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State Responsibility for Genocide
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The International Court of Justice's Judgment in the Genocide Case and its Aftermath

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Contents

Summary

State responsibility for commission of genocide has a *jus cogens* status in customary international law and is based on the general rule of attribution: whether the persons or groups acting within the State are acting, or at least can be treated as acting on behalf of the State is key for State responsibility to arise. For non-state actors to be attributable to the State the relationship between them must be one of "complete dependence", as the test of control formulated in the Nicaragua case of 1986 suggests. The Genocide Convention however does not directly address the question of a State's liability for committing genocide; Article I obligates States to prevent and punish, but otherwise the Convention focuses on individual criminal responsibility.

The Genocide case of 2007 changed this interpretation of the Convention. The ICJ could only use the Convention as a basis for its judgment, not the customary international law, and declared that the obligation to prevent genocide in Article I also necessarily implies the prohibition of the commission of genocide. Nevertheless, the Court ended up not holding Serbia, the respondent in the case, responsible for the commission of genocide in Srebrenica. Instead it found Serbia in violation of its obligation to prevent and punish genocide; a result which could have been the same without the Court's game changing interpretation of Article I. The ICJ's judgment in the Genocide case has been heavily criticized, not only for the interpretation of Article I, but also for the high standard of proof of attribution and the choice to use the Nicaragua test as the test of control. It is however important to remember, that the Genocide case was the first case in history where a State was on trial for commission of genocide. Even though the ICJ's judgment is flawed, possibly deeply so, it can still be seen as a step forward towards greater State responsibility for genocide.

Sammanfattning

Statsansvaret för folkmord har en *jus cogens* status i internationell sedvanerätt och utgår från den generella hänförbarhetsregeln: huruvida de inom staten aktiva personer eller grupper är verksamma, eller åtminstone kan anses vara verksamma å statens vägnar är avgörande för att staten kan hållas ansvarig. För att icke-statliga aktörer kan vara hänförliga till staten måste förhållandet dem emellan vara ett förhållande med fullständig beroende, såsom testen för kontroll i Nicaragua-målet från 1986 föreslår. Folkmordskonventionen emellertid riktar sig inte direkt mot frågan om statens ansvar för att begå folkmord; artikel I förpliktar stater att förhindra och straffa folkmord, men annars fokuserar Konventionen på individuellt kriminellt ansvar.

Folkmordsmålet från 2007 har ändrat denna tolkning av Konventionen. ICJ hade inte jurisdiktion utanför tolkningen av Konventionen och kunde inte utnyttja regler från den internationella sedvanerätten. ICJ dömde att artikel I i Konventionen innehåller också en plikt för stater att inte begå folkmord, dessutom att artikeln förpliktar stater att förhindra och straffa. I slutändan höll ICJ inte Serbia, svarande i målet, ansvarig för att ha begått folkmord, utan att ha överträtt sin förpliktelse att förhindra och straffa folkmord. Detta resultat kunde ha varit exakt detsamma även om ICJ inte hade överraskande tolkat artikel I på ett nytt sätt. ICJ's dom i Folkmordsmålet har väckt mycket kritik, inte endast på grund av tolkningen av artikel I, utan också för den höga beviskraven för hänförlighet och för valet att använda Nicaragua-testen i målet. Det är ändå viktigt att komma ihåg, att Folkmordsmålet var det första målet någonsin i vilket frågan var en stats ansvar för folkmord. Även om ICJ's dom är bristfällig och möjligtvis i högre grad, den kan ändå inses som ett steg framåt till ett mer omfattande statsansvar för folkmord.

Preface

The road to this choice of subject was a long one and started in the spring of 2016 when I attended a lecture by Lennart Aspegren, a UN judge who worked in the International Criminal Tribunal for Rwanda. I dived in some literature, starting with Romeo Dallaire's *Shake hands with the devil*, and ending up with the questions of State responsibility concerning genocide. Even though it has been several years since the Genocide case of 2007, the case and the debate it caused is still very much alive and valid, and in my opinion worthy of further analyzing. All the critique it received made me question the possible positives of the case.

As time-consuming as this process has been, it has also been very rewarding. I want to thank my supervisor and my friends and family for the support to finish this thesis.

