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Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections

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INDIVIDUAL CRIMINAL LIABILITY AND STATE RESPONSIBILITY FOR GENOCIDE: BOUNDARIES AND INTERSECTIONS*

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I. INTRODUCTION

Criminal responsibility and state responsibility have different purposes and evidentiary standards. While the former aims at punishing individual perpetrators, the latter provides a means of reparation.[1] The evidentiary standard for criminal responsibility should require a higher threshold of proof, while international state responsibility should maintain a less strict evidentiary baseline.[2] Customary international law accepts the coexistence of both forms of responsibility. This coexistence is recognized both in the Statute of the International Criminal Court[3] and in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts identify criminal and state responsibility.[4] The International Court of Justice

1. Anja Seibert-Fohr, *State Responsibility for Genocide Under the Genocide Convention*, *in* THE UN GENOCIDE CONVENTION - A COMMENTARY 349, 370 (Paola Gaeta ed., 2009) (stating that state responsibility does not depend on individual responsibility).

2. *Id.* at 371; Berglind H. Birkland, *Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide*, 84 N.Y.U. L. REV. 1623, 1641-42 (2009) (noting that although the Genocide Convention imposes a civil standard, in practice, the ICJ has imposed a stricter criminal standard for state responsibility); André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L & COMP. L.Q. 615, 630 (2003) (arguing a stricter standard for state responsibility for genocide is appropriate because of the seriousness of the allegations).

3. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

4. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, 42 (2001) [hereinafter A.R.S.I.W.A.].

(ICJ) also acknowledged this "duality of responsibilities" in cases of genocide.[5]

The interaction between these two forms of responsibility presents additional challenges in genocide cases. Genocide is typically a complex criminal enterprise in which different agents participate with varying degrees of contribution and create an entanglement of acts and omissions to achieve a particular result. The legal definition of genocide requires the "intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such."[6] This article focuses on the construction of genocidal intent under international criminal law and under the law on state responsibility.

This study argues these two areas of law use opposite methodologies when determining responsibility for genocide. This methodological divergence is particularly apparent in the way international courts have construed genocidal intent. This article identifies a systemic distortion and suggests international criminal law's approach to determining responsibility for genocide is more appropriate for determining state responsibility, and vice-versa. This study aims to demonstrate this disparity and propose strategies to overcome it.

What does this divergence of methodologies consist of? Part II of the article will concentrate on this question. In summary, international criminal law follows a *realist* approach, in which *policy* considerations are prominent (Part II.A.1). It has developed, through *dialectical reasoning,* an expansive legal framework that is appropriate for its policy purpose: ending impunity by punishing the genocide's mastermind (Part II.A.2). With this victim-centered approach in mind, international criminal law tends to adopt *inductive* methods of fact-

5. *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶ 129 (Feb. 3) (noting that when the Court finds individual responsibility it can use this finding as a basis to determine if the state is responsible); *see also* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 163 (Feb. 26).

6. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The Rome Statute and the statutes of the ad hoc tribunals have adopted the same definition. *See* Rome Statute, *supra* note 3, art. 6.

finding (Part II.A.3) that cluster and generalize specific conduct to establish a general criminal context. The gravity of the crime of genocide is often raised to justify this policy purpose and methodology.

By contrast, the law on state responsibility has been widely construed in a *formalist* manner (Part II.B.1) and is based on *analytical reasoning* that largely ignores policy considerations (Part II.B.2). Fact-finding tends to be established through *deductive* methods, by descending to the specific conduct of an agent (Part II.B.3). Due to the gravity of the crime of genocide, the attribution of acts or omissions to a particular state must strictly follow previously established legal premises. This approach leads to a legally unsatisfactory result, as state intent is more stringently construed than an individual's *dolus specialis*.

How can this divergence be overcome? As explained in Part III, this divergence can be overcome by revisiting the methods used to assess individual and state intent. In sum, *dolus specialis* has both a *volitional* and *cognitive* dimensions, which ought to be weighed differently under each realm of law. The appropriate method for establishing an individual's genocidal intent is based on volitional elements, with cognitive elements being of secondary consideration. Conversely, a state's genocidal intent should be established using a nuanced, objective, and cognitive elements-based approach that allows for a refined assessment of state conduct during a genocidal campaign.

II. BOUNDARIES

Part II compares the methodologies developed in international criminal law and in the law on state responsibility used to assess responsibility for genocide, with emphasis on genocidal intent. The analysis occurs in three stages. First, it argues that each realm of law has its own point of departure: a realist approach, in the case of international criminal law, and a formalist one in the case of state responsibility. The second level of analysis discusses how the legal premises applied to a particular case are construed under both criminal and state responsibility, focusing on the interpretation and reasoning judges employ to extract abstract norms that will be applied to the facts of the case. The third level of analysis deals with the construction of a

factual narrative, based on the totality of the evidence before the judge (or fact-finding).[7]

The separation between the second level of analysis, establishment of the legal premise, and the third level, fact-finding, is useful for analytical purposes, but is also artificial. In practice, these two tasks are intertwined. When confronted with what Larenz calls a "raw factual situation" ("Roh-Sacheverhalt"), the interpreter tends to select legally relevant elements through a mental operation that results in the creation of a "final factual situation" ("endgultige Sacheverhalt"), a process in which a legal assessment ("rechtliche Beurteilung") has already been anticipated.[8] The judge will always select those elements of conduct that are of legal significance, based on the legal premise he or she has construed.

Although the separation of these levels of analysis may be artificial, it is instrumental in showing the methodological divide between international criminal law and the law on state responsibility. Part II aims to point to a possible systemic distortion created by this methodological divergence that makes international criminal law's approach better suited to the law on state responsibility, and vice-versa.

A. INTERNATIONAL CRIMINAL LAW: REALISM, DIALECTIC REASONING, INDUCTIVE FACT-FINDING

1. Realism

Individual criminal responsibility developed under an essentially realist approach. For the purpose of this work, realism is defined as the method of "deciding a case so that its outcome best promotes

7. In this article, the term "fact-finding" signifies the method of effective search of legal information and evaluation of evidence by a judicial authority or an interpreter. It does not refer to the crucially important task of investigation and data collection the prosecutor undertakes in international criminal tribunals. *See* Vern R. Walker, *A Default-Logic Paradigm for Legal Fact-Finding*, 47 JURIMETRICS J. 193, 208 (2007) (stating that after translating the content of legal rules into a logic model of "implication trees," fact-finding can be defined as "the process of 'linking' admitted evidence to those terminal propositions (issues of fact) of a legal implication tree to which the evidence is relevant").

8. KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 279 (6th ed. 1991).

public welfare in non-legalistic terms," embedding a "policy analysis."[9] Realism is a critique of what is considered an excessive reliance by positivist, Cartesian legal methodology, on certainty and logical coherence.[10] Holmes, one of the early exponents of legal realism, stated the "notion that the only force at work in the development of the law is logic" is a "fallacy."[11] He argued, "behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment" that goes to "the very root and nerve of the whole proceeding."[12] The root and nerve of international criminal law has been victim-centered and aimed at avoiding impunity of the main perpetrators of heinous crimes. The gravity of the crime of genocide justifies the purpose of avoiding impunity.

International criminal law was founded with the post-Second World War trials. The purpose of these trials was to punish the individuals responsible for the large-scale atrocities committed during the War.[13] Since international criminal law's inception, its main concern has been to prioritize the prosecution of those who bear greater responsibility for the design and command of the atrocities committed. The Chief Prosecutor at the International Military Tribunal stated:

> [t]he common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.[14]

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9. Richard A. Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-82 (1986).

10. Edgar Bodenheimer, *Perelman's Contribution to Legal Methodology*, 12 N. KY. L. REV. 391, 400-01 (1985) ("The chief medium through which the critique of the Cartesian approach expressed itself in American legal theory was a movement called 'legal realism.'").

11. Oliver W. Holmes, *The Path of the Law*, 78 B.U. L. REV. 699, 705-06 (1998). The text is originally an address delivered at the Boston University School of Law on January 8, 1897.

12. *Id.*

13. U.S. v. Göring, Judgment, 171 (Int'l Mil. Trib. Oct. 1, 1946), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

14. Robert H. Jackson, *Opening Statement Before the International Military Tribunal*, ROBERT H. JACKSON CTR., https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/ (last visited

The prosecution in Nuremberg explicitly excluded persons in "purely clerical, stenographic, janitorial, or similar unofficial routine tasks" and instead focused on officials holding certain positions.[15] The International Military Tribunal also acquitted individuals that, despite being high-level officials, were "not one of the inner circle around Hitler."[16]

When international criminal law was resuscitated in the 1990s after almost fifty years of dormancy, two modes of criminal responsibility were adopted: the joint criminal enterprise (JCE) and the "control over the crime theory" (Part II.A.2). These forms of attribution are fundamentally different and were interpreted by international criminal tribunals inspired by realist, policy-oriented methodology. For example, in construing JCE, the International Criminal Tribunal for the Former Yugoslavia (ICTY) relied on the words of the U.N. Secretary-General, who mentioned the importance of bringing to justice "all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations."[17] This justification, which does not come from the Tribunal's statute, indicates the expansive scope of JCE[18] and the policy underlying it: to reach the main perpetrators of atrocities. Furthermore, the Prosecutor of the ICTY gradually dropped indictments against low-ranking officials to concentrate on the "big

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15. *Göring* at 267-68 (noting the only positions the prosecution focused on included the "Ämter III, VI, and VII of the RSHA and all other members of the SD, including all local representatives and agents, honorary or otherwise").

16. *See id.* at 307, 325 (examining the cases of Schacht, former president of the Reichsbank and Minister of Economics, and Von Papen, former Chancellor and representative in Turkey, Russia, and Austria).

17. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 190 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

18. On the expansive character of JCE as a mode of liability, *see generally* Mohamed E. Badar, *Just Convict Everyone! – Joint Perpetration: From* Tadić *to* Stakić *and Back Again*, 6 INT'L CRIM. L. REV. 293 (2006) (describing the expansive character of JCE as a mode of liability). On the purpose to end impunity in cases of genocide, by one of the main creators of JCE, *see* Antonio Cassese, *La Communauté Internationale et Le Génocide, in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTIVE ET DU DÉVELOPPEMENT - MÉLANGES MICHEL VIRALLY 183 (Pedone ed., 1991).

fish."[19]

Something similar can be said about the adoption of the "control over the crime theory," in particular its variation of "control over the organization" ("Organisationsherrschaft"), developed by Claus Roxin.[20] The concept of "offenses by virtue of organized power apparatus"[21] has the confessed objective of reaching the "criminal behind the desk" ("Schreibtischtäter"). Roxin emphasized "the immediate cause . . . was the recently finished process in Jerusalem against Adolf Eichmann, a main perpetrator of murder against Jews in the Nazi era."[22] Designed to reach the masterminds of crimes perpetrated through complex organizations, Roxin's theory was useful to avoid impunity in certain high-profile political cases in jurisdictions that accepted "Organisationsherrschaft." These cases include: the trial of Argentina's military Junta by the Buenos Aires Court of Appeals in 1985;[23] the famous *Mauerschützen*[24] trial in Germany in 1994; the Peruvian Supreme Court's conviction of former President Alberto Fujimori;[25] and more recently, the Brazilian Supreme Court's conviction of an ex-presidential Chief of Staff in a high-profile

19. Payam Akhavan & Mora Johnson, *International Criminal Tribunal for the Former Yugoslavia*, *in* THE GENOCIDE STUDIES READER 441, 443 (Samuel Totten & Paul R. Bartrop eds., 2009).

20. Claus Roxin, *El Dominio de Organización Como Forma Independiente de Autoría Mediata*, 7 REVISTA DE ESTUDIOS DE LA JUSTICIA 242 (2006) [hereinafter Roxin, *El Dominio de Organizacíon]*.

21. In German, "Straftaten im Rahmen organisatorischer Machtapparate."

22. Roxin, *El Dominio de Organizacíon*, *supra* note 20, at 242.

23. Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal (Sala C.) [National Chamber of Appeals on Criminal and Correctional Federal Matters of the Federal Capital], 9/12/1985, "Case against Jorge Rafael Videla et al.," Bulletin of Jurisprudence [Boletin de Jurisprudencia], Sentencia Causa (13-84-295) (Arg.). The sentence was confirmed by the Argentinian Supreme Court. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 30/12/1986, La Ley [L.L.] (T.1987-A-53) (Arg.).

