

**STATE OBLIGATIONS UNDER THE GENOCIDE CONVENTION  
IN LIGHT OF THE ICJ'S DECISION IN THE CASE CONCERNING  
THE APPLICATION OF THE CONVENTION ON THE PREVENTION  
AND PUNISHMENT OF THE CRIME OF GENOCIDE**

*Roger S. Clark\**

The decision of the International Court of Justice (ICJ) on February 26, 2007, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Judgment)<sup>1</sup> represented the final stage in proceedings originally brought by Bosnia and Herzegovina against the Federal Republic of Yugoslavia in March 1993. The court dealt with numerous complex questions of fact and law. This Article is concerned primarily with one major legal issue discussed by the court: the extent to which the Genocide Convention is concerned with state responsibility as well as individual responsibility.

In its dispositive paragraph, the court held by substantial majorities that it had jurisdiction over the proceedings on the basis of Article IX of the Genocide Convention; that Serbia had “not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention”; that Serbia had “not conspired to commit genocide, nor incited commission of genocide, in violation of its obligations under the Convention”; that it had “not been complicit in genocide, in violation of its obligations under the Convention”; but that it *had* violated the obligation to prevent genocide under the Convention, although only in respect of the genocide that occurred in Srebrenica in July 1995; that it *had* violated its obligations under the Convention by having failed to transfer Ratko Mladić for trial by the International Criminal Tribunal for the former Yugoslavia; and, that it *had* “violated its obligation to comply with the provisional meas-

---

\* Board of Governors Professor, Rutgers Law School, Camden, New Jersey.

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Feb. 26, 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf> [hereinafter Judgment]. As the former Yugoslavia shrank further over the years, Serbia alone was left as the respondent at the end of the proceedings. *See id.* ¶¶ 1, 32. In what follows, the parties are often referred to as “Bosnia” and “Serbia” for short. In quotations from the Judgment, Bosnia often appears as “Applicant” and Serbia as “Respondent.”

ures ordered by the Court” in April and September 1993 at an early stage of the case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995.<sup>2</sup>

Concerning remedies, the court decided that Serbia was under an obligation to take effective steps immediately to transfer individuals accused of genocide to the International Tribunal, and that its failure to prevent genocide and to comply with the provisional measures were not such as to give rise to an order for payment of compensation, or a direction to provide assurances and guarantees of non-repetition.<sup>3</sup> The court’s finding would constitute appropriate satisfaction.<sup>4</sup>

It is not my aim here to evaluate the ultimate factual and legal determinations about Serbia’s responsibility.<sup>5</sup> My interest is in the light that the judgment throws on the legal obligations of States Parties under the Convention. As explicated by the court, the obligations include: to make genocide criminal under domestic law; not to engage in genocide; not to be complicit in genocide; to take reasonable actions to prevent genocide; and to cooperate in surrendering persons for trial, both to domestic courts, and where relevant, to the appropriate international tribunal with jurisdiction.<sup>6</sup>

#### I. THE DUTY TO CRIMINALIZE GENOCIDE (ARTICLES I-VII OF THE CONVENTION)

At an absolute minimum, the Genocide Convention is a “suppression convention.”<sup>7</sup> That is to say, it is a treaty in which States accept an obligation to have municipal laws in place criminalizing certain acts or omissions as “international crimes” and (expressly or

2. *Id.* ¶ 471.

3. *See id.*

4. *See id.*

5. I thought the Dissenting Opinion of Vice-President Al-Khasawneh more persuasive. He writes:

The Court has absolved Serbia from responsibility for genocide in Bosnia and Herzegovina – save for responsibility for failure to prevent genocide in Srebrenica. It achieved this extraordinary result in the face of vast and compelling evidence to the contrary. This result was however a product of a combination of methods and techniques the Court adopted that could not but have led to this result.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), ¶ 62 (Feb. 26, 2007) (Dissenting Opinion of Vice-President Al-Khasawneh), <http://www.icj-cij.org/docket/files/91/13689.pdf> [hereinafter Dissent of Vice-President Al-Khasawneh].

6. *See* Judgment, *supra* note 1, ¶¶ 161-169.

7. EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 40 (2d ed. 2004).

impliedly) to prosecute in appropriate cases.<sup>8</sup> Serbia in its argument suggested in essence that this was the only substantial obligation of States in the Convention.<sup>9</sup> As a teacher of International Criminal Law, this has always been the feature of the Convention that I have emphasized most when explicating the Convention. Yet the court made it clear that the obligations of the Convention are much more comprehensive than just “suppression” in this narrow sense.<sup>10</sup>

Various aspects of criminal prohibition are addressed in the first seven articles of the Genocide Convention. In Article I, the Parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.”<sup>11</sup> Article II defines the “acts”<sup>12</sup> and the specific intent (“intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”)<sup>13</sup> that constitute the crime. Article III adds that these “acts shall be punishable”<sup>14</sup>: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide.<sup>15</sup> “Genocide” here presumably refers to what a “principal” actor does, either alone or in the company of others.<sup>16</sup> “Conspiracy” is an unusual term in international criminal law treaties. In this Convention, it was an offshoot of the conspiracy to commit crimes against peace that was pursued at Nuremberg.<sup>17</sup> It must refer to an inchoate or prepa-

8. See generally *id.* at 38-41 (discussing concept of “suppression conventions”).

9. See Judgment, *supra* note 1, ¶¶ 170-171.

10. See *id.* ¶¶ 172-173.

11. Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Convention].

12. *Id.* art. II. The “acts” so described in Article II are (a) killing members of the group; (b) causing serious bodily injury 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. “Acts” is a curious choice of term to a criminal lawyer. As the court notes in the Judgment: “It is well established that the acts . . . themselves include mental elements.” Judgment, *supra* note 1, ¶ 186. Thus, it comments that “killing” must be “intentional” and the same goes for “causing serious bodily or mental harm.” *Id.* On the two levels of *mens rea*, see Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT’L L. 399 (2001). For a useful account of the court’s discussion of substantive criminal law, see Claus Kreß, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT’L L. 619 (2007).

13. Convention, *supra* note 11, art. II.

14. *Id.* art. III. Note that the term “acts” is used differently here than in Article II. Here, it is used to describe the various ways in which an actor can be associated with the crime (or potential crime) of genocide.

15. *Id.*

16. Judgment, *supra* note 1, ¶ 421.

17. Roger S. Clark, *Nuremberg and the Crime against Peace*, 6 WASH. U. GLOBAL

ratory conspiracy; individual responsibility may lie, even if the conspiracy is not consummated.<sup>18</sup> “Direct and public incitement to commit genocide” is another inchoate or preparatory offense; it is not necessary that genocide actually occur.<sup>19</sup> “Attempt” is not defined further, but this represents an early example of an international criminal law provision requiring a sanction for attempted acts. Earlier criminal law treaties, including the Nuremberg and Tokyo Charters, left attempts to be punished (if at all) in domestic courts on the basis of domestic doctrine alone.<sup>20</sup> Finally, “complicity” must refer to “secondary” participants, those who aid and abet or those whose participation is described by verbs like counsel, solicit, incite or procure.<sup>21</sup>

Article IV, emphasizing individual criminal responsibility, re-

---

STUD. L. REV. 527, 543 n.66 (2007) (finding conspiracy applicable to crimes against peace, but not to war crimes and crimes against humanity). An even broader conspiracy theory espoused by the American prosecutors did not find much favor with the Tribunal. *Id.*; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 563 (2006) (discussing conspiracy as a crime under international law).

18. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 260-61 (2000) (discussing preparatory work). Yet, consider the following (incautious) statement by the court:

The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and . . . for purposes of the obligation to prevent genocide.

Judgment, *supra* note 1, ¶ 180. A State which conspires with another actor (State or non-State) to commit a genocide which does not occur must surely have breached Article III of the Convention.

19. Convention, *supra* note 11, art. III. If the incitement leads to genocide (or attempted genocide) by another, the inciter is presumably liable for a completed or attempted act on the basis of the “complicity” provision in Article III.

20. See generally, e.g., Charter of the International Military Tribunal for the Far East, May 3, 1946, <http://www.icwc.de/fileadmin/media/IMTFEC.pdf>; Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal, Aug. 8, 1945, <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

21. In Schabas’s words:

Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing “secondary” about it. The “accomplice” is often the real villain, and the “principal offender” a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was “only” an accomplice to the crime of genocide.

SCHABAS, *supra* note 18, at 286 (footnote omitted). The court notes that “if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it . . . and no question of complicity would arise.” Judgment, *supra* note 1, ¶ 419. It adds that “there is no doubt that complicity, in the sense of Article III, paragraph (e), of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus.” *Id.* (internal quotation marks omitted).

moves the defenses of immunity or act of state: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>22</sup>

Article V then introduces the basic suppression obligation that “[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”<sup>23</sup> The plain meaning of this is that a specific criminal prohibition should be adopted to cover all the elements of the offense as defined in the Convention and enforced with severe penalties appropriate to the gravity of the offense.<sup>24</sup> This was the view taken, for example, by the United Kingdom and the United States, neither of whom was among the ranks of the early ratifiers.<sup>25</sup> The United Kingdom Parliament enacted the Genocide Act of 1969 in advance of the United Kingdom’s 1970 accession to the Convention.<sup>26</sup> The United States adopted the Genocide Convention Implementation Act of 1987 before ratification in 1988.<sup>27</sup> On the other hand, several countries with similar legal systems, such as Canada<sup>28</sup> and New Zealand,<sup>29</sup> became parties to the Convention without creating any new offenses.<sup>30</sup> They apparently took the position that there were ample existing crimes on their books, such as murder and other offenses against the person, that fulfilled the obligation to make genocide criminal.<sup>31</sup>

---

22. Convention, *supra* note 11, art. IV.

23. *Id.* art. V.