The 3rd of January 2017, in Lund

Kaisa Marttinen

Abbreviations

FRY	the Federal Republic of Yugoslavia
ICJ	International Court of Justice; also, the Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
VRS	Vojska Republike Srpske, the Army of Republika Srpska, the Bosnian Serb Army

1 Introduction

1.1 Purpose

The purpose of this thesis is to enlighten the field of State responsibility for genocide, especially after the International Court of Justice's (hereinafter the ICJ or the Court) judgment in the Bosnian Genocide case of 2007. Critique has arisen from the Court's judgment and in this thesis, I will try to deal with the critique and possible positive outcome of the Genocide case.

1.2 Research question and delimitations

The central research question of this thesis is whether the ICJ's judgment in the Genocide case can be described as a success despite of the heavy critique the judgment received. To find the answer to this question, it was necessary to first find answers to the following questions:

- What was the ICJ's reasoning behind the judgment?
- Towards which issues was the critique targeted?
- Did the judgment result in any changes change in the field of State responsibility for genocide?

I have decided to only discuss the ICJ's rulings on the matter of the genocide in Srebrenica and not include the Court's arguments on the other areas of the case, since the Court confirmed that genocide was only committed in Srebrenica and not in other regions of Bosnia and Herzegovina.

1.3 Method and materials

The method used is a traditional judicial, analysing method. I have used the Genocide case *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, 26 Feb. 2007)* as a main source for information, as well as the Genocide Convention (hereinafter "the Convention"), articles of the European

Journal of International Law and other publications, doctrine and other relevant literature.

1.4 Outline

In the second chapter I will first shortly discuss State responsibility for genocide in international law altogether (2.1) and more specifically in the Convention (2.2), which is the basis of the ICJ's judgment in the Genocide case. The third chapter approaches the Genocide case itself, starting with a summary of the events in Bosnia and Herzegovina after the break-up of Yugoslavia and moving forward to the central issues dealt by the ICJ in its judgment. The fourth chapter offers a view to the criticism the judgment received and considers the possible positive outcome of the judgment.

2 State Responsibility for Genocide in International Law

The rules of State responsibility in international law apply for all internationally wrongful acts, including genocide. In this chapter I will shortly display the most central and important of these rules for a better understanding of the ICJ's judgment in the Genocide case[1], discussed in chapter three. What separates a State's responsibility for genocide from an individual criminal responsibility is that it is not necessary to find proof of a genocidal intent within the State leadership; instead the key is the State's control over the perpetrators who had the intent and committed genocide.[2]

2.1 Attribution

The most central requirement and the basis for State responsibility is the attribution, in other words, the confirmed relationship between the State and the actual part committing the act.[3] The crucial factor in defining State responsibility is whether the persons or groups acting within the State are acting, or at least can be treated as acting on behalf of the State. If not, State responsibility cannot be evoked.

Several of the ILC Articles focus on State responsibility and attribution. Article 4 gives the general rule and cornerstone of state accountability: *"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions […]."* This means that the acts of these organs are attributable to their State even if they have acted against the State's instructions or exceeded their competence granted by the State, as long as the organ was acting on behalf of the State.[4] As Article 4 covers the

[1] *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007* (hereinafter referred to as "The Genocide Case Judgment")
[2] Milanovic, EJIL 2006, vol. 17 no. 3, p. 576
[3] Dixon, *Textbook on International Law*, p. 257
[4] Dixon, Textbook on International Law, p. 258

de jure organs of a State, Article 8 gives a possibility to hold the State responsible for the acts of its de facto organs. It declares 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."*

2.1.1. State Responsibility for Acts Committed by Non-State Actors

A general rule of State responsibility is that a State is not accountable for the acts of private individuals, even if the acts are executed in the State's territory. Nevertheless, private individuals and groups can in specific situations act on behalf of a State in a way that attribution to the State arises. For example, the local law can legitimize their actions on behalf of the State, or they are acting on the instructions of or under the direction and control of the State.[5] The latter example was valid in the Genocide case, where the ICJ ruled that not only did the perpetrators need to be under the direction and control of the State, but also in a relationship of "complete dependence", an ideology in which the Court echoed the test of control drafted in the Nicaragua case displayed below.[6]