24. Bundesgerichtshof [BGH] [Federal Court of Justice] July 26, 1994, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] [Decisions of the Federal Court of Justice in Criminal Matters] 40, 218 (Ger.) (applying Roxin's theory in paragraph 73).

25. Corte Suprema de Justicia de la República del Perú [CSJR] [Supreme Court of Justice of the Republic of Peru], Sala Penal Especial [Special Criminal Room], Apr. 7 2009, Exp. A.V. 19-2001, 642 (Peru).

corruption case in 2012.[26] All these decisions share a common policy purpose of ending impunity of high-level individuals who perpetrated grave crimes. These cases also involved large numbers of victims and the need to identify concrete criminal acts within a wider pattern of organized criminality.

International criminal law pursued the goal of ending impunity even to the point of justifying limitations to a defendant's rights. In *Tadić*, the ICTY analyzed claims of a breach of the right to a fair trial under Article 14 of the International Covenant for Civil and Political Rights, Article 6 of the European Convention of Human Rights, and Article 21 of the Statute of the ICTY, and it observed the European Court of Human Rights (ECtHR) and the ICTY operate in "different circumstances."[27] Unlike the ECtHR, which deals with ordinary criminals, the ICTY "is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction . . . the International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence."[28] While it would be unfair to generalize this statement to the whole of international criminal law, it would be unwise to ignore that there is an intrinsic tension between the rights of a defendant to a fair trial, and a criminal procedure that answers to impunity as a main concern.

This international criminal law approach lies in contrast to the ICJ's jurisprudence on state responsibility.[29] Few judicial documents have expressed this opposition more eloquently than the separate opinion of Judges McDonald and Vohrah in *Erdemović*:

> There is the view that international law should distance itself from social policy and this view has been articulated by the International Court of Justice in the South West Africa Cases, where it is stated that "[l]aw exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline." We are of the opinion that this separation of law from social policy is inapposite [in

26. S.T.F. AP 470/MG, Relator: Min. Joaquim Barbosa, 17.12.2012, 693 (Braz).

27. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995).

28. *Id.*

29. *See infra* Part II.A.2.

> relation to international criminal law] . . . at the municipal level, criminal law and criminal policy are closely intertwined. There is no reason why this should be any different in international criminal law.[30]

In sum, international criminal law bases its policy to end impunity on the gravity of international crimes—a tendency that has not been immune to criticism.[31] The following section will explore the reasoning behind two critical international criminal law innovations: JCE and the "control over the crime theory."

2. Establishing the Legal Premise: Dialectic Reasoning

Given international criminal law's realist nature, what kinds of legal premises would appropriately respond to its policy objectives? Certainly, an expansive legal premise that allows criminal conduct to be ascribed to its mastermind, just as it is ascribed to its direct perpetrator. Two legal innovations were introduced to achieve this goal: the joint criminal enterprise and the "control over the crime theory."

a. Joint Criminal Enterprise (JCE)

When the ICTY introduced the notion of JCE or common criminal purpose,[32] its main objective was to characterize more conduct as principal perpetration. Applied to genocide, JCE offered a portal to generalize specific intent and apply it to all participants in the common plan.

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30. Prosecutor v. Erdemović, Case No. IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

31. *See* Badar, *supra* note 18, at 301-02 (arguing that the purpose of international criminal trials is adjudicative in nature—to determine whether someone is innocent or guilty—rather than political); *see also* Jenia I. Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 529 (2008) (highlighting the adjudicative (as opposed to political) nature of international criminal tribunals).

32. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 210-16 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (differentiating between criminal liability for acting with a common criminal purpose and aiding and abetting). The concept of JCE was explained and its scope was expanded in Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 373 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

The ICTY Appeals Chamber detailed the notion of JCE in *Tadić*. Tadić was a member of paramilitary forces who at the village of Jaskići when five men were killed. While the Trial Chamber found there was not enough evidence to establish that Tadić had participated in the killings,[33] the Appeals Chamber disagreed. It stated "the only reasonable conclusion" was "the armed group to which the Appellant belonged killed the five men in Jaskići."[34] Tadić's liability emerged from his participation in a criminal enterprise. Three categories of JCE were devised: (i) JCE I, "where all co-defendants, acting pursuant to a common design, possess the same criminal intention;"[35] (ii) JCE II, or "'concentration camp' cases;"[36] and (iii) JCE III, concerning "cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose,"[37] – precisely the basis on which Tadić was convicted.[38]

The ICTY has been criticized for the *Tadić* decision on many grounds,[39] but it inaugurated an expanded mode of legal liability with far-reaching consequences, as demonstrated by other *ad hoc* tribunals' adoption of JCE. At the Special Court for Sierra Leone, the prosecution used JCE in every single indictment it presented to the Court, even describing a common purpose that was not criminal per se[40]—an innovation that was also criticized.[41]

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33. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 373.

34. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

35. *Id.* ¶ 196.

36. *Id.* ¶ 202 (including cases in which the accused held a position of authority within a hierarchy, usually involving those running concentration camps).

37. *Id.* ¶ 204 (introducing in practice, *dolus eventualis* as a form of international criminal responsibility).

38. *Id.* ¶ 232.

39. Criticism ranged from the unconventional methodology to the threat to the principle of individual liability. *See* GIDEON BOAS ET AL., FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 17-19 (2013); Jens D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 85 (2007).

40. Prosecutor v. Taylor, Case No. SCSL-03-01-I, Indictment, ¶¶ 23-24 (Spec. Ct. for Sierra Leone, Mar. 7, 2003).

41. *See* BOAS ET AL., *supra* note 39, at 132; see *also* John R.W.D. Jones et al.,

The International Criminal Tribunal for Rwanda (ICTR) also adopted JCE, though the prosecution took time to incorporate the legal novelty. This time lag is understandable, as the fact-finding completed for the Tribunal's first case clearly established a case of genocide; therefore, the ICTR did not have a pressing need to creatively expand the law.[42] However, since the Tribunal first recognized JCE as a form of criminal liability in 2004, prosecutors have invoked it in 20 of their 26 indictments.[43] JCE had undoubtedly fallen into the taste of prosecutors in the *ad hoc* tribunals.

In genocide cases, JCE facilitates establishing genocidal intent by allowing *dolus specialis* to be inferred from the activities of the group as a whole. Proving specific intent is a difficult task. It is unlikely that such intent will be clearly expressed by an accused or openly discussed in an official manner, such as in the case of the Nazis during the 1942

The Special Court for Sierra Leone: A Defence Perspective, 2 J. INT'L CRIM. JUST. 211, 225 (2004) (arguing that the actions of the defendants were not in furtherance of a joint criminal enterprise).

42. BEATRICE I. BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 131 (2009).

43. *See* Prosecutor v. Munyarugarama, Case No. ICTR-02-79-I, Amended Indictment, ¶¶ 50, 57 (June 13, 2012); *see also* Prosecutor v. Ndimbati, Case No. ICTR-95-1F-I, Second Amended Indictment, ¶ 3 (May 8, 2012); Prosecutor v. Ntaganzwa, Case No. ICTR-96-9-I, Second Amended Indictment, ¶ 3 (Mar. 30, 2012); Prosecutor v. Nizeyimana, Case No. ICTR-00-55-PT, Amended Indictment, ¶ 5 (Mar. 1, 2010); Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Amended Indictment, ¶¶ 14, 49 (Apr. 14, 2009); Prosecutor v. Setako, Case No. ICTR-04-81-I, Amended Indictment, ¶¶ 16, 23 (June 23, 2008); Prosecutor v. Nchamihigo, Case No. ICTR-01-63-I, Second Revised Amended Indictment, ¶ 15 (Dec. 11, 2006); Prosecutor v. Bagaragaza, Case No. ICTR-05-86-I, Amended Indictment, ¶¶ 16, 25 (Dec. 1, 2006); Prosecutor v. Renzaho, Case No. ICTR-97-31-I, Second Amended Indictment, ¶ 6 (Feb. 16, 2006); Prosecutor v. Karemera, Case No. ICTR-98-44-I, Amended Indictment, ¶¶ 4, 30, 64, 69, 72 (Aug. 24, 2005); Prosecutor v. Serugendo, Case No. ICTR-05-84-I, Corrigendum of Indictment, ¶¶ 26, 51, 74 (July 21, 2005); Prosecutor v. Munyeshyaka, Case No. ICTR-05-87-I, Indictment, ¶¶ 9, 12, 27, 41 (July 20, 2005); Prosecutor v. Bucyibaruta, Case No. ICTR-05-85-I, Indictment, ¶ 8 (June 16, 2005); Prosecutor v. Uwilingyimana, Case No. ICTR-05-83-I, Indictment, ¶¶ 14, 21, 37 (June 10, 2005); Prosecutor v. Munyagishari, Case No. ICTR-05-89-I, Indictment, ¶ 27 (June 9, 2005); Prosecutor v. Ntawukuriryayo, Case No. ICTR-05-82-I, Indictment, ¶ 8 (May 26, 2005); Prosecutor v. Gatete, Case No. ICTR-00-61-I, Amended Indictment, ¶¶ 7, 9 (May 10, 2005); Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-I, Amended Indictment, ¶ 47 (Mar. 8, 2005); Prosecutor v. Kabuga, Case No. ICTR-98-44B-I, Amended Indictment, ¶¶ 55, 71 (Oct. 1, 2004); Prosecutor v. Simba, Case No. ICTR-01-76-I, Amended Indictment, ¶¶ 16, 23 (May 10, 2004).

Wannsee Conference.[44] If an accused can be characterized as one of many gears in the machinery of a genocidal enterprise, the prosecution might be spared a detailed incursion into his state of mind.[45] As Bonafè stresses,

> [T]he accused charged under joint criminal enterprise needs to have had genocidal intent, but the psychological element is shared by the members of this enterprise. Thus, it is much easier to demonstrate that the accused shared the specific intent with other perpetrators than to prove he alone intended to destroy the targeted group by his actions.[46]

b. Control Over the Crime

The International Criminal Court (ICC) adopted a different mechanism of attribution in cases with multiple perpetrators: the "control over the crime" theory.[47] It was introduced to differentiate principal and accessory liability, allowing for a remote agent in an organized criminal apparatus to be treated as a principal offender rather than an accessory.[48]

According to Roxin's theory, four main conditions establish a perpetrator has control over a crime. These conditions can be divided into two levels: objective and subjective. At the objective level, the

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44. *But see* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 522 (Nov. 28, 2008) (noting an exception when the defendants, as a result of the nature of their activities, expressed genocidal intent in an unusually clear manner that placed the case in the eye of the media). For the Wannsee Conference and a competent compilation of documents containing de facto confessions of genocidal intent, *see* JEREMY NOAKES & GEOFFREY PRIDHAM, NAZISM 1919-1945: FOREIGN POLICY, WAR AND RACIAL DISCRIMINATION 1103, 1125 (1991).

45. *See also* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 633 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (concluding that Krstić "participated in a joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica"). The decision was controversial given the absence of elements to demonstrate specific intent. In fact, the Appeals Chamber reversed this finding and concluded Krstić merely had knowledge that a genocidal criminal enterprise was underway (aiding and abetting). *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 135-38 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (reversing the controversial trial court decision).

46. BONAFÈ, *supra* note 42, at 135-36.

47. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 330 (Jan. 29, 2007).

48. *Id.* ¶ 317.

conditions are: (i) the perpetrator must have the power of command; and (ii) the organization must be detached from the legal order.[49] The first condition is crucial to establish dominance over the functions of the organization and the second is vital to consolidate that control. Together, they constitute "the basic support that will allow the strategic superior level (indirect perpetrator) to edify and consolidate the dominance over the totality of the criminal structure."[50]

The subjective level includes (iii) the fungibility of the direct perpetrator and (iv) the high level of availability or readiness of the direct perpetrator to actually commit the crime.[51] These subjective conditions deal with the "consequences of the automaticity of the criminal apparatus," according to which "the conduct of the direct perpetrator will ultimately depend on his/her own will."[52] However, if he or she decides not to execute the act, it will lead to a "substitution with [an]other person with a larger predisposition to carry out the conduct."[53] In summary, the "control over the crime" theory is an apparatus with a "peculiar functioning:" it is "at the disposal of the 'man behind'" and constitutes "an organization [that] therefore unfurls a life that is independent from the variable identity of its members. It works 'automatically,' in a manner that the identity of the actual executor is irrelevant."[54]

c. Dialectic Reasoning

International criminal law adopted JCE and the "control over the crime theory" to help achieve its policy purpose of criminalizing remote perpetration of genocide.

