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THE LEGAL OBLIGATION TO PREVENT GENOCIDE: BOSNIA V SERBIA AND BEYOND

Abstract

This article assesses the impact of legal rules aimed at preventing genocide. The specific features of the legal obligation to prevent genocide are analyzed in light of the current debate on the “responsibility to protect” and the ICJ’s stance on the issue in Bosnia v Serbia. While the content of positive obligations such as the one under discussion is usually elaborated through the case law of judicial or quasi-judicial bodies, the ICJ refrained from doing so, stating that only manifest breaches of the obligation to prevent genocide give rise to international responsibility. The author seeks an explanation for the reasons underlying such an approach, and tries to identify other ways in which legal standards in the field of genocide prevention could be developed.

INTRODUCTION

A significant shift of focus from the repression of offenders to the prevention of genocide and other mass atrocities has taken place in the last decade. A number of efforts have been made to overcome the “Nurenbergian” attitude taken in the past at international level.¹ These include the commitments undertaken in the UN

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¹ See, W. M. Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 Case Western Reserve Journal of International Law 57 (2007-2009) p. 59, noting that the international community “has preferred to invest its efforts in punishment rather than prevention.”

framework as regards the so-called "responsibility to protect,"² the endorsement of this concept by the Security Council,³ and the appointment of a Special Advisor to the Secretary General on this topic and on a related one specifically aimed

² On the concept of "responsibility to protect," see e.g., R. Thakur, *In Defence of the Responsibility to Protect*, 7(3) *International Journal of Human Rights* 160 (2003); L. Boisson de Chazournes, L. Condorelli, *De la 'responsabilité de protéger', oud'une nouvelle parure pour une notion déjà bien établie*, 110 *Revue générale de droit international public* 11 (2006); P. Hilpold, *The Duty to Protect and the Reform of the United Nations, a New Step in the Development of International Law?* 10 *Max Planck Yearbook of United Nations Law* 35 (2006); C.C. Joyner, *The 'Responsibility to Protect': Humanitarian Concern and the Lawfulness of Humanitarian Intervention*, 47 *Vanderbilt Journal of International Law* 693 (2006-2007); C. Stahn, *Responsibility to Protect – Political Rhetoric or Emerging Legal Norm?*, 101 *American Journal of International Law* 99 (2007); C. Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention*, 13 *Journal of Conflict & Security Law* 191 (2008); E. Greppi, *The Responsibility to Protect: an Introduction*, in: G.L. Beruti (ed.), *International Humanitarian Law Human Rights and Peace Operations – Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4-6 September 2008*, IHL, San Remo: 2009, p. 174; A. Peters, *The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members*, in: U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer & C. Vedder (eds.), *From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford: 2011, p. 297; P. Hilpold, *From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?* (*Ibidem*, p. 462); A. Zimmermann, *The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?* (*Ibidem*, p. 629); L. Glanville, *The Responsibility to Protect Beyond Borders*, 12 *Human Rights Law Review* 1 (2012).

³ Notably, in Resolution 1373 (2011) concerning the situation in Libya, which, according to the UN Secretary general, "affirms, clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government" (statement of March 17, 2011, available at <http://www.un.org/apps/sg/sgstats.asp?nid=5145#>). Whereas Resolution 1973 was adopted with five abstentions, the criticism of the abstaining states related to the choice of allowing recourse to military action: no doubts were cast in the debate as to the need for UN action in order to protect civilians in Libya (see the statements made by Brazil, Germany, India, the Russian Federation and China at the 6498th meeting of the Security Council, March 17, 2011, S/PV.6498). As is well known, the Council did not take similar actions as regards other situations, such as the one in Syria (*cf.*, however, Resolutions 2042(2012) and 2043(2012)). As regards the General Assembly, Resolution 63/308 of 14 September 2009 was adopted by consensus, albeit only after the words expressing appreciation for the 2009 Secretary General's Report on Implementing the Responsibility to Protect (A/63/677, January 12, 2009) were deleted from the draft. The debate on the topic was further pursued within the framework of informal interactive dialogues taking place on August 9, 2010 and July 12, 2011 respectively, on the basis of the reports issued by the Secretary General dealing with Early warning, assessment and the responsibility to protect (A/64/864, July 14, 2010) and on The role of regional and sub-regional arrangements in implementing the responsibility to protect (A/65/877, June 27, 2011).

at genocide prevention. However, it is not always clear the extent to which these commitments are translated into legally binding norms.⁴

