TALLINN UNIVERSITY OF TECHNOLOGY

Faculty of Social Sciences

Tallinn Law School

Tamar Mikaberidze

State Responsibility for Genocide in the Light of ICJ Genocide Judgments and Darfur Commission Report

Master Thesis

Supervisor: **Dr. Evhen Tsybulenko**

Tallinn. 2016

I hereby declare that I am the sole author
of this Master Thesis and it has
not been presented to any other
university of examination.

Tamara Mikaberidze
30 December, 2015

The Master Thesis meets the established requirements

Supervisor : Dr. Evhen Tsybulenko
“ ..... “ 2016

Accepted for examination “ ..... “ 2016

Board of Examiners of Law Master’s Theses

……

Table of Contents

List of Acronyms

UN	United Nations
ICJ	International Court of Justice
IMT	International Military Tribunal in Nürmberg
IMTFE	International Military Tribunal for the Far East
ICTY	International Criminal Tribunals for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
ILC	International Law Commission
FRY	Republic of Former Yugoslavia
VRS	Army of the Republika Srpska
NATO	North Atlantic Treaty Organization

INTRODUCTION

Concurrence between state and individual responsibility has been the subject to longstanding and the most controversial debates. These two concepts are proved to be separate, however recent developments in international law has confirmed the fact that the responsibility of both state and individual can exist simultaneously with respect to certain heinous acts that shock the whole international Community.

Nevertheless, holding the state criminally liable for grave breaches of international human rights did not gain worldwide acceptance in any of the international documents and in customary international law, which is resulted out of fear from the states to surrender their sovereignty. On the other hand, aftermath of the World Word II and consequent tragedy demonstrated the rapid increase in setting up various ad hoc tribunals for a mere purpose of holding separate individuals criminally liable for their conducts.

While turning to the issue of assessing the crime of genocide in the context of international state responsibility, the discussion becomes more controversial. History of international law shows that responsibility for the crime of genocide is primarily considered in the context of individual prosecution. Attributing acts of genocide to particular state proves to be extremely rare.

Nevertheless, the recent documents, adopted by the two different bodies, the Report of International Commission of Inquiry on Darfur and the Judgments of International Court of Justice on genocide in Bosnia and Herzegovina and in Croatia attempted to challenge the dilemma existence around the issue of state responsibility for genocide. These two bodies were set up based on different legal framework; they were tasked to serve distinct goals and consequently produced the result that raises more questions than it existed before with regard to state responsibility for genocide.

These two bodies and the results they have achieved in their documents refer essentially to the similar issue. However, both of them arrive at the conclusion in a different manner while dealing with the Intent and attribution of the acts of Genocide to the relevant governments.

When should the acts of Genocide be attributed to the state and are there different, contradictory approaches while proving state responsibility in the crime of Genocide according to the case law? State policy and state plan – Is that the independent element and a decisive feature in determining the intent to commit the crime of genocide? Considering the

recent developments in the field, there has been different approaches in determining whether state policy or state planning is a decisive factor in determining the *dolus specialis* of the crime of Genocide.

Darfur Commission, which was tasked to identify individual perpetrators of genocide, rejected the existence of acts of genocide on the grounds of lack of state policy element pursued by the central government of Sudan. Commissions approach seems to be extremely challenging, provided that it contradicts the line taken by previous tribunals on the same matter and therefore even raising the threshold of application of possibility of application of the Genocide Convention to States Parties. It would also create a situation where certain state sponsored criminal acts in reality amounting to genocide would remain unpunished. Therefore, my aim is to in depth research the role of the state policy element in establishing the commitment of the crime of Genocide and to support the view that it is relevant only for the purpose of proving the genocidal intent.

1. THE CONCURRENCE BETWEEN INDIVIDUAL CRIMINAL RESPONSIBILITY AND STATE RESPONSIBILITY FOR GENOCIDE

1.1. **Concurrence of State and Individual responsibility in International law**

Prior to World War II, international law imputed the unlawful conduct of an individual to a state and removed the responsibility of that individual.[1] However, Following the theoretical developments at Nuremberg and subsequent developments in international law, concurrent responsibility of the state and individual may now exist for planning, preparing or ordering wars of aggression, genocide, crimes against humanity, killings of protected persons in armed conflict, terrorism and torture, whereby an individual may be subject to individual criminal responsibility and the state may be simultaneously subject to state responsibility.[2]

Historically, international law aimed its direction at the collective level, i.e. at the actions of nations and states, their interactions and their peaceful coexistence. When there was adjudication, it was directed at the collective level, where states were criticized for their collective illegal conduct under international norms, either through treaty or custom. Punishments for collective crimes included sanctions and reparations. Criminal law, however, aimed its gaze at the individual, attributing legal responsibility for individual culpability and punishing offenders on that basis.[3]

There exist two main views with respect to the concurrence between individual and state responsibility. A number of commentators argue that individual responsibility exists on its own, exclusively from state responsibility. Others are firmly convinced that state and individual could concurrently be held responsible for one and the same breach.

With respect to the first approach, although, technically, individual responsibility does not exclude state responsibility, occasionally it has been suggested that for reasons of

---

[1] P.M. Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford: Oxford University Press, 2002), at 1086.

[2] A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', *52 International and Comparative Law Quarterly* (2003) 615-640, at 618-619.

3 G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', *3 JICJ* (2005) 539-561, at 542.

legal policy, individual responsibility should be of an exclusive nature The Nuremberg Tribunal stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[4] The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of World War II. It was included in the London Charter of 1945 which established the International Military Tribunal in Nuremberg (IMT or Nuremberg Tribunal)[5] and was subsequently endorsed by the General Assembly.[6] Accordingly, since the creation of Nuremberg Tribunal and The International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal), Statutes of the two ad hoc International Criminal Tribunals for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), and recently the Statute of the International Criminal Court (ICC) clearly envisaged that they should have jurisdiction over "natural persons".[7] So far this principle has operated in the field of criminal responsibility.[8]

Furthermore, Judges Vereshchetin and Shi en Oda considered in their individual Opinions in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) whether the fact that the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) envisages individual responsibility may imply that there is no room for state responsibility.[9] They wrote:

> The determination of the international community to bring individual perpetrators of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action. We

[4] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany. Part 22, at 447. The judgment of the Nuremberg Tribunal is available at: www.yale.edu/lawweb/avalon/imt/proc/judcont.htm.

[5] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279.

[6] G.A. Res. 95 (I), 11 December 1946. See, also the International Law Commission's Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, *Yearbook... 1950*, vol. II, p. 374.

[7] See, Art. 25 (1) of the ICCSt; Art. 6 of the ICTYSt; and Art. 5 of the ICTRSt.

[8] Commentary of International Law Commission on Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Commentary), 2001, commentary on Art. 58, at 364.

[9] Joint declaration of Judge Shi and Judge Vereshchetin ICJ Rep 1996, 631; Declaration of Judge Oda, ibid, 625.

> share the view expressed by Britain's Chief Prosecutor at Nuremberg, Hartley Shawcross, in a recent article in which he declared that "There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs" (*International Herald Tribune*, 23 May 1996, 8). Therefore, in our view, it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings.[10]

To follow the second approach in this respect, as Dupuy observes, internationally wrongful acts may be "imputed both to a sovereign State and to an individual acting on its behalf".[11]

This possibility of concurrent responsibility is reflected in Article 25(2) of the Rome Statute of International Criminal Court (ICC Statute), which provides that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."[12] The reverse is equally true - the engagement of state responsibility does not negate an individual international criminal liability. Article 58 of the Articles on State Responsibility for International Wrongful Acts (The Articles on State Responsibility) of the International Law Commission (ILC) provides that "[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."[13] Both in its work on the Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes)[14] and on Articles on State Responsibility, the ILC has taken the position that responsibility of individual state organs does not exclude state responsibility. In its commentary to former Article 19, the ILC said that individual responsibility "certainly does not exhaust the prosecution of the international responsibility incumbent upon the state for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs" and that 'the state may thus remain responsible and be unable to exonerate itself from responsibility by

[10] Ibid, 632.
[11] Dupuy, *supra* note 1, at 1088.
[12] See, Art. 25(2) of the ICCSt.
[13] See, Art. 58 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, 2001.
[14] See, Art. 4 of the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, 1996.

invoking the prosecution or punishment of the individuals who committed the crime."[15] It also stated that "the criminal responsibility of individuals does not eliminate the international responsibility of States for the acts committed by persons acting as organs or agents of the State".[16]

State practice provides no support for the proposition that, in cases where responsibility has been allocated to an individual, there can be no room for attribution to the state. Several examples can be brought in support of this opinion. After the Second World War, both Germany and Japan were declared liable, even though the political and military leaders were prosecuted for individual crimes.[17] The fact that four individuals, who were assumed to be agents of Libya, were held responsible for bomb attacks in a bar in Berlin in 1986 did not discourage the suggestion that Germany should claim compensation from the state of Libya. The prosecution and conviction of the individual responsible for the Lockerbie bombing, considered to be an agent of Libya, did not preclude subsequent claims against Libya for compensation by the United Kingdom and the United States. The effectuation of responsibility of individual agents of Yugoslavia for acts during the armed conflict between 1991 and 1995 in the ICTY and national courts did not preclude claims by Bosnia and Herzegovina in the ICJ. It does not appear that in any of these cases the states against which claims were made invoked the argument that these acts could not be attributed to the state since they already had been attributed to individual agents.[18]

Another good example for the argument that holding individuals responsible does not preclude state responsibility is the The Rainbow Warrior case, which is considered to be a leading precedent in the field of State responsibility. It has played a significant role in theory and practice, providing that it is comprised of mediation and arbitration procedures, neither of which bear the same importance and authority as a ruling by an international court or tribunal. However, the Rainbow Warrior case is one of the brightest examples of the law of State responsibility.

The case referred to the facts of nuclear tests being carried out by France in French Polynesia, which were opposed by the environmental non-governmental organization Greenpeace, sending its vessel, Rainbow Warrior, to New Zealand in order to protest the

[15] Report of the International Law Commission on the work of its forty-eighth session (Doc A/51/10), General Assembly Official Records Fifty-First Session, Supplement No. 10, 30.
[16] Report of the International Law Commission on the work of its thirty-sixth session (Doc A/39/10), YILC (1984), II, Part Two, 11, para 32.
[17] Dupuy, *supra* note 1, at 1086.
[18] Nollkaemper, *supra* note 2, at 618.

French nuclear activities. On 10 July 1985 the ship was lying in Auckland harbour when an explosion organized by the French security agents, sunk the vessel, killing one person. The Prime Minister of France issued a communiqué confirming that the Rainbow Warrior had been sunk by agents of the French Directorate General of External Security, under orders, and the French Minister for External Affairs indicated to the Prime Minister of New Zealand that France was ready to undertake reparations for that action. Two agents, who had been posing as Swiss tourists, were arrested in New Zealand in relation to the incident and pleaded guilty and sentenced by the Chief Justice of New Zealand to a term of 10 years' imprisonment.[19]

The two States referred all the issues between them arising from the *Rainbow Warrior* affair to the Secretary-General of the United Nations for a binding ruling (Peaceful Settlement of International Disputes), which ruled that the French Prime Minister should convey a formal and unqualified apology to the Prime Minister of New Zealand, and that the French Government should pay US$7 million in compensation. In addition, by the exchange of letters, the Government of New Zealand and the Government of France established an arbitral tribunal consisting of three members to resolve any dispute concerning those letters' interpretation or application. According to the mentioned Tribunal "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation".[20]

Moreover, several authorities have recognised the non-exclusive nature of individual and state responsibility. In *Prosecutor v Furundzija*, the ICTY said: "Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers."[21] In the Genocide Case, the ICJ accepted the concurrent approach to responsibility, observing that the "duality of responsibility continues to be a constant feature of international law".[22] The ICJ quoted the view expressed in the ILC Commentary on the Articles on State Responsibility that "[w]here crimes against

---

[19] "The Rainbow Warrior" - Cristina Hoss, Jason Morgan-Foster, Oxford Public International law. April 2010. Article available at http://opil.ouplaw.com

[20] *Rainbow Warrior (New Zealand v France)* France-New Zealand Arbitration Tribunal (Award of 30 April 1990) . para 75.

[21] Judgment, *Prosecutor v Furundzija*, ICTY Trial Chamber II, 10 December 1998, para 142.

[22] Judgment, *Case Concerning the 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 (ICJ Genocide Judgment), 26 February 2007, para. 173.

international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them",[23] and that 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."[24] More recently, in its judgment on Preliminary Objections in the *Application of the Genocide Convention* case, the ICJ said with respect to Article IX of Genocide Convention that the reference in Article IX to the responsibility of a State for genocide or for any of the other acts enumerated in Article III does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.[25]

After the 2007 Judgement of the ICJ in the *Bosnia Genocide* case, it is no longer possible to deny the distinct obligation of a state under the Convention and therefore the consequences of direct responsibility of state. In other words, Genocide Convention can give rise to both – the responsibility of state and criminal liability of individuals as well.

The possibility of double attribution is also recognised in the law on war crimes.[26] Article 29 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War provides that "The party to the conflict, in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred".[27]

Individual responsibility does not necessarily mean that the state is atomised and that the state could negate its own responsibility by having responsibility shifted towards individual state organs. State responsibility can exist next to individual responsibility.[28] Nor the concurrence of individual criminal responsibility and state responsibility mean that the state responsibility is criminal in nature. To the contrary, ascribing criminal responsibility to a state has been decisively rejected, a view that the ICJ in the Genocide Judgment confirmed, noting that the "general international law does not recognize the criminal

[23] ILC Commentary, *supra* note 8, at 364.
[24] Ibid.
[25] Preliminary Objections, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia*), ICJ, 11 July 1996, para 32.
[26] Nollkaemper, *supra* note 2, at 618.
[27] See, Art. 29 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
[28] Nollkaemper, *supra* note 2, at 618.

responsibility of States".[29] The notion of international crimes was excluded by the ILC as it prepared its Articles on State Responsibility. Structures and procedures to implement criminal state responsibility are non-existent. Concurrence between individual criminal responsibility and state responsibility thus does not necessarily involve criminal state responsibility.[30] Therefore, when we speak about the State responsibility under Genocide Convention, we mean responsibility for the breach of an obligation under international law, arising from the terms of an international convention, which is not criminal in nature. On the contrary, individual responsibility for Genocide is purely of criminal nature, considering that the mentioned convention is one of the first international documents envisaging prosecuting individuals for their actions.