The legal premise of "perpetration" has been mainly expanded through *dialectical* reasoning—which is "necessary when the judge, by thorough and often complex arguments, must creatively establish a

49. Corte Suprema de Justicia de la República del Perú [CSJR] [Supreme Court of Justice of the Republic of Peru], Sala Penal Especial [Special Criminal Room], Apr. 7, 2009, Exp. A.V. 19-2001, 642 (Peru).

50. *Id.* at 634.

51. *Id.*

52. *Id.* at 635.

53. *Id.*

54. CLAUS ROXIN, AUTORÍA Y DOMINIO DEL HECHO EN DERECHO PENAL 272 (2000) [hereinafter ROXIN, AUTORÍA Y DOMINIO].

major premise serving as a proper rationale for a legal conclusion."[55] Dialectical reasoning acknowledges that sometimes the tension between what is legal and what is reasonable requires a balanced solution between the two. It rejects the proposition that only through the shackles of formalism can a decision be "rational" or "logic[al]." Dialectical reasoning provides that not all knowledge is demonstrative, but "reasoning often proceeds from opinions that are believed to be true or probably true."[56] This method of reasoning consists of "the search for a convincing solution, that can establish judicial peace because it is, at the same time, reasonable and in accordance with the law."[57]

JCE and the "control over the crime theory" are quintessential examples of dialectical reasoning: efforts to reconcile what is strictly legal (the text of a statute) with what is reasonable (reaching the "person behind"). In the absence of clear textual provisions, the judge takes a position "neither completely subordinated, nor simply opposed"[58] to the legislator, but aimed to complement the law. This is not only a legal task, "but also political, that of harmonizing the legal order of legislative origin with the dominant ideas of what is equitable in a given environment."[59] Application of the law becomes not merely a deductive process, but a "constant adaptation of the legal provisions to values that are in conflict in judicial controversies."[60]

In its dialectical construction of JCE, the ICTY recognized that "the Tribunal's Statute does not specify (either expressly or by implication)" the elements of this new "category of collective criminality."[61] The Tribunal had to resort to:

55. Edgar Bodenheimer, *Perelman's Contribution to Legal Methodology*, 12 N. KY. L. REV. 391, 410 (1985).

56. *Id.* at 404.

57. Extracted from the definition of dialectical in CHAÏM PERELMAN, LOGIQUE JURIDIQUE: NOUVELLE RHÉTORIQUE 84 (1976).

58. *Id.*

59. *Id.*

60. *Id.*

61. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 194 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

(i) A teleological interpretation of the Statute (specifically Article 1);[62]

(ii) The U.N. Secretary General's report, in which it is stated "the Secretary-General believes that *all* persons who participate in . . . serious violations of international humanitarian law . . . are individually responsible for such violations;"[63]

(iii) "The moral gravity" of the acts of the masterminds;[64]

(iv) The need not to "understate the degree of their criminal responsibility" by holding them liable as mere aiders and abettors;[65]

(v) The "inherent characteristics of many crimes perpetrated in wartime,"[66] which usually indicate a plurality of perpetrators with a common design; and

(vi) The study of "case law" and "a few instances of international legislation" with a view to infer customary international law.[67]

As in the case of the ICTY in introducing JCE, the ICC complemented and adapted the positive legal order when it adopted the theory of "Tatherrschaft."[68] The ICC embraced this theory, not because it had any textual basis in the Rome Statute, but based on the Court's investigation into approaches to differentiate between principal and accessory perpetration. According to the objective approach, the level of contribution is the defining criterion in determining accessory or principal liability. In contrast, the subjective theory is based on the mental state of the criminal. Finally, "Tatherrschaft" (literally dominance over the fact), was presented as a synthesized form[69] of the previous approaches, which was already being "applied in numerous legal systems."[70] The Chamber's

62. *Id.* ¶ 189.
63. *Id.* ¶ 190 (emphasis in original).
64. *Id.* ¶ 191.
65. *Id.* ¶ 192.
66. *Id.* ¶ 193.
67. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 194 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).
68. ROXIN, AUTORÍA Y DOMINIO, *supra* note 54.
69. *See* Prosecutor v. Katanga, Case No. ICC-01-04-01/07, Decision on the Confirmation of Charges, ¶ 482-84 (Sept. 30, 2008) (highlighting Tatherrschaft).
70. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the

argumentation related to the adoption of "Tatherrschaft" bears some structural resemblance to Chapter 2 of Roxin's seminal book.[71]

Just as in the case of JCE, the ICC's reliance on the "control over the crime" theory has been controversial. It is not a universally recognized mode of liability, and the Chamber's justification for its adoption is the subject of much debate. Essentially, the Chamber adopted an approach by exclusion: because the Rome Statute neither adopted the objective theory, nor the subjective one, the Chamber concluded the Statute must have opted for control over the crime.[72] Weigand critically observed that "[i]t is likely that the concept of 'domination through an organization' owes its existence more to policy considerations than to strict theoretical consistency."[73] He opines that "[i]ts invention can best be understood as a reaction to the phenomenon of 'systemic' crime—a phenomenon that has massively spread since the 1930s."[74]

In adopting Roxin's theory, the ICC responded to a policy problem similar to the one before the ICTY: the need to ensure that international criminal law is equipped with legal rules that embrace large-scale criminality to reach the main perpetrators. The ICC has not yet dealt with the merits of a genocide case, but the Prosecutor invoked control over the crime to characterize Omar al Bashir as main perpetrator of genocide in Darfur.[75] The Prosecutor's Application offers insight into how Roxin's theory might expand the legal premise of perpetration to facilitate the establishment of genocidal intent. Rather than primarily relying on Bashir's words and deeds,[76] the

Confirmation of Charges, ¶ 330 (Jan. 29, 2007).

71. ROXIN, AUTORÍA Y DOMINIO, *supra* note 54 (addressing the objective theory (divided into objective-formal and objective-material), subjective theory, and mixed theories (among which is control over the crime) in chapter two)).

72. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 338.

73. Thomas Weigend, *Perpetration through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT'L CRIM. JUST. 91, 101 (2011) (criticizing Roxin's theory, noting that adding empirical criteria is arbitrary in nature).

74. *Id.*

75. Situation in Darfur, ICC-02/05-157-Annex A, Prosecutor's Application Under Article 58, ¶¶ 244-48 (July 14, 2008).

76. *Id.* ¶¶ 270-79.

prosecution devoted considerably more attention to an easier task—determining the unquestionable position of Bashir vis-à-vis every instance of military or paramilitary apparatus in Sudan.[77] The focus shifted from determining Bashir's *mens rea*, to establishing that Sudanese government forces and the militias it controls perpetrated genocide and that Bashir had control over the whole apparatus as a main perpetrator.

3. Inductive Fact-Finding

The predominant method of fact-finding in international criminal law is one that achieves its policy purpose by enabling a direct connection between the specific criminal act and the general role of the remote perpetrator. Moreover, the trend within international criminal law has been to evaluate "raw factual situations" so as to generalize the specific conduct and contextualize it within a larger pattern of conduct (the "final, legally relevant factual situation").[78]

Fact-finding is generally a strenuous challenge in genocide cases. The scope of atrocities and the intricacy of acts and omissions usually involve hundreds of witnesses and thousands of pages of evidence. In undertaking the arduous task of screening such a large inventory, international criminal law has relied primarily (though not exclusively) on an *inductive* method, in which "the direction appears to be from the particular to general" and "the general finds its meaning in the relationship between the particulars."[79] When applied to genocidal intent, this means that *dolus specialis* can be reasonably inferred from a pattern of conduct and/or a general context. Individual instances of conduct are treated as building blocks of a "pattern of conduct" that constitutes part of a larger "general criminal context." Although the ICTR has stated that it is preferable to deduce genocidal intent from the accused's own actions, the reality is that "almost all of the accused before the ICTR . . . convicted for genocide . . . [had] their *dolus specialis* . . . established [through the general criminal

77. *Id.* ¶¶ 250-69.

78. LARENZ, *supra* note 8, at 279.

79. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 27 (2013) (discussing the difference between case law and legislation and finding that the latter's wording must be more strictly adhered to).

context]."[80]

Genocidal intent is construed by generalizing the conduct in an *a posteriori* analysis of an individual's actions. It is a holistic, *backward-looking* approach where a person's conduct is assessed by an observer that has the privilege of already knowing the conduct's implications. Moreover, the observer taking this approach looks to the factual circumstances of the case[81] or, more generally, to

> [A] number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.[82]

Applying JCE to an alleged genocide perpetrator as well as evaluating the "general criminal context" in which the genocide took place significantly impacts the ability and means of determining the individual's genocidal intent. The generalization of an individual's conduct from the fact that he participated in a JCE creates a tension with the principle of individual liability, which guides criminal law and requires a careful individualization of conduct. Jurisprudence of the *ad hoc* tribunals demonstrates that applying and analyzing the "general criminal context-joint criminal enterprise" has led to considerable flexibility in the attribution of genocidal intent. The accused's *dolus specialis* does not have to be directly determined from his own acts, but can be inferred from the conduct of other members of the JCE and the context in which the group operated.

This method of inferring genocidal intent is apparent in the case law of the ICTR, more so than in the jurisprudence of any other court.[83] While recognizing that "[w]here the underlying crime requires a

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80. *See* BONAFÈ, *supra* note 42, at 131; *see also* Raphaëlle Maison, *Le Crime de Génocide Dans Les Premiers Jugements Du Tribunal Pénal International Pour Le Rwanda*, 103 REVUE GÉNÉRALLE DE DROIT INTERNATIONAL PUBLIC 129, 137-40 (1999).

81. *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 524 (May 16, 2008); *see also* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

82. Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

83. *See* BONAFÈ, *supra* note 42, at 131.

special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent,"[84] the ICTR has avoided the daunting task of determining genocidal intent based solely on an individual's criminal conduct.[85] The logic is that, in a well-established general context of genocide, like that which existed in Rwanda, a member of a JCE can easily predict or realize that his actions are likely to produce the genocidal result. For instance, in *Simba,* the ICTR determined,

> [g]iven the *scale of the killings and their context*, the only reasonable conclusion is that the assailants who physically perpetrated the killings possessed the intent to destroy in whole or in part a substantial part of the Tutsi group. This genocidal intent was *shared by all participants* in the joint criminal enterprise."[86]

In a similar vein, the Tribunal in *Akayesu* stated, "[o]n the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine."[87] Ultimately, to determine the individual's specific intent, the Tribunal made inferences "from a certain number of presumptions of fact," namely: "the general context of the perpetration of other culpable acts systematically directed against that same group;" the persons who committed those acts, whether by the same offender or by others; the scale of atrocities; the "general nature" of the atrocities "in a region or a country;" and "the fact of deliberately and systematically targeting victims on account of their membership [in] a particular group, while excluding the members of other groups."[88]

The ICTR has been accused of focusing so much on the general context, that it has not "ascertain[ed] the accused's genocidal intent sufficiently."[89] Heller criticized the Tribunal for creating a "potentially

84. Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment and Sentence, ¶ 388 (Dec. 13, 2005); *see also* BONAFÈ, *supra* note 42, at 134-35.

85. *See* Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment and Sentence, ¶¶ 417-19.

86. BONAFÈ, *supra* note 42, at 134 (emphases added).

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

88. *Id.*

89. Marjolein Cupido, *The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts*, 15 MELB. J. INT'L L. 378, 397

lethal pair." On the one hand, it decided a nationwide campaign of genocide is "a fact of common knowledge of which trial chambers must take judicial notice;" on the other, it has also established that genocidal intent can be inferred from a general context and from the acts of others.[90] As a result, the prosecution could, in fact, prove "specific intent without introducing any evidence of that intent at all."[91]

The ICTY adopted a similar inductive, generalizing fact-finding methodology in *Karadžić*. The Trial Chamber observed that the intent of the accused "is intrinsically connected to all of the evidence on the record" and, therefore, "conducted a *holistic* and *contextualized* assessment of this evidence."[92] Accordingly, the Chamber proceeded to aggregate a number of pieces of evidence to conduct a "bottom-up analysis"[93] of the events in Srebrenica. The Trial Chamber evaluated specific conversations Karadžić had with his subordinates (Mladić, Deronjić, Bajagić, Vasić, and Živanović)[94] and concluded it would be unreasonable to suppose Karadžic and his subordinates did not discuss certain genocidal acts. As Ambos noted, the Trial Chamber "only found—quite plausibly—his [Karadžić's] knowledge and inferred from this his shared intent," but "this intent could be limited to the [forced] removal of Bosnian Muslims, perhaps also including some killing, but this does not necessarily amount to the intent to destroy

(2014) (discussing the difficulty the Courts have had when evaluating individual actions to establish genocidal intent, leading them to look at the broader context).