2.1.1.1 The Nicaragua Test of Control

The Nicaragua case is relevant for the understanding of the Genocide case for their resemblance in the matter of the application of the law of State responsibility, and the fact that the ICJ used the test of attribution created in the Nicaragua case for resolving whether the acts committed in Bosnia were the right kind and degree to be attributable to Serbia. The Nicaragua case dealt with the support the United States gave to the *contras,* a group of rebels fighting against the government of Nicaragua, and the international responsibility of the US for violations of international law evoked by the support. Since the *contras* were not *de jure* organs of the US, the ICJ drafted a test of control to define, whether the US control over the

[5] Dixon, Textbook on International Law, p. 260

[6] C*ase concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986* (hereinafter referred to as "The Nicaragua Case Judgment")

contras was of the kind and degree that the *contras* could be seen as a *de facto* organ of the US.[7]

For the acts of a non-state part to be attributable to a State, the relationship between the State and the individual or group in question needs to be a relationship of dependence on the individual's or the group's side and a relationship of control on the State's side. Only then the non-state organ can be equated with a State organ or as acting on its behalf. Questions such as if the support given by the State to the non-state organ was crucial for its functioning and existence, or if the State selected or paid the leaders of the non-state organ, help to form the result of the Nicaragua test of control.[8] The autonomy of the group, or the lack of it, is the key here. In addition, the international responsibility of a State could arise even if the kind of complete dependence mentioned above was not fulfilled; the Court added that if a State had effective control of the acts committed by the non-state organ, the State responsibility could still be evoked.[9]

2.2 State Responsibility in the Genocide Convention

The Genocide Convention was created first and foremost for the purpose of prosecuting *individuals* and hold them responsible for their actions of genocide. However, States are often involved when a genocide is being committed; State organs have been systematically executing it like in the Nazi Germany, or more subtly assisting the non-state groups financially like in the Genocide case in Bosnia. When the Convention was drafted, differing views emerged among the contracting States whether States could be held responsible for genocide.[10] The Convention does establish some obligations for States, but does not directly express the possibility of a State being guilty of commission of genocide. Article III, paragraph (a) of the Convention declares that commission of genocide is a punishable act, but according to Article IV only "*persons* committing genocide or any of the other acts enumerated

[7] Linderfalk, *Folkrätten i ett nötskal,* p. 22
[8] The Nicaragua Case Judgment, para. 109; 110
[9] The Nicaragua Case Judgment, para. 115
[10] Schabas, *Genocide in international law: The Crime of Crimes,* p. 418

in article III shall be punished […]".[11] The individual criminal responsibility, but not the responsibility of a State, exists in the words of Article IV.

Article IX references State responsibility by declaring that *"[d]isputes 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".* The debate whether civil accountability for genocide was addressed through the Article continues to this day, and while the general concept of State responsibility for genocide even has a *jus cogens* status,[12] the problem with Article IX is the jurisdiction it gives to the ICJ: if the dispute does not concern the interpretation, application or fulfilment of the Convention, the access to the Court is denied.[13] In other words, if State responsibility is seen non-existent in the Convention, a dispute involving State responsibility can therefore not concern any of the jurisdictional areas given in the Article and the ICJ will not have jurisdiction in such a matter.

In the Genocide case, Yugoslavia challenged the ICJ's jurisdiction based on Article IX, by stating that the Convention only covers the State's responsibility to prevent and punish, but not to commit genocide. The Court addressed this allegation by declaring that the reference in Article IX to the responsibilities of a State does not exclude any form of State responsibility.[14] In other words, the Court gave itself jurisdiction in the case by accepting a wider interpretation of Article IX.

Before the Genocide case, State responsibility in the Convention was mostly searched for in Article IX, and the applicant in the Genocide Case, Bosnia and Herzegovina, also used this point of view as a main argument in its application. The Court made a surprising judgment and instead interpreted that Article I, which gives States an obligation to prevent and punish genocide, "necessarily implies the prohibition of the commission of genocide". The Court justified its opinion by stating

[11] Emphasis added
[12] Gaeta, EJIL 2007, vol. 18 no. 4, p. 632
[13] Schabas, *Genocide in international law: The Crime of Crimes,* p. 434
[14] The Genocide Case Judgment, para. 150; 151

that even though Article I does not *expressis verbis* require that States should not commit genocide, such an expectation follows logically from the obligation to prevent genocide; if a state is under an obligation to prevent commission of genocide by persons over whom they exercise a certain amount of control, it would be illogical for it not to be forbidden to commit such acts through their own organs.[15]

[15] The Genocide Case Judgment, para. 166

3 The Genocide Case

The war in Bosnia and Herzegovina (hereinafter Bosnia) between 1992 and 1995 was an exceptionally violent armed conflict in the Yugoslav wars, and in post–World War II Europe in general; studies show an estimate of possibly over one hundred thousand dead, whereof most were Muslim civilians.[16] This chapter will more closely examine the conflict and its aftermath between two of the many States that emerged from the ruins of the Socialist Federal Republic of Yugoslavia (SFRY); the Federal Republic of Yugoslavia (FRY, later Serbia and Montenegro) and the Republic of Bosnia and Herzegovina.

