of liability—the ancillary genocidal offenses, failure to prevent, failure to punish—and the issue of reparations. The Court achieved its verdict exonerating Serbia of responsibility for genocide itself by not seeking evidence relevant to the case, by dismissing the probative value of an acknowledgement of responsibility by Serbian leaders, and through the standards of evidence and attribution it imposed for the various tests of responsibility it applied and how it chose to treat the formal separate political-territorial status of the Republika Srpska and its organs.

4.2. Admission of Responsibility by Serbian Authorities

Before the Court moved to an in depth examination of the issue of Serbia's responsibility for genocide it summarily dismissed what would ordinarily be considered one of the most compelling forms of evidence: a public declaration acknowledging responsibility by officials of the accused state. The declaration was made by the Council of Ministers of the Serbia and Montenegro following the airing of a video on Serbian television depicting members of the military formation the "Scorpions"¹⁸² torturing and executing Bosniak prisoners taken during the conquest of Srebrenica, the Council of Ministers of Serbia and Montenegro issued a public declaration that:

Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.¹⁸³

The meaning of the statement that the perpetrators of the Srebrenica massacres "represented" the Serbian regime of Slobodan Milošević is open to some interpretation. It nonetheless implies a degree of connection that would in all likelihood give rise to complicity at the very least. The statement, through its reference the anti-Milošević protests,¹⁸⁴ acknowledges the responsibility of the Serbian government, the "undemocratic regime of terror and death" in its formulation, to whatever degree. But the

¹⁸² The Court for some reason avoids mention of the name of the group when it addresses here the statement from the Council of Ministers even though the question of whether or not the conduct of the group shown in that film, the "Scorpions," could be attributed to Serbia figures prominently later in the Judgment (see §§389-95).

¹⁸³ Quoted at ICJ, *Bosnia v. Serbia, Judgment*, sec. 377.

¹⁸⁴ See Lazić, *Protest in Belgrade*; Collin, *This Is Serbia Calling*.

Court dismisses it as a “political” declaration that could not be a legal admission of responsibility since that would go against Serbia’s submissions to the Court both before and after the statement.¹⁸⁵

The Court’s stance clearly relies on a unitary understanding of the state as actor. States are not monoliths however but assemblages of organs and persons that can and do work at cross-purposes knowingly or unknowingly. It is entirely possible—in fact it seems likely—that the Council of Ministers made the statement without consulting Serbia’s international legal advisors and without being fully cognizant of the legal consequences that would follow from such an admission. In his Dissenting Opinion, Judge Al-Khasawneh took note of the context and intention of the statement, the desire of a new post-Milošević government to distance itself from the previous regime and affirmed its probative value, in keeping with established ICJ jurisprudence regarding statements of public officials of a party to a case that are unfavorable to its cause.¹⁸⁶ Having dismissed the probative value of the statement of the Council of Ministers, the Court then settled down to analyze the other evidence and arguments brought forward by the parties concerning Serbia’s responsibility for genocide.

4.3. Three Tests of Responsibility for Genocide

The Court applied three separate tests of responsibility to determine if Serbia’s responsibility for breaches of Article III (a), the obligation not to commit genocide, was engaged by the Srebrenica massacres: the involvement of *de jure* organs, *de facto* organs, and direction or control over non-state organs. These three tests of responsibility sought

¹⁸⁵ ICJ, *Bosnia v. Serbia, Judgment*, 378.

¹⁸⁶ ICJ, *Bosnia v. Serbia, Dissenting Op. Al-Khasawneh*, sec. 57-8.

to ascertain, respectively, whether individuals or organs of Serbia having the status of official state organs under its internal law were directly involved in the massacres, whether organs merely lacking official recognition as organs of Serbia but operating as such were involved, or whether non-state organs committed genocide at Srebrenica while acting upon Serbia's instructions or under its control. The political-territorial separation of the Republika Srpska from Serbia made a variable contribution to each test. Its most significant contribution was to Serbia's avoidance of attribution on the basis of the conduct of *de jure* organs. It both rendered the conduct of the Republika Srpska forces not attributable, and it raised the bar for the evidence that Bosnia was required to submit to prove Serbia's responsibility was engaged even by the participation of Serbia's *own* official organs in the massacres. Second, that political-territorial separation was alone not enough for Serbia to avoid attribution of responsibility under the *de facto* organ test. The degree of operational autonomy enjoyed by the VRS and other Republika Srpska forces was necessary for Serbia to avoid attribution under this test, given the threshold of attribution adopted by the Court. Third, the Republika Srpska's separate political-territorial status established a precondition for the application of the direction and control test, as it did for the *de facto* test, but did not contribute to Serbia's avoidance of responsibility. Here the spatio-temporal delimitation—augmented by the Court's abstraction of the acts of killing from the sequence of events of which they were a part—enabled Serbia to avoid attribution. In discussing each of these tests below, I expand on the question of the latitude of interpretation the Court had in relation to each.

4.3.1. *De Jure* Organ Test of Responsibility

The Court first addresses the most direct form of state responsibility for genocide, when it is committed by the state through one or more of its own organs. Article 4 of the ILC Articles on State Responsibility declares that the conduct of any organ of the state will engage the responsibility of the state as a whole. That organ can be an organ of the central government or that of a territorial unit of the state, and it derives its status as an organ from the state's internal law.¹⁸⁷ The Republika Srpska was not a territorial unit of Serbia according to its internal law. So proving Serbia's direct responsibility for the commission of genocide would require proving that official organs of Serbia participated in the genocidal massacres, either as complete units or as individuals serving with the Army of the Republika Srpska (VRS), and that that conduct could be attributed to Serbia. Bosnia and Herzegovina attempted to establish Serbia's responsibility on two bases: that individual officers of the Serbia-controlled Army of Yugoslavia (VJ) served with the VRS and that the purported paramilitary unit, the "Scorpions", was in fact an organ of Serbia under its internal law. That the Court did not find Serbia responsible on this basis is, broadly speaking, the result of two factors. First, the Court chose to rely on an abstract assumption, that of regarding the Republika Srpska effectively as an independent state despite its extraordinary dependence on Serbia and the fact that it was not a recognized state according to international law. And second, there is the contingent circumstance of the probative evidence available to the Court given the timing of the Judgment relative to ongoing trials at the ICTY and the Court's dependence on the ICTY to establish matters of fact.

¹⁸⁷ Crawford and ILC, *The International Law Commission's articles on state responsibility*.

In its first attempt to prove the direct involvement Serbia via *de jure* organs, Bosnia and Herzegovina asserted that officers serving in the VRS remained officers of the VJ. It drew attention to the role that Serbia took in the administration of officers of the VRS via the VJ's 30th Personnel Center that handled their pay, promotions, and pensions—including it alleged of the commander of the VRS, Mladić. Some officers of the VRS even retained their rank within the VJ. Despite the evidence this provides of the Republika Srpska's lack of essential state capacity, the Court took note of all of this and determined that it amounted merely to support of the Republika Srpska. It does not conclude that these officers thereby remained organs of Serbia. It maintains that "in the absence of evidence to the contrary," these officers were to be considered agents of the authority of the Republika Srpska.¹⁸⁸ The Court says Mladić's status as an officer of the VJ was not proven, a point debated by Judge *ad hoc* Mahiou. Mahiou points out that in 1994 Mladić was promoted as an officer within the VJ, something that would make little sense if he were not an officer of the VJ.¹⁸⁹ Because VRS commanders were appointed to their positions by the Republika Srpska, the Court insisted they were to be considered formally subordinated to its authority.¹⁹⁰ Had the Republika Srpska not been a formally separate political territory the Court would not have been able to make this assertion.

The Court chose to rely on this abstract assumption without an attempt to engage with the concrete reality of the actual relationship between the VRS and the political authorities of the Republika Srpska and to justify its position. The subordination it cites was in scant evidence at the time of the massacres. Mladić at that time was openly

¹⁸⁸ ICJ, *Bosnia v. Serbia, Judgment*, sec. 388.

¹⁸⁹ ICJ, *Bosnia v. Serbia, Dissenting Op. Mahiou*, sec. 108.

¹⁹⁰ ICJ, *Bosnia v. Serbia, Judgment*, 388.

defying the authority of Karadžić, President of the Republika Srpska. The two had long been at odds. Karadžić had broken with Milošević in 1994 and feared Mladić as a rival, as the latter retained his close ties and demonstrated personal loyalty to the leadership in Belgrade. Karadžić had taken the opportunity presented by VRS losses of territory in western Bosnia and Herzegovina and attempted to remove Mladić from his position of command just weeks before the takeover of Srebrenica. Mladić simply refused to go and by exposing Karadžić's impotence emerged the stronger of the two. Mladić continued to work closely with Milošević while Milošević publicly snubbed the Karadžić, demonstrating the absence of real sovereignty of the Republika Srpska vis-à-vis Serbia.¹⁹¹ At the time of the Srebrenica massacres, Mladić was conferring closely with Milošević while Karadžić was unaware of their meetings.¹⁹²

To understand the relationship of the VRS and the Republika Srpska it is helpful to recall the attitude toward political authority of its parent army, the JNA. The JNA in the 1980s began to put about that it was Yugoslavia's 'seventh republic.' At a time when significant power had been devolved to the constituent republics of Yugoslavia, the federal army let it be known that it saw itself as having, at the very least, coequal status with them in the formation of federal policy. It had established the political economic basis for its autonomy in the 1970s through the development of a military industrial complex that earned significant revenue from arms exports. Its vision for Yugoslavia was to undo the constitutional changes that had brought about the devolution of powers to the republics and to recentralize Yugoslavia in a new political and military order. This it felt

¹⁹¹ Block, "The Madness of General Mladic."

¹⁹² UN General Assembly, 54th session, *Report of the Secretary-General Pursuant to General Assembly resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999*; ICJ, *Bosnia v. Serbia, Dissenting Op. Al-Khasawneh*, sec. 49.

was necessary to prevent the dissolution of the federal state.¹⁹³ At the time of the dissolution of Yugoslavia, the JNA disregarded orders from the federal political authorities in pursuit of its own agenda of first attempting to keep the federation together and then to carve out a Greater Serbia in alliance with the leadership of the Republic of Serbia and radical right Serb nationalists.¹⁹⁴ The JNA pursued its own agenda as an organ of the federal state and did not see itself inherently subordinated to the constituent republics, separatist parastates, or even other organs of the federal government such as the presidency. The military chose its own masters as it saw fit, its attitude evoking Deleuze and Guattari's conception of the war machine.¹⁹⁵ It is unsurprising that the culture of military autonomy of the JNA would continue in the VRS.

Also, there was a deep affinity between the leadership of the VRS and the political and military leadership of Serbia that did not exist between the VRS and the political leadership of the Republika Srpska. The leadership of the VRS and Milošević's Serbia emerged out of the Communist structures and social milieu of the former Yugoslavia. In contrast, the paramilitaries and the political leadership of the Republika Srpska were composed of anti-Communist dissidents who identified with the monarchist far right, the Chetniks, that had been defeated by the Communist Partisans during the Second World War. Memories of his own family's losses during the bitter conflict between Chetniks and Communists during the Second World War had made Mladić reluctant to wear the neo-monarchist cap of the VRS uniform.¹⁹⁶ Milošević had ridden to

¹⁹³ Špegelj, "The First Phase, 1990-1992: The JNA Prepares for Aggression and Croatia for Defense."

¹⁹⁴ Silber and Little, *Yugoslavia: Death of a Nation*.

¹⁹⁵ Deleuze and Guattari, *A thousand plateaus*.

¹⁹⁶ SENSE News Agency, "Rise and Fall of General Mladić."

power by co-opting the nationalist sentiments and agenda of the anti-Communist far right, but the relationship between the nationalist socialists and the monarchists was marked by periods of both political conflict and cooperation.¹⁹⁷ The fraying relationship between Mladić and Karadžić is simply another example. The nationalist far right provided Milošević with a sought after degree of plausible deniability but were discarded when they challenged his authority and direction.

But if it cannot simply be assumed that the VRS was subordinated to the political authorities of the Republika Srpska, how can one then characterize the relationship between the VRS and the political authorities of Serbia. Was the relationship of support so close as to make the VRS an organ of Serbia? What was the relationship between the VRS and VJ? Some sources concur with the ICJ in its judgment that the VRS maintained a significant degree of effective autonomy from Serbia and the VJ.¹⁹⁸ Yet Carla Del Ponte, who has had access to the unredacted minutes of the Supreme Defense Council of Serbia, has declared that they prove that Serbia directed and controlled the war effort in Bosnia and Herzegovina and, moreover, that units of Serbia's Interior Ministry Police participated in the preparations for the massacres.¹⁹⁹ Though the Court often relies on the ICTY to establish facts and their legal characterization, it does so selectively. It does not cite the finding of the ICTY Trial Chamber in *Prosecutor v. Brdjanin* that the establishment of the VRS was “merely a ploy” to disguise Serbia's continued illegal intervention.²⁰⁰

¹⁹⁷ Đukić, *Milošević and Marković*.

¹⁹⁸ Block, “The Madness of General Mladic.”

¹⁹⁹ Del Ponte, *Madame Prosecutor*.

²⁰⁰ ICTY Trial Chamber, *Brdjanin*, sec. 151., cited in *Bosnia v. Serbia*, Dissenting Opinion Mahiou, sec. 106.

Bosnia and Herzegovina's second effort to prove Serbia's responsibility through the conduct of *de jure* organs was to assert that the supposed paramilitary unit, the "Scorpions," was in fact a *de jure* organ of Serbia's Interior Ministry Police. The Court, however, did not regard the evidence produced by Bosnia and Herzegovina convincing. Bosnia was able to produce evidence that the unit had that status in 1991 during the war in Croatia, but not evidence that they retained that status in 1995 at the time of the massacres. It also produced intercepts of internal communications of Republika Srpska officials in which they referred to the "Scorpions" as a unit of Serbia's Interior Ministry Police (MUP). The Court dismissed this evidence because it did not emanate from Serbia itself and so could not be considered probative of the unit's status according to Serbia's internal law. The Court concludes by citing a principle it derives from the ILC Articles that the conduct of an organ placed at the disposal of another state is attributable to that other state.²⁰¹ Even if it had been proven that the "Scorpions" were a *de jure* organ, the Court would not have automatically attributed their conduct to Serbia. It would have required proof that they were not 'seconded' to the Republika Srpska.

That Serbia was not found responsible on the basis of acts of the "Scorpions" was a result both of this legal finding and evidentiary matters relating to the willingness and capacity of the Court to determine matters of fact. The Court as noted had not chosen to seek to obtain the unredacted minutes of the Supreme Defense Council of the FRY. The unredacted minutes are a part of the evidence in two ongoing cases before the ICTY, each of officers of *de jure* organs of Serbia charged with responsibility for crimes committed

²⁰¹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 389. The Court refers to 'public authorities', thus dodging here the relevant issue that the Republika Srpska was not a state under international law. The ILC Article it cites refers to organs placed at the disposal of another state. It does acknowledge later in its discussion of complicity at §420 that ILC Article 16 on aid and assistance is not directly relevant because it deals with the relationship between two states, which the Republika Srpska was not.

in Bosnia and Herzegovina. These cases could shed important light on both the overall relationship between the VJ and the VRS and whether the “Scorpions” were in fact *de jure* organs of Serbia. The Court acknowledges one of these, *The Prosecutor v. Jovica Stanišić and Franko Simatović*²⁰², could definitively prove the status of the “Scorpions.”²⁰³ It does not acknowledge the other, *The Prosecutor v. Momčilo Perišić*.

The ICTY Indictment of Momčilo Perišić, the Chief of the General Staff and most senior officer of the VJ during the war in Bosnia and Herzegovina, provides a portrait of a degree of functional integration between the VRS and VJ that defies simple categorization.²⁰⁴ The picture that emerges is of an articulated assemblage of military machines joined for a common purpose with an ontological status as such that may not be simply reducible to the either/or of an organ of the parastate or the parent state. The indictment indicates that officers transferred freely back and forth between the VRS and VJ, a highly anomalous situation for the militaries of separate states. The indictment alleges that many high ranking officers of the VRS, including General Mladić, retained their rank within the VJ and that their promotions as officers of the VJ had to be approved by Belgrade regardless of any promotion they might have received in the VRS. Though the Court dismissed its significance when Bosnia had been able to submit evidence, the handling of the promotion of Mladić by the Supreme Defense Council of the FRY suggests that the VJ maintained overall authority. Notions that VJ personnel were ‘seconded’ to the VRS must be seen in this light. According to its rules of evidence,

²⁰² The two accused are high-ranking officials of the State Security Service of the Ministry of Internal Affairs of the Republic of Serbia. They are charged with war crimes and crimes against humanity for their roles in the wars in Croatia and Bosnia and Herzegovina.

