

On the Use of Criminal Law Notions in Determining State Responsibility for Genocide

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Abstract

On the face of it the 1948 Convention on Genocide appears to be a treaty that on the one hand obliges contracting states to criminalize and punish genocide in their domestic legal systems and, on the other, arranges for interstate judicial cooperation for the repression of genocide. The International Court of Justice (ICJ), in the Bosnia v. Serbia judgment, has instead held that the Convention, in addition to providing for the criminal liability of individuals, also imposes on contracting states as international subjects a set of obligations (to refrain from engaging in genocide, to prevent and punish the crime, and also to refrain for all those categories of conduct enumerated in Article III: conspiracy, incitement, attempt, complicity). This approach raises two questions: (i) is it warranted so to broaden states' responsibility? (ii) when applying such Article III categories to state responsibility, should an international court such as the ICJ that pronounces on interstate disputes rely upon criminal law categories to establish whether a state incurs responsibility for conspiracy, complicity, and so on? Or should it instead forge autonomous legal categories better suited to state responsibility? The author sets forth doubts about whether it is appropriate to transpose criminal law categories to the corpus of international law of state responsibility. In particular, his misgivings relate to the category of 'state complicity in genocide' as set out by the Court: once the Court decided to transplant this criminal law category to state responsibility, arguably it should have relied upon the rigorous concept of complicity, as derived by international criminal courts from case law and the relevant practice of states, rather than apply a notion that finds no basis in international criminal law, in comparative criminal law or in state practice.

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1. The Genocide Convention as a Treaty on Judicial Cooperation in Criminal Matters

A careful look at the 1948 Convention on the Prevention and Punishment of Genocide shows that it pursues two goals: to oblige Contracting Parties to criminalize genocide and punish its perpetrators within the legal system of each Party, and accordingly to provide for the judicial cooperation of those Contracting Parties for the suppression of the crime. This is made clear by the preamble, where the drafters, after declaring that genocide is a crime under international law, set out their conviction that ‘in order to liberate mankind from such an odious scourge, *international co-operation* is required’.¹ The various provisions of the Convention bear out that this is its main purpose. In Article I it is stipulated that the Contracting Parties ‘undertake to prevent and punish’ genocide. Article III imposes upon Contracting Parties the obligation to punish not only the perpetration of genocide but also conduct somehow linked to the crime, which the provision defines by using criminal law categories: conspiracy, incitement, attempt and complicity. By Article IV Contracting Parties assume the obligation to punish persons committing genocide or related conduct even if they are ‘constitutionally responsible rulers’ or ‘public officials’. Article V provides for the enactment of the necessary criminal legislation, with particular regard to penalties. Article VI deals with criminal jurisdiction over the offence, and Article VII addresses the issue of extradition.

It thus seems clear, both from the text of the Convention and the preparatory works,² that the Genocide Convention is very much like some previous international treaties such as the 1926 Convention on Slavery (followed by the Protocol of 1953), the 1929 International Convention for the Suppression of Counterfeiting Currency, or the more recent Convention Against Torture of 1984, which provide for a set of international obligations that contracting states are required to implement within their own domestic legal systems and,

1 The emphasis is added.

2 For the preparatory works, see for instance N. Robinson, *The Genocide Convention – A Commentary* (New York: Institute of Jewish Affairs, 1960). It is crystal clear, for example with regard to Article III, that the drafters of the Convention only had in mind action to be taken by each contracting state at the domestic level. This is also apparent from the statement of the Swedish delegate: ‘The discussion at the beginning of this meeting seems to me to have shown that the significance of the terms corresponding to the French and English expressions here in question [used in Article III] — incitement, conspiracy, attempt, complicity, etc. — is subject to certain variations in many systems of criminal law represented here. *When these expressions have to be translated in order to introduce the text of the Convention into our different criminal codes in other languages*, it will no doubt be necessary to resign ourselves to the fact that certain differences in meaning are inevitable. It would therefore be advisable to indicate in the Committee’s report that Article IV of the Convention does not bind signatory States to punish the various types of acts to a greater extent than the corresponding acts aimed at the most serious crimes, as, for example, murder and high treason, already recognized under national law’. (UN Docs A/760, at 4, and A/C.6 SR.84, at 7, reported in Robinson, *op. cit.*, at 70; emphasis added).

in addition to arrange for judicial cooperation in the matter regulated by the treaty.

