

## The Nature of the Genocide case

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### Introduction

After proceedings stretching to almost 14 years, in February 2007 the International Court of Justice (ICJ) finally ruled on the question of whether Serbia incurred State responsibility under the 1948 Genocide Convention for acts committed or omitted from 1991 to 1995 in Bosnia and Herzegovina.<sup>2</sup> In a highly anticipated judgment, the Court found that Serbia had not committed genocide in Bosnia nor could it be considered an accomplice to it. The Court did find Serbia responsible for failing to prevent and punish the genocide which occurred at Srebrenica in 1995. Though the finding that the genocide could not be attributed to Serbia appeared to reflect a broad consensus with a comfortable thirteen to two vote, a closer look reveals a fundamental divergence of views between the judges. At least five Judges within the majority argued in declarations and separate opinions that the acceptance by the Court that a State can *commit* the crime of genocide necessarily implies accepting that a State can incur criminal responsibility. However, general international law does not recognise the notion of State criminal responsibility, and nor did the Court in this case, nor either of the parties for that matter. Accordingly, those five Judges rejected the possibility that Serbia could be conceptualised as a perpetrator of genocide in the first place and thus concurred in the negative finding. Their position is an answer to an interesting question that needs to be further explored. Is it a legally sound solution to detach a criminal provision from its specifically designed procedural framework to apply it in a non-criminal procedure? To put it in other words, is it legally acceptable to hold a State responsible for the crime of genocide, in a dominantly civil procedure between States before the ICJ? What are the substantive and procedural consequences for such a course of action and more importantly, is the Court equipped for it? This commentary first assesses the Court's interpretation of the Genocide Convention. Subsequently, it deals with the question of whether the Court should adapt its procedure to better accommodate charges of extreme gravity with a criminal character. Thirdly, the

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<sup>2</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgment 26 February 2007, available online at: <http://www.icj-cij.org/docket/files/91/13685.pdf> (visited 14 September 2007).

question of whether the Court's acceptance that a State can commit genocide affects the nature of the responsibility for such a breach of international law is addressed. The commentary will conclude with a more general evaluation of the case.

## The interpretation of the Genocide Convention by the Court

The initial critical reactions on the case mostly focused on the high legal standards applied by the Court with regard to both evidence and legal definitions.<sup>3</sup> The Court's interpretation that the prohibition to commit genocide is addressed at States directly, as well as to individuals, was largely taken for granted or ignored. This is remarkable since a closer look at the Genocide Convention reveals that Article I only formulates two main obligations for States, namely to prevent and to punish genocide.<sup>4</sup> The Convention does not expressly prohibit *States* from committing genocide. This prohibition is historically only addressed to *individuals*.<sup>5</sup> The 1948 Genocide Convention should, in this regard, be situated in the historical context of the Nuremberg trials which, as is well known, in a revolutionary fashion broke away from traditional State responsibility by introducing the notion of individual criminal responsibility in international law. The primary motivation for this departure from classical State centred international law was to exclude the use of the State as a shield against the incurrence of international responsibility for the perpetration of crimes. This objective was aptly expressed by the International Military Tribunal at Nuremberg:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>6</sup>

The title and contents of the Genocide Convention suggest that it fits perfectly in the new post-war logic of attributing criminal responsibility to the *real* culprits of international crime: the individual.<sup>7</sup> The Convention provides the framework for co-operation in which the Contracting Parties confirm that genocide is a crime under international law and consequently will prevent and punish genocide committed by individuals. So the State is the instrument rather than the object of criminalisation. In light of the adverse effects

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<sup>3</sup> See Ruth Wedgwood, 'Slobodan Milošević's Last Waltz', in: *The New York Times*, 12 March 2007; and Antonio Cassese, 'A Judicial Massacre', 27 February 2007, at: [http://commentisfree.guardian.co.uk/antonio\\_cassese/2007/02/the\\_judicial\\_massacre\\_of\\_srebr.html](http://commentisfree.guardian.co.uk/antonio_cassese/2007/02/the_judicial_massacre_of_srebr.html) (visited 15 September 2007).

<sup>4</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (hereinafter, Genocide Convention), Article 1:

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.

<sup>5</sup> See for instance H. Lauterpacht, *International Law and Human Rights*, London: Stevens & Sons Limited, 1950, p. 44. See also *infra* notes 12 and 13.