24. *Id.*

25. The United Kingdom acceded to the Convention on January 30, 1970 and the United States ratified on November 25, 1988. *See* Participants to the Convention on the Prevention and Punishment of the Crime of Genocide, <http://unhchr.ch/html/menu3/b/treaty1gen.htm> (last visited Dec. 18, 2008).

26. Unlike the United States which signed the Convention in 1948, the United Kingdom had not signed it, so that its appropriate mode of acceptance was “accession.” *See id.*

27. Pub. L. No. 100-606, § 2(a), 102 Stat. 3045 (1988) (current version at 18 U.S.C. §§ 1091-93 (2007)).

28. Canada ratified the Convention on September 3, 1952. *See* Participants to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 25.

29. New Zealand’s ratification became effective Dec. 28, 1978. *Id.*

30. Canada and New Zealand later made genocide a crime as a part of their legislative packages to give effect to the Rome Statute of the International Criminal Court. *See* Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24, § 4 (Can.); International Crimes and International Criminal Court Act 2000, 2000 S.N.Z. No. 26, § 9.

31. They must have recognized some obligation to cooperate with an international

The fundamental obligation to criminalize contained in Article V has to be read in context with Articles VI and VII.

Article VI is jurisdictional. It says that those charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>32</sup>

It will be noted that the obligation here is to exercise jurisdiction on a territorial basis.<sup>33</sup> There is no *obligation* to exercise jurisdiction on the basis that the crime is committed by a national of the country in question.<sup>34</sup> Nor is there an obligation to exercise jurisdiction on the basis of universal jurisdiction.<sup>35</sup> On the other hand, Article VI does not *prohibit* trial on the basis of the nationality of the alleged offender, or even on a basis of universal jurisdiction.<sup>36</sup> The received wisdom is that both these bases of jurisdiction over genocide are acceptable (but not obligatory) under international customary law.<sup>37</sup> Indeed, the original United States legislation contemplated jurisdiction both where the offense is “committed within the United States” or where “the alleged offender is a national of the United States.”<sup>38</sup>

In 2007, the Genocide Accountability Act expanded the bases of jurisdiction under United States law to include cases where “the offense is committed *in whole or in part* within the United States,” where “the alleged offender *is a national* of the United States,” where “the alleged offender *is an alien lawfully admitted for permanent residence* in the United States,” where “the alleged offender *is a stateless person whose habitual residence* is in the United States,” and when “after the conduct required for the offense occurs, the alleged offender

---

tribunal in a prosecution for an offense defined exactly in terms of the Convention. See discussion of the international penal tribunal aspect of art. VI, *infra* notes 40-45 and accompanying text.

32. Convention, *supra* note 11, art. VI.

33. *Id.*

34. *Id.*

35. As will be seen below, the obligation to “prevent” may be of a broader scope and not limited by geographical boundaries, like the obligation to prosecute on a territorial basis. See Judgment, *supra* note 1, ¶¶ 183-184.

36. See Convention, *supra* note 11, art. VI.

37. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (discussing universal jurisdiction); see also SCHABAS, *supra* note 18, at 359-60 (discussing issues of nationality in preparatory work and subsequent history of Article VI).

38. Pub. L. No. 100-606, § 2(a), 102 Stat. 3045, 3045 (1988) (current version at 18 U.S.C. §§ 1091(d) (2007)). In ratifying the Convention, the United States entered an “understanding” that “nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.” SCHABAS, *supra* note 18, at 359 n.99 (internal quotation marks omitted).

is brought into, or found in, the United States, even if that conduct occurred outside the United States.”<sup>39</sup> The final, universal jurisdiction, theory is of course so broad that it subsumes all the others and makes them redundant.

Article VI, moreover, makes reference to trial “by such international penal tribunal as may have jurisdiction.”<sup>40</sup> At the time that the Genocide Convention was being drafted in 1947-48, the issue of creating a permanent international criminal court, based on the models of the Military Tribunals that sat in Nuremberg and Tokyo at the end of the Second World War, was very much on the international agenda.<sup>41</sup> As events would turn out, no permanent court would be established until the treaty for the International Criminal Court (ICC) came into force in 2002.<sup>42</sup> But the ad hoc Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) were created by the United Nations Security Council in the mid-1990s.<sup>43</sup> Both were afforded jurisdiction which included the crime of genocide, essentially as defined in the Genocide Convention.<sup>44</sup> As will be seen, the reference in Article VI to an international tribunal had potential implications for the obligations of Serbia to hand people over to the ICTY.<sup>45</sup> The ICC is the ultimate fulfillment of the expectation of the Genocide Convention that a permanent court would be available with jurisdiction over the crime of genocide.

Article VII is some kind of extradition provision, although exactly what obligations it imposes is obscure. It is composed of two sentences. The first says that “[g]enocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.”<sup>46</sup> The second asserts that “[t]he Contracting Par-

39. Genocide Accountability Act of 2007 § 2, 18 U.S.C. §§ 1091-93 (2007) (originally enacted as Genocide Convention Implementation Act of 1987, ch. 50A, §§ 1091-93, 102 Stat. 3045 (1988)) (emphasis added). This must mean, for example, that there is U.S. jurisdiction if the conduct took place in the U.S. but the result occurred somewhere else (and vice versa). This is consistent with the effects or objective territoriality jurisdiction recognized in *Case of the S.S. Lotus, (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 10 (Judgment of Sept. 7) (negligence on French vessel resulting in deaths on Turkish vessel).

40. Convention, *supra* note 11, art. VI.

41. See United Nations Department of Public Information, *The International Criminal Court*, Dec. 2002, <http://www.un.org/news/facts/iccfact.htm>.

42. See *id.*; see also Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

43. See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 483-84 (Harper Perennial 2003) (2002).

44. Compare Statute of the International Tribunal for the Former Yugoslavia art. 4, May 25, 1993, 32 I.L.M. 1192, and Statute of the International Tribunal for Rwanda art. 2, Nov. 8, 1994, 33 I.L.M. 1598, with Convention, *supra* note 11, art. II.

45. See Judgment, *supra* note 1, ¶¶ 448-449.

46. Convention, *supra* note 11, art. VII.

ties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”<sup>47</sup>

Extradition in state practice can take place either by treaty or without a treaty.<sup>48</sup> In United States practice, a treaty is required.<sup>49</sup> On the other hand, members of the Commonwealth (mostly Great Britain and her former colonies) have extradition relationships under a non-treaty “Scheme” that operates on the basis of parallel legislation adopted by each country that wishes to participate.<sup>50</sup> In both types of relationships, there is a common exception to the principle of granting extradition if the offense is political.<sup>51</sup> The United States writes such an exception into its treaties and the Commonwealth Scheme has language similar to that found in typical treaties.<sup>52</sup> What the first sentence of Article VII must do is modify extradition treaties, the Commonwealth Scheme, and any similar arrangements by making it clear that, whatever the political offender exception might mean, it does not extend to those charged with genocide.<sup>53</sup> Extradi-

---

47. *Id.*

48. *See* Extradition, 1968 Digest § 1, at 727.

49. *See id.* (“Under United States law the United States may grant extradition only pursuant to a treaty.”); *see also* Factor v. Laubenheimer, 290 U.S. 276, 287 (1993) (finding that in the United States “the legal right to demand . . . [a fugitive’s] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.”).

50. *See* The London Scheme for Extradition within the Commonwealth (last amended 2002) [hereinafter London Scheme], <http://www.thecommonwealth.org> (enter “London Scheme” into search box; then follow first hyperlink) (last visited Dec. 18, 2008).

51. *See id.* ¶ 12(1)(a) (“The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character.”); *see also* Model Treaty on Extradition, G.A. Res. 45/116, at Art. 3(a), 68th plen. mtg., U.N. Doc. A/RES/45/116 (Dec. 14, 1990), <http://www.un.org/documents/ga/res/45/a45r116.htm> (precluding extradition “[i]f the offence for which the extradition is requested is regarded by the requested State as an offence of a political nature”).

52. *See* Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-Gr. Brit.-N. Ir., art. V(1)(c), June 8, 1972, 28 U.S.T. 227 (proclaiming extradition shall not be granted if “the offense for which extradition is requested is regarded by the requested Party as one of a political character”); *see also* London Scheme, *supra* note 50, ¶ 12(1)(a) (“The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character.”).