It was perhaps the naive assumption of the Convention's drafters that, after the horrendous genocide of European Jews in the Second World War and the stiff punishment of many of its planners and perpetrators at the hands of criminal courts, contracting states themselves would not dare to engage in genocide, or, in other words, would not go so far as to soil their hands with such horrible behaviour. It is plausible that this assumption to some extent accounts for the odd (or, rather, ingenuous) provision in Article VI stipulating that persons accused of genocide must be prosecuted and tried by the judicial authorities of the territory in which 'the act was committed' (plus a future international criminal court that in 1948 looked like a radiant daydream).

That the 1948 Convention was conceived of as a treaty having the scope I have just described, can also be inferred from another circumstance: both in 1947–1948 and subsequently, states have consistently shied away from the notion that they themselves might be held criminally responsible for genocide. In their view, states as international subjects may not commit *crimes* proper: they can only incur state responsibility for *internationally wrongful acts*. Hence, it would be inappropriate to apply criminal law categories to their conduct.

2. The ICJ's Approach to the Convention

In the judgment delivered on 26 February 2007 in the *Bosnia v. Serbia* case,³ the International Court of Justice (ICJ) has instead adopted an expansive interpretation on the Convention. It has preferred to look upon the Convention as a treaty that *also* imposes on contracting states themselves — as international subjects specific obligations relating to their own behaviour towards groups protected under Article II(1) (national, ethnical, racial or religious groups). This leads the Court to advance the notion that the Convention upholds 'a duality of responsibility' for genocide: according to the Court the same acts may give rise both to individual criminal liability and state responsibility.⁴

The Court has first of all construed Article I as imposing not only a duty to prevent and punish genocide, but also an obligation for contracting states to refrain from engaging in genocide.⁵ This interpretation, as the Court rightly notes, is fully warranted having regard to the object and purpose of the Convention. This interpretation broadens the scope of Article I and also makes the set of obligations it is designed to impose more consistent: it would

3 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, 26 February 2007, available online at: <http://www.icj-cij.org/docket/files/91/13685.pdf> (visited 29 April 2007) (hereinafter 'Judgment').

4 Judgment, §§ 163 and 173.

5 *Ibid.*, §§ 162–166.

be ‘paradoxical’ for states to be obliged to prevent and punish genocide, while being free to themselves engage in genocide.⁶ The interpretation ‘is also supported by the purely humanitarian and civilizing purpose of the Convention.’⁷ I would add that this obligation, as set out by the Court, does not remain unchecked: it is the ICJ that can ensure the judicial safeguard of compliance with such obligation, pursuant to Article IX of the Convention.

However, the Court does not stop here. It interprets Article III as implying that contracting states also are under the obligation to refrain from engaging in any of the types of conduct envisaged in that provision: conspiracy, direct and public incitement, attempt to commit genocide or complicity in genocide. In the view of the Court, although

the concepts used in paragraphs (b) to (e) of Article III, and particularly that of ‘complicity’, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals . . . it would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.⁸

Thus, the Court ends up contemplating the same prohibited conduct both with regard to individuals and to states. Both individuals and states may incur, respectively, criminal liability and state responsibility for the same unlawful behaviour (acts of genocide, conspiracy, incitement, attempt or complicity).

3. Two Problems Raised by the Court’s Approach

This approach poses two serious problems. First, is it warranted so to expand the possible state responsibility of Contracting Parties? To put it differently, is it warranted significantly to broaden the obligations deriving from the Convention for each Contracting Party? (According to the Court, such Parties are under the obligation not only to refrain from engaging in genocide, to prevent and punish genocide as well as conducts related to genocide, but also to refrain from conspiracy to commit genocide, from attempting, aiding and abetting or inciting genocide). The Court does not explain what justifies this remarkable extension of contracting states’ obligations under the Convention. It simply and tersely refers to the object and scope of the Convention. Can this means of interpretation justify such a sweeping conclusion? Whatever the answer, one point needs to be emphasized. The Court’s conclusion is — at least in some respects — in stark contrast with what the Court later asserts with regard to the ‘overall control’ test propounded by the ICTY in *Tadić*, namely that this test must be regarded as unsuitable ‘for it

6 *Ibid.*, § 166.

