NOTES

REINING IN NON-STATE ACTORS: STATE RESPONSIBILITY AND ATTRIBUTION IN CASES OF GENOCIDE

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In 2007, the International Court of Justice defined the scope of state responsibility under the Genocide Convention for the very first time when it reached the merits in the Genocide Case*, a case arising from the violent breakup of the former Yugoslavia. The opinion immediately spurred extensive academic commentary, much of which was critical of the Court's ultimate holding that Serbia had not committed genocide despite its well-documented role in the Srebrenica massacre. While the* Genocide Case *can be read as a disappointment, and the Court's analysis is vulnerable to normative critique, this Note argues that it was nonetheless an important victory in the movement toward greater state accountability for genocide, especially considering the context in which the Court acts and the limitations imposed on its independence by the practical need for legitimacy. Although the Court raised onerous evidentiary hurdles for establishing state responsibility for the direct commission of genocide, it managed simultaneously to impose upon states a clear duty to rein in non-state actors over whom they exercise influence by interpreting the state obligation to prevent genocide broadly. This broad duty to rein in non-state actors has important implications not only for the Court's own jurisprudence but also extrajudiciously within the customary framework of state responsibility, by empowering the general international community to enforce states' obligations to curb genocidal actors within their reach.*

INTRODUCTION

The 1948 Genocide Convention[1] promised to "liberate mankind" from the "odious scourge" of genocide through "international co-

 J.D., 2009, New York University School of Law; B.A., 2006, University of Minnesota. This Note is dedicated to the memory of Professor Thomas Franck, an exceptional international scholar who helped chart the course of my research. My sincerest thanks go to the entire editorial staff of the *New York University Law Review*, the most academically talented group of people I have ever had the honor of working with. Special thanks are due to Margarita O'Donnell, Munia Jabbar, Rebecca Talbott, Drew Johnson-Skinner, and Benjamin Stoll. I would also like to thank Lawrence Fleischer and Michael Reveal for invaluable feedback on earlier drafts. Finally, my deepest thanks to my dear husband Adib Birkland, without whom this Note would never have been published.

[1] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. As of July 18, 2007, 140 states were parties to the Convention. *See* United Nations Treaty Collection,

operation."[2] The dismal record of the past sixty years, however, suggests that the international community has fallen drastically short of delivering on this promise.[3] While important steps have been taken toward greater individual accountability through the establishment of *ad hoc* tribunals[4] and a permanent International Criminal Court,[5]

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http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (last visited Aug. 11, 2009) (providing up-to-date list of parties). Genocide is defined in Article II in the following terms:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;
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> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra*, art. II.

[2] Genocide Convention, *supra* note 1, pmbl.

[3] The genocide label has been applied to several conflicts in the post–World War II era. The label is routinely applied to the mass murders committed by the Khmer Rouge regime in Cambodia, the brutal conflict in Rwanda, and the recent mass killings in Darfur. *See, e.g.*, BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR 540–68, 594–96 (2007) (describing mass murders in Cambodia, Rwanda, and Darfur); ERIC D. WEITZ, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION 144–89 (2003) (describing Cambodia under Khmer Rouge); Robert Melson, *Modern Genocide in Rwanda: Ideology, Revolution, War, and Mass Murder in an African State*, *in* THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE 325, 325–38 (Robert Gellately & Ben Kiernan eds., 2003) [hereinafter SPECTER OF GENOCIDE] (chronicling history of genocide in Rwanda). Some scholars have also suggested that genocide occurred during Indonesia's occupation of East Timor. *See, e.g.*, KIERNAN, *supra*, at 576–82 (detailing atrocities committed in East Timor following Indonesia's invasion); John C. Taylor, *"Encirclement and Annihilation": The Indonesian Occupation of East Timor*, *in* SPECTER OF GENOCIDE, *supra*, at 163, 163–85 (analyzing Indonesian invasion into East Timor and labeling it genocide). Others have suggested that the massacres in Guatemala in the 1980s rose to the level of genocide. *See, e.g.*, KIERNAN, *supra*, at 582–85 (equating massacres in Guatemala with genocide); Greg Grandin, *History, Motive, Law, Intent: Combining Historical and Legal Methods in Understanding Guatemala's 1981–1983 Genocide*, *in* SPECTER OF GENOCIDE, *supra*, at 339, 339–52 (analyzing events in Guatemala as example of genocide). Finally, some have suggested that genocide took place under Saddam Hussein in Iraq. *See, e.g.*, KIERNAN, *supra*, at 585–87 (concluding that Hussein's administration committed genocide).

[4] The most prominent are the tribunals established by the United Nations Security Council to address the conflicts in Rwanda and in the former Yugoslavia, respectively. *See* Statute of the International Tribunal for Rwanda art. 1, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute] (establishing International Criminal Tribunal for Rwanda); Statute of the International Tribunal art. 1, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute] (establishing International Criminal Tribunal for former Yugoslavia).

[5] *See* Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute] (establishing International Criminal Court).

recent history inevitably raises the question of whether individual criminal responsibility is really enough.[6]

This Note considers an alternative form of accountability: the imposition of responsibility upon a state *qua* state, which can and should complement individual criminal liability for genocide.[7] State responsibility is an important concept in international law in general[8] but is particularly important for genocide, which presupposes a systematic governmental campaign.[9]

In 2007, the International Court of Justice ("ICJ" or "the Court")[10] defined the scope of state responsibility under the Genocide Convention for the first time when it reached the merits in the *Genocide Case*,[11] a case originally brought in 1993 by the Republic of Bosnia and Herzegovina (now Bosnia and Herzegovina) against the Federal Republic of Yugoslavia (now the Republic of Serbia).[12] The

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[6] *See* Thomas Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?*, 6 WASH. U. GLOBAL STUD. L. REV. 567, 569 (2007) (arguing that establishment of international criminal courts does not obviate need for state responsibility); *supra* note 3 (listing recent instances of genocide).

[7] *Cf.* Franck, *supra* note 6, at 571 ("[State responsibility] summons the people of the victim state and the victimizer state to work together to ameliorate the damage done, to display a new determination to work together, to rebuild, to reconstitute."); Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1314 (2005) (reviewing FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (Philippe Sands ed., 2003)) (describing consequences of ignoring state responsibility by highlighting "retributive shortfall" that occurs when focus is solely on individual criminal liability).

[8] Ian Brownlie, *State Responsibility and the International Court of Justice*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 11, 12 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("State responsibility . . . provides the foundation of the law of treaties and constitutes the most basic part of general international law."); *see also* Anthony F. Lang, Jr., *Crime and Punishment: Holding States Accountable*, 21 ETHICS & INT'L AFF. 239, 240 (2007) ("International law is largely about what states can and cannot do. States continue to be the primary agents in the international system . . . .").

[9] *See* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 526 (1996) ("Genocide is usually considered a crime that is committed pursuant to a policy developed by the authorities of a state or state-like entity."); Lang, *supra* note 8, at 254 (arguing that "genocide is a crime that requires state complicity . . . [and] a large-scale operation beyond the scope of any one individual or even a small number of individuals" (internal citation omitted)).

[10] The ICJ is the "principal judicial organ of the United Nations." U.N. Charter art. 92. The ICJ was created through a statute annexed to the U.N. Charter, which established the U.N. in 1945. *Id.* pmbl. (establishing U.N.); *id.* art. 92 (establishing ICJ); *see* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute] (founding statute of ICJ).

[11] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) [hereinafter *Genocide Case*], *available at* http://www.icj-cij.org/docket/files/91/13685.pdf.

[12] The Republic of Bosnia and Herzegovina became Bosnia and Herzegovina on December 14, 1995. *Id.* ¶ 1. The Federal Republic of Yugoslavia became the state of Serbia and Montenegro on February 4, 2003. *Id.* On June 3, 2006, the Republic of Serbia

dispute arose from the violent breakup of the former Yugoslavia. After years of litigation, mostly concerned with jurisdiction and state secession, the Court issued a divided opinion that immediately spurred extensive academic commentary, much of which was critical of the Court's conclusion that Serbia had not committed genocide despite its well-documented role in the massacre of Bosnian Muslims and other non-Serbs in Srebrenica, the primary site of the 1995 genocide.[13] Essential to the Court's holding was its high standard for attribution, the test for determining when actions of non-state actors may be attributed to a state for the purposes of imposing liability.

While the *Genocide Case* can be read as a disappointment, and the Court's analysis is vulnerable to normative critique, this Note argues that it was nonetheless an important victory in the movement toward greater state accountability for genocide. Although the Court raised onerous evidentiary hurdles for establishing state responsibility for the *direct commission* of genocide, it managed simultaneously to impose upon states a clear duty to rein in non-state actors over whom they exercise influence by interpreting broadly their obligation to *prevent* genocide. By broadening states' duties to rein in non-state actors over whom they have influence, the Court opened the door to imposing liability upon states for failing to prevent acts not otherwise attributable to them, which has implications not only for the Court's own jurisprudence but also extrajudiciously within the customary framework of state responsibility.

Part I of this Note briefly reviews the framework of state responsibility under international law and provides background on the ICJ. Part II summarizes the decades-long debate on state responsibility under the Genocide Convention, the ICJ's resolution of that debate in the *Genocide Case*, and scholarly critiques of the opinion. Part III argues that the ICJ's opinion actually imposes on states an obligation to rein in non-state actors over whom they have influence. It then outlines how this obligation can be enforced through the political

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became the official successor to Serbia and Montenegro. *Id.* ¶¶ 1, 67–79. Thus, at the time of the *Genocide Case*'s final judgment, the only remaining respondent in the case was the Republic of Serbia. *Id.* ¶ 77. The sovereign state of Montenegro, which declared independence from Serbia and Montenegro on June 3, 2006, *id.* ¶ 67, was deemed not an official party to the case, *id.* ¶ 77, even though the facts and events underlying the case occurred during a time period when Serbia and Montenegro constituted a single state. *Id.* ¶¶ 74, 78.