53. The Genocide Convention’s exception to the political offender exception was unique in United Nations usage for about five decades. Similar clauses have, however, begun to appear again. The most recent of the U.N. criminal law treaties, the Convention against Nuclear Terrorism of April 13, 2005 and the International Convention for the Protection of all Persons from Enforced Disappearance of December 20, 2006 return to the model of the Genocide Convention; each provides that none of the offenses created by the Convention shall be regarded as a political offense or as an activity connected with a political offense or inspired by political motives and that extradition re-

tion treaties at the time of the Genocide Convention were typically bilateral (although multilateral extradition treaties have since become quite common) and this multilateral treaty thus had the effect of modifying such treaties between States that were also party to the Genocide Convention. There may be all sorts of reasons why extradition may be refused, but the equation of genocide with a political offense is not one of them.<sup>54</sup>

The second sentence is much more difficult to fathom. What exactly is meant by a promise by States to “grant extradition in accordance with their laws and treaties in force”?<sup>55</sup> It is possible that this is an entirely illusory promise (other than the political offense modification)—if there are existing treaties or laws that permit extradition, they are to be applied, but nothing new is created.<sup>56</sup> A second possibility is that genocide is to be added to the list of “extradition” (or “extraditable”) offenses in a particular treaty or scheme. In the standard extradition practice at the time the Convention was drafted, extradition treaties contained a list of offenses (like murder and larceny) to which the treaty applied.<sup>57</sup> There was some flexibility in interpreting the categories but unless the offense was colorably within the treaty, there was no extradition.<sup>58</sup> It is certainly plausible

---

quests may not be refused on this ground alone. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/711, Art. 13, Annex, U.N. Doc. A/RES/61/177 (Dec. 20, 2006); International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, Art. 15, Annex, U.N. Doc. A/RES/59/290 (Apr. 13, 2005).

54. In *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), which was decided before the United States became a party to the Genocide Convention, the political offense issue was not argued.

55. Convention, *supra* note 11, art. VII.

56. Whatever new is granted, there is no attempt in Article VII to dispense with baggage of extradition doctrine, such as the usual refusal of civil law countries to extradite their own nationals. *See id.* Article 8 of the the International Convention for the Suppression of Counterfeiting Currency contained an obligation on a country that refused to extradite on this basis to consider prosecuting on the basis of nationality jurisdiction. International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 U.N.T.S. 372 [hereinafter Counterfeiting Currency Convention]. Surprisingly, given the existence of this precedent, such an obligation does not appear in the Genocide Convention.

57. *See, e.g.*, Treaty between the United States and the Republic of Guatemala for the Mutual Extradition of Fugitives from Justice art. II, §§ 1-7, Feb. 27, 1903, 33 Stat. 2147 (listing as extradition offenses such crimes as “[m]urder,” “[m]ayhem,” “[r]ape,” “[b]ligamy,” and “[a]rson”).

58. Modern practice is to describe as “extraditable” those offenses (however defined) that draw a certain level of punishment in both countries, typically one year’s imprisonment in bilateral treaties and two years in the Commonwealth Scheme. The tests in the modern context are thus double criminality and gravity. *See generally* ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW §12.01 (2d ed. 2008).

that the drafters meant to add genocide to the list, but they were coy about actually saying so. Drafters in comparable circumstances had a formula for spelling out such expectations; in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted by the United Nations General Assembly the following year, the drafters stated explicitly that:

The offences referred to in articles 1 and 2 of the present Convention shall be regarded as extraditable offences in any extradition treaty which has been or may hereafter be concluded between any of the Parties to this Convention.

The Parties to the present Convention which do not make extradition conditional on the existence of a treaty shall henceforward recognize the offences referred to in . . . the present Convention as cases for extradition between themselves.<sup>59</sup>

Perhaps the second sentence of Article VII of the Genocide Convention is an inartful way of saying this, but it is not what the language *says* and the drafters surely knew how to express themselves if they wished.<sup>60</sup>

Article VII may thus be an addition to existing treaties, but it is clearly not itself an extradition treaty. Compare significant later practices; for instance, beginning with the Hague Convention on aircraft hijacking in 1970, it has become common to include, in multilateral criminal law treaties, a “mini-extradition” provision referring to the crime created by the treaty.<sup>61</sup> The Hague Convention provided:

If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.<sup>62</sup>

---

59. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others art. 8, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951). The model for this provision appears to be Article 10 of the International Convention for the Suppression of Counterfeiting Currency. *See* Counterfeiting Currency Convention, *supra* note 56.

60. *Cf.* SCHABAS, note 18, at 402-04 (supporting an argument that the article amounts to an obligation to extradite on the basis of a dubious review of the preparatory work behind Article VII and the principle of effectiveness).

61. *See* Hague Convention for the Suppression of Unlawful Seizure of Aircraft art. 8, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Unlawful Seizure Convention; *see also, e.g.*, The SAARC (South Asian Association for Regional Cooperation) Convention (Suppression of Terrorism) Act art. 6, Apr. 26, 1993 (Act no. 36 of 1993), <http://meaindia.nic.in/actsadm/30aa07.pdf> (“A Contracting State in whose territory an alleged offender is found, shall, upon receiving request for extradition from another Contracting State . . . ensure his presence for purposes of extradition or prosecution.”).

62. Unlawful Seizure Convention, *supra* note 61. A similar provision appears, for

It seems far too much of a stretch to suggest that the second sentence of Article VII amounts to an extradition agreement like this.

## II. THE DUTY NOT TO COMMIT GENOCIDE AND THE DUTY TO PREVENT IT

The Convention does not say specifically that a State party has an obligation not to engage in genocide or to prevent other states from engaging in it, as opposed to preventing and punishing individuals who do.<sup>63</sup> Such an obligation is perhaps hinted at by the compromissory clause in Article IX of the Convention.<sup>64</sup> It provides that:

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 III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.<sup>65</sup>

The typical language in clauses providing for referral of disputes to an international tribunal uses the words “interpretation or application.”<sup>66</sup> Article IX adds “or fulfillment” and, perhaps more significantly, “including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III.”<sup>67</sup> It is possible to read the article, and notably the language about responsibility, as creating an obligation on States which goes beyond adopting suppression legislation<sup>68</sup> to include a duty not to engage in genocide,

---

example, as Article 8(2) of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 8, U.N. GAOR, 39th Sess., Supp. No. 51 at 198, U.N. Doc. A/39/51 (Dec. 10, 1984), <http://www.un.org/documents/ga/res/39/a39r046.htm>. Those treaties also put the parties in a situation where they must either extradite or prosecute on receipt of a request for extradition. The obligation is said to be one of *aut dedere aut judicare*. For a very tentative discussion on whether the obligation to extradite or prosecute may be one of customary law for a “limited number of crimes,” see U.N. Int’l Law Comm’n, Zdzislaw Galicki, Special Rapporteur, *Second Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare)*, at 8-9, U.N. Doc. A/CN.4/585 (Nov. 6, 2007), <http://documents-dds-ny.un.org/doc/UNDOC/Gen/n07/375/60.pdf>. The Commission does not list its “limited number” but genocide would surely be on such a list, if it existed.

63. See Convention, *supra* note 11.

64. *Id.* art. IX.

65. *Id.*

66. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women, Annex, art. 29, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail art. 15, Jan. 10, 1952, 163 U.N.T.S. 3; see also Convention, *supra* note 11, art. IX.

67. See Convention, *supra* note 11, art. I.

68. See *id.*; see also Judgment, *supra* note 1. The court noted that both parties accepted that there could be responsibility for breaches of obligations imposed by the

as defined in Article II, and the variants contained in Article III.<sup>69</sup> On the other hand, Article IX may be a provision which is merely a jurisdictional grant to the ICJ and the obligation not to engage in genocide, if any, has to be found elsewhere, for example in Article I of the Convention,<sup>70</sup> or in general international law.<sup>71</sup>

In addressing potential obligations to such an effect, the court noted that Article I contains two propositions.<sup>72</sup> The first is an “affirmation that genocide is a crime under international law,”<sup>73</sup> that is, a reaffirmation of General Assembly Resolution 96(I) which had recognized genocide as a crime under international law, even without any treaty obligation.<sup>74</sup> The second proposition is an undertaking “to prevent and to punish” it.<sup>75</sup> The second proposition must be read in light of the first. In an earlier opinion the ICJ had suggested that:

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.<sup>76</sup>

---

Convention. Judgment, *supra* note 1, ¶ 159. Respondent, Serbia, argued:

[T]he Genocide Convention does not provide the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to “the prevention and punishment of the crime of genocide” when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and proscription] . . . make this abundantly clear.

*Id.* ¶ 156 (internal quotation marks omitted). The court noted also that in Serbia’s view, the sole remedy for a “failure to prevent or to punish acts of genocide by individuals within its territory or . . . its control” would “be a declaratory judgment.” *Id.*

69. See Convention, *supra* note 11, arts. II-III.

70. See *id.* arts. I, IX.

71. See Judgment, *supra* note 1, ¶ 160. Referring to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which it described as “well recognized as part of customary international law,” the court

observe[d] that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion.

*Id.*

72. *Id.* ¶ 161.

73. *Id.*

74. See *id.*; G.A. Res. 96(I), at 188-89, U.N. Doc. A/64 (Dec. 11, 1946).

75. See Judgment, *supra* note 1, ¶ 162.

76. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

The court has observed that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).<sup>77</sup> Such considerations of the significance of the Convention were of great relevance to interpreting the nature of the undertaking in the latter part of Article 1. There is first the ordinary meaning of “undertake”; in the court’s language, to undertake, in this and other human rights treaties, “is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. . . . It is not merely hortatory or purposive.”<sup>78</sup> It is, moreover, “unqualified” and “is not to be read merely as an introduction to later express references to legislation, prosecution and extradition.”<sup>79</sup>

According to the court, the conclusion that Article I creates obligations on States distinct from those of criminalization, was “confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion . . . .”<sup>80</sup> These constituted the context in which the Convention was drafted.