7 *Ibid.*, § 162.

8 *Ibid.*, § 167.

stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'.⁹ Assuming that the 'stretching' required by the *Tadić* test is excessive, for it unduly broadens state responsibility, is it not also excessive unduly to widen state responsibility for genocide, without any support to this effect in state practice and *opinio juris*, or at least in general principles?

The second serious problem the Court's approach raises is as follows: since the legal categories applicable to establishing whether a contracting state is living up to the obligations flowing from Article III of the Convention are criminal law categories, how should the ICJ analyse such categories when determining whether a state is responsible for conspiracy, complicity, etc.? Should the Court first establish whether the organ of a Contracting Party entertains the requisite mental element and takes the requisite conduct, and then infer from this that the state is responsible for an internationally wrongful act? Or should the Court instead use those categories (conspiracy, complicity, etc.) as autonomous and self-sufficient public international law categories, that is, regardless of what is prescribed in this regard by international criminal law or by the domestic criminal law system of the relevant state?

4. The Court's Treatment of the Second Problem

In dealing with the second of the two aforementioned issues, the Court transposes — in a manner not supported by any authority and simply warranted, in the opinion of the Court, by a principle of interpretation based on the object and purpose of the Convention — criminal law categories to interstate relations, thereby classifying states' action under those criminal law categories. The essential reason behind this transposition is evident. Since international rules on state responsibility only know the category of (i) internationally wrongful acts and that of (ii) aiding and assisting in the commission of a wrongful act, to put into effect its approach to the Convention, the Court is constrained to *borrow* from criminal law when applying Article III to states' conduct.

This borrowing is not only artificial but may lead to paradoxical consequences. For instance, it could result in a crime being imputed to a state as an internationally wrongful act even if the state official perpetrating the act is not criminally punishable because he may legitimately avail himself of an excuse (think of the case of a commander who, having ordered the extermination of members of an ethnic group, then successfully pleads involuntary intoxication or insanity; or think of the member of a military unit who, ordered to execute members of a religious group, later, when charged with persecution or extermination, invokes mistake of fact, claiming that he was not aware that the victims had illegally been ordered to be murdered on religious grounds).¹⁰

⁹ *Ibid.*, § 406.

¹⁰ See the apposite remarks by P. Gaeta, 'Génocide d'Etat et responsabilité pénale individuelle', *Revue générale de droit international public* (2007) (forthcoming).

The Court's approach may also lead to using categories different from those upheld in international criminal law.

This in particular applies to what the Court says on the issue of complicity in genocide, as I will show below. It also applies to the relationship between different modalities of responsibility for genocide. According to the Court

[e]ven though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para (a)), conspiracy to commit genocide (Art. III, para (b)), and direct and public incitement to commit genocide (Art. III, para (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since *responsibility under (a) absorbs that under the other two*.¹¹

On the face of it this holding may appear to be convincing from the viewpoint of state responsibility. The problem is, however, that it is grounded in a departure from the criminal law import of the Convention. Under the criminal law provisions of the Convention (and the corresponding customary rules), genocide does not 'absorb' conspiracy or incitement because, exceptionally, these two categories constitute inchoate crimes, that is, criminal offences that (i) are or may be preparatory to other prohibited offences, and (ii) on account of their great danger to society are punished on their own, regardless of whether or not they have led to consummation of the major offence. It follows that an individual may be punished only for conspiracy to commit genocide (even if no genocidal acts follow), or for incitement to genocide (even if no other individual or group heed such incitement). By the same token, individuals may be convicted of both engaging in conspiracy to commit genocide *and* genocide, or of both publicly and directly instigating genocide *and* perpetrating acts of genocide. International case law is clear on this matter.¹² If one embraces the 'duality of responsibility' notion upheld by the ICJ, it is of course logically admissible to assert that in this area there is a *differentiation* between individual criminal liability and state responsibility. This is indeed what the Court does. However, one would have expected proof of, or arguments buttressing such differentiation, as well as clarification of the rationale for the 'absorption' of ancillary categories into the primary category, assertedly existing in the field of state responsibility for genocide. In particular, the Court should have asked itself whether the considerations militating in favour of regarding the various classes of criminal liability for genocide as distinct (and possibly cumulative) also apply to state responsibility. For instance, does conspiracy to commit genocide not followed by genocide generate state responsibility? If so, on what grounds? Would such responsibility be warranted by the need to prohibit to the