For a better understanding of the basis in the "Genocide Case" brought to the ICJ by Bosnia, and the outcome of the ICJ's judgment in the case, it is necessary to first clarify the situation in Bosnia right before and during the conflict, after which I will specify the main features of the ICJ's judgment concerning the massacre in Srebrenica.

3.1 Background

At the time of the break-up of the SFRY in 1991, most of the inhabitants in Bosnia described themselves either as Muslims (44 %), Serbs (31 %) or Croats (17 %).[17] Bosnia adopted a "sovereignty" resolution in October 1991, followed by a referendum and a declaration of independence in early 1992. The Bosnian Serbs boycotted the vote and contested the validity of the resolution by proclaiming a separate Assembly of the Serb Nation and by declaring the Republic of the Serb people of Bosnia and Herzegovina, later called Republika Srpska, which would come into force when the Republic of Bosnia and Herzegovina is internationally recognized.[18] With support from the Serbian government, the Serb population in Bosnia started the war by aiming to secure Serb territory.

[16] The Bosnian Institute in London: Revised death toll for Bosnian war (available at http://www.bosnia.org.uk/news/news_body.cfm?newsid=1985)
[17] The Genocide Case Judgment, para. 232
[18] The Genocide Case Judgment, para. 233; 234

3.1.1 Srebrenica

Often described as the most brutal atrocity committed in Europe after World War II, the ICTY has legally qualified the mass murder in the Bosnian town of Srebrenica in July 1995 as genocide.[19] According to the ICJ, the best summary of the events in Srebrenica can be found in the first paragraph of the Judgment of the Trial Chamber in the *Krstic case*[20]*:*

"The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again." [21]

Serbia questioned the existence of a specific intent of genocide and that the acts in Srebrenica could be attributed to such intent, claiming that the measures taken by the Republika Srpska were a part of a war for territory,[22] not intended to destroy a national or religious group as such. In contrast, Bosnia claimed that the attack on Srebrenica could not have been executed without thorough planning, with a specific intent of destroying every military-aged Muslim man.[23]

[19] The ICTY Trial Chamber's judgment in the Krstic case IT-98-33-T, Judgment, 02 August 2001, para. 598

[20] Radislav Krstic was a commander in the Army of the Republika Srpska (Bosnian Serb Army, VRS) and was convicted of genocide by the ICTY based on his actions in Srebrenica in 1995.

[21] IT-98-33-T, Judgment, 02 August 2001, para. 1

[22] The Genocide Case Judgment, para. 278

[23] The Genocide Case Judgment, para. 279: a report from 1994 by a VRS commandant states that the "final goal" of the VRS is an "entirely Serbian Podrinje", a valley in Bosnia and Herzegovina where the town of Srebrenica is located in.

3.2 The International Court of Justice's Judgment

The ICJ had the task to attend to the claims and allegations made by Bosnia against Serbia concerning the application and fulfilment of the Genocide Convention. For the first time in history, a State had been tried for genocide under the Genocide Convention. The Court started by dealing with the question of whether the acts committed in Srebrenica can be defined as genocide, after which it decided on whether Serbia and Montenegro (hereinafter Serbia) can be held responsible for the genocide (given that it could be defined as such).