The first aspect was this: in its Second Session, the United Nations General Assembly had “request[ed] the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly.”<sup>81</sup> In making the request, the Assembly declared “that genocide is an international crime entailing national and international responsibility on the part of individuals and States.”<sup>82</sup> On the same day, the Assembly had indicated its interest in the responsibility both of individuals and of States by directing two sequential requests to the newly-formed International Law Commission (ILC).<sup>83</sup> One related to the formulation of the Nuremberg Principles, which concerned the rights and duties of individuals.<sup>84</sup> The other was concerned with a “draft declaration on the rights and duties of States.”<sup>85</sup> Responsibility *both of States and of individuals* was clearly on the mind of the General Assembly.

The second indication related to the details of the drafting process within the General Assembly itself. In the draft that came to the Sixth (Legal) Committee of the Assembly, the obligation to “pre-

---

77. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), ¶ 64 (Feb. 3 2006), <http://www.icj-cij.org/docket/files/126/10435.pdf>.

78. Judgment, *supra* note 1, ¶ 162.

79. *Id.*

80. *Id.* ¶ 163.

81. *Id.*; see G.A. Res. 180 (II), at 129, U.N. Doc. A/519 (Nov. 21, 1947).

82. G.A. Res. 180 (II), *supra* note 81.

83. See Judgment, *supra* note 1, ¶ 163.

84. See *id.*; G.A. Res. 177 (II), at 111, U.N. Doc. A/519 (Nov. 21, 1947).

85. Judgment, *supra* note 1, ¶ 163; see G.A. Res. 178 (II), at 112, U.N. Doc. A/519 (Nov. 21, 1947).

vent and punish” was contained in the final preambular paragraph.<sup>86</sup> It read “[the High Contracting Parties] . . . [h]ereby agree to prevent and punish the crime as hereinafter provided.”<sup>87</sup> “The first Article would have provided ‘[g]enocide is a crime under international law whether committed in time of peace or in time of war.’”<sup>88</sup> Several changes were discussed in the ensuing debate. The suggestion was made to move “the undertaking to prevent and punish” into the operative part of the treaty, in order to make it more effective.<sup>89</sup> One version of a new Article I that was proposed read: “The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles.”<sup>90</sup> The final phrase of this draft “in accordance with the following articles” was deleted, again in a effort to make the treaty more effective.<sup>91</sup> The court concluded that:

[B]oth changes—the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause (“in accordance with the following articles”)—confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.<sup>92</sup>

This conclusion led the court to question whether the “obligation to prevent” subsumes an obligation on States “not to commit genocide themselves.”<sup>93</sup> Such an obligation is not stated expressly. Bosnia’s main argument on this point was that an obligation flows from Article IX, particularly its reference to disputes “including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III.”<sup>94</sup> The court preferred to treat Article IX as “essentially a jurisdictional provision.”<sup>95</sup> It concluded, nonetheless that one “effect of Article I is to prohibit States from themselves committing genocide.”<sup>96</sup> First, by agreeing to a characterization of

---

86. See Judgment, *supra* note 1, ¶ 164.

87. *Id.* (emphasis omitted).

88. *Id.* (quoting U.N. Econ. & Soc. Council [ECOSOC], *Ad Hoc* Committee on Genocide, *Official Records of the Economic and Social Council*, 7th Session, Supp. No. 6, 2, 18, U.N. Doc E/794) (April 5 – May 10, 1948)).

89. *Id.*

90. *Id.* (citations omitted).

91. *Id.*

92. *Id.* ¶ 165. Professor Gaeta captures the point nicely when she says that the court “held that Article I has an operative and non-preambular character.” Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUR. J. INT’L L. 631, 632-33 (2007).

93. Judgment, *supra* note 1, ¶ 166 (internal quotation marks omitted).

94. *Id.* (internal quotation marks omitted).

95. *Id.*

96. *Id.*

genocide as “a crime under international law,” States “must logically be undertaking not to commit the act so described.”<sup>97</sup> Second, the obligation not to commit flows from the obligation to prevent. The court explains:

It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.<sup>98</sup>

The obligation not to commit applies also to the other acts listed in Article III.<sup>99</sup> The court notes that “[i]t is true that the concepts used in paragraphs (b) to (e) of Article III, and particularly that of complicity, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals.”<sup>100</sup> Nevertheless, it “would not be in keeping with the object and purpose of the Convention to fail to include the possibility of engaging State responsibility through the acts contained in Article III.”<sup>101</sup>

Having considered the positive arguments for finding that there is an obligation on States not to commit genocide, the court turns to some arguments made by Serbia in an effort to contradict this position.<sup>102</sup> Serbia’s first argument of this kind was that “as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not

---

97. *Id.* (internal quotation marks omitted).

98. *Id.* The court finds that its interpretation of Article I is “confirmed” by the “unusual” wording of Article IX, namely the reference to responsibility “for genocide”—not merely to responsibility for the failure to prevent or punish. *Id.* ¶¶ 168-169. Judge Owada, in a thoughtful separate opinion, argues forcefully that the source of the obligation not to commit genocide is general international law and that Article IX’s reference to the responsibility of a State had the effect of bringing this general law claim within the scope of the jurisdiction conferred by the Convention. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), ¶ 73 (Feb. 26, 2007) (separate opinion of Judge Owada), <http://www.icj-cij.org/docket/files/91/13697.pdf>.

99. *See* Judgment, *supra* note 1, ¶ 167.

100. *Id.* (internal quotation marks omitted).

101. *Id.* Similar conceptual problems arise in the United States in cases under the Alien Tort Act in dealing especially with allegations of war crimes and crimes against humanity. *See* 28 U.S.C. § 1350 (2006). Notwithstanding the civil nature of such cases, courts have tended to accept that claims against secondary parties may be based on criminal theories such as command responsibility, aiding and abetting, conspiracy and joint criminal enterprise. BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 257-76 (2d ed. 2008).

102. Judgment, *supra* note 1, ¶ 170.

provide a vehicle for the imposition of such criminal responsibility.”<sup>103</sup> In essence, the court accepted that, owing to the way the principles on State responsibility have developed, States “cannot” incur “criminal responsibility” but concluded that responsibility of a State for genocide was not “criminal” and thus permissible.<sup>104</sup>

In its famous draft Article 19, provisionally included in its 1976 Draft Articles on State Responsibility, the ILC had put forward the position that “[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.”<sup>105</sup> As an example of the phenomenon, the ILC gave “a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and *apartheid*.”<sup>106</sup>

When the Commission finally concluded its work on the topic in 2001, Article 19 had been deleted.<sup>107</sup> Professor James Crawford, the Reporter on the topic who encouraged the deletion of Article 19, explained that this was not just a “terminological matter.”<sup>108</sup> The final drafting proceeded “on the basis that internationally wrongful acts of a State form a single category . . . without reference to any distinction between delictual and criminal responsibility.”<sup>109</sup>

The court was thus able to sidestep nicely the argument that states cannot incur criminal responsibility. It simply noted that the “obligations in question . . . arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature.”<sup>110</sup>

---

103. *Id.*

104. *Id.*

105. *Report of the International Law Commission on the Work of Its Twenty-Eighth Session* art. 19(2), U.N. GAOR, 31st Sess., Supp. No. 10, U.N. Doc. A/31/10 (1976).

106. *Id.* art. 19(3)(c).

107. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

108. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 37 (2002).

109. *Id.* (internal quotation marks omitted). Crawford added that:

A further consequence of this change is that the old notion of international crime has been broken down into a number of distinct components, more closely related to the twin concepts of peremptory norms and obligations to the international community as a whole, which provided its legal (as distinct from rhetorical) underpinnings.

*Id.* (internal quotation marks omitted).

110. Judgment, *supra* note 1, ¶ 170.

A second variant of this argument made by Serbia was that “[t]he emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of a breach of the obligations reflected in Article III.”<sup>111</sup> The court made reference in this context to the “famous sentence in the Nuremberg Judgment that ‘[c]rimes against international law are committed by men, not by abstract entities.’”<sup>112</sup> The court explained that the statement by the Nuremberg Tribunal arose in response to the opposite argument to that now being made by Serbia, namely that there could be no individual responsibility, since States are responsible.<sup>113</sup> The Nuremberg Tribunal had reacted to this argument with its famous aphorism. It also added (at least in the English text of its Judgment) the comment: “[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.”<sup>114</sup> This “duality of responsibility”<sup>115</sup> finds expression elsewhere in international practice, for example in Article 25, paragraph 4 of the Rome Statute of the International Criminal Court,<sup>116</sup> and in Article 58 of the ILC’s Articles on State Responsibility.<sup>117</sup> Given such a context in general international law, the court could find nothing in this material to displace its interpretation of Article I as imposing an obligation on States not to commit genocide.<sup>118</sup>

---

111. *Id.* ¶ 171. This was some form of *expressio unius est exclusio alterius* argument.