¹¹ Judgment, § 380 (emphasis added).

¹² That conspiracy to commit genocide is punishable even if genocide is then not perpetrated has been held by various ICTR Trial Chambers: see *Musema* (judgment of 27 January 2000, § 194), *Kajelijeli* (judgment of 1 December 2003, § 788), *Nahimana and others* (judgment of 3 December 2003, § 1044) and *Niyitegeka* (judgment of 16 May 2003, § 423). In *Nahimana and others*, the Trial Chamber found Nahimana, Barayagwiza and Ngeze simultaneously guilty of conspiracy to commit genocide, genocide and public and direct incitement of genocide (§§ 1091–1093).

greatest extent any action likely to lead to genocide? (In which case, this broadening of responsibility would be justified by the same reasons behind punishment of conspiracy to commit genocide as an inchoate crime).

5. States' Complicity in Genocide According to the ICJ

In its judgment the Court, after ruling that Serbia (formerly the Federal Republic of Yugoslavia, or FRY) did not commit genocide, discusses the question of whether that state may nevertheless be found responsible for complicity in genocide. For this purpose, the Court again tries to rely upon criminal law categories. However, since public international law also provides for some form of state responsibility for aiding another state in the commission of an internationally wrongful act, as recognized by Article 16 of the Articles on State Responsibility of the International Law Commission (ILC) ('aid and assistance in the commission of an internationally wrongful act'), the Court ends up sitting, as it were, on two stools, by combining public international law and criminal law categories.

After rightly noting that Article 16 of the ILC's Articles concerns a relationship between two states and is not therefore 'directly relevant to the present case' (which implied a relationship between a sovereign state, the then FRY, and a *de facto* government, the so-called Republika Srpska, operating within another sovereign state, Bosnia and Herzegovina), the Court points out that Article 16 'nevertheless merits consideration'.¹³ It then tries to amalgamate the notion enshrined in Article 16 with the notion of complicity in international criminal law, by emphasizing that both notions hinge on two elements: (i) the furnishing of aid or assistance for the commission of a crime and (ii) knowledge of the provider of such aid or assistance of the criminal intent of the principal perpetrator, which means, in the case of genocide, awareness of the specific intent (*dolus specialis*) of that principal perpetrator.¹⁴ More specifically, according to the Court complicity (i) 'always requires that *some positive action* be undertaken to furnish aid or assistance';¹⁵ and (ii) always requires 'full knowledge of the facts' of the crime committed or to be committed by the perpetrator.¹⁶

The Court then notes that, although the objective element required for complicity was met in the case at issue (Serbia provided substantial assistance of a political, military and financial nature to the authorities of Republika Srpska even during 'the tragic events of Srebrenica'), the mental element was not. In the Court's opinion

it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS [the Bosnian Serb

¹³ Judgment, § 420.

¹⁴ *Ibid.*, § 421.

¹⁵ *Ibid.*, § 432 (emphasis added).

¹⁶ *Ibid.*, §§ 422, 432.

Army] leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was underway; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.¹⁷

To clinch the point the Court states that it had not been conclusively established before it that, ‘at the crucial time’, namely ‘essentially between 13 and 16 July 1995’, the FRY ‘supplied aid to the perpetrators of genocide in full awareness that the aid supplied would be used to commit genocide’.¹⁸

6. Some Possible Objections

I respectfully submit that the Court’s argument lends itself to three major objections.