²⁰³ ICJ, *Bosnia v. Serbia, Judgment*, sec. 395.

²⁰⁴ ICTY Office of the Prosecutor, *Perišić indictment*; SENSE News Agency, “ICTY Lifts Seal from Supreme Defense Council Documents in Momčilo Perišić Case.”

the Court would not assign probative value to an ICTY indictment. But if a final judgment in the Perišić case had been rendered before the ICJ rendered judgment in the *Bosnia v. Serbia* Genocide Case, the latter may have turned out very differently. Given the details of operational realities provided the Supreme Defense Council records that the Court did avail itself of, simply assuming a discrete separation of command responsibility between the VRS and VJ on the basis of the (provisional) separate political territoriality of the Republika Srpska and Serbia would appear to amount to a manifestation of what John Agnew has described as the ‘territorial trap.’²⁰⁵

4.3.2. *De Facto* Organ Test of Responsibility

The second test of responsibility, responsibility on the basis of the conduct of a *de facto* organ, is designed to assess whether the fact that an organ lacks official status as an organ of state under its internal law is in reality a purely fictitious arrangement for the purpose of avoiding the attribution of responsibility. The separate political-territorial status of the Republika Srpska acts here as a precondition for the application of the test. The test requires proving that a relationship of complete control exists between the state and the alleged *de facto* entities. To avoid attribution an organ, in this case a parastate, must exhibit a degree of autonomy from the state sponsoring it. So while it is at the same time an expansion of the regime of accountability, it incorporates a higher threshold of attribution than the test of responsibility for *de jure* organs, where it is simply enough to prove that an organ has that status officially. Even if a *de facto* organ acts contrary to instructions state responsibility is still engaged. Although the *de jure* test excluded the

²⁰⁵ Agnew, “The Territorial Trap: The Geographical Assumptions of International Relations Theory.”

possibility of considering the VRS or Republika Srpska in their entirety as an organ of Serbia, here Bosnia and Herzegovina attempted to argue precisely that. And it argued that various paramilitary formations, including the “Scorpions”, were if not formally at least *de facto* organs of Serbia.²⁰⁶

This second test of responsibility goes beyond the principles encoded in the ILC Articles on State Responsibility upon which the Court otherwise relies. It is derived instead from the Court’s own prior jurisprudence in the 1986 case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. To prove that persons or organizations are *de facto* organs of a state requires proving that the relationship was one of “complete dependence” of the individual or organ upon the state in question.²⁰⁷ The Court interpreted the test of “complete dependence” to mean that the relationship of dependence of the Republika Srpska and VRS with Serbia meant that, despite how necessary aid from Serbia was to their operations, at no time could the former demonstrate an ability to fail to submit to influence or pressure. The Court alludes to the resistance of the Republika Srpska to pressure from Milošević to surrender territory in return for a peace agreement; it does not engage with the degree of pressure employed. It summarily concludes that VRS and the Republika Srpska forces could not be considered “mere instruments” and were therefore were not *de facto* organs.²⁰⁸ Given the concern that the Milošević regime had demonstrated to immunize itself from the attribution of responsibility for crimes—through the use of non-governmental paramilitaries and the formation of the VRS—it is

²⁰⁶ ICJ, *Bosnia v. Serbia, Judgment*, sec. 390.

²⁰⁷ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, sec. 110; ICJ, *Bosnia v. Serbia, Judgment*, sec. 391.

²⁰⁸ ICJ, *Bosnia v. Serbia, Judgment*, sec. 394.

not hard to imagine that at least the appearance of a degree of autonomy on the part of the VRS was quite welcome, and perhaps entirely deliberate.

4.3.3. Direction or Control Test of Responsibility

The application of the third test of responsibility, responsibility on the basis of direction or control of a non-state organ, accepts as valid the separate political-territorial status of the Republika Srpska, but, like the *de facto* organ test, this test does not regard that alone as sufficient to immunize Serbia. However, it differs from the *de facto* test in that it does not require an Applicant to prove that a particular overall relationship exists between a state and an at least formally non-state organ. Whether the Republika Srpska had or could exhibit autonomy at any point is irrelevant for this test. The focus instead is on the relationship between the two in regard to specific conduct, and only that conduct—in this case the Srebrenica massacres. Bosnia and Herzegovina would have to prove that Serbia either directed or instructed the Republika Srpska to carry out the massacres or that in carrying out the massacres it acted under Serbia’s direction or control. The latitude of interpretation available to the Court consisted in the variable thresholds of attribution it could have applied. The Court adopted a threshold of “effective control” over specific operations from its own prior jurisprudence in the *Nicaragua v. United States of America* case. Bosnia and Herzegovina advocated two other thresholds, the first based on a differing understanding of the particular ontology of genocide as a complex aggregate of acts and the second an argument of the need to account for the concrete specificity—social, political, territorial—separating the

Nicaraguan and Bosnian conflicts. The Court rejected Bosnia's arguments and insisted upon its "effective control" test from *Nicaragua*.²⁰⁹

The basis for this test of responsibility is ILC Article 8 "Conduct directed or controlled by a state," which states that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.²¹⁰

The ILC Commentary on Article 8 specifies that acting 'on the instructions of' and 'under the direction of' and 'under the control of' are disjunctive without specifying exactly how these terms differ (§7). It is clear however that responsibility can be engaged in the absence of explicit instructions that a non-state organ carry out wrongful conduct. The Commentary explains that the responsibility of a state will be engaged if it directed or controlled the specific operation in which the wrongful conduct occurred and that conduct was integral to the operation (§3). The Commentary does specify further at §7 that "each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of."²¹¹

To prove Serbia's responsibility on the basis of this test, Bosnia and Herzegovina would have had to prove either that the massacres were carried out under the instructions of Serbia or that Serbia directed and controlled the seizure of the enclave and the

²⁰⁹ *Ibid.*, sec. 407.

²¹⁰ Crawford and ILC, *The International Law Commission's articles on state responsibility*.

²¹¹ *Ibid.*, 113.

massacres were an integral part of the seizure as an operation. If Bosnia and Herzegovina were to prove that Serbia exerted direction or control over the seizure of the enclave, the question remains as to whether the Court would find Serbia's responsibility engaged based on a whether the massacres were considered an integral part of the seizure of the enclave or not. As Hartmann points out, post-seizure massacres were entirely predictable and were an established part of the operations of Serbian nationalists after seizing control of territory.²¹² To determine if the massacres were integral the Court could have resorted to the kind of generalization it relied on to distinguish genocide and 'ethnic cleansing.' It could have separated out forced deportation from the other crimes constitutive of 'ethnic cleansing' and declare only deportation integral to the operation of seizure. Or the Court could point to the specificity of its definition of genocide as destruction in part, raising the standard of proof enormously by asserting that massacre of that nature was unprecedented and therefore not integral.

When the Court considered the evidence it moves back and forth between consideration of evidence for direction or control over the operation of the seizure of the enclave itself and more specifically the massacres. Where it finds evidence suggesting that the seizure of the enclave was "coordinated" with Serbia, it declares evidence concerning participation in preparation for the massacres as more significant for its purposes.²¹³ It concludes by citing a source that finds no compelling evidence of control or direction by Serbia over the seizure of the enclave and finds its responsibility therefore not engaged. In short, the Judgment at this point is not at all clear on whether the massacres were to be considered an integral aspect or not of the seizure. It would

²¹² "Srebrenica Through the ICTY's Eyes."

²¹³ ICJ, *Bosnia v. Serbia, Judgment*, sec. 411.

however return to the question when it addressed Serbia's responsibility for complicity where it finds that the massacres need not be considered integral to the seizure of the enclave.

Bosnia and Herzegovina had attempted to argue for two different but closely related thresholds of attribution to be applied in the direction and control test of responsibility other than the Court's threshold of effective control over specific operations. The first was to argue for an application of the effective control test to the operations in Bosnia and Herzegovina taken as a whole and the second was to argue for a standard of overall rather than effective control to be applied to specific operations. The Court rejected both of these ILC Articles but examining these arguments affords an opportunity to consider how adequate the effective threshold is in light of both the ontology of genocide and the specific modality of the grave crimes in the Bosnian conflict.

Bosnia and Herzegovina's first argument for effective control over the whole of the campaign of atrocities was based on a particular conception of the ontology of genocide, that genocide was a property of the whole that emerged from individual acts in their ensemble. This is of course not different from arguing that the property of genocide as a specific effect on a group emerges from the aggregate of multiple singular crimes applied to a more spatially and temporally concentrated instance, such as the multiple rapes and murders and mutilations perpetrated at the fall of Srebrenica. But effectively what Bosnia and Herzegovina was arguing through this alternative threshold was that acts can be spatially and temporally dispersed and still amount to genocide as destruction in

part.²¹⁴ However, the Court's entire methodology repudiates Bosnia and Herzegovina's approach. It had required that genocidal intent had to be inferred in relation to specific acts, not acts taken in their ensemble.²¹⁵ Here the Court insisted that the particular nature of the crime of genocide alone did not justify any deviation from ILC principles insisting on effective control over specific operations.²¹⁶ It asserts that these principles reflect customary international law, though this point is debatable.²¹⁷

Bosnia and Herzegovina's closely related second argument for a different threshold of control, one based on "overall" rather than "effective control," maintained that the circumstances that separated the Bosnian conflict from the Nicaraguan conflict were legally significant and required a different threshold of control.²¹⁸ This argument was originally produced by the justices of the Appeals Chamber of the ICTY in the *Tadić* case.²¹⁹ The overall control test required only that Serbia provide substantial support and overall direction to the Republika Srpska and the VRS but not explicitly order particular crimes or exert control over specific operations. To justify an interpretation that departed from the standard adopted by the Court in *Nicaragua v. United States of America*, the Appeals Chamber in *Tadić* appealed to, *inter alia*, geographic differences between the two cases. The shared territorial objectives combined with the existence of deep ethnic and social ties between the Republika Srpska and Serbia created a commonality of immediate and strategic interest that obviated the need for explicit instruction or

²¹⁴ *Ibid.*, sec. 401.

²¹⁵ *Ibid.*, 370.

²¹⁶ *Ibid.*, sec. 401.

²¹⁷ Cassese, "Nicaragua and Tadić Tests Revisited"; Caron, "The ILC Articles on State Responsibility."

²¹⁸ ICJ, *Bosnia v. Serbia, Judgment*, sec. 402.

²¹⁹ ICTY Appeals Chamber, *Tadić*.

effective control over specific operations. It noted also the nature of the political and military control that Serbia exerted over the Republika Srpska, a degree of control that became fully evident during the Dayton-Paris peace negotiations when Serbia not the Republika Srpska negotiated the end of the conflict on terms binding for the latter.²²⁰ If Milošević’s government had not exerted operational control over the massacres themselves, it would be consistent with a strategy of legal immunization seen in the ‘division of labor’ between the JNA and Serbian paramilitaries during the early stages of the Bosnian conflict. What the overall control test amounts to as the ICTY Appeals Chamber acknowledged is a different standard for *de facto* organ status than the Court’s ‘complete dependence’ threshold. The Court rejected the overall control threshold of attribution derived from the *Tadić* Appeal Chamber Judgment, stating simply that it stretched “almost to the breaking point” the connection that must exist between the actions of a state’s organs and its responsibility.²²¹

Even though the Court may have based its rejection of overall control on the ILC Article 8 and Commentary and its settled jurisprudence as expressed in *Nicaragua*, Cassese maintains that neither of these is consistent with customary international law.²²² The ICJ and the ILC are outliers in this sense.²²³ Cassese notes that it is the ICTY’s ruling on state responsibility in *Tadić*—which holds that effective control applies only to individuals and overall control to organized groups such as paramilitaries—is reflected in state practice, case law, and *opinio juris*. He cites case law of the European Court of

²²⁰ *Ibid.*, 146-162.

²²¹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 406.

²²² Cassese, “Nicaragua and Tadić Tests Revisited.” Cassese’s argument is in part against a critique of *Tadić* in Milanović, “State Responsibility for Genocide.”

²²³ Five members of the ICJ’s bench at the time of the case had been members of the ILC drafting its Articles on State Responsibility, Milanović, “State Responsibility for Genocide: A Follow-Up.”

Human Rights (ECtHR), reports of UN organs including the Secretary General, and international arbitral and claims commissions. He bases his argument also on an application of the customary law principle expressed in ILC Article 7 on state responsibility, that the acts of an entity empowered to exercise elements of governmental authority are attributable to a state even if that entity contravenes instructions.²²⁴

Significantly, two of the examples that figure into Cassese's argument as 'armed groups' to which the overall control test applies are in fact separatist parastates, the Turkish Republic of Northern Cyprus and the Transdnistria breakaway region of Moldova. In the case of Northern Cyprus, the ECtHR ruled that actions of the separatist administration were attributable to Turkey, despite its claims that Northern Cyprus had formally separate political status. As the ECtHR stated in *Cyprus v. Turkey*:

Where a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support.²²⁵

Talmon suggests that the ECtHR is propounding a third threshold of attribution in addition to overall and effective control, that of 'overall effective control' whereby control over territory, instead of control over the subordinate authorities themselves, becomes the basis for the attribution of responsibility.²²⁶ The role of the Turkish military and state in establishing and maintaining the borders of Northern Cyprus, of securing the

²²⁴ Crawford and ILC, *The International Law Commission's articles on state responsibility*.

²²⁵ ECtHR, *Cyprus v. Turkey*, 25781/94, sec. 77., cited in Cassese, "The Nicaragua and Tadić Tests Revisited"

²²⁶ Talmon, "The Responsibility of Outside Powers for Acts of Secessionist Entities."

territorial prerequisite of its existence, absent any explicit instructions in specific matters, engages Turkey's responsibility. Cassese however interprets the ECtHR rulings to refer in fact to control over the authorities.²²⁷

The reference in the ECtHR Judgment to Turkey's soldiers and officials illustrates a relevant difference between the Republika Srpska and Serbia case, the formal presence of the Turkish military and government in Northern Cyprus. But that the dependence of Northern Cyprus on Turkey for its survival is an element that engages Turkey's responsibility is nonetheless significant. Cassese's second example is compelling for its greater similarity to the Republika Srpska. The European Court of Human Rights in its 2004 Judgment in the case of *Ilaşcu and others v. Moldova and Russia*, was called upon to determine which state's responsibility (Moldova or Russia) was engaged by the conduct of the separatist parastate of Transnistria and found that:

[T]he Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transnistrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transnistria, which is part of the territory of the Republic of Moldova.

The Court also notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political

²²⁷ Cassese, "Nicaragua and Tadić Tests Revisited."

and economic support to the separatist regime... thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova.²²⁸

Russia's responsibility is engaged despite Transdniestria's formally separate political-territorial status and proof of complete dependence is not required. In the cases of both Transdniestria and Northern Cyprus the issue is not whether either is in a state of complete dependence upon their respective sponsor, as in the ICJ's standard for *de facto* organ status (which, again, derives from its *Nicaragua* ruling), nor is it a question of the wrongful conduct being carried out according to the instruction or direction of the sponsor. Rather responsibility is engaged through how instrumental the sponsor was in the coming into being and then continued existence of the separatist entity. As with Cyprus, the Russian military is still present in Moldova, but Russia does not occupy Transdniestria in the same way that Turkey occupies Northern Cyprus. It is therefore a much closer parallel to the relationship between the Republika Srpska and Serbia.

Bosnia and Herzegovina's arguments concerning the need for law to consider the ontology of genocide as a crime and the specific modality of genocide in the context of particular conflicts are compelling. However, as the Court insisted, its effective control threshold of attribution reflects the ILC Commentary on Article 8 and upholds its prior jurisprudence. These two are of course intrinsically linked.²²⁹ In this sense the outcome of the application of the direction and control test of responsibility is a product of the constraints imposed by existing law and principles of legal attribution. This is not to say

²²⁸ ECtHR, *Ilascu and Others v. Moldova and Russia*, 48787/99, sec. 382; Cassese, "Nicaragua and Tadić Tests Revisited," 659.