In the conclusion, it is to be reiterated that there are only a limited number of acts that can lead both to state responsibility and individual responsibility. These acts include planning, preparing, or ordering wars of aggression, genocide, crimes against humanity, killings of protected persons in armed conflict, terrorism, and torture. These acts can be attributed twice: both to the state and the individual. For instance, this holds true with regards to the ICJ statement in Genocide Judgment, where the Court held that state responsibility can not only arise for failure to prevent or punish individuals committing genocide, but also for an act of genocide perpetrated by the state itself.[31]

1.2. Defining Genocide

Though the word Genocide is relatively recent concept, the reality of genocide can be traced from ancient times. "The fact of genocide is as old as humanity" wrote Jean-Paul Sartre.[32] The Holocaust was probably "the most infamous and abominable [modern] example of genocide."[33] Modern history has faced

[29] James Crawford. 'Revising the Draft Articles on State Responsibility', *10 EJIL* (1999) 443.
[30] Nollkaemper, *supra* note 2, at 618.
[31] Preliminary Objections, ICJ Genocide Case, *supra* note 25, para 32.
[32] Jean-Paul Sartre, "On Genocide", in Richard A. Falk, Gabriel Kolko an Robert Jay Lifton, (eds.), *Crimes of War,* New-York: Random House, 1971, 534-49, at 534.
[33] John R.W.D. Jones, *The Practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda* (2d ed. 2000), at 99.

> the extermination of Tasmanian and other Australian aboriginals in the nineteenth century, the forced removal and elimination of American Indians in the United States over the past two hundred years, the German Vernichtungsbefehl, or extermination order, and subsequent virtual annihilation of the Heroro in Namibia in 1904, the Turkish exterminating of the Anatolian Armeninas in 1915 and contemporary massacres of Indians in the Americas, Tutsi in Rwanda, [and] Muslim in Bosnia and Herzogovina.[34]

There has been other genocides in contemporary times, however, in the modern world Rwanda genocide and killing almost 1,000,000 Tutsi by Hutus, remains "the purest genocide since 1945, and perhaps the single greatest act of evil since Pol Pot turned Cambodia into a Killing filed."[35]This "odious scourge" as the Genocide Convention describes genocide, due to its nature has been first called by Winston Churchill "the crime without the name."[36] Few years later, the term "genocide" was coined by Raphael Lemkin from two words, *genos,* which means race, nation or tribe in ancient Greek, and *caedere,* meaning to kill in Latin.[37] Lemkin, a Polish Jew, who fled from the Nazis during World War II[38] and immigrated to the United States in the 1930s, originally used the term genocide in reference to the Nazi campaign to exterminate the Jews, gypsies, and other ethnic groups in what is now regarded as the Holocaust.[39] He defined genocide as an International

> "coordinated plan of different actions aiming at the destruction of essential foundation of the life of national group, with the aim of annihilating the Groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national group and the destruction of the personal security, liberty, health, dignity and even the lives of the

[34] Ibid.
[35] Rwanda, Remembered, *Economist*, 27 March 2004, at 11.
[36] Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, at 12.
[37] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World peace, 1944.
[38] David Bosco, *Crime of Crime: Does it have to be Genocide for the World to Act?* Washington Post, 6 March 2005, at B01.
[39] Nsongurua J. Udombana, An Escape from the Reason: Genocide and the International Commission of Inquiry in Darfur, *40 The International Lawyer* (2006), 41-66, at 46.

> individuals belonging to such groups… [T]he actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[40]

Definition proposed by Lemkin in his Book *Axis Rule in Occupied Europe* received prompt reception and recognition on an international level. Soon after the end of the Second World War in 1946 the same idea was pronounced in the UN General Assembly Resolution 96 (I), pursuant to which genocide results "in gross losses to humanity in the form of cultural or other contributions."[41]

Prior to starting encompassing genocide definition in various international instruments, Article 6 (c) of the Charter of the IMT did not envisage genocide as a crime falling under the Tribunal's jurisdiction, however, while referring to crimes against humanity it used a wording ("murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population" and "persecution on political, racial or religious grounds"). IMT, while dealing with extermination of Jews and other ethnic and religious groups by Nazi regime, referred in its judgment to the crime of persecution and not genocide.[42]

Soon after, Economic and Social Council was instructed to formulate a draft convention on the crime of genocide. The UN Secretary General and an Ad Hoc Committee of the Economic and Social Council submitted early drafts[43] which both reflected the wide concept suggested by Lemkin.[44]

International Community embodied the legal definition of the crime of genocide in the Genocide Convention, which was adopted almost at the same period, when the Genocide was coined and it modified the definition already proposed by Lemkin, defining genocide as

> 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;

[40] Lemkin, supra note 37, at 79.
[41] U.N. Doc. A/96 (I), 11 December 1946.
[42] Antonio Cassese, *International Criminal Law*, Second Edition, 2008, at 127.
[43] U.N. Doc. E/447 and E/794.
[44] Klaus Kress, The Crime of Genocide under International Law, *6 International Criminal Law Review* (2006), 461–502, at 467.

(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.[45]

The newly established crime of genocide was then repeatedly the subject of discussions within the U.N. Article II of the Genocide Convention, which, as already mentioned, envisages the definition of genocide was incorporated into the Article 4 of the ICTY Statute in 1993 and one year later in Article 2 of the statute of the ICTR. These two tribunals' well-established case-law and opinions are very important and helpful in expressing what has developed as the international law of genocide. Again without any change, the same definition of genocide was articulated into Article 6 of the ICC Statute. The Elements of Crimes of the ICC contain a number of important indications and clarifications as to the more specific content of the crime.[46]

It is reasonable to conclude that the Genocide Convention was a mirror image at the time of its adoption[47] and that its importance has not diminished, given its direct transportation in later international instruments. Most importantly, one of the best achievements of those instruments encompassing genocide is freeing the concept of genocide from connection with war.

1.2.1. Nature of the Crime of Genocide

Genocide is today generally regarded not just a "Crime under International law", as the UN General Assembly Resolution 96 (I) categorized Genocide, but it is not disputed any more that genocide acquired the nature of peremptory norm – *jus cogens*,[48] giving rise to an

[45] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Art. 2, December 9 , 1948.
[46] Art. 6, Elements of Crimes.
[47] Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of Genocide*, ICJ, 28 May 1951, 15.
[48] See, Art. 53 of the Vienna Convention on Law of Treaties, 1969: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation

erga omnes obligation, which are the obligations of " a State towards the international community as a whole."[49]

As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.[50] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[51] ICJ affirmed this view in the Genocide case asserting that "the first consequence arising from this conception is that the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligations."[52] Furthermore, ICJ recognized in 2006 that the prohibition of Genocide amounts to *jus cogens.*[53]

Moreover, according to the International Court of Justice, obligations *erga omnes* derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[54] The International Law Commission also gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens:* (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the

---

is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[49] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

[50] See, for example, the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993,* p. 325, at pp. 439-440; *Counter-Claims, I.C.J. Reports 1997,* p. 243; the District Court of Jerusalem in *Attorney-General of the Government of Israel v. Eichmann,* (1961) *I.L.R.*, vol. 36, p. 5.

[51] Cf. *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para.. 29.

[52] Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of Genocide*, 1951, ICJ, 15 (28 May).

[53] *Case concerning Armed Activities on the Territory of Congo, Jurisdiction of the Court and Admissibility of the Application* (*Democratic Republic of Congo* v. *Rwanda*), Judgment of 3 February 2006, para. 64.

[54] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970,* p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia), I.C.J. Reports 1995,* p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996,* p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, at pp. 615-616, paras. 31-32.

commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate.[55]

At the preliminary objections stage of the Genocide case, the ICJ stated that the rights and obligations enshrined by the Genocide Convention are rights and obligations *erga omnes.*[56] The ICJ in *Barcelona Traction* case reaffirmed its position in the *Genocide* case and indicated that, given the importance of the rights at issue, certain areas exist such as the prevention and punishment of the crime of genocide for which states have obligations towards the entire international community and not only to another state.[57]

Undoubtedly, Genocide Convention is one of the major components of the contemporary international protection of Human rights. It makes genocide a punishable international crime,[58] requires state parties to enact domestic legislation to punish genocide,[59] and requires prosecution in domestic courts or international court.[60] Article 1 of the Convention obliges parties to "prevent" and "punish" genocide,[61] but Article 8 gives them the option of "call[ing] upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide…"[62]

1.2.2. Determining Genocide Intent

Special element that differentiates the crime of genocide from other crimes under international law is that it should be committed with the "intent". Two distinct mental elements must be satisfied for a conviction for genocide: the general intent requirement which pertains to the material elements and the special intent requirement pursuant to which the perpetrator must act with the special intent to destroy, in whole or in part, a protected group as such.[63] Trial Chamber of the ICTR wrote in *Akayesu*: "The moral element is

[55] ILC Commentary, *supra* note 8, commentary on Article 58, at 281 (Footnote).
[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, at p. 616, para. 31.
[57] *Barcelona Traction, Light and Power Co. (Belgium v. Spain),* 1970 ICJ, 3 (February 5).
[58] Genocide Convention, *supra* note 45, Art 2.
[59] Idid. art. 5.
[60] Ibid. art. 6.
[61] Ibid. art. 1.
[62] Ibid. art. 8.
[63] Kress, *supra* note 44. at 484.

reflected in the desire of the Accused that the crime be in fact committed".[64] District Court of Jerusalem in the case of *Eichmann*, affirmed that the concept of genocide intent explains the special nature of the crime of genocide, as defined in the Convention.[65]

Mental requirement for the crime of genocide – special intent, is introduced in the *chapeau* of Article 2 of the Genocide Convention, as well as in international instruments defining the crime of genocide. Article 2 of the Convention provides for an exact determination of the word "intent", meaning: "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such…"[66] Genocide is a crime, which is based on "depersonalization of the victim. Genocide is a crime, where the victim is not targeted on account of his or her individual qualities or characteristics, but because he or she is a member of the group.[67]

Professor Cassese writes that genocide intent amounts to *dolus specialis,* meaning an aggravated criminal intention required in addition to the criminal intent accompanying the underlying offence (killing; causing serious bodily or mental harm; inflicting conditions of life calculated to physically destroy the group; imposing measures designed to prevent birth within the group; forcibly transferring children). According to Professor Cassese's opinion other categories of mental element are excluded: recklessness (or *dolus eventualis*) and gross negligence.[68]

Problem arises with respect to the level of intent. The requirement of intent is confirmed in Article 30 of the ICC Statute, which sets rather a high threshold with regard to the "consequences" of "death of one or more member of a group". This is in conformity with the case law of ICTR and ICTY to the extent that the latter Tribunals reject the application of a negligence standard.[69] It does not, however, appear to have been definitively settled in the jurisprudence of ICTR and ICTY whether or not a recklessness standard might be applied to the "underlying offences" of killing and causing serious bodily or mental harm.[70]

---

[64] Judgment, *Prosecutor* v. *Akayesu* (*Akayesu* Judgment), ICTR-96.4.T, Trial Chamber, 2 September 1998, para. 475.
[65] William A. Schabas, *Genocide in International Law*, (Cambridge: Cambridge University Press, 2000), at 214.
[66] Genocide Convention, see, *supra* note 43, Art. 2.
[67] Antonio Cassese, *International Criminal Law*, Second Edition, 2008, at 137.
[68] ibid.
[69] *Akayesu* Judgment, *supra* note 64, para. 501.
[70] Judgment, *Prosecutor* v. *Krstic*, Appeals Chamber,19 April 2004, para. 543 in conjunction with para. 485.

Nevertheless, ICTR Trial Chamber has significantly contributed to the determination and clarification of the subject element of the crime of genocide. In *Akayesu,* ICTR Trial Chamber held that commission of genocide required "a special intent of *dolus specialis".*[71] Furthermore, in the same case special intent was defined by the ICTR as "the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."[72] The Trial Chamber added that intent "is a mental factor which is difficult, even impossible to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of facts."[73]

Proving Genocidal intent appeared to be the most difficult and vulnerable issue while taking the decision on the crime by the courts. This is also true in terms of the ICJ recent judgments. Although according to the dissenting opinion of the Judge A.A Cancado Trindade on the case Croatia v. Serbia "even in the absence of direct evidence, genocidal intent may be inferred from circumstantial evidence, and the general context and pattern of extreme violence and destruction".

In his dissenting opinion, he gives the examples of the recent in its recent Judgment of the, 11.07.2013, the ICTY (*Appeals Chamber- R. Karadžić case*) where the court stated:

> "The Appeals Chamber also recalls that by its nature, genocidal intent is not usually susceptible to direct proof. As recognized by the Trial Chamber, in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy".[74]

[71] Cassese, *supra* note 42, at 137.
[72] *Akayesu* Judgment, *supra* note 64, para. 498.
[73] Ibid. para 523.
[74] Dissenting opinion of the Judge A.A Cancado Trindade on the Judgment , *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 3 February, 2015*

1.3. State Responsibility for Genocide as for an International Wrongful Act

The Convention on the Prevention and Punishment of the Crime of Genocide was drafted and negotiated just after the end of World War II focusing on criminal accountability for individuals who commit genocide. The convention also imposes certain obligations on states (e.g. to enact relevant legislation, to grant extradition in genocide cases, etc), although it does not explicitly provide that states themselves must not commit genocide. Whether the document obligates the state not to commit genocide has been discussed and interpreted only nearly sixty years after the adoption of the convention. In order to better understand whether initially the drafters of the treaty considered the possibility of state responsibility for genocide, one would look back at the *travaux preparatoires* of the convention itself.