The first relates to the facts, as reported by the Court itself. The Court mentions the contacts regarding Srebrenica that Mr Carl Bildt, the European Union negotiator, had on 14 July 1995 with President Milošević and then again with him and General Mladić.¹⁹ The Court notes that these contacts do not establish ‘any direct involvement by President Milošević with the massacre’.²⁰ Whether or not this interpretation is correct, it seems most doubtful that even in those early days when the genocide was being carried out President Milošević was kept in the dark by General Mladić about what was really occurring. It would seem from the testimony General Clark rendered in the *Milošević* case that President Milošević was aware of what was going on in Srebrenica, if it is true that he had warned General Mladić of the danger of genocide.²¹

The second objection is that the Court, once it had chosen to rely upon criminal law categories for the notion of ‘complicity’, does not consistently

¹⁷ *Ibid.*, § 422.

¹⁸ *Ibid.*, § 423.

¹⁹ *Ibid.*, § 408.

²⁰ *Ibid.*

²¹ In his testimony before an ICTY Trial Chamber, General Clark stated about his conversation with Milošević on 17 August 1995: ‘I said, “Mr. President, you say you have so much influence over the Bosnian Serbs, but how is it then, if you have such influence, that you allowed General Mladić to kill all those people in Srebrenica?” And Milošević looked at me and he paused for a moment. He then said, “Well, General Clark,” he said, “I warned Mladić not to do this, but he didn’t listen to me.”’ Later on the witness makes the following observation: ‘Well, it was very clear what I was asking was about the massacre at Srebrenica. When I said “kill all these people,” it wasn’t a military operation, it was the massacre. And this was in fact what had been in the news. It had been the starting point for the international agreements which led to NATO’s increased resolve to see an end to the fighting in the Balkans. So it was very clear what I was asking. It was also, to me, very clear what Milošević was answering. He was answering that he did know this in advance, and he was walking the fine line between saying he was powerful enough, influential enough to have known it but trying to excuse from himself the responsibility for having done it’. (Transcript of hearing of 15 December 2003, at 30373–30374).

do so. Had it adopted a rigorous criminal law approach, it could have come to a different conclusion with regard to both the mental element (*mens rea*) and the objective element (*actus reus*) required for an accomplice to incur responsibility.

On the question of mental element the case law of the ICTY has convincingly shown that for criminal liability for aiding and abetting to arise, the aider and abettor — in addition to harbouring the intent to help or encourage another person in the commission of a crime — is required to be aware either of the criminal intent of the perpetrator or at least of the *risk* that the perpetrator may engage in criminal conduct.²² This case law has recently been confirmed by the Special Court for Sierra Leone in *Brima and others*. As the Court put it, ‘the *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.’²³ In other words, it may suffice for the accomplice to entertain recklessness (*dolus eventualis*): awareness of the high possibility of the commission of the offence by the principal may well be a ground of accessory liability. This seems to correspond to fundamental principles of criminal law: if I lend a gun to a well-known thug, already convicted of burglary or armed robbery, without knowing what specific crime he intends to perpetrate but in the knowledge that he will use it to engage in criminal conduct, I am answerable for aiding and abetting whatever crime he may later have committed by using that weapon (murder, armed robbery, serious bodily harm, etc.); it is not necessary for me to be fully aware of the specific crime he intends to perpetrate and the required mental element of that crime. The same holds true if I lend a sharp dagger to a lady well known as deeply hating and detesting her husband, having been repeatedly and harshly beaten up by him: even though I do not know the precise intentions of that lady, if she later severely wounds her husband I may be charged with aiding and abetting grievous bodily harm, for I willingly took the risk that she might use the dagger to injure her husband.