²²⁹ Caron, "The ILC Articles on State Responsibility."

that the *Nicaragua* decision, from which these were derived, was not itself the product of a prior geopolitics involving proxy warfare and the desire of states to immunize themselves from the attribution of legal responsibility. However, the Court could have chosen an approach to the Articles on State Responsibility that would, as Cassese suggests, read Article 8 in conjunction with Article 7.²³⁰ Support for a parastate or *de facto* state is at once support for an armed insurrection and an exercise of extraterritorial jurisdiction. It is empowering an armed group to exercise elements of governmental authority while remaining under the overall control of the sponsoring state. Such an approach would have brought the Court into harmony with customary international law as reflected in the practice of the ECtHR.²³¹

The differing practice of the ECtHR and even organs of the UN points to a degree of fragmentation in the global regime of international responsibility and indicates that the legal constraints faced by the Court were institution specific. This divergence in the practice of the ECtHR and the ICJ illustrates the importance of the geographic scope of participation in multinational juridical institutions. Participation in the ECtHR is limited to the 47 members of the Council of Europe and the law it adjudicates is that body's European Convention on Human Rights.²³² The ICJ operates at a global scale and is charged with maintaining international peace. Lacking any enforcement power, it acts, and in fact is structured to function, as an arbitral court whereby decisions must reconcile, and be reconciled to, the parties to the dispute and the international community of states as a whole. In contrast, the European Court of Human Rights is established to define

²³⁰ "Nicaragua and Tadić Tests Revisited."

²³¹ ECtHR, *Cyprus v. Turkey*, 25781/94; ECtHR, *Ilascu and Others v. Moldova and Russia*, 48787/99.

²³² ECtHR, "The Court in Brief."

Europe as a particular region within the global order. The harmony between the ICTY in *Tadić* and the ECtHR can be seen as reflecting that the ICTY was not charged with maintaining peace between major and lesser powers but with punishing individuals for crimes in a specific conflict in a specific region.

4.4. Conclusion

To grapple with the legal responsibility engaged by Serbia's massive and indispensable support for the ethnoterritorial separatist project of the Republika Srpska, given that that support had enabled the latter to commit genocide, the Court applied three tests of responsibility. The manner that the Court chose to treat the formal political-territorial separation of the Republika Srpska affected each of these tests by creating extremely high standards of proof for attribution. For the first test, responsibility of *de jure* organs, the Court chose to treat the Republika Srpska as a sovereign independent state. It insisted that even if it could be proven that organs of Serbia participated in the massacres, in the absence of evidence to the contrary they would have to be assumed to be operating under the authority of the Republika Srpska and their conduct would be attributable to it. Producing such evidence as the case illustrates is exceedingly difficult and, except where a state has been defeated in war and directly occupied, likely impossible. For the second test, responsibility for *de facto* organs, the Court demanded that the Republika Srpska demonstrate no capacity to not comply with the wishes of Serbia. States wishing to immunize themselves from responsibility need only provide such a degree of autonomy to their proxies, or at least give the appearance of such autonomy. For the third test, responsibility on the basis of direction or control, the Court

insisted that it be proven that Serbia either instructed the Republika Srpska to perpetrate the massacres at Srebrenica or that Serbia exerted control over the operation to seize the enclave, and the genocidal massacres were an intrinsic part of that operation.

The Court's stringent requirements, though consistent with its own prior jurisprudence, illustrate the fragmentation of the international regime of state responsibility. The European Court of Human Rights has consistently found that an essential relationship of aid and support between a separatist parastate and its state sponsor engages the responsibility of the latter for the wrongful conduct of the former. In contrast, through the stringent requirements of these tests of responsibility, the Court has established the efficacy of parastate formation as a means of avoiding the attribution of legal responsibility for genocide itself.

CHAPTER V
STATE RESPONSIBILITY: COMPLICITY AND OTHER ANCILLARY
OFFENSES UNDER ARTICLE III

5.1. Introduction

Having failed to find Serbia's involvement in the Bosnian conflict engaged its direct responsibility for the commission of genocide at Srebrenica, the Court then proceeded to address the question of whether Serbia was responsible for any of the ancillary genocidal crimes of Article III: conspiracy, direct and public incitement, attempt, or complicity and again failed to find Serbia responsible. These are forms of participation in the crime of genocide other than actually committing any of the *actus reus* of genocide as defined in Article II and therefore constitute secondary forms of liability.²³³ Its treatment of the first three offenses is cursory and offers little guidance on how to translate these criminal law categories into a regime of state responsibility. The Court did grapple with this issue in regard to complicity. It again chose to apply to the relationship between Serbia and the Republika Srpska international rules of responsibility devised for interstate relations, effectively choosing to regard the parastate as a *de facto* state. It translated complicity into the ILC requirements for international responsibility for provision of aid and assistance, which it chose to interpret as requiring certain knowledge of the perpetrator's genocidal intent. Making a positive finding of fact on when the VRS formulated its genocidal intent that dramatically narrowed the spatial and temporal window of Serbia's potential responsibility, the Court found this requirement

²³³ Schabas, *Genocide in International Law: The Crimes of Crimes*.

had not been satisfied. The almost one-third of the Justices who dissented asserted that it had in fact been proven that Serbia had the requisite awareness.

5.2. Ancillary Offenses Other Than Complicity: Conspiracy, Incitement Attempt

The Court's treatment of the first three ancillary offenses is less significant to an understanding of the implications of the Judgment for the international regime of responsibility than its ruling on complicity. The Court summarily dismissed these charges without engaging with what it would mean to translate these criminal law offenses into a regime of state responsibility. Yet the manner of its treatment of these issues affords an opportunity to highlight that the outcome of the case was not the result of a straightforward application of the law but also of the particular approach of this Court to issues of law.

The Court does not rule on the offense of attempt to commit genocide. This is presumably because, as the Court noted, Bosnia and Herzegovina had not made any submission in that regard.²³⁴ For the two offenses it did consider, conspiracy and direct and public incitement, the Court decided that it would have to examine the question of Serbia's responsibility only in relation to Srebrenica.²³⁵ For conspiracy, it asserted that it would not have to rule on the offense because it had not found that the commission of genocide at Srebrenica could be attributed to Serbia. But if genocide as the Court ruled could be committed in a localized area, there is no logical reason Serbia could not have conspired to commit genocide elsewhere in Bosnia and Herzegovina. Producing evidence to support such an accusation is entirely another matter but the Court dismisses

²³⁴ ICJ, *Bosnia v. Serbia, Judgment*, sec. 416.

²³⁵ *Ibid.*, sec. 417.

conspiracy without considering evidence. For direct and public incitement, the charge is dismissed on the basis of lack of evidence, but the Court again restricts itself only to the massacres at Srebrenica “as is appropriate.”²³⁶ (Though it does mention in passing a lack of evidence for incitement to commit genocide elsewhere in Bosnia and Herzegovina.) Since the ancillary offenses are inchoate and do not require that incitement actually succeed in inciting anyone,²³⁷ there is no logical or legal reason to restrict examination of the charge to an instance of the actual commission of genocide, anymore than there would be in the case of conspiracy.

The spatiotemporal delimitation of the characterization as genocide only to acts committed at Srebrenica dramatically narrowed the window of the potential attribution of responsibility to Serbia. But for offenses other than complicity, that alone should not have excluded consideration of responsibility for ancillary offenses in relation to acts elsewhere in Bosnia and Herzegovina. The Court’s high standard of proof and threshold of attribution would of course have posed great difficulties in proving conspiracy or attempt, particularly as the Court refused to attempt to obtain the documents of the Supreme Defense Council and restricted itself to inferring intent based on manifest acts. The nature of conspiracy and attempt as forms of responsibility falling short of the actual commission of genocide would have made truly daunting to prove them on the basis of manifest acts. This would of course not be true of direct and public incitement. Evidentiary issues aside, the Court’s jurisprudence in relation to ancillary offenses is

²³⁶ Ibid.

²³⁷ Schabas, *Genocide in International Law: The Crimes of Crimes*.

curious and is no doubt a source of the perception that the verdict was “rushed” with an air of “half-heartedness.”²³⁸

5.3. Complicity

Complicity as an ancillary offense is of a different order than the previous three. It necessarily involves a direct connection with the actual commission of genocide.²³⁹ It is not an inchoate offense that could be determined, in reference to this case, through consideration of acts elsewhere than at Srebrenica. That necessary linkage with commission means that here again the Court’s effective spatiotemporal delimitation of the characterization of acts as genocide contributed significantly to Serbia not being found responsible. However, that alone was not enough to allow Serbia to escape being found responsible for complicity. First, the Court had to decide how to translate the criminal offense of complicity into rules of international state responsibility. It chose to regard the political-territorial entity of the Republika Srpska as, *de facto*, a state. This allowed it to apply a stringent standard for attribution derived from the ILC Articles on State Responsibility. Second, the Court took over a debatable finding of fact from the ICTY on when the perpetrators formulated their genocidal intent that even further constricted the window of Serbia’s potential responsibility.

First, the Court chose to translate the criminal law offense of complicity into the terms of existing principles of state responsibility by finding that complicity was

²³⁸ Gattini, “Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment.”

²³⁹ Keeping in mind that genocide itself consists of acts committed with the intent to destroy. It is not predicated on the fact that such acts actually effect what they intend. Though the Court’s application of its standard of proof in relation to intent—that genocidal intent can only be inferred only if it can only be exclusively inferred on the basis of manifest acts—effectively erases this.

analogous to ILC Article 16, “Aid or assistance in the commission of an internationally wrongful act.” As the Court acknowledged, that Article was not “directly relevant” because it concerns relations between states.²⁴⁰ The Republika Srpska was not a state under international law, but because the Court chose to treat it as such, the parastate formation strategy made its contribution. Had the Court not decided to treat the Republika Srpska as a *de facto* state, the Court may have had to engage more concretely with situations not envisioned or addressed by the Articles on State Responsibility. These Articles, in preparation for 40 years, do not encompass the realities of the 21st century, in particular the prominence of non-state actors,²⁴¹ or as I would argue, parastate actors. For customary law principles, the Court could have turned to state practice and judicial precedent for separatist territorial political entities that are highly dependent and functionally integrated in important ways with their sponsors. The European Court of Human Rights (ECtHR) has ruled in several cases on state responsibility in such situations.²⁴² This judicial practice is important because genocide is ultimately a brutal form of territoriality and there is little if any precedent on the matter of state responsibility in territorial disputes.²⁴³ Alternately, it could have developed, as it did in *Nicaragua*, its own new approaches to state responsibility that go beyond what is encoded in the ILC Articles.²⁴⁴ Instead, the Court demonstrated its preference to approach

²⁴⁰ ICJ, *Bosnia v. Serbia, Judgment*, sec. 420.

²⁴¹ Weiss, “Invoking State Responsibility in the Twenty-First Century.”

²⁴² Cassese, “Nicaragua and Tadić Tests Revisited.”

²⁴³ Milano, “Territorial Disputes, Wrongful Occupations and State Responsibility.” The Court’s 2005 decision in *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* is an important exception to the Court’s lack of jurisprudence. But here there was no question of parastate formation but rather direct occupation and support for non-state armed groups, wherein the Court drew upon its prior jurisprudence in *Nicaragua*.

²⁴⁴ As noted, the ILC articles are a scholarly study, not an international convention with the status of law,

fundamental issues at a high level of abstraction, an approach that enabled it to apply an ILC article “not directly relevant.”²⁴⁵

Article 16, which the Court did elect to apply, reads in its entirety:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

The Court interpreted the rather broad language of “with knowledge of the circumstances” in relation to genocide to mean that it had to be proven that Serbia had “full knowledge” of the perpetrators’ specific intent to commit genocide, as the Court defines it.²⁴⁶ It did so with reference to the ILC Commentary on Article 16 that stipulates three conditions that limit a state’s responsibility under the article: the state must be aware of the circumstances that make the act committed internationally wrongful; the state must intend for the assistance to further the commission of the wrongful act and that act must have actually been committed; and the act must have been wrongful if the state had committed it itself.²⁴⁷ The first and third of these correspond to the explicit

see Caron, “The ILC Articles on State Responsibility.”

²⁴⁵ ICJ, *Bosnia v. Serbia*, Dec. Keith, §420.

²⁴⁶ Ibid., 423.

²⁴⁷ Crawford, *The International Law Commission’s articles on state responsibility: introduction, text, and commentaries*, 149.

provisions of the Article. The second, the requirement that it should intend to facilitate that wrongful act, is not actually an explicitly stated provision of the Article.

When the Court applied these requirements to the evidence provided by the parties, it did not find it conclusively proven that the first condition, awareness, was satisfied.²⁴⁸ It therefore did not rule on the condition of intent in the provision of aid and assistance. The question of whether a state providing aid and assistance must not only be aware of the perpetrators' specific intent but also share that intent was raised by the Court but not addressed.²⁴⁹ Had it done so and affirmed that requiring the sharing of specific intent was in keeping with the ILC Commentary on Article 16, intent would have piled on intent in the ILC's highly stringent regime of state responsibility. Such a requirement would have imposed a staggering burden of proof on any Applicant. Because it did not rule on the requirement, it is not clear if providing aid and assistance while aware of the perpetrator's intent would be sufficient to infer that an accomplice state intended that it be so used. In a future case, the ICJ may require additional proof to satisfy its intent requirement. Just satisfying an 'awareness of the circumstances' requirement that demands certain awareness of the intent to commit the crime of genocide alone imposes a standard of proof that would be very difficult to meet, not least because the Court has defined genocide very specifically. It is not enough that a state intend that its aid or assistance be used to commit ethnically targeted massacres, but ethnically targeted massacres targeted in such a way as to biologically or physically destroy a localized community. Applied in this case, the Court imposes a requisite standard of knowledge that effectively requires that it be proven that the state providing

²⁴⁸ ICJ, *Bosnia v. Serbia*, Dec. Keith, sec. 422.

²⁴⁹ Ibid., sec. 421.

aid and assistance, Serbia, be aware of a legal characterization that would not be made until twelve years in the future, an *ex pre facto* requirement likely unprecedented in international jurisprudence.

The Court's translation of complicity into the terms of Article 16 means that though Serbia was formally judged for responsibility for complicity, in fact it was not. The Court's application of Article 16 differs in several respects from the crime of complicity as it exists in international criminal law.²⁵⁰ The Court comes up with a two-fold definition of complicity in genocide in both its material and mental elements. The material element for the Court must be an act of commission, a positive act. The mental element requires certain knowledge that the aid or assistance provided will be used in the commission of a crime.²⁵¹ First, ICTY and ICTR case law has established that responsibility for complicity can be engaged by acts of omission as well as commission in certain circumstances. Reference to those specific circumstances would distinguish between these acts of omission as complicity and mere failure to prevent. Second, the mental element of complicity, harboring the intent to provide aid or assistance in the commission of a crime can be engaged not only when there is certain knowledge that a specific act will be committed with the aid or assistance but when there is knowledge of a high possibility that the act will be committed. Providing aid or assistance with such 'knowledge of the circumstances' in international criminal law would engage responsibility on the basis of recklessness, or *dolus eventualis*.²⁵² The Court's ruling that the provision of aid or assistance with knowledge of the grave likelihood that it will be

²⁵⁰ Cassese, "On the Use of Criminal Law Notions in Determining State Responsibility for Genocide."

²⁵¹ Ibid.

²⁵² Ibid.

used in the commission of a crime is not complicity thus makes ‘complicity’ for the purposes of state responsibility very different from complicity as that term is normally used. Given the Court’s Judgment in this case, a state may avoid the attribution of responsibility for complicity by providing aid or assistance in the commission of genocide while deliberately leaving itself without certain awareness of the perpetrators intentions, even though circumstances indicate the grave risk that those receiving the aid or assistance will use it to commit genocide.