<sup>6</sup> *Judgment of the International Military Tribunal*, trial of the Major War Criminals, 1947, *Official Documents*, Vol. I, p. 223.

<sup>7</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 1, Separate Opinion Judge Owada, para. 45 for a similar view. See *supra* note 3 for the title.

associated with the *de facto* punishment of the State of Germany provided for in the Treaty of Versailles, the emancipation from collective responsibility should be seen as a positive development. Yet an exclusive individualistic approach also completely fails to capture the involvement of the State in the perpetration of the crime. As States must have been aware just a few years after the Holocaust, genocide is hardly conceivable without the availability of a State apparatus. Its systematic nature requires active participation of the State, or at the very least its acquiescence. Thus any absence of a reference to this reality would result in a seriously flawed Convention.<sup>8</sup>

This provoked continued efforts from the United Kingdom during the negotiations of the Convention to insert links to State responsibility in the provisions, but most other States rejected the concept of State criminal responsibility.<sup>9</sup> Only at the final stages of the negotiations was a joint amendment to Article IX referring to State responsibility for genocide successful, and then only when it was ‘watered down’ to a civil-like responsibility.<sup>10</sup> But as Judges Shi and Vereshchetin noted in their joint declaration to the Preliminary Objections Judgement, the amendment was still only accepted by a very small majority of 19 against 17 votes, with 9 abstentions.<sup>11</sup> Moreover, a great deal of confusion between the negotiating States remained as to the precise nature of the provision as being either civil or criminal. This illustrates that the compromise that emerged from the negotiations, namely a crime resulting in civil responsibility, is far from self-evident.<sup>12</sup> The willingness of the delegations to accept the notion of the State as perpetrator did not go so far as to create a substantive provision identifying the elements of a State perpetrated genocide.<sup>13</sup> As one commentator observed, this peculiar outcome leaves the Genocide Convention conferring jurisdiction to the ICJ for an act that has not been described in the Convention itself.<sup>14</sup> As is not uncommon for controversial notions lacking political support, it was essentially left to the judiciary to clarify the matter.

In considering whether the State parties to the Genocide Convention themselves are under an obligation not to commit genocide, the Court observed that ‘such an obligation is not expressly imposed by the actual terms of the Convention’.<sup>15</sup> The Court was reluctant to adopt Bosnia’s argument that Article IX imposes such an obligation, since it is only a jurisdictional provision. The Court did find a substantive basis for the obligation for States not to commit genocide in Article I. It asserted that the obligation to prevent genocide *implies* a direct prohibition for States to commit genocide. The Court held that when prescribing a certain act as a crime, States automatically undertake the obligation not to

<sup>8</sup> Nehemiah Robinson, *The Genocide Convention, A Commentary*, New York: Institute of Jewish Affairs 1960, p. 101.

<sup>9</sup> John Quigley, *The Genocide Convention: an international law analysis*, Aldershot: Ashgate 2006, at pp. 223-224.

<sup>10</sup> *UN Doc. A/C.6/SR.103*, p. 440.

<sup>11</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 1, *Preliminary Objections, Judgment, I. C. J. Reports 1996*, p. 595, Joint declaration of Judge Shi and Judge Vereshchetin.

<sup>12</sup> John Quigley, *supra* note 8, at pp. 227-233, and Nehemiah Robinson, *supra* note 6, pp. 101-102.

<sup>13</sup> *Ibid.*, p. 224.

<sup>14</sup> *Ibid.*, p. 224.

<sup>15</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 1, para. 166.

commit that act themselves. Moreover, the Court found that it would be paradoxical if States were under an obligation to prevent genocide being committed by persons over whom they exert some influence, but not by their own organs over which they are supposed to have full control. This is a logical and welcome interpretation by the Court that equally applies to ‘the other acts enumerated in Article III’.<sup>16</sup> Yet, it is instantaneously followed, as if to quickly prevent anyone from drawing a more evident inference, by the conclusion that the responsibility of the State involved is ‘quite different in nature from criminal responsibility’.<sup>17</sup>

Having determined that a State can commit genocide, it is up to the Court to identify precisely which are the elements of a State-perpetrated genocide. Though the issue might never have been resolved by the negotiating parties, the Court is short and resolute in its conclusion: States commit genocide *as defined by the Convention*.<sup>18</sup> Again it is hard to disagree with this finding. After all, one of the Convention’s main purposes is to denominate the previously nameless horror of genocide by introducing a legally binding definition, containing all the essential elements that give genocide its unique character. But the choice for the Convention’s definition, namely Article II, has far reaching implications, both substantive and procedural. As Article II indisputably is a criminal provision, the Court takes it upon itself to reconcile two supposedly distinct regimes of law: the classic regime of State responsibility and the modern regime of international criminal responsibility.