As for the nature of the *conduct* of the aider and abetter, the ICJ’s insistence on the absolute need that it should ‘always’ consist of ‘positive action’ is objectionable. It may suffice to mention that, for example, in *Furundžija*, an ICTY Trial Chamber, after reviewing the relevant case law, concluded that a simple spectator (that is somebody who is merely present at a crime and has not

22 In *Furundžija* an ICTY Trial Chamber held that ‘it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor’. (Judgment of 10 December 1998, § 247). Another Trial Chamber supported this proposition in *Blaškić* (judgment of 3 March 2000, at § 287), and the Appeals Chamber concurred in its judgment in *Blaškić* of 29 July 2004 (at § 50).

23 Judgment, *Brima and others* (SCSL-04-16-T), Trial Chamber II, 20 June 2007, at § 776.

undertaken any positive action), may be held to be guilty of complicity, under certain circumstances.²⁴ Furthermore, in *Akayesu*, an ICTR Trial Chamber held that the defendant was guilty of aiding and abetting genocide for his failure to stop other persons killing Tutsis. In other words, his aiding and abetting genocide resulted from omission.²⁵ This, it should be noted, corresponds to the doctrine of aiding and abetting taken in most national legal systems.²⁶

If a judicial body pronouncing on disputes between states deems it necessary to rely upon criminal law notions, arguably it should apply them to state responsibility as they have been set out by international criminal courts. In any case, the notion of complicity in genocide propounded by the Court is not supported by any national or international case law nor based on general principles of international criminal law, comparative criminal law or public international law.

It would follow that *in casu* it was sufficient to prove that President Milošević and the other leaders of the then FRY were aware of the high likelihood that

24 According to the Chamber ‘an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity’. (§ 207).

25 The Chamber found that ‘Akayesu, in his capacity as *bourgmestre* [mayor], was responsible for maintaining law and public order in the commune of Taba and . . . had the effective authority over the communal police. Moreover, as ‘leader’ of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proved that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was *bourgmestre* of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, after which date he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi . . . The Chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present [during] such criminal acts. (§§ 704–705).

26 A. Ashworth, *Principles of Criminal Law* (5th edn., Oxford: Oxford University Press, 2006), at 418 notes that ‘There would surely be no awkwardness in describing the cleaner of a bank who, in pursuance of an agreed plan, purposely omits to lock the doors when leaving as “aiding” a burglary of the bank. In such a case, there is a clear duty and a failure to perform it, and the causation question is answered (in so far as it is relevant to aiding) in the same way as for omissions generally. Another example would be the driving instructor who is supervising a learner driver and who realizes that the learner is about to undertake a manoeuvre which is dangerous to other road-users: if, as in *Rubie v Faulkner* (1940), the instructor fails to intervene, either by telling the learner not to do it or by physically acting to prevent it, then this failure in the duty of supervision is rightly held to be sufficient to support liability for aiding and abetting the learner driver’s offence.’

According to F. Desportes and F. Le Gunehec, *Le Nouveau Droit Pénal*, Vol. 1 (3rd edn., Paris: Economica, 1996), the French case law has envisaged many cases of complicity by omission: for instance, that of a lover who ‘morally’ assists his mistress during her abortion, or the case of a customs inspector who ‘closes his eyes, in agreement with the author of unlawful smuggling of goods, or that of a person who, by voluntarily being a member of a group of attackers, facilitates the perpetration of violence by those attackers on a smaller group of victims (at 420).

genocide would be committed for the FRY to be found responsible for complicity in genocide. In this respect a few facts should be underscored. First, as I will discuss in greater detail below, back in 1993, the ICJ had issued an Order on provisional measures enjoining the FRY to ensure that both its organs and persons or organizations under its 'control, direction or influence' refrain from committing genocide. The Belgrade authorities had thus been warned that they must take measures to prevent anybody under their authority from engaging in genocide. Secondly, on 14 July 1995 the President of the Security Council adopted a statement on behalf of the Council where he, among other things, expressed deep concern about 'the ongoing forced relocation of tens of thousands of civilians from the Srebrenica safe area' as well as 'reports that up to 4,000 men and boys have been forcibly removed by the Bosnian Serb party from the Srebrenica safe area', besides 'reports of grave mistreatment and killing of innocent civilians.'²⁷ Thirdly, according to the 1999 UN Report on the Fall of Srebrenica, already on 16–18 July 1995 'widespread reports of atrocities' in Srebrenica had begun to surface.²⁸ Faced with this wealth of information and knowing that there was a high likelihood that genocidal acts be committed, the Belgrade leadership could not but be aware of at least the high risk of genocide; as a bare minimum, they should have *stopped their economic, logistical, military etc., assistance forthwith*. That they did not do so patently evinces that, although they (i) contemplated that their assistance would or might bring about or at least assist the perpetration of the offence (genocide), nevertheless they (ii) willingly took the risk to assist the Bosnian Serb army in the commission of the genocide.

