STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES – CASE OF GENOCIDE

University of Oslo
Faculty of Law

Ondrej Svacek

Supervisor: Jo Martin Stigen
Deadline for submission: (December/01/2010):

Number of words: 15.118 (max. 18.000)

24/11/2010

Content

Introduction

Foundation-stone of every normative system rests in eligibility of its subjects to bear consequences of their own unlawful conduct. International law is not an exception. Last 60 years of unprecedented development in the area of public international law had repercussions also in the field of secondary (responsibility) norms, that is true both in quantitative and qualitative way. On the one hand, there are international rules addressed to individuals and international organizations, on the other, specific regime of aggravated state responsibility for serious violations of peremptory norms was introduced. Inevitable consequence of this progression is that state is no longer the only entity, which can be held responsible for unlawful conduct under international law. Presented analysis deliberately excludes international organizations from its scope, especially because codification process in International Law Commission (ILC) is still ongoing and state/organization responsibility relation seems to be qualified as exclusive one,[1] and limits itself to the relation between state and individual responsibility which is more complex.

Current international law is called up to solve "special unlawful situation",[2] where identical conduct activates parallel legal consequences both in the province of state and individual responsibility. The axiomatic situation of presented thesis can be construed very simply: if individual acting as state organ, whose conduct is therefore fully attributable to his home-state, perpetrates international crime, his unlawful performance gives rise not only to his own individual criminal liability, but initiates as well aggravated state responsibility for serious violation of peremptory norms of international law. It is evidenced by concurrent legal proceedings before interstate court

[1] DARIO art 6 – compare relevant case law: Behrami v. France, Saramati v. France, Germany and Norway, Al-Saadon and Mufhdi v. the United Kingdom, Al-Jedda v. the United Kingdom, Al-Skeini v. the United Kingdom

[2] David (1988) p. 72

(International Court of Justice – ICJ) and criminal tribunal (International Criminal Tribunal for the Former Yugoslavia – ICTY) which pertain to identical factual situation – genocide in Srebrenica. This duality of responsibility regimes is described by ICJ as "constant feature of international law."[3]

Much has been written about either state responsibility or individual criminal responsibility as such, but mutual relation between both regimes came to the attention of doctrine only in the last decade.[4] The gist of presented master thesis is to analyze exactly the inosculation of individual criminal responsibility for international crimes and state responsibility for serious violations of peremptory norms of international law, which has been formerly titled as international crimes of states. For more coherent analysis master thesis will be focused only on one category of crimes, namely the crime of genocide. This option is motivated by the fact that the crime of genocide as compared to other categories of international crimes is relatively best elaborated both in theory and practice of ILC and (interstate and criminal) international tribunals. The starting point of presented thesis which attracts doctrinal attention is the fact that "all aspects of relationship between State responsibility for any internationally wrongful acts, including international crimes, and the personal criminal responsibility of individual acting as State organs, are not as yet clear."[5] Similarly, P.-M. Dupuy speaks in this context about "shadow areas".[6] It is author's modest wish to contribute at least marginally to ongoing debate about the topic.

The structure of master thesis which seeks to explore the issue from broader perspective is consequent. In introductory part (Basic Delimitation) methods used for establishment of aggravated state responsibility are defined for purposes of master thesis. The focus is given on two different approaches adopted by international bodies when considering state responsibility for serious violation of international law, because

---

[3] Bosnia and Hercegovina v. Serbia and Montenegro, § 173 – here referred as *Genocide Case*

[4] To this day the only coherent treatise on mutual relation between state and individual responsibility is work by B. Bonafé *The Relationship Between State and Individual Responsibility for International Crimes* (2009)

[5] Degan (2001) p. 204

[6] Dupuy (2002) p. 1098

they reveal diverse possibility how to perceive mutual relation between both regimes of responsibility. First, there is ICJ approach adopted in *Genocide Case* which puts emphasis on the conduct of concrete state organs, with pivotal role played by *dolus specialis*. On the other hand, another method can be distinguished in decisions of Inter-American Court of Human Rights (IACHR) (e.g. *Myrna Mack-Chang v. Guatemala*, *Pueblo Bello Massacre v. Colombia, La Cantuta v. Peru*)[7] and in report of International Commission of Inquiry on Darfur (ICID), where *dolus specialis* is suppressed in favor of state policy requirement, which completely separates both regimes of responsibility from the very beginning.

Next part (Theoretical Delimitation) analyzes doctrinal approaches toward relation of state and individual responsibility. To the knowledge of author, at least four possible models can be distinguished: monistic model focused on states as the only legal subjects of international law (here individual criminal responsibility is defined as form of state responsibility);[8] dualistic model which is predominant in current legal doctrine (here state and individual responsibility are different institutes which do not exclude but complement one another);[9] accessory model, where individual criminal responsibility is perceived as separate regime which is nevertheless dependant on previous conclusion about state responsibility;[10] and *vice versa* model, where individual responsibility is perceived like separate regime upon which state responsibility is made dependent.[11]

In the following part (Role of International Law Commission), codification effort of ILC is analyzed. Here, the special focus is given on disciplinary and penal actions against individuals as possible form of state responsibility. The major question is, whether penal action is part of primary or secondary norms of international law.

---

[7] Cases before IACHR do not concern state responsibility for genocide, but state responsibility for serious violation of international law in general.

[8] Maison (2004)

[9] Cançado Trindade (2005) p. 255

[10] This approach is applicable in relation to the crime of aggression and in certain circumstances to the war crimes – compare Wilmshurst (2001) p. 93 and Zimmermann (2007) p. 219

[11] Gaeta (2007) pp. 645-46

Next chapter describes personal and material prerequisite of concurrence between state and individual responsibility for crime of genocide. It is clear that concurrence is possible only in situations, where wrongful act is committed by person, whose conduct can be attributed to the state. The position of genocide perpetrator is therefore analyzed – e.g. according to Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), genocide can be committed even by private individuals, which shapes the final "visage" of mutual relation between both responsibility regimes – ICTY jurisprudence[12] is of the importance here. Next, issue of capacity in which international crimes are committed by state organs is reflected. Problematic *Arrest Warrant Case* enables conclusion that international crimes are committed in private capacity, which would make concurrence between state and individual responsibility impossible.[13] Next, concurrence between state and individual responsibility in proper sense of the word is meaningful only where identical duties are prescribed for state and individual by international law (prerequisite *ratione materiae*). The content of primary norms is therefore analyzed. The crucial question is whether Genocide Convention was rightly interpreted by ICJ as including duty not to commit genocide – the role of customary international law is mentioned as well. As far as primary norms are concerned, last issue to be focused on is *mens rea* in international criminal law and fault in the law of state responsibility with special emphasis on *dolus specialis* requirement with respect to the crime of genocide. It remains to be seen, whether state and individual responsibility reveal some point of contact as far as psychological element is concerned. In the last part of master thesis, conclusions are summarized.

Definition of basic notions

Before proper analysis is conducted, it is appropriate to briefly define basic framework and concepts used within work as to enhance its consistency and prevent potential misunderstanding. Master thesis compares state and individual responsibility

[12] Prosecutor v. Jelisic, §§ 100-101

[13] Spinedi (2002) p. 895

for international crimes. The notion of *international crime* is used here as abbreviation and umbrella term for serious violation of international law committed both by individual and/or state. It therefore encompasses crimes under international law committed by individuals[14] and international crimes *stricto senso* contained in ex-Article 19 of Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR).[15] This solution is practical since it escapes usage of current terminology under DASR Article 40 (*serious breaches of obligations arising under peremptory norms of general international law*), traditionally described as "twin brother"[16] of previous concept under ex-Article 19. The term 'serious breaches of obligations arising under peremptory norms of general international law' is used only to remove repetition of wording 'international crimes' and refers strictly to the branch of state responsibility. Occasional appearance of the term 'crimes under international law' on the other hand relates only to the criminal responsibility of individual.

In accordance with opinion of international theory and practice, state responsibility is envisaged here as legal institute, which is "neither civil, nor penal, but simply international".[17] State responsibility is connected only with reparation of damages and in no way implies punishment of the state.[18] The term *aggravated state responsibility* is given the same meaning as state responsibility for international crimes, which distinguishes it from ordinary state responsibility connected with less serious violations of international law. On the other hand, responsibility of individual is defined in strictly criminal sense, without any reference to its potential civil character which may be found in some domestic legal orders.[19] It is clear that despite sharing of the same goal

[14] Nürnberg Principles Principle I

[15] Spinedi (1989) p. 138. DASR Article 19 (2) defined international crime as an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.

[16] Wyler (2002) p. 1147

[17] Pellet (2006) p. 4

[18] Cassese (2003) p. 19

[19] Murphy (1999) p. 28

(i.e. implementation of international law),[20] state and individual responsibility are based on different material and procedural rules which in sum create totally dissimilar mechanisms to achieve this common objective.

Master thesis focuses on genocide, which is generally defined in accordance with Article II of Genocide Convention as any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Concurrence between state and individual responsibility for crime of genocide in international law is taken for granted and need not be further demonstrated. It is enough to mention e.g. ICTY Statute Article 4, ICC Statute Article 6 in the area of international criminal law and Genocide Convention or DASR Article 40 (ILC commentary) in the area of state responsibility.

State responsibility for genocide is approached as archetypal case of aggravated state responsibility.[21] It is recognized both in the original version of DASR and its final version adopted in the second reading.[22] Contrary to other categories of international crimes (e.g. war crimes or crimes against humanity) genocide similarly with aggression requires intentional violation on a large scale and thus constitutes serious violation of international law *per se*.[23] Commission of genocide therefore initiates concurrence between individual criminal responsibility and aggravated state responsibility.

[20] Werle (2005) p. 35

[21] YILC 1976, Vol. 2, Part Two, p. 121, § 70.

[22] YILC 2001, Vol. 2, Part Two, p. 112, § 4

[23] Ibid, p. 113, § 8

1 Basic Delimitation

1.1 Conflicting methods

Presented master thesis focuses on concurrence between state and individual responsibility for international crimes, namely for crime of genocide. Current international practice in principle distinguishes two antagonistic methodologies how to assess state responsibility for international crimes, which consequently determines mutual relationship between both responsibility regimes. These methods are mentioned at the very outset of master thesis, because adoption of the first or second one fundamentally influences mutual link as between state and individual responsibility.

Under the *classical scheme*, if there is a serious violation of international obligations under peremptory norms of international law (objective element), competent tribunal consequently makes inquiry whether this conduct can be attributed to the state (subjective element) – this approach does not differ from the establishment of responsibility in other areas of international law, even in situations of less serious violation of international obligations (previously labeled as international delicts), it can therefore be titled as classical scheme.[24] There is conduct of individual (state organ) in the centre of international wrongful act, which puts individualization otherwise characteristic for international criminal law into the regime of state responsibility. If unlawful act of individual, whose conduct is attributable to the state fulfils elements of international crimes (e.g. genocide), state responsibility is without any further ado established. A. Chouliras points to the conclusion that "individual criminal responsibility for genocide becomes a sort of prerequisite of state responsibility."[25] Model case, where classical approach can be demonstrated is *Genocide Case*.