## Procedural consequences

The fact that the Court is not endowed with a criminal jurisdiction was not seen by the Court as an impediment to apply Articles II and III of the Convention. It considers itself fully capable of making an autonomous determination of genocide:

The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity.<sup>19</sup>

The Court does not indicate which exact statutory provisions enable it to undertake this task. Perhaps it should be understood as to refer to Article 36 of the ICJ Statute as it lays down the virtually unlimited jurisdiction *ratione materiae* and thus allows cases of extreme gravity to be brought before the Court.<sup>20</sup> Clearly the Court does not want to forfeit its competence to adjudicate extreme grave interstate disputes, even when criminal tribunals have been put into place to effectuate the individual criminal responsibility for the exact

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<sup>16</sup> Ibid., para. 167.

<sup>17</sup> Ibid., para. 167.

<sup>18</sup> Ibid., para. 180.

<sup>19</sup> Ibid., para. 181.

<sup>20</sup> Provided that they concern questions of international law.

same configuration of facts. It considers that it still has a role to play even when the facts amount to criminal acts. One might wonder though whether the Court wrongly equates the *competence* with the *capacity* to deal with these cases. A criminal tribunal has procedures and powers that are tailor-made for its primary purpose: the application of substantive criminal law. This application is not unqualified. Criminal procedure reflects a delicate balance between the different goals of a criminal procedure such as truth finding, protection of the rights of the accused, but also efficiency. Particularly the first two objectives gain prominence in a criminal trial compared to other proceedings. Their weight is directly related to the seriousness of the blame that is embodied by the substantive provision. The graver and more morally reprehensible the offence, the more important it becomes to decide the case on the basis of the truth while simultaneously safeguarding the accused against unwarranted legal infringements in the course of the criminal proceedings or against wrongful conviction.<sup>21</sup>

There is thus an intimate relationship between substantive criminal law and criminal procedure and those two should not be (arbitrarily) detached from each other. This has also been underlined by the European Court of Human Rights (ECtHR). According to its leading case law, a criminal charge cannot be disconnected in its substance from the procedural guarantees that must ensure the right to fair trial of an accused. To determine whether a charge is essentially criminal, the nature of the offence is the most important factor.<sup>22</sup> “The relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.”<sup>23</sup> The European Court’s case law confirms that removing a criminal charge from its original criminal framework to a different (less intrusive) procedure will not break the connection between the offence and the minimum procedural guarantees that correspond to the seriousness of the offence.<sup>24</sup>

In this regard the ICJ was fully justified in rejecting Bosnia’s proposition that, since the matter was not one of criminal law, the balance of probabilities would be the appropriate standard of proof.<sup>25</sup> Consistent with the exceptional gravity of the charge (and previous case law),<sup>26</sup> the Court required proof that is ‘fully conclusive’. This means that the Court will only hold that Serbia as a State is responsible for genocide if the Court is fully convinced that the allegations regarding genocide or the acts enumerated in Article III have been clearly established. By adopting this standard of proof the Court recognised the importance of protecting Serbia against an inadequately supported determination of genocide and it acknowledged the importance of truth finding. Both objectives originate

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<sup>21</sup> This function is aptly expressed by Judge Robertson (limited to the context of the principle of legality): “...it is precisely when the acts are abhorrent or deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime...”. *Prosecutor v. Norman Hinga*, Dissenting Opinion Judge Robertson - *Decision on preliminary motion based on lack of jurisdiction (child recruitment)*, 31 May 2004, para. 12.

<sup>22</sup> *Ozturk v. Federal Republic of Germany*, ECHR Series A vol.73, para. 52.

<sup>23</sup> *Ibid.*, para. 54.