[13] *See infra* note 95 and accompanying text (summarizing scholarly critique). Srebrenica, a city in Bosnia and Herzegovina, was the primary site of the brutal ethnic cleansing that gave rise to the *Genocide Case*. Despite Srebrenica's being declared a "safe area" by the United Nations, the Bosnian Serb Army (VRS) stormed the city in July of 1995, targeting Bosnian Muslims in particular, and 7000 people were never seen again. *Genocide Case*, *supra* note 11, ¶ 278.

organs of the United Nations or through the informal system of state responsibility.

I
State Responsibility, Attribution, and Adjudication

As a general background to the ICJ's opinion in the *Genocide Case*, this Part describes how states' international obligations are defined and enforced. Subsection A.1 outlines the system of state responsibility as codified by the International Law Commission (ILC).[14] Subsection A.2 considers how the actions of individuals and groups are attributed to states for the purposes of state responsibility. Finally, Section B describes the role of the ICJ within this system.

A. State Responsibility

States are subject to a rapidly expanding web of international obligations, and in the absence of a transnational executive power, enforcement of these obligations is primarily secured through a diffuse system of state accountability. In the Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles" or "the Articles"), the ILC provided the most authoritative description of this system.[15] The Articles, which were in the works for half a century,[16] do not attempt to define the substantive responsibilities, or "primary obligations," that states have under international law. Instead, they describe the "secondary obligations" that attach once a state has violated a primary obligation.[17]

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[14] The ILC was established by the United Nations General Assembly in 1947 for the purpose of "encouraging the progressive development of international law and its codification." G.A. Res. 174 (II), at 105, U.N. Doc. A/519 (Nov. 17, 1947). A detailed history of the ILC and its work is available at the ILC's official website. International Law Commission, Introduction, http://untreaty.un.org/ilc/ilcintro.htm (last visited Oct. 20, 2009).

[15] Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter ILC Articles], *in Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 59, U.N. Doc. A/56/10 (2001), *available at* http://www.un.org/documents/ga/docs/56/a5610.pdf.

[16] For a detailed overview of the ILC's work on state responsibility from 1949 to the present, including links to relevant documents, see International Law Commission, State Responsibility, http://untreaty.un.org/ilc/summaries/9_6.htm (last visited Aug. 11, 2009).

[17] By focusing their efforts on secondary rather than primary obligations, the ILC "managed to relegate extremely controversial issues . . . and thereby achieve both a wider acceptance of the Articles and a sound methodological structure." Marko Milanovic, *State Responsibility for Genocide*, 17 Eur. J. Int'l L. 553, 560 (2006).

This distinction between primary and secondary obligations is "the central organizing device of the [A]rticles"[18] and is essential to understanding the system of state responsibility. The goal of the Articles is not to summarize the *content* of states' international obligations but simply to outline the *consequences* that flow from violating those obligations. The Articles, for example, say nothing about how to define each state's territorial waters, something that is governed by customary international law and by the U.N. Convention on the Law of the Sea;[19] however, they do suggest what measures a state may take when its rights under the law of the sea are violated. Similarly, the Articles do not define states' obligations under the Genocide Convention but merely outline the consequences arising from of a violation of these obligations.

1. Secondary Obligations and Peremptory Norms

Under the framework of state responsibility, when a state violates a primary obligation, at least two secondary obligations attach: the obligation to cease the violation[20] and, as appropriate, the obligation to provide reparation.[21] In order to ensure that the violating state carries out its secondary obligations, "injured"[22] states may impose sanctions and take other reprisal actions in order to induce compliance.[23]

While this framework generally applies to all international obligations, the ILC realized early on that it was necessary to distinguish particularly egregious violations from run-of-the-mill transgressions.

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[18] James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 876 (2002).

[19] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[20] ILC Articles, *supra* note 15, at 216 (art. 30) (stating that states who are responsible for internationally wrongful acts have obligation "to cease that act [and] offer appropriate assurances and guarantees of non-repetition").

[21] Article 31(1) states: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *Id.* at 223 (art. 31(1)). Reparations can take the form of restitution, compensation, or satisfaction. *Id.* at 237, 243, 263 (arts. 35–37).

[22] An "injured" state is a state "whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act." *Id.* at 293 (cmt. to pt. 3, ch. I).

[23] Such actions are referred to as "countermeasures." Countermeasures, while permitted under the Articles, are severely limited. Injured states may only take countermeasures "in order to induce the responsible State to comply with its [secondary] obligations." *Id.* at 328 (cmt. to art. 49(1)). Further, countermeasures must be taken "in such a way as to permit the resumption of performance of the obligations in question." *Id.* Additionally, countermeasures may not breach the international prohibition against the use of force, fundamental human rights, or other peremptory norms of international law. *Id.* at 333 (art. 50). For an explanation of peremptory norms, see *infra* note 31.

Earlier drafts of the Articles sought to capture this distinction by classifying certain violations as *criminal*.[24] Commission members were sharply divided on the notion of "State crimes,"[25] however, and comments received from governments reflected "varying degrees of satisfaction or dissatisfaction" with the distinction.[26] A number of states opposed the idea of state crimes altogether[27] while others expressed strong support for the proposed framework because it properly allowed more severe consequences to attach to particularly egregious violations of international law.[28] Opposition to the notion of state criminality ultimately won the day, and the Articles as finally adopted by the ILC in 2001 make no reference to state crimes.[29]

However, the Articles still manage to preserve a distinction between lesser and greater violations by distinguishing "[s]erious breaches of obligations under peremptory norms of general international law" from other violations.[30] These serious breaches are identified by reference to two criteria. First, they involve breaches of obligations under peremptory norms of international law.[31] Secondly,

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[24] In the 1996 draft, Article 19, entitled "International Crimes and International Delicts," defined an "international crime" as "[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." *Report of the International Law Commission to the General Assembly*, 51 U.N. GAOR Supp. (No. 10) at 131 (art. 19(2)), U.N. Doc. A/51/10 (1996) [hereinafter ILC 1996 Report].

[25] *Report of the International Law Commission to the General Assembly*, 53 U.N. GAOR Supp. (No. 10) at 130–31 (¶ 284), U.N. Doc. A/53/10 (1998) [hereinafter ILC 1998 Report].

[26] *Id.* at 119 (¶ 246); *see also id.* ("[A] number of Governments were vehemently opposed to the notion of [state] crimes and regarded it as capable of destroying the draft articles as a whole . . . .").

[27] *See, e.g.*, Int'l Law Comm'n, *State Responsibility: Comments and Observations Received from Governments*, at 61, U.N. Doc. A/CN.4/488 (Mar. 25, 1998) [hereinafter ILC, *Comments and Observations*] (comment from United States) (arguing that notion of state crimes "[has] no support under the customary international law of State responsibility, would not be a progressive development and would be unworkable in practice"); *id.* at 50–51 (comment from Austria) (cautioning that state crimes framework would "provide tempting pretexts for defending countermeasures and sanctions of a disproportional character against minor violations of international law").

[28] *See, e.g.*, *id.* at 53–54 (comment from Denmark, on behalf of Nordic countries) (stressing need to "establish particularly grave violations of international law by a State, such as aggression and genocide, as a specific category, where the consequences of the violations are more severe").

[29] *See generally* ILC Articles, *supra* note 15.

[30] ILC Articles, *supra* note 15, at 277 (cmt. to ch. III). The abandonment of state crimes in favor of this new framework was "not simply a terminological substitute for state criminality," but rather "a fundamental rejection of the notion of a different [i.e. *criminal*] kind of responsibility of states." Milanovic, *supra* note 17, at 563.

[31] ILC Articles, *supra* note 15, at 277 (cmt. to ch. III). Peremptory norms, often referred to by the Latin term "*jus cogens*," are defined in the Vienna Convention as

the breaches are "in themselves serious, having regard to their scale or character."[32] These "serious" breaches, in addition to giving rise to secondary obligations on the part of the breaching state, impose an obligation on third-party states to "cooperate to bring [the breach] to an end through lawful means,"[33] and not to "recognize as lawful a situation created by [such] a serious breach."[34]

This affirmative duty to cooperate may be carried out through the U.N. or independently by a group of states outside of any formal international institutional structure.[35] There is general consensus that the prohibition against genocide is one of these peremptory norms.[36] Therefore, under the Articles on State Responsibility, acts of genocide give rise to an affirmative duty on the part of the international community as a whole to take action to end the genocide.

2. *Attribution and Agency*

A necessary requirement for holding any state responsible for wrongful conduct is a proven relationship between the state and the actual perpetrator of the wrongful conduct. State responsibility depends, in other words, on *attribution*.[37] Attribution is not only relevant for determining whether a state has violated international law,

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"norm[s] accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[32] ILC Articles, *supra* note 15, at 277 (cmt. to ch. III). Breaches are serious if they involve "a gross or systematic failure by the responsible State to fulfil the obligation." *Id.* at 282 (art. 40(2)). Factors to consider in determining the seriousness of a violation include "the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims." *Id.* at 285 (cmt. to art. 40).

[33] *Id.* at 286 (art. 41(1)).

[34] *Id.* (art. 41(2)).

[35] *Id.* at 287 (cmt. to art. 41) ("Cooperation could be organized in the framework of a competent international organization, in particular the United Nations[, or through] non-institutionalized cooperation.").

[36] *See, e.g.*, *id.* at 208 (cmt. to art. 26) (listing genocide as example of "clearly accepted and recognized" peremptory norm); *see also* Application of Convention on Prevention and Punishment of Crime of Genocide, Further Requests for Indication of Provisional Measures (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 440 (Sept. 13) (separate opinion of Judge Lauterpacht) ("[T]he prohibition of genocide . . . has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.").