[24] DASR art 2, art 40

[25] Chouliras (2010) p. 207

According to the ICJ judgment, a state is responsible for genocide or any of the other acts listed in Article III of the Genocide Convention where these are committed by persons or organs whose conduct is attributable to the Respondent.[26] ICJ method how to establish state responsibility in situation of breach of peremptory norms under international law does not differ e.g. from violation of obligations in the area of diplomatic or consular law – as ICJ puts it, rules for attributing of internationally wrongful act do not vary with the nature of the wrongful act, which reflects the state of customary international law.[27] In hypothetical situation, under current approach, the conduct of even very small group of state organs is capable to give rise to state responsibility for serious violation of peremptory norms under international law.

Second approach, derived from *sociological studies of organizations*, rejects above mentioned axioms of classical method.[28] Basic assumption can be formulated consequently: gist of organization (e.g. of the state) act is derived not from an individual conduct, but from the organizational goal which is pursued. State is defined not as mere sum of individuals but as autonomous entity acting independently on will or intent of concrete persons. Individual conduct, though accompanied by relevant *mens rea*, need not be identical with goals followed and therefore has to be rejected as basis of organization (state) responsibility. Sociological method criticizes classical approach because it enables to ground state responsibility even on conduct of few individuals.[29] State responsibility is founded here on state policy which is connected with assigned goals. Sociological approach can be described on the work of P. Gaeta.

---

[26] Ibid, p. 207. *Genocide Case*, § 471

[27] Ibid, § 401

[28] Supra note 25, p. 209. Compare Gross (1969) p. 284

[29] Supra note 11, p. 636. ILC commentary to DASR ex-Article 19 is of the relevance here (supra note 21, p. 104, § 21), ILC stated:

> Conversely, as far as the State is concerned, it is not necessarily true that any 'crime under international law' committed by one of its organs for which the perpetrator is held personally liable to punishment, despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned, but also as an act entailing a 'special form' of responsibility for that State.

Gaeta asserts that the fact of concurrence between individual criminal responsibility and state responsibility for international crimes in itself does not mean that crimes under international law are identical with state international crimes and consequently demonstrates this presumption on the case of genocide. Genocide like crime under international law requires *dolus specialis* (the intent to destroy protected group as such), on the other hand for state responsibility to arise, the existence of state policy aiming at destruction of protected group is required.[30] As far as state responsibility for genocide is concerned, there is no need to find out *dolus specialis*, which is very practical from the perspective of tricky theoretical question where to locate adequate "state fault".[31] Gaeta comes to the conclusion that only by adoption of sociological approach real duality of responsibility in international law can be maintained, duality which separates state and individual responsibility for serious violations of international law.[32]

Above mentioned method can be traced even in findings of ICID. Security Council resolution 1564 (2004) gave Commission mandate to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties and to determine whether or not acts of genocide have occurred.[33] ICID concluded that Sudanese government is responsible for serious violations of human rights and international humanitarian law amounting to the level of crimes under international law.[34] With respect to genocide ICID came to the negative conclusion, because "the Government of the Sudan has not pursued a policy of genocide."[35] At the same time

---

[30] Supra note 11, p. 643

[31] Some scholars explicitly demand adequate *mens rea* of prominent political leaders as prerequsite for state responsibility. Compare Schabas (2000) p. 444

[32] Supra note 11, pp. 643-44

[33] ICID Report, p. 2

[34] Ibid, p. 3

[35] Ibid, p. 4. Relevance of state policy with respect to state responsiblity for genocide has been confirmed even by ILC when it dealt with issue of composite acts: "Even though it has special features, the prohibition of genocide, formulated in identical terms in the 1948 Convention and in later instruments, may be taken as an illustration of a composite obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice." Supra note 22, p. 62, § 3

ICID admitted that in particular cases individuals, including government officials, could have acted with genocide intent. From the brief outline it is clear that conduct of concrete state organ was not important for ICID findings, it was only general policy pursued which was counted.

The same attitude can be distinguished in decision-practice of IACHR which is, especially during last decade, often confronted with situations of serious violations of human rights resulting in acknowledgment of aggravated state responsibility.[36] Despite non-uniform terminology used by IACHR (aggravated responsibility, aggravated sufferings, aggravated effect) some common features can be distinguished in its practice. First and foremost, it is the existence of state plan, policy or pattern of similar conduct, which subsumes IACHR decisions under the heading of sociological approach. In *Myrna Mack-Chang v. Guatemala* aggravated responsibility was based not on concrete conduct of state agents (murder of Myrna Mack-Chang), but on "pattern of selective extra-legal executions fostered by the State, which was directed against those individuals who were considered "internal enemies."[37] Similarly, in *Plan de Sanchéz Massacre v. Guatemala*, Court concluded that bloodshed in Plan de Sanchéz village was part of governmental policy *tierra arasada* ranged against aboriginal Maya communities.[38] In these situations, according to B. Bonafé, IACHR awards judgments about aggravated responsibility without being directly ask to do so.[39] Nevertheless, individual complaints are set in wider context of state policy, which enables to fulfill criterion of seriousness inevitable for establishment of aggravated state responsibility.

Final shape of mutual relationship between individual and state responsibility in international law is highly influenced by acceptance of the first or second method described above. Under classical model, the linkage is much closer, because it is individual conduct which is in the heart of state conduct as opposed to the requirement of state policy under second model, which leads to complete separation of both

---

[36] Supra note 7

[37] Myrna Mack-Chang v. Guatemala, § 139

[38] Plan de Sanchéz v. Guatemala, § 51

[39] Supra note 4, p. 79

responsibility regimes. Despite the promulgation of latter method at international scene, authoritative decision of ICJ hints that it is classical approach which is preferred under international law *de lege lata*. In *Genocide Case*, ICJ considered the existence of general plan or pattern only as potential evidence of genocidal intent, it did not require it in any manner as condition *sine qua non* included in the genocide definition.[40] This outcome is preferable not only for purposes of presented thesis, as it facilitates further evaluation of reciprocal link, but as well from standpoint of consistency in international law – as ILC puts it, nature of obligation breached can not alter rules of attribution under customary rules of state responsibility. This approach leads to coherent application of these rules in all situations of unlawful state conduct.

[40] *Genocide Case*, § 373. Similar conclusion can be found in decision practice of ICTY. In *Jelisic Case* Trial Chamber ruled that "the drafters of the Convention did not deem the existence of an organization or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such." Prosecutor v. Jelisic, § 100

2 Theoretical Delimitation

Mutual relationship between state and individual responsibility for international crimes has been coming to the attention of international doctrine from various reasons over time. Early era, confronted with foundation of the first international criminal tribunals, had to substantiate the very existence of individual as separate legal person in international law.[41] Next period, marked by introduction of international crimes of states, had to evaluate their link to the well established categories of crimes under international law. Finally, current increased doctrinal interest in the field can be reasoned by concurrent legal proceedings at international scene concerning state and individual responsibility for international crimes. Generalization of doctrinal debate enables to distinguish four theoretical models of mutual relationship between both responsibility regimes – as it shall be seen, except of one model they all are applicable to the crime of genocide as well.

2.1 Monistic model

Monistic approach is based on assumption that individual criminal responsibility constitutes mere form of state responsibility - the only legal entity facing responsibility in international law is state.[42] Individual criminal responsibility is here absorbed into state responsibility. A. Nollkaemper adverts to the "invisibility of individual in the traditional law of state responsibility",[43] which means that unlawful act of individual in position of state organ was attributed only to his mother state. Penal action against individual performed at domestic level was considered as satisfaction by which mother

[41] Similarly Nollkaemper (2003), Bonafé (2005), Franck (2007), Jørgensen (2000), Dupuy (2002)

[42] Monism/dualism dichotomy is used by M. Starita, compare Starita (2000) p. 104

[43] Nollkaemper (2003) p. 617

state realized its own obligation of reparation.[44] Sanction against individual was prerogative of mother state that means all other members of international community were excluded from sanctioning by reference to traditional international legal axiom *pars in parem non habet iurisdictionem*. Protagonists of monistic approach later postulated rule, according to which serious violation of international law implicated breach of otherwise inviolable principle of sovereign equality of states – lack of mother state action activated right (not duty) of all other states to initiate penal proceedings against foreign state organs.[45]

Monistic approach is built on the basis of traditional international law with states as only legal person of whole system. It is connected mostly with works from the middle of 20th century.[46] References to monism can nevertheless be traced in the last decade as well. R. Maison in her work from 2004 advocates monistic approach even in the light of unprecedented evolution in the field of international criminal law – in her opinion international criminal tribunals, which act in the name of international community as a whole, constitute tools of centralized repression which only replace duty of mother state and right of all other state to initiate penal action against individual.[47] Monistic approach can be detected both in primary norms (obligation to criminalize certain unlawful conduct)[48] and secondary norms (punishment of individual as form of satisfaction)[49] addressed to and adherent with the state.

2.2 Dualistic model

Dualistic model represents prevailing opinion on parallel existence of state and individual responsibility in international law. Both regimes are embraced as separate institutes which complement (i.e. not exclude) one another.[50] When compared to

[44] Supra note 4, pp. 52-53

[45] Supra note 2, p. 80

[46] Supra note 4, pp. 54-57

[47] Supra note 8, pp. 10-11

[48] Genocide Convention art I, art V

[49] Compare Chapter 3

[50] Supra note 9, p. 255

monism, dualistic approach is based on exactly antipodal presumptions: legal personality of individual is taken as self-evident,[51] activity of international tribunals is not construed as sanction against state and finally punishment of individual is not taken as part of state secondary obligations.[52] Although common goal is usually highlighted (suppression of international criminality), it is clear that both responsibility regimes are based on different material and procedural rules[53] which reveal their unlikeness – state responsibility holds its reparative nature,[54] on the other hand individual responsibility has typically criminal character with *mens rea* as cornerstone of whole discipline. Individual responsibility is responsibility for international crimes, on the other hand state responsibility pertains to international wrongful acts.

Despite various distinctions between both responsibility regimes, protagonists of dualism admit that "some degree of overlap may occur."[55] As far as genocide is concerned, intent forms part of primary rule prohibiting genocide and is therefore relevant within the system of state responsibility as well. It is obvious that intent like psychological element can be connected only with acts of individuals, in this case state agents, to trigger state responsibility.[56] Dualistic approach nevertheless rejects opinion that conclusion about state responsibility is formally dependant on previous conclusion about criminal responsibility of individual (compare *vice versa* model) – if previous criminal decision is available, it can be used most highly for evidentiary purposes, but it can not in any way predetermine the outcome of interstate proceedings.[57] Put it briefly, both responsibility regimes are independent, separated and do not influence conclusions

---

[51] Lauterpacht (1968) p. 40

[52] According to A. Zimmermann, duty to punish perpetrators of crimes under international law is part of primary norms, compare Zimmermann (2009) pp. 304-5

[53] Supra note 6, p. 1094

[54] The idea of punitive dimension of state responsibility was persuasively rejected both in theory and practice. Supra note 17, p. 4. Compare *Genocide Case*, § 178

[55] Bianchi (2009) p. 18

[56] Ibid, p. 18

[57] Asunción (2009) pp. 1208-9

adopted in the other area of international law.[58] Formal dependency of state and individual responsibility was pointed out by Serbia in proceedings before ICJ. Serbia presented argument that "the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility."[59] ICJ promptly rejected this line of argumentation, according to the court any other interpretation would enable situations, where hiding of responsible individuals before criminal justice spills over to the other branch of international law, namely to the law of state responsibility.[60]

2.3 Accessory model

Accessory model treats individual criminal responsibility as category flowing directly from rules of international law (i.e. not resulting only from state obligations as monism contends), but at the same time makes its realization dependant on previous conclusion about state responsibility. Applicability of this model is nevertheless limited to war crimes[61] and crime of aggression, which is based on axiom "no State responsibility for an act of aggression, no crime of aggression by an individual."[62] Theory of state and individual responsibility does not apply this approach to the crime of genocide, there is therefore no need dwell on it in bigger details.