As regards genocide, an undertaking to prevent it is included in Article I of the UN Genocide Convention.⁵ The ICJ judgment on the merits in the *Bosnia v Serbia* case⁶ and, more recently, the judgment of the Hague Court of Appeal in *Mustafic v De Staat der Nederlanden*⁷ have emphasized the legally binding nature of this undertaking.⁸ Nevertheless, doubts are raised as to the role legal rules may play in preventing genocide,⁹ and certain commentators still hold that “the political sphere (...) is where genocide prevention really belongs.”¹⁰

This article is aimed at clarifying the impact the current legal framework may have on genocide prevention by analyzing some specific features of the obligation to prevent genocide and elaborating on possible directions in its future development. These issues will be examined in the light of the *Bosnia v Serbia*

⁴ Significantly, U.S. President Obama qualified prevention of mass atrocities and genocide as a “core national security interest and a core moral responsibility of the United States”, yet without mentioning the existence of legal obligations in this respect (*cf.*, Presidential Study Directive on Mass Atrocities – PSD-10, August 4, 2011 (available at <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>, accessed March 28, 2012).

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 UNTS 277. So far, the Convention has been ratified by 142 States.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia) (Merits)*, [2007] ICJ Rep. 43.

⁷ The Hague Court of Appeal, Case no. 200.020.173/01, *Mehida Mustafic-Mujic et al. v De Staat der Nederlanden* (July 5, 2011), para. 6.2 (available at <http://zoeken.rechtspraak.nl>, accessed March 28, 2012; *cf.*, also the parallel Case No. 200.020.174/01, *Hasan Nuhanovic v De Staat der Nederlanden*, July 5, 2011, para. 5.8, *ibid.*). The Hague Court of Appeal thus reversed a judgment of the District Court of the Hague in which the responsibility of the Netherlands had been denied essentially on grounds of lack of attribution of the relevant conduct (Judgment of September 10, 2008, case no. 265615/HA ZA 06-167, on which *cf.*, G. Gaja, *Seventh report on responsibility of international organizations*, Doc. A/CN.4/610 of 27 March 2009, p. 11, para. 29).

⁸ As noted by O. Ben-Naftali, *The Obligations to Prevent and to Punish Genocide*, in: P. Gaeta (ed.), *The Genocide Convention – A Commentary*, Oxford University Press, Oxford: 2009, p. 41, “during the various stages of the Bosnian genocide case, the ICJ has transformed the ‘duty to prevent’ into a substantive legal obligation.”

⁹ J. Quigley, *The Genocide Convention – An International Law Analysis*, Ashgate Publishing, Aldershot: 2006, p. xiv.

¹⁰ W.A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2 *Genocide Studies and Prevention* 101 (2007), pp. 115-116; A. Bartoli, T. Ogata & G. Stanton, *Emerging Paradigms in Genocide Prevention*, 47 *Politorbis* 16 (2007), p. 16, maintain that “genocide is a highly political act and genocide prevention cannot be but a political response.” *Cf.*, also the dissenting opinion by Judge Ranjeva in *Bosnia v Serbia*, *supra* note 6, p. 278, para. 6.

judgment, which constituted the first, and so far the only, opportunity for the International Court of Justice to apply the UN Convention in contentious proceedings on the basis of the jurisdictional clause included in Article IX.¹¹ The judgment considered the meaning and scope of some of the substantive obligations stipulated by the Convention, including the obligation to prevent genocide set forth in Article I.

1. THE UN CONVENTION FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

First of all, the Court made it clear that the undertaking to prevent genocide plays an autonomous role in the Convention's framework. In response to Serbia's contention that the obligation stipulated by Article I only binds States to punish the perpetrators of genocide, the ICJ stressed that "[t]he obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."¹²

Furthermore, the obligation to prevent genocide is broader in scope than the obligation to punish, which is set forth in Article VI. In principle, a State party is under the obligation to repress only genocide perpetrated within its territory; as regards other situations the State is only bound to cooperate with the activities of International Criminal Tribunals and Courts to whose jurisdiction it is subject.¹³ On the other hand, the ICJ read the obligation to prevent genocide as covering not only activities of non-State actors within the territory of the State party, but