90. Kevin J. Heller, *Prosecutor v. Karemera, Ngirumpatse, & Nzirorera*, 101 AM. J. INT'L L. 157, 157, 161 (2007).

91. *Id.* at 162 (explaining that *Karemera* changed the way the Court looks at nationwide campaigns of genocidal acts and that proof that it actually occurred is no longer required; the Court may assume that it occurred).

92. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 2592 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) (emphases added).

93. *See* Kai Ambos, *Karadžić's Genocidal Intent as the 'Only Reasonable Inference'?*, EUR. J. OF INT'L L. BLOG (Apr. 1, 2016), https://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/ (discussing the Chamber's method for analyzing genocide in this case, noting that they began by looking at the crimes first and then determining whether they had acted with genocidal intent).

94. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶¶ 5770, 5773, 5783-84, 5803.

this group as such."[95] The Trial Chamber again inferred to establish that, as a whole, the acts perpetrated in Srebrenica revealed Karadžic's intent to destroy Bosnian Muslims. The Trial Chamber reasoned, "[v]iewing the evidence in its totality . . . the Bosnian Serb Forces must have been aware of the detrimental impact that the eradication of multiple generations of men would have," and it found, "beyond reasonable doubt that these acts were carried out with the intent to destroy the Bosnian Muslims in Srebrenica as such."[96]

a. ICC and the Criminal Context

Although the ICC has not dealt with the merits of a genocide case,[97] it has not been indifferent to discussions about how to infer genocidal intent from concrete facts. During the 1999-2000 negotiations of the Elements of Crimes related to genocide, flexibility in assessing the *mens rea* of the crime was at the heart of the deliberations.[98] There were multiple proposals to lower the evidentiary threshold of *dolus specialis.* First, the Preparatory Commission for the International Criminal Court dealt with a proposal to include, in the Elements of Crimes, the following provision: "The accused knew *or should have known* that the conduct *would* destroy, in whole or in part, such group or that the conduct *was part of a pattern of similar conduct* directed against that group."[99]

The inductive approach embedded in this proposal is clear. It aimed at reducing *dolus specialis* to a cognitive, rather than volitional element, thus avoiding a detailed analysis of the accused's mental state and her conduct in isolation. The debates that ensued resulted in three

95. *See* Ambos, *supra* note 93.

96. Prosecutor v. Karadžić*,* Case No. IT-95-5/18-T, Judgment, ¶ 5671; Ambos, *supra* note 93.

97. *See, e.g.*, International Criminal Court, *Situations Under Investigation: Darfur, Sudan*, https://www.icc-cpi.int/darfur (noting that Sudan's president Omar Al Bashir was the first person charged of genocide, although the arrest warrants against him have not been enforced and he is not in the Court's custody).

98. *See* Proposal Submitted by the United States of America: Draft Elements of Crimes, U.N. Preparatory Comm'n for the Int'l Crim. Ct., ¶ 2, U.N. Doc. PCNICC/1999/DP.4 (Feb. 4, 1999).

99. *See* Addendum – Annex III: Elements of Crimes, U.N. Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/1999/L.5/Rev.1/Add.2 (Dec. 22, 1999) (emphases added).

changes related to the fact-finding methodologies used to infer genocidal intent.

The first change is the role of circumstances in proving genocidal intent. While some parties to the negotiations deemed the negligence ("should have known") standard in the original proposal to be too low to satisfy the *mens rea* requirement of the crime, a number of countries insisted on a more flexible approach to assessing specific intent.[100] The result of the negotiations was the current Elements of Crimes text, which excluded the "should have known", standard, but incorporated a reference to "knowledge of circumstances" and left it to the Court to decide, on a case-by-case basis, the relevance of these circumstances when defining genocidal intent.[101]

The second change is the introduction of the element of "general context" in a new paragraph of the Elements of Crime. According to this element, when evaluating *mens rea*, judges should also consider if the actions "took place in the context of a manifest pattern of similar conduct."[102] Third, changes were incorporated to clarify that, for genocide to be committed, the intended result needed not materialize ("would destroy").[103] It would be enough to assess the suitability ("could destroy") of criminal conduct to achieving the intended result.[104] In sum, the current text reads:

> Notwithstanding the normal requirement for a mental element provided for in article 30, and *recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent*, the appropriate requirement, if any, for a mental element regarding this circumstance will *need to be decided by the Court on a case-by-case basis*.[105]
>
> The conduct took place *in the context of a manifest pattern of similar conduct* directed against that group or was conduct that *could* [instead of

100. *See* Jennifer Schense, *Preparatory Commission Report*, ICCNOW.ORG (Mar. 2000), http://www.iccnow.org/documents/4thPrepComReportMarch2000.pdf.

101. Elements of Crimes, Assembly of States Parties to the Rome Statute of the International Criminal Court, art. 6, U.N. Doc. ICC-ASP/1/3 (Sept. 3-10, 2002).

102. *Id.*

103. *Id.*

104. Schense, *supra* note 100.

105. Elements of Crimes, Assembly of State Parties to the Rome Statute of the International Criminal Court, *supra* note 102, art. 6.

"would" in the original proposal] itself effect such destruction.[106]

Though the original proposal was diluted, the Elements of Crimes currently in force incorporates and acknowledges the importance of an inductive fact-finding method and the determination of a general criminal context in devising genocidal intent—thereby following the trend started by the *ad hoc* tribunals in their jurisprudence.

Undoubtedly, proving genocidal intent is an intricate task, and a tension exists between the inferential method of proof described in the preceding paragraphs and the principle of individual liability. This tension is heightened by the comprehensive jurisdiction of international criminal courts, which, in the absence of specific intent, allows for a conviction under less serious offenses corresponding to the *actus reus* of genocide. Still, especially when higher-ranking defendants are concerned and the policy purpose of international criminal law is in its full force, it should be recognized that the establishment of legal premises by international tribunals has followed a dialectical methodology with an expansive effect on an individual's responsibility. Likewise, genocidal intent tends to be inferred from generalizing extrapolations. As pointed out by Cupido, the argumentative processes of international criminal courts have been marked by the exercise of a "certain discretion" and by a "casuistic development of the law, through the flexible use of factors," which entail "a certain risk of abuse:"[107] "there is a danger that judges will freely tweak the law to fit the facts," which is "problematic in light of the principle of legality."[108]

B. STATE RESPONSIBILITY: FORMALISM, DEDUCTIVE REASONING, AND FACT-FINDING

1. Formalism

In sharp contrast with individual responsibility under international criminal law, the law on state responsibility has predominantly been construed in a *formalist* manner, based on the application of *deductive*

106. *Id.* (emphases added).
107. Cupido, *supra* note 89, at 407.
108. *Id.*

methods in which *analytical* arguments outweigh policy considerations. State responsibility for genocide is established by looking to the specific conduct of an agent and verifying if his or her acts or omissions are attributable to the state in accordance with previously established premises.[109]

Formalism will be employed to mean "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative."[110] Formalism emphasizes that every judicial decision is a form of syllogistic deduction[111] and distrusts any reliance by judges on experience, intuition, or other factors that are not logically formulated.[112] A formalist conclusion is more likely to be "judged sound or unsound," rather than "correct or incorrect—the latter pair suggest[s] a more demonstrable, verifiable mode of analysis than will usually be possible in weighing considerations of policy."[113] According to formalists, legal reasoning is based on an analytical approach, in which a sound legal decision is derived from a syllogism consisting in the application of a legal premise to descriptive propositions of fact.

The ICJ often takes a formalistic approach, which can be seen in its decisions. Analyzing the *Temple Case*[114] and the *South-West African Case (2nd phase),*[115] Prott criticized the Court for refusing arguments

109. *See* BONAFÈ, *supra* note 42, at 25, 31.

110. Posner, *supra* note 9, at 181.

111. *See* Edward J. Bloustein, *Logic and Legal Realism The Realist as a Frustrated Idealist*, 50 CORNELL L. REV. 24, 24 (1964) (discussing the realist school of thought's opposition to the idea that each judicial decision transcends from previous decisions).

112. *See* Morris Raphael Cohen, *Law and Scientific Method*, 6 AM. L. SCH. REV. 231, 237 (1928).

113. Posner, *supra* note 9, at 181.

114. For examples of a formalist approach, *see* Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, ¶¶ 25, 35 (June 15) (claiming there are no legal grounds in the argument that a state incurred in error when defining a border, and discussing the application of treaty interpretation to define the border line).

115. *See* South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. Rep. 6, ¶¶ 49-50 (July 18) ("[I]t has been suggested . . . that humanitarian considerations are sufficient in themselves to generate legal rights and obligations . . . [but] [t]he Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that

that were not strictly based on legal logic, and for deciding these cases in a formalistic manner.[116] The ICJ's approach to genocide is similarly formalistic. The Court analyzes each factual situation on its own merit, avoiding extrapolations, and opting for a deductive, rather than inductive, generalizing methodology.

Surprisingly, the ICJ seems to view the *gravity* of crime of genocide as a reason to adhere more closely to its traditionally formalistic approach in evaluating these cases. In essence, while international criminal law views the particular gravity of international crimes as justification for expanding its reach to capture more perpetrators of these crimes, the ICJ sees this gravity as a reason to tighten the shackles of formalism. In both *Bosnia & Herzegovina v. Serbia & Montenegro* and *Croatia v. Serbia,*[117] the ICJ stated the seriousness of genocidal intent required that certain elements be met to attribute genocidal intent to a state. To support this assertion, the Court invoked its decision in the *Corfu* case finding "[a] charge of such exceptional gravity [laying mines in the territorial waters of Albania] against a State would require a degree of certainty that has not been reached here."[118]

In requiring that a "degree of certainty" be met to attribute genocidal intent to a particular state, the ICJ not only followed a path different from the one forged by international criminal law in establishing individual criminal responsibility, but also departed from principles established in jurisprudence on state responsibility for human rights violations. International human rights courts[119] and

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reason it can do so only through and within the limits of its own discipline.").

116. *See* Lyndel v. Prott*, The Justification of Decisions in the International Court of Justice*, *in* LA MOTIVATION DES DÉCISIONS DE JUSTICE 331, 335 (Chaïm Perelman & Paul Foriers eds., 1978).

117. Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶ 178 (Feb. 3).

118. Corfu Channel, Judgment, 1949 I.C.J. Rep. 4, 17 (Apr. 9).

119. *See* SARAH JOSEPH & ADAM FLETCHER, *Scope of Application*, *in* INTERNATIONAL HUMAN RIGHTS LAW 119, 119, 124 (Daniel Moeckli et al. eds., 2014) ("An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention."); *see also* Nollkaemper, *supra* note 2, at 630-31.

treaty-bodies[120] have argued that the standard of proof should be more lenient for grave crimes. This call for leniency is based on the assumption that large-scale acts could not take place without some of fault of the State and the policy-based rationale that a victim-centered approach prioritizes reparations.

Indeed, human rights bodies have invoked gravity as a reason to establish a state's responsibility—and at times aggravated responsibility—for serious crimes.[121] For instance, in *Plan de Sánchez Massacre*,[122] the Inter-American Court of Human Rights considered the occurrence of genocide when establishing aggravated state responsibility and when requiring reparations. According to the judgment, "facts such as those stated, which gravely affected the members of the Maya achí people . . . took place within a pattern of massacres, [and] constitute an aggravated impact that entails international responsibility of the State."[123] In its decision on reparations, the Court relied on the "extreme gravity" of the case to establish aggravated state responsibility, and to require the state pay victims reparation.[124] In the ICJ, Judge Cançado Trindade is the main proponent of this victim-centered human rights approach, and is essentially alone in taking this position.[125] In his dissenting opinions, he has pointed to the need to consider the seriousness of the crime and the need to provide reparations as additional reasons to hold states responsible for grave crimes.[126] Table 1 compares examples of each of

120. *See* Hum. Rights Comm., General Comment No. 31, ¶ 8, CCPR/C/21/Rev.1/Add.13 (May 24, 2004).