2.4 *Vice versa* model

Last model abstracted from international theory (and practice) is regular reflection of previous accessory approach. Here, individual criminal responsibility is treated as separate regime (i.e. not as monistic form of state responsibility) which is highlighted by the assumption that state responsibility for international crimes is formally made dependant on previous conclusion about individual criminal responsibility. The

---

[58] Supra note 43, p. 628

[59] *Genocide Case*, § 180

[60] Ibid, § 182

[61] Zimmermann (2007) p. 217 – Zimmermann points to the importance of reprisals in international criminal law. Compare Cassese (2008) p. 255

[62] Wilmshurst (2001) p. 93

arguments of this school of thoughts were echoed in declaration of Judge Skotnikov annexed to *Genocide Case* judgment – according to Skotnikov, ICJ as interstate tribunal has exceeded its powers, when it admitted that "it can itself make a determination as to whether or not genocide was committed without a distinct decision by a court or tribunal exercising criminal jurisdiction."[63] Similarly, D. Groome argues, that "ICJ should and must wait until such final [criminal] judgments are rendered before it commences its work on the merits."[64] Groome contends that ICJ has no competence in criminal matters and by reserving it (§ 181 *Genocide Case* judgment), ICJ points to *in absentia* trial without adequate guarantees provided in criminal proceedings.[65]

As relevant presented arguments are, it can be concluded that dominant doctrinal opinion is identified with traditional dualistic approach which accepts certain overlap between both responsibility regimes, but at the same time rejects idea of formalized mutual dependency otherwise typical for accessory model and its regular reflection in *vice versa* model. The foundation of state conduct rests in behavior of individual acting as state agents, but it can not act as factor of *de iure* subservience between both regimes – here, state organ conduct has relevance only for fulfillment of objective and subjective element within the state responsibility for wrongful act, it has no connotation as far as criminal guilt and individual criminal punishment are concerned.

[63] Declaration of Judge Skotnikov, p. 6

[64] Groome (2008) pp. 985-86

[65] Ibid, p. 986. Similarly supra note 11, pp. 645-46

3 Role of International Law Commission

Concurrence between state and individual responsibility was vividly discussed within ILC during codification works on state responsibility for wrongful acts and individual criminal responsibility for crimes against the peace and security of mankind. It is therefore logical to at least briefly summarize ILC position towards the matter. As it is well known, codification effort led in adoption of two important documents, namely DASR (2001) and Draft Code of Crimes against the Peace and Security of Mankind (1996) – (Code). Both documents contain provision expressly defining their scope which differentiates them from responsibility rules applicable towards individual or state respectively.

Without prejudice clause in DASR (Article 58) states that "these articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." Identical wording is used in Code as well, its Article 4 stipulates that "the fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law." Commentaries of both codification outcomes reveal that ILC highlighted non-exclusive character of state and individual responsibility (without prejudice clause)[66] and principal distinction existing between them.[67] Concurrence between state and individual responsibility is claimed by ILC as matter of fact, nevertheless there is no detail analysis of mutual relationship between both regimes contained anywhere in presented drafts. Such attitude is of no surprise as any other solution would obstruct finalization of codification works. Next section seeks to explore signs of contact between both regimes

[66] YILC 1996, Vol. 2, Part Two, p. 23, § 2

[67] Supra note 22, p. 142, § 3

as they were presented during discussions in ILC – these opinions are relevant with respect to crime of genocide as well.

3.1 Codification of state responsibility

Very soon after adoption of state responsibility on the list of topics considered by ILC, the crucial question of a role the prosecution of individual state organs will play within the system of state responsibility was presented. It was necessary to establish, whether penalization of individuals should be capable to exhaust reparatory obligation of states and whether criminal sanctions towards guilty state organs should be treated as part of primary or secondary state obligations.[68] First rapporteur on the topic of state responsibility, F.V. García-Amador, in his original report accepted punitive character of state responsibility.[69] García-Amador distinguished between ordinary wrongful act and punishable act (e.g. genocide, crimes against humanity, aggression) with punitive dimension. He smartly resolved impossibility of imposing criminal sanctions against state (*societas delinquere non potest*) as punishment was limited only to individuals in position of state organs.[70] Criminal sanction against individual thus formed part of secondary state obligation.

This conception was strictly rejected by R. Ago, who became special rapporteur in 1963. Ago in his fifth report from 1976 argued that punishment of individuals, whose conduct initiated state responsibility can not be defined as special form of state responsibility, because there are manifest distinctions between both responsibility regimes.[71] According to Ago, adverse consequences of illegal act could not be transferred from one legal entity to another.

Final stage of DASR codification process revealed this question with new intensity. Position of prosecution and punishment of individual within the system of state

---

[68] Ingadottir (2010) pp. 587-88

[69] YILC 1956, Vol. 2, p. 211, § 201

[70] Ibid, § 208. "Punitive damages were thought of as a penalty or punishment directly imposed upon the guilty person."

[71] YILC 1976, Vol. 2, Part One, p. 33

responsibility was connected with DASR Article 45 (satisfaction) adopted in the first reading, which according to G. Hafner presented "thorniest [part] of the draft articles".[72] J. Crawford, last special rapporteur, impugned ex-Art 45 as he pointed to the fact that it is not clear whether punishment of individuals is connected with primary or secondary obligations. He nevertheless retained this form of satisfaction in draft presented to drafting committee and recommended only slight change in wording which would better correspond with division of state power and independence of judiciary – penal action instead of punishment.

Very inspirational are even other presented comments. A. Pellet concluded that "it would have been instructive to draw a parallel between "the serious misconduct of officials or … the criminal conduct of any person" and article 19, on crimes, and to examine the possible relationship between the two —or three—concepts involved."[73] Regrettably, no such analyze has ever been conducted, and finally opinion which rejected any connection between state responsibility and punishment of individuals prevailed.[74] In the light of this substantial critics statement of G. Gaja, at that time chairman of drafting committee, is of no surprise: "Given the divergent views on this issue and also the fact that paragraph 2 does not intend to provide an exhaustive list, the Committee decided not to mention disciplinary or penal action in the text."[75] Opinion of drafting committee shaped final wording of current Article 37 (satisfaction), which refers only to acknowledgment of the breach, regret, apology or another appropriate modality.

Explicit inclusion of prosecution and punishment of state organs among forms of satisfaction would lead to more concrete interlacing between state and individual responsibility. On the other hand, such solution would open the door for potential

[72] YILC 2000, Vol. 1, p. 202, § 2

[73] Ibid, p. 204, § 24

[74] Some ILC members spoke about humiliation of state. Ibid, p. 213, § 33

[75] Statement of the Chairman of the Drafting Committee Mr. G. Gaja at the 2662nd meeting of the ILC, 17 August 2000, p. 22

transfer of responsibility which ILC explicitly rejected.[76] It can be concluded that questions connected with individual entirely disappeared from DASR second version or were at least substantially marginalized.[77] ILC preferred understanding of criminal actions against individuals as part of primary obligations, which can be demonstrated on Genocide Convention.[78] Finally, this conclusion was confirmed even by ICJ in *Genocide Case*[79] – obligation to punish genocide is not a consequence of a state organ previous commission of genocide, i.e. non-punishment of perpetrators is regarded as separate violation of international law.

3.2 Codification of individual responsibility

Mutual link between state and individual responsibility was discussed even during works on the Code – here, the issue was connected with the question of perpetrators of crimes against the peace and security of mankind. In the 1950s ILC came to the conclusion that perpetrators of crimes can only be individuals.[80] D. Thiam report from 1983 which opened door for potential penal state responsibility and proposed the interconnection between crimes against the peace and security of mankind on the one hand and international crimes of the state on the other (definition of first category should have been derived from DASR ex-Article 19) was therefore somewhat

---

[76] Supra note 66, p. 114, § 21. ILC commentary says:

> The obligation to punish personally individuals who are organs of the State and are guilty of crimes against the peace, against humanity, and so on does not, in the Commission's view, constitute a form of international responsibility of the State, and such punishment certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs.

[77] Mazzeschi (2004) p. 39

[78] Genocide Convention art VI

[79] *Genocide Case*, §§ 439-42

[80] YILC 1950, Vol. 2, p. 380, § 151

astonishing.[81] ILC repelled this variant even in embryonic phase – *ratione personae* scope of the Code should have been limited only to individuals for future.[82]

Any linkage towards state was consequently limited by adoption of approach according to which international crimes can be committed not only by state authorities but as well by private individuals.[83] Definite separation of state and individual responsibility was achieved by rejection of idea that crimes against the peace should be defined through international crimes of state[84] – criticism can be summarized as follows:

a) general definition of crimes against the peace and security of mankind is needless, it was not contained even in ILC works on the topic from 1950s
b) international crime of state is broader term, which should not be used for purpose of definition of narrower term
c) international crime of state as *enfant terrible* concept strongly opposed by many authorities should not be spread to other areas of international law
d) state and individual responsibility are two distinct institutes giving rise to different consequences – briefly, definition of penal institute can not be derived from extra-penal (civilian) institute.[85]

ILC rejected any conceptual links between state and individual responsibility and emphasized their dissimilarity. Article 4 included in final version of Code can be interpreted as rational evaluation of reality (i.e. existence of dual responsibility in international law) and *sui generis* safety-clause, which is best reflected in comment presented by Belgium.[86] As pointed out above, one can only complain, ILC did not

---

[81] Supra note 4, p. 32

[82] YILC 1984, Vol. 2, Part Two, p. 11, § 32

[83] YILC 1985, Vol. 2, Part Two, pp. 13-14, § 60

[84] YILC 1985, Vol. 2, Part One, p. 81

[85] YILC 1985, Vol. 1, p. 45, § 33

[86] YILC 1994, Vol. 2, Part One, p. 101, § 42 - Belgian position is as follows:

> There ought to be an article in the Code dealing with the question of the international responsibility of States. The State as such is inevitably involved in any crime against the peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly

analyze mutual relation between state and individual responsibility regimes in more details and managed with superficial enunciation of their simultaneous existence.

because of its failure to act or its own improvidence. It therefore seems unusual that State responsibility should not have been dealt with in the Code. It should also be noted that inclusion of State responsibility in the Code would make it possible to provide a sound juridical basis for the granting of compensation to the victims of crimes and other eligible parties.

4 Concurrence Prerequisites

4.1 Prerequisites *ratione personae*

Next chapter shall analyze questions connected with position of genocide perpetrator, which considerably influence mutual relation between state and individual responsibility - they are therefore denominated as concurrence prerequisites *ratione personae.* As the concurrence of responsibilities is possible only in situation, where wrongful act is committed by person, whose conduct is attributable to the state, the position of perpetrator is evaluated first of all - as it shall be seen, current *lex lata* is quite clear in this issue. Next, controversial ICJ decision in *Arrest Warrant Case* which enables conclusion that international crimes by public authorities are committed in private capacity is examined and critically reviewed. Prerequisites *ratione personae* are fulfilled, where the perpetrator of genocide is state organ, whose acts are adopted in public capacity. Any other outcome would make establishment of direct state responsibility impossible. If genocide is committed by private individual, respectively in private capacity of state organ, one can speak mostly about concurrence between individual criminal responsibility and indirect state responsibility.