112. *Id.* ¶ 172 (quoting 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) [hereinafter TRIAL]).

113. *Id.*

114. TRIAL, *supra* note 112, at 223. As the court notes, the words “as well as upon States” do not appear in the French text. Judgment, *supra* note 1, ¶ 172.

115. Judgment, *supra* note 1, ¶ 173.

116. See Rome Statute of the International Criminal Court, *supra* note 42, art. 25 (discussing “[i]ndividual criminal responsibility”). Article 25 (4) states that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” *Id.*

117. See *Report of the International Law Commission on the Work of Its Fifty-Third Session*, *supra* note 107, art. 58. Article 58 provides: “[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.” *Id.*

118. Judgment, *supra* note 1, ¶ 174. Serbia had another argument against the proposition that States have an obligation not to commit genocide, based on the preparatory work and particularly that of Article IX. *Id.* ¶ 175. It requires only a brief mention. The court saw “two points” emerging from the drafting history: “The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted—to Article IX—is about jurisdiction in respect of the responsibility of States *simpliciter*.” *Id.* ¶ 178. In short, the drafting history supported the court’s conclusion rather than any other. *Id.*

## III. APPLICATION OF THESE PRINCIPLES TO FORMER YUGOSLAVIA

The court then applies these general principles on the responsibilities to “prevent” and “not to commit” genocide to the events surrounding the breakup of the former Yugoslavia.<sup>119</sup> In the course of doing so, it significantly expands the legal conceptualization of State responsibility, especially for failure to prevent.<sup>120</sup>

First, it is necessary to say a little about the main players involved, or as the court put it, “[t]he entities involved in the events complained of.”<sup>121</sup> Of the independent States that had emerged from the Former Yugoslavia, two were involved here: the Federal Republic of Yugoslavia (FRY) (later becoming Serbia and Montenegro and ultimately Serbia) and the Republic of Bosnia and Herzegovina.<sup>122</sup> Within Bosnia and Herzegovina, another entity also declared its independence under the name Republika Srpska.<sup>123</sup> As the court explains, “[t]he Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.”<sup>124</sup> At the military level, there were numerous military and paramilitary units involved in the conflict.<sup>125</sup> At the risk of over-simplification, it can be accepted for present purposes that the main entities whose activities were in question were the Yugoslav People’s Army (JNA), which would become the Yugoslav Army (VJ), and the army of the Republika Srpska (VRS).<sup>126</sup> There was considerable debate about the exact relationship between the two, notably the extent of control and support afforded to the VRS by the VJ (including payment to members of the military).<sup>127</sup> The court espoused at least the minimalist position that Serbia and Montenegro was “making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.”<sup>128</sup>

The court examined the facts alleged by Bosnia and Herzegovina

---

119. *Id.* ¶¶ 180-185.

120. *See id.*

121. *Id.* ¶ 235.

122. *Id.* ¶ 1-2.

123. *Id.* ¶ 233.

124. *Id.* ¶ 235.

125. For a complete description, see *id.* ¶¶ 235-241.

126. *Id.* ¶ 236.

127. *See id.* ¶ 239.

128. *Id.* ¶ 241. Vice-President Al-Khasawneh, who dissented from the findings that Serbia was not responsible as either a principal or an accomplice, regarded the Serbian involvement as much stronger than this. *See* Dissent of Vice-President Al-Khasawneh, *supra* note 5, ¶¶ 48-55.

“in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say, whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group (*dolus specialis*).”<sup>129</sup> The targeted group on which the court places its focus is “that of the Bosnian Muslims.”<sup>130</sup>

The court then examines the atrocities alleged in several of the well-known theaters of conflict: Sarajevo, Drina River Valley, Prijedor, Banja Luka, and Brčko.<sup>131</sup> In each of these cases, it concludes that the necessary specific intent (*dolus specialis*) has not been established.<sup>132</sup> While various acts coming within the scope of Article II have been shown,<sup>133</sup> they do not amount to genocide in the absence of the genocidal intent.<sup>134</sup> They might well amount to war crimes or crimes against humanity, but in a complaint under the Genocide Convention, the court has no jurisdiction over those crimes.<sup>135</sup>

That left the massacre at Srebrenica for examination. In this instance, after examining the evidence, the court was able to conclude:

[T]hat the acts committed at Srebrenica falling within Article II (*a*)

129. Judgment, *supra* note 1, ¶ 242. The court, in fact, engages in a third enquiry, namely whether the atrocities fit the categories of Article II of the Convention. *Id.* ¶ 243.

130. *Id.* ¶ 242. The court adds that “while the Applicant has presented evidence said to relate to the wider group of non-Serb Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted group.” *Id.* Earlier, the court had insisted that the group must be “positively” rather than “negatively” defined. *Id.* ¶¶ 191-196. “The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. . . . Such an understanding of genocide requires a positive identification of the group.” *Id.* ¶ 194.

131. *See id.* ¶¶ 245-277.

132. *Id.* ¶ 277.

133. The strongest showing in this part of the argument related to Article II (*a*) (killing members of the group) and (*b*) (causing serious bodily or mental harm to members of the group). *See id.* ¶¶ 245-304; *see also* Convention, *supra* note 11, art. II. The Applicant was less successful in establishing breaches of paragraph (*d*) (imposing measures intended to prevent births within the group) and (*e*) (forcibly transferring children of the group to another group). *See* Judgment, *supra* note 1, ¶¶ 355-367.

134. *Id.* ¶ 277 (stating that killings may not have been committed with the required specific intent).

135. For a discussion of the restraints that its limited jurisdiction placed on the Court, see Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669 (2007). Milanović explains away what some commentators see as timidity on the part of the court as explicable in terms of these constraints and the strategy of the parties. *See id.* Milanović is, nevertheless, critical of the court's failure to insist that Serbia produce certain confidential documents. *See id.* at 677-80.

and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide committed by members of the VRS in and around Srebrenica from about 13 July 1995.<sup>136</sup>

The determination that “acts of genocide were committed in operations led by members of the VRS,”<sup>137</sup> sets up the ultimate question of “whether those acts are attributable to the Respondent.”<sup>138</sup> The remainder of the analysis thus limited the issues of the responsibility of Serbia to Srebrenica, there being no other genocide theory remaining, on the facts, over which the court might have jurisdiction.<sup>139</sup>

The initial framework for examining these questions must be whether a State is responsible on the basis of having itself committed one or more of the various “acts” described as “punishable” in Article III of the Convention.<sup>140</sup> Nonetheless, according to the court, “it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs (a) to (e), of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.”<sup>141</sup> What is more, it is possible for a State to be responsible both for genocide or its Article III variants “and for the breach by [a] State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases

136. Judgment, *supra* note 1, ¶ 297. The court relied heavily on the analysis of the incidents developed in the case law of the ICTY where, to date, only Srebrenica has been held to come within the Genocide Convention. *See id.* But *see id.* ¶ 227 (holding that specific intent was not “conclusively established in other events). Professor Gaeta comments:

It is perhaps on account of the inevitable practical difficulties that it had to face that the Court, in order to adjudicate on the dispute brought before it, relied so heavily upon the case law of the ICTY. This perhaps explains why the Court eventually found, as hitherto the ICTY had done, that only the killing of 7,000 men in Srebrenica—coupled with the mass expulsion of women and children—constituted genocide. This perhaps also explains why the Court eventually adopted a standard of proof similar to that used by criminal tribunals (i.e., the “beyond reasonable doubt” standard), without taking advantage of some measures that other courts, such as the European Court of Human Rights or the Inter-American Court of Human Rights, had resorted to when faced with a lack of cooperation by the respondent state with regard to allegations of serious violations of human rights.

Gaeta, *supra* note 92, at 646.

137. Judgment, *supra* note 1, ¶ 376.

138. *Id.*

139. *See id.* ¶¶ 378-470.

140. Convention, *supra* note 11, art. III.

141. Judgment, *supra* note 1, ¶ 382.

for its international responsibility.”<sup>142</sup>

What then is to be made of Serbia’s responsibility for the various acts made “punishable” by Article III?<sup>143</sup> The court turned first to “genocide” and then to the other “acts.”<sup>144</sup>

#### IV. RESPONSIBILITY FOR GENOCIDE<sup>145</sup>

Essentially, the issue here was whether Serbia was a principal perpetrator.<sup>146</sup> As alternative routes to a potential holding of responsibility, the court suggested that there were two aspects to the question that had to be addressed separately.<sup>147</sup> “First,” wrote the court, “it should be ascertained whether the acts committed at Srebrenica 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.”<sup>148</sup> If this is answered in the negative, then “it should be ascertained whether the acts in question

142. *Id.* ¶ 383.

143. *See id.* ¶ 379.

144. *See id.*

145. As a methodological matter, the court saw it as necessary to address the matters in the order set out in Article III. It explained:

Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a) in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of “genocide” (Art. III, para. (a)), “attempt to commit genocide” (Art. III, para. (d)), and “complicity in genocide” (Art. III, para (e)), in relation to the same actions, must be rejected as untenable both logically and legally.

On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph (a), of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent’s responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (b) to (e). In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

*Id.* ¶¶ 380-381.

146. *See id.* ¶ 379.

147. *Id.* ¶ 384.