[37] The imposition of liability upon a state for the acts of non-state actors is sometimes termed "imputability" rather than "attribution." *See, e.g.*, ILC 1998 Report, *supra* note 25, at 80, 157 (using "imputability"). In this Note, however, the latter term will be used. *Cf. id.* at 153 (explaining that drafters of ILC Articles decided to use "attribution" rather than "imputability" because latter term "implied, quite unnecessarily, an element of fiction").

but also for determining whether an injured state is permitted to take action against the perpetrating state.[38]

Unlike the American common law of agency, attribution in international law is less focused on reliance and outward manifestations of consent[39] and more focused on the existence of an actual relationship between the state and the wrongful actor. Thus, a state may be liable for the actions of an individual or group it directs and controls regardless of whether that relationship is apparent to the reasonable observer.[40]

States are naturally liable for the actions of their own organs.[41] In fact, states may be responsible for the wrongful acts of their organs even when they exceed their authority or contravene instructions.[42] States are similarly liable for the actions of persons or entities that, while not organs strictly speaking, are empowered by the law to exercise elements of governmental authority.[43] Attribution is more con-

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[38] *See* Jörn Griebel & Milan Plücken, *New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in* Bosnia v. Serbia, 21 LEIDEN J. INT'L L. 601, 604 (2008) (explaining that attribution to state leads to both *substantial* and *instrumental* consequences, meaning, respectively, that "the responsible state [must] make good the violation," for example by paying restitution, and "the victim state [may also] take measures in reaction to the violation").

[39] American agency law places emphasis on *reasonable reliance* by agents and third parties and *manifestations of intent* by the principal. *See* RESTATEMENT (THIRD) OF AGENCY §§ 1.01, 2.01, 2.03 (2006) (stating that agency relationship arises where principal "manifests intent" to enter into arrangement and finding agency authority where agent or third party "reasonably believes" authority to have been granted).

[40] Ultimately, attribution for the purposes of state responsibility is less about protecting agents from liability for the actions they must carry out on behalf of their principals and more about determining which conduct is appropriately regarded as conduct of the state itself. In fact, holding a state responsible for the actions of individuals does not necessarily relieve the individual perpetrator from liability. As the ICJ observed in the *Genocide Case*, "duality of responsibility continues to be a constant feature of international law." *Genocide Case*, *supra* note 11, ¶ 173. This duality is reflected in the Rome Statute, establishing the International Criminal Court, and in the Articles on State Responsibility. *See* Rome Statute, *supra* note 5, art. 25(4) ("No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."); ILC Articles, *supra* note 15, at 363 (art. 58) ("These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."); *see also id.* at 364 (cmt. to art. 58) ("The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.").

[41] The ILC defines "state organs" as "all the individual or collective entities which make up the organization of the State and act on its behalf," including "organ[s] of any territorial governmental entity within the State." ILC Articles, *supra* note 15, at 84 (cmt. to art. 4).

[42] *Id.* at 99 (cmt. to art. 7) ("The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form.").

[43] *Id.* at 92 (art. 5).

tested when the wrongdoers do not have any official or legal relationship to the state but instead have received financial or logistical support from the state or have acted under the state's instruction or direction. At the heart of the *Genocide Case* was a disagreement about the scope of attributable action.[44]

Since attribution is a necessary element of state responsibility, the test applied will often be outcome determinative. This was precisely what happened in the *Genocide Case* where the ICJ's attribution test proved fatal to Bosnia's genocide claim.[45]

B. The International Court of Justice

Outside the system of state responsibility described above, international legal obligations may also be enforced by the ICJ. The ICJ was born as part of the establishment of the U.N. in 1945.[46] Under the U.N. Charter, which created both the U.N. and the ICJ,[47] all U.N. Member States are automatically parties to the Statute of the ICJ,[48] which is "an integral part" of the Charter itself.[49] Since states can be members of the Court without being members of the U.N.[50] but not

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[44] As one commentator has observed, attribution is an issue "highly likely to recur" in future cases applying the Genocide Convention since "states today find many ways . . . of trying to cover up their tracks when on a genocidal rampage." Milanovic, *supra* note 17, at 575.

[45] *Genocide Case*, *supra* note 11, ¶¶ 413–15 ("The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent . . . .").

[46] The founding statute of the ICJ was annexed as part of the U.N. Charter itself. *See* U.N. Charter art. 92 (establishing ICJ and referring to annexed statute); ICJ Statute, *supra* note 10. The ICJ, the principal judicial organ of the United Nations, is a civil tribunal that adjudicates disputes between states. The ICJ was a successor to the Permanent Court of International Justice (PCIJ), an organ of the League of Nations established in the post–World War I era. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 707 (7th ed. 2008). The statutes of the two courts are virtually the same and jurisdiction under instruments referring to the PCIJ are now read to refer to the ICJ. *Id.* at 708. The continuity between the two courts is evident in that the ICJ "and States appearing before it make continual use of the judicial precedents established in the earlier period." SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005, 73 (2006). The ICJ is distinct from the International Criminal Court, established by the Rome Statute, *supra* note 5, which is independent of the U.N. and has been granted criminal jurisdiction over the prosecution of individuals. *See* International Criminal Court, About the Court, Frequently Asked Questions, http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/ (last visited Oct. 19, 2009).

[47] U.N. Charter pmbl. (establishing U.N.); *id.* art. 92 (establishing ICJ).

[48] U.N. Charter art. 93(1).

[49] U.N. Charter art. 92.

[50] U.N. Charter art. 93(2).

vice versa, membership of the Court is typically larger than the membership of the U.N. It is thus rightly called the "World Court."[51]

Unlike the high court of most states, however, the ICJ's jurisdiction is not plenary. While membership in the ICJ is mandatory for U.N. members, they are not obliged to consent fully (or even partially) to the jurisdiction of the Court.[52] Instead, the ICJ's jurisdiction over an international dispute depends on the extent to which the respondent state has consented ex ante to the Court's jurisdiction. In addition to this limitation on jurisdiction, the Court's decisions are, strictly speaking, only binding on the parties before them.[53]

The judges on the Court are inevitably mindful of the reality that the states whose disputes they are to resolve may withdraw their consent to jurisdiction over future cases in response to an unfavorable judgment. The United States has done just this: It has gradually chipped away at the Court's authority in the wake of controversial

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[51] This label is common. For example, the Max-Planck-Institute publishes a digest of ICJ cases called the "World Court Digest." *See* PETRA MINNEROP ET AL., MAX-PLANCK-INST. FOR INT'L LAW, WORLD COURT DIGEST 2001–2005 (2009), *available at* http://www.mpil.de/ww/en/pub/research/details/publications/institute/wcd.cfm. Shabtai Rosenne, one of the world's leading experts on ICJ procedure, has also published a book about the ICJ using the "World Court" label. *See* SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (4th ed. 1989).

[52] *See, e.g.*, BROWNLIE, *supra* note 46, at 711–12 (noting that being party to ICJ Statute does not in and of itself signify state's submission to ICJ jurisdiction but that "some further expression of consent is required"). Consent to ICJ jurisdiction is expressed in one of three ways. First, in the most straightforward case, states agree to refer their pre-existing dispute to the ICJ, and jurisdiction is thus clear and uncontested. *See* ICJ Statute, *supra* note 10, art. 36(1) (giving ICJ jurisdiction over "all cases which the parties refer to it"). Secondly, states may confer jurisdiction on the Court as part of a multilateral treaty for matters that arise under the treaty, in advance of any particular dispute. *Id.* (giving ICJ jurisdiction over "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"). Third, a state may submit to the Court's jurisdiction more broadly by means of a declaration to that effect. *Id.* art. 36(2) ("The state parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning [legal issues or obligations designated in the declaration]."). These declarations are entirely voluntary and may be withdrawn at any time. States typically attach reservations to their declarations excluding from jurisdiction certain types of disputes. For an up-to-date collection of declarations and reservations, see International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Aug. 11, 2009).

[53] ICJ Statute, *supra* note 10, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."). If necessary, parties' obligations to comply may be enforced by the Security Council. U.N. Charter art. 94(2) ("If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council . . . .").

judgments.[54] The judges on the Court thus have a very pragmatic reason to hesitate before taking a bold stance against Member States.

These limitations notwithstanding, the Court plays an important role both symbolically and practically. In addition to mediating disputes between states, it "represents and is designed to serve the international community in its entirety[, and] its first and foremost role is to uphold the global values of that community."[55] This influence is not only moral and political but also doctrinal because an opinion of the Court may contribute in important ways to the gradual evolution of international law.[56]

II
State Obligations Under the Genocide Convention

The legal definition of genocide is well settled[57] and is widely considered part of customary international law.[58] This definition was codified in the Genocide Convention[59] and later incorporated ver-

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[54] For example, after the ICJ held in the *Nicaragua* case that the United States violated international law by supporting guerrillas against the Nicaraguan government and by mining Nicaragua's harbors, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), the United States withdrew its declaration of jurisdiction. Renata Szafarz, The Compulsory Jurisdiction of the International Court of Justice 89 (1993). Similarly, after a defeat in the *LaGrand* case, a case concerning the consular rights of non-citizens on death row, LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations that had given the Court jurisdiction. *See generally* John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 Duke J. Comp. & Int'l L. 263 (2009) (examining reasons for, as well as legality and implications of, United States's withdrawal after *LaGrand* case).

[55] Georges Abi-Saab, *The International Court as a World Court*, *in* Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings 3, 7 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

[56] *See* Brownlie, *supra* note 46, at 20 ("[I]t is obvious that a unanimous, or almost unanimous, decision [of the ICJ] has a role in the progressive development of the law.").

[57] ILC 1996 Report, *supra* note 24, at 87 ("The definition of genocide contained in article II of the [Genocide] Convention . . . is widely accepted and generally recognized as the authoritative definition of this crime . . . ."); *see supra* note 1 (providing definition of genocide from Genocide Convention).

[58] Customary international law emerges when a pattern of state practice is accompanied by *opinio juris*, that is, the general belief among states that the practice is obligatory. Brownlie, *supra* note 46, at 6; *see also* ICJ Statute, *supra* note 10, art. 38(1)(b) (listing, as one of four sources of international law, "international custom, as evidence of general practice accepted as law"). The customary nature of the prohibition on genocide means that it is binding upon *all* states, even if they are not signatories to the Genocide Convention. *See, e.g.*, Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) ("[T]he principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.").