By private individual any person who does not show any link (formal or factual) to the state is meant. The individual acting e.g. on the instructions of the state or under its effective direction or control is therefore understood here as *de facto* state organ whose conduct can without any doubt establish direct state responsibility.[87] On the other hand,

[87] Cassese (2007) p. 649. Bonafé states that "in establishing individual liability for certain international crimes, international criminal tribunals might have to apply rules belonging to the law of state responsibility" which she considers to be an evidence of mutual interconnection between both spheres. Supra note 4, pp. 194-202

as far as private individual in proper sense of the word is concerned, the state is responsible only for failure to prevent and repress his conduct. "The basis of responsibility here is not the attribution to the State of the acts of the individuals; it is the failure by the State as an entity to comply with the obligations of prevention and prosecution incumbent on it."[88] To use terminology adherent to human rights, one can speak about state positive obligations.[89] The concurrence between negative obligations (here duty not to commit genocide) is hence feasible only where international crime is committed by state organ in his public capacity. Moreover, indirect state responsibility can hardly fulfill criteria of aggravated state responsibility which require gross or systematic violation of cogent international norms. Even if obligation to prevent and repress genocide is defined as part of *ius cogens*,[90] it is hardly imaginable that seriousness standard would be established.

4.1.1 Position of perpetrator

Theory and practice of international law generally agree that international crimes can be committed even by private individuals. At the same time the reality of most conflicts reveal that such crimes are usually perpetrated (or at least acquiesced) by state organs as integral part of criminal state policy.[91] Close tie to the state was evident in the early era of individual criminal responsibility – e.g. Article 6 of Charter of International Military Tribunal (IMT) established jurisdiction only over persons who acted in the interest of European Axis countries. IMT hence covered only unlawful conduct of *de iure* or *de facto* state organs.[92] Latter international tribunals do not explicitly require official position of perpetrator, they instead stress the character of unlawful conduct – e.g. according to the Rome Statute ICC shall have the power to exercise its jurisdiction

[88] Crawford (2005) p. 905, similarly Fox (2002) pp. 148-50

[89] Akandji-Kombe (2007) p. 7

[90] *Genocide Case*, §§ 161-62

[91] Wouters (2003) p. 262

[92] Supra note 6, p. 1087

over persons for the most serious crimes of international concern.[93] This general position is valid as well in relation to genocide.

Article IV of Genocide Convention unambiguously states that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[94] Most cases before *ad hoc* tribunals covered crimes committed by public officials, on the other hand lack of such status can not pose as a bar for criminal proceedings, the doors are opened even for prosecution of private individuals – to give example related to the genocide, famous *Media Case* held before ICTR can be mentioned.[95] Any link to the state is further diminished by explicit refusal of state policy as discrete element of genocide. State plan or policy is not legal ingredient of the crime, although the existence of such policy can help to establish that accused held required *dolus specialis*.[96] Briefly, genocidal policy can be used as indirect evidence of *mens rea*.

4.1.2 International crimes - private or public capacity?

Despite theoretical possibility of genocide perpetration by private individual, typical wrong-doer remains an individual holding an office within the state system. It is therefore necessary to establish, whether international crimes when committed by state organs are manifestation of private or public capacity. If international crimes are committed in private capacity, situation would be somewhat similar to school-book example of crime passionel[97] – here, state would be responsible mostly for failure to exercise due diligence, but definitely not for murder. The motive of long-standing

[93] ICC Statute art 1

[94] Genocide Convention art IV

[95] Prosecutor v. Nahimana, Barayagwiza, Ngeze, §§ 5-7

[96] Prosecutor v. Krstić, § 225

[97] David (2006) p. 333. Cassese speaks about murder in a fit of rage, Cassese (2002) p. 868

debates, which still can not be regarded as definitively settled, is judgment rendered by ICJ in 2002 in so-called *Arrest Warrant Case*.[98]

Factual background can be summarized as follows. In the year 2000 Belgian court issued arrest warrant against Congolese incumbent foreign minister for grave breaches of Geneva Conventions and for crimes against humanity allegedly perpetrated before he took the office. Democratic Republic of Congo claimed that conduct of Belgium violated international law, namely "the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality among all Members of the United Nations"[99] and "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State".[100] Two years later, ICJ decided in favor of Congo with overwhelming majority 13:3 – the decision was based on absolute character of immunities *ratione personae* before foreign domestic courts, which is without any doubt norm arising from customary international law.[101] ICJ ruled that in certain circumstances personal immunity does not represent a bar to criminal prosecution and gave following examples. Incumbent state officials can be tried before own domestic courts, they can be tried even abroad, if state they represent decides to waive their immunity and finally, they can be tried before international criminal tribunal, where immunity *ratione personae* is not taken into account at all.[102]

According to the most controversial part of the judgment, a state organ (generally speaking) can be prosecuted after he leaves his office for crimes committed during the period of office in private capacity.[103] To use argumentation *a contrario*, any acts done during office in public capacity would have to stay unpunished – as A. Cassese points,

---

[98] Democratic Republic of the Congo v. Belgium - here reffered as *Arrest Warrant Case*

[99] Ibid, Application Instituting Proccedings, p. 3

[100] Ibid, p. 3

[101] *Arrest Warrant Case*, § 58

[102] Ibid, § 61. Irelevance of personal immunities before international criminal tribunals can be demonstrated on arrest warrants issued by ICC on Al-Bashir.

[103] ICJ ruled that "court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity." *Arrest Warrant Case*, § 61

international crimes could be prosecuted only if they were regarded as acts done in private capacity.[104] The pitfalls of judgment were best described by M. Spinedi, who concludes that ICJ approach would make establishment of state responsibility for war crimes or crimes against humanity entirely impossible.[105] The same holds true for genocide. Is it hence necessary to resign on the idea of concurrent responsibility of state and individual from this reason? Are international crimes committed in private or public capacity?

Proponents of first line of reasoning (private capacity) argue that international crimes can not be regarded as official acts, because they are not listed among normal state functions.[106] On the other hand, massive commission of international crimes is hardly imaginable without abuse of powers, which individuals enjoy rightly through their official function. "It is primarily through the position and rank they occupy that they are in a position to order, instigate or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions."[107] The doctrine and practice of international law is divided between those, who stress that interpretation of international law can not shut the doors for establishment of state responsibility (international crimes as acts done in public capacity) and those, who deny that international crimes are function of any state organ (international crimes as acts done in private capacity).[108]

The author of presented master thesis identifies himself with position, according to which international crimes are committed in public capacity and presents four grounds

---

[104] Supra note 97, p. 853

[105] Supra note 13, p. 896

[106] Bianchi (1993) pp. 227-28

[107] Supra note 97, p. 868

[108] Lords Justice Wilkinson, Hutton and Philips in famous *Pinochet Case* held before House of Lords built their position on the second assumption. Lord Hutton stated that "alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture". R . v. Bartle and the Commissioner of Police for the Metropolis and Others, ex Parte Pinochet. Majority of judges nevertheless denied to grant Pinochet immunity for crime of torture committed in Chile.

supporting his conclusion. First, international law provides for the exception from functional immunities which has already attained the status of customary international law.[109] Generally speaking, functional immunities cover official acts of *de iure* or *de facto* state organs (act of the state doctrine), which means that these acts are attributed only towards the state and can not induce individual responsibility.[110] The exception from general rule enables conclusion that international crimes are widely recognized as official acts which can nevertheless be attributed toward individuals and incur his criminal liability at the same time. *Blaskic* decision implies that it is not necessary to substantiate domestic criminal prosecution of international crimes by their private character and to circumvent intricately the general rule on functional immunities.[111] Individual is shielded only by immunities *ratione personae* which, at least as domestic level is concerned, have absolute character.

Second, official character of international crimes was implicitly acknowledged even by ICJ in its later case law, the court thus departed from the controversial conclusion in *Arrest Warrant Case.* According to ICJ, state responsibility for genocide in Srebrenica could only arise if it was "perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia".[112] International crimes perpetrated by state organs hence do not exclude state responsibility, i.e. they are not committed in private capacity.[113] Moreover, when ICJ speaks about existence of dual system of responsibility, it uses the logic of constant feature of international law. Conclusion from *Arrest Warrant Case* is strictly contrary to the proposed constancy.

Third, main argument of private act doctrine rests on impossibility to regard commission of international crimes as enforcement of regular state function. This argument is rational and must be subscribed to, it need not be nevertheless deduced from it that international crimes are committed in private capacity. Exceeding of state

---

[109] Prosecutor v. Blaskic, § 41. For other case-law compare Wirth (2002) pp. 884-87

[110] Ibid, p. 882

[111] Prosecutor v. Blaskic, § 41

[112] *Genocide Case*, § 386

[113] Supra note 11, p. 645

organs powers is not a bar for establishment of state responsibility (DASR Article 7), at the same time it eliminates the possibility to invoke the act of the state doctrine connected with functional immunities.[114] International crimes committed by state organs are regarded as exemplary case of *ultra vires* acts, they are prohibited by international law, they are in most instances committed with the aid of resources linked to the particular official function – they are "carried out by persons cloaked with governmental authority".[115] ILC commentary to DASR admits that the problem can arise how to distinguish between "unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other",[116] which is not attributed to the state, but at the same time it clarifies that this is not the case if the conduct in question is massive, systematic or recurrent.[117] In such situation it is clear that the state knew or should have known about unlawful conduct and should have applied preventive and repressive measures.[118] Briefly, if commission of international crimes is usually widespread and systematic, there is no doubt about its official character. The conditions set in DASR Article 7 are therefore fulfilled, *ultra vires* conduct can be attributed to the state and simultaneously individual in the position of state organ can not rely on the act of the state doctrine, because his conduct was clearly in the breach of domestic law, respectively international law.

Last, if international crimes fall into the category of private acts, it would be reasonable to expect that states would use this argument first and foremost as a reason to exonerate themselves from international responsibility. Such approach would be in stark contradiction to the idea of dual responsibility as "constant feature of international law".[119] To the knowledge of the author, this line of reasoning does not appear in

---

[114] Van Alebeek (2008) pp. 146-49

[115] Petrolane, Inc. v. The Government of the Islamic Republic of Iran – compare supra note 22, p. 46, § 7

[116] Ibid, p. 46, § 8

[117] ICTY conclusion in *Jelisic Case* about commission of genocide by sole perpetrator (supra note 40) is generally considered as illustrative and theoretical.

[118] Supra note 22, p. 46, § 8

[119] Supra note 3

international practice. Moreover, there is lack of judicial pronouncements which could be used in favor of private act approach – above mentioned *Arrest Warrant Case* contains this conclusion only implicitly, *Pinochet Case* refers to private acts only in minority vote. All these reasons support opinion, according to which international crimes when committed by state organs have to be regarded as acts done in official capacity. Thus, if genocide is committed by state organ, it can be without difficulties attributed to the state.

4.2 Prerequisites *ratione materiae*

Previous part of master thesis elaborated questions connected with position of genocide perpetrator, following chapter deals with content of genocide-related norms. First, comparison is made between primary norms stipulated by international law toward state and individual, later the key aspect of these norms (*dolus specialis*) is evaluated. It shall be seen to what degree one can speak about concurrence between state and individual responsibility (identity of primary norms), respectively how far is state fault conformable to the intent of individual perpetrator.