<sup>24</sup> In Dutch criminal doctrine the relationship is described as an ‘unbreakable connection’. See G.J.M. Corstens, *Het Nederlandse strafprocesrecht*, Deventer: Kluwer 4<sup>th</sup> ed., pp. 4-5.

<sup>25</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, supra note 1, para. 208.

<sup>26</sup> *Corfu Channel (United Kingdom v. Albania)*, Judgment, I.C.J. Reports 1949, p. 17.

from the manifest criminal character of genocide, which is often referred to as the ‘crime of crimes’, and ‘singled out for special condemnation and opprobrium’.<sup>27</sup>

One might argue that even if the blame should be considered of a criminal character, this still does not justify a higher standard of proof since the Court cannot impose a formal sanction against which Serbia needs to be protected. But the Court is not legally precluded from ordering financial compensation that reflects the gravity of the breach.<sup>28</sup> Furthermore, the exceptional blameworthiness intrinsic to the crime of genocide more than compensates for the absence of formal sanctions. Rather, the unique stigma attached to the crime of genocide should be seen as a punitive effect in itself. This view is supported by the Appeals Chamber of the ICTY: “Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.”<sup>29</sup> The stigmatisation thus demands that charges of genocide are scrutinised with the utmost care and precision, as such determinations entail a grave infringement on the standing of a member of the international community.

Interestingly, the Court differentiated between the standard of proof for the obligation to punish and for the obligation to prevent genocide. Though allegations that a State has failed to prevent or punish genocide still requires proof ‘at a high level of certainty appropriate to the seriousness of the allegation’, the Court did not refer to the fully conclusive standard as it had done with regard to the prohibition for a State to *commit* genocide. Although admittedly a matter of degree, the Court apparently considers the obligation to prevent or punish of a less serious category than the prohibition to commit. This is a notable difference since the obligation not to commit genocide is directly derived from the obligation to prevent. It seems to be an acknowledgement by the Court that the criminal character of Articles II and III justifies a higher standard than obligations such as in Article I, which have not been framed in criminal terms.

In addition to the safeguard against stigmatisation of the accused party without fully convincing evidence, one might argue that the importance of establishing the truth about the alleged genocide exceeds the interest of the parties. The *ius cogens* status of the prohibition of genocide and its *erga omnes* character seem to leave little room for another conclusion. As the obligation not to commit genocide is owed to the international community as a whole, and deviance from that obligation is not allowed, the international community has a legitimate interest in having the truth established regarding the alleged genocide. This gives the Court greater responsibility to establish the facts regardless of, or

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<sup>27</sup> Respectively: *Prosecutor v. Kambanda* (ICTR 97-23-S), Trial Chamber I, 4 September 1998, para. 16, *Prosecutor v. Radislav Krstic*, (Case No: IT-98-33-A), Appeals Chamber 19 April 2004, para. 36.

<sup>28</sup> Although the possibility of ‘damages reflecting the gravity of the breach’ proved controversial and was finally deleted from article 42(1) of the Articles on State Responsibility, the Court can of course decide that the particular circumstances warrant the use of that standard. See on this point James Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge: Cambridge University Press 2002, p. 36.

<sup>29</sup> *Prosecutor v. Krstic*, supra note 26, para. 37.



in addition to, the information that the Parties bring before the Court.<sup>30</sup> In this respect one may question the suitability of the traditional bilateral formula, that the procedure before the Court is moulded into.

At this point the Court shows an inconsistent approach by raising the standard of proof to rule out uncertainty, while shying away from asking for the complete version of the Supreme Defence Council minutes under Article 49 of its Statute.<sup>31</sup> This decision is not explained except for a rather irrelevant assertion by the Court that Bosnia ‘has extensive documentation and evidence available to it’.<sup>32</sup> While the decision was heavily criticized by Vice-President Al-Khasawneh,<sup>33</sup> quite remarkably, no other Judge attempted to justify the omission. This author argues that the Court should have ordered Serbia to provide the records. A next query however, is what the consequence should be from a failure by Serbia to do so. The Court does not have many options. A reversal of the burden of proof on attribution as proposed by Bosnia would be too extreme, as that would come down to a *de facto* finding of genocide (provided that Serbia would have refused to produce the requested evidence). Such a ‘formal truth’, based on the choice of Serbia not to meet the request and theoretically opting for the consequences, seems highly undesirable with regard to a charge of genocide. Such a charge demands in the most absolute terms a decision based on the actual facts, in other words the ‘material truth’. Criminal courts are endowed with an arsenal of investigatory powers in order to be able to decide as much as possible on the ‘material truth’. The lack of comparable powers casts doubt on the Court’s position that it is sufficiently equipped to deal with these exceptionally serious cases.