As already mentioned earlier, the United Nations Economic and Social Council was instructed by the UN General Assembly to prepare the draft convention on the crime of genocide, which has already been declared as a crime under international law. [75] The ECOSOC submitted early draft prepared by the Ad Hoc Committee to the General Assembly, although it didn't address the issue of state responsibility. The subject came up only later at the Sixth Committee debate, where delegates disagreed about whether the text should include a provision allowing states, in addition to individuals, to be held accountable for committing genocide.[76]

At the end, the drafters agreed on a text that included a reference to state responsibility:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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". [77]

[75] *UN GA Resolution 96 (I) , at 188-189*

[76] *See* U.N. Econ. & Soc. Council, Ad Hoc Comm. on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee* at 54-59, 18, U.N. Doc. E/794 (May 24, 1948); Draft Convention on the Crime of Genocide at 10, U.N. Doc. E/447 (June 26, 1947)

[77] Genocide Convention, supra note 45, art. 9;

However, the drafters had divergent views on whether the Convention should address state liability for committing genocide at all and what kind of liability could be imposed on a state under international law.[78] While most states agreed that genocide generally resulted from state action or complicity, they disagreed on whether and how the Convention should address the role of states in the perpetration of genocide. The issue was raised during the discussion on Articles IV, VI, and IX.

Debates on whether the Convention should address state responsibility for committing genocide initially arose during the Sixth Committee's negotiations, when The United Kingdom introduced an amendment that envisioned responsibility of both states and individuals for committing genocide. In the view of the United Kingdom, genocide was most likely to be perpetrated by a state.[79]

Although many delegations agreed that in most of the cases states would be the main actors in committing genocide, few delegations still opposed the notion of state responsibility. For example, the United States strongly held the position that the Convention should focus on punishment of individuals, not states.[80] For those delegations that supported state responsibility, the question of remedy carried great significance. Several delegations stressed the importance of granting the ICJ jurisdiction to decide the responsibility of states for committing genocide.[81]

The United Kingdom's amendment was defeated, with twenty-four votes against and twenty-two - in favor of the amendment.[82] The issue that a state could be held responsible for a crime gave way to particular controversy, despite the fact that the United Kingdom maintained that the amendment envisioned only civil responsibility, and not criminal liability. [83]

During the debates, amendments have been introduced by the United Kingdom and Belgium on article VI regarding the state responsibility, although, again, not receiving the support of the delegates. Therefore, the United Kingdom and Belgium withdrew their

[78] Saira Mohamed - "Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice"; University of Colorado Law Review, 2009. Vol. 80.
[79] *ibid*
[80] Sixth Committee 95th Meeting, *supra* note 24, at 344.
[81] Saira Mohamed - "Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice"; supra note78.
[82] Sixth Committee 96th Meeting, *supra* note 25, at 355.
[83] Saira Mohamed , supra note 78.

proposals and drafted a new proposal which had to be discussed during the debate on Article IX.[84]

In the Sixth Committee debate, the United Kingdom and Belgium resubmitted a modified version of the text they had previously withdrawn:

> Any dispute between the High Contracting Parties relating to the interpretation, application or fulfillment of the present convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles [I] and [III], shall be submitted to the International Court of Justice, at the request of any of the High Contracting Parties.[85]

Considering the distinction between civil and criminal responsibility, states had mixed positions to the amendment. Like the previous debates, the concerns they had were not from opposition to state responsibility itself, but mostly regarding the nature of the responsibility introduced in the amendment.[86] Although, despite that, the amendment was adopted by the committee.

1.3.1 International Obligations raised by Genocide Convention

The crime of genocide acquired more significance in the aftermath of the Nuremberg Trial, when Genocide Convention was adopted by the UN General Assembly in 1948. The Genocide Convention filled the gap left by the IMT, according to which "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[87]

Genocide Convention establishes both individual and state responsibility for the acts of genocide. On the one hand, the Convention is concerned with the prosecution of perpetrators committing genocide, whereas on the other hand, the convention imposes a number of obligations on the states, for which the states could be held responsible the same

[84] ibid
[85] U.N. General Assembly Official Records, 6th Comm., 3d Sess., U.N. Doc. A/C.6/258 (Nov. 10, 1948).
[86] Saira Mohamed, supra note 78.
[87] The Trial of Major War Criminals, *supra* note 4.

way as individuals. Namely, Articles 2 of the Convention[88] sets out the definition of the crime itself, whereas Article 3[89] imposes upon Contracting Parties the obligation to punish not only the perpetration of genocide but also punish other acts related to the crime using various criminal law categories: conspiracy, incitement, attempt and complicity.[90] Article IV deprives the state or the head of state of any immunity by stating that "Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[91]

This interplay of individual and state responsibility requires a careful consideration while attempting to attribute criminal responsibility for the crime of genocide.[92] As already mentioned, the Convention is particularly significant for "undertaking to prevent and punish" genocide regardless its commission in time of peace or war.[93]

In order to make to Convention functional, the drafters included the obligation of the state parties to the Convention to criminalize the offence in their domestic legislations with effective penalties,[94] as well as try the perpetrators "by competent tribunal of the State in the territory of which the act was committed" or for the repression of genocide on an international plane, that envisaged an international criminal tribunal endowed with jurisdiction over this crime by stating "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[95]

---

[88] Genocide Convention, *supra* note 45, Art. 2: 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.

[89] Art. 3: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide;(e) Complicity in genocide

[90] Antonio Cassese, On the Use of Criminal Law Notions in Determining State Responsibility for Genocide, 5 *JICJ*, 2007, 875-887, 876.

[91] Genocide Convention, *supra* note 45. Art. 4.

[92] Georgia P. Fletcher and Jens David Ohlin, Reclaiming Fundamental Principles of Criminal law in the Darfur Case, 3 JICJ (2005), 539-545, at 545.

[93] Genocide Convention, *supra* note 45, Art. 1.

[94] Ibid. Art. 5.

[95] Ibid. Art. 6.

The idea of individual responsibility is quite explicit in the Convention, which cannot be said with respect to holding the states accountable for commission of genocide. Although article 6 does not exclude "responsible rulers" and "public officials" from being prosecuted and punished for the offence, and even though Article 1 imposes the obligation on the states to "prevent and punish" genocide by the states, Convention is not precise as regards the issue of declaring a state as guilty for genocide. This matter has been a subject to various considerations and discussion in academic writings.

By the opinion of Paola Gaeta the Convention wanted to achieve the enforcement, through the imposition of national criminal sanctions, of "fundamental values of international law regardless of whether they are violated by individuals acting on behalf of a state." She believes that as the states cannot be considered "criminal" and based on the Nuremberg Legacy "crimes are committed by men and not by abstract entities", it is not in keeping with the historical and theoretical foundations of the Genocide Convention to maintain that Convention, because it imposes upon states the obligation to prevent and punish genocide as a crime, also constitutes the conventional legal foundation of the responsibility of states for genocide as an international wrongful act. Here, she refers to a similar stand taken by Judges Shi and Koroma in their joint declaration attached to the ICJ Genocide judgment of 2007.[96] In a joint declaration attached to the Judgment, Judges Shi and Koroma have expressed their serious doubts about the interpretation given to the Genocide Convention by the Judgment with regards to the fact that a State itself could be held responsible for committing the crime of genocide. [97]

In their view, such an interpretation, derived by implication from Article I of the Convention, is inconsistent with the object and purpose of the Convention as a whole, with its plain meaning, and with the intention of the parties at the time the treaty was concluded. The judges have maintained that the Convention envisages the trial and punishment of individuals for the crime of genocide and that State responsibility is defined in terms of various specific obligations related to the undertaking to prevent the crime and to punish those who commit it. They suppose it would be absurd for a State party to the Convention to undertake to punish itself as a State. In the judges' view, if the Convention had been

[96] Paola Gaeta, On What Conditions Can a State Be Held Responsible for Genocide? *18 EJIL* (2007), 875-887, at 635.

[97] Joint declaration of Judges Shi and Koroma; Case Concerning the 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 (ICJ Genocide Judgment), 26 February 2007

intended to contain an obligation of such importance as to envision the criminal responsibility of States, then this would have been expressly stipulated in the Convention, but there is none. However, they believe in the duty of a State to do what it properly can, within the legal framework, to prevent genocide when there is a serious danger of its occurrence of which the State is or should be aware. [98]

However, on the other hand, Gaeta does not reject that since the Genocide Convention is an international criminal law treaty that has nothing to do with the international responsibility of states for committing genocide, such form of international responsibility does not exist at all. However, she finally concludes that absent a pattern of "state criminality", individuals can incur criminal responsibility under international law without the state being directly responsible for their criminal acts when committed by its agents or representatives.[99]

Professor William Schabas asserts that even though the Convention does not clearly stipulate for state criminality, states have still often been accused of committing genocide, since it is difficult to imagine the commission of genocide without "some form of state complicity or involvement.[100] Pursuant to Article 9 of the Genocide Convention "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a state for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[101]

Professor Schabas refers to four applications in which the ICJ has invoked the issue raised in Article 9.[102] The first case was filed by Pakistan in 1973 and Pakistan alleged that India was breaching the Convention because it proposed to transfer Pakistani prisoners of war to Bangladesh for trial. The case was discontinued following the political negotiations. The second application was lodged by Bosnia and Herzegovina in 1993 charging the former Yugoslavia (Serbia and Montenegro) with Genocide. Two provisional measures orders were granted by the Court. After failing to obtain a dismissal of the case based on the preliminary objections, Yugoslavia filed a cross-demand charging Bosnia with genocide. In 1999, the third application under Article 9 was filed by Yugoslavia against several members of the

[98] Ibid.
[99] Paola Gaeta, On What Conditions Can a State Be Held Responsible for Genocide? *18 EJIL* (2007), 875-887. at 636.
[100] Schabas, *supra* note 65, at 419.
[101] Genocide Convention, *supra* note 45, Art. 9.
[102] Schabas, *supra* note 65, at 419.

North Atlantic Treaty Organization (NATO) concerning their conduct during the Kosovo bombing campaign. Week later, on 2 July 1999, Croatia took a suit against Yugoslavia alleging its responsibility for genocide[103].

Out of those four applications filed before the ICJ, the Court has delivered its judgment and actually discussed the issue of attribution of genocidal acts to the state, was ICJ Genocide Judgment of 2007 (Bosnia and Herzegovina v. Serbia and Montenegro) and the most recent decision rendered on February 3, 2015 on the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), which will be dealt in details below.

1.3.2. State Policy Element in the Crime of Genocide

Individual and collective elements of the crime of genocide are very often confused. Some commentators suggest that state policy or collective intent is not required for classifying genocide as a crime; others note that genocide acts committed either by individuals or groups presuppose state policy or collective activity.

Some Judicial and academic opinions support the view that plan may not be a determinative aspect, but could be considered as an evidentiary issue.[104] For instance, In *Jelesic* case, ICTY confirmed the requirement of a plan as an evidentiary matter even if it is not explicitly part of the definition within the Genocide Convention.[105] Moreover, in *Kaishema and Rusindana,* the ICTR stressed that "although a specific plan to destroy does not constitute an element of genocide it would appear that it is not easy to carry out genocide without a plan or organization".[106]

However in international instruments dealing with the crime of genocide state policy or plan is not envisaged as a separate element for the crime of genocide. In particular, neither Genocide Convention, nor ICC Statute makes it explicit requirement. Logic dictates that if the definition of genocide does not explicitly state policy element, therefore it's not a requirement. Furthermore, again in *Jelesic* case, ICTY held that "The existence of a plan or

[103] Ibid. at 425.
[104] See, *Prosecutor v. Karadzic and Mladic,* case No. IT-95-5-R61, IT-95-18-R61, 94 (July 1996).
[105] *Prosecutor v. Jelesic*, case No. IT-95-10-A, 655.
[106] *Kaishema and Rusindana,* case, ICTR 96-4-T, 497.

policy is not a legal ingredient of the crime", although "it may facilitate proof of the crime".[107]

It is worth referring to *Kunarac* decision delivered by ICTY, where the Court made analogy between crimes against humanity and genocide and decided that if there is not a state element in genocide, why would there be one for crimes against humanity, since these two crimes are closely related. The Court held that "There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes".[108] The Court further resolved the problem in the footnote stating that

> There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgment, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (*Streicher*) and 318-319 (*von Schirach*); Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich* v *The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General* v *Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al.* v *Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; *Moreno* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 298, 14 September 1993; *Sivakumar* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 433, 4 November 1993. See also Report of the Secretary- General Pursuant to

[107] *Prosecutor v. Jelesic*, case No. IT-95-10-A, 655, para 48.
[108] *Kunarac et al.* Appeal Judgment, 12 June 2002, para. 98.

> Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (*Jelisic* Appeal Judgment, para 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor* v *Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 *ILR* 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR 14/1947, 278 and 284 and comment thereupon in *Ivan*with."[109]

ICTY in this decision applies different authorities to prove that there exists no policy requirement under customary international law for the crimes against humanity, thus making analogy with genocide. They refer to *Eichmann* case and then they cite one of the decisions, namely, *Justice Trial*,[110] often quoted in support of policy or plan and being one of the strongest authorities asserting that the policy is needed. Nevertheless, ICTY set aside this case saying that state policy is not required.

As noted above some academic opinions suggest that acts of genocide presuppose policy element.[111] Klau Kress suggests that genocide requires a collective activity of a

[109] Ibid.
[110] *In re Altstötter*, ILR 14/1947, 278 and 284.
[111] See, for example, Kress, *supra* note 44; Klaus Kress, The Darfur Report and Genocidal Intent, 3 *JICJ*, (2005), 562-78.

group, state or entity - activity in which individual perpetrators participate.[112] According to the author a single human being is not capable of destroying one of the groups protected by the rule against genocide in whole or in part. For all practical purposes, the occurrence of the crime of genocide thus entails a collective activity aimed at the destructive goal.[113] Professor Kress considered that genocide is in fact a collective crime and there should be a distinctive line between the levels of collective and individual genocidal conduct, and questions if so should be construed the attitude towards genocidal intent. He suggests that the crime of genocide requires placing the acts of the individual perpetrators in the collective perspective.[114]

One-man genocide is not either supported by William Schabas by stating that "The theory that an individual, acting alone, may commit genocide is little more than a sophomoric *hypothese d'ecole*, and a distraction for international judicial institutions."[115] Lemkin has expressed his opinion on this fact as follows: [Genocide] is intended [. . .] 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.