4.2.1 Content of primary norms

Concurrence between state and individual responsibility in proper sense of the word is meaningful only there, where identical duties are prescribed for state and individual by international law. Closer look to the content of primary norms as far as genocide is concerned is integral part of presented analysis. The crucial question is, whether international law provides for identical duties irrespective of its addressee – state or individual.

To begin with individual, there is no doubt that primary norms[120] do prohibit commission of genocide. Obligations imposed on individuals are nevertheless not exhausted by negative duty, civilian and military superiors (commanders) may be held

[120] With respect to individual, primary norms are defined as "set of acts that give rise to individual criminal responsibility", secondary norms on the other hand deals with question of attribution and defenses – Ratner (2001) pp. 491-92

responsible for breach of their positive duty to prevent and repress genocide committed by their subordinates.[121] Failure to take all necessary and reasonable measures to prevent and repress genocide, when military or civilian superior knew or should have known about unlawful conduct of his inferiors (primary obligation) therefore establishes responsibility (secondary obligation) – it is enough to mention *Musema Case*[122] and *Kayishema & Ruzindana Case*[123] held before ICTR where superior responsibility was declared. It is of importance that *ad hoc* tribunals do not require existence of *dolus specialis* for conviction under this form of responsibility.[124] Next lines shall analyze content of international obligations provided with respect to genocide towards state.

This question was discussed especially during proceedings in *Genocide Case*. It is appropriate to focus firstly on particular international law represented by Genocide Convention and consequently on general customary international law as both sources of international law need not necessarily lay down the same rules. Genocide Convention expressly mentions obligations to prevent and punish genocide (Article I), to enact respective domestic regulation (Article V), to prosecute perpetrators of genocide (Article VI) and finally obligation to allow extradition (Article VII) – ICJ specified that prevention of genocide is obligation "of conduct and not one of result"[125] and limited duty to repress perpetrators only to territorial states.[126]

It is evident that Genocide Convention does not contain explicit command not to commit genocide. Bosnia and Herzegovina nevertheless argued in favor of this obligation, using provision of Article IX, which establishes ICJ jurisdiction in disputes "including those relating to the responsibility of a State for genocide", as the starting point. ICJ rejected this proposition, it stressed the jurisdictional character of Article IX,

---

[121] ICC Statute art 28, ICTY Statute art 7(3), ICTR Statute art 6 (3) – for general discourse about superior responsibility compare e.g. Bantekas (2002) and Mettraux (2009)

[122] Prosecutor v. Musema, § 936

[123] Prosecutor v. Kayishema & Ruzindana, §§ 551-571

[124] Prosecutor v. Brdanin, § 719

[125] *Genocide Case*, § 430

[126] Ibid, § 442

but at the same time admitted that the obligation not to commit genocide may flow from other substantive provisions of convention.[127] At the end, ICJ came to the conclusion that duty not to commit genocide is necessarily implied in obligation to prevent genocide (argument *a minori ad maius*), because "it would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs."[128] ICJ reading of Genocide Convention was not unanimously shared. Dissenting judges highlighted that majority opinion leads to decriminalization of genocide which is transformed to mere state wrongful act,[129] or pointed to the impossibility to deduce the prohibition of genocide from its prevention without inextricable perversion of treaty interpretation methods as included in Vienna Convention on the Law of Treaties.[130] It is suitable to dwell on the matter at some length.

Travaux préparatoires reveal that three different conceptions of relation between state and individual responsibility were discussed during conference.[131] The United States and the Soviet Union regarded future convention as criminal tool and orientated themselves on individual criminal responsibility which should have been enforced entirely at domestic level. Similar position was maintained by France, with the exception that French proposals stressed necessity to establish international tribunal for prosecution of individuals as it would have been more effective in achievement of assigned goal. On the other hand, the United Kingdom believed that individual responsibility is not adequate measure as "it was impossible to blame any particular individual for actions for which whole governments or States were responsible."[132] It therefore proposed enactment of provision which would expressly mention direct state

[127] Ibid, § 166

[128] Ibid, § 166

[129] Supra note 63, p. 4

[130] Separate Opinion of Judge Tomka, § 41

[131] Schabas (2009) p. 492

[132] Ibid, p. 492

responsibility for commission of genocide – the UK further admitted that obligation not to commit genocide is implied in obligation to prevent it as well.[133] At the end, British initiative was rejected by margin of only two votes (24 against, 22 in favor), whereas the main reason was ambiguous wording interpreted by some states as enabling to make conclusion about state criminal responsibility.[134]

The content of duties imposed on states by Genocide Convention has been subjected to scrutiny both during and after the adoption of convention. Proponents of individual oriented approach argue that Genocide Convention is nothing more than a treaty on judicial cooperation in criminal matters.[135] Cassese asserts that drafters` intent results e.g. from preamble which declares that "in order to liberate mankind from such an odious scourge, international co-operation is required."[136] Genocide Convention similarly like other treaties such as Torture Convention (1984) harmonizes domestic legislation and criminalizes specific category of international crime. Gaeta comes to the conclusion that ICJ ruling is going contrary to the historical foundation of Genocide Convention (Nürnberg legacy of individual criminal responsibility) and contrary to the ordinary interpretation methods of international treaties (impossibility to deduce duty not to commit genocide from duty to prevent it).[137]

On the other hand, proponents of state oriented approach usually argue with above mentioned Article IX of Genocide Convention, which speaks about *responsibility of a state for genocide.* Article IX has been analyzed in details by ICJ which accented its jurisdictional dimension, but at the same time used it as subsidiary argument for its reading of convention.[138] ICJ cited its previous decision on jurisdiction (1996) and held

---

[133] Quigley (2006) p. 224

[134] Jørgensen (2000) p. 36

[135] Cassese (2007) p. 876, compare Joint Declaration of Judges Shi and Vereshchetin, p. 1

[136] Ibid, p. 876

[137] Supra note 11, p. 640. Gaeta gives impressive example on the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), by application of ICJ approach she comes to the conclusion that it is possible to establish state responsibility for prostitution of human beings.

[138] *Genocide Case*, § 169

that "the reference to Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility."[139] M. Milanovič[140] and J. Quigley[141] argue by plain meaning of Article IX and add that there is no need to make recourse to the *travaux préparatoires* because such technique is justified only if ordinary meaning of the text is ambiguous. As it is seen, both intellectual trends present completely antagonistic but still persuasive arguments.

Finally, brief mention about other forms of responsibility recognized both under law of state responsibility and international criminal law should be made - ICJ expressly dealt with incitement, conspiracy and especially complicity in genocide. It can be summarized that all these categories were treated differently than in the area of international criminal law, which does not correspond very well with the substantial adherence to ICTY work revealed in the other parts of *Genocide Case* judgment.[142] ICJ ruled, without any explanation, that commission of genocide absorbs incitement and conspiracy to commit genocide, which conclusion is going contrary to settled jurisprudence in international criminal law. Here, both forms are regarded as so-called inchoate crimes having autonomous character independent on the commission of principal act.[143] As for complicity in genocide, ICJ stressed that complicity "always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide"[144] Case-law of *ad-hoc* tribunals (*Furundžija*, *Akayesu*) nevertheless acknowledges complicity even in negative form, i.e. complicity by omission.[145] To conclude, the content of obligations provided by international law towards state is in comparison to individual narrower.

---

[139] Ibid, § 151

[140] Milanovic (2006) p. 566

[141] Supra note 133, p. 236

[142] Compare subchapter *Mens Rea* v. Fault

[143] Supra note 135, p. 880

[144] *Genocide Case*, § 432

[145] Supra note 135, p. 884

From the viewpoint of customary international law, the issue of primary norms content is fortunately absolutely clear. Position is pertinently expressed by Gaeta, who contends that "nobody would dare to deny that customary international law contains a rule prohibiting states from committing genocide."[146] Moreover, such rule attained the status of *ius cogens*. Proceedings before ICJ in *Genocide Case* could have been therefore much easier if there had been no jurisdictional constraint precluding application of customary international law. Jurisdictional limits nevertheless compelled ICJ to adopt "implication language" which was later subjected to critics mentioned above.

Without any doubts, customary international law provides even for the obligation to prevent and repress genocidal acts.[147] Here the similarity with international criminal law doctrine of superior responsibility is flagrant.[148] ICJ confirmed accessory character of preventive and repressive obligation which follows only if genocide is actually committed,[149] stressed distinct character of prevention and repression, clarified that content of positive obligation is bound up with conduct and not with result (i.e. state is obliged to use all reasonably available measures) and finally declared that state is only responsible if it was aware or should have been aware of serious danger of genocide.[150]

The only difference between international criminal law regulation and the law of state responsibility rests in criterion describing the relationship to actual perpetrators. International criminal law rejects standard of mere influence and constantly speaks about effective control of superiors over inferiors, which is defined as "material ability to prevent or punish the commission of the offences".[151] On the other hand, ICJ requires mere "capacity to influence effectively the actions of persons likely to commit

[146] Supra note 11, p. 632

[147] Supra note 31, p. 500

[148] Boas (2007) pp. 274-77

[149] DASR art 14 (3)

[150] *Genocide Case*, §§ 427-32

[151] Prosecutor v. Delalic, § 378

[…] genocide."[152] Such solution is nevertheless rational – the dwell upon more stringent criterion of effective control would make state responsibility for failure to prevent and repress international crimes illusory, because its territorial scope is much wider (i.e. it encompasses whole territory and not only respective sphere of command)[153] than corresponding duty of superiors under the rules of international criminal law. Moreover, despite similar wordings, it is clear that content of positive obligations need not be necessarily identical – e.g. state can be bound to adopt measures which can not be logically demanded on individual (passage of adequate legislation). State positive obligations are therefore wider both in territorial and material aspects.

From above lines one can make following conclusions. As far as customary international law is concerned, the overlap between obligations not to commit genocide (negative duty) and to prevent and repress genocide (positive duty) is taken for granted with qualifications made thereinbefore. N. Reid stresses the importance of positive duty and with respect to superior responsibility speaks about the "missing link between state and individual responsibility under international law".[154] From the viewpoint of particular international law the overlap is less clear. This ambiguity does not concern positive duty explicitly mentioned in Genocide Convention, but deals with negative duty, which can be only inferred from the wording of the convention.[155] If judgments of ICJ are accepted as legal sources enjoying high relevance in international law (despite the fact they have formally no binding force except between the parties and in respect of that particular case),[156] the authoritative ruling in *Genocide Case* enables to speak about overlap between state and individual primary obligations even as regards duty not

[152] *Genocide Case*, § 431

[153] A. Gattini refers to jurisdiction – Gattini (2007) p. 700

[154] Reid (2005) p. 795

[155] First authoritative commentary of Genocide Convention admits that "there were many doubts as to the actual meaning" of refference to the state responsibility in the text of convention. Robinson (1949) p. 42

[156] ICJ Statute art 59

to commit genocide. Such conclusion can nevertheless be subjected to critical evaluation.

4.2.2 *Mens rea* v. Fault

Subjective element represents important "point of contact between aggravated state responsibility and individual criminal liability."[157] Generally speaking, subjective element is to be given different meaning in international criminal law and the law of state responsibility. In international criminal law *mens rea* is fundamental and unsubstitutable category which has to be proven beyond reasonable doubt in every single criminal case. *Mens rea* (according to ICC Statute Article 30 either intent or knowledge) reflects psychological participation of perpetrator in international crime and is pertinent to the principle of individual responsibility bound up with international criminal law.[158] Things are different as far as rules of state responsibility are concerned.