121. BONAFÈ, *supra* note 42, at 78.

122. Plan de Sánchez is a village in Guatemala that was inhabited primarily by people from Mayan indigenous ethnic group. In 1982, Guatemala was governed by a military junta that kept a heavy military presence in the region where Plan de Sánchez is located. The government accused Mayan groups of participation in anti-government guerrillas. In July 1982, a massacre took place in the village, leading to the execution of 268 people. *See* Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 42 (Apr. 29, 2004).

123. *Id.* ¶ 51.

124. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 93 (Nov. 19, 2004).

125. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, 179, ¶ 6 (Feb. 3) (dissenting opinion by Trindade, J.).

126. *See id.* ¶ 303; Application of Convention on Prevention and Punishment of

the three approaches to "gravity."

Table 1
THREE APPROACHES TO GRAVITY

INTERNATIONAL CRIMINAL LAW	ICJ	HUMAN RIGHTS APPROACH
"The International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence."[127]	"The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive."[128]	"The threshold of the gravity of the breaches of human rights and of international humanitarian law removes any bar to jurisdiction, in the quest for reparation to the victimized individuals. It is indeed important that all mass atrocities are nowadays considered in the light of the threshold of gravity, irrespective of who committed them."[129]

The ICJ's approach to gravity has a critical effect on its judgment and permeates its methodology. It reinforces a formalistic tendency both in establishing legal premises (see Part II.B.2 below) and, more crucially, in fact-finding (see Part II.B.3 below).

Crime of Genocide (Croat v. Serb.), Judgment, 2015 I.C.J. Rep. 3, 244 (Feb. 3) (dissenting opinion by Trindade, J.).

127. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 28 (Int'l Crim. Trib. For the Former Yugoslavia Aug. 10, 1995).

128. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 209 (Feb. 26).

129. Ger. v. It.: Greece Intervening, 2012 I.C.J. Rep. at 179, ¶ 303 (dissenting opinion by Trindade, J.).

2. Establishing the Legal Premise: Analytical Reasoning

Contrary to international criminal law, which has resorted to dialectical reasoning to "creatively establish a major premise serving as a proper rationale for a legal conclusion," the ICJ has predominantly based its arguments on formal, pre-existing legal premises, leading to reasoning that is "analytical rather than dialectical."[130] For a state to be responsible, the conduct in question must strictly fall within pre-established legal rules.

The legal premises for attribution of state responsibility were spelled out by the ICJ in *Nicaragua* and are included in the Articles on Responsibility of States for Internationally Wrongful Acts ("A.R.S.I.W.A.").[131] The structural and functional tests outlined in *Nicaragua* and in the A.R.S.I.W.A. require a strict link between the specific conduct and the state. Under the structural test, the conduct of any state organ—meaning any person or entity with that status under the state's law—is considered an act of that state.[132] The functional test applies to a "person or entity . . . which is empowered by the law of that state to exercise elements of the governmental authority"[133] even if "only exceptionally and to a limited extent."[134]

A State may also be responsible for the conduct of non-state actors that do not exercise elements of governmental authority.[135] In genocide cases, this form of responsibility acquired greater importance in the context of the former Yugoslavia. Article 8 of the draft A.R.S.I.W.A. states that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if

130. Bodenheimer, *supra* note 10, at 410.

131. *See* G.A. Res. 56/83, art. 4 (Jan. 28, 2002).

132. *See id.*

133. *Id.* art. 5.

134. JAMES CRAWFORD, STATE RESPONSIBILITY—THE GENERAL PART 127 (John S. Bell et al. eds., 2013) (explaining that if an individual committing the crime of genocide is doing so within the parameters of State law and government authority, then it shall be considered an act of the State, not just the individual, under international law); *see also* U.N. OFFICE OF LEGAL AFFAIRS, MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, at 51-53, ST/LEG/SER B/25 (2012).

135. *See* G.A. Res. 56/83 arts. 5, 7, *supra* note 131 (explaining that if a State gives an individual the capacity to commit the crime of genocide, then that crime will be an act of the State, not just the individual).

the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[136]

In *Nicaragua*, the ICJ articulated the ways in which a non-state actor's acts could be attributable to a state in a two-tier test evaluating whether the non-state actor was: (i) completely dependent on the state and (ii) under the state's effective control.[137] The Court used this test to determine whether the *Contras'* humanitarian and human rights law violations could be attributed to the U.S. Government. In the end, the ICJ found that the *Contras* were not completely dependent on,[138] or under the effective control[139] of the United States. Importantly, the Court evaluated each separate violation when verifying whether the United States directed the group.

Although the Court did not attribute the specific conduct performed by the *Contras* to the United States, it assessed whether the support that the United States provided the group complied with international law. However, there is a major difference between *Nicaragua* and the genocide cases: the ICJ in *Nicaragua* had jurisdiction under customary law and was able to provide a nuanced analysis of the United States' conduct. The Court addressed each act and subsumed it under specific legal categories: the United States was found in breach of obligations: (i) not to intervene in the affairs of another State; (ii) not to use force; (iii) not to violate the sovereignty of another State; (iv) not to interrupt peaceful maritime commerce; (v) to inform the location of mines; and (vi) under general principles of humanitarian law.[140] In other words, in the seminal case in which rules of State responsibility were spelled out, the Court had broad jurisdiction *ratione materiae*, enabling it to descend to each particular act and subsume it under a specific legal premise. The same option was not available in the ICJ's genocide cases, in which the Court simply concluded that a state was either responsible for genocide or that it was not—even where the state's

136. *Id.* art. 8.
137. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 109-111 (June 27).
138. *See id.*
139. *See id.* ¶ 115.
140. *See id.* ¶ 292.

actions constituted other breaches of international law.[141]

The ICTY took a more flexible approach than the ICJ did in *Nicaragua*, when attributing the acts of non-state actors to states in *Tadić*. The Appeals Chamber in *Tadić* highlighted the rigidity of the *Nicaragua* test, and devoted a section of its decision to explaining the "grounds on which the *Nicaragua* test does not seem to be persuasive."[142] The Chamber contended "[t]he principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria."[143] In analyzing the A.R.S.I.W.A., the Appeals Chamber concluded that "[t]he rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks"[144] that could be undertaken by a state organ.[145] The A.R.S.I.W.A.'s goal is to prevent states from "shelter[ing] behind, or us[ing] as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility."[146] The Appeals Chamber concluded that "the whole body of international law on State responsibility is based on a "*realistic concept of accountability, which disregards legal formalities and aims at ensuring that States* entrusting some functions to individuals or groups of individuals *must answer for their actions*, even when they act contrary to their directives."[147] While the multiplicity of actors and acts being considered by the ICTY merited a broader, more relaxed assessment of whether the state had control over non-state actors, in *Nicaragua,* there were fewer actors and acts to consider, and this may have contributed to the Court's application

141. *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 ¶ 147 (Feb. 26) (showing that the Court recognizes such restraints); Marko Milanović, *State Responsibility for Genocide: A Follow Up*, 18 EUR. J. INT'L L. 669, 671 (2007) (commenting on this limited jurisdiction and its impact on the judgment and on the strategies of the parties).

142. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 115 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

143. *Id.* ¶ 117.

144. *Id.*

145. *Id.*

146. *Id.* ¶ 123.

147. *Id.* ¶ 121 (emphases added).

of a restrictive test for effective control.[148] Accordingly, the ICTY found that the Bosnian Serb armed forces were under the "overall control" of the Former Republic of Yugoslavia (FRY).[149]

In *Tadić*, the ICTY outlined a plan that would significantly narrow the gap between criminal and state responsibilities. The Tribunal (i) proposed to introduce *flexibility* in the attribution criteria of state responsibility, adapting them *in accordance with the context*; (ii) argued that the policy purpose of the law on state responsibility is to *prevent states from escaping* their responsibility; (iii) defended a *realistic concept* of accountability, in which legal formalities have a lesser role; and (iv) considered that *complex criminal contexts* require a *less strict* rule of attribution.[150]

Nevertheless, the ICJ did not adopt *Tadić's* overall control test. In defending the effective control test it developed in *Nicaragua*, the ICJ stressed that the fundamental tenet of international responsibility is that "a State is responsible only for its own conduct, which is to say the conduct of persons acting, on whatever basis, on its behalf."[151] To find otherwise would be stretching "too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility."[152]

The concrete question before the ICJ in *Bosnia v. Serbia*, was whether the acts of the VRS in Srebrenica were attributable to Belgrade. The Court acknowledged the close links that existed between the FRY and the VRS, but nevertheless (and mindful of the exceptional gravity of the conduct to be attributed to the state), it decided "to equate persons or entities with State organs when they do not have that status under internal law *must be exceptional*, for it requires a *particularly great degree* of State control over them."[153] Then, in assessing whether Belgrade had effective control over the

148. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 122 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

149. *See id.* ¶¶ 125, 131.

150. *See id.* ¶ 117.

151. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 406 (Feb. 26).

152. *Id.*

153. *Id.* ¶ 393 (emphases added).

VRS, the Court required that the "state's instructions were given in respect of *each operation* in which the alleged violations occurred, *not generally* in respect of the overall actions."[154] Ultimately, after applying this restrictive effective control test and the aforementioned parameters, the Court found the VRS's actions were not attributable to the FRY.[155]

These extracts demonstrate the fundamental difference in how legal premises are construed in international criminal law and in the law on state responsibility. In Part II.A.2, it was argued that international criminal law developed a legal framework that allowed the attribution of conduct to remote perpetrators. The ICJ took the opposite approach, and strictly applied pre-established legal premises that, at least with regard to non-state actors, narrowed the possibility of attribution.

3. Deductive Fact-Finding

As described in Part II.A.3, international criminal law adopted an inductive method clustering and generalizing specific conduct to form a general criminal context from which genocidal intent can be inferred. In contrast, state responsibility for acts of genocide requires the establishment of genocidal intent through deduction, applying either the exacting "effective control," or less strict "overall control" test.

In principle, a "general plan" to carry out genocide is required to demonstrate a state's genocidal intent.[156] The ICJ recognized that, absent that plan, *dolus specialis* (the Court used the criminal law terminology) could be inferred from a pattern of conduct. However, given the special gravity of the conduct (Part II.B.1), the state's genocidal intent should be the only possible conclusion one could derive from the pattern of conduct:

> Turning now to the Applicant's *contention that the very pattern* of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the *Court cannot agree with such a broad proposition*. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be *convincingly shown by reference to particular circumstances*, unless a

154. *Id.* ¶ 400 (emphases added).
155. *Id.* ¶ 424.
156. *See id.* ¶ 373.

> general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it *could only point* to the existence of such intent. [157]

By requiring virtual certainty that a state possessed intent to commit grave crimes, the ICJ has added yet another layer of rigidity to hinder its ability to properly assess a state's genocidal intent. In requiring virtual certainty, the ICJ departed not only from the international criminal law approach, but also from some of its own precedent. Indeed, the Court imposed additional burdens on fact-finding, instead of building on previously recognized flexibilities stemming from its own case law, dealing with situations where a state could be held responsible for acts it did not directly perpetrate.[158] One example of the Court's flexibility in attribution is the *Corfu* case."[159] Although the charges were serious, as in the aforementioned cases, the Court ultimately found Albania liable for the "laying of mines in its territory by an unnamed third party (most likely Yugoslavia) on the basis of its officials' knowledge of the activity and their corresponding failure to warn shipping in the area."[160]

A revealing exercise is a comparison between the ICJ's evidentiary standards (i) in the genocide cases and (ii) in *Corfu*. As already mentioned, the Court based its "only possible inference" rule on a

157. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 373 (Feb. 26) (emphases added); *See also* Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶ 178 (Feb. 3) (clarifying that the "notion of reasonableness must necessarily be regarded as implicit in the reasoning" of 2007, recognizing that "[t]o interpret paragraph 373 of the 2007 Judgment in any other way would make it impossible to reach conclusions by way of inference").

158. *See* CRAWFORD, *supra* note 134, at 117-18 (recalling two main precedents in this regard: Corfu, which will be discussed further, and the C.S.S. Alabama arbitration of 1871); *see also* Tom Bingham, *The Alabama Claims Arbitration*, 54 INT'L & COMP. L.Q. 1, 15 (2005) (quoting Article VI of the Treaty of Washington of 1871, which established the arbitration "rules to be taken as applicable to the case, and by such principles of International Law" included that "[a] neutral Government is bound . . . to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace").