148. *Id.*

were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.”<sup>149</sup>

As to conduct of State organs, the court relied heavily on the rule formulated in Article 4 of the ILC’s Articles on State Responsibility,<sup>150</sup> a rule the court regarded as reflective of customary law.<sup>151</sup> That Article asserts that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.<sup>152</sup>

It adds that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.”<sup>153</sup> The court was adamant that responsibility could not be attributed to Serbia by this route.<sup>154</sup> It had not been established that the FRY army contributed to the massacres at Srebrenica, nor that the political leaders of FRY were involved in the preparation or execution of the massacres.<sup>155</sup> The court accepted that the FRY army had been involved directly and indirectly “along with the Bosnia Serb forces in military operations . . . in Bosnia and Herzegovina in the years prior to Srebrenica.”<sup>156</sup> It explained that:

It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica. . . . Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.<sup>157</sup>

---

149. *Id.*

150. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, *supra* note 107, art. 4.

151. Judgment, *supra* note 1, ¶ 385.

152. *Report of the International Law Committee on the Work of Its Fifty-Third Session*, *supra* note 107, art. 4(1).

153. *Id.* art. 4(2).

154. Judgment, *supra* note 1, ¶ 386.

155. *Id.*

156. *Id.*

157. *Id.* The court continues to note that:

There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska . . . and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska.

Bosnia had a different argument in respect of a group known as the Scorpions. While it may not have been able to show that this group (and others like it) had become de jure organs of the Respondent, Bosnia argued that it was enough that they had become de facto organs of the FRY.<sup>158</sup> Quoting from its previous decision in the *Nicaragua Case*,<sup>159</sup> the court accepted that:

[P]ersons, 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.<sup>160</sup>

On the facts, the court found that none of the relevant entities, be it the Republika Srpska, the VRS, or the Scorpions, were acting in “complete dependence” on the FRY.<sup>161</sup> Thus their actions could not be attributed to the FRY.<sup>162</sup>

The court then turned to another theory espoused by the Applicant: even if those who perpetrated the massacre could not be regarded as de jure or de facto organs of the Respondent, there could nevertheless be responsibility on the basis of Article 8 of the ILC’s Articles on State Responsibility.<sup>163</sup> Article 8 is headed “Conduct directed or controlled by a State.”<sup>164</sup> It provides that: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>165</sup>

In its decision in the *Nicaragua Case*, the court had held that, for liability to be ascribed on this theory, “it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>166</sup> It is not necessary in these kinds of cases to show that the person or group of persons was legally a part of the

---

*Id.* ¶ 388.

158. *Id.* ¶¶ 389-390.

159. Military Activities and Paramilitary Activities in and Against Nicaragua (*Nicar. v. United States*), Merits, Judgment, 1986 I.C.J. 14, 62-64 (June 27) [hereinafter *Nicaragua Case*] (holding the United States not responsible for acts of “*Contras*” where *Contra* reliance on the United States did not amount to “complete dependence”).

160. Judgment, *supra* note 1, ¶ 392.

161. *Id.* ¶¶ 394-395.

162. *Id.* For a different assessment of the role of the Scorpions, see Milanović, *supra* note 135, at 673-74.

163. Crawford, *supra* note 108, at 110.

164. *Id.*

165. *Id.*

166. *Nicaragua Case*, *supra* note 159, at 65.

State apparatus in question, nor that they were in a state of “complete dependence.”<sup>167</sup> What must be shown is that the “effective control was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”<sup>168</sup>

In the case of *Prosecutor v. Tadic*,<sup>169</sup> however, the ICTY Appeals Chamber had disagreed with the ICJ on the proper test in the “control” cases.<sup>170</sup> It had held that the test “applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the overall control exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case.”<sup>171</sup>

The ICJ declined to alter its own test along the lines of “overall control.”<sup>172</sup> It pointed out that in *Tadic*, the only issue before the ICTY in the relevant discussion was whether the conflict was an international one or a non-international one.<sup>173</sup> Any discussion of State responsibility was therefore outside what the Tribunal had to decide.<sup>174</sup> The ICJ was faced with the “other” issue, that of State responsibility. The ICJ did not believe that it had to decide the issue before the ICTY, but it did have a firm view of how the issue now squarely before it had to be decided.<sup>175</sup> The court also suggests that the test in the two situations, the characterization of the conflict as international or not, and the determination of State responsibility in a specific case, need not necessarily be the same.<sup>176</sup> The two can be different “without logical inconsistency.”<sup>177</sup> For the court, the “overall control” test pushes the boundaries of State responsibility too far. It “has the major drawback of broadening the scope of State responsibil-

---

167. See Judgment, *supra* note 1, ¶¶ 396-400.

168. *Id.* ¶ 400 (internal quotation marks omitted). The court declined to carve out a special rule for genocide, notwithstanding its special characteristic in the pantheon of State responsibility. It insisted that “[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.” *Id.* ¶ 401.

169. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (July 15, 1999).

170. *Id.* ¶ 145 (defining the proper test as “overall control”).

171. See Judgment, *supra* note 1, ¶ 402 (internal quotation marks omitted).

172. *Id.* ¶ 402-403.

173. *Id.* ¶ 404.

174. *Id.* The implication for a common lawyer is that the ICJ is suggesting that the ICTY discussion is obiter dicta, and thus not of much weight, but the court does not use the term.

175. *Id.*

176. *Id.* ¶ 405.

177. *Id.*

ity well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say, the conduct of persons acting, on whatever basis, on its behalf.”<sup>178</sup> Accordingly, “the overall control test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.”<sup>179</sup>

The court, in short, maintained its own jurisprudence and insisted that the responsibility of Serbia for committing genocide as a principal fell to be determined using Article 8 of the ILC Articles on State Responsibility, interpreted to include the “effective control” test.<sup>180</sup>

Given these various tests, and the court’s evaluation of the facts, it was a short step to the conclusion that it had “not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent.”<sup>181</sup> By the same token, the court also found that “it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which . . . constituted the crime of genocide, were perpetrated.”<sup>182</sup>

#### V. RESPONSIBILITY UNDER ARTICLE III, PARAGRAPHS (B) TO (E) OF THE CONVENTION

No claim had been made by Bosnia with respect to attempted genocide (paragraph (d)). Paragraphs (b) (conspiracy) and (c) (direct and public incitement) failed on the facts.<sup>183</sup> It had not been proved

178. *Id.* ¶ 406.

179. *Id.* (internal quotation marks omitted).

180. *See id.* ¶ 407. Former Judge Cassese, author of *Tadić*, was not impressed with the ICJ’s arguments. *See* Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649 (2007); *cf.* Dissent of Vice-President Al-Khasawneh, *supra* note 5, ¶ 39 (“The *Contras* could indeed have limited themselves to military targets in the accomplishment of their objectives. As such, in order to attribute crimes against humanity in furtherance of the common objective, the court held that the crimes themselves should be the object of control. When, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.”).

181. *See* Judgment, *supra* note 1, ¶ 413.

182. *Id.*

183. *See id.* ¶ 417.

that organs of Serbia, or “persons acting on the instructions or under the effective control” of Serbia, had engaged in such acts.<sup>184</sup> A failure of the factual basis doomed the claims based on conspiracy or public incitement.

“Complicity” (paragraph (e)) presented some much more difficult factual and legal questions. Complicity catches in its net some accessory parties who can not be described as principals.<sup>185</sup> It “includes the provision of means to enable or facilitate the commission of the crime.”<sup>186</sup> The court points out that:

[I]t is noteworthy that, although “complicity,” as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the “aid or assistance” furnished by one State for the commission of a wrongful act by another State.<sup>187</sup>

This customary rule is codified in Article 16 of the ILC’s Articles on State Responsibility.<sup>188</sup> It provides that a “State which aids or assists another State in the commission of an internationally wrongful act” is internationally responsible if “(a) [t]hat State does so with knowledge of the circumstances of the internationally wrongful act; and (b) [t]he act would be internationally wrongful if committed by that State.”<sup>189</sup> For the court, “complicity” in Article III (e) of the Genocide Convention and “aid or assistance” in Article 16 of the Articles on State Responsibility are, in effect, substantially the same.<sup>190</sup>

There was, however, one fundamental question that needed to be addressed about complicity. That was the relationship between the specific intent of the principal in genocide and whatever intent was required of the secondary party.<sup>191</sup> Need the accomplice share the specific intent to destroy a group, in whole or in part?<sup>192</sup> Ultimately, the court avoided committing itself to a definitive answer. It asserted that:

[W]hatever the reply to this question, there is no 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 (*do-*

---

184. *Id.*

185. *See id.* ¶ 419.

186. *Id.*

187. *Id.*

188. *Id.* ¶ 420.

189. *Report of the International Law Commission on the Work of Its Fifty-Third Session*, *supra* note 107, art. 16.

190. *See Judgment*, *supra* note 1, ¶¶ 419-420.

191. *Id.* ¶ 421.