"The problem […] whether the attribution of international responsibility to a State of an act or omission infringing an international legal obligation is conditional upon the fault—*culpa* or *dolus*—of the organ/organs […][is treated differently by] two main conflicting schools of thought—the 'Objective Theory' and the 'Fault Theory'."[159] First approach, objective or risk theory, emphasizes concrete conduct which is to be compared with what should have been done under respective international legal obligation (i.e. accent is given on the wrongful act), second approach highlights fault of individual state organ, whose conduct forms basis of state responsibility and makes it precondition of wrongful act.[160] Fault features here as additional criterion of international responsibility of the state. According to M. Shaw, the "relevant cases and academic opinions are divided on this question, although the majority tends towards the strict liability, objective theory of responsibility."[161] Somewhat controversial issue can

[157] Supra note 4, p. 119

[158] Ibid, p. 119

[159] Palmisano (2007)

[160] Shaw (2008) p. 783

[161] Ibid, p. 783

be moreover pragmatically resolved by so-called eclectic approach, which resigns to definitely resolve the position of fault in secondary rules of state responsibility and transfers this question to the area of primary norms.[162] It seems this solution was endorsed even by ILC which concluded that "whether responsibility is 'objective' or 'subjective' in this sense depends on the circumstances, including the content of the primary obligation in question."[163] State responsibility for genocide is therefore typically subjective as it demands the existence of *dolus specialis*.

It is notorious that genocide comes under the rubric of so-called specific intent crimes (*dolus specialis*), whereas the psychological element is required both under international criminal law and the law of state responsibility.[164] Briefly, specific intent is part of primary norms applicable to states as well as to individuals.[165] Next part of master thesis shall analyze how genocidal *dolus specialis* is interpreted in both branches of international law and try to draw conclusion about mutual relation between individual and state responsibility as far as psychological element is concerned. Finally, focus shall be given even on psychological element required with respect to preventive and repressive obligation.

It is proper to shortly mention that some scholars argue for lower psychological standard, connected to the so-called knowledge-based approach. Accordingly "the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."[166] Proponents of knowledge-based approach distinguish between collective intent reflected by overall genocidal policy and *mens rea* of individual perpetrator which is established by mere knowledge of general context. However, this methodology has to be rejected. ICTY requires that every perpetrator of genocide is holder of necessary

[162] Supra note 159

[163] Supra note 22, p. 34, § 3

[164] Supra note 6, pp. 1095-96

[165] *Genocide Case*, §§ 186-89

[166] Greenawalt (1999) p. 2288

specific intent.[167] Such solution is to be welcomed because it best reflects gravity of genocide as crime of the crimes. Following analyze therefore stems from the so-called purpose based approach resolutely connected with intent.

Crucial question to answer is how to establish intent of abstract entity such as a state? Generally speaking, two possible models can be distinguished.[168] First, state intent is identified with intent of responsible state organ. Such model is well known from domestic legal regulation of corporate responsibility, nevertheless its usage at international scene reveals certain disadvantages. With respect to isolated international crimes[169] or crimes perpetrated by small groups of leaders (e.g. closed extreme form of dictatorship)[170] such model is acceptable, on the other hand its application is much more difficult within systemic collective crimes (typically genocide) usually committed or at least tolerated by state. Who should be identified as relevant bearer of state intent here? To resolve this issue, the second model is available. State intent is not connected to the psychological category of *mens rea* any more, but is inferred from more objective indicator which is state policy. The reference can be made to report of ICID or to decisions of IACHR – this issue has been discussed in greater details in previous part.

---

[167] Prosecutor v. Krstić, § 134 – ICTY ruled that:

> As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.

[168] Supra note 4, p. 123 – compare Chapter 1.1 Conflicting methods

[169] Ibid, p. 123

[170] Supra note 131, p. 518. Nollkaemper proposes exclusion of state responsibility in such situation, punishment of state leaders who acted contrary to the will of population should be adequate remedy – compare supra note 43, pp. 621-22

From theoretical point of view, state intent should be more objective, i.e. it should not be inferred merely from internal psychological attitude of single individuals. If one accepts that inference of perpetrator's intent (or knowledge) from wider context, which is recognized in decision-practice of international criminal tribunals, makes these psychological category more objective, it is possible to speak about clear linkage between state and individual responsibility. Such line of reasoning is presented by Bonafé who concludes that this particular aspect "dramatically reduces the distance between individual criminal liability and aggravated state responsibility."[171] General criminal context shifts the establishment of *mens rea* (*dolus specialis*) from the personal conduct of the accused, from his "words and deeds and […] from patterns of purposeful actions",[172] to the conduct of someone else. According to ICTY Appeal Chamber in *Krstić Case* "[w]here direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime".[173]

General criminal context is defined as encompassing among others four basic characteristics:[174] the extent of actual destruction, the existence of genocidal plan or policy, perpetration and/or repetition of other destructive acts committed as part of the same pattern of conduct, the utterances of the accused. Prosecutor in *Brdanin Case* argued that pattern of acts committed on the territory of the Republic of Serbian Krajina displays the existence of genocidal intent, respectively it followed genocidal policy which can be used as evidence of genocidal intent - that means, the existence of genocidal policy was not approached as legal ingredient of genocide, but as indirect evidence which can prove existence of genocidal intent. ICTY rejected this argument ruling that in particular case widespread nature of atrocities is indeed evidence of

[171] Supra note 4, p. 135

[172] Prosecutor v. Bagilishema, § 63

[173] Prosecutor v. Krstic, § 34. Similarly in *Akayesu Case* ICTR held that " [t]he Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others." Prosecutor v. Akayesu, § 523

[174] Prosecutor v. Brdanin, § 971

persecution, but it can not sufficiently establish the requirement of *dolus specialis*.[175] Interestingly, according to ICTY, "[w]here an inference needs to be drawn, it has to be *the only reasonable inference available on the evidence.*"[176] Any other potential interpretation of indirect evidence (e.g. conclusion about commission of crimes against humanity) precludes conviction from genocide. Such approach has to be welcomed, because it corresponds with the fundamental principles of international criminal law based on individualization of criminal conduct, respectively it hampers needless profusion with the most serious criminal conviction one can imagine.[177]

Standards of *mens rea* and fault required by *ad hoc* tribunals and ICJ for genocide conviction reveal striking similarity. It is especially evident, where *dolus specialis* has to be inferred from pattern of acts due to the lack of direct evidence.[178] ICJ approach is as follows:

> 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 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.[179]

Similarly with ICTY, ICJ would have accepted indirect evidence of *dolus specialis* only if any other interpretation had not been available (e.g. ethnic cleansing). Standard for state genocide conviction is hence as strict as in international criminal law. ICJ itself declared this approach when it adopted standard of proof appropriate to charges of

---

[175] Ibid, § 984. It should be stressed that genocidal policy was accepted in general as indirect evidence of *dolus specialis*, in concrete case its existence was nevertheless not established.

[176] Ibid, § 970

[177] Cryer (2007) p. 185

[178] *Genocide Case*, § 371. "Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework".

[179] Ibid, § 373

exceptional gravity.[180] As ICJ highly relied on the case-law of *ad hoc* tribunal it is of no wonder that it came to the same conclusion. It is possible to formulate hypothesis that if ICTY in its judgments rendered before February 2007 had inferred *dolus specialis* from pattern of acts and had ruled about commission of genocide even elsewhere and not only in Srebrenica, ICJ would have probably adopted the same approach which would have been favorable for Bosnia and Herzegovina. It seems that state responsibility standard of genocidal *dolus specialis* is interchangeable with criterion adopted in international criminal law.

This outcome was criticized by A. Abass who contends that ICJ should have considered the trend of *ad hoc* tribunals on inference of genocidal intent from circumstantial evidence.[181] But to the knowledge of master thesis author, it is exactly what ICJ did using standard which, if not identical, is very similar to the criminal standard of proof "beyond reasonable doubts". Despite negative appraisals presented soon after the *Genocide Case* judgment was delivered, which criticized this standard as unreasonably high,[182] at least systematic argument and argument of judicial analogy speak in favor of the chosen approach. First, it has to be kept in mind that responsibility for genocide stems from one of the most serious wrongful act imaginable, less stringent criterion would made international law inconsistent, because "double standard would bring about the curious and undesirable result of having at the same time in international law a 'crime' of genocide alongside a 'tort' of genocide."[183]

Next, high standard of proof was requested by international judicial bodies even in less compelling accusations. A. Gattini points to the decision of 1903 UK-Venezuela Claim Commission[184] and to the inter-state case-law of European Court of Human Rights (ECHR) – in famous *Ireland v. the United Kingdom Case* concerned with

---

[180] Ibid, § 181

[181] Abass (2008) p. 900

[182] Cassese (2007), available at http://www.guardian.co.uk/commentisfree/2007/feb/27/thejudicialmassacreofsrebr (visited on 21/11/2010)

[183] Gattini (2007) pp. 894-95

[184] Ibid, p. 894

alleged torture or inhuman treatment committed by the United Kingdom during the Operation Demetrius in Northern Ireland, ECHR adopted the standard of proof "beyond reasonable doubts" but added that "such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of facts."[185] The same approach was endorsed in *Cyprus v. Turkey Case*, interestingly even with relation to violation of e.g. freedom of association, freedom of expression or freedom of religion.[186] Briefly, *mens rea* and fault needed for establishment of individual and state responsibility for genocide reveal close contact between both regimes of responsibility, or at least fill up the gap between them.

Completely different standard is required for establishment of superior responsibility, respectively for state responsibility for failure to provide preventive and repressive measures. As far as superior responsibility is concerned, there is no need to prove genocidal intent[187] - this form of responsibility arises where superior knew or should have known[188] about unlawful conduct of inferiors. In the light of aforementioned similarity between *mens rea*/fault standard in genocidal special intent analyzed with respect to negative obligation (duty not to commit genocide), it is not surprising that resemblance appears even with relation to positive duty to prevent and repress genocide.

Fault requirement for violation of state preventive and repressive duty is expressed by wording that state "was aware or should normally have been aware"[189] of the serious danger that genocide would be committed. The existence of *dolus specialis* is not requested. It is important that ICJ adopted less demanding standard of proof as far as obligation to prevent is concerned, it referred to "high level of certainty".[190] In given

---

[185] Ireland v. the United Kingdom, § 161

[186] Cyprus v. Turkey, § 113

[187] Prosecutor v. Brdanin, § 719

[188] ICTY and ICTR use identical criterion expressed by wording „knew or had reason to know" – compare ICTY Statute art 7(3), ICTR Statute art 6(3)

[189] *Genocide Case*, § 432

[190] Ibid, § 210

case ICJ ruled that Belgrade authorities "could hardly have been unaware of the serious risk of [genocide] once the VRS forces had decided to occupy the Srebrenica enclave."[191]

To conclude, fault requirements necessary to establish state responsibility are interpreted in the same way as in the area of international criminal law. Only difference deals with state responsibility for complicity in genocide – similarly to conduct requirements, fault is interpreted in narrower way. While in the area of international criminal law it is enough that aider or abettor was "aware of substantial likelihood that his acts would assist the commission of a crime by the perpetrator",[192] ICJ ruled that "accomplice must have given support in perpetrating the genocide with full knowledge of the facts."[193] If less stringent standard from international criminal law had been grafted into the law of state responsibility, Serbia would have been also in breach of complicity in genocide. It is possible to assert that in this particular area one can speak about differentness between state and individual responsibility,[194] on the other hand ICJ should have dwellt upon the issue in more details and at least briefly explain, why it decided to divert from settled jurisprudence in international criminal law. It should be especially useful if the extensive adherence to ICTY work revealed in other parts of *Genocide Case* judgment is taken into account.