[59] Genocide Convention, *supra* note 1, art. II.

batim into the statutes of the *ad hoc* criminal tribunals[60] and the International Criminal Court.[61] Despite this general consensus, the application of the definition to real-life conflicts is not free from debate.[62] Thus, while the peremptory status of the prohibition against genocide is undisputed, the precise scope of states' *primary* obligations regarding genocide has been contested. As the Genocide Convention's full title—"Convention on the Prevention and Punishment of the Crime of Genocide"—suggests, it is clear that the Convention obligates signatories to *prevent* individuals from perpetrating genocide within their borders and, when they fail to do so, to *punish* individual perpetrators.[63] One significant point of contention regarding the Convention has been whether it also imposes an *affirmative* obligation upon states themselves to refrain from engaging in genocide, and if so, what the scope of that obligation is.[64]

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[60] ICTR Statute, *supra* note 4, art. 2; ICTY Statute, *supra* note 4, art. 4.

[61] Rome Statute, *supra* note 5, art. 6; *see* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 30 (1999) (suggesting genocide was only crime defined in Rome Statute "that received a quick and unanimous consensus").

[62] Whether to include political groups as a protected group under the Convention, for example, continues to be a contested issue. While political groups were expressly excluded from the Convention's scope, *see* Genocide Convention, *supra* note 1, art. II (including only "national, ethnical, racial, or religious group[s]"), some commentators argue that they are included in the *customary* definition of genocide. *E.g.*, Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2280 (1997). Some national courts, in punishing violators for acts of genocide, notoriously have expanded the definition to cover acts outside the scope of orthodox readings of the Convention. *See generally* Margarita K. O'Donnell, Note, *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations*, 84 N.Y.U. L. REV. 333 (2009) (critiquing recent Argentine judgments for unwarranted expansion of genocide definition).

[63] *See, e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 631, 631 (July 11) (joint declaration of Judges Shi and Vereshchetin) ("The Convention on Genocide is essentially and primarily directed toward the punishment of persons committing genocide or genocidal acts and the prevention of the commission of such crimes by individuals.").

[64] Prior to the ICJ's opinion in the *Genocide Case*, the literature reflected a widely held view that states could not be held responsible for the commission of genocide. *See, e.g.*, JOHN QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 222 (2006) (stating that Bosnia's claim in *Genocide Case* was novel considering widespread agreement that genocide can only be committed by individuals); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 290 (1999) (reading Article IV of Genocide Convention as limiting Convention's scope to individual perpetrators). As is suggested in Section II.A, *infra*, the drafters of the Convention were themselves divided on whether the Convention should impose affirmative obligations on states or only on individual perpetrators. *Cf.* U.N. GAOR, 3d Sess., 95th mtg. at 346, U.N. Doc. A/C.6/SR.95 (Nov. 8, 1948) (Mr. Perezo, Venezuela) (arguing against state responsibility and insisting that "[i]t was useless to provide for the abstract sentencing of a legal entity which would not be affected by the moral or material aspects of the severe measures in the sentence").

This Part considers the nature and scope of states' primary obligations[65] as understood prior to and after the *Genocide Case*. Section A reviews the drafting history of the Genocide Convention where the controversy over state responsibility first originated. Section B briefly summarizes the facts underlying the *Genocide Case*. Section C highlights key aspects of the Court's analysis and the scholarly critiques it has provoked.

A. An Ambiguous Compromise: The Travaux *of the Genocide Convention*

The language of the Genocide Convention does not provide clear guidance regarding the scope of states' obligations, and the *travaux préparatoires*[66] of the Convention suggest that the drafters never actually reached a consensus on the scope of state responsibility. The final language of the Convention instead represents an uneasy compromise enshrined in two articles that are difficult to reconcile. On the one hand, Article IV states: "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."[67] While this language seems to imply that responsibility only attaches to natural persons,[68] Article IX adds a wrinkle. In conferring jurisdiction upon the ICJ, Article IX suggests that states can be held responsible under the Convention:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the

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[65] For a discussion of primary and secondary obligations and the distinction between them, see *supra* notes 17–23 and accompanying text.

[66] Under the Vienna Convention on the Law of Treaties, when the ordinary meaning of treaty language is ambiguous, recourse may be made to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." Vienna Convention, *supra* note 31, art. 32. In international law, this preparatory work, namely the legislative or drafting history of treaties, is typically referred to by its French title, "*travaux préparatoires*." *See* BLACK'S LAW DICTIONARY 1638 (9th ed. 2009) (defining *travaux préparatoires* as "[m]aterials used in preparing the ultimate form of an agreement or statute, and esp. of an international treaty").

[67] Genocide Convention, *supra* note 1, art. IV. While Article II of the Genocide Convention defines "genocide," Article III defines the specific crimes that may be punished under the Convention. *See id.* arts. II–III.

[68] Some scholars have read this language to suggest that liability is "confined to those who have something in common with" those categories, i.e., natural persons. Van der Vyver, *supra* note 64, at 290. Other scholars reject this reading and argue that Article IV includes no such limitation since its purpose is simply to "ensure that individuals not escape responsibility by virtue of their position in government." QUIGLEY, *supra* note 64, at 235.

> International Court of Justice at the request of any of the parties to the dispute.[69]

This indecision about state responsibility stems from the tension between the desire to outlaw genocide on the one hand and states' reluctance to expose themselves to liability on the other. In the drafting process, a group of states, led by the U.K., lobbied for the inclusion of express state responsibility in the Convention, but they were only partially successful. They failed to garner sufficient support during the drafting of Article IV[70] but succeeded in the case of Article IX.[71] The language of the Convention thus failed to lay the tension to rest, and the ICJ was silent on the issue for more than half a century.

B. The Conflict in the Former Yugoslavia

In the *Genocide Case*, the Court addressed, for the very first time, state responsibility under the Genocide Convention.[72] The case centered on atrocities that occurred in Bosnia and Herzegovina during the conflict accompanying the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s. The SFRY, a federation formed in the 1940s and held together for decades by its leader Josip Broz Tito,[73] began to crumble slowly after Tito's

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[69] Genocide Convention, *supra* note 1, art. IX.

[70] The U.K. proposed an amendment that would have made state responsibility explicit: "Criminal responsibility for any act of genocide . . . shall extend not only to all private persons or associations, but also to States, Governments, or organs or authorities of the State or Government . . . ." U.N. Econ. & Soc. Council, *United Kingdom: Further Amendments to the Draft Convention (E/794)*, U.N. Doc. A/C.6/236 (Oct. 16, 1948). The amendment was narrowly rejected by twenty-four votes to twenty-two. U.N. GAOR, 3d Sess., 96th mtg. at 355, U.N. Doc. A/C.6/SR.96 (Nov. 9, 1948).

[71] The final language of Article IX derived from a joint amendment (proposing to amend what was then Article X), submitted by the U.K. and Belgium and further amended by India. *See* U.N. Econ. & Soc. Council, *Belgium and United Kingdom: Joint Amendment to Article X of the Draft Convention (E/794)*, U.N. Doc. A/C.6/258 (Nov. 10, 1948). This amendment was adopted by twenty-three votes to thirteen, with eight abstentions. U.N. GAOR, 3d Sess., 104th mtg. at 447, U.N. Doc. A/C.6/SR.104 (Nov. 13, 1948).

[72] While the Court had been asked to impose state responsibility for genocide before, it had not reached the merits in any of those cases. *See, e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.) (Preliminary Objections Judgment of Nov. 18, 2008), *available at* http://www.icj-cij.org/docket/files/118/14891.pdf (failing to reach merits in dispute between Croatia and Serbia); Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 279 (Dec. 15) (failing to reach merits of claim brought by Serbia and Montenegro); Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 347 (Dec. 15) (failing to reach merits in Bangladesh war case).

[73] *See, e.g.*, PETER RONAYNE, NEVER AGAIN? THE UNITED STATES AND THE PREVENTION AND PUNISHMENT OF GENOCIDE SINCE THE HOLOCAUST 103 (2001) (describing how Tito, through "combination of strict control from above and strong distaste for ethnic intolerance ushered in a lengthy period of stability and relative ethnic harmony for the Balkans").

death in 1980.[74] As the union fell apart and the Cold War came to a close, political leaders in the constituent republics capitalized on and fanned the flames of underlying ethnic tensions.[75]

In 1991, three republics—Slovenia, Croatia, and Macedonia—declared independence and left the union. Bosnia and Herzegovina ("Bosnia") followed a year later. While none of these republics was able to secede peacefully,[76] the violence that erupted in Bosnia, the most ethnically heterogeneous of the Yugoslav republics,[77] was particularly horrendous.[78] When the Bosnian people decided via referendum to declare independence,[79] Bosnian Serb nationalists, who had opposed independence, declared their own separate Bosnian Serb state (the Republika Srpska) within the borders of old Bosnia, with the backing of Slobodan Milosevic, the President of the Federal Republic of Yugoslavia (FRY, what remained of the recently defunct SFRY).[80] To aid the Republika Srpska's military (the VRS), Milosevic dispatched troops and other equipment belonging to the now Serb-dominated Yugoslav National Army (the JNA) to Bosnia.[81] Although the soldiers changed their badges, their army vehicles continued to bear traces of the label "JNA."[82]

The conflict was not simply about land ownership and political boundaries, but also about ethnic homogeneity. "Ethnic cleansing"—a euphemism for removing hostile ethnic groups from particular plots

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[74] *Id.* at 103–04; *see also* VIKTOR MEIER, YUGOSLAVIA: A HISTORY OF ITS DEMISE 3 (Sabrina P. Ramet trans., 1999) (describing "vacuum of authority" following Tito's death in 1980).

[75] *See, e.g.*, RICHARD HOLBROOKE, TO END A WAR 23–24 (1998) (arguing that Yugoslav atrocities were "the product of bad, even criminal, political leaders who encouraged ethnic confrontation for personal, political, and financial gain"); RONAYNE, *supra* note 73, at 103–04 (describing "resurgent nationalist sentiment and solidarity" that manifested itself after Tito's death and after fall of Soviet Union).

[76] *Cf.* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 247 (2002) (explaining that Croatia's declaration of independence resulted in seven-month war leaving some 10,000 dead and 700,000 displaced).

[77] Bosnia was home to three ethnic communities—Muslims, Serbs, and Croats—who lived "not only together, but intermixed." MEIER, *supra* note 74, at 195. The Bosnian people were divided along ethnic lines about whether to seek independence or to remain a part of the Serb-dominated Yugoslavia. *Id.* at 196.

[78] The violence in Bosnia is well documented. For a vivid summary of events, see generally POWER, *supra* note 76, at 247–327.