¹¹ The Court dealt with the Genocide Convention in the well-known *Advisory Opinion on the Reservations to the Convention on Genocide* [1951] ICJ Rep. 15. As regards contentious proceedings, the interpretation of the Convention was at stake in the *Case Concerning the Trial of Pakistani Prisoners of War (Pakistan v India)* (for the application of May 11, 1973, see *Pleadings, Oral Arguments, Documents, Trial of Pakistani Prisoners of War*, 3 ff.) which was however removed from the list upon the request of Pakistan (see, Order of 15 December 1973, [1973] ICJ Rep. 347-348). The ICJ found it did not have jurisdiction in a number of cases – namely, the *Case Concerning Armed Activities in the Territory of the Congo (Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep. 6, and those *Concerning the Legality of the Use of Force* [2004] ICJ Rep. 865 (judgment against Italy); the cases against the United States and Spain were struck off the list ([1999] ICJ Rep. 916 and 761). Jurisdiction was affirmed in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2008] ICJ Rep. 412, but the judgment on the merits has not been issued yet.

¹² *Bosnia v Serbia*, *supra* note 6, p. 220, para. 427.

¹³ *Ibidem*, p. 226, paras. 442 ff.

also to include genocide that may occur beyond a State's borders. In Serbia's case, it was precisely the lack of prevention of the massacre in Srebrenica – the only act qualified as genocide by the Court¹⁴ – that was considered to be in breach of the Convention.¹⁵ This interpretation, which confirms the stance taken by the Court in its 1996 judgment on jurisdiction,¹⁶ may well depart from the overall approach taken by the drafters of the Convention¹⁷ but is justified under Articles 31(1) and 31(3)(c) of the Vienna Convention on the Law of Treaties, especially in the light of the recent developments concerning the responsibility to protect. Indeed, a different interpretation of Article I would have implied the existence of a significant gap in the Convention's framework.

The Court also made it clear that, “while respecting the United Nations Charter and any decisions that may have been taken by its competent organs,” the State Party's obligation to prevent genocide does not cease when those organs have been called upon to intervene under Article VIII of the Convention.¹⁸

2. THE CUSTOMARY NATURE OF THE OBLIGATION TO PREVENT GENOCIDE

It may safely be postulated that, in addition to being incorporated in the 1948 UN Convention, the obligation to prevent genocide is a customary rule of international law. Several elements corroborate this conclusion. Already in 1951, the International Court of Justice stated that the “principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”¹⁹ In their joint declaration appended to the *Bosnia v Serbia* judgment, Judges Shi and Koroma characterized the obligation to prevent genocide set forth by Article I as an “overriding legal imperative.”²⁰

The idea that the substantive obligations stipulated by the Convention reflect international custom was specifically accepted by Serbia. As is well known,

¹⁴ *Ibidem*, para. 376. Cf., on the issue J. Quigley, *International Court of Justice as a Forum for Genocide Cases*, 40 Case Western Reserve Journal of International Law 243 (2007-2009).

¹⁵ *Bosnia v Serbia*, *supra* note 6, p. 225, para. 438.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep. 595, pp. 615-616.

¹⁷ See, A. Cassese, *Taking Stock of the Genocide Convention and Looking Ahead*, in: Gaeta, *The UN Genocide Convention*, *supra* note 8, p. 533; Ben-Naftali, *supra* note 8, p. 29 ff.

¹⁸ *Bosnia v Serbia*, *supra* note 6, p. 220, para. 427.

¹⁹ *Reservations to the Convention on Genocide*, *supra* note 11, p. 23.

²⁰ *Bosnia v Serbia*, *supra* note 6, p. 282, para. 5.

in the last phase of the *Bosnia v Serbia* case, as well as in other proceedings before the ICJ, Serbia maintained that it is not bound by the UN Convention as such (and more specifically by Article IX). However, it acknowledged that “all actors in the conflict were at all times bound by the customary international law prohibition of genocide,”²¹ without distinguishing between prohibition and prevention.

Furthermore, in a well-known passage concerning the responsibility to protect, the 2005 UN World Summit Outcome stated that “[e]ach individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes (...). We accept that responsibility and will act in accordance with it.”²² Whereas the term “responsibility” is deliberately ambiguous in this context,²³ and emphasis is laid on prevention by the territorial State rather than through external pressure,²⁴ the World Summit Outcome confirms the existence of a broad consensus on the customary nature of the obligation to prevent genocide.²⁵

As a customary rule, the obligation to prevent genocide thus binds not only the State Parties to the Convention, but also other States and any other entity endowed with international legal personality; notably international organizations, including the United Nations.²⁶ For the sake of simplicity however the remainder of this article refers only to the position of States.