192. *Id.*

*lus specialis*) of the principal perpetrator.<sup>193</sup>

If at least knowledge cannot be proved, then there is no complicity. The court then held that knowledge had not been shown; hence, there was no complicity.<sup>194</sup>

Sir Kenneth Keith disagreed with the majority of the court in assessing the proof of knowledge.<sup>195</sup> Having found on the facts that the FRY had knowledge, he then had to address the legal issue of whether knowledge was sufficient, or whether the person in complicity had to share the specific intent.<sup>196</sup> In doing so, he relied heavily on the reasoning of the Appeals Chamber of the ICTY in *Prosecutor v. Krstić*.<sup>197</sup> He noted that “complicity” was open to both a wider and a narrower interpretation.<sup>198</sup> Sometimes, in its broader sense, “the accomplice is the person who participates in the crime or wrong of another, including as a co-author.”<sup>199</sup> In the narrower sense, it is used to describe “the person who participates as an accessory.”<sup>200</sup> A “co-author” must share the specific intent, but an aider and abettor, the category that seems most relevant here, requires only knowledge.<sup>201</sup> Judge Keith, referring to the discussion in *Krstić*, notes that “[i]n many national legal systems aiders and abettors need only be aware that they are aiding the principal perpetrator in the commis-

193. *Id.* ¶ 422.

194. *Id.* ¶ 423. The court explained that:

A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found . . . that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

*Id.*

195. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Feb. 26, 2007) (declaration of Judge Keith), <http://www.icj-cij.org/docket/files/91/13701.pdf> [hereinafter Declaration of Judge Keith]. For a briefer discussion to the same effect by Judge Bennouna, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Feb. 26, 2007) (declaration de M. le Juge Bennouna), <http://www.icj-cij.org/docket/files/91/13702.pdf>, which is currently available only in French.

196. Declaration of Judge Keith, *supra* note 195, ¶ 1.

197. See *id.* ¶ 5 (citing *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, (April 19, 2004)).

198. Declaration of Judge Keith, *supra* note 195, ¶ 3.

199. *Id.*

200. *Id.*

201. *Id.* ¶¶ 5-7.

sion of its offence by their contribution (see e.g. the law of France, Germany, Switzerland, England, Canada, Australia and some of the states of the United States).<sup>202</sup> “More significantly,” he adds, “the Appeals Chamber of the ICTY in *Krstić*, following earlier decisions, has ruled consistently with that body of national law that ‘an individual who aids and abets a specific intent offense may be held responsible if he assists in the commission of the crime knowing the intent behind the crime.’”<sup>203</sup> The matter has been widely discussed in the secondary literature.<sup>204</sup>

#### VI. RESPONSIBILITY FOR BREACH OF THE OBLIGATIONS TO PREVENT AND PUNISH GENOCIDE

The court turned finally to these two “distinct yet connected obligations” to prevent and to punish.<sup>205</sup> The words “prevent” and “punish” appear together in Article I.<sup>206</sup> As the court notes, “one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent.”<sup>207</sup> Most of the subsequent substantive articles of the Con-

202. *Id.* ¶ 5 (citing *Krstić*, Case No. IT-98-33-A, ¶ 141). “Some of the states” is a telling comment; as the court conceded in *Krstić*, it is not the majority rule in the United States. See *Krstić*, Case No. IT-98-33-A, ¶ 141 n.244 (citing Candace Courteau, Note, *The Mental Element Required for Accomplice Liability*, 59 LA. L. REV. 325, 334 (1998)). Nor, one might add, is it the rule espoused in the Model Penal Code. See MODEL PENAL CODE §2.06 (Proposed Official Draft 1962) (requiring action “with the purpose of promoting or facilitating the commission of the offense”).

203. Declaration of Judge Keith, *supra* note 195, ¶ 5 (quoting *Krstić*, Case No. IT-98-33-A, ¶ 140). He then adds:

As Judge Shahabudeen said in paragraph 67 of his opinion in *Krstić*, those preparing the text of the Genocide Convention could not have failed to criminalize the actions of the commercial suppliers of poisonous gas who knew of the intent of the purchasers to use the gas for the purpose of destroying a national, ethnical, racial or religious group, even if the suppliers themselves did not share that intent.

*Id.* ¶ 6. A recent study forcefully argues that international jurisprudence supports a knowledge standard. See generally Chimène Keitner, *Conceptualizing Complicity on Alien Tort Cases*, 60 HASTINGS L.J. (forthcoming 2008).

204. Professor Schabas asserted boldly in 2000 that “[a]n accomplice to genocide must have the intent to destroy in whole or in part a national, racial, ethnical or religious group, as such, in accordance with article II of the Convention.” WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 300 (2000). However, the cases he cites seems to support a requirement only of knowledge.

205. Judgment, *supra* note 1, ¶ 425.

206. See Convention, *supra* note 11, art. I.

207. Judgment, *supra* note 1, ¶ 426. The ICJ’s faith in the deterrent power of prosecution, not shared by all, is however espoused in preambular paragraph 5 of the Rome Statute of the International Criminal Court, in which the parties describe themselves as “[d]etermined to put an end to impunity for the perpetrators of these crimes and

vention (Articles III-VII) concern the duty to punish; the Convention “reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII.”<sup>208</sup> Article VIII deals with calling upon organs of the United Nations (presumably the Security Council and the General Assembly, but perhaps human rights organs as well) to take action “for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”<sup>209</sup> Nonetheless, the court sees the content of the “obligation to prevent” as going beyond the multilateral action contemplated in Article VIII.<sup>210</sup> “It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations.”<sup>211</sup> Indeed:

Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.<sup>212</sup>

The obligation, in short, has both multilateral and unilateral dimensions.<sup>213</sup>

#### A. *The Content of the Obligation to Prevent Genocide*

The court noted in passing that the Genocide Convention is not

thus to contribute to the prevention of such crimes.” U.N. Doc. A/CONF. 183/9 (Nov. 10, 1998) (emphasis added). Other language in the preamble flirts with restorative and even retributive justice, a not untypical way in which the goals of punishment are multiple. For a thoughtful analysis of the objectives of international justice, see Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUMAN RIGHTS Q. 90 (2000).

208. Judgment, *supra* note 1, ¶ 426.

209. See Convention, *supra* note 11, art. VIII. Article VIII states, in full that “[a]ny Contracting Party may call 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 or any of the other acts enumerated in article III.” *Id.*

210. Judgment, *supra* note 1, ¶ 427.

211. *Id.*

212. *Id.*

213. The obligations do not extend to humanitarian intervention. A commentator on Darfur remarks:

At least one noted genocide scholar suggests the hesitation to call the crimes “genocide” stems from a fallacious notion that if the crimes were deemed genocide, there would be an obligation of humanitarian intervention; that scholar, however, notes that the more logical reading of the Convention . . . is that it does not require such intervention.

Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 FORDHAM INT’L L.J. 990, 993 n.12 (2008) (citing William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1718 (2006)).

the only multilateral treaty containing an obligation to take steps to prevent the acts which the Convention seeks to suppress,<sup>214</sup> but it avoided getting into a general discussion of “all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts.”<sup>215</sup> It is sufficient for now to examine the scope of the duty to prevent in the specific treaty before the court. What are the parameters of that duty?

The most fundamental (and catchy) statement here is that “the obligation in question is *one of conduct and not one of result*.”<sup>216</sup> This means that “a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide:

214. Judgment, *supra* note 1, ¶ 429. The court also mentioned:

[T]he Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984 (Article 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of December 14, 1973 (Article 4); the Convention on the Safety of United Nations and Associated Personnel of December 9, 1994 (Article 11); and the International Convention on the Suppression of Terrorist Bombings, of December 15, 1997 (Article 15).

*Id.* In addition to the court’s list, Article 1 of The International Convention for the Suppression of Counterfeiting Currency “recognise[s] the rules” in the Convention “as the most effective means . . . for ensuring the prevention and punishment of the offense.” Counterfeiting Currency Convention, *supra* note 56, art. 1.

215. Judgment, *supra* note 1, ¶ 429. There is an intriguing suggestion here, on which the court does not elaborate, that there may well be customary law obligations of prevention in relation to some international crimes, in addition to those accepted by treaty. A good candidate for such an obligation might be crimes against humanity, a category which, notwithstanding its inclusion in the Rome Statute of the International Criminal Court, does not have its own suppression treaty creating an obligation to prevent and punish. See *United States v. Arjona*, 120 U.S. 479 (1887) (establishing a customary law obligation to criminalize the counterfeiting of foreign currency); Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crime against Humanity, G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (Dec. 3, 1973) (reflecting customary obligation to punish); see also George Ginsburgs, *Moscow and International Legal Cooperation in the Pursuit of War Criminals*, 21 REV. CENT. & E. EUR. L. 1, 15 (1995) (discussing the Soviet Union’s customary law obligation to surrender those guilty of war crimes and crimes against humanity, including nationals of the requested state).

216. Judgment, *supra* note 1, ¶ 430 (emphasis added). The court notes:

On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.

*Id.*

the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.”<sup>217</sup> The court also describes the obligation as one of “due diligence” and says that “responsibility is . . . incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”<sup>218</sup> Not all States are in the same situation vis-à-vis potentially genocidal States: factors such as power, geography, political links and links of other kinds are relevant, and, of course, a State may only act within the limits permitted by international law.

State responsibility is incurred when genocide or one of the other Article III “acts” occurs, but the obligation to prevent begins earlier than that.<sup>219</sup> “[A] State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”<sup>220</sup> This is the language of negligence (“should normally have learned”) not knowledge. This distinction is fundamental in comparing the obligations in the failure-to-prevent cases with those in cases of complicity.