3.2.1 Defining the Events in Srebrenica as Genocide

The ICJ stated unanimously with the ICTY that both killings and other acts causing serious bodily or mental harm, within the terms of Article II (a) and (b) of the Convention respectively, took place in Srebrenica during the massacre. However, the Court found it necessary to have a closer look to the ICTY's decisions of existence of the *specific intent* to destroy the Muslim male population of Srebrenica and the definition of "group" in Article II; furthermore, the Court had to address the possible involvement of Serbia in the actions in Srebrenica before taking a conclusive stand in the Genocide Case.[24]

3.2.1.1 The Question About the Specific Intent

Article II in the Convention requires an *"intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".* The definition of this kind of intent is presented as an intent not only to target members of a group because they belong to it, but to target these members with intent to destroy the group itself, either in whole or in part.[25]

The Trial Chamber in the Krstic case was convinced of the existence of the specific intent based on the evidence brought before the Chamber, according to which the executions of the victims in Srebrenica "systematically targeted" all the male Bosnian Muslims who were military-aged, leaving aside whether they were civilians or soldiers. Initially the plan may have been to only target military personnel, but

[24] The Genocide Case Judgment, para. 291
[25] The Genocide Case Judgment, para. 187

eventually this changed and it became the intention to kill all the Bosnian Muslim men.[26] The Chamber found that "[t]he acts of genocide need not be premeditated and the intent may become the goal later in an operation"[27]. The Court concluded, without departing from the ICTY's opinion, that the specific intent existed**,** but only after the Serbian forces took over Srebrenica.[28]

3.2.1.2 The Question About the Meaning of "Group" in Article II

As stated above, an intent to destroy a protected *group* in whole or in part is a requirement of Article II of the Convention. Bosnia referred to *"the non-Serb national, ethnical or religious group […] of Bosnia and Herzegovina, including in particular the Muslim population",* while Serbia considered such definition to be legally problematic, due to the *negative* characterization of the group.[29]

What defines a group for the purposes of Article II are the *positive* characteristics of the group, such as nationality, ethnicity, race and religion. As the ICJ defines it, *"it is a matter of who those people are, not who they are not"*.[30] A positive definition of "group" must be used.[31] Since Bosnia didn't make other, more precise references to the non-Serb populations than the Bosnian Muslims, the ICJ could only find that genocide was committed if it can be established that there was a specific intent to destroy the Bosnian Muslims.[32]

In determining what the Convention aims at in Article II with "part" of the "group", three relevant issues must be taken into consideration[33]:

1. *Substantiality:* At least a significant part of the group in question must be the target for killing and it must have an impact on the group as a whole

[26] The Genocide Case Judgment, para. 292; IT-98-33-T, Judgment, 02 August 2001, para. 546-547
[27] IT-98-33-T, Judgment, 02 August 2001, para. 572
[28] The Genocide Case Judgment, para. 295
[29] The Genocide Case Judgment, para. 191
[30] The Genocide Case Judgment, para. 193
[31] The Genocide Case Judgment, para. 194
[32] The Genocide Case Judgment, para. 196
[33] The Genocide Case Judgment, para. 198, 199, 200 respectively

2. *Geographical area:* The perpetrator's area of activity must be considered when evaluating what is a significant part of a group; the intent does not have to be to destroy every member of a group from every corner of the world.
3. *Qualitative criterion:* The number of targeted people shouldn't be evaluated purely in absolute terms, but instead in relation to the size of the entire group. A part of a group can be significant even if the number of individuals is small, if it is essential to the group's survival.

The findings in the Krstic case showed that the VRS targeted the Bosnian Muslim men of Srebrenica and that even though the Muslim population in Srebrenica only constituted a small percentage of the entire Muslim population of Bosnia, the importance of this small percentage was significant enough for the acts to be classified as genocide. [34] The ICJ saw no reason to question these findings and with them and the three issues named above as background, concluded that a specific intent to destroy in part the group of the Bosnian Muslims as such existed in Srebrenica and that these were acts of genocide, committed by members of the VRS (the military forces of the Republika Srpska).[35]

3.2.2 Possible State Responsibility for Events in Srebrenica

To conclude whether Serbia as a State can be held responsible for the genocide in Srebrenica, the ICJ had to address three issues[36]:

1. whether the acts in Srebrenica were committed by persons or organs whose actions can be attributed to Serbia,
2. whether the acts referred to in Article III, paragraph (e) were committed by such persons or organs whose conduct is attributable to Serbia, and
3. whether Serbia fulfilled its obligation in Article I to prevent and punish genocide.

[34] The Appeals Chamber's Judgment in the Krstic Case IT-98-33-A, Judgment, 19 April 2004, para. 15
[35] The Genocide Case Judgment, para. 296; 297
[36] The Genocide Case Judgment, para. 379

I will now summarize the ICJ's decisions in these issues before going further to analyze the criticism deriving from these decisions in the next chapter.