Klaus Kress goes further to assert the existence of the element collective activity in the crime of Genocide.[116] He states that the individual act which forms the basis for a conviction of genocide is thus typically part of systemic criminality. For this reason, he refers to the *District Court of Jerusalem*, which inquired into the overall genocidal campaign as masterminded by the Nazi leadership.[117] For the same reason the ICTR Chambers, from the beginning, concerned themselves with the question as to whether or not there was a "nationwide" genocide in Rwanda in 1994,[118] and similarly the ICTY Trial Chamber, in its judgment in *Prosecutor* v. *Krstic*, made a determination regarding the overall "criminal enterprise".[119]

---

[112] Ibid. at 562.
[113] Kress, *supra* note 44, at 470.
[114] Ibid.
[115] William Schabas, Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide, *18 Leiden Journal of International Law* (2005), 871-885, at 877.
[116] Kress, *supra* note 44, at 471.
[117] Attorney-General of the Government of *Israel* v. *Eichmann*, *District Court of Jerusalem*, Judgment of 12 December 1961, 36 I.L.R. (1968), p. 79 *et seq*.
[118] *Prosecutor* v. *Akayesu*, ICTR-96.4.T, Judgment, 2 September 1998, paras. 78 et seq., 112 et seq.
[119] *Prosecutor* v. *Krstic*, Judgment, IT-98-33-A, 19 April 2004, para. 549.

Finally, the ICC Elements of Crimes describe the typical case of genocide in the first alternative of the element common to all forms of genocide as a scenario where the individual conduct (killing of one or more members of a protected group etc.) takes place "in the context of a manifest pattern of similar conduct directed against that group". Kress concludes that the key to reconcile the approach taken in *Eichmann*, by the ICTR and ICTY, and in the ICC Elements of Crimes, with the definition of the crime lies in the "interpretation of the concept of genocidal intent". This intent must be realistic and must thus be understood to require "more than a vain hope". It follows that it must, for all practical purposes, have an "overall genocidal campaign as an objective point of reference." Therefore, collective activity constitutes an objective contextual element in the case of crimes against humanity, while collective activity serves as the point of reference in determining genocidal intent.[120]

Professor Cassese takes different approach in this respect. He argues that according to customary and treaty rules on genocide a contextual element is not required for some types of genocide, whereas it might be required for the other. He suggests two categories of the acts of genocide as being killing members of the protected group and causing serious bodily and mental harm to members of a protected group, where one or more person can be engaged in the crime without pursuing any general policy or collective action necessary for them to be prosecuted and punished for the crime.[121]

On the other hand, Professor Cassese brings forward other three categories of the crime of genocide, which must take a form of some kind of collective and organized action. These are: deliberately inflicting on protected group or members thereof conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent birth within a protected group; forcibly transferring children of a protected group to another group.

Hence, according to Professor Cassese above such actions "are necessarily carried out on a large scale and by multitude of individuals in pursuance of a common plan, possibly or at least the acquiescence of the authorities."[122]

Several views have been expressed in terms of difficulty to prove the intent of the state itself, since it is the individual who actually commits the crime. In particular, Professor

[120] Kress, *supra* note 44, at 472.
[121] Cassese, *supra* note 42, at 140.
[122] Ibid. at 141.

Schabas has observed, the "obvious problem" is that the definition of genocide "requires proof of specific intent" and it "is hard to conceive of a state with a specific intent."[123] Moreover, pursuant to Dupuy, "intention is essentially individual and is only in a sense communicated to the state because the origin of the latter is, as the Nuremberg Tribunal said, ''men and not abstract entities."[124]

The developments of the issue of state polity as an element of the crime of genocide can be traced in three documents: ICJ Genocide Judgments of 2007 and 2015 and the Report of the International Commission of Inquiry on Darfur (Darfur Commission Report). What ICJ and what Darfur Report did is that they tried to link two concepts of international law – individual responsibility and state responsibility. Darfur Report concedes that some government individuals may have acted with individual genocidal intent, but it fails to attribute such actions to the state of Sudan.[125]

On the other hand, in Genocide Judgment of 2007, ICJ was asked whether the actions of Serbia were attributed to the state. The Court assessed that the crime of genocide in Genocide Convention is an act which can be committed by a state and by an individual. If it is a state, it is subject to state responsibility before ICJ.[126]

[123] Schabas, *supra* note 65, at 444.
[124] Dupuy, *supra* note 1, at 1096.
[125] Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004 (Darfur Commission Report), UN Doc. S/2005/ 60, 25 January 2005.
[126] ICJ Genocide Judgment, *supra* note 22.

2. RECENT DEVELOPMENTS OF THE ISSUE OF STATE RESPONSIBILITY FOR GENOCIDE IN THE LIGHT OF ICJ GENOCIDE JUDGMENTS AND DARFUR COMMISSION REPORT

2.1. Introductory Remarks

Recent signs of elevation of the issue of state responsibility for genocide are quite vivid. In 2005 the Darfur Commission has released its Report on the situation in Darfur region, Western Sudan having assessed that to classify the acts committed in the territory of Darfur as genocide they lacked to prove an actual intent of the Government of Sudan, even though the Commission was not specifically asked to elaborate on the state involvement in the process of the commission of the crime of genocide. On the other hand, in 2007 the ICJ derived the judgment concerning the attribution to the state of Serbia the acts of genocide committed in the territory of Bosnia and Herzegovina. However, the acts of those who perpetrated the genocide could not be attributed to the Serbian State, ICJ held Serbia responsible for violating the obligation to prevent and punish the acts of genocide.

It should also be noted that the case of Bosnia and Herzegovina v. Federal Republic of Yugoslavia was the first case of genocide ever brought in front of the ICJ. ICJ Genocide Judgment was relating to the conflicts that accompanied Bosnia and Herzegovina's secession from the Former Yugoslavia which culminated in a declaration of independence by the President of Bosnia and Herzegovina following a referendum. Bosnia and Herzegovina filed an Application in the ICJ against the Federal Yugoslav Republic (subsequently Serbia and Montenegro) which alleged violations of the Genocide Convention and invoked Article IX of the Genocide Convention as the basis for the ICJ's jurisdiction. Bosnia and Herzegovina pursued its case in the ICJ and sought reparations for Serbia's alleged violations of the Genocide Convention. It asked the ICJ to conclude that Serbia, through its organs or entities under its control, had:

> violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the

territory of Bosnia and Herzegovina, including in particular the Muslim population.[127]

The ICJ was therefore asked to consider, inter alia, the responsibility of the State of Serbia and Montenegro for the commission of Genocide.

The ICJ concluded on 26 February 2007 that the State of Serbia and Montenegro was not responsible for committing genocide, conspiracy to commit genocide, incitement of genocide or complicity in genocide. The ICJ found that genocide had occurred at Srebrenica in July 1995, the United Nations ('UN') 'safe area' in Bosnia and Herzegovina.

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 were moved out from their houses, 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 were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.[128]

The acts of those who perpetrated the genocide could not be attributed to the Serbian State. The ICJ did find however that the State of Serbia violated its obligation to prevent genocide and violated its obligations to prevent and punish genocide by failing to transfer those who perpetuated the genocide to the ICTY.

2.2 Nature, Function and Mandate of the ICJ and the Darfur Commission

It is to be noted from the outset that the ICJ and Darfur Commission are two different bodies in terms of their nature, functions and the mandate. The ICJ is a judicial body aimed at examining and dealing with disputes once raised between two sovereign states and the consequences of its decision is compulsory upon states. Whereas, Darfur Commission is a body created by the United Nations, composed of prominent experts and tasked with general assessment of the grave situation in Sudan. Therefore, these two bodies serve different aims and the results they produce considerably differ.

[127] ICJ Genocide Judgment, *supra* note 22, para. 66.
[128] Ibid. para.278

The International Court of Justice (ICJ) is described in Article 92 of the UN Charter as the United Nations' "principal judicial organ".[129] Established in June 1945 by the Charter of the United Nations, it is competent to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Statute of the International Court of Justice is the main constitutional document constituting and regulating the Court.

The Court is composed of 15 judges elected by the UN General Assembly and by the Security Council. It is a judicial body which discharges its functions applying international law.

When deciding cases, the ICJ applies international law as summarized in Article 38 of the ICJ Statute. Article 38 provides that in arriving at its decisions, the ICJ shall apply international conventions, international custom, and the "general principles of law recognized by civilized nations". The ICJ may also refer to academic writings ("the teachings of the most highly qualified publicists of the various nations") and also to previous judicial decisions to assist in the interpretation of the law though the ICJ is not formally bound by its previous decisions. The common law doctrine of *stare decisis* (doctrine of precedent) does not apply to the decisions of the ICJ.[130]

On the other hand, the Darfur Commission was established as an international commission of inquiry under Chapter VII of the United Nations Charter in September 2004 by Security Council Resolution 1564, when in a struggle for political control of the area, the armed clashes took place in Darfur. Conflicts increased between African farmers and many nomadic Arab tribes. In 2003, two Darfuri rebel movements- the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM)- took up arms against the Sudanese government,[131] complaining about the marginalization of the area and the failure to protect sedentary people from attacks by nomads. The government of Sudan responded by unleashing Arab militias known as Janjaweed. Sudanese forces and Janjaweed militia attacked hundreds of villages throughout Darfur. Over 400 villages were completely destroyed and millions of civilians were forced to flee their homes.

[129] The Charter of the United Nations, 26 June 1945, Art. 92.

[130] Statute of the International Court of Justice, 26 June 1945, Art. 59.

[131] Darfur Commission Report; supra note 125. pp 22-23.

On March 4, 2009 Sudanese President Omar al Bashir, became the first sitting president to be indicted by ICC for directing a campaign of mass killing, rape, and pillage against civilians in Darfur.

The mandate of the Commission was described as follows:

> to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.[132]

The Commission was composed of mixed personnel. It mobilized persons possessing various expertise and comprised legal researchers, investigators specialized in gender violence, forensic experts and military analysts all appointed by the UN High Commissioner for Human Rights.

In those terms, it expresses the potentials exiting in the coordination of the human rights machinery and the activity of the Security Council. Further, by means of a commission of experts, the Security Council could aim at rendering its work more transparent and accountable and could employ an appropriate filtering mechanism before taking a decision whether or not a situation warrants referral to the ICC.

The above considerations clarify that the Darfur Commission lacked any kind of judicial power being an investigative body. In discharging its functions, the Commission was indeed influenced by and large by international political concerns and probably suffered from the political pressure exiting within the Security Council where its Members expressed different interests. For example, China's close links with the Sudanese Government and its involvement in the extraction of oil. China–Sudan relations have become strong and close since the states established diplomatic relations in 1959. China is Sudan's biggest trade partner. China imports oil from Sudan, while Sudan imports low cost items as well as armaments from China. Weapons deliveries from China to Sudan since 1995 have included ammunition, tanks, helicopters, and fighter aircraft. China also became a major supplier of antipersonnel and antitank mines after 1980, according to a Sudanese government official.[133] The countries enjoy a very robust and productive relationship in the fields of diplomacy,

[132] Darfur Commission Report, *supra* note 125, Executive Summary, at 2.
[133] Human Rights Watch report. See: https://www.hrw.org/reports/2003/sudan1103/26.htm

economic trade, and political strategies. Although, China is not the only UN security Council permanent member, having special interests in Darfur: According to the Amnesty International "Arms sales from China and Russia are fuelling serious human rights violations in Darfur".[134]

From the start, the commission recognized that it was "not a judicial body,"[135] although it adopted an approach proper to a judicial body in classifying the facts according to international criminal law. However, given the "limitations inherent in its powers,"[136] the commission decided not to comply with the standards normally adopted by criminal courts or with those used by international prosecutors and judges in cases for the purpose of confirming indictments. Instead, it stated "that the most appropriate standard was requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime."

After several months of the nomination of the members of commission and its innauguration, On January 25, 2005, the Commission submitted an extensive report to the U.N. Secretary-General. It found that war crimes and crimes against humanity occurred in Darfur". On the specific question of whether genocide occurred in Darfur, the Commission was doubtful, holding that the Government of Sudan had not pursued a policy of genocide in Darfur.[137]

The need not to over stigmatize the responsibility of Sudan, and thus the adoption of a Report which saved the Sudanese Government from responsibility over the crime of genocide - a rather softly approach - represented probably the most consistent approach the Commission could take.

By limiting its legal analysis at looking for the existence of a "state plane or policy" which would satisfy the specific subjective element of genocide, the Commission did adopt a narrow approach which yet was probably the one most in line with its task and with the contingent political situation in which it was operating.

---

[134] Amnesty International. See: https://www.amnesty.org/en/latest/news/2012/02/darfur-new-weapons-china-and-russia-fuelling-conflict/

[135] See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, U.N. Doc. S/2005/ 60 (Jan. 25, 2005), available at http://wvw.un.org/News/dh/sudan/com-inq-darfur. pdf

[136] ibid

[137] ibid

2.3. Dealing with the issue of Genocidal Intent on an Individual and State Level

2.3.1. Position of the ICJ

Before starting to analyze the ICJ's decision on Serbia's responsibility for genocide in Bosnia, it would be reasonable to briefly overview the Bosnia/Herzegovina crisis and the details of the case discussed by the International Court of Justice. The Case was brought by the Republic of Bosnia and Herzegovina on March 20, 1993, against the Federal Republic of Yugoslavia with respect to a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

The applicant and the claimant were two of the six states and two autonomous provinces that formed what, until 1992, was known as the Social Federal Republic of Yugoslavia ("SFRY'). In addition to Serbia, SFRY consisted of Croatia, Macedonia, Slovenia, Montenegro, Bosnia and Herzegovina, and the autonomous provinces of Kosovo and Vojvodina. For different reasons, the SFRY collapsed in 1991.[138] The events that led to the mentioned suit started in October 1991, when, by a "sovereignty" resolution, the Parliament of Bosnia and Herzegovina declared its independence from the SFRY.[139]

On October 24, 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina.[140] The latter, which had been renamed the Republika Srpska on August 12, 1992, declared independence from Bosnia and Herzegovina. Following a referendum on March 1, 1992, Bosnia and Herzegovina formally declared its own independence from the SFRY. The United States, the European Union, and the U.N. recognized the referendum vote on May 22, 1992.[141]

In order to attribute the acts of genocide to Serbian State, the ICJ first looked at the issue, whether or not genocide was committed in the territory of Bosnia and Herzegovina

[138] "Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur"- Ademola Abass; Fordham International Law Journal. Volume 31, Issue 4, Article 6, 2007.