“In the first place . . . complicity always requires that some positive action has been taken to [assist;] violation of the obligation to prevent”<sup>221</sup> comes about by omission—by a failure to take suitable preventative measures. Also:

---

217. *Id.*

218. *Id.* The nature of the obligation seems to be fashioned from whole cloth—the court does not refer to any supportive authority. Judge Skotnikov takes issue with the “due diligence” nature of the obligation and with its geographical scope. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), ¶ 58 (Feb. 26, 2007) (declaration of Judge Skotnikov), <http://www.icj-cij.org/docket/files/91/13705.pdf>. He writes:

What the Court should have said on the subject is, in my opinion, the following: a State fails its duty to prevent under the Genocide Convention if genocide is committed within the territory where it exercises its jurisdiction or which is under its control. Even if the perpetrators are not its organs or persons capable of engaging its responsibility under customary international law, the failure is still there. Even if the State in question takes the exhaustive measures required by the Convention, such as enactment of relevant legislation, should genocide occur within the territory under its jurisdiction or control, it still fails its duty to prevent. The duty to prevent is a duty of result and not one of conduct.

*Id.* In one way, Judge Skotnikov’s concept of responsibility is broader than that of the majority: the obligation is one of strict liability. In another way, it is narrower in that it is circumscribed by territoriality. For the majority, the duty could potentially apply anywhere in the world—it all depends on the relevant relationships. On duty, see also *infra* note 225.

219. Judgment, *supra* note 1, ¶ 431.

220. *Id.*

221. *Id.* ¶ 432.

In the second place . . . there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts.<sup>222</sup>

For failing to prevent, on the other hand, “it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”<sup>223</sup> This last difference would prove crucial to the finding that Serbia was responsible on a failure-to-prevent theory.

One noteworthy fact was that the FRY at the relevant time “was in a position of influence over the Bosnian Serbs [and the VRS] who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between [them].”<sup>224</sup> Hence, the court found a duty to act.<sup>225</sup> Was there a breach of that duty? The court was convinced that, even though knowledge had not been proved, the Belgrade authorities “could hardly have been unaware of the serious risk of [genocide] once the VRS forces had decided to occupy the Srebrenica enclave.”<sup>226</sup> Thus,

---

222. *Id.*

223. *Id.*

224. *Id.* ¶ 434.

225. *See id.* ¶ 435. The court does not explore, however, exactly why there was a duty. The court seems to regard the duty as underscored by its indication of provisional measures in 1993 in which the FRY was required to ensure:

“that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .”

*Id.* (quoting Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 325, 342-43 (Further Requests for Indication of Provisional Measures (Sept. 13))). Yet, more seems to be at stake. It cannot be the case that any State in the world would have an obligation to prevent. There must be some small parties to the Convention (Andorra, say) who could not be required to do anything, and Article VIII says that States “may” bring matters to the attention of United Nations organs, not that they must, so even that minimal chore is not obligatory. *See* Convention, *supra* note 11, art. VIII. The argument must be a relational one; because Serbia has been engaged in (nefarious) activities with Republika Srpska, it has acquired some obligations. A possible analogy in Anglo-American law is the relative, or the person who starts an involvement, who thereby acquires an obligation to become a “good samaritan.” *See generally* THE GOOD SAMARITAN AND THE LAW (James M. Ratcliffe ed., 1966). For some thoughts on the nature of the anti-genocidal obligation, see Milanović, *supra* note 135, at 686-87.

226. Judgment, *supra* note 1, ¶ 436.

“the Yugoslav federal authorities should, in the view of the court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.”<sup>227</sup> Accordingly, its international responsibility was engaged.

*B. The Obligation to Punish Genocide*

Bosnia and Herzegovina had argued that Serbia and Montenegro was in breach of its obligation to punish by failing to transfer accused individuals to the ICTY.<sup>228</sup> As the genocide was not carried out on Serbian territory, Serbia could not be faulted under the Convention for failing to prosecute the accused before its own courts, since Article VI speaks to obligatory jurisdiction in the courts of the territory in which the crimes were committed.<sup>229</sup> But was this a breach of an obligation to cooperate with an “international penal tribunal” within the meaning of the second jurisdictional possibility in Article VI? The drafters of the Convention probably had in mind a tribunal created directly by treaty, since they used the words “those Contracting Parties which shall have accepted [the] jurisdiction” of the international penal tribunal.<sup>230</sup> But this was not a serious problem for the court. The ICTY was created by the Security Council acting pursuant to Chapter VII of the United Nations Charter.<sup>231</sup> It would, the court said, “be contrary to the object of” Article VI to read “international penal tribunal restrictively in order to exclude” such a creation.<sup>232</sup> There was then the ambiguous status of the FRY’s United Nations membership at various points.<sup>233</sup> For the court, though, it was suffi-

---

227. *Id.* ¶ 438.

228. *Id.* ¶ 440.

229. *See* Convention, *supra* note 11, art. VI. Serbia *could* probably have prosecuted the accused from Bosnia and Herzegovina in its own courts on a universal jurisdiction theory (if it had physical custody of them). *See supra* notes 39-41 and accompanying text.

230. Convention, *supra* note 11, art. VI.

231. *Id.* ¶ 445.

232. *Id.* (internal quotation marks omitted).

233. The Security Council and General Assembly had acted ambiguously on whether the rump Federal Republic of Yugoslavia continued the old Yugoslav membership in the U.N. and thus access to the ICJ. *See id.* ¶¶ 89-97. The FRY formally requested U.N. membership in October 2000. *See id.* ¶ 98. Meanwhile, in 1996, the court had ruled on preliminary objections in the Genocide Case that it ultimately interpreted as *res judicata*, precluding Serbia from raising post-2000 the question of whether in the mid-90s it was a member of the U.N. and party to the Genocide Convention. *See id.* ¶¶ 67-141. In several cases brought by Serbia against NATO countries for the 1999 bombing of Serbia, the court held that Serbia and Montenegro was not a member of the U.N. at the relevant time and thus could not seize the court of the issue. *See, e.g.,* Legality of Use of Force (Serb. and Mont. v. Belg.), 2004 I.C.J. 15, 32 (Dec. 15). On the court’s fancy footwork to keep the present proceedings alive while sending the cases

cient that the FRY was bound to cooperate with the ICTY from at least the date of the Dayton Agreement in December 1995 and there was a further basis of obligation after the FRY's admission to the UN in 2000.<sup>234</sup> The FRY has failed in this cooperation. In particular:

[T]he Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him.<sup>235</sup>

## VII. REPARATION

That left the question of the appropriate remedy for failures to prevent and to punish.<sup>236</sup> Were money damages appropriate? So far as the *failure to prevent* was concerned, the court saw the ultimate issue as “whether there . . . [was] a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage[s] of any type, material or moral, caused by the acts of genocide.”<sup>237</sup> This, Bosnia had not succeeded in establishing.<sup>238</sup> It was true that there were significant means of influencing events which Bosnia should have exercised, “but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought.”<sup>239</sup> There was a crime at Srebrenica (genocide), as *Krstić* had held, and the ICJ concurred.<sup>240</sup> There was a wrongful act by Serbia, but the connections between the crime and Serbia's breach of an international obligation, and the material damage in Bosnia had not been established.<sup>241</sup> Financial com-

---

against NATO to outer darkness, see Stephan Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 EUR. J. INT'L L. 591 (2007).

234. Judgment, *supra* note 1, ¶ 447.

235. *Id.* ¶ 448.

236. See generally *id.* ¶¶ 462-469 (discussing possible remedy, punishment, and reparation schemes).

237. *Id.* ¶ 462.

238. See *id.* (“Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide of Srebrenica, financial compensation is not an appropriate form of reparation for the breach of the obligation to prevent genocide.”)

239. *Id.*

240. See Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 37 (April 19, 2004).

241. See Judgment, *supra* note 1, ¶ 462.

pensation was therefore not appropriate.<sup>242</sup> It was, however, “clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide.”<sup>243</sup>

With respect to the *failure to punish*, the breach was continuing. The court was “satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić . . . .”<sup>244</sup> Accordingly, the court made a declaration to this effect in the operative clause of the Judgment.<sup>245</sup>

---

242. *Id.*

243. *Id.* ¶ 463. Milanović regards this part of the judgment as “indefensible.” Milanović, *supra* note 135, at 689. His most telling point is that:

[T]here is no evidence in customary law and jurisprudence that compensation for wrongful omission to act would be an appropriate remedy only if “but for” causality could be established. The Court, moreover, cites absolutely no authority for its position. There is, on the other hand, ample evidence to the contrary, most notably in human rights jurisprudence. Both the European Court of Human Rights and the Inter-American Court have in a number of cases awarded compensation against states that failed to secure the human rights of persons within their jurisdiction and to prevent violations against these persons by third parties . . . . In neither of these two cases did the courts require the applicants to show that the violations of their human rights perpetrated by a private actor, whose activities the state tolerated, would *certainly* have been prevented if the state had acted to the best of its ability.

*Id.* at 689-90 (citations omitted).

244. Judgment, *supra* note 1, ¶ 465.

245. *See id.* ¶ 471.