²¹ See the pleading of V. Djerić, counsel to Serbia, in *Croatia v Serbia*, hearing of May 26, 2008, CR 2008/9, p. 12, para. 37.

²² Res. 60/1 of September 20, 2005, par. 138. Cf., the Declaration of the Stockholm International Forum 2004 -*Preventing Genocide: Threats and Responsibilities*, of January 28, 2004 (available at <http://www.aegitrust.org/Treaties-Conventions/stockholm-declaration.html>, accessed March 28, 2012).

²³ Cf., Focarelli, *supra* note 3, p. 200.

²⁴ Cf., e.g., UN Secretary General, *Report on the role of regional and sub-regional arrangements in implementing the responsibility to protect*, *supra* note 3, para. 10.

²⁵ According to the UN Secretary General, the commitments quoted above are “firmly anchored in well-established principles of international law” (*Implementing the Responsibility to Protect*, *supra* note 3, para. 3).

²⁶ G. Gaja, *Third Report on Responsibility of International Organizations*, Doc. A/CN.4/553, para. 10. Cf., also, G. Gaja, *The Role of the United Nations in Preventing and Suppressing Genocide*, in: Gaeta (ed.), *The Genocide Convention*, *supra* note 8, p. 405; Boisson de Chazournes & Condorelli, *supra* note 2, pp. 15-16; A. Peters, *supra* note 1, p. 305 ff.; A. Zimmermann, *supra* note 2, p. 638. For a more sceptical interpretation, see, Reisman, *supra* note 1, p. 70. The responsibility of the United Nations for the Srebrenica massacre was alleged in *Mothers of Srebrenica v Netherlands & United Nations*, decided upon by the The Hague Court of Appeal, Case No. 200.022.151/01, March 30, 2010, 49 ILM 1021 (2010).

3. SPECIFIC FEATURES OF THE OBLIGATION TO PREVENT GENOCIDE

The obligation to prevent genocide binds a State to thwart genocidal behaviors which are attributable to other States and to non-State actors. In this respect, one should distinguish the obligation to *prevent* from the obligation *not to commit* genocide, which also stems from the UN Convention. The ICJ in *Bosnia v Serbia* emphasized this distinction. It first acknowledged that the 1948 Convention binds States not to commit genocide directly, thus dismissing Serbia's arguments to the contrary²⁷ and avoiding what would have been a major shortcoming in the legal framework set up by the Convention.²⁸ However, Serbia was not held to be in breach of that obligation, since the genocide performed by the Bosnian Serbs in Srebrenica was not attributed to the Serbian State.²⁹ Nor was Serbia deemed to be an accomplice in the genocide, due to a lack of evidence as to Serbia's awareness that its assistance to the Bosnian Serbs would be used to commit genocide.³⁰ On the other hand, the Court ascertained that Serbia was legally responsible for not preventing the genocide that occurred in Srebrenica (as well as for not cooperating with the ICTY).

While the judgment thus confirmed the clear-cut and autonomous nature of the obligation to prevent genocide, problems arise however in identifying the specific features of this obligation, in particular its nature, the conditions under which it applies, and its content.

3.1. The obligation to prevent genocide as a rule of *jus cogens*?

There is little doubt that acts of genocide are prohibited by a rule of *jus cogens*. The characterization of genocide as a "crime under international law", under

²⁷ The Convention does not expressly stipulate such a prohibition. For the Court's reasoning on the issue, see, *Bosnia v Serbia*, *supra* note 6, p. 113, paras. 166 ff. Serbia's contentions were upheld by some individual judges: see e.g., the Joint Declaration of Judges Shi and Koroma, [2007] ICJ Rep. 279, para. 1; the separate opinion of Judge Owada (*Ibidem*, p. 298, para. 44); the dissenting opinion of Judge Tomka (*Ibidem*, p. 333, paras. 41 and 61); the declaration of Judge Skotnikov (*Ibidem*, p. 370); and the dissenting opinion of Judge Kreca (*Ibidem*, p. 551, para. 126 ff.). See further, Quigley, *supra* note 14, p. 258.

²⁸ Genocide as such is prohibited by a peremptory norm of general international law (on this point see further under 3.1: however, the only basis for the Court's jurisdiction in the *Bosnia v Serbia* case was the compromissory clause included in the Genocide Convention. Therefore, had the Court read the Article in a more restrictive way, it could not have assessed Serbia's compliance with the obligation not to commit genocide: cf., *Bosnia v Serbia*, *supra* note 6, p. 104, para. 147.