[139] ICJ Genocide Judgment, supra note 22, para 231-34.

[140] Ibid. p 233

[141] Ibid. p 234

with special individual intent required for classification of genocide as a crime. The ICJ in its Judgment confirms that genocide as defined in Article 2 of the Genocide Convention comprises both "acts" and "intent" and also confirms it is well established the acts have their own mental elements.[142] ICJ further states that in addition to each of those mental elements for each of the acts, Article 2 of the Genocide Convention also requires a further mental element, namely "It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such".[143] The ICJ confirms this further subjective element is "often referred to as a special or specific intent (*dolus specialis*),[144] which refers to an aggravated criminal intention. With respect to the latte concept, the Court emphasized that "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."[145] In addition, the ICJ also approached the notion of *dolus specialis* in relation to the crime of "complicity" in genocide holding that "there is not doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator.[146]

While establishing whether the atrocities alleged by Bosnia and Herzegovina have indeed occurred, the Court "established by overwhelming evidence that massive killings" took place, that "the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings" and that the underlying genocidal act had been committed.[147] However, it was not proven by the Court that individual atrocities against protected groups were committed with the intent to destroy in whole or in part the group as such as required by the Convention[148] save for those occurred in Srebrenica, which has been already proven by ICTY in *Prosecutor v. Krstic.*[149] Hence, the Court simply reiterated the ICTY decision and based on the grounds of the lack

[142] ICJ Genocide Judgment, *supra* note 22, para. 173.
[143] Ibid. para. 187.
[144] Ibid.
[145] Ibid. para. 373.
[146] Ibid. para. 421.
[147] Sandesh Sivakumaran, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro), 56 ICLQ* (July 2007), 695–708, at 698, referring to the ICJ Genocide judgment, para. 276.
[148] ICJ Genocide Convention, see, *supra* note 45, para. 277.
[149] Judgment, *Prosecutor* v. *Krstic*, Trial Chamber Judgment 2 August 2001, Appeals Chamber Judgment, 19 April 2004.

of evidence and necessary intent required for genocide, declared that individual atrocities, except for Srebrenica, could not be qualified as genocide.

Having found it unproven that the individual atrocities, save for those at Srebrenica, were not committed with genocidal intent, the Court considered whether the intent could be located from wider circumstances.[150] As to whether it could be found from an official statement in the Decision on Strategic Goals issued on 12 May 1992 by Momcilo Krajisnik, the President of the National Assembly of Republika Srpska, the Court concluded in the negative.[151] The Court also held that genocidal intent could not be inferred from the pattern of atrocities. In order for such an inference to be made, the pattern "would have to be such that it could only point to the existence of such intent" but it had not established that this was the case.[152] As such, in the view of the Court, only the events at Srebrenica were proved to be genocide.

Stemming from all above-mentioned, and taking into consideration the fact that the aim and functions of the ICJ is to deal with inter-state complaints, thus primarily examining the responsibility of sovereign states and not engaging in holding individuals criminally accountable for grave offences under international law, it is to be mentioned that the ICJ looked at the issue of individuals intent with the view to determine whether Serbian Government is responsible for atrocities occurred in the territory of Bosnia and Herzegovina.

While dealing with the genocide intent the court did not consider the trend of international tribunals' jurisprudence on inferring genocidal intent from circumstantial evidence.[153] The ICTY Appeals Chamber held In *Prosecutor v. Krstić* case, that "when direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.' [154] In Prosecutor v. Rutaganda case the ICTR Appeals Chamber affirmed that it is possible to conclude that the genocidal intent

> "inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same

[150] Sivakumaran, *supra* note 147, at 698, referring to the ICJ Genocide judgment, para. 698.
[151] ICJ Genocide Judgment, *supra* note 22, para. 372.
[152] Ibid. para. 373.
[153] "Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur"- Ademola Abass; Fordham International Law Journal. Volume 31, Issue 4, Article 6, 2007.
[154] Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, p.28 (Apr. 19, 2004)

group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.'[155]

There are number of cases where different international tribunals have inferred genocidal intent from facts and circumstances of the case in the absence of written documents directly proving or affiliating States or individual persons with international crimes.

Further on, the ICJ has invoked the concept of state policy in referring to "ethnic purification of deliberate destruction of the historical, cultural and religious heritage of the protected group" of Bosnian Muslims,[156] as well as the policy pursued by the Serbian Government pertaining to forced pregnancy.[157] Nevertheless, the existence of the element of state policy on both occasions has been rejected by the Court.

Furthermore, the ICJ tackled the policy issue while considering the responsibility of the Serbian Government for acts of complicity in genocide. The ICJ held that the responsibility of Serbian State is not engaged for acts of complicity in genocide",[158] while referring to the issue of "general policy" of political, military and financial aid and assistance provided by FRY to the Republika Srpska and the VRS.[159]

As regards the state plan and policy, Professor Schabas contends that since the state cannot posses a mental element, the ICJ was looking at the "plan or policy" of the state and not its intent. Schabas refers to the ICJ Judgment stating that even though the Court observes that the material element of the crime of genocide may be present, it still had not been "conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such."[160] But in reality, the Court is looking for evidence of

[155] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, p 398 (Dec. 6, 1999).
[156] ICJ Genocide Judgment, *supra* note 22 para. 344
[157] Ibid. para. 367.
[158] Ibid. para. 424.
[159] Ibid. para. 422.
[160] William A. Schabas, Whither genocide? The International Court of Justice finally pronounces, *9 Journal of Genocide Research* (June 2007), 183–192, at 188-189.

a plan or policy not the mental element. Schabas concludes that both the Darfur Commission and the International Court of Justice have looked, in practice, to State policy.[161]

While discussing on the evidence of *dolus specialis* in the case Croatia v. Serbia, ICJ stated that where there is no "State plan expressing the intent to commit genocide, it is necessary [...] to clarify the process whereby such an intent may be inferred from the individual conduct of perpetrators of the acts". Unlike Darfur Commission Report, which concluded that "the Government of Sudan has not pursued as policy of genocide",[162] the Court did not consider the state policy as an independent element of genocide by uphelding its 2007 Judgment:

> "[t]he *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" .[163]

This conclusion of the Court was inconsistent with the various international instruments dealing with the crime of genocide and relevant customary international rules, as well as well-established case law of the ICTY. In particular, ICTY Appeals Chamber held in *Jelesic* Judgment that

> that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[164]

---

[161] Ibid. at 189.
[162] Darfur Commission Report, *supra* note 125, at 519.
[163] Judgment , *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 3 February, 2015*
[164] *Prosecutor v. Jelesic*, Appeals Chamber, 5 July 2001 case No. IT-95-10-A, para. 48. This was also held in the oral decision by the Appeals Chamber for the ICTR in *Obed Ruzindana and Clément Kayishema v. Prosecutor,* Case No.: ICTR-95-1-A, 1 June 2001.

Based on the above elaborations, it should be concluded that the ICJ referred to the mental element of genocide, as well as the state policy in order to attribute those acts to the state of Serbia and thus assert the responsibility of FRY over the atrocities committed in the territory of Bosnia and Herzegovina. In other words, considering the nature and functions of the ICJ, the latter looked at subjective element and state policy in the light of international responsibility of the state. However, unlike subjective element (specific intent), which is a determinative factor for genocide, the ICJ did not consider the state policy as a separate element of the crime. Hence, On the other hand, to compare the decision of the ICJ with the Darfur Commission Report, the latter, as some commentators interpret elevated the concept of state policy on the level of decisive feature of the crime of genocide, by stating that since there is not a state policy pursued by the Government of Sudan, the genocide has not occurred there.

In general, as already mentioned, proving Genocidal intent appeared to be the most difficult part while taking the decision on the crime by the courts. The latest judgment of the International Court of Justice dealing with the issue of state responsibility for Genocide was rendered on February 3, 2015 (Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), which, according to the comments of some international law specialists was a waste of time (15 years) and resulted completely predictably, by the court rejecting the both- Croatia's claim and Serbia's counter-claim for Genocide.

In order to discuss the case, it would be reasonable to look back to the Situation in Croatia as the case concerns. The case mainly deals with the events which took place between 1991 and 1995 in the territory of the Republic of Croatia as it had existed within the SFRY.

According to the Institute for Statistics of the republic of Croatia at the end of March 1991, the majority of the inhabitants of Croatia (some 78 per cent) were of Croat origin. A number of ethnic and national minorities were also represented; in particular, some 12 per cent of the population was of Serb origin.[165]

The tensions between the Government of the republic of Croatia and the Serbs living in Croatia and opposed to its independence, increased at the start of the 1990s with the amendments to the constitution, which, was perceived by the Serb minority as a sign of

[165] Judgment , *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 3 February, 2015;*. para 61

hostility towards them. A Serb assembly and a "Serb National Council" (the executive organ of the assembly) were established at Srb, north of Knin; they proclaimed themselves to be the political representatives of the Serb population of Croatia and declared the sovereignty and autonomy of the Serbs in Croatia.[166]

The referendum (which was opposed by Croatian Government, responded by the Serb minority by erecting roadblocks) took place and a majority voted in favour of autonomy. Consequently three autonomous regions were established: "Serb Autonomous Region of Krajina", "SAO Slavonia, Baranja and Western Srem" and "SAO Western Slavonia".

On 22 December 1990, the Croatian Parliament adopted a new Constitution. The Croatian Serbs considered that this new Constitution deprived them of certain basic rights and removed their status as a constituent nation of Croatia. In spring 1991, clashes broke out between the Croatian armed forces and those of the SAO Krajina and other armed groups. The Yugoslav National Army ("JNA") intervened officially to separate the protagonists, but, according to Croatia, in support of the Krajina Serbs.

By the summer of 1991, an armed conflict had broken out in Croatia. [167] The JNA (allegedly, then controlled by the Government of the republic of Serbia) intervened in the fighting against the Croatian Government forces. By late 1991, the JNA and Serb forces controlled around one-third of Croatian territory.

Negotiations backed by the international community resulted in 1992 with the deployment of the United Nations Protection Force ("UNPROFOR").[168] The Vance plan provided for a ceasefire, demilitarization of the Croatian territories under the Serb control, the return of refugees and facilitating the solution of the conflict, although, objectives of the Vance plan and of UNPROFOR were never fully achieved.

Between 1992 and the spring of 1995 certain military operations were conducted by both parties to the conflict, and attempts to achieve a peaceful settlement failed. In the spring and summer of 1995, Croatia succeeded in re-establishing control over the greater part of the RSK following a series of military operations. [169]

[166] Ibid. para 62
[167] Ibid. para.69
[168] Ibid. para 71
[169] ibid para 72-73

Taking into consideration the mentioned latest judgment, the Court essentially dismissed Croatia's claim on the basis of lack of *dolus specialis* even though the *actus reus* was established:

> The acts constituting the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide.[170]

In Croatia v. Serbia case the court as well as the parties agreed state policy is the first indicator of the *dolus specialis*, although it's also clear that such kind of intent would seldom be expressly stated. Therefore, it is logical that *dolus specialis* should be established by indirect evidence, stemming from the certain types of conduct. [171] Croatia considered that the criterion defined in 2007 judgment of the court, stating that 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" is excessively restrictive. In addition, it stated that the mentioned pattern is not based on any precedent and therefore asked the court to reconsider it.

For the modification of the mentioned criterion, Croatia offered the passage from the Tolimir case (ICTY Trial Judgment) : "Indications of such intent are rarely overt, however, and thus it is permissible to infer the existence of genocidal intent based on 'all of the evidence taken together', as long as this inference is 'the only reasonable [one] available on the evidence'." Croatia claimed that the court had to establish *dolus specialis* if it was sure that the "only reasonable inference to be drawn from that conduct is one of genocidal intent".[172]

To the claim of Croatia the court interpreted its 2007 judgment and stated that "in order to infer the existence of dolus specialis from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question"[173]. Therefore, according to the court the criterion used in Tolimir case and 2007 judgment are substantially identical.

In establishing that *dolus specialis* did not exist, the Court considered many instances of violence and forced displacement, in some cases finding that the *actus reus* of

[170] ibid*;* Par*a:440.*
[171] ibid . para. 143
[172] Ibid. para.146
[173] Ibid. para. 148

genocide was present. However, the Court's argument that the intent to destroy, in whole or in part, must be "the only reasonable inference" [174] that may be determined from considering wartime conduct is perhaps setting too high threshold for the mental element of genocide.

One of the arguments that Croatia submitted was that the presence of "systematic policy of targeting Croats with a view to their elimination from the regions concerned" indicated *dolus specialis*. Croatia argued that the scale and consistent nature of the crimes committed by the Serb forces by itself show a clear intention to result in the physical destruction of the Croats.

Hereby, Croatia listed 17 factors, such as political doctrine of Serbian expansionism, the statements of public officials and propaganda on the part of State-controlled media, the use of ethnically derogatory language in the course of acts of killing, torture and rape, the consequent permanent and evidently intended demographic changes to the regions concerned, etc. [175]

Croatia was arguing that all the mentioned 17 factors indicated the existance of a „pattern of conduct from which the only reasonable inference to be drawn is that the Serb leaders were motivated by genocidal intent", with the intent to destroy in whole or in part the ethnic group.

While discussing the issue, the court made reference to the ICTY cases, namely *Mrkšić* and *Martić* Trial Judgments, considered many attacks, such as at Vukovar, "the purpose [of which] was to punish the town's Croat population, but not to destroy it."

In relation to the *dolus specialis* requirement, the Court distinguished between attacking a group considered by them to bear the status of an enemy with the intent of punishing the members of the group, and attacking a group with the intent of destroying it, in whole or in part.

Similarly, concerning Serbia's counterclaim, the court found that the forces of the Republic of Croatia perpetrated acts falling under article II (a) and II (b) of the Genocide Convention, whereas the specific intent was lacking, since the acts commited were not of sufficient gravity.

---

[174] ibid*; Para:146.*

[175] Ibid. Para 408.