This doubt is not removed by the Court’s handling of the method of proof. Though it starts out promising by stating that it must make its own determination of the facts, it relies almost entirely on the findings of the ICTY. As the Court is fully justified in accepting the factual findings in *judgments* of the ICTY as ‘highly persuasive’, the choice to also attach value to the decision of the Prosecutor, ‘either initially or in an amendment to an *indictment*, not to include or to exclude a charge of genocide’ seems to be based on a false assumption. The Court seems to assume that a decision not to prosecute for genocide in a particular case is necessarily related to a lack of evidence. In reality many reasons can lead to the deletion of a charge from the indictment, particularly the avoidance of a lengthy and costly trial in light of the completion strategy. Instead of autonomously evaluating the evidence regarding genocide, it draws a negative inference from such a choice. Thus the evidence regarding genocide like in the *Plavsić* case,<sup>34</sup> where the Prosecutor dropped the

<sup>30</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, supra note 1, Separate opinion Judge Tomka, para. 72 for a similar view.

<sup>31</sup> Bosnia suspected that the “redacted” sections of the SDC minutes would contain vital information on issues like attribution and genocidal intent. Serbia refused to provide the minutes of the SDC. See *Bosnia and Herzegovina v. Serbia and Montenegro*, supra note 1, at para. 204-206. For background information see M. Simons, ‘Genocide Court Ruled for Serbia Without Seeing Full War Archive’, *The New York Times*, 9 April 2007.

<sup>32</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, supra note 1, at para. 206.

<sup>33</sup> *Ibid.*, Dissenting opinion Vice-President Al-Khasawneh, at paras. 35, 62.

<sup>34</sup> *Prosecutor v. Biljana Plavsić*, (Case No. IT-00-39&40/1), Trial Chamber, Judgement, 27 February 2003. Some other cases where convictions on lesser counts than genocide followed a guilty plea: *Prosecutor v.*

charges on genocide after a plea bargain agreement with Plavsić, is excluded from scrutiny by the Court. The fact that the judges of the ICTY are deprived of the opportunity to review the evidence on genocide, does not automatically make the evidence unreliable or insufficient.

By giving significance to prosecutorial strategy, the Court adopts a policy that allows it to use all judgments as evidence, whether genocide featured in the indictment or not. This strategy makes it very unlikely that the Court will reach conclusions other than those of a criminal tribunal, therefore demonstrating its unwillingness to engage in intensive independent fact finding and evaluation. The statement that “[t]he Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, *without* an individual being convicted of the crime or an associated one”,<sup>35</sup> becomes an empty phrase once a criminal tribunal has been set in place.

### Substantive consequences?

The position that the Court is capable to deal with cases of extreme gravity also has consequences at the substantive level. The lack of a criminal jurisdiction forces the Court to treat the criminal acts as treaty violations and consequently as wrongful acts generating international responsibility. There seems to be agreement that this kind of responsibility is not of a criminal nature.<sup>36</sup> In the second reading of the Draft Articles on State Responsibility,<sup>37</sup> the International Law Commission had to abandon the notion of a ‘crime of State’ on account of a lack of consensus on the full implications and the ‘potential to destroy the project as a whole’.<sup>38</sup> International responsibility is frequently characterised as neither criminal nor civil, but simply ‘international’ in nature.<sup>39</sup>

One would tend to agree with the Court’s assertion that it is not *legally* precluded from establishing the international responsibility of a State for genocide. There is nothing inherently problematic about the adjudication of the same facts by another judge outside the context of an appeal, provided that a different dimension of blameworthiness is at

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*Momir Nikolic* (Case No. IT-02-60/1-S), Trial Chamber, Sentencing Judgement, 2 December 2003; *Prosecutor v. Obrenovic* (Case No. IT-02-60/2-2), Trial Chamber, Sentencing Judgement, 10 December 2003.

<sup>35</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, supra note 1, para. 182.