Finally, the Court narrows the window of Serbia’s potential responsibility even further by making a positive finding of fact that further circumscribes the temporal window for Serbia’s potential awareness of the VRS’s genocidal intent. The Court determined that the decision to eliminate the male population at Srebrenica was made after the seizure of the enclave.²⁵³ Earlier at §295 the Court had reached this conclusion “fortified” by the findings of the ICTY Trial Chamber in *Krstić* and *Blagojević*. Therefore, aid or assistance provided for the takeover of the enclave is automatically excluded from consideration for the attribution of responsibility for genocide and the massacres are abstracted from the sequence of events that were their necessary precursor and without which they could not have occurred. However, while the *Krstić* Trial Chamber found that the decision to exterminate the male population at Srebrenica was taken after the seizure of the enclave,²⁵⁴ the *Blagojević and Djokić* Trial Chamber found that the seizure of the enclave and the massacres were “all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica.”²⁵⁵ Moreover, the recently

²⁵³ ICJ, *Bosnia v. Serbia*, *Judgment*, sec. 423.

²⁵⁴ ICTY Trial Chamber, *Krstić*, sec. 87.

²⁵⁵ ICTY Trial Chamber, *Blagojević and Jokić*, sec. 674.

amended indictment of Radovan Karadžić at the ICTY suggests that the Tribunal may now be in possession of evidence proving that this prior finding of the Court—that the decision to commit genocide was made before and not after the seizure of the enclave—is in fact mistaken.²⁵⁶

Four of the fifteen judges on the Court disagreed with the majority and insisted that Serbia was responsible for complicity in genocide, a degree of dissent almost equaling those who objected to the Court’s findings on state responsibility. Judges Keith and Bennouna both issued Declarations agreeing that Serbia was not responsible for genocide but affirming that it was responsible for complicity in genocide. Each cited the continual relationship of aid and assistance Serbia provided the VRS and Republika Srpska and differed with the majority on whether the facts proved that Serbia had the requisite knowledge. Judge Al-Khasawneh and Judge *ad hoc* Mahiou maintained that Serbia was responsible for genocide itself but, if failing to find it responsible as a principle, there was sufficient evidence for the Court to find Serbia responsible for complicity.

Judge Keith in his Declaration asserted that the necessary intent of complicity in genocide was the provision of aid and assistance with knowledge of the direct perpetrator’s genocidal intent. The complicit state need not share the specific intent of genocide with the perpetrator.²⁵⁷ Regarding the facts establishing Serbia’s responsibility, he cited the evidence of how close relations were between Mladić and Milošević as the former was committing the massacres. The day the massacres are believed to have begun, Mladić was in Belgrade meeting with Milošević. Milošević subsequently played a key

²⁵⁶ Hartmann, “Srebrenica Through the ICTY’s Eyes.”

²⁵⁷ ICJ, *Bosnia v. Serbia*, Dec. Keith, sec. 1.

role in negotiations concerning the conduct of VRS forces toward the population of the now captured Srebrenica.²⁵⁸ This proof of close interaction of the leaderships of the Republika Srpska and Serbia, coupled with the conclusively proven provision of substantive material and other aid both before and after the massacres, is enough to satisfy the mental and material elements of complicity even during the majority's narrowed temporal window of potential responsibility.

In a similar manner, Judge Bennouna put forth a separate opinion that challenges the majority's evaluation of the facts proving Serbia's continued provision of aid and assistance while being aware of the Republika Srpska's genocidal intent. In doing so, he does not challenge the majority's legal construction of the requisite awareness of the direct perpetrator's intent necessary to find Serbia responsible for complicity in genocide and that necessary to engage responsibility for failure to prevent. The requirements of the text of the Article for (a) the provision of aid or assistance with (b) awareness of the circumstances making the conduct wrongful were met in his opinion. Regarding the first requirement, Judge Bennouna asserts that "ongoing political, military and financial support existed before, during and after the massacre at Srebrenica."²⁵⁹ In addition to the close interaction of Mladić and Milošević, he cites other evidence of ongoing aid and assistance that continued during the massacres, aid and assistance that also establishes that Serbia should have had the requisite awareness of the VRS's intent to commit genocide. He cites the presence of VJ officers at VRS headquarters at Hans Pijesak and the participation of the "Scorpions" in the massacres. Regardless of whether the latter were *de jure* organs or not, he regards their close ties with Serbia's Interior Ministry

²⁵⁸ Ibid., sec. 8.

²⁵⁹ ICJ, *Bosnia v. Serbia*, Dec. Bennouna, 363.

Police (MUP) fully proven. For him it would be inconceivable that either the VJ officers at VRS headquarters or the “Scorpions” would not have kept their superiors or sponsors in Serbia fully informed of the decision to commit genocide and the necessary preparations being taken. And because the “Scorpions” directly involved in perpetrating the massacres at Srebrenica, the material element of complicity is amply satisfied.

Effectively, like Judge Keith, Bennouna does not abstract the massacres from the overall continuum of events. The ongoing provision of aid, coupled with awareness during the specific temporal window asserted by the majority, is sufficient to establish complicity.

Two Judges who voted against the majority decision that Serbia was not responsible for complicity produced Dissenting Opinions that emphasized their belief that Serbia was responsible for genocide as a principal. Judge Al-Khasawneh made little effort to distinguish Serbia’s potential secondary responsibility from its responsibility as a principal. His arguments aim mainly at establishing Serbia’s responsibility for genocide and then only parenthetically refer to how the same facts could establish its responsibility for various ancillary offenses including complicity.²⁶⁰ Judge *ad hoc* Mahiou on the other hand made some effort to establish Serbia’s separate responsibility for complicity while still asserting his conviction in its responsibility for genocide itself. He found the Court’s distinction between responsibility for complicity and failure to prevent based solely on a difference between awareness of the certainty of commission and the grave risk of commission “hard to comprehend.”²⁶¹ Serbia’s awareness of the grave risk of genocide, activating its responsibility to prevent, should have caused it to cease aid and assistance to the Republika Srpska and VRS. For him, its failure to do so and its continued provision

²⁶⁰ ICJ, *Bosnia v. Serbia*, *Dissenting Op. Al-Khasawneh*.

²⁶¹ ICJ, *Bosnia v. Serbia*, *Dissenting Op. Mahiou*, sec. 128.

of aid and assistance *ex post facto* constitute complicity.²⁶² He also refuses to abstract the massacres from the overall continuum of events. He asks rhetorically, “Must one have acted only ‘at the critical time’, as indicated in paragraph 423, to be an accomplice to genocide? Is it really possible to massacre over 7,000 persons in an improvised or spontaneous way, without some degree of advance preparation and planning?”²⁶³ His critique of the Court’s use of its constrictive definition of genocidal intent to restrict the spatio-temporal frame of Serbia’s potential responsibility draws its strength from the scale and complexity of the crime and the demands this imposes upon the bureaucratic structures capable of committing it. His citation of *ex post facto* support applies some of the same notions of responsibility utilized in the command responsibility mode of liability in the ICTY’s jurisprudence on joint criminal conspiracy. Although Mahiou is a past president of the ILC, his views on state responsibility put him closer to the jurisprudence of the European Court of Human Rights than the ILC or the ICJ majority in this case. He differs from the majority both in his evaluation of the facts concerning Serbia’s provision of aid while in possession of awareness of the VRS’s genocidal intent and concerning its construction of the material and mental elements of the offense of complicity.

5.4. Conclusion

In conclusion, even though explicitly alluded to in Article IX of the Convention, the Court’s finding that a state could be held responsible for offenses formulated in terms of criminal law in Article III of the Convention constituted an expansion of the

²⁶² Ibid.

²⁶³ Ibid., sec. 127.

international regime of state responsibility.²⁶⁴ Yet the Court's formulation of the requisite standards of proof for attribution acted to severely constrain the likelihood of finding a state responsible. The Court's treatment of ancillary offenses other than complicity was peremptory; future cases before the ICJ will formulate the application of international principles of responsibility for these offenses. The determination that Serbia was not responsible for complicity was the result of applying a threshold of responsibility more stringent than that which exists in international criminal law. The Court applied a principle of state responsibility from the ILC Articles that required that a state providing aid or assistance do so not with knowledge of the grave risk of that aid or assistance being used in the commission of genocide but with certain knowledge that it would be so used. The Court was able to do this because it chose to treat the parastate of Republika Srpska as *de facto* a state for the purposes of the attribution of international responsibility. This despite the fact that the Republika Srpska was effectively sidelined at the time of the massacres and its ostensible army, the VRS, was closely coordinating its activities with the leadership of Serbia. Instead of engaging with the international legal implications of the VRS as a military formation with likely greater autonomy from the Republika Srpska than from Serbia, the Court had resort to the international legal fiction of the sovereign territorial state. The ILC codification of principles of international responsibility upon which it relied has not kept up with rapidly evolving international relations between states and non-state and parastate actors, even though customary international law to a degree has. The relationship of relative power between the VRS and the two political entities was a reflection of the Republika Srpska's dependence on

²⁶⁴ Cassese, "On the Use of Criminal Law Notions in Determining State Responsibility for Genocide."

Serbia's aid and assistance and the limited real capacities of the Republika Srpska government. That aid however was without legal consequence for Serbia's responsibility for complicity. Serbia was exonerated of responsibility for complicity both because the Court chose to abstract the genocidal massacres from the continuum of events and because it further narrowed the window of Serbia's potential responsibility by taking over a debatable finding of fact from the ICTY on when the VRS formulated its genocidal intent.

Two of the four dissenting Judges did not contest the majority's construction of the requirements to prove complicity but insisted that it had been proven that the Serbian leadership did have the requisite awareness of the VRS's genocidal intent. Judge *ad hoc* Mahiou on the other hand insisted that Serbia's responsibility for complicity was engaged when it became aware of the grave risk of genocide, yet continued its aid and assistance to the Republika Srpska. Mahiou's position fills a gap in the structure of international legal accountability opened up by the majority's Judgment, a gap that can be more fully appreciated after consideration of the Court's ruling on the obligations to prevent and to punish genocide and that on the award of reparations for breach of those obligations, matters we turn to next.

CHAPTER VI

STATE RESPONSIBILITY: OBLIGATIONS UNDER ARTICLE I, FAILURE TO PREVENT AND FAILURE TO PUNISH, REPARATIONS

6.1. Introduction

Having failed to find Serbia guilty of any offense under Article III of the Convention, neither genocide nor any other ancillary offense such as complicity, the Court turned to the matter of Serbia's responsibility under Article I of the Convention, the obligations to prevent and to punish. Here the Court upheld that Serbia was responsible for breaches of these obligations. On this basis, Serbia became the first state in history to be judged in breach of its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Yet the Court at the same time refused to award Bosnia and Herzegovina financial compensation as reparation for this breach and instead awarded it only declaratory satisfaction. For obligations under Article I the Court adopted a lower threshold of attribution than for offense under Article III, but then subsequently coupled that with an almost impossibly high threshold of proof for the award of reparations. The threshold of attribution imposed by the Court for reparations was not simply pre-given in law and is of dubious suitability for establishing a regime of international accountability for genocide.

6.2. Failure to Prevent

Failure to prevent, like complicity, requires that genocide actually have been committed. Serbia's potential responsibility for breach of this obligation was limited,

spatially and temporally, to those few days in July of 1995 in the environs of the town of Srebrenica. The separate political-territorial status of the Republika Srpska posed no barrier to the attribution of responsibility for the failure to prevent. The Court had already found during the Preliminary Objections stage that the obligation was not limited to Serbia's own territory.²⁶⁵ Serbia's efforts to sustain the existence of the separatist parastate it had helped bring into being constituted instead the basis for it having a particular responsibility to prevent. Any degree of autonomy on the part of the Republika Srpska is irrelevant, as the obligation to prevent is one of conduct and not result. The Court's reasoning for this is particularly salient for any analysis of its later finding on the award of reparations. For the Court, a state cannot justify a failure to act by claiming that genocide would have occurred anyway because this would be "generally" difficult to prove, and the combined efforts of multiple states would likely be necessary to actually effect prevention.²⁶⁶

In an implicit recognition perhaps of the potential overlap of the material element of failure to prevent and complicity given its constrained definition of complicity, the Court endeavors to distinguish the two offenses. Most crucial to finding Serbia responsible for failure to prevent rather than complicity was that the Court imposed a very different standard of knowledge for each. The Court determined that the obligation to prevent begins as soon as a state learns that there is a *serious risk* of genocide being committed. The breach of the obligation to prevent begins only when the genocide itself begins, but the onset of the obligation to prevent occurs earlier. This is in stark contrast to its requirement of certain knowledge for the attribution of responsibility for complicity.

²⁶⁵ ICJ, *Bosnia v. Serbia, Judgment, Preliminary Objections*, sec. 31.

²⁶⁶ ICJ, *Bosnia v. Serbia, Judgment*, sec. 430.

But the Court further distinguishes the two in a manner that raises questions about a potential gap in the international regime of responsibility opened up by the Court's delimitation of these offenses. The Court states that breach of the obligation to not be complicit is one of commission, while breach of the obligation to prevent is one of omission.²⁶⁷ Stated differently, the obligation to not be complicit is a negative obligation, a party must refrain from certain acts, while the obligation to prevent is a positive obligation, a state must perform certain acts.

One must recall again that for the Court, a state may provide aid and assistance while being fully aware of the serious risk that that aid will be used for the commission of genocide, but this will not be considered complicity. Only if it provided aid or assistance once it did have certain awareness of the perpetrators' genocidal intent would its responsibility for complicity be engaged. But would provision of aid or assistance with knowledge of grave risk be considered failure to prevent? The Court is not at all clear on this issue. It does not specify what measures Serbia would have to have taken to comply with its obligation to prevent given its prior conceptualization of breach of the obligation to not be complicit as one of commission and breach of the obligation to prevent as one of omission. Ceasing to provide aid as a measure of prevention would appear to be a negative act, one of omission. But one could just as reasonably consider that this would constitute the exertion of influence in order to prevent and therefore constitute a positive act. But again, the Court does not specifically address what measures Serbia should have taken to fulfill its obligation to prevent. As it stands, the Court may consider the positive act of providing aid or assistance with knowledge of the likelihood of it being used to

²⁶⁷ The Court's definition of complicity differs from the jurisprudence of the international criminal tribunals for the former Yugoslavia and Rwanda, according to which complicity could consist of acts of omission. The Court makes no attempt to acknowledge or explain its departure in this respect.

commit genocide constitutes merely failure to prevent. It does not explicitly say so however. Its insistence on distinguishing between acts of commission constitutive of complicity from acts of omission constitutive of failure to prevent leaves room for some doubt. The same act, the positive act of providing aid with knowledge of grave risk, would have to be regarded as a negative act of omission to be judged as failure to prevent. That would appear to beggar the entire distinction that the Court felt it so important to make. Applying rules of interpretation to the Judgment that the ILC devised for the interpretation of treaties, it would be manifestly absurd for the Court to determine that provision of aid and assistance with knowledge of the grave risk would fall into a legal void between complicity and failure to prevent.²⁶⁸ It is reasonable to assume that the Court considered the act of continuing to provide aid and assistance with knowledge of the grave risk as partly constitutive of Serbia's failure to prevent.

Turning to the facts of the case at hand, the Court found that Serbia violated its obligation to prevent because it was in a unique position to influence the VRS and Republika Srpska and because it possessed the requisite awareness of the grave likelihood of genocide being committed. The Court refers to the "strength of the political, military, and financial links" between Serbia and the Republika Srpska establishing the requirements of its obligation to prevent.²⁶⁹ Those links are not reducible entirely to the substantial and indispensable aid and assistance that Serbia provided, yet that aid was undoubtedly a source of major influence. The Court notes Serbia was bound by Provisional Orders of the Court from 1993 requiring it to ensure that genocide was not committed, not only by its own organs or those it directed and controlled but also by

²⁶⁸ See United Nations, *Vienna Convention on the Law of Treaties*.

²⁶⁹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 434.

those over whom it had influence. And finally, the Court noted the existence of evidence that Serbia had the requisite awareness, including a statement of Milošević to General Wesley Clark that he had warned Mladić not to “do this” in reference to the Srebrenica massacres.²⁷⁰ The Court found that there was no evidence Serbia took any measure to prevent the genocide at Srebrenica, though it was aware of the grave risk.²⁷¹ The Court did not specify how Serbia could have discharged its obligation to prevent, it simply notes that it did not take any action.