[79] CAROLE ROGEL, THE BREAKUP OF YUGOSLAVIA AND THE WAR IN BOSNIA 31 (1998) (showing that overwhelming majority chose independence). *But see* POWER, *supra* note 76, at 248 (noting this stark electoral result was due in part to Serbian boycott).

[80] POWER, *supra* note 76, at 248–49.

[81] *See id.* at 249 (noting contribution by Serb-dominated JNA to Bosnian Serb forces).

[82] *Id.*

of land using intimidation, forced expulsion, and murder—was widely deployed against ethnic non-Serbs.[83]

C. The ICJ Interprets the Genocide Convention

In 1993, while the war between Serb nationalists and newly independent Bosnia was still ongoing, Bosnia filed a complaint before the ICJ against the FRY alleging, inter alia, violations of the Genocide Convention.[84] In a preliminary judgment in 1996, the Court concluded that it only had jurisdiction over the dispute by virtue of Article IX of the Genocide Convention rather than under a more general grant of jurisdiction.[85] This meant that its subject matter jurisdiction was limited to questions "relating to the interpretation, application or fulfilment of the present Convention."[86] It could not look outside the four corners of the Convention, for example, by drawing on international humanitarian law or customary law,[87] which might have imposed greater obligations than those existing under the Convention itself.[88] Because of this limitation, the scope of state responsibility under the Genocide Convention was not merely a

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[83] *See Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 55, *in* The Secretary-General, *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/25274, Annex I (Feb. 10, 1993) (defining "ethnic cleansing" as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area"). The Bosnian Serb nationalists used a variety of "ethnic cleansing" tactics against the non-Serbian Muslims and Croats. POWER, *supra* note 76, at 249–50.

[84] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.) (Application Instituting Proceedings of Mar. 20, 1993), ¶ 4, *available at* http://www.icj-cij.org/docket/files/91/7199.pdf (accusing Yugoslavian government of "attempting to effectuate the complete and utter destruction of the State of Bosnia and Herzegovina as well as the extermination of its People").

[85] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 617–21 (Preliminary Objections Judgment of July 11). That is, the Court concluded its jurisdiction over the case was solely conferred by, and thereby precisely limited to, the multilateral treaty joined by both parties, namely the Genocide Convention. For a brief summary of the different forms of ICJ jurisdiction, see *supra* note 52.

[86] Genocide Convention, *supra* note 1, art. IX.

[87] In its application, Bosnia had asked the Court to weigh Serbia's actions against, inter alia, the Hague and Geneva Conventions, the U.N. Charter, and the Universal Declaration on Human Rights, as well as general international law. Vojin Dimitrijevic & Marko Milanovic, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT'L L. 65, 68 (2008).

[88] *Genocide Case*, *supra* note 11, ¶ 147 (explaining that since jurisdiction existed only under Geneva Convention Article IX, ICJ had "no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict"). Because the Court only had jurisdiction under Article IX, it "lost jurisdiction whenever it established that a particular atrocity, no matter how heinous, could not be qualified as genocide, but solely as a war crime or a crime against humanity." Dimitrijevic & Milanovic, *supra* note 87, at 84.

merits question but also a jurisdictional one. That is, to the extent that the ICJ concluded that the Genocide Convention did not contemplate state responsibility, it lost jurisdiction over the case.

In its final judgment, the majority of the Court chose not to focus its analysis on Article IX, which it considered "essentially a jurisdictional provision," and instead tried to "ascertain whether the substantive obligation on states not to commit genocide [might] flow from the other provisions of the Convention."[89] In a surprising move, the Court read state responsibility into an article where it had not generally been sought: Article I.[90] The Court argued that while Article I does not *expressly* require states to refrain from committing genocide, its *effect* is to impose such a prohibition.[91] The Court premised this on the classification of genocide as an international crime[92] and on states' obligation to prevent genocide.[93]

By stating so conclusively that the Genocide Convention did in fact impose an affirmative obligation upon states not to commit genocide, the ICJ took an important step in favor of state responsibility. This move has been criticized by commentators who believe the Genocide Convention merely imposes on states an obligation to prevent and punish.[94] Advocates for more direct state responsibility have been no less vocal, however, in their disapproval of the Court's opinion.[95] The following sections summarize these critiques.

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[89] *Genocide Case*, *supra* note 11, ¶ 166.

[90] *See* Genocide Convention, *supra* note 1, art. I ("The Contracting 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 to punish.").

[91] *Genocide Case*, *supra* note 11, ¶ 166.

[92] *See id.* (stating that by agreeing to categorize genocide as international crime "the States parties must logically be undertaking not to commit the act so described").

[93] *See id.* (stating that "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" since it would be "paradoxical" for states to be obliged to prevent genocide unless they were also "forbidden to commit such acts through their own organs, or persons [whose] conduct is attributable to [them]").

[94] *See, e.g.*, Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUR. J. INT'L L. 631, 635 (2007) (criticizing ICJ's judgment in *Genocide Case* for going against understanding that Genocide Convention does not impose obligation upon states not to commit genocide).

[95] *See, e.g.*, Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 J. INT'L CRIM. JUST. 875, 879 (2007) (criticizing Court for using criminal law categories and vocabulary in assessing Serbia's responsibility); Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 673–77 (2007) (criticizing Court for not holding Serbia directly responsible for supporting Bosnian Serb paramilitary groups); Scott Shackelford, *Holding States Accountable for the Ultimate Human Rights Abuse: A Review of the International Court of Justice's Bosnian Genocide Case*, HUM. RTS. BRIEF, Spring 2007, at 21, 23–24 (criticizing Court for applying unnecessarily strict attribution test).

1. An Onerous Evidentiary Burden

One controversial aspect of the ICJ's opinion is the standard of proof it imposed. Citing a 1949 precedent, the *Corfu Channel* case,[96] the Court stated that it had "long recognized that . . . charges of *exceptional gravity* must be proved by evidence that is *fully conclusive*."[97] In other words, the Court required that it be "fully convinced" of each element of genocide before imposing liability.[98]

While the Court's imposition of this onerous standard of proof was driven by the commendable desire not to take genocide lightly, it is important to remember that state responsibility under the Genocide Convention, as the ICJ itself explained, is civil, not criminal, in nature.[99] While the preamble to the Genocide Convention states clearly that genocide is "a *crime* under international law,"[100] that does not mean that *state* responsibility under the Convention is criminal.[101] Therefore, while a strict standard may be warranted, it should not rise to the level of a criminal standard. But the ICJ appears to have imposed just such a standard.[102] This onerous standard—when combined with a strict attribution test[103] and a refusal to consider circum-

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[96] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

[97] *Genocide Case*, *supra* note 11, ¶ 209 (internal citation omitted) (emphasis added).

[98] *Id.* For a scathing critique of the standard of proof imposed by the Court, see Ruth Wedgwood, Op-Ed., *Slobodan Milosevic's Last Waltz*, N.Y. TIMES, Mar. 12, 2007, at A23, *available at* http://www.nytimes.com/2007/03/12/opinion/12wedgwood.html.

[99] *Genocide Case*, *supra* note 11, ¶ 170. Recall also the overwhelming rejection of the notion of state criminality during the drafting of the ILC Articles. *See supra* notes 24–30 and accompanying text.

[100] Genocide Convention, *supra* note 1, pmbl. (emphasis added).

[101] This is consistent with the *travaux préparatoires* of the Convention. The French representative in the Sixth Committee, for example, explained that his government was "in no way opposed to the principle of the international responsibility of States as long as it was a matter of civil, and not criminal responsibility." U.N. GAOR, 3d Sess., 103d mtg. at 431, U.N. Doc. A/C.6/SR.103 (Nov. 12, 1948) (statement of Mr. Chaumont, France). The debates over the British amendment to Article IV "indicate[d] widespread opposition to any concept of State responsibility in a *criminal* law sense but [also] an equally widespread support for State *civil* liability." WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 420–21 (2000) (emphasis added); *see also* QUIGLEY, *supra* note 64, at 227 (arguing that disagreement among drafters centered on whether state responsibility was civil or penal). In any case, the ICJ does not possess the institutional authority to impose criminal liability. *Id.* at 231.

[102] *See, e.g.*, Cassese, *supra* note 95, at 879–81 (critiquing Court for transposing "in a manner not supported by any authority . . . criminal law categories to interstate relations, thereby classifying states' action under those criminal law categories"); Theodor Meron, *Major Developments in International Law: A Conversation on the ICJ's Opinion in* Bosnia and Herzegovina v. Serbia and Montenegro, 101 AM. SOC'Y INT'L L. PROC. 215, 215 (2007) (describing as "striking" extent to which ICJ drew "from criminal law and issues of criminal responsibility" despite case's being civil rather than criminal in nature).

[103] *See infra* Part II.C.2.

stantial evidence of intent[104]—raised the threshold high enough effectively to shut the door on most complaints under the Genocide Convention.[105]

2. *Attribution for the Acts of Non-State Actors*

Attribution was an important issue in the *Genocide Case*. The Court concluded that the VRS had committed genocide in Srebrenica,[106] but since the ICJ only had jurisdiction to impose *state* responsibility, it had to determine whether these genocidal acts were attributable to the Serbian state. The case turned, therefore, on the relationship between FRY (now Serbia) and the VRS.[107]

The Court recognized that the FRY made "considerable military and financial support available to the Republika Srpska" and that "had it withdrawn that support, [it] would have greatly constrained the options that were available to the Republika Srpska authorities."[108] However, despite this causal relationship, the Republika Srpska and the VRS were not de jure organs of the FRY as defined under the FRY's internal law,[109] so the Court drew on the international law of attribution to determine whether there was a de facto relationship.

To decide this issue, the ICJ chose to apply an extremely stringent attribution test that it first developed in the famous 1986 case between Nicaragua and the United States.[110] In that case, the Court required "clear evidence" of "effective control" by the state over the non-state forces "in all fields."[111]

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[104] *See infra* Part II.C.3.

[105] *See* Meron, *supra* note 102, at 216 (suggesting that high standard of proof when applied to attribution inquiry will "make it particularly hard for states to succeed in [similar] cases in the future").