<sup>36</sup> According to the authoritative ILC commentaries in the Articles on State Responsibility, the regime of State responsibility makes no distinction between civil or criminal law. See *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10 (A/56/10), *Commentaries* article 12, under 5. A similar view is taken by Special Rapporteur on State responsibility John Crawford: see J. Crawford and S. Olleson, ‘The Nature and Forms of International Responsibility’, in: Malcolm D. Evans (ed.), *International Law*, Oxford: Oxford University Press 2<sup>nd</sup> ed. 2006, pp. 457-458, and Alain Pellet: See Pellet, Alain, ‘Can a State Commit a Crime? Definitely, Yes!’, *European Journal of International Law* (10) 1999, p. 433. For a different view see Nina H.B. Jørgensen, *The responsibility of states for international crimes*, Oxford: Oxford University Press, 2003.

<sup>37</sup> *UN Doc. A/56/10* (2001), p. 279.

<sup>38</sup> See Crawford, supra note 27, p.20.

<sup>39</sup> Supra note 35.



stake. Under domestic law, criminal acts can give rise to both criminal and civil responsibility. Since essentially another blame is subject to judicial scrutiny, double jeopardy will not come into play and thus there is no mutual exclusion.<sup>40</sup> What would be problematic though, is a civil judge not restricting himself to reviewing the same facts as a criminal judge, but also applying a criminal provision instead of a definition of a wrongful act in order to qualify those facts. He would be assessing a criminal blame for which he lacks the necessary means as described in the above sections. Several goals of a legal procedure are intensified in a criminal context such as truth finding and the protection of the accused, and the civil procedure is not specifically designed to accommodate them to the necessary extent. Procedural aspects aside, the civil judge would be establishing a criminal kind of responsibility which is embodied in the substantive provision.

The individual opinions of the Judges in the *Genocide* case reveal that a similar consequence with respect to the case, namely the application of a substantive criminal provision in a non-criminal procedure and its consequences, must have been intensely debated during the deliberations. *Ad hoc* Judge Kreca argued that the perpetration of an act defined as a crime and the concept of criminal responsibility cannot be separated. The acceptance of a State being capable of committing genocide leads to the ‘original and genuine’ criminal responsibility of the State ‘as a natural and inevitable consequence’.<sup>41</sup> Judge Tomka held a similar view by stating that the interpretation of a State *committing* genocide implicates ‘the criminal responsibility of States in international law’.<sup>42</sup> In a similar vein Judges Shi and Koroma jointly opined that the acceptance of the State as perpetrator, produced an outcome contrary to the plain meaning of the Convention, namely the criminal responsibility of the State.<sup>43</sup> Judge Skotnikov took a slightly different approach in his dissent on this point. He implicitly agreed with the above cited Judges that criminal responsibility and perpetration of a crime cannot be separated. But as genocide has been qualified as an international wrongful act by the majority and thus not as a crime, it is not State criminal responsibility that has been generated. Skotnikov therefore concludes that the Court has decriminalised genocide, in contravention with the Convention which characterises genocide exclusively as a crime.<sup>44</sup> In addition to the five Judges, Judge Owada rejects the interpretation of the majority that a State can be a perpetrator of genocide under the Convention, which in his view would result in ‘somewhat less than criminal responsibility for jurisdictional reasons’.<sup>45</sup>

The position of this ‘hidden’ minority of Judges, that the acceptance that States can commit crimes influences the nature of the incurred responsibility, certainly seems to have

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<sup>40</sup> This concurrence can even yield different outcomes, like in the extensively media-covered O.J. Simpson case where the suspect was acquitted for murder in the criminal trial but held liable in a civil trial for the same facts for wrongful death. More often a (successful) civil suit will follow upon a criminal conviction.

<sup>41</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, supra note 1, Separate Opinion of Judge *ad hoc* Kreca, para. 129.

<sup>42</sup> *Ibid.*, Separate Opinion of Judge Tomka, para. 55.

<sup>43</sup> *Ibid.*, Joint Declaration of Judges Shi and Koroma, paras. 1, 4.

<sup>44</sup> *Ibid.*, Declaration of Judge Skotnikov (first page of the merits).