²⁹ *Ibidem*, p. 215, para. 415.

³⁰ *Ibidem*, para. 420.

both Resolution 96 (I) of the UN General Assembly³¹ and the 1948 Convention confirms this view. Genocide is specifically defined as a breach of a peremptory norm in the ILC commentaries to the text which became Article 53 of the 1969 Vienna Convention on the Law of Treaties³² and Article 40 of the 2001 Draft Articles on State Responsibility.³³ This approach was explicitly shared by several States at the Vienna Conference,³⁴ and by the ICJ in the *Congo v Rwanda* case.³⁵ Further support for this view is reflected in the very inclusion of genocide in first place in the list of wrongful acts which give rise to a responsibility to protect according to World Summit Outcome.

However, the obligation to *prevent* genocide does not seem to be a rule of *jus cogens*.³⁶ While no specific mention of the issue may be found in the above-mentioned authorities, their emphasis was on the incompatibility with *jus cogens* of genocide as such, rather than of a lack of prevention. This lack of previous focus on the obligation to prevent genocide,³⁷ coupled with the difficulties in acknowledging a legal obligation to prevent mass atrocities in general in the framework of the current debate on the responsibility to protect,³⁸ together would seem to imply that the obligation we are here discussing, albeit legally binding, is not (yet) part of the peremptory core of the prohibition of genocide.

This view finds further support in the judgment of the Hague Court of Appeal in *Mothers of Srebrenica v the United Nations*. In this case the Court emphasized that the applicants' allegations concerned lack of prevention, not genocide *per se* or complicity in genocide, clearly implying that the two situations should be

³¹ The Resolution was adopted by unanimous vote on December 11, 1946.

³² *Report of the International Law Commission on the work of its eighteenth session*, Yearbook of the International Law Commission (1966) (II), p. 248, para. 3.

³³ *Report of the International Law Commission on the work of its fifty-third session*, Yearbook of the International Law Commission (2001) (II), p. 113, para. 4 (see also further references there). It should be recalled that draft Article 19(3)(c) of the Draft Articles on State Responsibility, as adopted on first reading, listed genocide among "State crimes": *cf.*, *Report of the International Law Commission on the work of its twenty-eighth session*, 1976 Yearbook of the International Law Commission (II), p. 95.

³⁴ *See, Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole*, 52nd meeting, paras. 15, 31 and 43; 53rd meeting, paras. 15, 16, 35, 48, and 69; 56th meeting, para. 20.

³⁵ *Congo v Rwanda*, *supra* note 11, p. 32, para. 64.

³⁶ *Cf.*, A. Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 European Journal of International Law 695 (2007) p. 697. For a different stance, *see*, Ben-Naftali, *supra* note 8, p. 36.

³⁷ *Cf.*, L. Kuper, *The Prevention of Genocide*, Yale University Press, New Haven, London: 1985, pp. 84, 217.

³⁸ *Cf.*, C. Stahn, *supra* note 2, p. 120.

distinguished for the purpose of upholding immunity.³⁹ Moreover, it is significant that during the proceedings against Serbia, Bosnia requested compensation that would take into account the particularly serious nature of the wrongful acts it attributed to the respondent, but only in connection to the alleged breaches of the obligation *not to commit* genocide. As regards the obligation to prevent genocide, the request for monetary compensation was withdrawn in Bosnia's final submissions. The Court considered that the appropriate form of reparation for this kind of breach was satisfaction in the form of "a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide."⁴⁰ This treatment of the issue of reparations confirms the doubts that the obligation to prevent genocide is the object of a peremptory norm.

3.2. The conditions under which the obligation applies

As regards the conditions under which the obligation to prevent becomes applicable, according to the Court this obligation "and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."⁴¹ Serbia's awareness of such a risk could not be in doubt, since the ICJ Order concerning provisional measures of April 8, 1993 had already proclaimed its existence and enjoined Serbia to "take all measures within its power" to prevent genocide from occurring, and more specifically to "ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide" in Bosnia.⁴²

³⁹ *Mothers of Srebrenica v Netherlands & United Nations*, *supra*, note 26, paras. 5.10. On February 3, 2012, the ICJ held that international rules on immunity cannot be set aside even as regards allegations of breaches of *jus cogens* (*Jurisdictional Immunities of the State, Germany v Italy*, para. 93), but the relevance of the distinction made in the Dutch ruling mentioned in the text still remains relevant for our purposes.