3.2.2.1 Attribution of the genocide to Serbia

Article III, paragraph (a) of the Convention states that the act of genocide is punishable, and the first question the Court had to decide on is about whether Serbia can be held responsible for commission of genocide. The question, whether the FRY and consequently Serbia are responsible under the laws of State responsibility, has two aspects[37]: whether the acts were committed by *de jure* organs of the FRY[38], and if the answer is no, whether they were committed by parts who nevertheless acted on the instruction or under direction or control of the FRY and could be dealt with as *de facto* organs of the FRY[39].

According to the Court there is no evidence that the FRY army or its political leaders participated in the massacres in Srebrenica by preparing, planning or in any other way carrying out the massacres. The evidence brought forward in the case does prove that the FRY provided financial support to the Republika Srpska and that the withdrawal of that support would have significantly changed the options available to the Republika Srpska authorities,[40] but since neither the Republika Srpska nor the VRS were de jure organs of the FRY or under FRY's control at the time of the massacres, the Court moved forward to consider the possibility of them being *de facto* organs instead.

The ICJ had previously in the *Nicaragua Case* (see above chapter 2.1.1.1) addressed the issue of whether groups or persons who lack the status of State organs but act under strict control by the State can be treated as its organs when determining the existence of State responsibility for an internationally wrongful act. According to the judgment in the *Nicaragua Case* it would be possible to equate the non-State group or persons with a State organ if the relationship between the State and the group or

[37] The Genocide Case Judgment, para. 384
[38] The applicable rule for this aspect is Article 4 of the ILC Articles (see chapter 2.1)
[39] The applicable rule for this aspect is Article 8 of the ILC Articles (see chapter 2.1)
[40] The Genocide Case Judgment, para. 386

person was based on a "complete dependence" and effective control.[41] The Court didn't find that such complete dependence existed between the FRY and the persons and entities committing the acts of genocide at Srebrenica since neither the Republika Srpska nor the VRS were lacking any autonomy and the FRY wasn't acting through them.[42]

Several reports claim that there is no evidence that the FRY army had any part in planning and executing the acts in Srebrenica.[43] The Court found that the acts in Srebrenica were not committed on the instructions of or under the control of the FRY, since Bosnia did not succeed to prove that any of the orders to commit the genocide came from the federal authorities. The decision to destroy the Bosnian Muslim men in Srebrenica was made by the VRS officers, without instructions from the FRY.[44] Serbia can't therefore be held responsible under the rules of international law of State responsibility on the basis of Article III, paragraph (a).[45]

3.2.2.2 Attribution of Complicity in Genocide to Serbia

The term "complicity" in Article III, paragraph (e) of the Convention contains enabling and facilitating the commission of genocide and can be parallelized with the rules for *aid or assistance* in Article 16 of the ILC Articles for State responsibility,[46] according to which a State is internationally responsible when it has aided or assisted another State in the commission of an internationally wrongful act, if it has knowledge of the circumstances and the act would be internationally wrongful if it was committed by that State.

The Court found that the decision to destroy the Muslim men of Srebrenica was not brought to the attention of the FRY authorities when it was taken, and therefore the aid supplied by the FRY was not supplied in awareness that it would be used to

[41] The Genocide Case Judgment, para. 392; The Nicaragua Case Judgment, para. 109 (see also the Nicaragua test in chapter 2.1.1.1)
[42] The Genocide Case Judgment, para. 394
[43] The Genocide Case Judgment, para. 411; 412
[44] The Genocide Case Judgment, para. 413
[45] The Genocide Case Judgment, para. 415
[46] The Genocide Case Judgment, para. 419; 420

commit genocide.[47] Consequently, Serbia can't be held internationally responsible under any of the acts in Article III of the Convention.[48]

3.2.2.3 Serbia's Obligation to Prevent and Punish the Genocide in Srebrenica

The obligation to *prevent* genocide is stated in Article I of the Convention, and is a question of conduct, not result, by only requiring States to use all means reasonably available to them to prevent, instead of successfully preventing genocide.[49] Unlike the criterion for complicity in genocide, where the State's organs must have been aware that genocide was committed or about to be committed, the obligation to prevent can be violated even if the State was not aware of the risk of genocide and failed to act to prevent the crime; it is enough if the State should have been aware of the risk that acts of genocide would be committed.[50]