[106] *Genocide Case*, *supra* note 11, ¶ 297 ("The Court concludes that the acts committed at Srebrenica . . . were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995."); *see also* notes 13, 76–83 and accompanying text (summarizing facts of conflict).

[107] *Id.* ¶ 237. The relationship was clearly quite close. "[N]ot only were troops of Bosnian Serb origin from throughout the JNA [the army of the defunct Socialist Federal Republic of Yugoslavia] transferred into the VRS, but the FRY maintained control over the VRS." Richard J. Goldstone & Rebecca J. Hamilton, Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, 21 LEIDEN J. INT'L L. 95, 98 (2008).

[108] *Genocide Case*, *supra* note 11, ¶ 241.

[109] *Id.* ¶ 386.

[110] In that case, the Court had to determine whether the United States's aid to the contras in Nicaragua was sufficient to hold the United States responsible for the contras' actions under international law. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[111] *Id.* ¶ 109–15. Although the Court acknowledged that U.S. aid was "crucial to the pursuit of [the contras'] activities," this support was "insufficient to demonstrate their *com-*

Applying the *Nicaragua* test to the conflict in the former Yugoslavia, the Court in the *Genocide Case* concluded that the VRS could not be characterized as a de facto organ of the FRY because it was not in a relationship of "complete dependence" with, nor was it "merely [an] instrument" of, the FRY.[112] The financial support it received, albeit crucial to the genocidal campaign, was not enough for the purposes of attribution.[113] In other words, even though the massacres in Srebrenica qualified as genocide[114] and the FRY contributed significantly to those massacres,[115] the State was still not responsible under the Convention.

The *Nicaragua* test is a controversial standard and has not been universally accepted.[116] For example, in the *Tadic* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) explicitly refused to apply this "effective control" test to facts virtually identical to those before the ICJ in the *Genocide Case*.[117] In *Tadic*, the ICTY critiqued the ICJ's *Nicaragua* test for failing to apply different tests to private individuals and unorganized groups on the one hand and hier-

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plete dependence on United States aid." *Id.* ¶ 110 (emphasis added). Ultimately, the Court refused to impose liability even though it was clear that the contra force was "at least at one period . . . so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States." *Id.* ¶ 111.

112 *Genocide Case*, *supra* note 11, ¶ 392.

113 *Id.* ¶ 388.

114 *Id.* ¶ 297 (finding that "the acts committed at Srebrenica . . . 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").

115 *Id.* ¶ 241 ("The Court finds it established that the Respondent was thus 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.").

116 *See, e.g.*, 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, 654 (2007) (suggesting that *Nicaragua* "effective control" test is supported by state practice only as against single private individuals and that international practices favor "overall control" test for attribution of acts by organized armed groups).

117 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 69 (July 15, 1999). It should be noted that the attribution question arose in a different context in *Tadic* than in *Nicaragua*. In *Tadic*, attribution was relevant to the analysis of whether the underlying conflict was "international" in character. In other words, the ICTY was interested in the relationship between VRS and FRY not for the purposes of imposing state responsibility on FRY (since the ICTY has jurisdiction only over individuals) but because attribution of VRS's acts to a foreign government would internationalize the conflict and bring it under the tribunal's jurisdiction. The Appeals Chamber did not deem this distinction important, however, finding that the inquiry in *Tadic* and *Nicaragua* was essentially the same: namely, "establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials." *Id.* ¶ 104.

archically structured groups on the other.[118] Concluding that the *Nicaragua* "effective control" test was only applicable to the former, the ICTY applied an "overall control" test to the relationship between the VRS and the FRY military, and held that the two "did not . . . comprise two separate armies in any genuine sense"[119] and that "overall control" was manifested "not only in financial, logistical and other assistance and support, but also . . . in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS."[120] Thus, by applying different attribution tests to the very same facts, the two courts reached radically different results, demonstrating how crucial the choice of attribution test can be.

The ICJ's reaffirmation of the *Nicaragua* test in the *Genocide Case* has given rise to considerable scholarly critique.[121] The essence of these critiques is that an unnecessarily narrow attribution test allows states to escape liability for serious breaches of international law even when all available evidence points to their culpability.[122] This is particularly consequential because of the important role played

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[118] *Id.* ¶ 120. In the case of private individuals and unorganized groups, in addition to showing that the state "exercised some measure of authority over those individuals," the ICTY said it was necessary to show that the state "issued specific instructions to them concerning the performance of the acts at issue, or that it *ex post facto* publicly endorsed those acts." *Id.* ¶ 118. For organized groups, on the other hand, it was sufficient to show that "the group as a whole [was] under the *overall control* of the State." *Id.* ¶ 120 (emphasis added). Otherwise, the tribunal cautioned, "States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility." *Id.* ¶ 123.

[119] *Id.* ¶ 151.

[120] *Id.* ¶ 156.

[121] *See, e.g.*, Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in* Bosnia v. Serbia *and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L.J. 871, 894 (2008) (expressing doubts that *Nicaragua* test "exactly mirrors the state of customary international law"); Griebel & Plücken, *supra* note 38, at 621 (describing ICJ's use of *Nicaragua* test as "a misapplication of established rules which is unlikely to find much support" and as "a legal mistake made by the Court, one which it might be difficult to correct in the future"); Shackelford, *supra* note 95, at 24 (arguing *Tadic* test is better-suited to deal with allegations of genocide than restrictive *Nicaragua* test). Other scholars disagree and believe the *Nicaragua* test is the most appropriate test. *See, e.g.*, Nikolas Rajkovic, *On 'Bad Law' and 'Good Politics': The Politics of the ICJ* Genocide Case *and Its Interpretation*, 21 LEIDEN J. INT'L L. 885, 896, 900 (2008) (arguing that more expansive attribution test would be "malleable to . . . extra-legal agendas" and would open door to "politicized jurisprudence," and that Court's adherence to *Nicaragua* sent "a forceful message . . . that international courts should not be used to advance extra-legal agendas").

[122] In both *Nicaragua* and the *Genocide Case*, the Court conceded that the support of the United States and Serbia, respectively, was essential to the accomplishment of the wrongful acts in question. *See supra* notes 111, 115.

by non-state actors in modern-day conflict[123] and the fact that states may try to escape liability by acting through non-state or foreign-state actors.[124] Because the purpose of the Genocide Convention is to outlaw genocide,[125] and the Convention contemplates state responsibility not only for failure to prevent and punish but also for direct commission,[126] and further since this responsibility is civil in nature,[127] the evidentiary bar must not be set so high that states can systematically avoid accountability.

3. The Specific Intent Challenge

The ICJ's decision in the *Genocide Case* has also been critiqued for its approach to specific intent. Genocide is defined not only by the acts through which it is accomplished (actus reus)[128] but also by the intent with which those acts are executed (mens rea).[129] To qualify as genocide, a mass murder must be inspired by more than just general feelings of animosity toward a minority group; the perpetrator must intend specifically "to destroy [that minority group], in whole or in part."[130] This specific intent is what distinguishes genocide from other mass murders.[131]

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[123] *See* Cassese, *supra* note 116, at 665 (noting that state support of armed groups is "a frequent and dangerous occurrence . . . [that] may lead to full-blown international armed conflicts . . . [or] serious threats to peace and security").

[124] "States no longer need to act by way of their *de jure* organs if they wish to achieve certain aims; they can make use of the existing private groups." Griebel & Plücken, *supra* note 38, at 620; *see also* Cassese, *supra* note 116, at 654 (cautioning that *Nicaragua* test permits states to "evade responsibility towards other states when they, instead of acting through their own officials, *use* groups of individuals to undertake actions that are intended to damage, or in the event do damage, other states").

[125] Genocide Convention, *supra* note 1, pmbl.

[126] *See supra* notes 91–93 and accompanying text (summarizing ICJ's conclusion to this effect).

[127] *See supra* notes 99–101 and accompanying text.

[128] BLACK'S LAW DICTIONARY 41 (9th ed. 2009) (defining *actus reus* as "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability").

[129] *Id.* at 1075 (defining *mens rea* as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime").

[130] Genocide Convention, *supra* note 1, art. II. "[T]he intention must be to destroy a group and not merely one or more individuals . . . . It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide." ILC 1996 Report, *supra* note 24, at 45.

[131] *See, e.g.*, BASSIOUNI & MANIKAS, *supra* note 9, at 527 ("It is [the] element of specific intent which distinguishes genocide from crimes against humanity, war crimes, and common crimes."); Milanovic, *supra* note 17, at 558 ("It is the extreme *mens rea* of genocide which draws the distinction between genocide and crimes of humanity . . . . They only become genocide if the perpetrator commits them with the intention of physically or biologically destroying a protected group, in whole or in part." (internal citations omitted)).

In the *Genocide Case*, Bosnia argued that the Court should infer Serbia's specific intent from "an overall plan to commit genocide, indicated by the pattern of genocidal . . . acts . . . committed throughout the territory."[132] The ICJ rejected this "pattern approach," suggesting instead that specific intent "ha[d] to be convincingly shown by reference to particular circumstances."[133] The ICJ's refusal to infer the requisite intent from circumstantial evidence is at odds with the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), which held that genocidal intent could be inferred from "the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others."[134]

The onerous specific intent standards imposed by the Court in the *Genocide Case*, combined with the high standard of proof and the difficult requirements for attribution, made imposition of state responsibility for the direct commission of genocide virtually impossible.[135] Yet, as I argue in Part III, the Court did not entirely foreclose state responsibility for genocide committed by non-state actors.

III
Reining in Non-State Actors

In this Part, I argue that the *Genocide Case* judgment *expanded* rather than *restricted* states' obligations under the Convention. Notwithstanding the Court's strict standards of attribution and specific intent for imposing liability for direct *commission* of genocide, the Court characterized the responsibility to *prevent* genocide as broad enough to impose on states an obligation to rein in the non-state actors over whom they have influence. This expansive obligation to prevent genocide is made all the more important because of the high potential to enforce it through multiple channels, including the U.N. and the state responsibility framework.

A. Reading the Genocide Case *as Expanding, Not Restricting, State Responsibility*

Notwithstanding the criticisms described in Part II, the ICJ's opinion in the *Genocide Case* is a significant, albeit incomplete, victory for state responsibility. In fact, the majority's opinion may be

[132] *Genocide Case*, *supra* note 11, ¶ 370.