The Court thus applied a less stringent standard for the existence of an obligation to prevent as opposed to that which must exist for attribution of responsibility for genocide. The relationship must be one of “influence” rather than “complete dependence” or “effective control.” This is coupled with a less stringent standard of knowledge with respect to the intent of the perpetrator than that for complicity, likelihood rather than certainty. However, a definition of failure to prevent that is so broad as to include positive acts of aid and assistance as well the negative act of failing to exert power or influence over a course of events that one is not otherwise making a substantial material contribution to enable effectively opened up a vast lacuna in the regime of international legal responsibility for genocide. It does so by grouping together of acts of commission and acts of omission of a very different nature. Some authors nonetheless regard the Court’s reading of an obligation to prevent in Article I that exceeds the expressly stated obligations of Articles IV through VIII to be “revolutionary.”²⁷² This expansive reading of the obligation to prevent imposes duties upon states that may enhance the likelihood of

²⁷⁰ Ibid., sec. 437.

²⁷¹ Ibid., sec. 438.

²⁷² Birkland, “Reining in Non-State Actors”; Gibney, “Genocide and State Responsibility.”

states acting to prevent genocide outside the juridical realm, that is, politically and militarily.²⁷³

The Court's application of the Convention to the obligation to prevent was limited by its jurisdiction *ratione personae* in this case, that is to Serbia and Bosnia and Herzegovina as parties to a dispute under Article IX. But in establishing the conditions through which Serbia's responsibility to prevent was incurred, it did nonetheless articulate some general principles that could be used to establish the responsibilities of other states in relation to the Bosnian conflict, including the home states of some of the Judges on the Court's bench and even the United Nations itself. It did not, however, explicitly address these. Much like the abortive *Use of force* cases initiated by Serbia in response to the NATO bombing campaign of the Kosovo War, the Court would have to rule on these individually after the initiation of specific proceedings by Bosnia and Herzegovina. The possible legal responsibility for failure to prevent of other parties to the conflict, including those that intervened in the guise of keeping (a nonexistent) peace or providing humanitarian assistance, remains to be adjudicated. And it likely never will.

Both Judges Tomka and Skotnikov disagreed with the majority's finding that the obligation to prevent genocide is not territorially limited, asserting that the obligation to prevent is limited to the state's own territory or extraterritorial areas over which it exercises jurisdiction. Tomka reasons that the obligation to punish as specified in Article VII is territorially restricted, and that it is therefore legitimate to interpret the obligation to prevent as territorially limited.²⁷⁴ He further asserts that, beyond territory over which a state exercises jurisdiction, the obligation to prevent is limited to persons or groups over

²⁷³ Birkland, "Reining in Non-State Actors."

²⁷⁴ ICTY Appeals Chamber, *Tadić*.

which the state exercises control rather than influence.²⁷⁵ Without specifying the requisite degree of control, which Tomka does not do, that requirement would seem to erase the distinction between responsibility as a principal and responsibility as an accomplice. Tomka does assert that there is no evidence that Serbia exerted control over the Republika Srpska and that since the VRS decided to perpetrate genocide only after the seizure of Srebrenica, it could not have prevented genocide anyway. Of course the ICTY did find that Serbia exerted ‘overall control,’ and given the proven awareness of the grave risk of genocide, Serbia had time to act to prevent. His Opinion is an example of the lengths some justices were willing to go to circumscribe the application of the Genocide Convention. Tomka’s entire reasoning appears to uphold the norm of territorial sovereignty as more important for the maintenance of global order than the obligation to prevent genocide. Except when one considers that the most effective measures Serbia could have taken to prevent genocide would have involved ceasing to violate Bosnia and Herzegovina’s territorial sovereignty. For his part, Skotnikov held that the obligation to prevent was not limited to the prosecution of individuals, but that, simply, the responsibility for failure to prevent was engaged when genocide was committed on territory over which a state has jurisdiction or control and not by persons or organs whose conduct was attributable to it. The duty to prevent is, moreover, one of result, not conduct.²⁷⁶ Judge *ad hoc* Kreća asserts that an obligation to prevent is inconsistent with criminal law norms and that the obligation to prevent is a social and political, and not legal, one.²⁷⁷ Needless to say, however the majority may have been concerned to limit the

²⁷⁵ ICJ, *Bosnia v. Serbia*, *Sep. Op. Tomka*, sec. 67.

²⁷⁶ ICJ, *Bosnia v. Serbia*, *Dec. Skotnikov*, 379.

²⁷⁷ ICJ, *Bosnia v. Serbia*, *Sep. Op. Kreća*.

effectiveness of the Convention as a tool of state accountability, they did not find the reasoning of Tomka, Skotnikov, or Kreća convincing.

6.3. Failure to Punish

A matter of secondary importance is the application of the Convention to Serbia's failure to punish the crime of genocide. It is of secondary importance only because it pales in significance in regard to the impact of Serbia's other violations of the Genocide Convention that the Court considers 'failure to prevent.' However, for one author, its failure to punish makes Serbia an *ex post* accomplice in genocide.²⁷⁸ In contrast to the obligation to prevent, provisions relating to the obligation to punish are spelled out in Articles IV through VII that constitute the bulk of the Convention's operative articles. Article VI of the Convention establishes that persons charged with genocide are to be tried by the national courts of the state upon whose territory the crime was committed or by an international tribunal. Since the Republika Srpska was a formally separate political entity not a part of the territory of the FRY, Serbia was not obligated to try even its own nationals for genocidal crimes.²⁷⁹ Bosnia and Herzegovina was the state responsible to try Serbian nationals implicated in genocide. The Court did however have to address whether Serbia was obligated to cooperate with the ICTY. Being a signatory to the Convention alone was not enough to establish that obligation. The jurisdiction of the tribunal is limited by the text of Article VI of the Convention to Contracting Parties who have

²⁷⁸ Tomuschat, "Reparation in Cases of Genocide." For criminal responsibility, the ILC rejects the notion of *ex post facto* complicity except where aid or assistance provided after the commission of acts of genocide was explicitly agreed to prior to the commission of those acts (ILC, "Draft Code of Crimes against the Peace and Security of Mankind.")

²⁷⁹ Failure to prevent is not one of the punishable acts enumerated in Article III. It thus gives rise to state rather than individual responsibility under the Convention.

accepted its jurisdiction. Serbia had agreed to cooperate with the ICTY as a part of the Dayton peace agreement it had signed in December of 1995, so the Court did not have to establish any other basis upon which Serbia could be considered to have accepted the ICTY's jurisdiction. The Court accordingly found Serbia in breach of its obligation to punish for its failure to cooperate with the ICTY in the arrest and extradition of indicted suspects, including General Mladić. It will be for a future case to address the issue of a state's acceptance of the jurisdiction of an international tribunal in the absence of the explicit assent given by Serbia in signing the Dayton peace agreement.

6.4. Reparations

Upon finding that Serbia was in fact guilty of failure to prevent and failure to punish genocide, the Court turned to the matter of just reparations, the sanction given the Court's notion of 'civil' liability for genocide. Because the jurisdiction of the Court was limited to the crime of genocide, the Court was not in a position to award damages for anything other than the Srebrenica massacres. Serbia's complicity in and commission of war crimes and crimes against humanity on Bosnian soil, however destructive, were beyond what the Court could assess reparations for. The Court's constrained definition of genocide therefore had the effect of automatically limiting Serbia's potential financial liability. But, as with other matters, the outcome of the case was the result of the Court making legal choices that were by no means predetermined or constrained simply by the law as written. True to form, while the Court had given with one hand—expanding upon the legal regime of state responsibility by finding that Article I imposed distinct obligations on states, obligations moreover not limited to its territorial jurisdiction—the

Court now took with the other. It imposed a likely impossible-to-meet standard of proof that, leading to a minimal form of reparation, effectively renders failure to prevent almost consequence-free for states in breach of that obligation.

The Court had to determine what form of reparation to award Bosnia and Herzegovina. Reparation could consist of either restitution, compensation, or satisfaction or some combination of all three, in order to “so far as possible wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”²⁸⁰ Restitution in the case of mass murder is clearly impossible; there is no way to bring back the dead. In territorial terms, the form of restitution that Bosniak leaders have demanded is the dismantling of the political territorial situation created by the crimes against them, the establishment of the Republika Srpska.²⁸¹ But because the Court separated the massacres (as genocide) from the seizure of the enclave (as, potentially, a crime against humanity), it did not even consider this form of restitution—minimally the return of Srebrenica from the Republika Srpska to the Federation of Bosnia and Herzegovina. The Court weighed then whether compensation or satisfaction or both would be appropriate. ILC Article 31, “Reparation”, specifies that an Applicant is entitled to reparation for material and moral damages caused by a wrongful act. Compensation according to the ILC is the appropriate form of reparation for any financially assessable damage to either property or persons. Satisfaction is intended as a supplemental form of reparation for any injury that cannot be remedied by either restitution or reparation. These injuries often constitute symbolic

²⁸⁰ PCIJ, *Factory at Chorzow, Merits*, 47; Crawford and ILC, *The International Law Commission’s articles on state responsibility*, 201.

²⁸¹ Balkan Insight, “Bosnian Presidency Members Call for Abolition of Entities.”

affronts to a state that do not result in material or moral damage to property or persons.²⁸² The Court in this case however decided that it could not award compensation for Serbia's breach of its responsibility to prevent the Srebrenica massacres and instead awarded satisfaction in the form of a declaration that Serbia was responsible for breaches of its obligations.²⁸³

The failure to award financial compensation and instead declaratory satisfaction was a direct result of the standard of proof imposed by the Court to the issue of the injury caused by Serbia's failure to prevent. Regarding the existence of an obligation to prevent, the Court had upheld that a state could not argue that it was not obligated to intervene because, even if it had employed all means at its disposal, the genocide would have occurred anyway. The Court reasoned that this would be "generally difficult to prove" and that the efforts of several states might be required to achieve prevention.²⁸⁴ However, for the award of reparations the Court reverses itself and requires that there be proven a sufficiently "direct and certain causal nexus" between the failure to prevent and the damage resulting from that breach. The relevant passage of the decision reads in full:

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a

²⁸² Crawford and ILC, *The International Law Commission's articles on state responsibility*.

²⁸³ ICJ, *Bosnia v. Serbia, Judgment*, sec. 463-7.

²⁸⁴ *Ibid.*, sec. 430.

sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.²⁸⁵

The Court requires the Applicant to prove a counterfactual—to prove that if something that had not been done had been done then something that had occurred would not have occurred—surely a difficult task and one that imposes a daunting burden of proof. While the Court appears to be imposing a rigorous standard of proof upon an Applicant, one consistent with its previous determination of the standard of proof required given the gravity of genocide, it is in fact imposing a particular standard of causality, one that excludes instances of concomitant causality.²⁸⁶ As noted above in its jurisprudence on the obligation to prevent, this is a requirement that may be impossible to meet in some instances of genocide. It is also not simply derived from either the work of the ILC or customary law principles of state responsibility. There is no single accepted standard of causality in international law for the attribution of responsibility for breach of an obligation. In fact, in the *Corfu Channel* case where the United Kingdom was awarded financial compensation for damage to persons and property caused by Albania's failure to prevent the laying of mines, mines that had in fact been laid by Yugoslavia, the Court did not reduce Albania's responsibility on the basis that the damage could not be solely attributed to its act of omission.²⁸⁷ Although the ILC, noting the multiplicity of standards of causation in customary law, asserts that the standard of causation may vary with a

²⁸⁵ Ibid., sec. 462.

²⁸⁶ Gattini, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment."

²⁸⁷ Ibid.

given breach of obligation,²⁸⁸ there is no intrinsic reason to assert that in the case of genocide a state is not liable for reparation in the form of compensation in an instance of concurrent causation. For some the Court's position may have created an "impression of arbitrariness" that made the Judgment seem "rushed" and with an air of "half-heartedness;"²⁸⁹ for others it reeks of an imperious tendentiousness.

Does it matter if the Court finds a state responsible for 'failure to prevent' rather than 'complicity' if the regime of responsibility is civil and not criminal? The stigma associated with complicity would likely be higher. But the sanction the Respondent would face is the same in any case, reparation of one form or other. It could matter significantly though given that the Court had defined that failure to prevent is an act of omission while complicity is an act of commission. Proving the damage that results from each could in fact pose very different obstacles and be subject to differing standards of proof. But could there be any overlap in the material element of both offenses? Could the provision of aid and assistance with knowledge of the grave risk of genocide constitute a failure to prevent? The Court did not specify what exactly Serbia would have to have done to meet its obligation to prevent. A future Court could in fact find that what would constitute complicity in criminal law could constitute failure to prevent in the regime of state responsibility. But the standard of causality the Court imposed could yet prove an insuperable barrier. It is an integral and necessary component of the Court's effective neutralization of the Genocide Convention as a tool of state responsibility. A direct and certain causal connection between the failure to prevent of one party and the commission

²⁸⁸ Crawford and ILC, *The International Law Commission's articles on state responsibility*.

²⁸⁹ Gattini, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment," 709 & 711.

of genocide by another may prove in most circumstances impossible to demonstrate. The complexity of socio-material causation alone is enough to render it unlikely.

To sum up, while the Court had decided that the obligation to prevent genocide, “to contribute to restraining in any degree” its commission, is not dependent on the certainty of whether that intervention would succeed in its aim, to assess reparations for breach of this obligation it upheld the opposite.²⁹⁰ An Applicant must prove the existence of a “sufficiently direct and certain causal nexus” between the accused state’s failure to prevent and the damages resulting from the commission of genocide by another (formally separate) actor.²⁹¹ The Court must find that if the Respondent had fulfilled its obligations to prevent, then the genocide would not have occurred. The Court thus opened up another lacuna in the international regime of state responsibility. States can commit violations of the obligations imposed upon them by Article I of the Convention, yet escape any form of accountability other than a simple declaration that they failed to fulfill the obligation.

6.5. Conclusion

Serbia’s avoidance of the attribution of responsibility for genocide and complicity in genocide placed its substantial, and indeed critically enabling, contribution to the Republika Srpska’s crimes in Bosnia and Herzegovina under the heading of failure to prevent. Serbia avoided the charge of complicity because the Court imposed a standard of knowledge that required that the Serbian leadership have certain awareness of the VRS’s genocidal intent at Srebrenica. The standard of knowledge to engage the responsibility to prevent was considerably lower, knowledge of the likelihood rather than certainty. Had a

²⁹⁰ ICJ, *Bosnia v. Serbia, Judgment*, sec. 461.

²⁹¹ *Ibid.*, sec. 462.

higher standard been imposed, Serbia would have avoided the attribution of responsibility under any heading except failure to punish. But while imposing standards of proof that made it most likely that a state providing substantial aid and assistance could (only) be found responsible for failure to prevent, the Court reimposed a difficult standard of proof, one proving a certain causal nexus between the failure to punish and the occurrence of genocide, for the award of compensation as reparation for the breach of failure to prevent. In doing so, the Court effectively imposed a standard of singular causality inconsistent with the multicausal nature of complex events like genocide. The result is an international regime of responsibility for genocide in which states adopting Serbia's calculated strategy of parastate formation will most likely face only the consequence of a declaration by the Court that they have failed in their obligation to prevent genocide.

CHAPTER VII
CONCLUSION

“The sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against people under its rule, and... the United Nations, for all practical purposes, defends this right.”²⁹²

Leo Kuper

7.1. Introduction

Leo Kuper’s 1982 assertion that the UN for all intents and purposes defends the rights of states to perpetrate genocide might seem, from the perspective of the present, jaundiced and dated. There have been developments that would have been unthinkable in the immediate aftermath of Cambodia, East Timor, Bangladesh, Burundi. The leader of Serbia, Slobodan Milošević, died in a cell at the Hague while on trial before a United Nations tribunal for genocide and other crimes. Both Radovan Karadžić and Ratko Mladić have been arrested and extradited and are now being held and tried by that same tribunal, as have dozens of others. A UN Tribunal has been established for Rwanda and officials of the former Hutu supremacist regime have been convicted of genocide. An International Criminal Court under the auspices of the UN has been founded and is issuing indictments. Louise Arbour has written of an emerging “culture of accountability”

²⁹² Kuper, *Genocide*, 161.

for grave violations of human rights. Where, then, should one situate this Judgment with regard to the advancement of a regime of accountability for genocide more generally?