2.3.2. Position of the Darfur Commission

The Commission Report on Darfur referred to the objective (*actus reus*) and subjective (*mens rea*) elements of the crime of Genocide as outlined in the Genocide Convention and corresponding customary international rules. It confirmed the subjective element or *mens rea* for the crime of genocide is twofold comprising:

1. The criminal intent required for the underlying offence (killing, causing serious bodily or mental harm et cetera); and
2. "The intent to destroy in whole or in part" the protected group, as such. [176]

The Report on Darfur also confirmed that this "second intent" is an "aggravated criminal intention" or *"dolus specialis"* stating that this second intent "implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.[177]

The commission examined reports compiled by independent bodies, interviewed several government officials and victims of Darfur atrocities, and evaluated accounts of the Government of Sudan and rebel groups. Following an inspiring analysis of international law, the Commission concluded that "[s]ome elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of genocidal intent."' [178] Nevertheless, the Commission stated that there were other more indicative elements that showed the lack of genocidal intent.

In support of this, it recounted the patterns of attacks on villages, stating that the examples are vital to its conclusions and reproduced the facts of one of such attacks, namely the fact that in a number of villages attacked and burned by both militias and Government forces, the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men. [179]

[176] Darfur Commission Report, *supra* note 125, para. 491.
[177] Ibid.
[178] ibid
[179] ibid

The example refers to the attack of 22 January 2004 on Wadi Saleh, a group of 25 villages inhabited by about 11,000 Fur. According to testimonies of the eye witnesses questioned by the Commission, after occupying the villages the Government Commissioner and the leader of the Arab militias that took part in the attack and burning, gathered all those who had survived or who had not managed to escape into a large area. Using a microphone they selected 15 persons (whose names they read from a written list) and executed them on the spot. Later they sent elderly men, all boys, many men and all women to a nearby village, where they held them for some time, whereas they executed 205 young villagers (claimed to be rebels). According to the testimonies of the witnesses, about 800 persons were not killed.[180]

From these facts the Commission therefore inferred that, the attackers aimed to kill the rebels and to make sure that they would not be able to get aid from the local population and their purpose was not to destroy the ethnic group as such.

In Bosnia v. Serbia, regarding the massacre in Srebrenica, the ICJ stated, the only targets of the VRS were the men of the military age, although the evidence show that no distinction made and men were executed despite their civilian or military status. Since the situation in Srebrenica was pretty much similar to Darfur, some scholars fairly criticize that the decision rendered by the Court with regard to the "VRS" having killed Bosnian Muslims indiscriminately, since the VRS confined its attack to Bosnian men of military age, the Court could have found, as did the Commission, that the *actus reus* did not manifest the intent to destroy the people in part or in whole.[181]

Both the ICJ Judgment and the Report on Darfur therefore define and deal with the subjective element of genocide (i.e. the genocidal intent or *dolus specialis*) in a consistent or similar manner. They both adopted what has been termed the "purpose-based" approach to genocidal intent – looking at the fact that the perpetrator intended the results of his action. Nevertheless, the Commission arrived at an essentially negative and unusual conclusion as regards the genocidal intent. Instead of investigating on individual perpetrator's intent, the Commission turned to the issue of intent of the central government of Sudan as a whole by stating that

[180] ibid

[181] "Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur"- Ademola Abass; Fordham International Law Journal. Volume 31, Issue 4, Article 6, 2007

> [T]he Government of Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the actus reus consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led to the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[182]

Therefore, the Commission concluded that "Government of Sudan has not pursued a policy of genocide."[183]

The commission stated that the lack of genocidal intent by the State was demonstrated since villages with a mixed composition (African and Arab tribes) were not attacked. Additionally, it referred to the evidence given by one survivor of an attack on the Jabir village who claimed that he did not resist when attackers took 200 camels from him, and that although they beat him up, they did not shoot him dead. Based on these, the Commission concluded that " [c]learly, in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village " .[184]

[182] Darfur Commission Report, *supra* note 125. para 518.
[183] Ibid.
[184] Ibid. para 517

However, the Commission still left the room for the "competent court" to consider individual intent and consequent responsibility "on a case-by-case basis". The Commission held that

> One should not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group. If any single individual, including Governmental officials, has such intent, it would be for a competent court to make such a determination on a case by case basis. Should the competent court determine that in some instances certain individuals pursued the genocidal intent, the question would arise of establishing any possible criminal responsibility of senior officials either for complicity in genocide or for failure to investigate, or repress and punish such possible acts of genocide.[185]

Some scholars argue that a logical consequence of the Commission's finding that there was no state plan or policy is that there can be no individual liability, because 'in the absence of a collective goal to destroy, the desire of such individuals to destroy would remain a vain and thus legally irrelevant hope.'[186]

However, the Commission attached less significance to the intent of single individuals, than to the element of state policy on which the Commission basically based its Report. Therefore, conclusion of the Commission seems to be inconsistence first of all to the mandate it was given by the United Nations; second, to Genocide Convention and relevant customary international rules; and third, to the extensive case-law of the UN *ad hoc* Tribunals and the ICJ.

The Commission, as noted above, was initially established for the purpose of investigating the "reports of violations of international humanitarian law and human rights law in Darfur by all parties"; "to determine also whether or not acts of genocide have occurred"; and "to identify the perpetrators of such violations"; "with a view to ensuring that

[185] Ibid. para. 520.
[186] See, Kress, 'The Darfur Report and Genocidal Intent', 3 *JICJ* (2005) 562-578, at 577-578.

those responsible are held accountable".[187] It is vivid from the Commission mandate that the aim was to identify the individual perpetrators of genocide for holding them accountable for committing the offence.

Since, after the Commission Report the Situation in Sudan, Darfur Region was immediately referred to the Prosecutor of International Criminal Court (ICC) by the UN Security Council in 2005,[188] further proves that the identification of genocidal acts and its perpetrators was initially supposed to be considered by the ICC, which only deals with individual criminal responsibility of individuals and not states.

Hence, elevating an issue of the state policy element by the Commission as to be a decisive factor for the genocidal acts to be qualified as a crime and focusing whether Sudan Government possessed genocidal intent, was not falling under the mandate of the Commission. However, the Report produced this conclusion regardless it recognized its mandate to make findings solely on individuals criminal responsibility.

In addition, Article 2 of the Genocide Convention does not separately envisage policy element, which led many commentators and judges to the conclusion that it is not an element of the crime. Moreover, this view is supported by the UN ad hoc tribunals and ICJ. For instance, the ICTY Appeals Chamber in *Jelisic* stated that "the existence of a plan or policy is not a legal ingredient of the crime', although it noted that 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases".[189]

The Preparatory Commission for the International Criminal Court Working Group on the elements of crimes also rejected this view,[190] and proposals to include an explicit state plan or policy requirement were rejected during the drafting of the Genocide Convention itself.[191] Although W.A. Schabas, suggests that the reference to 'manifest pattern of similar conduct' is functionally equivalent to a state plan or policy, it is not readily apparent why that would be the case. Indeed, if it is correct, as Schabas states, that

[187] Darfur Commission Report, *supra* note 125. para. 2.
[188] SC Res. 1593 (2005)
[189] Judgment, *Jelisic* (IT-95-10A), Appeals Chamber, 5 July 2001, x 48. See also Judgment, *Prosecutor* v. *Krstic*, Appeals Chamber,19 April 2004, at 225.
[190] Andrew B. Loewenstein and Stephen A. Kostas, Divergent Approaches to Determining Responsibility for Genocide The Darfur Commission of Inquiry and the ICJ Judgment in the Genocide Case, *JICJ* (2007), 1-19, at 13, referring to Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add. 2, Art. 2, Art. 6(a)(4). Adopted by the Assembly of States Parties, First Session, New-York, 3-10 September 2002, ICCASP/ 1/3.
[191] Schabas, *supra* note 65, 207 n. 6 (citing UN Doc. E/AC.25/SR.4, 3-6) UN ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 14th mtg. at 13, UN Doc. E/AC.25/SR.14 (1948).

the tribunals' view has 'not been well received by many States', the absence of an explicit requirement for a state plan or policy in the ICC's elements of genocide is strong evidence that there is no such requirement.[192]

It is worth focusing on the comprehensive viewpoint of Professor Schabas on a state plan or policy. In particular, Schabas interprets the Commission's Report as standing for the proposition that a state plan or policy is a logical requirement for, if not a formal element of, individual criminal responsibility for genocide: "Consistent with case law of the ICTY, which holds that an individual, acting alone, may commit genocide, the Darfur Commission does not exclude the possibility that genocide convictions might eventually result from the acts in question.

However, it holds that there is no evidence of a state plan or policy intended at the physical destruction of the groups in question. This finding is helpful, for it affirms the centrality of a state plan or policy in the crime of genocide, even if this is not a formal element of the offence. In effect, in asking the Darfur Commission whether genocidal acts were being committed in Sudan, the Security Council wanted to know whether genocide was being committed pursuant to a plan or policy of the state.

Of course, the Security Council did not make this explicit, but the whole point was obvious enough."[193] Notably, Schabas does not cite the text of the Security Council resolution, its drafting history, or comments made by states' representatives to support his conclusion that it "was obvious" that "the Security Council only wanted to know whether genocide was being committed pursuant to a plan or policy" of Sudan. Instead, Schabas argues that the Security Council could only act pursuant to Art. 8 or 9 of the Genocide Convention if acts of genocide were committed pursuant to a state plan or policy: "an individual genocidaire acting alone without a state plan or policy [could not] provide a pretext for Security Council action, or for the intervention of United Nations bodies pursuant to Article 8 of the Genocide Convention, or give a basis for jurisdiction of the International Court of Justice in accordance with Article 9 of the Convention. The Darfur Commission implicitly understood this and answered accordingly.

Although there is no shortage of authority claiming that a state plan or policy is not an element of the crime of genocide, the behavior of the Security Council and the Darfur

[192] W.A. Schabas,The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (Cambridge: Cambridge University Press, 2006), at 171-172,
[193] Ibid. at 877 (internal citations omitted).

Commission shows that state plan or policy is not only an essential ingredient of the crime, it is the question that lies at the very heart of the debate. The theory that an individual, acting alone, may commit genocide is little more than a sophomoric *hypothese d'ecole*, and a distraction for international judicial institutions."[194]

Absence of state policy as far as Sudanese Government is concerned as the Report states, creates considerable inconsistence within the document itself. First, the Commission confirmed that Sudanese Government has committed acts against civilian population of Darfur by establishing that

> there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighboring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur.[195]

Second, the Report established clear alliance between the Sudanese Government and Janjaweed militia. It stated that the Sudanese army and senior civilian authorities have made "regular supplies of ammunition" to the militias, which have been used to commit mayhem."[196]

The Commission also found that the Sudanese armed forces have themselves committed vast attacks on civilians in Darfur villages.[197] It noted that many of the alleged crimes, which were committed "directly or through surrogate armed groups", have been widespread and systematic, thus amounting to "gross violations of human rights and humanitarian law."[198]

As to the crime of genocide, The Report agreed that "some of the objective elements of the crime of genocide materialized in Darfur",[199] however, it insisted that the crucial element of genocidal intent is missing in Darfur, "at least as far as the central Government authorities are concerned".[200]

---

[194] Ibid.
[195] Darfur Commission Report, *supra* note 125, para. 226.
[196] Ibid. 111.
[197] Ibid. 240.
[198] Ibid. 185.
[199] Ibid. 507.
[200] Ibid.

Ignoring the existence of individual intent, the Report fails to answer, for example, whether the systematic rape and sexual violence in Darfur were solely parts of counter-insurgency warfare or were the acts committed with the intent to destroy the targeted three ethnic communities in Darfur, namely, Fur, Massalit, and Zaghawa.[201]

In addition, the issue of whether the Darfur attackers killed indiscriminately all or some of their victims have raised question among the scholars, as to what is the amount of people to be killed for the act to be considered as having genocidal intent.[202] In fact, Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide is quite concise and doesn't provide a direct answer to this unclear issue. The *travaux preparatoires* to the convention are not helpful either.

While discussing the Darfur commission's findings whether genocide occurred or not, Professor Abass argued that in interpreting the phrase "in whole or in part", the commission should have determined if the "part" concerned (the military-aged Darfurians at stake) of the wider protected group (the entire population of black Darfurians) was targeted."

He also argues that the existing amount of the military-aged men of Darfur would not be very high, therefore killing several dozens of them, out of around 3 million Darfurians, would satisfy the requirement of "in part or in whole". [203] If the commission followed the mentioned approach, the extermination of some 205 military-aged men at Wadi Saleh might have satisfied the requirement of the specific intent to destroy "in part".

He discusses in parallel that, although it was evidenced that the Srebrenica attackers did not intend to exterminate the whole population (the separation of the young, the old and the elderly from the rest of the population), the Trial Chamber correctly held that specific intent existed. [204]

Several commentators express their surprise as to why it was so difficult to establish and identify genocidal acts and intent in case of Darfur.[205]

---

[201] Nsongurua J. Udombana, An Escape from the Reason: Genocide and the International Commission of Inquiry in Darfur, *The International Lawyer,* at 54.

[202] "Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur"- Ademola Abass; Fordham International Law Journal. Volume 31, Issue 4, Article 6, 2007

[203] Ibid.

[204] Ibid.

[205] See, G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *JICJ* (2005) 539-561, at 456.

2.4. Attribution of the Acts of Genocide to the Governments of Serbia and Sudan

2.4.1. Approach of the ICJ Genocide Judgment

In the Genocide Case, the ICJ laid out the methodology that should be followed in determining a state responsibility for genocide. In so doing, the Court was explicit that the methodology for attributing genocide to a state is the same as for attributing any other internationally wrongful conduct, in the absence of "clearly expressed lex specialis".[206] Thus, the Court held that "[g]enocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on instructions or directions of the State, or under its effective control"[207] This involves a two-step process:

> First, it should be ascertained whether the acts committed . . . were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by person who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.[208]

The first step involves determining "whether the acts of genocide" were 'perpetrated by ''persons or entities'' having the status of organs" of the relevant state. This is done by applying Article 4 of the ILC Articles on State Responsibility, which provides that an organ is "person or entity which has that status in accordance with the internal law of the State".[209] However, if the perpetrator is not a state organ under internal law, his conduct may still be attributed to the state if the state exercises a sufficiently high degree of control over him.

---

[206] ICJ Genocide Judgment, *supra* note 22, para. 401.
[207] Ibid.
[208] Ibid. para 384.
[209] Ibid. para 385.