My third objection is that the Court's holding on complicity is logically inconsistent with its ruling on the duty of Serbia to prevent genocide. The Court found that the obligation to prevent genocide and 'the corresponding duty to act', provided for in Article I of the Convention,

arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.²⁹

The Court thus holds that the obligation to prevent does not require knowledge that genocide is occurring or is about to be perpetrated; it is sufficient for the relevant state to be aware of the risk of genocide.³⁰ Were one to transplant

27 Statement by the President of the Security Council, S/PRST/1995/32, 14 July 1995.

28 Report of the Secretary-General pursuant to General Assembly resolution 53/54, The fall of Srebrenica, A/54/549, 15 November 1999, §§ 387–390.

29 Judgment, § 431.

30 In the Court's view 'a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed'. (Judgment, § 432).

criminal law categories into international law as a legal corpus regulating relations between states, one could say that it is sufficient for a state to act recklessly, that is, to possess *dolus eventualis*. The Court's propositions on this matter of 'prevention' are not open to objections, for they are grounded in an interpretation of Article III of the Convention that is consistent with the construction of that provision previously advanced by the Court. Under this construction, Article III obliges contracting states to take any possible measure designed to forestall acts of genocide. It follows that they must do so even in cases where there is a mere risk or a high probability that private individuals or state officials might engage in genocide.

Where one cannot agree with the Court is as regards its application of these notions to the case at issue. The Court, after noting that the FRY 'was in a position of influence over the Bosnian Serbs'³¹ and that it had been enjoined by the Court, in two Orders on provisional measures issued in 1993, to ensure that no genocide be committed,³² goes on to state that

although it [the Court] has not found that the information available to the Belgrade authorities indicated as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.³³

and that

the Yugoslav federal authorities should . . . have made the best effort within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica.³⁴

Thus, the Court clearly admits that the Belgrade authorities were aware of the risk of genocide, the more so because back in 1993 they had been warned by the same Court that they were to ensure that no genocide be committed by 'any military, paramilitary or irregular armed units that may be directed or supported by it [the FRY's Government], as well as any

31 Judgment, § 434.

32 *Ibid.*, § 435.

33 *Ibid.*, § 436.

34 *Ibid.*, § 438.

organization and persons which may be subject to its control, direction or influence'.³⁵

It seems illogical (besides being unsupported by any authority or legal rule or principle) to hold that the foresight of a risk of genocide is relevant to the obligation to prevent whereas it is irrelevant to the crime of (or to state responsibility for) complicity in genocide. If a state is aware that there is a serious danger that acts of genocide may be committed by individuals or groups that that state is helping and supporting, in order to comply with international law it must, at a minimum *stop providing help and assistance*. If it does not do so, it not only breaches its obligation of prevention, but also becomes an accomplice in genocide.

35 ICJ, Order of 8 April 1993, § 52A(2) (emphasis added). One should also note that in his testimony before an ICTY Trial Chamber in the *Milošević* case, Lord Owen stated that in a 18 April 1993 telephone conversation with the accused to whom he had spoken about his anxiety that 'despite repeated assurances from Dr Karadžić that he had no intention of taking Srebrenica, the Bosnian Serb army was now proceeding to do just that. The pocket was greatly reduced in size. I rarely heard Milošević so exasperated and also so worried. He feared that if the Bosnian Serb troops entered Srebrenica, there would be a bloodbath because of the tremendous bad blood that existed between the two armies'. (Transcript of the hearing of 3 November 2003, at 28411–28412).