7.2. Context

The establishment of the International Criminal Tribunal for the former Yugoslavia marks the beginning of the reemergence after the long hiatus following the cessation of the tribunals at Nürnberg and Tokyo of the exercise of the juridical mode of power in relation to war crimes, crimes against humanity, and genocide. The Tribunal was founded amid vocal demands that the UN Security Council lift the arms embargo. By founding the Tribunal, the Security Council deferred action on crimes against humanity and genocide into the future. It was a strategem to enable the continuation of a policy that contributed materially to the perpetration of those crimes.²⁹³ Even then the UN bureaucracy and some member states worked to limit its effectiveness.

It was the dedicated work of the UN Security Council's Special Rapporteur for war crimes in Bosnia and Herzegovina, Cherif Bassiouni, that laid the groundwork for the establishment of the Tribunal.²⁹⁴ The UN bureaucracy however did its utmost to impede his work by denying him the necessary resources. It was only his dedication and his ability to leverage the resources available to him as an academic that he was able to get around these obstructions. When the Tribunal was founded, it was underfunded and such monies as it was allocated were not disbursed; the UN bureaucracy offering no explanation of why. It was the resolute activism of the officials of the Court, entrepreneurs of international justice, that rescued the Tribunal from irrelevance and

²⁹³ Lebor, *"Complicity with Evil": The United Nations in the Age of Modern Genocide*.

²⁹⁴ Hagan, *Justice in the Balkans*.

made it a force to be reckoned with.²⁹⁵ The Tribunal was eventually able to garner significant support from some states including the United States, but even the US has impeded the work of the Tribunal by withholding evidence when it felt it was in its interests to do so.²⁹⁶

Even as the work of the ICTY nears completion, some regard its work as largely inadequate. Of the top military and political leaders of Serbia and Montenegro during the height of the violence during the crucial years of 1991 and 1992, the majority remain unindicted. The focus on Slobodan Milošević by the ICTY worked to individualize responsibility for the crimes of the Yugoslav wars to the detriment of an appreciation of the larger context and the involvement of state structures.²⁹⁷ When the ICTY ceases its work, responsibility for the prosecution of crimes in Bosnia and Herzegovina will then belong solely to the War Crimes Chamber of the Court of Bosnia and Herzegovina, which heretofore has only had the competence to prosecute mid and low level offenders and faces significant challenges in its efforts to bring perpetrators to justice.²⁹⁸

A significant backer of the Tribunal has been the United States, but the US has at the same time sought to otherwise impede the advancement of an international regime of accountability for grave human rights abuses. The US has been staunchly opposed to the International Criminal Court. The preference of powerful states such as the US for *ad hoc* tribunals that focus on specific conflicts and specific offenders like that at Nürnberg remains. Even such *ad hoc* tribunals have had their fierce opponents. And the principle of

²⁹⁵ Bass, *Stay the hand of vengeance*; Hagan, *Justice in the Balkans*.

²⁹⁶ Hartmann, *Paix et châtime*.

²⁹⁷ Hoare, "Bosnia-Herzegovina and International Justice."

²⁹⁸ Jeffrey, "The Political Geographies of Transitional Justice."

state responsibility for genocide, as this case reveals, is still as contested as it was during the drafting of the Genocide Convention. In this context it is perhaps not surprising that the ICJ failed to significantly advance the regime of international accountability for genocide. But are the reactions of the judgments fiercest critics justified? David Scheffer has declared that in its Judgment the majority “has discovered in spades” an “easy way for judges and lawyers to avoid state responsibility for genocide.”²⁹⁹ For Gibney, the Judgment “sends a disturbing message” that reads like “a primer on how to avoid responsibility altogether.”³⁰⁰ For Amabelle Asuncion, in the Court’s approach, the gravity of genocide has been “magically transformed into a legal shield which protects states from responsibility even as individual convictions are being handed down.”³⁰¹

7.3. Contours of the Judgment

In this thesis I have indicated the degree of latitude the Court had in formulating its Judgment in order to advance an argument that the Judgment was crafted to exonerate Serbia of responsibility and produce a more constrained definition of genocide and regime of accountability more generally while at the same time affirming the judicial precedent that the massacre of Srebrenica did in fact amount to genocide. It is not that the crimes committed elsewhere in Bosnia and Herzegovina by the Serbia-controlled federal Yugoslav army or the forces of Serbia’s proxy parastate, the Republika Srpska, did not meet the “technical requirements” of genocide.³⁰² The requirements the Court attributed

²⁹⁹ Scheffer, “The World Court’s Fractured Ruling on Genocide,” 128.

³⁰⁰ Gibney, “Genocide and State Responsibility,” 771.

³⁰¹ Asuncion, “Pulling the Stops on Genocide: The State or the Individual?,” 1195.

³⁰² Clearwater, “Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ’s 2007 Decision in *Bosnia v Serbia*,” 25.

to the Convention did not preexist the Judgment; the Court devised them in the course of arriving at its decision. And they certainly are not ‘technical;’ they are inherently political. Where it relied on the precedent established by the ICTY, it did so selectively.³⁰³

7.3.1. The Court’s Definition of Genocide as Destruction “In Part”

The Court produced a definition of genocide as destruction “in part” that maintains that it is the total physical or biological destruction of a geographically localized subset of a targeted group rather than the partial destruction of the entire group. The definition adopted by the Court is not inherently more compelling than the definition in Bosnia and Herzegovina’s submissions. The Court’s effective spatialization of the definition for the purposes of inference created a boundary around the massacre at Srebrenica in July 1995. The Court made a finding of fact on when the leadership of the VRS formulated its genocidal approach that further constrained this spatio-temporal boundary to the period after the enclave had been seized. The result was to greatly limit the possibility that Serbia or any other actor in the tragedy would be found responsible.

Abstracting the massacres from the sequence of events both before and after was a product of the Court’s interpretation of the requisite intent of genocide: “to destroy a national, ethnical, racial, or religious group, in whole or in part, as such.”³⁰⁴ Even though there was disagreement within the ICTY, and sources of customary law indicated otherwise, the Court insisted that “to destroy” referred to the physical or biological destruction of a group in both means and form. Partial physical, biological destruction in

³⁰³ ICJ, *Bosnia v. Serbia*, *Dissenting Op. Al-Khasawneh*.

³⁰⁴ UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide.”

order to destroy a group as a socially reproducing entity had support within the judicial practice of the ICTY and German National Courts but the Court decided otherwise. The Court rejected Bosnia and Herzegovina's submissions defining the targeted group negatively as non-Serbs and focused almost exclusively on Bosniaks. But neither the Applicant nor Respondent contested that the Bosniaks as a group fell within the Convention's specification of protected groups. The Court's tripartite criteria to define "in part" included substantiality, opportunity, and qualitative criteria. The portion of the group targeted must be significant enough to affect the group as a whole. Genocidal intent is inferred in relation to the part of the group that falls within the perpetrator's area of control, not the entire group wherever it may exist. And the functional or symbolic importance of the portion targeted may help it meet the substantiality requirement. The Court found that the massacre at Srebrenica met all of these criteria. Even though only the male population of adults and older children were targeted and the female, aged, and younger children were forcibly expelled, the indiscriminate killing of this group was substantial relative to the population defined by the perpetrator's control. That the killing was gender targeted meant that even though a fraction of the population there was killed, it was functionally critical for the biological reproduction of that population. In addition, even though the population at Srebrenica was small relative to the population of Bosniaks as a whole, almost 40,000 persons of a population of 1.8 million, the Court found that the population of Srebrenica was symbolic of the Bosniak population as a whole. The final mental element, "as such," when combined with all of the above, was crucial in allowing the Court to determine that only the massacre at Srebrenica amounted to genocide. "As such" could be interpreted to mean to target the group on the basis of its identity or it

could mean to target the group as a separate and distinct entity. The Court chose the latter, and while the difference may seem slight, when the Court combines this standard with its requirement of physical and biological destruction, the effect was to require the total destruction of the portion targeted. Other communities that may have been targeted substantially or were themselves substantial relative to the group were not wholly destroyed biologically or physically.

The partial destruction of other communities may have been committed with genocidal intent, but the Court would not infer on the basis of the pattern of manifest acts that it was. That is because it distinguishes the intent to forcibly expel targeted populations from given territories, even if accomplished in part through the commission of the *actus reus* of genocide, from the intent of genocide. The intent to destroy a part of a population from a given territory as a means to expel the rest would seem to conform to the plain meaning of “to destroy” “in part.” The aim of forcible expulsion would appear to be a motive or further intent for the intent of genocide; that is, genocide is committed as a means to assert control over territory. But the Court upholds the position that ethnically targeted killing, even on the scale of massacres, constitutes only the crime of persecution—a crime against humanity committed with discriminatory intent. Only when the destruction is of the type stipulated by its construction of genocidal intent—the total physical or biological destruction of a localized part of a group—could the intent of genocide be assigned to “ethnic cleansing.” This then is how the Court rejected Bosnia and Herzegovina’s submissions that the totality of the killing and other crimes targeting the Bosniak group amounted to genocide and that only the massacre at Srebrenica did.

7.3.2. The Contours of the Regime of International Responsibility

The Judgment of the Court was momentous in that it was the first time in international law that it was found that a state could be held responsible for genocide. But at the same time it threw up daunting obstacles to a state actually being found responsible in the form of the standards of evidence and attribution that it imposed. On the face of it, the Court's affirmation of the possibility of state responsibility for genocide, as opposed to the individual responsibility of state leaders or operatives, would appear uncontroversial. The compromissory clause, Article IX, that established the Court's jurisdiction in the case clearly refers to "the responsibility of a State for genocide or for any of the other acts enumerated in article III."³⁰⁵ Yet, more than one third of the judges on the Court voted against the Court's finding that a state could be held directly responsible for genocide, four of them rejecting outright that the Convention embraced state responsibility for breaches of Article III.

Because Article IX was of a jurisdictional nature, the Court was forced to derive the obligation not to commit genocide, conspiracy, attempt, incitement, and complicity via inference from Article I wherein states committed themselves to prevent and to punish genocide. That it had to do so is a reflection of how contested the principle of state responsibility was during the drafting of the Convention, something reflected in its text. The only direct mention of state responsibility is in Article IX; the bulk of the operative articles of the Convention deal only with state obligations relating to the prosecution and punishment of individuals. That hesitancy to acknowledge state responsibility is a reflection of the grave concerns that signatories to the Convention had that they might

³⁰⁵ Ibid.

themselves be found responsible. The massive internal repression in the Soviet Union, institutionalized racial discrimination in the US, the practice of total war by the Allies, all were concerns in the immediate aftermath of the Second World War.³⁰⁶ Those concerns regarding the Genocide Convention evidently still remain. In the present Judgment, those who opposed the notion of state responsibility under the Convention in principle were able to join with others in imposing the Court's stringent requirements for the attribution of responsibility.

The specifics of this case relate to the responsibility of a state for the genocidal acts of armed forces it aids and supports and, by virtue of that support, acts through. Serbia, then acting as the FRY, had established in Bosnia and Herzegovina a Serb nationalist parastate that was formally separate from the FRY. Because the Charter of the United Nations prohibits the forcible alteration of state boundaries, states adopt such an approach when they intervene to partition the territories of recognized states, often on behalf of their own ethnic group. Examples include Northern Cyprus and Transnistria in Moldova and South Ossetia and Abkhazia in Georgia. Had the Republika Srpska not been a separate territory, there would have been no question of Serbia's direct responsibility for the genocide at Srebrenica. The Court therefore applied three separate tests of responsibility to determine if Serbia's responsibility was engaged despite the separate territorial status of the Republika Srpska. The Judgment grappled with the separate political territorial structuring specific to this case, but the implications of the Court's findings extend to proxy warfare more generally. The closeness and intimacy of

³⁰⁶ Power, *A problem from hell*; Quigley, *The Genocide Convention: An International Law Analysis*.

the relations between the Republika Srpska and Serbia establish it as something of a limit case for the possibility of such state responsibility.

In the first of the three tests, responsibility on the basis of the conduct of *de jure* organs, the Court determined that even if individual personnel or entire military units of Serbia were found to have participated in genocide, the Court would assume, absent evidence to the contrary, that these were 'seconded' to the Republika Srpska. Applying a standard of international responsibility for interstate relations to the relationship between a state and a dependent parastate, the Court determined that, absent evidence to the contrary, Serbia would not therefore be held responsible. Second, the Court also considered whether Serbia's massive and essential support for the existence and operations of the Republika Srpska meant that the latter was a *de facto* organ of Serbia. It found that, if a parastate or other actor exhibits any margin of independence from its sponsor, it does not. Third, the Court considered whether Serbia's responsibility was engaged by virtue of the direction and control it exerted over the Republika Srpska. Any derogation from Serbia's overall control would not negate Serbia's responsibility if it could be established that Serbia exerted control over specific wrongful acts. The Court found that an overall relationship of control was insufficient, that it had to be demonstrated that Serbia directed or controlled specific operations of which the prohibited conduct was integral part. The Court upheld here its own prior jurisprudence but diverged from the judicial practice of the European Court of Human Rights, which favored an overall control test. The Court found that states can knowingly provide aid and assistance for forces engaged in wrongful acts and not incur responsibility if it cannot be proven that those acts were specifically directed. By virtue of the sovereign territorial

state's control over information, the requirements that the Court established for state responsibility for genocide make it unlikely that a state will be found responsible.

The Court's requirements for the remainder of the forms of responsibility—complicity, failure to prevent and to punish—are no less daunting. The Court found that for a state to be held responsible for complicity by virtue of the aid and assistance it provides an actor that commits genocide, it would have to be proved that it did so with certain knowledge that the perpetrator would use that aid or assistance to commit genocide. Grave knowledge of the risk would be insufficient. By not finding that Serbia had the requisite knowledge, the Court did not decide in this case if a state must share the genocidal intent of the perpetrator to be found responsible for complicity or any of the other offenses of Article III. Almost one third of the Court's justices disagreed with the majority on the standard of knowledge and held that Serbia should have been found responsible for complicity. The Court dramatically lowered its standard of knowledge for failure to prevent. As such, Serbia became the first state in history to be found responsible for breaches of its obligations under the Genocide Convention. Knowledge of the grave risk of genocide was sufficient. With characteristic vagueness, the Court did not specify that Serbia's provision of aid and assistance constituted failure to prevent or what other positive measures it could have taken, noting merely that it did nothing. But when it came to the question of reparations, the Court again insisted on a standard of certain knowledge for the award of compensation. Bosnia and Herzegovina was awarded only declaratory satisfaction.

Thus the standard of knowledge that the Court imposed has created an international regime of responsibility with two important gaps. The first exists between

complicity and failure to prevent. Providing material assistance for the commission of a crime, with knowledge of the grave risk that it will be so used, is grouped together with the negative acts of otherwise uninvolved states that fail to intervene. Such an aggregation fails to distinguish the specific mode of responsibility of the involvement of Serbia and other states engaged in parastate establishment or proxy warfare, ongoing acts of commission rather than merely acts of omission. The second gap concerns the award of reparations. Imposing a standard of absolute certainty for a causal connection between a specific act of omission constitutive of failure to prevent and the commission of genocide, given the complexity of causation that the Court acknowledges,³⁰⁷ means that almost all breaches of the obligation to prevent will result in the award of declaratory satisfaction rather than compensation. Combining the Court's very specific definition of genocidal intent as the total physical and biological destruction of a localized community with these standards of knowledge results in a regime of state immunization rather than accountability.

7.4. Implications

The hope of many geographers such as myself is that we may bring the tools of spatial analysis to bear on the prevention of genocide and other grave human rights violations.³⁰⁸ The Court put forth its spatialized definition of genocide with an important caveat,³⁰⁹ but this Judgment can still serve as an indicator of which events the Court

³⁰⁷ ICJ, *Bosnia v. Serbia, Judgment*, 430.

³⁰⁸ Madden and Ross, "Genocide and GIScience: Integrating Personal Narratives and Geographic Information Science to Study Human Rights"; AAAS, "Scientific Responsibility, Human Rights and Law: Geospatial Technologies and Human Rights."

