

State Responsibility and the “Object and Purpose” of the Genocide Convention

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The 1948 Genocide Convention was drafted as a direct response to the unspeakable horrors of World War II. Article I is the key provision of the Convention and what it does is to establish a shared international responsibility to eliminate any and all vestiges of genocide: “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.”¹ In the Spring 2007, the International Court of Justice (ICJ or Court) handed down its ruling in *Bosnia and Herzegovina v. Serbia and Montenegro* (*Bosnia v. Serbia*), some 14 years after the case was initially filed.² *Bosnia v. Serbia* constitutes the Court’s most extensive analysis of the Genocide Convention, as well as its most extended treatment of extraterritorial state responsibility. As is commonly known, the backdrop for the

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case was Bosnia's declaration of independence from the (Former) Yugoslavia that was opposed by the Serbian state—mainly through the vehicle of its Bosnian Serb allies. In its application to the ICJ, Bosnia claimed that Serbia had violated the Genocide Convention in two different ways. The first was by “aiding and assisting” the various Bosnian Serb paramilitary forces that were engaging in genocide and the second was its failure to “prevent and punish” those who had committed genocide.

The ICJ rejected the first claim but ruled against Serbia under the second. In terms of the issue of “aiding and assisting,” the Court applied much the same kind of “effective control” standard that it had first set forth in *Nicaragua v. United States*.³ In its analysis, the ICJ held (correctly) that Bosnian Serb forces were not “organs” of the Serbian government nor that the Serbian government had “directed and controlled” the actions and behavior of the Bosnian Serbs. Beyond this, and using Article 16 of the Draft Articles on State Responsibility as its framework, the Court held (incorrectly) that Serbian practices did not rise to the level of “complicity.”⁴ Thus, despite the enormous levels of military and economic assistance as well as the extraordinarily close political and diplomatic ties between Serbia and the various Bosnian Serb forces, the Serb state was found to be no more “responsible” for the genocide in Bosnia than countries that had absolutely no relationship or connection with the Bosnian Serb forces whatsoever.

This is the central holding of *Bosnia v. Serbia* and it is a ruling that makes a mockery of the notion of state responsibility. Yet, standing in stark contrast to this result was the Court's ruling with respect to whether Serbia had met its obligation under Article 1 to "prevent" and to "punish" those who carried out genocide, which the ICJ treated as constituting two distinct obligations. In terms of the former, the Court applied a rather liberal (and nebulous) "influence" standard, holding that because of the extremely close ties between Serbia and the Bosnian Serbs, the former had a special obligation to "prevent" genocide from being carried out by the latter. The Court held (correctly) that Serbia had failed to meet this obligation. In terms of the duty to "punish," the Court first held (incorrectly) that Serbia was under no legal obligation to prosecute war criminals within its territory, the reasoning being that genocide had not taken place within the territorial jurisdiction of the Serbian state. However, the ICJ did hold (correctly) that through its continuing failure to arrest alleged war criminals as requested by the International Criminal Tribunal for Yugoslavia (ICTY), Serbia had violated its obligation to "punish" those who directed or carried out acts of genocide.

To be clear, *Bosnia v. Serbia* takes up a whole host of issues including where and when genocide had been carried out (with the Court arriving at the rather incredulous finding that the only genocide that had been conclusively proven was immediately after the fall of

Srebrenica), the issue of state succession to treaties, and so forth. This article will not take up such matters.⁵ Rather, it will focus on the Court's overall approach to the question before it. The argument to be made is that the ICJ committed two fundamental errors. The first relates to its method of treaty interpretation, while the second concerns the notion of state responsibility within the context of an international human rights treaty generally and the Genocide Convention in particular.

Treaty Interpretation

Article 31.1 of the Vienna Convention on the Law of Treaties (General rule of interpretation) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁶ To be clear, the object of the Genocide Convention is genocide and the purpose of this international treaty is the elimination of genocide. Spelling out the object and purpose of the Genocide Convention might seem simple (or simplistic) enough, but it is something that the ICJ repeatedly failed to do. More than that, one of the only times the Court actually did employ an object and purpose analysis, it did so in the context of addressing a question-are state parties to the Genocide Convention under an obligation not to commit genocide themselves?-that is so rudimentary and should be so obvious that the Court's treatment of the issue is rather absurd. Here

is the Court's answer. Under Article I the State parties are bound to prevent such an act [genocide], which it describes as "a crime under international law," being committed. The Article does not expressly require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law"; by agreeing to such a categorization, the State parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission the commission of acts of genocide. That obligation requires the State parties, inter alia, to employ the means at their disposal . . . to prevent persons or groups not directly under their authority from committing an act of genocide . . . (par. 166). And further:

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

of the commission of genocide (par. 166).