159. Corfu Channel, Judgment, 1949 I.C.J. Rep. 4, 17 (Apr. 9).

160. CRAWFORD, *supra* note 134, at 118.

passage in the *Corfu* decision. However, in this passage, the ICJ was determining the reliability of specific testimony, not establishing parameters for assessing state liability.[161] In the part of the judgment in which the ICJ *did* address state responsibility, it stated that the acts could not have been perpetrated without Albania's knowledge. It also argued:

> [b]y reason of this exclusive control [over the waters], the other State, the victim of a breach of international law, is often unable to furnish direct proof . . . [and] should be allowed a *more liberal recourse to inferences of fact and circumstantial evidence* . . . [such indirect inferences carry] special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[162]

In *Bosnia v. Serbia*, the Court refused any "recourse to inferences,"[163] both when verifying if the actions of the VRS in Srebrenica were directly attributable to the FRY (which would mean that Belgrade shared genocidal intent) and when determining if the FRY was an accomplice under Article III(e) of the Genocide Convention (which would mean the FRY had knowledge of VRS's intent). In deciding whether Serbia (FRY) was responsible for the violence in Srebrenica, the ICJ stated:

> [u]ndoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events . . . however, the sole task of the Court is to establish the legal responsibility of the Respondent, a *responsibility which is subject to very specific conditions.* One of those conditions is not fulfilled, because it is *not established beyond any doubt* . . . [that FRY] authorities were *clearly aware that genocide* was about to take place or was under way; in other words that not only were massacres about to be carried out or already under

161. Beatrice I. Bonafè, *Responsabilità dello Stato e dell'individuo per Crimine di Genocidio: Persistenti Incertezze nella Giurisprudenza della Corte Internazionale di Giustizia*, SIDI BLOG (Feb. 20, 2015), http://www.sidiblog.org/2015/02/20/responsabilita-dello-stato-e-dellindividuo-per-crimine-di-genocidio-persistenti-incertezze-nella-giurisprudenza-della-corte-internazionale-di-giustizia/.

162. Corfu Channel, 1949 I.C.J. at 18 (emphases added).

163. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 376, 422 (Feb. 26).

> way, but that their perpetrators *had the specific intent characterizing genocide*.[164]

Regarding complicity, the Court demanded that it should be established "beyond any doubt" that the FRY supplied aid to the VRS "in full awareness" that it would be used to further a genocidal intent.[165] As Gattini noted, not even the "possible knowledge by Serbian authorities that massacres were about to be carried out in Srebrenica, or even that it was already happening, was deemed sufficient by the Court in order to demonstrate actual knowledge of the specific genocidal intent of the perpetrators."[166]

In a separate opinion that pursued a more inductive method of fact-finding, Judge Bennouna resorted to a "more liberal recourse to inferences and circumstantial evidence," as in the *Corfu* case.[167] Based on the totality of the evidence he concluded that the "manifold ties" between the political and military echelons of both sides meant "Serbia therefore had full knowledge of the genocide, which makes it an accomplice."[168] Judge Keith applied the same approach, basing his argument on the 1999 Report of the U.N. Secretary-General "The Fall of Srebrenica," in which the events in Srebrenica were "understood in the context of more general information about the very close relationships between the leaderships in Belgrade and in Pale and especially between President Milošević and President Karadžić."[169] Judge Keith also emphasized that the FRY was "fully aware of the climate of deep seated hatred" in Srebrenica and that the international community as a whole understood the deteriorating situation in the enclave before the massacre.[170] Judge Al-Khasawneh, who found the FRY did share genocidal intent, also complained about the "methods

164. *Id.* ¶ 422 (emphases added).
165. *Id.* ¶¶ 422-23.
166. Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 INT'L CRIM. JUST. 889, 897 (2007).
167. Corfu Channel, 1949 I.C.J. at 18.
168. *See* Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. at 359, 364 (declaration by Bennouna, J.) (referencing Wesley Clark's testimony, the continuous contact between Mladić and Milošević, the links between the Scorpions and the Ministry of the Interior in Belgrade, and the close military links between the officers of the VRS and Belgrade).
169. *Id.* at 352, ¶¶ 9-10 (declaration by Keith, J.).
170. *Id.* ¶ 10.

and techniques" of the majority, which through their rigidity "could only lead" to the conclusion that Serbia lacked genocidal intent.[171]

For the purpose of assessing genocidal intent, the majority aimed to determine what the state knew and wanted at the precise time the campaign in Srebrenica turned from ethnic cleansing into genocide.[172] It adopted an approach that is *forward-looking* in the sense that the analysis is based on the particular circumstances surrounding the conduct of the state at the moment the genocidal campaign began. This approach lies in stark contrast to international criminal law's holistic, *backward-looking* approach, in which the judge has the benefit of knowing the results of a criminal enterprise and the part the accused played in it.

The Appeals Chamber's decision regarding Tadić's participation in a JCE (mentioned in Part II.A.2), is a useful example for distinguishing these different approaches. The Trial Chamber found the killing of five men in Jaskici was not an expected result of participation.[173] By contrast, the Appeals Chamber held Tadić had the intention to further a criminal purpose in which the deaths were, under the circumstances, foreseeable.[174] If a forward-looking approach, like the ICJ's, was to be adopted to Tadić's benefit, would it be possible to conclude that, on the basis of the information he possessed, he actively pursued or at least reconciled himself with the deaths of the five men in Jaskici? Another pertinent question would be: is it not generally the case that a state, with its intelligence, diplomatic, and military apparatus, is in a better position to gather information on the general criminal context in which its actions are undertaken and predict the consequences of its conduct?

The current state of affairs, summarized in Table 2, is not ideal. It is counterintuitive that an individual's genocidal intent can be ascertained by reference to participation in a common plan and a general criminal context, whereas a state's intent is rigidly construed

171. *Id.* at 241, ¶ 62 (dissenting opinion of Vice-President Al-Khasawneh).
172. *Id.* at 122, ¶ 190.
173. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 759-65 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
174. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

by avoiding extrapolations and evaluating particular acts and circumstances. Given that a state is an abstract entity that can better calculate the effects of its actions, it is reasonable to allow the purpose of its actions to be inferred more liberally. Part III will try to address some of these concerns.

Table 2	**CRIMINAL RESPONSIBILITY**	**STATE RESPONSIBILITY**
PREDOMINANT APPROACH	Realist: ▪ Policy purpose for a *correct* result	Formalist: ▪ Logical reasoning for a sound decision
PREDOMINANT REASONING	Dialectical: ▪ Balancing legal and reasonable	Analytical: ▪ Logic syllogism based on formal premises
FACT-FINDING	Inductive: ▪ Elevating specific conduct	Deductive: ▪ Descending to particular act
INFERENCE OF GENOCIDAL INTENT	Effects, backward-looking based: ▪ "General criminal context" ▪ Gravity suggests the need to punish	Aims, forward-looking based: ▪ "Convincingly shown by particular circumstances" ▪ ICJ: Gravity recommends certainty ▪ Human rights tribunals: gravity recommends protection of victims

III. INTERSECTIONS

Dolus specialis was not devised with state responsibility in mind. The introduction of state responsibility for acts of genocide in an essentially criminal law-based treaty (Article IX of the Genocide Convention), was not an ideal legislative solution. It is thus not surprising that in both *Bosnia & Herzegovina v. Serbia & Montenegro* and *Croatia v. Serbia*, the ICJ had difficulties establishing the state's genocidal intent. Part III concentrates on how to translate a subjective criminal law element into the law on state responsibility.

Responses to this legal challenge vary dramatically. Some commentators and judges have questioned whether the Genocide Convention actually encompasses the state obligation not to commit genocide and have defended the view that the text merely establishes

the duty of the state to prevent and punish individual perpetrators.[175] Others have proposed the revival of the concept of crimes of the state and of *delicta imperii* as a possible mode of liability.[176]

This article suggests another approach. It proposes a methodological cross-fertilization between international criminal law and the law on state responsibility to more appropriately evaluate the intent of a state. A state's intent should be construed in a nuanced, objective, holistic way, benefitting from methods developed under international criminal law. Conversely, recourse to inductive extrapolations to establish an individual's genocidal intent requires prudence. In sum, based on the diagnosis that international criminal law and the law on state responsibility seem to counterintuitively follow inverted methodological directions, this study proposes a methodological re-balancing between these two realms of law.

A. ELEMENTS FOR A UNIFIED METHOD FOR GENOCIDAL INTENT

1. Nuanced Assessment of Gravity: Intent's Extent and Intensity

Why is *dolus specialis* a recurrent legislative technique in Roman-continental criminal systems?[177] It serves the purpose of aggravating a

175. *See* Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUR. J. INT'L L. 631, 641-42 (2007).

176. *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, 202, ¶ 94-95 (Feb. 3) (dissenting opinion by Trindade, J.); *see also* William A. Schabas, *Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide*, *in* THE CRIMINAL LAW OF GENOCIDE 39, 47 (Ralph Henham & Paul Behrens eds., 2007); Antônio Augusto Cançado Trindade, *Complementarity State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited*, *in* INTERNATIONAL RESPONSIBILITY TODAY – ESSAYS IN MEMORY OF OSCAR SCHACHTER 255-56 (Maurizio Ragazzi ed., 2005); Antonio Cassese, *La Communauté Internationale et Le Génocide, in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTIVE ET DU DÉVELOPPEMENT - MÉLANGES MICHEL VIRALLY 183, 186 (Pedone ed., 1991); Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, *in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT 25, 40 (Mélanges Michel Virally ed., 1991).

177. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 518 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998). Given that *dolus specialis* is a technique typical of Roman-continental legal systems, references in this article to national legislations and case law concentrate on countries from this legal tradition.

criminal offence when the criminal entertains a specific objective or motive considered to be particularly grave.[178] The legislator is concerned with the "resoluteness of the will"[179] of an agent, an intent that is "something more than the usual, simple willingness."[180]

Therefore, the legal definition of specific intent always embeds an element of gravity. Furthermore, for a criminal to have genocidal intent, a threshold of intensity (*destroy*) and extent (*a group, in whole, or in part*) needs to be established.[181] If that threshold is not met, the individual might either have committed other crimes, not requiring specific intent, or might have committed genocide through an accessory form of liability (Part III.A.3). In other words, it is doubtful whether different degrees of genocidal intent can be envisaged for an individual.[182]

By contrast, under the law on state responsibility, nothing prevents the adoption of a more nuanced approach to crimes, based on a sliding scale of seriousness. Under Chapter III of the A.R.S.I.W.A., breaches of obligations that constitute peremptory norms are to be considered serious, "having regard to their scale or character."[183] Article 40 envisages an aggravated form of responsibility for breaches of an obligation under a peremptory norm, which must involve "a *gross*

178. Typical examples are found in articles 584 and 598 of the Spanish Criminal Code. *See* arts. 584, 589 CÓDIGO PENAL [C.P.] (Spain). Both crimes contain a very similar *actus reus*: to obtain, reveal, falsify, or destroy classified information that can undermine (article 584) / that is related to (article 598) national security or defense. Article 584 (the more serious crime) requires that the individual act with the aim of favoring a foreign power, while article 598 is directed against an agent not sharing that purpose. Another example is article 141(2) of the Portuguese Penal Code, entitled aggravated abortion. *See* art. 141(2) CÓDIGO PENAL [C.P.] (Port.). It prescribes aggravated criminal responsibility if the agent practices abortion (already defined as a criminal act in Article 140) with the intent of obtaining profit.

179. The expression is borrowed from ERIK WOLF, LAS CATEGORÍAS DE LA TIPICIDAD 50 (2005).

180. SCIPIONE PIACENZA, SAGGIO DI UN'INDAGINE SUL DOLO SPECIFICO 13 (1943).

181. Genocide Convention, *supra* note 6.

182. *See* ROGER MERLE & ANDRÉ VITU, TRAITÉ DE DROIT CRIMINEL - PROBLÈMES GÉNÉRAUX DE LA SCIENCE CRIMINELLE 726 (1988) (admitting the possibility of *dolus indeterminatus* in crimes with special intent are inconclusive on *dolus eventualis* and deny the possibility of *praeter dolus*).

183. A.R.S.I.W.A., *supra* note 4, at 110.

[intensity] or *systematic* [extent] failure" to fulfill the obligation.[184] The International Law Commission explained that a violation is systematic if carried out in an organized and deliberate way and "the term 'gross' refers to the intensity of the violation or its effects."[185] It also recognized that not every violation of *jus cogens* entails aggravated responsibility. On the contrary, the Commission defended a nuanced approach that avoids trivializing breaches of peremptory norms. The Commission stated "relatively less serious cases of breach of peremptory norms can be envisaged," even though these breaches are still inexcusable.[186] In other words, different levels of seriousness can be attributed to breaches of *jus cogens* norms—including acts of genocide by a state.