This distinction was central in the ICJ's judgment of the question of Serbia's responsibility in preventing genocide. It is shown conclusively by the evidence in the case that the FRY authorities were completely aware of the reigning hostility and alienation between the Serbs and Muslims in Srebrenica. Even the international concern about the likely chain of events in Srebrenica was not enough to get the FRY to act and try to prevent the massacre. The ICJ states that it is not necessary to prove that the State had the power to prevent the genocide, instead it is enough that the FRY indeed had the means to try to prevent the acts but refrained from using them.[51]

The obligation to *punish* genocide is also stated in Article I of the Convention, and Article VI describes the process of trial in such cases. According to Article VI, persons charged with genocide are to be tried in the State, where the acts were committed, or alternatively by an international penal tribunal that has jurisdiction in the case. The contracting parties must also have accepted its jurisdiction.

[47] The Genocide Case Judgment, para. 423
[48] The Genocide Case Judgment, para. 424
[49] The Genocide Case Judgment, para. 430
[50] The Genocide Case Judgment, para. 432
[51] The Genocide Case Judgment, para. 438

Since the Srebrenica genocide was executed in the FRY territory, but after the break-up of Yugoslavia the territory in question belongs to Bosnia, Serbia can't be charged with not having tried before its own courts.[52] There is however no doubt that the ICTY is an international tribunal with jurisdiction in the case[53] and the ICJ also ruled that the FRY was obligated to co-operate with the Tribunal,[54] which consequently includes the obligation for Serbia to arrest those accused of genocide who reside in its territory, even though the genocide was committed outside its borders. If the prosecution isn't possible in its own courts, Serbia was obligated to hand the accused over to the Tribunal.[55] Since there were evidence that General Mladic, who was indicted by the ICTY for the genocide in Srebrenica, resided on Serbian territory on several occasions and that the Serb authorities didn't use the means available to arrest him,[56] the Court established that Serbia failed its obligation to co-operate with the Tribunal and violated its obligations under Article VI of the Convention. In conclusion, the ICJ's judgment states that Serbia failed to fulfil its obligation to both prevent and punish genocide in such a manner that its international responsibility is engaged.[57]

3.2.3 Summary of the Judgment

The ICJ, much like the ICTY before it, concluded that the events in Srebrenica classify as genocide, since the target was not only the military personnel but the entire population of adult Muslim men in Srebrenica. The Muslim population of Srebrenica also fulfilled the criteria for the concept "group" used in Article II of the Convention.

The Court was convinced that the VRS committed genocide in Srebrenica,[58] but it only had jurisdiction to resolve the possibility of State responsibility in the case. In principle, the Court accepted the possibility that a State can be held accountable for genocide through the acts of its *de jure* or *de facto* organs through its interpretation of Articles I and III of the Convention, but didn't see such a situation in the Genocide

[52] The Genocide Case Judgment, para. 442
[53] The Genocide Case Judgment, para. 445
[54] The Genocide Case Judgment, para. 447
[55] The Genocide Case Judgment, para. 443
[56] The Genocide Case Judgment, para. 448
[57] The Genocide Case Judgment, para. 450
[58] The Genocide Case Judgment, para. 297

case due to lack of evidence of the involvement of the FRY organs and their relationship with the VRS. However, the Court did find Serbia in violation of the obligation in Article I to prevent and punish genocide.

4 Analysis

4.1 Critique for the ICJ's Judgment

One of the main controversies in the ICJ's judgment in the Genocide case is its statement that Article I of the Convention not only includes the obligation for States to prevent and punish, but also introduces the obligation not to commit genocide.[59] This has been criticized by not only the supporters of the idea that the Convention only obliges States to prevent and punish genocide,[60] but also those who advocate for a more direct State responsibility for genocide[61]. Whether it was necessary for the Court in the first place to decide if States could commit genocide is worthy of a discussion. Instead of taking a stand in State responsibility for commission of genocide whilst not holding Serbia responsible for it, the Court could have concentrated only on interpreting the obligation to prevent and punish. The result would still have been the same; Serbia was in violation of the obligation to prevent and punish genocide. It has been argued that the Court's quest to redefine the construction of the Convention in this matter was unnecessary and that the Court in fact did not have jurisdiction in making findings on the possible commission of genocide by individuals.[62]