Paradoxical? There are many other words that come to mind other than “paradoxical.” I would suggest that an interpretation of the Genocide Convention that would allow state parties to commit genocide would be nothing short of obscene. It is easy to question whether there was any need for the Court to address this matter. However, the problem is not so much that the Court provides this kind of “object and purpose” analysis for such an obvious issue, but the fact that it so often failed to do exactly this same thing when addressing other matters. Consider the central issue raised by *Bosnia v. Serbia*: whether Serbia’s aid and assistance makes it “responsible” in some manner for the genocide in Bosnia. If the Court had applied the same kind of “object and purpose” analysis to this issue (which it did not), it is next to impossible to imagine that it would have reached the result that it did. Thus, the question that the ICJ should have asked (but did not) is this: in what way is providing massive amounts of military, economic and political assistance to paramilitary forces with genocidal designs at all consistent with the object and purpose of the Genocide Convention? The answer is obvious. Because such actions facilitate the commission of genocide – rather than achieving the opposite result – these policies are in violation of the Convention. In fact, with the sole exception of actually carrying out genocide itself, it is not possible to conjure up a scenario where Serbia’s actions would have been more in

conflict with the object and purpose of the Genocide Convention.

The real question is why the ICJ made so little effort to examine the object and purpose of the Genocide Convention and why such an analysis did not readily serve as the Court's lodestar in addressing the issue of state responsibility. What makes this even more mystifying is that the analysis would be easy enough to do. The key is to compare state behavior against the object and purpose of the Convention. Moreover, as the Court clearly recognizes in the context of the issue of the responsibility to "prevent" genocide, not all states (and state actions) are similarly situated. Some states are more blameworthy than others and the law on state responsibility should reflect this. However, at the present time it does not, at least with respect to the issue of "aiding and assisting." Rather, the Court continues to employ a blunt either/or analysis—either a state is fully responsible or it is not responsible at all – that does nothing to advance a proper understanding of what state responsibility should entail.

State Responsibility

The Court's second error is its approach to the issue of state responsibility itself. Throughout its opinion, the Court made frequent use of the Draft Articles on State Responsibility as evidence of customary international law in the realm of state responsibility. In its overall treatment of the broader issue of "aiding and assisting,"

the ICJ employed Article 4 in its “state organs” analysis,⁷ Article⁸ in examining whether Serbia had “directed and controlled” Bosnian Serb forces,⁸ and finally, Article 16 for the issue of complicity.⁹

Aside from the issue of the uncertain legal status of the Draft Articles,¹⁰ the Court never considered two different things. The first is whether the law on state responsibility might be different in a human rights context than it is for international treaties more broadly. The reason for asking this is that human rights treaties are not based on the egoism of states and the promotion of national interest. In fact, just the opposite is true. Yet, in its analysis the ICJ treats all international treaty instruments as being interchangeable. Under this approach, state responsibility in the context of a human rights treaty is treated as being no different than, say, a treaty on international fishing rights. This is an issue that needs much further exploration. The second issue that is ignored is whether state responsibility is sufficiently spelled out in the Genocide Convention itself so that there is no need to resort to the Draft Articles on State Responsibility, or anything like that. In other words, does the treaty instrument itself sufficiently set forth the obligations and responsibilities of the state parties? I would suggest that this is certainly the case here. Employing the Convention’s “object and purpose” as the guide, state parties are to take whatever actions are necessary in an effort to eliminate genocide and to avoid pursuing any policies that would facilitate genocide from taking place. These are

the responsibilities that all the state parties have agreed to undertake and be bound by. And what also has to be said is that these are the responsibilities that the Serbian state failed to promote and protect.

Conclusion

Bosnia v. Serbia is a nightmare ruling that allows state parties to the Genocide Convention to pursue policies and to perform acts that are directly contrary to the object and purpose of the Convention itself. In this case, the Court gives license to states to arm and equip and to be allied with entities in another state that are carrying out genocide—so long as the sending state did not exercise nearly complete control over the actions of the receiving entity and that supporting genocide was not the sending state's intent. What the Court completely misses—mainly because it fails to even raise this issue—is how Serbia's position and its policies were in direct contravention to the object and purpose of the Genocide Convention. Thus, it is imperative that the Court take up a much different approach to the issue of state responsibility, one that is based on the object and purpose of the international human rights treaty in question rather than one that systematically ignores such an analysis. □



Footnotes:

1. 78 UNTS 277.
2. ICJ Reports 2007.
3. ICJ Reports 1989.
4. Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, UN Doc A/56/10.
5. For an excellent treatment of these issues see Sandesh Sivakumaran, "Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)," *International and Comparative Law Quarterly* 56:695-708 (2007).
6. 1155 UNTS 331.
7. Article 4 provides: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions"
8. Article 8 provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction and control of, that State in carrying out the conduct."
9. Article 16 provides: A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
 - a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
 - b) The act would be internationally wrongful if committed by that State.
10. See generally, James Crawford and Simon Olleson, "The Continuing Debate on a UN Convention on State Responsibility," *International and Comparative Law Quarterly* 54:959-972 (2005).