---

[191] Ibid, § 436

[192] Supra note 135, p. 883. Cassese reffers to *Furundžija Case* and *Brima and others Case*. ICTY in *Furundžija Case* ruled following (Prosecutor v. Furundžija, § 246):

> [I]t is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

[193] *Genocide Case*, § 432

[194] Supra note 135, p. 880

5 Conclusion

Current public international law regulation of genocide pulls the stop[195] both to the state and the individual, which reflects ICJ ruling that system of dual responsibility continues to be a constant feature of international law. Presented master thesis elaborated this fundamental axiom at some length considering methodological approach, doctrinal approach and both personal and material prerequisites of concurrence between state and individual responsibility for international crimes, respectively for genocide.

Basic methodological delimitation revealed observation indicative of close relationship between state and individual conduct/responsibility whereof whole thesis is stemming from. Current international law is built on presumption that it is conduct of individual (*de iure* or *de facto* state organ) attributable to the state which forms the basis of state conduct. Despite some promulgation of opposite approach derived from sociological studies of organizations, evidenced e.g. in the report of ICID or practice of IACHR, from legal point of view, basis of state conduct does not rests on goal or policy to be pursued. In *Genocide Case*, ICJ considered the existence of general plan or pattern only as potential evidence of genocidal intent, it did not require it as condition included in the genocide definition.[196] The same holds true in the area of international criminal law – state policy is approached only as indirect evidence of genocidal intent.[197] This conclusion approximates both regimes of responsibility together from the very beginning and precludes assertion that state and individual responsibility grow up from different spawn.

---

[195] Supra note 57, p. 1195

[196] *Genocide Case*, § 373

[197] Supra note 175

Indication of closer relationship between both responsibilities was enunciated even in theoretical delimitation. The approach which would exclude possibility of concurrence (monistic approach) was persuasively rejected. Current doctrine of international law denies consideration of individual criminal responsibility as mere manifestation or the form of state responsibility. Right on the contrary, individual criminal responsibility is treated as distinct and separate institute which entered the scene of international law by way of "Nürnberg revolution"[198] and became its integral part from that time. Mutual relationship between individual and state responsibility is best described in terms of mutual complementation which can disclose very intimate contact.[199] Individual criminal responsibility does not exclude state responsibility and *vice versa*. Crime of genocide is exemplary example of unlawful act, which evidences "deep contingency"[200] as *dolus specialis* is part of primary norms relevant both to states and individuals. On the other hand, majority doctrinal opinion (in the same way as relevant practice) rejects conclusion which would upgrade mutual relationship between state and individual responsibility to the higher level, it denies acceptance of formal dependency between them. Thus, under current international law competent tribunals can make a finding of genocide by a state even in absence of prior conviction of individual and *vice versa*, the lack of decision about state responsibility is not a bar for individual genocidal conviction.[201] Opposite doctrinal opinions are marginal or relate to other categories of international crimes which were not treated within master thesis. Clearly, despite the substantial overlap between state and individual responsibility for genocide, potential prior convictions of individual logically can not be used to incriminate state and *vice versa*. Prior decisions have only evidentiary relevance.[202] To give example, binding decision about state responsibility for genocide shall have no

[198] Supra note 6, p. 1086

[199] Supra note 55

[200] Šturma (2002) p. 15

[201] *Genocide Case*, §§ 180-82

[202] Ibid, § 277

connotation in the area of individual convictions, e.g. because individual may claim existence of a circumstance precluding wrongfulness.

In the part devoted to the work of ILC independence of both responsibility regimes was further confirmed. Commentaries to both codification outcomes (DASR, Code) reveal that ILC highlighted non-exclusive character of state and individual responsibility (without prejudice clauses) and principal distinction existing between them. ILC further expressed its understanding of criminal actions against individuals which it considered to be a part of primary obligations and completely marginalized their relevance in area of state responsibility. Validity of this conclusion can be demonstrated on Genocide Convention Article VI, eventually on *Genocide Case*[203] – obligation to punish genocide is not a consequence of a state organ previous commission of genocide, i.e. non-punishment of perpetrators is regarded as separate violation of international law.

Last part of master thesis evaluated prerequisites of concurrence between state and individual responsibility both in personal and material scope. It can be concluded that both personal premises and material premises reveal integrative and disintegrative tendencies. International criminal law evolved significantly from times of Nürnberg, except of post World War Two tribunals it is acknowledged that international crimes can be perpetrated even by private individuals, which has consequences for state responsibility. As described above, in such situation state would be responsible only indirectly for failure to adopt adequate preventive and repressive measures. Genocide Convention does not allow for any doubts as it expressly recognizes perpetration of genocide by private individuals. On the other hand, if genocide is committed by state organ, it has to be subsumed under the heading of public capacity what is important from the perspective of direct state responsibility. It was persuasively argued that international crimes due to their character can not be committed in private capacity.

Finally, content of primary norms, including psychological element of *mens rea* and fault,[204] was analyzed. As far as customary international law is concerned, the overlap

[203] Ibid, §§ 439-42

[204] Supra note 4, p. 119

between obligation not to commit genocide (negative duty) and obligation to prevent and repress genocide (positive duty) was taken for granted. It was argued that the overlap between individual responsibility and particular state responsibility covered by Genocide Convention (with respect to negative obligation) depends on reading of this instrument. If judgments of ICJ are accepted as authoritative legal sources the ruling in *Genocide Case* enables to make affirmative conclusion about overlap between state and individual responsibility even in particular international law. This general conclusion has to be nevertheless specified. Concrete preventive steps adopted by the state (e.g. enactment of legislative measures) have no counterparts in the area of international criminal law, their nature simply precludes they are addressed to individuals. Next, it was mentioned that due diligence standard provided towards the state is broader as it is expressed by vague wording "effective influence" as opposed by "effective control" required by superior responsibility doctrine in international criminal law. Finally, other punishable acts foreseen in Genocide Convention (complicity, incitement, conspiracy) are interpreted differently in both areas of international law. These aspects reveal disintegrative tendency and enable to make conclusion that state and individual is responsible for violation of dissimilar primary obligations.

As far as psychological element (*dolus specialis*) is concerned, fault requirements necessary to establish state responsibility for genocide are interpreted in the same way as *mens rea* in the area of international criminal law. It is especially evident, where *dolus specialis* has to be inferred from pattern of acts due to the lack of direct evidence, which shall be rather rule than exception in international practice – in such situations, the intent to destroy protected group as such has to be the only reasonable inference available. Any other potential interpretation of indirect evidence (e.g. conclusion about commission of crimes against humanity) precludes conviction from genocide. In *Genocide Case* ICJ heavily relied on ICTY case law which brings individualization to the area of state responsibility, the presumption was formulated that if ICTY in its judgments rendered before February 2007 had inferred *dolus specialis* from pattern of acts and had ruled about commission of genocide even elsewhere and not only in Srebrenica, ICJ would have probably adopted the same approach The only variation

from criminal law requirements deals with complicity, where ICJ opted for narrower standard.

The endeavor to answer complicated question of mutual relationship between state and individual responsibility for genocide is enhancing task as it reflects progress made by international law – there are two distinct enforcement mechanisms available for eradication of the most serious crime imaginable. Unfortunately or fortunately, the most apparent link between state and individual responsibility nevertheless remains in the obvious legal difficulty in establishment of genocidal convictions.

References

List of Judgements/Decision

Bosnia and Hercegovina v. Serbia and Montenegro. International Court of Justice, The Hague, 27 February 2007.

Cyprus v. Turkey. European Court of Human Rights, Strasbourg, 10 May 2001.

Declaration of Judge Skotnikov. Bosnia and Hercegovina v. Serbia and Montenegro. International Court of Justice, The Hague, 27 February 2007.

Democratic Republic of the Congo v. Belgium. International Court of Justice, The Hague, 14 February 2002.

Ireland v. the United Kingdom. European Court of Human Rights, Strasbourg, 18 January 1978.

La Cantuta v. Peru. Inter-American Court of Human Rights, San José, 29 November 2006.

Myrna Mack-Chang v. Guatemala. Inter-American Court of Human Rights, San José, 25 November 2003.

Petrolane, Inc. v. The Government of the Islamic Republic of Iran. Iran-United States Claims Tribunal, The Hague, 14 August 1991.

Prosecutor v. Akayesu. Case No. ICTR-96-4. ICTR Trial Chamber, Arusha, 2 September 1998.

Prosecutor v. Bagilishema. Case No. ICTR-95-1A. ICTR Trial Chamber, Arusha, 7 June 2001.

Prosecutor v. Blaskic. Case No. IT-95-14. ICTY Appeal Chamber, The Hague, 29 October 1997.

Prosecutor v. Brdanin. Case No. IT-99-36. ICTY Trial Chamber, The Hague, 1 September 2004.

Prosecutor v. Brima and others. Case No. SCSL-04-16. Special Court for Sierra Leone Trial Chamber, Freetown, 20 June 2007.

Prosecutor v. Delalic and others. Case No. IT-96-21. ICTY Trial Chamber, The Hague, 16 November 1998.

Prosecutor v. Furundžija. Case No. IT-95-17/1. ICTY Trial Chamber, The Hague, 10 December 1998.

Prosecutor v. Jelisic. Case No. IT-95-10. ICTY Trial Chamber, The Hague, 14 December 1999.

Prosecutor v. Kayishema & Ruzindana. Case No. ICTR-95-1. ICTR Trial Chamber, Arusha, 21 May 1999.

Prosecutor v. Krstic. Case No. IT-98-33. ICTY Appeal Chamber, The Hague, 19 April 2004.

Prosecutor v. Musema. Case No. ICTR-96-13. ICTR Trial Chamber, Arusha, 27 January 2000.

Prosecutor v. Nahimana, Barayagwiza, Ngeze. Case No. ICTR-99-52. ICTR Trial Chamber, Arusha, 3 December 2003.

Pueblo Bello Massacre v. Colombia. Inter-American Court of Human Rights, San José, 29 April 2004.

R . v. Bartle and the Commissioner of Police for the Metropolis and Others, ex Parte Pinochet (No. 3). House of Lords, London, 24 March 1999.

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. ICID, Geneva, 25 January 2005.

Separate Opinion of Judge Tomka. Bosnia and Hercegovina v. Serbia and Montenegro. International Court of Justice, The Hague, 27 February 2007.