In that regard, following its earlier holding in Nicaragua, the Court ruled that "persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in ''complete dependence'' on the State, of which they are ultimately merely the instrument".[210]

The ICJ also held that even if a perpetrator is not an organ *de jure* and should not be equated with an organ because the perpetrator is not completely dependent on the state, genocidal acts may still be attributable to a state if, "in the specific circumstances surrounding" the relevant events, "the perpetrators of genocide were acting on the [State's] instructions, or under its direction or control". Such "international responsibility would be incurred owing to the conduct of those of its own organs, which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations".[211]

Under the approach developed in Nicaragua, this requires a showing that the perpetrator acted "in accordance with" the "state's instructions or under it's ''effective control''' at the time when the alleged international violation occurred.[212] The Court held, in turn, that the Bosnian Serb allies:

1) Were not "state organs" of the Serbian government (*de jure* or de facto);

2) Had not been under the "direction and control" of the Serbian state; and finally

3) Had not received "aid or assistance' from Serbia.

In so considering, the Court was faced with the stark choice between the conflicting tests espoused in *Nicaragua* and *Tadic* relating to the requisite level of control to be exercised over such persons. Preferring the *Nicaragua* test, the Court held that the requisite level of "effective control" had not been exercised and that the decision to kill the adult males of the Muslim population in Srebrenica was taken by some members of the VRS Main Staff without instructions from or effective control by the FRY.[213]

Nevertheless, issue of effective control was not extended too much by the ICJ in its Judgment. The most important matter the ICJ tackled was that the Court has chosen a dual approach to the issue. In particular, the Court held that one and the same act may give rise to both individual and state responsibility simultaneously. The Court stated that Article I of the

[210] Ibid. para 392.
[211] Ibid. para 397.
[212] Ibid. paras. 399-400.
[213] Genocide Judgment, see, *supra* note 42, paras. 396-412

Genocide Convention imposed not only a duty to prevent and punish genocide, but also an obligation for contracting states to refrain from engaging in genocide.[214]

However, the Court does not stop here. It interprets Article 3 as implying that contracting states also are under the obligation to refrain from engaging in any of the types of conduct envisaged in that provision: conspiracy, direct and public incitement, attempt to commit genocide or complicity in genocide.[215] In the light of these statements the ICJ could not hold Serbia responsible for committing genocide but responsible for not preventing it and punishing possible perpetrators.

The ICJ's approach to the attribution of genocide was at variance to the approach of the Darfur Commission. It adopted the general rules of state responsibility for international wrongful acts. In recognizing the long existing difficulty of ascribing specific intent to a State, the focus of the ICJ was instead on the intent of the individual perpetrators of the alleged genocidal acts regardless of the fact it was considering state responsibility.

The ICJ therefore started its approach at the level of the actor committing the crimes, collecting evidence such as coordination and planning to demonstrate the actor's intent as genocidal. Once it had examined whether or not the individual perpetrators possessed the requisite genocidal intent (*dolus specialis*), the ICJ then considered whether the individual perpetrators' conduct could be ascribed to the state of Serbia either because those individual perpetrators were state organs or non-state actors whose conduct could possibly be ascribed to the state of Serbia.

The ICJ was therefore consistent in adopting the general rules of state responsibility for internationally wrongful acts by focusing on the intent of the individual perpetrators rather than on the intent of the Serbian State.

As already mentioned above the ICJ clearly set out the requirements to be addressed in order to ascertain a state responsibility for genocide and concluded that

> Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on instructions or directions of the State, or under its effective control.[216]

[214] Ibid. paras. 162-166.
[215] Ibid. para 167.
[216] Ibid. para. 401.

The ICJ's approach is certainly more in line with existing international law as pronounced by the United Nations ad hoc tribunals (ICTY and ICTR). It confirmed the two following principles with respect to state responsibility and genocide: 1) The existence of a policy or plan of genocide is relevant only for the purpose of proving the genocidal intent of the perpetrator and not as an independent element of genocide. This is consistent with the jurisprudence of the ICTY Appeals Chamber in *Jelesic*; 2) determining state intent (whilst difficult to define) is not part of determining state responsibility for genocide.

2.4.2. Approach of the Darfur Commission

The Darfur Commission's exclusive focus on the intentions of the authorities in Sudanese Central Government was extremely narrow. Thus, even if the Commission was correct in limiting its focus to the responsibility of the "central government", it still should have, consistent with the approach in the Judgment in the Genocide Case, assessed whether the perpetrators of the genocidal acts harbored specific intent, and then determined whether their relationship vis-a'-vis the Sudanese state invoked Sudanese state responsibility.

The Commission's decision not to assess whether actors other than the central government had genocidal intent appears to be a particularly important omission since many members of the Janjaweed, who are the most likely candidates for harboring genocidal intent, almost certainly qualify as organs of Sudan.

Indeed, an entire section of the Commission's Report refers to the Janjaweed as government "supported" or "controlled militias", and the Commission and other UN investigative missions have found that many, if not most, Janjaweed are formally incorporated into the Sudanese government and thus qualify as organs of the Sudanese state.[217]

The approach of the Darfur Commission on the attribution of genocide to the State was arguably limited: it limited itself to the question of whether or not the Sudanese Central Government had committed genocide. Under this limited interpretation of the mandate, the Darfur Commission specifically focused on the intent of the Sudanese Central Government in assessing if Sudan had committed Genocide. It concluded the Government of the Sudan

[217] Loewenstein and Kostas, *supra* note 190.

has not pursued a policy of genocide[218] and that "the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned".[219]

Under international law, concurrent responsibility for both individuals and states for genocidal acts exists; therefore, it is arguable that the Darfur Commission could have investigated either or both types of criminal responsibility.

From the Report, it appears that the Darfur Commission understood that it had been asked to consider individual criminal responsibility but despite this, the Commission went on to focus on whether the Sudanese Central Government had genocidal intent.

The approach by the Darfur Commission (in particular, the Commission's focus on the issue of whether or not a State plan or policy of genocide was pursued) is questionable because:

1. The Security Council mandate did not require the Darfur Commission to give prominence to the issue of whether a State plan or policy of genocide existed;

2. A focus on whether a State plan or policy of genocide existed is not required by the law of individual or state responsibility;

3. The focus on state intent prevented the Darfur Commission from fully utilizing and considering circumstantial evidence to prove genocidal intent; and

4. The focus on state genocidal intent prevented the Darfur Commission from fully considering the possibility that Sudan, through its organs and agents could be responsible for complicity in genocide.

Criticisms have been raised that the Darfur Commission's approach appears to have "elevated a state plan or policy to the level of an element of the crime of genocide" – a view which is not shared by the UN ad hoc tribunals (ICTY and ICTR – in particular ICTY Appeals Chamber in *Jelesic*).[220]

Whilst the Darfur Commission concluded there was no state plan or policy of genocide, it stated it did recognize that in some instances, individuals including Government officials may commit acts with genocidal intent.

The Darfur Commission concluded that whether or not this was the actual case in Darfur was a determination that only a competent court could make on a case by case basis. Essentially, this meant the Commission found that individuals, at least those outside the

[218] Darfur Commission Report, *supra* note 125, Executive Summary, para. 518.
[219] Ibid.
[220] Loewenstein and Kostas, *supra* note 190, para. 13.

Sudanese Central Government could be liable to genocide notwithstanding the lack of a state plan or policy.

In adopting the above indicated approach, the Darfur Commission did limit the actual international obligations of Sudan vis-à-vis of international customary law and of international treaties to which Sudan is party.

In fact, the Commission did not extend its findings and rationale as to render evident the existence of “primary” responsibility upon the Government of Sudan for it did fail to prevent and punish acts of genocide perpetrated within its territory.

CONCLUSION

In 2007 Bosnia v. Serbia judgment and the Darfur Inquiry, , for the first time ever the ICJ and the Commission had a very good possibility to, determine whether States have committed genocide, although, here, both turned a negative conclusion.

The ICJ Judgment and Darfur Commission Report have clearly taken different approaches. The ICJ dealt with the state responsibility issue as it was tasked. Nevertheless, the Commission erred in properly following its mandate and instead of concentrating on individual perpetrators of genocide, declared that without state policy element pursued by the Sudanese government, the genocide could not have been committed.

It should be noted that the case of Bosnia and Herzegovina v. Federal Republic of Yugoslavia was the first case of genocide ever brought in front of the ICJ. The Court was therefore asked to consider, inter alia, the responsibility of the State of Serbia and Montenegro for the commission of Genocide. The ICJ concluded on 26 February 2007 that the State of Serbia and Montenegro was not responsible for committing genocide, conspiracy to commit genocide, incitement of genocide or complicity in genocide. The ICJ found that whilst genocide had occurred at Srebrenica in July 1995, the acts of those who perpetrated the crime of genocide could not be attributed to the Serbian State. The ICJ did find however that the State of Serbia violated its obligation to prevent genocide and violated its obligations to prevent and punish genocide by failing to transfer those who perpetuated the genocide to the ICTY.

The ICJ's approach is certainly in line with existing international law as pronounced by the United Nations ad hoc tribunals (ICTY and ICTR). It confirmed the two following principles with respect to state responsibility and genocide: 1) The existence of a policy or plan of genocide is relevant only for the purpose of proving the genocidal intent of the perpetrator and not as an independent element of genocide. This is consistent with the jurisprudence of the ICTY Appeals Chamber in *Jelesic*; 2) determining state intent (whilst difficult to define) is not part of determining state responsibility for genocide.

Based on the above elaborations, it should be concluded that the ICJ referred to the mental element of genocide, as well as the state policy in order to attribute those acts to the state of Serbia and thus assert the responsibility of FRY over the atrocities committed in the territory of Bosnia and Herzegovina. In other words, considering the nature and functions of the ICJ, the latter looked at subjective element and state policy in the light of international

responsibility of the state. However, unlike subjective element (specific intent), which is a determinative factor for genocide, the ICJ did not consider the state policy as a separate element of the crime. Hence, On the other hand, to compare the decision of the ICJ with the Darfur Commission Report, the latter, as some commentators interpret, elevated the concept of state policy on the level of decisive feature of the crime of genocide, by stating that since there is not a state policy pursued by the Government of Sudan, the genocide has not occurred there.

On the other hand, by limiting its legal analysis at looking for the existence of a "state plan or policy" which would satisfy the specific subjective element of genocide, the Darfur Commission did adopt a narrow approach which yet was probably the one most in line with its task and with the contingent political situation in which it was operating. The Commission placed the discussion on whether "state plan or policy" constitutes an independent element of the crime of genocide in the very heart of its analysis, although this was not the task at stake from the Security Council, rather than finding whether "acts of genocide have occurred".

In those terms, it expresses the potentials existing in the coordination of the human rights machinery and the activity of the Security Council. Further, by means of a commission of experts, the Security Council could aim at rendering its work more transparent and accountable and could employ an appropriate filtering mechanism before taking a decision whether or not a situation warrants referral to the ICC.

The above considerations clarify that the Darfur Commission lacked any kind of judicial power being an investigative body. In discharging its functions, as it is already mentioned above, the Commission was indeed influenced by and large by international political concerns and probably suffered from the political pressure exiting within the Security Council where its Members expressed different interests (e.g.: China's close links with the Sudanese Government and its involvement in the extraction of oil).

The need not to over stigmatize the responsibility of Sudan, and thus the adoption of a Report which saved the Sudanese Government from responsibility over the crime of genocide - a rather softly approach - represented probably the most consistent approach the Commission could take. Many Human Rights activists were largely disappointed by the commission's conclusion that genocide has not been committed in Darfur. The report has even been treated as some kind of betrayal.

The approach by the Darfur Commission (in particular, the Commission's focus on the issue of whether or not a State plan or policy of genocide was pursued) is questionable because:

1. The Security Council mandate did not require the Darfur Commission to give prominence to the issue of whether a State plan or policy of genocide existed;

2. A focus on whether a State plan or policy of genocide existed is not required by the law of individual or state responsibility;

3. The focus on state intent prevented the Darfur Commission from fully utilizing and considering circumstantial evidence to prove genocidal intent; and

4. The focus on state genocidal intent prevented the Darfur Commission from fully considering the possibility that Sudan, through its organs and agents could be responsible for complicity in genocide.

The Darfur Commission's approach appears to have "elevated a state plan or policy to the level of an element of the crime of genocide" – a view which is not shared by the UN ad hoc tribunals, not it is contemplated by any of the international instruments.

Whilst the Darfur Commission concluded there was no state plan or policy of genocide, it stated it did recognize that in some instances, individuals including Government officials may commit acts with genocidal intent. The Darfur Commission concluded that whether or not this was the actual case in Darfur was a determination that only a competent court could make on a case by case basis. Essentially, this meant the Commission found that individuals, at least those outside the Sudanese Central Government could be liable to genocide notwithstanding the lack of a state plan or policy.

In adopting the above indicated approach, the Darfur Commission did limit the actual international obligations of Sudan vis-à-vis of international customary law and of international treaties to which Sudan is party. In fact, the Commission did not extend its findings and rationale as to render evident the existence of "primary" responsibility upon the Government of Sudan for it did fail to prevent and punish acts of genocide perpetrated within its territory.

The question raises here, whether, in coming to their respective decisions on Serbia and Sudan's responsibilities, the ICJ and the Darfur Commission did everything that was required of them, especially under the law of State responsibility. It is beyond any doubt that grave crimes were committed in Darfur, and if no genocide was indeed committed in the times, such a conclusion is difficult to be rendered.

Despite finding numerous "indiscriminate killings" across Darfur, the Commission chose a single incident of Wadi Saleh where the killing had been selective to disprove genocidal intent to destroy in part or in whole. The Commission was in fact well aware that motive had no relevance to genocide and nonetheless, it accepted that the destruction of villages and attacks conducted were purely for counterinsurgency purposes, or even for stealing cattle from the owners.

To conclude the ICJ approach was more in line with existing international law and therefore represents the better or more consistent approach. The Darfur Commission limited its analysis by looking for the existence of a "state plan or policy" which would satisfy the specific subjective element of genocide, and in that almost accorded the qualification of that specific state plan or policy as an element of the crime of genocide. On the contrary, the ICJ approach appears more comprehensive and consistent as it evaluated both state responsibility "by attribution" and State "primary" responsibility. The ICJ approach also was in line with the applicable rules of state responsibility as emerging from international customary law and also was consistent with the jurisprudence of the UN ad hoc tribunals (ICTY and ICTR).