[133] *Id.* ¶ 373.

[134] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 523 (Sept. 2, 1998).

[135] Shackelford, *supra* note 95, at 22 ("By applying the specific intent requirement in such a stringent manner, the ICJ has arguably limited prosecution of genocide to situations where there is 'smoking gun' evidence or its equivalent.").

about as radical as the Court could manage considering the constraints under which it operates.[136] The Court's ultimate holding that Serbia was not liable for the commission of genocide does not negate its revolutionary conclusion that the Genocide Convention imposes an affirmative obligation upon states not to commit genocide.

As discussed above, prior to the *Genocide Case* it was by no means settled law that the Convention imposed on states an independent duty not to commit genocide, a duty beyond their enumerated duties to prevent and punish genocide.[137] Furthermore, while the Court ultimately declined to hold Serbia liable for direct commission, it did so *on evidentiary grounds* only. Nowhere in its opinion did the Court acquit Serbia of liability; it simply held that Bosnia failed to meet the high standard of proof it required for an allegation as serious as genocide.

1. The Primary Obligations: Commission and Prevention

The Court's conservative direct commission holding is offset by its highly ambitious prevention holding. While the Court declined to hold Serbia responsible for the *commission* of genocide in the specific case at hand,[138] it nonetheless sent a clear message to states who support (or fail to stop) non-state actors in the commission of genocide,[139] by holding that Serbia violated its obligation to *prevent* genocide because it "was in a position of influence over the Bosnian Serbs who devised and implemented the genocide."[140] "States," the Court

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[136] Alexander Bickel famously described how the U.S. Supreme Court utilizes its "[p]assive [v]irtues," such as justiciability doctrines like standing and ripeness, to avoid judicial decisionmaking when prudent to preserve its legitimacy as a non-elected institution. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (2d ed. 1986). The ICJ is in an even more fragile position than the U.S. Supreme Court since not only its legitimacy but its very jurisdiction is dependent on the consent of Member States. *See supra* notes 52–54 and accompanying text.

[137] *See supra* notes 63–64 and accompanying text.

[138] *Genocide Case*, *supra* note 11, ¶ 415.

[139] Paul Schmitt, Note, *The Future of Genocide Suits at the International Court of Justice: France's Role in Rwanda and Implications of the* Bosnia v. Serbia *Decision*, 18 GEO. J. INT'L L. 585, 589 (2009) ("While the bar has been raised to demonstrate direct responsibility for genocide, states have effectively been put on notice that they may be held responsible for other forms of cooperation with genocidal regimes.").

[140] *Genocide Case*, *supra* note 11, ¶ 434; *see also id.* ¶ 438 ("In view of their undeniable influence and of the information . . . in their possession, the Yugoslav federal authorities should . . . have made the best efforts within their power to try and prevent the tragic events then taking shape . . . ."). In accordance with this liability finding, the Court imposed sanctions in the form of a declaration that Serbia and Montenegro had failed to comply with its obligation to prevent genocide under the Genocide Convention. *Id.* ¶ 463. The Court declined to award financial reparations, determining that Bosnia and Herzegovina had failed to establish a sufficient causal nexus between Serbia and Montenegro's

explained, are "under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence,"[141] and they are liable for failure to prevent genocide when they are "aware, or should normally have been aware, of the serious danger that acts of genocide would be committed."[142]

Although prevention and commission must not be equated or conflated, the ICJ's holding is nonetheless significant inasmuch as it imposes an obligation upon states to prevent non-state actors over whom they have "influence" from committing genocide. Thus, while the Court concluded that there was insufficient evidence that Serbia had "effective control" over the Bosnian Serb forces for the purposes of liability for the commission of genocide, it did find satisfactory evidence that Serbia had sufficient control over Bosnian Serb forces to hold it liable for failure to prevent genocide.[143] The Court's holding on the prevention issue is, in a sense, a gap-filler for the inadequacies left by its holding on the issue of direct commission and should theoretically provide for liability in many cases where the evidentiary and specific intent standards for direct commission cannot be met.

2. *Lower Evidentiary Standards for the Duty To Prevent*

Under the Court's doctrinal framework, the high evidentiary burden and the strict attribution test for commission are offset by a far more lenient test for prevention. In contrast to direct commission, the test for prevention does not contain an element of attribution. Instead, the ICJ asks whether the state has "the capacity to influence effectively the action of persons likely to commit, or already committing, genocide."[144] The emphasis is therefore not on *control* but on *ability to influence*.[145] This test brings within the scope of state responsibility not only de jure and de facto organs, but any individual or group which the state could, conceivably, rein in.[146] Furthermore,

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failure to restrain the Bosnian Serb military and the ensuing genocide at Srebrenica to support such reparations. *Id.* ¶ 462.

[141] *Id.* ¶ 166.

[142] *Id.* ¶ 432.

[143] *Id.* ¶ 438 (finding liability for failure to prevent genocide); *see also id.* ¶ 463 (imposing declarative sanctions).

[144] *Id.* ¶ 430.

[145] That being said, the prevention test does give some consideration to the legal status of the participants since states are only responsible for those actors whom they can influence without violating international law. *Id.*

[146] It is interesting to note that the Court contemplates that in any given situation, there may be several states whose obligation to prevent is triggered. Each state is required to take whatever steps are within its power and cannot plead as a defense that it was powerless to stop the genocide by itself because "the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have

unlike liability for direct commission or complicity, a state may be liable for failing to prevent genocide even when it takes no affirmative action.[147]

While a state's international *responsibility* for failure to prevent is only triggered when genocide has actually occurred,[148] the *obligation* to rein in potential perpetrators arises much earlier. A state must take action "at the instant that [it] learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed."[149] This duty is not territorially limited, which means that a state may be liable for failing to rein in actors over whom it has influence even if they are located outside the state's own borders.[150] In short, unlike for direct commission, a state's duty to prevent genocide requires that it "employ all means reasonably available to [it], so as to prevent genocide so far as possible."[151]

Survivors of genocide may derive less satisfaction from a finding of failure to prevent than from direct responsibility, but the duty to prevent is an important alternative, particularly—as in the *Genocide Case*—where the state in question is probably guilty of genocide but direct responsibility cannot be imposed for procedural or pragmatic reasons. In other words, the duty to prevent (and its lower evidentiary burden) is an important alternative way to hold states accountable for genocide.

B. Jurisdictional Limits on the Power of the ICJ

The *Genocide Case* highlights several inadequacies of the ICJ as a forum for addressing genocide. However, the ICJ, while poorly suited to *enforce* state responsibility, can play an important role in *defining* the contours of states' obligations under the Convention, which may then be enforced extrajudicially under the framework of state responsibility or through the system of international cooperation envisioned by the Genocide Convention itself. Thus, despite the ultimate holding

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achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce." *Id.*

147 While complicity requires "some positive action [to have] been taken," failure to prevent may arise from "mere failure to adopt and implement suitable measures to prevent genocide from being committed." *Id.* ¶ 432.

148 *See id*. ¶ 431 (holding that obligation to prevent genocidal event is only breached "if genocide [is] actually committed" (citing ILC Articles, *supra* note 15, at 138 (art. 14(3)))).

149 *Id.* (emphasis added).

150 *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 616 (Preliminary Objections Judgment of July 11) (noting that states' obligations "to prevent and to punish the crime of genocide [are] not territorially limited by the Convention").

151 *Genocide Case*, *supra* note 11, ¶ 430.

in the *Genocide Case*, the ICJ's doctrinal analysis is helpful to the international community's broader efforts to stamp out genocide.

The opinion in the *Genocide Case* itself demonstrates the limitations of enforcing the Genocide Convention through ICJ adjudication. While membership in the Court is virtually universal,[152] submission to its jurisdiction is ultimately voluntary.[153] Furthermore, even when it is able to exercise jurisdiction, it often takes many years to reach a final decision.[154] In transposing the Court's analysis to the political context, it is important to realize that the jurisdictional limitations under which the ICJ operates need not constrain the international political community. In fashioning a response to alleged instances of genocide, the international community acts within a much richer tapestry of rights and obligations than those stipulated in treaty instruments such as the ICJ Statute.[155]

In the *Genocide Case*, the Court stated in very clear terms that its jurisdiction was not coterminous with the parties' international obligations.[156] This indicates that the Court's holding did not necessarily sound the death knell for enforcing states' obligations not to commit genocide. Not only did the Court lack jurisdiction to address state violations falling short of genocide, but it also had to limit itself to the restrictive definition of genocide found in the Convention, rather than the broader definition that arguably exists in customary international law.[157] The prohibition against genocide may, in other words, be broader than the Court's analysis suggests. The Court only had juris-

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[152] *See supra* notes 48–50 and accompanying text (explaining that membership of ICJ is necessarily greater than or equal to membership of U.N.).

[153] *See supra* note 52 and accompanying text (describing voluntary nature of ICJ jurisdiction).

[154] The *Genocide Case* took fourteen years to decide and much of the Court's and the parties' energy during that time was spent on jurisdictional questions. *See supra* Part II.C (describing *Genocide Case* litigation).

[155] The U.N. Security Council, for example, has authority to take action in response to "any threat to the peace, breach of the peace, or act of aggression." U.N. Charter art. 39.

[156] *Genocide Case*, *supra* note 11, ¶ 148.

[157] In a statement to the press following the issuance of the opinion, Rosalyn Higgins, President of the ICJ, explained that while the Court was "confronted with substantial evidence of events in Bosnia and Herzegovina that may amount to war crimes or crimes against humanity," it did not have jurisdiction to make findings to that effect. "We have been concerned *only* with genocide," she explained, "genocide in the legal sense of that term, not in the broad use of that term that is sometimes made." H.E. Judge Rosalyn Higgins, President, Int'l Court of Justice, Statement to the Press (Feb. 26, 2007), http://www.icj-cij.org/court/index.php?pr=1898&pt=3&p1=1&p2=3&p3=1 (last visited Oct. 16, 2009). Many argue that the customary definition of genocide is broader than the conventional one. *See, e.g.*, Gaeta, *supra* note 94, at 632 (arguing that customary international law imposes broader obligations upon states than Genocide Convention does); Van Schaack, *supra* note 62, at 2280 (arguing that customary definition of genocide protects political groups although Genocide Convention does not).

diction to interpret the Genocide Convention itself, not its customary counterpart, nor was it permitted to apply international humanitarian law or international human rights law. Outside the courtroom these restrictions no longer apply.