<sup>45</sup> *Ibid.*, Separate Opinion of Judge Owada, para. 71.

merit. It raises a serious question regarding the Court's assessment that the responsibility resulting from Articles II and III is essentially 'quite different in nature from criminal responsibility'. After all, the nature of the responsibility for the crime of genocide is not simply what the Court states it to be, authoritative as such a statement may be. Nor is it what the negotiating parties of the Genocide Convention envisaged, though the confusion indicates that a common view on the precise nature was never actually achieved.<sup>46</sup> The nature of the legal responsibility can only be determined by substantive criteria like the nature of the legal interest underlying the obligation, the (punitive) consequences of a violation of the obligation and foremost the elements of which the obligation is composed. Though it exceeds the limited scope of this commentary, a more detailed examination of the precise nature seems to be called for.

## Conclusion

The Genocide case presented several major challenges to the Court. Other contributions have already highlighted the difficulties the Court had to face when dealing with jurisdiction and reparations.<sup>47</sup> The fundamental question whether States can commit crimes was another issue of great importance. While in criminology there is an increasing interest in the involvement of the State in international crimes,<sup>48</sup> international law has largely been 'in denial' since the introduction of individual criminal responsibility. The Court's interpretation of the Genocide Convention should be welcomed as an essential recognition in law of the role of the State in the participation of crimes. The negotiations preceding the Genocide Convention and the deliberations within the International Law Commission demonstrate the controversy that surrounds the concept of State crime and the responsibility it generates. The Court certainly did not take the easy way out by applying a restrictive, literal interpretation method which would have resulted in conformation to the famous Nuremberg maxim that States do not commit crimes. Hence State responsibility does not end where international criminal law begins.<sup>49</sup>

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<sup>46</sup> Supra note 11.

<sup>47</sup> See Terry Gill, 'The "Genocide" case: Reflections on the ICJ's Decision in Bosnia-Herzegovina v. Serbia', 2 *Hague Justice Journal* 1 (2007), at <http://www.haguejusticeportal.net/eCache/DEF/7515.html> (visited 17-09-2007). Christian Tomuschat, 'Reparation in Cases of Genocide', 9 July 2007, at: <http://www.haguejusticeportal.net/eCache/DEF/7879.html> (visited 17-09-2007), L. Breuker, 'The Judgment of the ICJ in the Genocide case: The State as Perpetrator of Genocide', 8 *Griffin's View* nr. 2, June 2007, pp. 39-78. Forthcoming: symposium on the *Genocide* judgment in Vol. 18 of the *European Journal of International Law*.

<sup>48</sup> For instance Penny Green & Tony Ward, *State Crime, Governments, Violence and Corruption*, London: Pluto Press 2004, and Ronald C. Kramer & Raymond J. Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq', *British Journal of Criminology* (45) 2005, pp. 446-469, David Kauzlarich and Ronald C. Kramer, *Crimes of the American Nuclear State: At Home and Abroad*. Boston: Northeastern University Press 1998.

<sup>49</sup> For an excellent forward-looking analysis of the interplay between the two regimes: André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *International & Comparative Law Quarterly* 3 (2003), 615-640.

But by claiming that it is capable of determining whether genocide has been committed by a State, the Court takes it upon itself to assess norms which are codified in substantive criminal provisions, thereby compelling itself to meet the high level of procedural demands that are inextricably linked with the crime of genocide. Though it raised the standard of proof to a level consistent with the blameworthiness of the charge, it portrayed the passive attitude with respect to fact finding efforts and the method of proof that characterises a civil judge. But one might wonder whether an active approach would have compensated the lack of a criminal procedure and matching powers to deal with this kind of cases. The Court inherited a Statute from its predecessor which operated in an era where party-autonomy as an expression of State sovereignty was an inviolable asset in international dispute settlement.<sup>50</sup> This autonomy goes at the expense of the powers of the Court and thus interferes to a large extent with the objective of truth finding that is required in cases of exceptional gravity that exceed the interests of the parties. Genocide should be decided upon the basis of the actual facts and not merely upon the facts that the parties are content for the Court to review. If the Court insists that the ‘old’ regime of State responsibility is suited to incorporate norms from the ‘new’ regime of international criminal law, as a minimum it has to adapt its attitude by actively engaging in truth finding.

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<sup>50</sup> A clear example of the strong position of party-autonomy is the fact that even in case of an alleged breach of *ius cogens* norms the Court still requires consent of both parties to adjudicate the case. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, para. 64.