³⁰⁹ ICJ, *Bosnia v. Serbia, Judgment*, sec. 201.

would in any future case determine to be genocide and thus to which events the tools of geography could successfully be applied under the Convention. The Court's prohibitive standards of inference are, on the other hand, quite firm and put into question the utility of spatial inference in many instances. The larger implication the Judgment may have for geographers and others is what it reveals about the degree of commitment to genocide prevention among the states of the world. The Bosnian genocide was not a case of a terrible eventuality that the world was all but helpless to prevent. It was a crime in which the perpetrators were emboldened to do their worst because they could count on powerful allies to tie the hands of their victims. The leadership of Bosnia and Herzegovina had tragically miscalculated, thinking that the values of Europe and their manifest commitment to them would not permit war. But the space of Europe as a space of sovereign nation-states at peace with each other was predicated upon significant violence perpetrated elsewhere and the repression of difference within. The Bosnians discovered to their dismay that they were outside the boundaries of the new Europe being constructed in the formerly Communist East.

The Bosnian decision to initiate the case was a response to the critical exigencies of the moment. It was not an appeal that others come to its aid; it was an attempt to regain the right to defend itself, a right denied by the UN-imposed arms embargo. This case is not just about states pushing for a restrictive definition of genocide in order to avoid being dragged into costly and expensive interventions in far flung parts of the world for which they are ill-prepared. It is not about an expansive construction of the responsibility to prevent. It is rather a case about how business gets done in the world at present. Some states carry out brutal acts of repression, while others provide them with material

aid and support. Others, at a minimum, have no intention of allowing their relations with states or groups carrying out these acts to be affected thereby. This case is thus about complicity. The enormous lacunae opened up by this judgment between responsibility for genocide, complicity in genocide, and failure to prevent serves to effectively neutralize the Convention as a tool of state accountability.

It is not as if that there was no case to be made or that Bosnia and Herzegovina failed to make that case. Bosnia and Herzegovina's failure is owed in no small part to the obstacles thrown up by the Court. The Court failed to seek documents essential to the case and the Court established such stringent standards of proof that, unless these are overturned in subsequent adjudication, no applicant is likely to succeed in using the Genocide Convention as a tool of state accountability. The highest court in the world has thus failed to uphold the aims and purposes of the Genocide Convention. In this it merely followed the UN Security Council and the UN bureaucracy. So long as states in this world, both the most powerful and those less so, are resolved to employ grave violations of human rights either directly or by proxy as instruments of statecraft, the meaning and purpose of the Genocide Convention will not be fulfilled. Any hope for the institutions of international justice to obtain a degree of effective autonomy from the interests of individual states is, for now, misplaced.

The exercise of juridical power to repress genocide may indeed be indispensable, however inefficacious it is in comparison to materially preventing crimes before happen or impeding those in progress. But the Court, despite its self-conception, is not a disinterested institution serenely applying the law, concerned only with transcendent principles of justice. It is a thoroughly political institution. It is composed of justices

selected and nominated by state representatives at the UN. It is states that provide the *ad hoc* tribunals, the ICC, and the ICJ with the resources to operate, and it is states that have the capacity to enforce their decisions. A truly effective regime of international protection of human rights will be dependent upon a profound transformation of the political values and political structuring of the states of the world. As desirable as democratization is, it is not a panacea. Democratic publics may prove just as prone to commit or be complicit in genocide as state elites. But challenging the insulation of foreign policy making from popular democratic input that currently prevails even in formally democratic states at least creates an opening for the mobilization of transnational civil society for genocide prevention to have some effect.

At present, the Judgment of the Court in this case demonstrates both the limitations of current law and the unwillingness of the Judges of the International Court of Justice to interpret that law in a manner that advances a regime of prevention and punishment for genocide. Arbour has correctly identified the momentum that currently exists for the establishment of such a regime. The advancement of a regime of accountability for individuals in the sphere of international criminal law is a hopeful story that points to the necessity and possibility of continued struggle even in the face of obstruction by the UN and its member states. But the limits of that regime, and the result of this case, point to the daunting structural impediments that exist to the advancement of a truly effective regime of accountability for genocide. Subjecting this Judgment to a thorough critique is only one very small step in the direction of realizing an effective regime of state accountability. The harder question is envisioning just what an institutionalization of a juridical mechanism for the repression of genocide would look

like even in a more fully democratized international political system. Realizing such an institutionalization of constituted power may require more profound changes than simply establishing a court to regulate a world of sovereign territorial states. Ultimately, formal political arrangements have only a limited capacity to restrain the imbalances of power that derive from economic, social, or demographic factors.

The sovereign territorial nation-state ideal derives its appeal from the promise it offers peoples of power and security. Attempts to realize its imagined correspondence of nations and territorial states motivate much contemporary genocidal violence, producing radical conditions of insecurity for some. Conflicts over territory occur within the larger context of a political and economic structuring of the world and the efforts by states to position themselves within particular distributions of power it produces. The most important contribution political geographers and others may be able to make toward the construction of a different order is to critically interrogate (purportedly) exclusive models of territorial sovereignty. Historic work examining the emergence and consolidation of the current system of partitioning territory and the non-exclusive sovereignty that preceded it,³¹⁰ contemporary theorizations that question bounded conceptions of place,³¹¹ analyses of formal attempts to practically realize alternatives,³¹² efforts to theorize other

³¹⁰ Murphy, "Sovereign State System as Political-territorial Ideal": Historical and Contemporary Considerations"; Elden, *Terror and Territory: the Spatial Extent of Sovereignty*; Elden, "Missing the point."

³¹¹ Massey, *For Space*; Elden, "Land, Terrain, Territory."

³¹² Cohen, "Revisiting Territorial Pragmatism in the Palestinian-Israeli Conflict"; Cohen and Frank, "Jerusalem and the Riparian Simile."

alternatives,³¹³ and attempts to grasp the partitioning of space within the fullness of socio-spatial complexity³¹⁴ all make valuable contributions toward this end.

³¹³ Nimni, *Multicultural Nationalism*; Nimni, *National Cultural Autonomy and its Contemporary Critics*.

³¹⁴ Paasi, "Is the world more complex than our theories of it?"; Jessop, Brenner, and Jones, "Theorizing Sociospatial Relations."

APPENDIX

A SECOND LOOK: THE JUDGMENT'S INTERPRETATION OF GENOCIDE AS DESTRUCTION "IN PART" IN LIGHT OF LEMKIN'S ORIGINAL WORK

Lemkin's Original Definition

It is often taken as a given that the conception of the crime of genocide in the work of the man who created the neologism, Rafael Lemkin, is broader than the definition ultimately agreed upon by the drafters of the UN Genocide Convention.³¹⁵ I argue that, despite important differences, that distance is not as great as is often supposed. Subsequent interpretations of the Convention, including that in the present Judgment, have established a degree of divergence that does not inhere within the text of the Convention. The Court's interpretation in particular has produced a spatialization of the definition of genocide that is less than fully cogent and that does little to further the stated aim of the Convention, the *prevention* and punishment of genocide. Reading the Genocide Convention in the light of Lemkin's ideas, rather than the reverse, offers an important hermeneutic with which to overcome these deficiencies. I regard this move as legitimate given how central Lemkin's work was to the formulation of the Convention. Lemkin not only coined the neologism and campaigned vigorously for an international convention, he was one of three jurists selected to serve as an adviser for the UN Secretariat committee that produced the first draft of the Convention.³¹⁶ Thus, Lemkin's

³¹⁵ Schabas, *Genocide in international law*.

³¹⁶ Robinson, *The Genocide Convention: A Commentary*.

originary conception was taken up by state representatives at the UN and modified through a contested drafting process. His conception remains a valuable key to interpreting the meaning of the elements of the Convention's statement of intent, in particular "to destroy" and "in whole or in part." The majority's Judgment depended upon a distinction between 'ethnic cleansing' and genocide such that genocidal intent could be inferred if the destruction wreaked upon a targeted community would lead to its disappearance as a physically or biologically reproducing collectivity. Lemkin's work, on the other hand, points toward the intrinsic link between territory, territoriality and genocide.

Geopolitics, Biology, Culture, Territory

Both the Nazi genocidal project and Lemkin's dogged, desperate, and impassioned response drew upon competing geopolitical visions that emerged out of the 'geopolitical panic' that seized Europe at the end of the 19th century, a panic triggered by the phenomenal rise of the continent-sized powers, the United States and Russia. The rapid economic changes created by increasing global economic integration and the specter that this new world economy would be dominated by a country such as the US whose economic might was based on its combination of technical industrial prowess and a massive territorial extent that enabled a degree of autarkism. The US's territory granted it exclusive access to enormous resources and enabled it to sustain a large and growing population that could serve as both a source of labor and an internal market. This triggered a number of interrelated responses: European states began to close off their economies in a wave of nationalist protectionism while simultaneously embarking on a

mad scramble to seize colonial territories overseas. When the returns on the overseas empires proved too meager—not only to counter the US but now to match the economic might of a rising and increasingly aggressive power within Europe itself, Germany—Europeans turned their attentions back upon Europe itself. They created a bipolar division whose purpose was to contain both German economic expansion and the Austro-Hungarian territorial expansion to the southeast that abetted it. The challenge to the Austro-Hungarian Empire was not only external; internally it was beset by the rising nationalist sentiment of its Slavic subject peoples.³¹⁷ The emergence out of the Ottoman empire of independent Slavic polities backed by Russia as well as Great Britain and France had already demonstrated, in the Balkan Wars of 1912-13, that the effort to create nation-states in Eastern Europe could trigger enormous bloodshed. These new states scrambled to expand territorially, massacring ethnic minorities who could stand as a challenge to their nationalist territorial claims.³¹⁸

In this context, two emerging geopolitical doctrines among many others emerged. One would influence political and military circles in Germany bent on territorial expansion—including eventually the Nazis—and the other would influence figures on both the nationalist right and the internationalist left in Germany, Austria-Hungary, and elsewhere.³¹⁹ It was the internationalist left version that would appeal to Lemkin.³²⁰ The other, the nationalist territorial expansionist, *Lebensraum* vision can be traced in Germany to the work of Friedrich Ratzel. Ratzel combined a biogeographic vision of

³¹⁷ Heffernan, “Fin de Siècle, Fin du Monde?: On the Origins of European Geopolitics, 1890–1920.”

³¹⁸ International Commission to Inquire into the Causes and Conduct of the Balkan Wars, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*; Trotsky, *The Balkan wars, 1912-13*; Akçam, *A shameful act*; McCarthy, *Death and exile*.

³¹⁹ Heffernan, “Fin de Siècle, Fin du Monde?: On the Origins of European Geopolitics, 1890–1920.”

³²⁰ Moses, “Raphael Lemkin, Culture, and the Concept of Genocide.”

dynamic range expansion and contraction derived from his own spatial revision of Social Darwinism with romantic ideals of cultural, spiritual, and demographic vitality.³²¹ Ratzel critiqued the idea that it was territory or soil alone that accounted for political and economic power; rather power emerges from this articulation of socio-cultural dynamism and prowess and the material resources provided by territory. Expansionary pressure occurs when a given society's territorial extent does not match its socio-cultural vitality and territorial contraction occurs when a given society is enfeebled relative to its rivals.³²² Although Ratzel initially stressed overseas colonial expansion in Africa, he eventually came to see Europe as the most appropriate site for territorial annexation.³²³ He appears not to have shared the eliminationist biological racism of the Nazis, but rather to have favored the subsumption and eventual assimilation of other peoples engulfed by an expanding German realm.³²⁴

A contrasting vision was provided by Karl Renner, an Austro-Marxist who developed a particular variation on the concept of *Mitteleuropa*, a federation of central and southcentral European states.³²⁵ Whereas conservative versions of *Mitteleuropa* came close to Ratzel's vision in seeing the federation as a means to achieve the eventual subsumption and assimilation of non-Germans, Renner's was designed to meet the challenge posed by the rising nationalism of the subject peoples of the Austro-Hungarian Empire by genuinely accommodating their ethnocultural aspirations for autonomy.

³²¹ Heffernan, "Fin de Siècle, Fin du Monde?: On the Origins of European Geopolitics, 1890–1920."

³²² Ibid.

³²³ Smith, *Politics and the Sciences of Culture in Germany, 1840-1920*; Ó Tuathail, *Critical Geopolitics: The Politics of Writing Global Space*.

³²⁴ Ó Tuathail, *Critical Geopolitics: The Politics of Writing Global Space*.

³²⁵ Moses, "Raphael Lemkin, Culture, and the Concept of Genocide."

Renner held that maintaining common political and economic policies and structures also served their best interests in ways that small exclusive territorial nation-states could not. These nation-states would be too small to effectively compete economically and politically. And the effort to carve out state boundaries that would correspond to ethnic distributions was bound to produce bloody conflict given the intricate ethnic mosaic of Central and Eastern Europe. Renner's solution was to advocate a federative structure whereby representation and responsibility for political and economic matters would be based on existing territorial state units, while representation for decision making on cultural matters would be based on representation of non-territorial units ethnic-cultural affiliation.³²⁶ This vision was acclaimed by Lemkin, who cited it as an important influence upon his own thinking.³²⁷

Renner's federative geopolitical and geoeconomic vision articulated with Lemkin's own thinking on culture, biology, nation, and territory. Lemkin's particular contribution to international law—to extend protection to particular sorts of human groups, in contrast to the usual protection of states and individuals, is an outgrowth of his commitment to a vision of “the human cosmos,” an expression of romantic national cosmopolitanism.³²⁸ Lemkin based the Genocide Convention on an affirmation of a symphony of nations, “the human cosmos.” His was a national cosmopolitanism that maintained that it is nations, ethnic groups, religious groups that incubate the developments of high culture, which then diffuse to enrich the lives of humanity as a

³²⁶ Heffernan, “Fin de Siècle, Fin du Monde?: On the Origins of European Geopolitics, 1890–1920.”

³²⁷ Moses, “Raphael Lemkin, Culture, and the Concept of Genocide.”

³²⁸ *Ibid.*, 23.

whole.³²⁹ And at the same time, cultures were unique responses to the physical, biological needs of groups giving rise to socially integrative institutions and practices necessary for the survival of individuals. Thus both the socio-cultural and physical-biological reproduction of groups were intrinsically interrelated. The destruction of these integrative institutions and the difficulty of the process of assimilation to new ways and structures posed threats to the survival of individuals.³³⁰ Lemkin's pragmatic answer, in the absence of any hope of an immediate construction of a global federative structure along the lines proposed by Renner, was to argue for the establishment of a regime of international legal protection. The hope was that a structure of international law could serve as a substitute for an overarching political sovereign in the protection of the rights of minorities threatened by the homogenizing logic of the national territorial sovereign state.

Resituating Genocide in a Territorial Frame: Genocide as Colonial Territoriality

The practice of genocide, the ontology of what genocide is, has come to be understood by many in an aterritorial manner. That it is inherently designed to undo the bond between particular populations and territories is now often lost sight of; population is foregrounded and territory recedes into the background, when it is acknowledged at all. Thus in the *Oxford Handbook on Genocide Studies*, it is possible for a scholar to write of the distinction between 'ethnic cleansing' and genocide that "ethnic cleansing is related to genocide, but ethnic cleansing is focused more closely on geography and on forced removal of ethnic or related groups from particular areas."³³¹ I would argue instead that

³²⁹ Moses, "Raphael Lemkin, Culture, and the Concept of Genocide."

³³⁰ Ibid.

³³¹ Lieberman, "'Ethnic Cleansing' Versus Genocide?," 44.

the practice of genocide is no less focused on geography and the forced removal of groups from particular areas. The geographic dimension of genocide has been obscured if not occulted as people have based their understanding of what genocide is by relying solely on the text of the Genocide Convention and on a particular understanding of the Nazi Holocaust of the Jews as the paradigmatic instance that defines the crime. In the Convention, issues of geography are mentioned in the operative article on the requirement (or right) to prosecute the crime of genocide, but elsewhere the Convention is silent on territory, including in relation to genocidal intent. This was the result of a conscious effort to exclude the element of motive from the Convention,³³² and has contributed to an understanding of genocide that is aspatial. This understanding appears to have influenced how legal authorities interpret the Convention.³³³ There is a tendency to interpret the Genocide Convention in a manner that upholds the Nazi genocide of the Jews as the ideal type of genocide against which all others must be measured. This genocide is thought to be motivated essentially by a spirit of animus toward the Jewish people; the specifically territorial dimension of that motive is lost.