The Darfur Commission appears to have had a difficult time asserting the subjective elements of the crime of genocide whilst the ICJ struggled with the subject of attribution of already established genocide to the State in accordance with the international law of State Responsibility.

Both the ICJ Judgment and the Report on Darfur therefore define and deal with the subjective element of genocide (i.e. the genocidal intent or *dolus specialis*) in a consistent or similar manner. They both adopted what has been termed the "purpose-based" approach to genocidal intent – looking at the fact that the perpetrator intended the results of his action. Nevertheless, the Commission arrived at an essentially negative and unusual conclusion as regards the genocidal intent. Instead of investigating on individual perpetrator's intent, the Commission turned to the issue of intent of the central government of Sudan.

It is obvious that the political relations and external influence played important role in the drafting of the Darfur Commission report. It is difficult to state whether there was any pressure on the international Court of Justice to return the kind of decision regarding the responsibility of Serbia, but most probably the issues at stake, namely establishing a state responsibility for such a grave crime as genocide, is of the level of importance, where politics should also play its role.

As the *post scriptum* to the conclusion, on the other hand, it is worth mentioning that in the case Croatia v. Serbia, Croatia submittied the series of 17 factors (see above on page 45) to the Court with the belief, that they, individually or taken together, could lead the Court to conclude that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned. It should be rather arguable whether they are not sufficient factors to determine the state policy element. Although again, in my opinion, we come to the tendences of rising the threshhold of proving the intent to the highest level, making the crime of genocide almost impossible to be proved. In the mentioned case, it might be difficult to believe that in each of the situations of violence described in the judgment, the perpetrators did not at least have the understanding that their acts would amount to destruction of a group, in whole or in part.

Although, it would be fair enough also to mention that the case, as it was rendered by the court, was pretty much predictable for the scholars, for several reasons, mainly because it was obvious that the court would follow the pattern already rendered in 2007. In addition, it would be quite difficult to prove genocide facts, even though there had been many murder cases on the spot during the conflict, the difficulty here would be to prove that those particular acts were committed with the specific intent to destroy in whole or in part the group.

It might be possible that in this particular case, the Court did not adequately consider that the intent to commit genocide existed alongside other aims in the conduct of hostilities and that genocidal acts occurred. Is this issue of definition of the Convention that requires the very high level of proof of specific intent to destroy the group or the weakness of the Court to interpret the provision of the Convention itself? It is quite obvious that the international criminal tribunals are more "courageous" in proving genocidal intent which according to their jurisprudence may be inferred from the several factors (such as, inter alia, e.g., the plan or policy of destruction) even in the absence of direct proofs (the ICTR Trial Chamber Kayishema and Ruzindana case). In other words, even when direct evidence is not at stake, the case studies of contemporary international tribunals, as mentioned above, show that the intent can be inferred on the basis of circumstantial evidence. The ICJ seems to have set too high the standard of proof in establishing the genocidal intent here.

At this point, I would like to agree with the Dissenting opinion of the Judge A.A Cancado Trindade on the Judgment of the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

where he stated that the *"*attempts to impose a high threshold for proof of genocide, and to discredit the production of evidence (e.g., witness statements) are most regrettable, ending up in reducing genocide to an almost impossible crime to determine, and the Genocide Convention to an almost dead letter. This can only bring impunity to the perpetrators of genocide, — States and individuals alike, — and make any hope of access to justice on the part of victims of genocide fade away. Lawlessness would replace the rule of law."

Bibliography

LITERATURE

Cassese, Antonio — *International Criminal Law*, Second Edition, (Oxford: Oxford University Press 2008)

Dupuy, P.M. — "International Criminal Responsibility of the Individual and International Responsibility of the State', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court:* A Commentary, Vol. II (Oxford: Oxford University Press, 2002)

Gellately Robert
Ben Kiernan — "The Specter of Genocide: Mass Murder in Historical Perspective", Cambridge University Press, 2003

Jones, John R.W.D. — The Practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda 99 (2d ed.2000).

Kuper, Leo — *Genocide, Its Political Use in the Twentieth Century,* New Heven: Yale University Press, 1981

Lemkin, Raphael — *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress,* Washington: Carnegie Endowment for World peace, 1944

Sartre, Jean-Paul — "On Genocide", in Richard A.Falk, Gabriel Kolko an Robert Jay Lifton, eds., *Crimes of War,* New-York: Random House, 1971,

Schabas, A. William — *Genocide in International Law*, (Cambridge: Cambridge University Press, 2000)

Zohar, Alexander — *International Criminal Law, A critical Introduction*, Oxford University Press, 2008.

ARTICLES

Nollkaemper, A. — ”Concurrence Between Individual Responsibility and State Responsibility in International Law”, 52 *International and Comparative Law Quarterly,* 2003, 615-640

Mathew, Jamie A. — “The Darfur Debate: Whether the ICC Should Determine that the Atrocities in Darfur Constitute Genocide”, *18 Florida Journal of International Law,* 2006, 517-548

Lippman, Matthew — “The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide”, *3 Boston University International Law Journal,* 1985, 1-65

Ben-Naftali, Orna
Sharon, Miri — “What the ICJ did not say about the Duty to Punish Genocide The Missing Pieces in a Puzzle”, *5 JICJ,* 2007, 859-874

Fletcher and J.D. Ohlin, G.P. — “Reclaiming Fundamental Principles of Criminal Law in the Darfur Case”, 3 *JICJ*, 2005, 539-561

Greenawalt, Alexander K.A. — “Rethinking Genocidal Intent: The Case for the Knowledge-Based Interpretation”, *99 Columbia Law Review,* 1999, 2259-2294

Melvern, Linda — "The Security Council in the Face of Genocide", *3 JICJ*, 2005, 847-860

Rosenne, Shabtai — "State Responsibility and International Crimes: Further Reflection on Article 19 of the Draft Articles on State Responsibility", *30 N.Y.U. International Law and Politics*, 1997-1998, 145-166

Akhavan, Payam — "The Crime of Genocide in the ICTR Jurisprudence", *3 JICJ*, 2005, 989-1006

Alston, Philip — "The Darfur Commission as a Model for Future Responses to Crisis Situations", *3 JICJ*, 2005, 600-607

Crawford, James — "Revising the Draft Articles on State Responsibility", 10 *EJIL*, 1999, 443.

Pellet, Allain — "Can a State Commit a Crime? Definitely, Yes!", *10 EJIL*, 1999, 425-434

Luigi Condorelli
Annalisa Ciampi — "Comments on the Security Council Referral of the Situation in Darfur to the ICC", *3 JICJ*, 2005, 590-599

Van der Wilt Harmen G. — "Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case", *JICJ 4*, 2006, 239-257

Spinedi, Marina — "State Responsibility v. Individual Responsibiltiy for International Crimes: Tertium Non Datur?", *JICJ 4*, 2006, 239-257

Klaus Kress	"The International Court of Justice and the Elements of the Crime of Genocide", *18 EJIL*, 2007, 619-629
Udombana, Nsongurua J.	"An Escape from the Reason: Genocide and the International Commission of Inquiry in Darfur", *The International Lawyer*
Unknown Author	Rwanda, Remembered, *Economist,* 27 March 2004
Kress, Klaus	"The Crime of Genocide under International Law", 6 *International Criminal Law Review***,** 2006, 461–502
Cassese, Antonio	"On the Use of Criminal Law Notions in Determining State Responsibility for Genocide", 5 *JICJ*, 2007, 875-887
Gaeta, Paola	"On What Conditions Can a State Be Held Responsible for Genocide?", Vol. 18, no. 4 *EJIL* 2007
Kress, Klaus	The Darfur Report and Genocidal Intent, 3 *JICJ*, 2005, 562-78
Schabas, William	"Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide", 18 Leiden Journal of International Law, 2005, 871-885
Sivakumaran, Sandesh	"Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro)*", 56 *ICLQ*, July 2007, 695–708

Schabas, William A. "Whither genocide? The International Court of Justice finally pronounces", *Journal of Genocide Research*, 2007, 9(2), June, 183–192

Loewenstein, Andrew B.
Kostas, Stephen A. "Divergent Approaches to Determining Responsibility for Genocide The Darfur Commission of Inquiry and the ICJ Judgment in the Genocide Case", *JICJ* (2007), 1-19

Bassiouni, Cherif M. "International Crimes: *Jus cogens* and Obligation *erga omnes*, 59 *Law and Contemporary Problems*, Autumn 1996, 63-74

Gattini, Andrea "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment", *18 EJIL*, 2007, 695−713

Gattini, Andrea "Evidentiary Issues in the ICJ's Genocide Judgment", 5 *JICJ*, 2007, 889-904

Nolte, Georg "From Dionisio Anzilotti to Roberto Ago: the classical international law of state responsibility and the traditional primacy of a bilateral conception of inter-state relations", *EJIL* 2002, 13(5), 1083-1098

Sicilianos, Linos-Alexander "The classification of obligations and the multilateral dimension of the relations of international responsibility", *EJIL*, 2002, 13(5), 1127-1145

Wyler, Eric "From "state crime" to responsibility for "serious breaches of obligations under peremptory norms of

general international law", *EJIL,* 2002, 13(5), 1147-1160

Wald, Patricia M. "Genocide and Crimes against Humanity", 6 *Washington University Global Studies Law Review*, 2006, 621-633

Gibney, Mark "Genocide and State Responsibility", *7 Human Rights Law Review*, 2007,760-773

Scobbie, Iain "The invocation of responsibility for the breach of "obligations under peremptory norms of general international law", *EJIL,* 2002, 13(5), 1201-1220

Dupuy, Pierre-Marie "A general stocktaking of the connections between the multilateral dimension of obligations and codification of the law of responsibility", *EJIL,* 2002, 13(5), 1053-1081

Dumberry, Patrick "New state responsibility for internationally wrongful acts by an insurrectional movement", *EJIL* , 2006, 17(3), 605-621

Spinedi, Marina "On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia", *5 JICJ*, 2007, 829-838

Klein, Pierre "Responsibility for serious breaches of obligations deriving from peremptory norms of international law and United Nations law", *Journal of International Law,* 2002, 13(5), 1241-1255

Southwick, Katherine G. "Srebrenica as Genocide? The *Krstić* Decision and the Language of the Unspeakable", *8 Yale Human Rights and Development L.J.* 2005, 188-227

Boed, Roman "State of Necessity as a Justification for Internationally Wrongful Conduct", *8 Yale Human Rights and Development L.J.* 2000, 1-43

Milanović, Marko "State Responsibility for Genocide: A Follow-Up", *8 EJIL*, 2007, 669−694

Sassòli, Marco "State responsibility for violations of international humanitarian law", *84 IRRC*, June 2002, 401-434

Reyntjens, Filip "Rwanda: Genocide and Beyond", *9 Journal of Refugee Studies*, 1996, 240-251

Verdirame, Guclielmo "The Genocide Definition in the Jurisdiction of the *ad hoc* Tribunals", *49 International and Comparative Law Quarterly*, July 2000, 578-598

Cassese, Antonio "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *18 EJIL*, 2007, 649−668

Crawford, James
Olleson, Simon "The continuing debate on a UN convention on state responsibility", *49 International and Comparative Law Quarterly*, 2005, 54(4), 959-971

Mohamed, Saira "Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice";

UNIVERSITY OF COLORADO LAW REVIEW, 2009. Vol. 80.

Ademola Abass "Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur"; Fordham International Law Journal. Volume 31, Issue 4, Article 6, 2007.

INTERNATIONAL INSTRUMENTS

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, London, United Nations, *Treaty Series,* vol. 82

The Statute of the International Criminal Court, 17 July 1998

The Statute of the International Tribunal for the Former Yugoslavia, 25 May 1993

The Statute of the International Tribunal for Rwanda, 1994

Vienna Convention on Law of Treaties, 1969

Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948.

The Charter of the United Nations, 26 June 1945

Statute of the International Court of Justice, June 26 1945

Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/ 60, 25 January 2005

UN DOCUMENTS

International Law Commission

ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001

Report of the International Law Commission on the work of its forty-eighth session (Doc A/51/10), General Assembly Official Records Fifty-First Session, Supplement No. 10, 30.

Report of the International Law Commission on the work of its thirty-sixth session (Doc A/39/10), YILC (1984), II, Part Two, 11

TABLE OF CASES

International Court of Justice

*Barcelona Traction, Light and Power Co. (*Belgium v. Spain*),* 1970 ICJ, 3 (February 5).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996

East Timor (Portugal v. Australia), I.C.J. Reports 1995

Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996
Joint declaration of Judge Shi and Judge Vereshchetin ICJ Rep 1996, 631; Declaration of Judge Oda

Judgment, *Case Concerning the 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 (Genocide Case or Judgment), 26 February 2007

Judgment , *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 3 February, 2015*

Application of the Genocide Convention case, Preliminary Objections

Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 1951, ICJ, 15 (28 May).

Case concerning Armed Activities on the Territory of Congo, Jurisdiction of the Court and Admissibility of the Application (*Democratic Republic of Congo* v. *Rwanda*), Judgment of 3 February 2006

Dissenting opinion of the Judge A.A Cancado Trindade on the Judgment , *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 3 February, 2015*

Joint declaration of Judges Shi and Koroma; *Case Concerning the 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 (ICJ Genocide Judgment), 26 February 2007*

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. *Krstic*, Judgment, IT-98-33-A, Trial Cjamber Judgment 2 August 2001, Appeals Chamber Judgment, 19 April 2004.

Prosecutor v. Karadzic and Mladic, case No. IT-95-5-R61, IT-95-18-R61, 94 (July 1996)

Prosecutor v. Jelesic, Appeals Chamber, 5 July 2001 case No. IT-95-10-A,

Kunarac et al. Appeal Judgemen 12 June 2002

International Criminal Tribunal for Rwanda

Prosecutor v. *Akayesu*, ICTR-96.4.T, Judgment, 2 September 1998
Kaishema and Rusindana, case No. ICTR 96-4-T, 497.

Obed Ruzindana and Clément Kayishema v. Prosecutor, Case No.: ICTR-95-1-A, 1 June 2001.

National Courts
District Court of Jerusalem in *Attorney-General of the Government of Israel v. Eichmann*, (1961) *I.L.R.*, vol. 36