This approach is not different from the ones that the ICJ has adopted in the past. In *Diplomatic Staff in Tehran*,[187] the Court based its conclusions about Iran's "true intentions" on the fact that it was "fully aware" of the urgent US Embassy situation and yet did nothing to protect the Embassy.[188] Indeed, the ICJ considered the case "unique" and of "very particular gravity" because "the receiving State itself" disregarded the inviolability of a foreign embassy.[189] Such conduct, Dupuy argues, implicitly helped the Court establish "not only the existence of wrongfulness and its attribution to the state, but also its level of gravity."[190]

Applied to a state, genocidal intent is key in determining how serious a breach of the Genocide Convention is (and, accordingly, if aggravated responsibility should attach). In determining a state's genocidal intent, what needs to be established is the *extent* and *intensity* of state intent.[191] Instead of determining "if" a state has *dolus*

184. *Id.* at 112 (emphases and comments added).
185. *Id.* at 113.
186. *Id.*
187. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 68 (May 24).
188. Pierre M. Dupuy, *Responsabilité Internationale Des États*, *in* RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 21, 35 (1986).
189. U.S. v. Iran, 1980 I.C.J. ¶ 92.
190. Dupuy, *supra* note 188, at 35.
191. Arangio-Ruiz, *supra* note 176, at 25 (writing in 1991 when the debates on state crimes in the ILC were still active, and noting the possibility of assessing the degree of fault to define the consequences of crimes).

specialis, the focus shifts to the question "does the state have any genocidal intent and, if so, to what degree?" The next section will argue a holistic, objectified analysis should guide the answer to this question.

2. Individual and Holistic Approaches to Genocidal Intent

In establishing specific intent, an interpreter can adopt an *individual* approach that reconstructs the perpetrator's state of mind at the time of the act. The analysis is forward-looking,[192] based on the information available to the perpetrator in her particular circumstances. As mentioned in Part II.B, this has been the predominant approach in cases of state responsibility for genocide.

Another approach to establishing specific intent is *holistic*. This approach interprets the conduct of the perpetrator in light of the conduct's general context, in a backward-looking analysis that assumes "intentions are typically grounded on prior deliberation."[193] This holistic approach is predominant in international criminal law (Part II.A).

This article argues these methodologies should be inverted. A general criminal context is construed *ex post facto*, on the basis of information that was not necessarily available to the individual at the time of the act. This does not mean that, in conjunction with other factors, the context of an individual's conduct might not be relevant to infer *dolus specialis*. But, inferring *dolus specialis* should entail a careful analysis of an individual's decision-making process and of the role genocidal intent plays in it—an approach that is forward-looking and would better uphold the principle of individual liability.

By contrast, the presumption that a state had enough information to, through a process of "prior deliberation," comprehensively evaluate a given criminal context is more defensible.[194] A state is an organized, abstract entity formed by officials with different sources of military, diplomatic, and intelligence information. Therefore, it is, in principle, in a better position to calculate its own conduct in light of ongoing

192. *See generally* MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 139-64 (1999) (especially chapter 10).
193. *Id.* at 152.
194. *Id.*

events and to modulate the effects of its choices to act. A person, by contrast, tends to react in a less predictable manner, as her intentions are influenced by a changing environment. Therefore, contrary to the current tendency, a holistic approach is preferable in assessing states' intent, whereas an individualized evaluation is appropriate under international criminal law.

An individual's intent is not always irrelevant to state responsibility. The state of mind of a state official could have probative value: if Milosević were to be found guilty of genocide, it would probably affect findings on state genocidal intent. However, this simplistic view should be applied with caution as governments are not purely homogeneous entities formed by officials with a single state of mind.[195] Genocidal intent could be the attitude of an isolated official. Gaeta presents the problem in the following manner:

> [L]et us imagine that a state official of a country, say Italy, acting in his official capacity, participated in the perpetration of the terrorist attacks of 11 September 2001 . . . can anybody argue that Italy as such is responsible for having perpetrated the 11 September attacks and therefore for being 'a terrorist state'?'[196]

On the other hand, when a non-state actor is responsible for acts of genocide (Part II.B.2), the result tends to disregard the role of the State. In these cases, the rules governing attribution of state responsibility as formalistically applied by the ICJ are draconian. By requiring the interpreter to descend to the particular conduct (Part II.B.3), it becomes almost impossible to find a state responsible for acts of genocide.

A holistic analysis of intent avoids these unsuitable problems of attribution. For example, in *Bosnia & Herzegovina v. Serbia &*

195. The approach herein proposed is objective and casts doubts on the opinion of those who argue that a state's genocidal intent is ultimately established by the act of an individual. *But see* Sam Clearwater, *Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ's 2007 Decision in Bosnia v. Serbia*, 15 AUCKLAND U. L. REV. 1, 22 (2009); Nollkaemper, *supra* note 2, at 634.

196. Gaeta, *supra* note 175, at 636-37 (explaining that the intent of an individual official agent of a state does not represent the intent of the entire entity and, therefore, the entire entity cannot be held responsible for the individual agent's intent).

Montenegro, Bosnia submitted a number of general arguments aimed at establishing the FRY's *dolus specialis*. Allegations included: (i) the existence of a general plan for a "Greater Serbia;" (ii) the close military ties between JNA and the VRS, whose officers were even paid by Belgrade; (iii) the high proportion (up to 90%) of the military material of the VRS supplied by Belgrade; (iv) the FRY, Republika Srpska, and Republika Srpska Krajina formed one single economic entity and the FRY constituted the primary source of income of Republika Srpska and Republika Srpska Krajina; and (v) massive killings in detention camps throughout Bosnia, carried out using similar methods, and targeting the same group.[197] The Court (except for separate and dissenting opinions) refused to holistically interpret the facts, and insisted on determining what state authorities actually knew in a given moment (Part II.B.3) through an individual assessment of each allegation.[198]

This article proposes the point of departure to evaluate state genocidal intent is to objectively consider the degree of anticipation by the state of the genocidal result, based on the totality of information available to it. Such a solution would avoid two problems. First, it would prevent a simplistic attribution of the acts of a lone, rogue state agent, whose actions would only begrime the state to the extent they are part of a larger, holistic and nuanced analysis of state conduct. Second, it would permit a state's active contribution to third parties carrying out a genocidal enterprise to be adequately evaluated, attaching to the conduct the proper level of intent it displays.

3. Volitional and Cognitive Elements of Genocidal Intent

For a long time, the theory of *dolus* in continental systems has devoted attention to the dichotomy between its *volitional* and its *cognitive* elements.[199] The very evolution of the concept in continental systems can be traced back to theories that privilege a volitional

197. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 237-40, 371 (Feb. 26).

198. *Id.* ¶ 422.

199. *See* PIACENZA, *supra* note 180, at 14 (noting the importance of distinguishing purpose in a "subjective sense," with a psychological and emotive content, and what the purpose "would be objectively").

approach (a person that wants a result acts with *dolus*) or a cognitive one (*dolus* means that the agent mentally envisioned the result).[200] Welzel, founder of the influential finalist theory of *dolus* in Germany, famously defined it as "know and want the realization of a crime"[201]—or, more appropriately, the "realization of the legal description of the facts" ("Tatbestandsverwirklichung").[202] Welzel explains that an act with intent is carried out in "two moments:" an intellectual moment, or the consciousness of what one wants ("Bewußt sein davon, was man will"); and a volitional moment, or determination to perform the act ("Entschlossenheit dazu, daß man es durchführen will").[203] *Dolus* requires *both* a volitional (want a result) and a cognitive element (anticipate the result through a previous mental representation).

Commentators of international criminal law have revived this dichotomy with regard to genocidal intent. However, instead of recognizing that *dolus* is composed of these two elements, there is a tendency to rely either on volitional[204] or cognitive[205] standards to define genocidal intent. The volitional standard considers that a

200. Rui F. S. S. Patrício, *O Dolo Enquanto Elemento do Tipo Penal (no Direito Português Actual): Questão-de-Facto ou Questão-de-Direito?*, *in* I REVISTA DA ORDEM DOS ADVOGADOS PORTUGESES 147, 162-172 (1998); Antonio Luis Chaves Camargo, Motivo, Vontade, Intenção, Dolo (1986) (unpublished thesis, University of São Paulo) (on file with author).

201. HANS WELZEL, DAS DEUTSCHE STRAFRECHT IN SEINEN GRUNDZÜGEN—EINE SYSTEMATISCHE DARSTELLUNG 25, 40-41 (2d ed. 1949).

202. *Id.* at 25.

203. *Id.* at 40-41.

204. That seems to be the position adopted by the ILC. *See Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int'l L. Comm'n 15, 44, U.N. Doc. A/CN.4/SER.A/1996/Add.1; *see also* Devrim Aydin, *The Interpretation of Genocidal Intent Under the Genocide Convention and the Jurisprudence of International Courts*, 78 J. CRIM. L. 423, 441 (2014); Michael G. Karnavas, *Is the Emerging Jurisprudence on Complicity in Genocide Before the International Ad Hoc Tribunals a Moving Target in Conflict with the Principle of Legality?*, *in* THE CRIMINAL LAW OF GENOCIDE 97, 110-11 (Ralph Henham & Paul Behrens eds., 2007).

205. *See* Claus Kress, *The Darfur Report and Genocidal Intent*, 3 J. INT'L CRIM. JUST. 562, 577 (2005); *see also* Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2266-70 (1999). For the opinion that a volitional standard is not only too narrow, but also an obstacle to preventing genocide, *see* Ekkehard Strauss, *Reconsidering Genocidal Intent in the Interest of Prevention*, 5 GLOBAL RESP. TO PROTECT 129, 137 (2013).

perpetrator "acts because he wants the destruction" of a protected group, whereas "under the cognitive standard, the perpetrator acts in the knowledge that destruction would be the (likely) consequence of his conduct."[206] Both standards merely reduce *dolus specialis* to one of its constitutive elements, as recognized by the general theory of *dolus* since Welzel.

While genocidal intent combines both cognitive and volitional dimensions, it is suggested that they assume different significances under international criminal law and under the law on state responsibility. In short, the volitional element is the predominant element in construing an individual's genocidal intent, whereas the cognitive dimension is the point of departure for a state's intent. Suppose the following scale that combines these two variables, presented under the formula [*volitional*/**cognitive**]:

TABLE 3 (R=result)	**Levels of cognitive representation of results:**			
Levels of volition:	**1. R will happen**	**2. R is very likely**	**3. R is likely**	**4. R is possible**
a. Direct will that . . .	a1	a2	a3	a4
b. Indirect will that . . .[207]	b1	b2	b3	b4
c. Foresaw and reconciled that . . .[208]	c1	c2	c3	c4
d. Awareness that . . .[209]	d1	d2	d3	d4
e. Inexcusable unawareness that . . .[210]	e1	e2	e3	e4

206. Paul Behrens, *The Mens Rea of Genocide*, *in* ELEMENTS OF GENOCIDE 70, 76 (Paul Behrens & Ralph Hanham eds., 2012).

207. *Id.* at 77 (meaning the standard usually employed for *dolus directus* 2nd degree).

208. *Id.* at 77-78 (understood as the traditional elements for *dolus eventualis*: that of an individual that foresaw a result and accepted it or at least reconciled oneself with it).

209. *Id.* at 77 (defined as a loose impression or perception).

210. *Id.* at 78 (understood as the standard of "should have been aware that," usually employed to define negligence in criminal law and lack of due diligence for the purpose of state responsibility).

Under international criminal law, *dolus specialis* requires a high level of volition, which should be met with a certain level of cognitive anticipation of the act's results.[211]

In principle, direct will (a1 to a4) is the most important test for individual genocidal intent, even if the results anticipated are not deemed likely. A *génocidaire* pessimistic about chances of success still has genocidal intent. Theoretically, the anticipation of results might not be irrelevant: if an agent clearly hated an ethnic group and wanted its elimination ("a") but only foresaw a very remote possibility ("4") that her actions would foster the criminal result, one might question whether she actually had any intention to act on her hatred. Direct motivation also appears to be the volitional element of *dolus specialis* required in certain cases of accessory liability. That is the case of aiding and abetting according to the ICC (Article 25 (3)(c) of the Rome Statute), although not in the jurisprudence of the *ad hoc* tribunals.[212] In one of the hypotheses about complicity in a crime by a group of persons acting with a common purpose, the Statute also requires the accomplice to share the intent of the group, under Article 25(3)(d)(i).