Treaties/Statutes

ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950

Genocide Convention, Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN GA Resolution 260 (III) A, 9 December 1948

ICC Statute, Statute of the International Criminal Court, Rome 17 July 1998

ICTY Statute, Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by UN SC Resolution 827, 25 May 1993

ICTR Statute, Statute of the International Criminal Tribunal for Rwanda, adopted by SC Resolution 855, 8 November 1994

IMT Charter, Charter of the International Military Tribunal, annexed to London Agreement, 8 August 1945

UN Charter, Charter of the United Nations, San Francisco, 26 June 1945

VCLT, Vienna Convention on the Law of Treaties, Vienna 23 May 1969

UN Documents

Code, Draft Code of Crimes against the Peace and Security of Mankind, text adopted by the ILC on second reading in 1996

DARIO, Draft Articles on Responsibility of International Organizations, text adopted by the ILC on first reading in 2009

DASR, Draft Articles on Responsibility of States for Internationally Wrongful Acts, text adopted by the ILC on second reading in 2001

Nürnberg Principles, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the ILC in 1950

UN SC Resolution 1564 (2004), 18 September 2004, S/RES 1564/2004

YILC 1950, Yearbook of the International Law Commission 1950, Vol. 2, A/CN. 4/SER.A/1950/Add. 1

YILC 1956, Yearbook of the International Law Commission 1956, Vol. 2, A/CN.4/SER.A/1956/Add.l

YILC 1976, Yearbook of the International Law Commission 1976, Vol. 2, Part One, A/CN.4/SER.A/1976/Add.l (Part 1)

YILC 1976, Yearbook of the International Law Commission 1976, Vol. 2, Part Two, A/CN.4/SER.4/1976/Add. 1 (Part 2)

YILC 1984, Yearbook of the International Law Commission 1984, Vol. 2, Part Two, A/CN.4/SER.A/1984/Add.l (Part 2)

YILC 1985, Yearbook of the International Law Commission 1985, Vol. 1, A/CN.4/SER.A/1985

YILC 1985, Yearbook of the International Law Commission 1985, Vol. 2, Part One, A/CN.4/SER.A/1985/Add.l (Part 1)

YILC 1985, Yearbook of the International Law Commission 1985, Vol. 2, Part Two, A/CN.4/SER.A/1985/Add.l (Part 2)

YILC 1994, Yearbook of the International Law Commission 1994, Vol. 2, Part One, A/CN.4/SER.A/1994/Add.l (Part 1)

YILC 1996, Yearbook of the International Law Commission 1996, Vol. 2, Part Two, A/CN.4/SER.A/1996/Add.l (Part 2)

YILC 2000, Yearbook of the International Law Commission 2000, Vol. 1, A/CN.4/SER.A/2000

YILC 2001, Yearbook of the International Law Commission 2001, Vol. 2, Part Two, A/CN.4/SER.A/2001/Add.1 (Part 2)

Secondary Literature

Abass, Ademola. *Proving State Responsibility for Genocide: the ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*. In: Fordham International Law Journal. Vol. 31 (2008), pp. 871-910

An Introduction to International Criminal Law and Procedure. Robert Cryer … [et al.]. Cambridge, (Cambridge University Press) 2007

Akandji-Kombe, Jean-François. *Positive Obligations under the European Convention on Human Rights*. Strasbourg 2007. http://echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf [Visited 22 November 2010]

Asuncion, C. Amabelle. *Pulling the Stops on Genocide. The State or the Individual?* In: European Journal of International Law. Vol. 20 (2010), pp. 1195-1222

Bantekas, Ilias. *Principles of direct and superior responsibility in international humanitarian law*. Manchester, (Manchester University Press) 2002

Bianchi, Andrea. *Denying state immunity to violators of human rights*. In: Austrian journal of public and international law. Vol. 46 (1993), pp. 195-229

Bianchi, Andrea. *State Responsibility and Criminal Liability of Individuals*. In: The Oxford companion to international criminal justice. Oxford, (Oxford University Press) 2009. pp. 16-24

Boas, Gideon, Bischoff, James and Reid, Natalie. *Forms of Responsibility in International Criminal Law*. Cambridge, (Cambridge University Press) 2007

Bonafé, Beatrice. *The Relationship Between State and Individual Responsibility for International Crimes*. Leiden, (Nijhoff) 2009

Cançado Trindade, Antônio Augusto. *Complementarity between 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. Leiden, (Brill) 2005. pp. 253-269

Cassese, Antonio. *A Judicial Masacre*. In: The Guardian. 27 February 2007

Cassese, Antonio. *International Criminal Law*. 1st edition. Oxford, (Oxford University Press) 2003

Cassese, Antonio. *International Criminal Law*. 2nd edition. Oxford, (Oxford University Press) 2008

Cassese, Antonio. *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*. In: Journal of International Criminal Justice. Vol. 5 (2007), pp. 875-887

Cassese, Antonio. *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*. In: European Journal of International Law. Vol. 18 (2007), pp. 649-668

Cassese, Antonio. *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*. In: European Journal of International Law. Vol. 13 (2002), pp. 853-875

Chouliaras, Anthanasios. *State Crime and Individual Criminal Responsibility : Theoretical Inquiries and Practical Consequences*. In: The Review Conference and the future of the International Criminal Court : proceedings of the first AIDP symposium for young

penalists in Tübingen, Germany, co-organized by the AIDP YP Committee. Köln, (Heymann) 2010. pp. 191-214

Crawford, James and Olleson, Simon. *State Responsibility*. In: Encyclopedia of Genocide and Crimes against Humanity. Detroit, (Thomson/Gale) 2005. pp. 904-910

David, Vladislav. *Mezinárodní právo veřejné*. 3rd edition. Praha, (Linde) 2006

David, Vladislav. *Mezinárodní zločiny a jejich právní následky*. Brno, (Univerzita Jana Evangelisty Purkyně) 1988

Degan, Vladimir-Djuro. *Responsibility of states and individuals for international crimes*. In: International law in the post-Cold War world : essays in memory of Li Haopei. London, (Routledge) 2001. pp. 202-223

Dupuy, Pierre-Marie. *International Criminal Responsibility of the Individual and International Responsibility of the State*. In: The Rome Statute of the International Criminal Court : a commentary. Oxford, (Oxford University Press) 2002. pp. 1085-1099

Fox, Hazel. *The International Court of Justice's Treatment of Acts of the State and in particular the attribution of acts of individuals to the state.* In: Liber amicorum judge Shigeru Oda. The Hague, (Kluwer Law International) 2002. pp. 147-163

Franck, Thomas. *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?* In: Washington University Global Studies University Review. Vol. 6 (2007), pp. 567-573

Gaeta, Paola. *On What Conditions Can a State Be Held Responsible for Genocide?* In: European Journal of International Law. Vol. 18 (2007), pp. 631-648

Gattini, Andrea. *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*. In: European Journal of International Law. Vol. 18 (2007), pp. 695-713

Gattini, Andrea. *Evidentiary Issues in the ICJ's Genocide Judgment*. In: Journal of International Criminal Justice. Vol. 5 (2007), pp. 889-904

Greenawalt, Alexander. *Rethinking genocidal intent: the case for a knowledge-based interpretation.* In: Columbia law review. Vol. 99 (1999), pp. 2259-2294

Groome, Dermot. *Adjudication Genocide : is the International Court of Justice Capable of Judging State Criminal Responsibility*? In: Fordham International Law Journal. Vol. 31 (2008), pp. 911-989

Gross, Edward. *The definition of organizational goals*. In: The British Journal of Sociology. Vol. 20 (1969), pp. 277-294

Ingadottir, Thordis. *The ICJ Armed Activity Case : Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions*. In: Nordic Journal of International Law. Vol. 78 (2009), pp. 581-598

Jørgensen, Nina. *The Responsibility of States for International Crimes.* 2nd edition. Oxford, (Oxford University Press) 2003.

Lauterpacht, Hersch. *International Law and Human Rights*. Hamden, (Archon Books) 1968

Maison, Rafaëlle. *La responsabilité individuelle pour crime d'état en droit international public*. Bruxelles, (Ed. de l'Université de Bruxelles) 2004

Mazzeschi, Riccardo. *The Marginal Role of the Individual in the ILC's Articles on State Responsibility.* In: The Italian Yearbook of International Law. Vol. 14 (2005), pp. 39-51

Mettraux, Guénaël. *The law of command responsibility*. Oxford, (Oxford University Press) 2009

Milanovic, Marko. *State Responsibility for Genocide*. In: European Journal of International Law. Vol. 17 (2006), pp. 553-604

Murphy, John. *Civil liability for the commission of international crimes as an alternative to criminal prosecution*. In: Harvard human rights journal. Vol. 12 (1999) pp. 1-56

Nollkaemper, André. *Concurrence Between Individual Responsibility and State Responsibility in International Law*. In: International and Comparative Law Quarterly. Vol. 52 (2003), pp. 615-640

Palmisano, Giuseppe. *Fault*. In: Max Planck Encyclopedia of Public International Law. [electronic database]

Pellet, Alain. *Responsabilité de l'état et responsabilité pénale individuelle en droit international.* Guest Lecture Series of the Office of the Prosecutor. The Hague, 30 May 2006. pp. 1-9

Quigley, John. *The Genocide Convention: an international law analysis*. Aldershot, (Ashgate) 2006

Ratner, Steven. *Corporations and Human Rights: a Theory of Legal Responsibility*. In: Yale Law Journal. Vol. 111 (2001), pp. 443-545

Reid, Natalie. *Bridging the Conceptual Chasm : Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law*. In: Leiden Journal of International Law. Vol. 18 (2005), pp. 795-828

Robinson, Nehemiah. *The Genocide convention: its origins and interpretation*. New York, (Institute of Jewish Affairs) 1949

Schabas, William. *Genocide in international law : the crime of crimes*. 1st edition. Cambridge, (Cambridge University Press) 2000

Schabas, William. *Genocide in international law : the crime of crimes*. 2nd edition. Cambridge, (Cambridge University Press) 2009

Shaw, Malcolm. *International Law*. 6th edition. Cambridge, (Cambridge University Press) 2008

Spinedi, Marina. *International Crimes of State. The Legislative History*. In: International crimes of state : a critical analysis of the ILC's Draft Article 19 on State Responsibility. Berlin, New York, (De Gruyter) 1989. pp. 7-138

Spinedi, Marina. *State responsibility v. individual responsibility for international crimes: tertium non datur*. In: European Journal of International Law. Vol. 13 (2002), pp. 895-899

Starita, Massimo. *Amnesty for crimes against humanity : coordinating the state and individual responsibility for gross violations of human rights*. In: The Italian yearbook of international law. Vol. 9 (2000), pp. 86-109

Šturma, Pavel. *Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva*. Praha, (Karolinum) 2002

Van Alebeek, Rosanne. *The immunity of states and their officials in the light of international criminal law and international human rights law*. Oxford, (Oxford University Press) 2008

Werle, Gerhard. *Principles of International Criminal Law*. The Hague, (T.M.C. Asser Press) 2005

Wilmshurst, Elizabeth. *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?* In: International Criminal Court and the Crime of Aggression. Aldershot, (Ashgate) 2001. pp. 93-96

Wirth, Steffen. *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*. In: European Journal of International Law. Vol. 13 (2002), pp. 877-893

Wouters, Jan. *The judgement of the International Court of Justice in the Arrest Warrant case : some critical remarks*. In: Leiden Journal of International Law. Vol. 16 (2003), pp. 253-267

Wyler, Eric. *From "state crime" to responsibility for "serious breaches of obligations under peremptory norms of general international law"*. In: European Journal of International Law. Vol. 13 (2002), pp. 1147-1160

Zimmermann, Andreas. *Comment: Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy or Conflict?* In: International Humanitarian Law Facing New Challenges. Berlin, (Springer) 2005. pp. 215-223

Zimmermann, Andreas. *State Responsibility for International Crimes*. In: System Criminality in International Law. Cambridge, (Cambridge University Press) 2009. pp. 298-313

M