States' obligations under the Genocide Convention may be enforced extrajudicially in at least two ways. The Convention, in Article VIII, expressly permits Member States to appeal to the United Nations. Furthermore, a state's obligation under the Convention, like any other obligation under international law, can be enforced through the system of state responsibility.

C. Enforcement Through the United Nations

Article VIII of the Genocide Convention permits Member States to "call upon the competent organs of the United Nations to take such action under the [U.N.] Charter . . . as they consider appropriate for the prevention and suppression of acts of genocide."[158] The framers of the Convention envisioned, in other words, that the organs of the U.N. would play a central role in the enforcement of states' obligations under the Convention. This provision may seem redundant since the U.N. Security Council is already empowered to take action in order to "maintain or restore international peace and security"[159] and since an established pattern of genocide is likely to qualify as a "threat to the peace"[160] justifying U.N. action even without resort to the Genocide Convention. Article VIII has independent significance, however, because it permits Member States to request U.N. action even before a threat to peace and security has been conclusively established. Article VIII includes no threshold requirement, which means that Members can appeal to the U.N. whenever they believe "appropriate" action is needed.[161] Article VIII's most significant contribution may lie, therefore, in explicitly permitting states to request action falling short of armed intervention in the early stages of genocide.

D. Enforcement Through the System of State Responsibility

Outside the framework established by the Genocide Convention, the prohibition against genocide may also be enforced through the

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[158] Genocide Convention, *supra* note 1, art. VIII.

[159] U.N. Charter art. 39. Permissible measures include the use of armed force. *Id.* arts. 41–42.

[160] *Id.* art. 39.

[161] Any action by the U.N. in response to such a request will obviously have to comply with the requirements of the U.N. Charter (otherwise it cannot possibly be considered "appropriate").

system of state responsibility.[162] It is in this context that the ICJ's redefinition of the obligation to prevent genocide becomes particularly significant. As suggested above, the prohibition against genocide is a peremptory norm of international law.[163] As such, serious violations by states of this prohibition give rise not only to secondary obligations for the breaching state,[164] but also obligate other states to respond, namely to "cooperate to bring [the breach] to an end through lawful means,"[165] and not to "recognize as lawful a situation created by [the] breach."[166]

Heightened secondary obligations arise from a state's failure to *prevent* genocide just as they do from the *commission* of genocide, since both are serious violations of a peremptory norm of international law.[167] Thus, the system of state responsibility permits, and even requires, action by third-party states, both individually and collectively, in response to a state's failure to rein in genocidal actors.

States' authority to act within the system of state responsibility is limited to "lawful" action,[168] which means that they cannot use force unless sanctioned by the U.N. Security Council.[169] However, this limitation does not mean that the broad license states have to act in response to breaches of peremptory norms is without significance.

There is a tendency to dismiss any reading of international law that envisions a broad role for the international community in enforcing international law as conflicting with the reality that the international community lacks the political will to exercise such broad authority.[170] This critique, however, proves too much. In a system

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[162] *See supra* Part I.A (describing system of state responsibility).

[163] *See supra* note 36 and accompanying text (describing general consensus that prohibition against genocide is *jus cogens*).

[164] *See supra* notes 20–23 and accompanying text (describing secondary obligations that attach upon violation of primary obligation by state).

[165] ILC Articles, *supra* note 15, at 286 (art. 41(1)).

[166] *Id.* (art. 41(2)); *see also supra* notes 30–34 and accompanying text (describing third-party states' obligations upon "serious" breaches of peremptory norms).

[167] An omission qualifies as a "wrongful act" under the Articles on State Responsibility. *See* ILC Articles, *supra* note 15, at 63 (cmt. to art. 1). Moreover, we must recall that at the time that the ILC concluded that a state's violation of the prohibition against genocide would give rise to heightened secondary obligations, *see supra* notes 30–36 and accompanying text, many scholars and states parties believed state responsibility under the Genocide Convention was in fact limited to prevention and punishment. *See supra* notes 64–71 and accompanying text.

[168] ILC Articles, *supra* note 15, at 286 (art. 41(1)).

[169] While this is implicit in the qualifier "lawful," *see id.*, the Articles also state explicitly that countermeasures must not violate the international prohibition against the use of force. *Id.* at 333 (art. 50).

[170] For example, while the Security Council has more-or-less unlimited authority to respond to threats to peace and security (including those posed by genocide), scholars frequently diminish the importance of this power by citing countless instances when the

that lacks a centralized executive, lack of political will can always prevent otherwise legitimate action. A solution to the political-will problem, which is beyond the scope of this Note, will require a fundamental shift in consciousness—the emergence of a profound sense of international responsibility. This is a transformative process that must necessarily take place in the social and political arena, independent of states' primary obligations in international law and jurisprudence.[171]

The law of genocide under the ICJ's interpretation imposes on states with the ability to stop genocide an obligation to do so. The reality that these legal obligations may not be enforced in the current international climate does not undercut the fact that such an obligation exists and that a system (albeit underutilized and imperfect) has emerged through which states could enforce it. Just as a *lack* of political will can be a hindrance to collective action, the *existence* of such a will can quickly make the previously impossible possible.[172] As the history of the U.N. Charter suggests, when popular opinion converges in considering a violation sufficiently serious, the international community reacts strongly, and sometimes tolerates even arguably *ultra vires* countermeasures.[173]

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desire to act has been trumped by a Permanent Member's veto. *See, e.g.*, Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 18–27 (cataloging Security Council's shortcomings). It is important to keep in mind, however, that this reality does not minimize the enormous potential for collective action that the Security Council embodies. The same can be said for the system of state responsibility and its potential for the enforcement of peremptory norms.

171 Prominent commentators have suggested that this shift is already occurring. In a 2001 report, the International Commission on Intervention and State Sovereignty (ICISS) identified "the responsibility to protect" as "an emerging guiding principle." INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 15 (2001). Under this new framework, "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe . . . but . . . when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states." *Id.* at VIII. In this model, state sovereignty and collective responsibility are not contradictory opposites but complementary principles lying on a continuum. In the years since the release of the ICISS's report, the "responsibility to protect" has gained some traction. Kofi Annan championed this new framework in his role as U.N. Secretary-General. In 2004 he appointed a panel whose report fully endorsed the principle. Sec'y-Gen.'s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 203, U.N. Doc. DPI/2367 (Dec. 2004). Annan similarly incorporated the principle into his own report a year later. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

172 "[W]here the necessary political will exists, a situation that would otherwise qualify as an 'internal affair' can be easily transformed into a 'threat to international peace and security.'" Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 254 (1995) (internal citation omitted).

173 Thomas Franck suggested that the U.N. Charter functions as a "quasi-constitutional" instrument that adapts through "the interpretive practice of its organs and members." THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND

When contemplating the potential for effective collective action, it is difficult not to feel discouraged by tragic examples of collective neglect. Nevertheless, it is important not to lose sight of how far the international community has progressed toward greater accountability, both practically and theoretically, since the international community first pledged to stamp out genocide over sixty years ago. While the response has been far from adequate, individual governments and governmental coalitions have shown a willingness to respond, in word and sometimes also in deed.

Conclusion

Although the International Court of Justice clearly stated that its *Genocide Case* judgment was by no means an acquittal,[174] this is precisely how it was read in both Serbia and Bosnia, and as such, it sent an unfortunate message to the masses in both states.[175] This is highly regrettable, but the Court's opinion must still be assessed fairly. The Court's ultimate holding on Serbia's responsibility should not obscure the important doctrinal moves the ICJ made within its jurisdictional and pragmatic confines.

Because of the context of the *Genocide Case*, the Court's judgment was destined to be controversial, regardless of its ultimate holding. Genocide is widely considered the crime of crimes, and the genocide label has great symbolic significance. Though acts constituting genocide are typically grave crimes in themselves—often carrying with them, in the individual criminal context, punishment as serious as that for genocide—this fact is often lost in the debate about whether to apply the genocide label because of the label's overwhelming significance. Further, in the *Genocide Case*, because the Court's jurisdiction was restricted to applying the Genocide Convention, its only real options were finding genocide or nothing. For these

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Armed Attacks 5, 171 (2002). Thus, even in the face of an absolute prohibition on the use of force under the U.N. Charter, the international community has turned a forgiving eye to use of force considered justified or necessary. *See id.* at 151, 156 (arguing that governments "pay attention to humanitarian concerns in calibrating their reaction" and suggesting that Security Council may, in some cases, "retroactively sanitize [regional] action that may have been of doubtful legality at the time it was taken").

[174] The Court stated in clear language that its judgment was limited to Serbia's liability under the Genocide Convention and had no bearing on its liability under customary international law or for violations of war crimes or crimes against humanity. *See supra* note 157 and accompanying text (describing ICJ President's statement to press suggesting that Serbia's actions may have constituted violations of other international laws for which Court did not have jurisdiction).

[175] *See* Dimitrijevic & Milanovic, *supra* note 87, at 85 (describing response to *Genocide Case* judgment in Bosnia and Serbia, where it was interpreted "as a judicial absolution of Serbia").

reasons, the Court's judgment conveyed an unfortunate sense of judicial absolution for Serbia.

However, the majority's opinion actually succeeds in striking a fairly even balance by declining to hold Serbia responsible for direct commission of genocide while simultaneously expanding the scope of state responsibility. In interpreting the Genocide Convention to impose an affirmative obligation on states not to commit genocide, and to prevent acts of genocide by non-state actors over whom the state exercises "influence," the Court has made an important contribution to building a legal regime for enforcement. Although enforcement of these obligations through the system of state responsibility will depend on existing political will, the Court's expansive view of states' obligations under the Genocide Convention is of great significance, not merely as a warning to potential perpetrators and their supporters but also as an invitation to the states standing on the sidelines to take appropriate action.