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211. Anticipation of the results refers to a mental representation by the criminal of the intended result. It does not mean a crime aggravated by the results, which would not find basis in the Genocide Convention. In the travaux préparatoires, the USSR, supported by France, suggested a totally results-based standard for genocide, substituting genocidal intent for "that resulted in the destruction of groups." The proposal has been rejected, with fierce resistance by the US. *See* Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, 371 (1984); Hans Vest, *A Structure-Based Concept of Genocidal Intent*, 5 J. INT'L CRIM. JUST. 781, 781 (2007) (arguing that genocidal intent should be based "on a volitional ('intent') and/or cognitive ('certain knowledge') element;" and treating "intent" and "certainty" (consequences must be virtually certain) as two separate forms to satisfy genocidal intent, whereas the approach herein proposed acknowledges that genocidal intent should combine both volitional and cognitive dimensions).

212. *See* Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 289 (Dec. 16, 2011); *see also* Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 127 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber May 9, 2007); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Apr. 19, 2004); BOAS ET AL., *supra* note 39, at 298; BONAFÈ, *supra* note 42, at 133; Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 801 (Antonio Cassese et al. eds., 2002).

Indirect will (b) might be enough for genocidal intent in cases of *dolus directus* in the second degree, when a criminal has full knowledge that a result will occur as part of her actions. Although, that would require a stricter cognitive element (it is doubtful whether hypotheses "b3" or "b4" would suffice as specific intent for the purposes of *dolus directus* in the second degree).

As a crime with specific intent, the possibility of genocide being committed with *dolus eventualis* (c) has been controversial.[213] The ICTY has recognized the applicability of *dolus eventualis* in genocide cases.[214] In continental legal systems, there is no *a priori* incompatibility between *dolus eventualis*[215] (as opposed to *dolus directus*) and *dolus specialis* (as opposed to *dolus generalis*).[216] Using genocidal intent as an example, a person can aim to destroy a protected group (*dolus directus* first degree), act in full knowledge that the group's destruction will occur as part of her actions (*dolus directus* second degree) or be reconciled with the foreseeable risk of causing the group's destruction (*dolus eventualis*).[217]

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213. Cassese, who acted as a judge in the Tadić case, has refuted the possibility of using JCE III for crimes with specific intent. *See* Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 125 (2007). For a summary of this position, *see* Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Preliminary Motion to Dismiss JCE III – Special Intent Crimes (Int'l Crim. Trib. for the Former Yugoslavia, Pre-Trial Chamber III Mar. 27, 2009). The motion was dismissed by the Trial Chamber without considering its merit in Prosecutor v, Karadžić, Case No. IT-95-5/18-T, Decision on Accused's Motion to Strike JCE III Allegations as to Specific Intent Crimes (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber Apr. 8, 2011). *See also* Cécile Tournaye, *Genocidal Intent Before the ICTY*, 52 INT'L & COMP. L.Q. 447, 450 (2003).

214. *See* Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Mar. 19, 2004).

215. In continental legal systems, *dolus eventualis* is usually treated as a form of intention (Vorsatz in German), unlike the common law concept of recklessness. *See generally* Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 OXFORD J. OF LEGAL STUD. 99, 108-15 (2004).

216. Examples of specific references to *dolus eventualis* can be found in CÓDIGO PENAL [C.P.], art. 141(2) (Port.); CÓDIGO PENAL [C.P.], art. 18(I) (Braz.); STRAFGESETZBUCH [StGB] [PENAL CODE], ¶ 5 (Ger.); CODE PÉNAL [C. PÉN.] [PENAL CODE], art. 121-23 (Fr.); Taylor, *supra* note 215, at 108-15.

217. In support of *dolus eventualis* in genocide cases, *see* Kress, *supra* note 205, at 577.

In principle, an individual's *dolus specialis* could never be envisaged under hypotheses "d" and "e." However, it might be argued that these hypotheses ("d" and "e") are contemplated in command responsibility under Article 28 of the Rome Statute, which establishes separate crimes of omission by the superior for a failure of proper supervision and control of subordinates.[218] However, under Article 28, the commander is responsible for her own omission, not for the acts perpetrated by subordinates acting as *génocidaires*.[219] In other words, even if responsibility might ensue, it does not lead to the conclusion that the commander entertained genocidal intent.

In sum, an individual's genocidal intent can be envisaged under limited situations in which a high volitional tendency meets a minimum cognitive threshold. This approach is better when it comes to upholding the principle of individual liability, and avoids overreliance on generalizations and extrapolations emphasizing the cognitive aspect of *dolus specialis*.

This study proposes that a less strict, more nuanced, and primarily cognitive-based test should be applied when determining a state's genocidal intent. In principle, a state could be found responsible for genocide under any of the described headings in Table 3 ("a" to "e," "1" to "4"). Here, the weight shifts to the cognitive side of the balance. The point of departure is an objective consideration of the results of state acts, with a view to reaching a nuanced conclusion that could, taking into account *actus reus*, place the state's conduct on a scale ranging from "failure to prevent" to "aggravated responsibility" (with non-aggravated responsibility also being an alternative, as seen in Part III.A.1).

This approach recognizes the intent of an abstract entity is challenging to construe and ought to be viewed objectively.[220] The point of departure here is different from that used when determining individual intent, because of the priority given to cognitive dimensions

218. Rome Statute art. 28, *supra* note 3.

219. *See* Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3343, Judgment, Trial Chamber III, ¶¶ 212-13 (Mar. 21, 2016); *see also* Kai Ambos, *Superior Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 851 (Antonio Cassese et al. eds., 2002).

220. *See* Giuseppe Sperduti, *Sulla Colpa in Diritto Internationale*, 3 COMUNICAZIONE E STUDI 80, 81 (1950).

when determining a state's genocidal intent.[221] This exercise is not an inquiry into whether the state had the direct will to destroy a protected group. Instead, it is primarily an assessment of what the state could anticipate as the results of its actions.

This approach is supported and practiced in other realms of law, which have abandoned any consideration of a personal or psychological nature in establishing state intent. The Inter-American Court of Human Rights, for instance, has refused to find violations "upon rules that take psychological factors into account in establishing individual culpability" and declared "irrelevant" the "intent or motivation of the agent who has violated the rights."[222] International labor law also offers some examples. In construing state intent, the International Labor Organization (ILO) supervisory system has consistently opted for an objective approach, without attempting to infer the ulterior "state of mind" of the concerned government, but rather shifting to an objective consideration of governmental conduct. Under ILO Convention 87 on freedom of association, legislation should not be enacted or applied with the purpose of hampering rights contained therein.[223] Another example is ILO Convention 169, which, interestingly, introduces not a forbidden intent, but a required one: consultations with indigenous and tribal peoples should be carried out with the purpose of reaching agreement or consensus.[224] To extract its conclusion on a state's purpose under Convention 169, the supervisory system verifies, for instance, whether enough consultations were

221. This seems to be the standard preferred by Judge Koroma who argued that if from the use of nuclear weapons the destruction of a protected group could be foreseen, that should be enough to characterize genocide. *See* Legality of the Threat or Use of Force of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 577 (July 8) (dissenting opinion by Koroma, J.).

222. Velásquez-Rodríguez v. Honduras, Judgment, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 173 (July 29, 1988).

223. ILO, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize art. 8, July 9, 1948, 68 U.N.T.S. 17.

224. This particular purpose is introduced as a measure of a state's good faith in engaging with indigenous and tribal peoples in negotiations of their interest. *See* ILO, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 6(2), June 27, 1989, 1650 U.N.T.S. 383.

held,[225] if all interested parties participated in consultations,[226] and if appropriate institutional mechanisms were in place.[227]

Similarly, the purpose or intent of state conduct has been addressed in World Trade Organization (WTO) dispute settlement cases. When assessing whether a measure was enacted or implemented "so as to afford protection to domestic production," the Appellate Body has consistently stressed that it is not necessary to "sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent."[228] It further added that the "subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters"[229]—a position that has been described as an "objective analysis of regulatory purpose."[230]

The comparison between the ILO and the WTO's interpretation of intent and the way *dolus specialis* is interpreted in assessing state responsibility for genocide requires evident caution. Not only is the nature of state obligations remarkably different, but also the ILO and the WTO confine their analysis to internal legislative acts, whose structure and design can be more easily ascertained than the behavior of a state in a case of genocide. Furthermore, there are important textual differences between these legislative acts and texts used in determining *dolus specialis*. Yet, these examples serve to illustrate the

225. *See, e.g.*, ILO, Rep. of the Comm. Set Up to Examine the Representation Alleging Non-Observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Union of Engineers of the Federal District, ¶ 42, ILO Doc. GB/304/14/7 (2009).

226. *See, e.g.*, ILO, Rep. of the Comm. Set Up to Examine the Representation Alleging Non-Observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Federation of Country and Civil Workers, ¶ 52, ILO Doc. GB/299/6/1 (2007).

227. *See, e.g.*, ILO, Rep. of the Comm. of Experts on the Application of Conventions and Recommendations, 542-44, ILO Doc. ILC.105.III(1A) (2016).

228. *See* Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, ¶ 62, WTO Doc. WT/DS87/AB/R (adopted Dec. 13, 1999) [hereinafter Chile Taxes]; *see also* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 27, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996).

229. Chile Taxes, *supra* note 228, ¶ 62.

230. Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, 32 INT'L L. 619, 631 (1998).

difficulty in adopting a strictly volitional standard to establish state intent—and the tendency to avoid it.

This article proposes that when assessing the genocidal intent of a state one should rely primarily on the cognitive element of *dolus specialis*. If result "R" in Table 3 was going to happen (1), a high degree of genocidal intent can be established. The volitional side of the equation becomes less important—albeit not irrelevant in a determination of the degree of genocidal intent exhibited. In any case, even in the lowest standard on both sides of the scale ("e4"), it is conceivable under the nuanced approach submitted herein that a state could still be considered in breach of a due diligence obligation to prevent genocide.

Under the proposed approach, the further right or down one is in the matrix contained in Table 3 (towards "e4"), the greater the possibility of concluding that a state's intent corresponds to failure to prevent genocide. The further to the left and the top (in the direction of "a1"), the greater the likelihood that a high level of genocidal intent can be inferred, leading to higher levels of responsibility.

Applying this nuanced approach to the factual elements in *Bosnia & Herzegovina v. Serbia & Montenegro*, it would be possible to properly value the FRY's critical contribution to the VRS military campaign, including by the time genocide started. This contribution (described in Part III.A.2) suggests a level of responsibility that is more than a "failure to prevent" and a level of intent that is more than what the ICJ concluded was an "absence of *dolus specialis*." This approach also avoids attributing a level of genocidal intent that would seem excessive in light of the circumstances. There is evidence to suggest that Belgrade accepted the fact that massacres were a real possibility. The concretely verifiable effects of the FRY's actions, in light of the context as a whole, suggests that some form of genocidal intent was tolerated, if not entertained. It might not have been widespread inside the state apparatus and it might not even have been the primary objective of the FRY's campaign. Most likely, though, Belgrade's conduct before and during the massacre, considered as a whole, permits the conclusion that it at least reconciled itself with the high probability genocide would occur. Whether that amounts to aggravated or non-aggravated responsibility would depend on a

judicious weighing and balancing exercise, taking into consideration other elements of the case.

In summary, in its un-nuanced analysis constrained by the shackles of its methodology (Part II.B), the ICJ did not find what would probably be a more accurate depiction of Belgrade's conduct: that the state provided essential contributions to a perpetrator of genocide in a situation in which it was or should have been aware that a genocide would likely be or was about to be committed.

IV. CONCLUDING REMARKS

Remarkable differences in methodology exist between international criminal law and the law on state responsibility. The methodological oppositions explored in Part II—realist *versus* formalist, dialectical *versus* analytical, inductive *versus* deductive methods—are not mere theoretical, inconsequential observations. They are symptomatic of a systemic distortion, according to which an individual's genocidal intent is more liberally construed than a state's faulty behavior. This work suggests a different approach, one that strives to strike a methodological re-balancing. It proposes that a volitional-based analysis relying on the accused's state of mind is the method that better preserves an individual's rights. By contrast, a nuanced, holistic, and cognitive-based analysis of a state's intent permits a more refined evaluation of a state's conduct during a genocidal campaign. In short, on the one hand this study advocates the need to understand the boundaries currently separating these two realms of law; on the other, it proposes a methodological cross-fertilization that fosters systemic coherence.