Another jurisdictional problem was the fact that the Court only had the Convention under which it could decide on the question of State responsibility for genocide, not under customary international law, where, granted, the prohibition for commission of genocide has a *jus cogens* status.[63] Bosnia requested in its application that the Court would exploit the Geneva Conventions and the U.N. Charter i.a. in the judgment,[64] but the Court did not have that alternative. This limitation in its jurisdiction complicated the Court's task significantly.[65]

[59] The Genocide Case Judgment, para. 166 & Gaeta, EJIL 2007, vol. 18 no. 4, p. 633
[60] e.g. Gaeta, EJIL 2007, vol. 18 no. 4
[61] e.g. Milanovic, EJIL 2007, vol. 18 no. 4
[62] Gaeta, EJIL 2007, vol. 18 no. 4, p. 645; 646
[63] Gaeta, EJIL 2007, vol. 18 no. 4, p. 632
[64] The Genocide Case Judgment, para. 64
[65] Gaeta, EJIL 2007, vol. 18 no. 4, p. 632

Another issue with the ICJ's judgment is the very strict standard of proof the Court placed, namely the requirement for the Court to be "fully convinced" that allegations for genocide and the proof of attribution have been clearly established.[66] The standard of proof adapted by the ICJ is much alike to what is used by many criminal tribunals, such as the European Court of Human Rights.[67] Such a high standard is justified in criminal cases, where the principle "innocent until proven guilty" is fundamental, but the Genocide Case was a civil matter and therefore the ICJ might have pushed the standard too far, even though a high standard may be necessary in questions like genocide.

The Court's choice to use the Nicaragua test as the test of control in the Genocide Case has been widely criticized by describing the test as too narrow, thus allowing violations in international law even though the evidence might indicate State responsibility. When the attribution test is narrow, the State's possibilities to use non-State actors to escape State responsibility grows. Some argue that the Tadic test would be more suitable in case of genocide; it is the test the ICTY used and includes a more flexible standard than the Nicaragua test.[68]

Narrow was also the ICJ's interpretation of the definition of genocide. The Court refused to include ethnic cleansing to the concept of genocide, possibly causing future judgments of international tribunals to classify ethnic cleansings as crimes against humanity instead of genocide.[69] Widening the definition of genocide, an effort supported by many, has taken a serious step backwards due to this judgment.

4.2 Positive Outcome of the ICJ's Judgment

Despite the wide critique, it is good to remember that the Genocide case was the first time in history a State has been tried before the ICJ for genocide. My argument is

[66] The Genocide Case Judgment, para. 209: the Court quoted the Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) on the requirement for the evidence to be fully conclusive
[67] Gaeta, EJIL 2007, vol. 18 no. 4, p. 646
[68] Shackelford, Human Rights Brief, spring 2007, p. 23, 24
[69] Schabas, Encyclopedia entry on Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)

that this alone is a good first step towards greater State responsibility for genocide, despite the weaknesses in the judgment itself.

Even though the ICJ decided not to hold Serbia responsible for the genocide in Srebrenica, it still managed to interpret the Convention in a way that created an obligation to States not to commit genocide. Granted, the process and the arguments used to get to this obligation can be challenged, but it does not change the fact that such an obligation has now officially been declared to exist in the Convention. As I said above, this could be a positive first step forward, and the weaknesses of the Genocide case judgment could eventually be outweighed by the development which the Genocide case itself has started.

The Court held Serbia responsible for violating the obligation to prevent genocide. This alone might not seem like much of a groundbreaking progress in the field of State responsibility for genocide, given that Article I clearly obligates States to prevent genocide. What it still does is draw a clear, previously non-existent line for State accountability for acts by non-state organs by declaring that a State can be held responsible for failure to prevent such acts, if the State's position is of influence over the non-state persons or groups.

The ICJ's jurisdictional problem in cases concerning genocide, which I shortly discussed above under the headline *critique,* obviously has an impact on its possibilities to form arguments. While this arrangement complicates its power over formulating rules for State responsibility, the Court can still do a lot of meaningful work by interpreting the existent rules in the Convention, which is precisely what it has done in the Genocide case.

In conclusion: the negative side of the judgment seems indeed to form a significantly longer list of issues than the positive side. While many controversial judgments were made, and the 14-year long process in the case not especially being an asset when discussing the ICJ's merits, I would not throw away all hope of a better tomorrow for the matter of State responsibility for genocide. The Genocide case is a starting point; not a perfect one, maybe not even a good one, but one nonetheless.

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