The Holocaust as Colonialism

Colonialism is an acquisitive form of territoriality. Colonial powers seek to extend their control over territory beyond the boundaries of their own state. If the object is to assert control over resources and labor in order to reorient the colonized land's economy to benefit the colonizer, it is known as extractive colonialism. If the aim instead is to displace the inhabitants of the colonized country from land that is to be handed over to

³³² Robinson, *The Genocide Convention: A Commentary*; Schabas, *Genocide in international law*.

³³³ See Schabas, *Genocide in international law*., for example on the meaning of “as such.”

colonizers from the occupying power, that is settler colonialism.³³⁴ Actually existing forms of colonialism may include both in combinations that vary spatially and temporally. If the native inhabitants of the land being colonized mount sufficient resistance to either extractive or settler colonialism, the colonizing power may resolve to destroy these populations or a substantial part thereof. The vulnerability of settler populations to retaliatory attacks by native inhabitants and the fact that extractive colonialism often relies on native labor means in practice that it is likely the latter form of colonialism that will lead to massacres amounting to genocide.³³⁵ Extractive colonialism can lead to mass death as well. Native inhabitants may mount sufficient resistance to their loss of political territorial control that the colonial power deliberately seeks to destroy a substantial part of the resisting inhabitants. Mass death may also result if the regime of labor exploitation is sufficiently harsh, such as in the Spanish colonial mines in the Andes or during the transportation of African slaves to the Americas across the Atlantic.³³⁶ The social and economic disruption caused by the restructuring of the colonized territory's economy for the purpose of wealth extraction can also lead to mass starvation.³³⁷

Scholars have paid increasing attention to the territorial dimension of the Holocaust. Much of this literature seeks to situate Nazi territoriality within the frame of colonialism. Some for example regard the colonial genocide of the Herero population in German Southwest Africa (present day Namibia) as an important precursor of German imperial conduct in Eastern Europe. Scholars note also that the German effort to

³³⁴ Wolfe, "Structure and Event: Settler Colonialism, Time, and the Question of Genocide."

³³⁵ Ibid.

³³⁶ Stannard, *American Holocaust: Columbus and the Conquest of the New World*.

³³⁷ Davis, *Late Victorian Holocausts : El Niño Famines and the Making of the Third World*.

exterminate the Herero was at the same time not a radical departure from the supremacist and eliminationist thinking of other European colonial powers at that time.³³⁸ Explicit statements by prominent Nazis support the idea that the German conquest and partial settlement of Eastern Europe was a self-consciously colonial enterprise. The Nazi jurist Karl Schmitt, for example, explicitly sought to provide justification for German expansion in the East as just compensation for the inability of Germany to secure colonies in the non-European world.³³⁹

The contribution of David Furber and Wendy Lower make to the discussion is to situate an understanding of the specificity of antisemitism within Nazi coloniality in the East of Europe and within a framework of colonialism more generally.³⁴⁰ Based on the statements of those such as Hitler that cast the National Socialist movement as one of national liberation against a post-First World War situation of colonial subjection, they emphasize that the Nazi conquest of the east and the differential treatment of Jews and Slavs must be regarded as manifestations of the Nazi's dual conception of their conquest as both a colonial and anticolonial enterprise. The Jews of Western Europe were regarded both as agents of international capital and as Asiatic colonizers. The Jews of Eastern Europe, though relatively impoverished, were regarded as a source population from which the ranks of Western Jews were replenished through migration. The Nazis resolved therefor to completely exterminate them in order to 'liberate' Germany from its colonial status. In contrast, Furber and Lower argue that the Slavs of Poland and the Ukraine in were not regarded as a colonial threat but rather as a typical native colonial population.

³³⁸ Lindqvist, *Exterminate All the Brutes*; Furber and Lower, "Colonialism and Genocide in Nazi-occupied Poland and Ukraine."

³³⁹ Furber and Lower, "Colonialism and Genocide in Nazi-occupied Poland and Ukraine."

³⁴⁰ Ibid.

Accordingly, the treatment of these Slavs varied across time and space. After a period of initial contest, the SS insistence on pursuing a policy of settlement colonialism of expropriation and displacement of the native Slavic population won out over the civil administration preference and the a policy of devastating the Slavic population was pursued. When the settlement enterprise in the East began to fail due to the inadequacy of local and settled German populations to replace the industrial labor of the Jews and the agricultural and the agricultural productivity of the Slavs and in the face of mounting armed partisan resistance, German policy eased and the emphasis returned to a regime of colonial extraction. Efforts to decimate the Slavic population were abandoned as their labor was now deemed more valuable to the German war effort than seizure of their land.³⁴¹ In short, what the Nazi incursion into Eastern Europe embodies is that aggressive forms of nationalist territorial aggrandizement can cast themselves in geopolitical and geoeconomic terms as national liberation movements of oppressed peoples. These perpetrators justify territorial aggression as a defensive maneuver against a globalizing economy, one that would enable a state and society to remap circuits of resources, products, capital, and labor on a more autarkic basis.

Lemkin's Conception: Colonialism and the Bio-geopolitical

While scholarship on genocide and colonialism captures an important aspect of Nazi crimes in occupied Eastern Europe, Raphael Lemkin, in his *Axis Rule* offers an understanding of the Nazi incursion into Eastern Europe that both embraces and extends

³⁴¹ Ibid.

beyond the frame of colonialism.³⁴² First, Lemkin shared the understanding of the German occupation as a form of colonialism. His *Axis Rule* is a detailed exposition of Nazi colonialism in Eastern Europe and of genocide as a practice of territoriality in the service of that colonial enterprise.³⁴³ Indeed, the frame of colonialism is central to Lemkin's entire body of work on the question of genocide. At the time of his death, he was at work on a manuscript on genocide in world history. Yet for Lemkin, the Nazi incursion into Eastern Europe was not simply an attempt to establish and maintain lasting direct control over territory, our classic understanding of colonialist territorial hegemony, though this was attempted. It was not simply a combined colonial and anticolonial enterprise in the minds of its perpetrators, *pace* Furber and Lower. Rather, Lemkin regarded the Nazi incursion as at the same time a sabotage mission on a grand scale, a bio-geopolitical assault directed both at the (intrinsically related) demographic and socio-cultural basis of economic and political power, a gambit designed to further German interests even if direct territorial control of Eastern Europe were to be lost.

In *Axis Rule*, Lemkin uses terms such as “annihilation” and “destruction” of nations and ethnic groups to define genocide.³⁴⁴ But what does he mean by annihilation and destruction? And does he mean that such attempted annihilation or destruction of the targeted group is their total physical or biological destruction? At the outset of his chapter “Genocide,” Lemkin provides a succinct definition of the crime that signals that genocide is not an event but a process:

³⁴² Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*, 79.

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.³⁴⁵

To answer the question of how exactly Lemkin understood annihilation it is necessary to examine this complex of measures by which the occupiers sought to achieve their aim. Raphael Lemkin's conception of genocide in his *Axis Rule* and other works can be usefully considered from the point of view of the aims and means of the crime. The codification in law of the practices of occupation provided Lemkin in *Axis Rule* with a means to ascertain the methods by which German policy was carried out and from these to infer what its aims were. He arrived at the conclusion that:

The picture of coordinated German techniques of occupation must lead to the conclusion that the German occupant has embarked upon a gigantic scheme to change, in favor of Germany, the balance of biological forces between it and the captive nations for many years to come. The objective of this scheme is to destroy or to cripple the subjugated peoples in their

³⁴⁵ Ibid.

development so that, even in the case of Germany's military defeat, it will be in a position to deal with other European nations from the vantage point of numerical, physical, and economic superiority.³⁴⁶

Lemkin clearly conceived of Germany's occupation policy as a continuation of the practice of total war with the aim of winning the peace even if the war should be lost. Its purpose was to secure lasting regional economic and political hegemony. This decisive alteration of the relative power of the home territory of the German state relative to the surrounding territorial states would thereby change Germany's position in the global hierarchy of power. This it sought to achieve by a territorial incursion that may prove temporary but that would wreak such destruction that it would enable the assertion of economic and political hegemony in the absence of direct territorial control. It is in other words a practice of neocolonialism.³⁴⁷ In this formulation, the attack upon "biological forces" has the intent either to destroy the targeted group or to cripple them in their development. Just what Lemkin means by development is suggested by his explication of the means by which the occupiers attempt to achieve their aim.

Lemkin clearly states that Germany does not seek to realize its goals solely through physical and biological attacks on the targeted groups. Rather, "genocide is effected through a synchronized attack on different aspects of life of the captive peoples" in the political, social, cultural, economic, biological, physical, and moral fields.³⁴⁸

Political attacks include the dismantling of institutions of self-government of occupied territories and peoples. It also includes ethnocratic measures of empowering some local

³⁴⁶ Ibid., xi.

³⁴⁷ Its implication for our understanding of contemporary structural adjustment policies is suggestive.

³⁴⁸ Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, xi.

populations at the expense of others. (Separately, in his chapter on “Administration” he notes how the German occupiers divided the occupied territories in multiple administrative divisions sealed off from each other as a conscious territorial strategy to weaken and divide those occupied.³⁴⁹) The forcible displacement of occupied populations of non-Germans, the seizure of their land, and the settlement of ethnic Germans upon it is also classed as a political method of genocide. It therefore appears that this unbinding of peoples and territories, what is referred to by the contemporary expression of ‘ethnic cleansing,’ is considered a means by which genocide is effected.

Within the social field, the occupiers mount their assault by disrupting the “social cohesion of the nation involved and killing or removing elements such as the intelligentsia, which provide spiritual leadership.”³⁵⁰ Social measures in other words take into explicit consideration the class structure of occupied peoples and the socio-cultural distribution of functions. Cultural measures enact restrictions on language use, education, and artistic expression—some to these designed to assimilate and others to assign some occupied peoples to a subordinate place in a class hierarchy. It also includes the destruction of national monuments, archives, and libraries. Economic measures are enacted to deprive targeted groups of the ability to sustain themselves physically and culturally and to elevate some groups over others.

Biological measures refer specifically to efforts to alter the demographic balance of territories through differential effects on birth rates. Physical measures aim at the “debilitation and even annihilation” of targeted groups and run the gamut from measures affecting health and nutrition to outright killing. Religious measures target institutions

³⁴⁹ Lemkin *Axis Rules*, p. x

³⁵⁰ Lemkin *Axis Rules*, p. xi.

and practices in so far as these are central to a people's identity. Moral measures divert the energies of a people into addictive and nonproductive activities and away from ideas and practices that could enable resistance. Lemkin describes the foregoing as practiced by the German occupiers as “an elaborate, almost scientific system.”³⁵¹ The exact combination of methods and their intensity or severity is tailored to the specificity of particular territories and peoples.

William Schabas prefaces his discussion of Lemkin's conception of the means by which destruction is carried out by characterizing physical destruction of the group as the “ultimate or final stage in genocide.”³⁵² I maintain that this is a mischaracterization of Lemkin's conception of genocide. Lemkin may have considered killing as an ultimate measure of genocide in terms of its gravity, however it does not appear that Lemkin necessarily considered the other attacks to be merely preparatory, designed to undermine the group's ability to resist the consummate act of killing. Indeed, when Lemkin does speak of stages of genocide, he asserts that it has two phases: the destruction of the “national pattern” of the oppressed group followed by the imposition of the “national pattern” of the oppressor. For this second stage, Lemkin critiques the use of the general term “denationalization” as well as more specific terms that name the pattern being imposed, such as “Germanization.”³⁵³ The reason he finds fault with these terms is that they address mainly the cultural, economic, and social aspects of genocide as he sees it, to the neglect of the biological aspect. For Lemkin, this latter aspect need not cause the

³⁵¹ Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 70-90.

³⁵² Schabas, *Genocide in International Law: The Crimes of Crimes*, 229.

³⁵³ Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 79-80.

destruction of the group; rather it can cause its decline. Annihilation then in Lemkin's usage need not entail the outright physical destruction of the group, but the loss of its separate personality. Indeed, he states that the second stage, the imposition of the national pattern of the oppressor may be carried out upon the people and the territory, or on the territory alone, after the people have been removed.³⁵⁴

The Relationship Between Biology and Culture in Lemkin's Definition of Genocide

Lemkin lays great stress on the physical, biological rationale underlying genocide. He describes Nazi occupation policy in Germany as a “giant scheme” to alter “the balance of biological forces.” Yet, at the same time he maintains that genocide consists of a synchronized attack on all aspects of life of targeted groups—social, cultural, economic, political—and not merely just measures to kill and injure and to prevent from reproducing. So while the aim of genocide as practiced by the Nazi regime is to wreak physical, biological destruction upon a people, it does this not only through physical and biological attacks but through attacks upon their culture and other aspects of their social existence. And the significance of such a destruction for humanity as a whole, whether that destruction is total or if it results in the permanent crippling of a group's development, is the cultural loss to humanity. Lemkin subscribed to notions of national cultural groups as possessed of individual personality and each contributing to a symphony of nations. For him, these groups incubated the ideas and practices for the progressive development of human civilization. At the same time, Lemkin's understanding of the importance of culture for individual human groups themselves was

³⁵⁴ Ibid., 79.

informed by a functionalist understanding of culture as guaranteeing the biological survival of a people.

There are two distinct but linked notions of the relation of biological and culture in Lemkin's anti-genocide thinking and they are related to two different notions of culture, one that I will term the national popular and the other high culture. National popular culture is the constellation of practices of everyday life, both in terms of material production and in the production of social cohesion. These serve, in a functionalist sense, to ensure the biological survival of a people by providing a social structure that enables them to exploit the resources provided by the natural environment. National popular cultures are thus adapted, though not necessarily determined,³⁵⁵ by the realities of the physical environment that a people inhabits. An attack on this culture then has clear implications for the survival, or at the very least the flourishing, of a people. But then there is higher culture, the culture that is produced from a given people's national-popular culture and that reflects and embodies its specificity, which then diffuses to the rest of humanity to enrich its collective life. Now here biological existence is the necessary prerequisite of this cultural production. The preservation of the biological life of a people is justified in order to preserve its potential to produce just such contributions to higher culture.

Thus there is a degree of historic contingency and specificity in the emphasis on biology in the definition of genocide in *Axis Rule*. The importance of biological racism in Nazi ideology, and the practices of genocide that flowed from it, are but a specific manifestation of a more general phenomenon. Lemkin himself clearly privileges culture

³⁵⁵ Lemkin after all notes that one people with a distinctive culture may forcibly replace another upon the same land.

in his definition of nations but at the same time acknowledges the interrelation of the biological and the social. An attack upon social structures has biological implications, and an attack on the biological will have cultural implications. The prevailing interpretation of the Genocide Convention represented in the Judgment, one that seeks to make a clear separation between not just the means by which genocide is carried out, but in the form of that genocide itself—biological-physical destruction as opposed to social-cultural—is not one that Lemkin would embrace.

Conclusion

The definition of genocide in the Convention is less expansive than Lemkin's. It has a more restrictive enumeration of the *actus reii* of genocide and it does not embrace the notion of 'cultural genocide.' Yet Lemkin's conceptualization of genocide remains critical for the interpretation of the Convention. The Convention offers little guidance on what destruction "in part" of a group means. The drafting history and the provisions of the Convention itself suggest that those who drew up the Convention shared Lemkin's view that genocide was a term applicable not only to efforts at outright total extermination such as those targeting the Jews but at those measures targeting other colonized peoples that fell short of immediate total extermination. The inclusion of the infliction of mental harm as part of the *actus reus* of genocide was at the behest of the Chinese delegation that sought thereby capture the provision of opium to the Chinese population by the Japanese occupiers during the Second World War. Discussion of the proposal explicitly addressed the need for the Convention to embrace such colonial crimes that differed from the Nazi measures against the Jews, and that would therefore

include the measures targeting the Slavic populations of Eastern Europe described by Lemkin. To destroy a people “in part” can be interpreted as the deliberate infliction of damage calculated to permanently alter the balance of power between the perpetrator and victim groups, to cripple a group through partial destruction. Territorially, the objective can be to secure control over territory by displacing the targeted population or to target specific sectors of the population in order to effect their social dissolution and eventual dispersion or assimilation. This understanding of genocide as partial destruction differs from that produced by the Court in this Judgment. By interpreting partial destruction as simply partial destruction, and not only as localized total destruction, this understanding of genocide as destruction “in part” is both more faithful to the history of the Convention and more suitable to fulfilling the aim of the convention in light of contemporary realities.

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