⁴⁰ *Bosnia v Serbia*, *supra* note 6, p. 234, para. 463. See also: the statement of Condorelli, counsel to Bosnia, at the hearing of March 7 2006, CR 2006/11, p. 18: "il va de soi que la gravité pourtant évidente des violations de l'article I se relativise considérablement par rapport à la perpétration par la RFY du crime de génocide lui-même". For a critical appraisal of the ICJ's ruling on reparation, see: C. Tomuschat, *Reparation in Cases of Genocide*, 5 *Journal of International Criminal Justice* 905 (2007); S. Forlati, *Obbligo di prevenire il genocidio e riparazione nell' affare Bosnia c. Serbia*, 90 *Rivista di diritto internazionale* 425 (2007).

⁴¹ *Bosnia v Serbia*, *supra*, note 6, p. 222, para. 431.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, *Bosnia v Serbia*, [1993] ICJ Rep., p. 3 ff., p. 24, para. 52. *Cf.*, also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 13 September 1993, *Ibidem*, p. 325 ff.,

In other contexts however it may not be easy to forecast when, where and whether there is a risk of genocide. Even when risk factors unequivocally exist, there could be consequences that are less serious than genocide (or other mass atrocities), or events may develop in more positive ways notwithstanding the lack of preventive action by a given State or international organization.⁴³ It is therefore not surprising that the current debate focuses on the establishment of efficient early warning mechanisms which would not allow a State to justify its failure to undertake preventive measures by relying (in good or bad faith) on allegations of ignorance. In the words of Secretary-General Ban Ki Moon, “[g]etting the right assessment – both of the situation on the ground and of the policy options available to the United Nations and its regional and sub-regional partners – is essential for the effective, credible and sustainable implementation of the responsibility to protect.”⁴⁴

Hopefully, it will be possible to overcome the practical and political hindrances to the establishment of such mechanisms⁴⁵ and of other institutional arrangements specifically aimed at the prevention of genocide. This could be done both along the lines of those mechanisms created to complement Article 3 of the European Convention on Human Rights 1950, or the 1984 UN Convention against torture,⁴⁶

pp. 349-350. *See further*, Security Council Resolution 819 of April 16, 1993. In any case, the conduct of the Serb authorities, especially of President Milosevic, showed awareness of the risk that genocide might occur in Srebrenica. *See, Bosnia v Serbia, supra* note 6, p. 224, paras. 436-438.

⁴³ *Cf.*, T.R. Gurr, *Options for the Prevention and Mitigation of Genocide: Strategies and Examples for Policy-Makers*, 47(2) *Politorbis* 47 (2009).

⁴⁴ Early warning, assessment and the responsibility to protect, *supra* note 3, at p. 8, para. 19. Early warning is specifically mentioned both in the Stockholm Declaration and the World Summit Outcome (para. 138). The efforts of the Office of Secretary General’s Special Adviser on Genocide Prevention, whose functions in this respect are specifically supported by the latter document, are focused on the identification of relevant risk factors, case studies, and other forms of risk assessment. *See*, Office of the Special Adviser on the Prevention of Genocide (OSAPG), *Analysis Framework*, available at http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf (accessed June 10, 2011). *Cf.*, also, L. Woocher, *Developing a Strategy, Methods and Tools for Genocide Early Warning – Prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide* (26 September 2006), (available at <http://www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf>, accessed March 8, 2012).

⁴⁵ *See*, Woocher, *supra* note 44, p. 6.

⁴⁶ *See respectively*, The European Convention on the Prevention of Torture of November 26, 1987 and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 18, 2002. *Cf.*, in this respect, the speech delivered by the UN Secretary General Kofi Annan at the Stockholm International Forum (January 26, 2004), Press Release SG/SM/9126.

and at different levels – for instance, entrusting institutions and organizations with specific expertise in the field of genocide and mass atrocities with mediation or early warning tasks, be they within the UN framework or elsewhere.⁴⁷

From the conceptual point of view, more problems arise as to the second condition laid down by the Court, namely that the State should have at its disposal the “means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent.”⁴⁸ It would seem that here, as in other parts of the judgment,⁴⁹ the Court seeks to limit the consequences of extending the scope of the *ratione loci* of Article 1 beyond those areas falling under the jurisdiction of each State Party. This implies a qualification of the scope of the *ratione personae* of Article 1 of the Convention, which does not find any basis either in its wording or in the object and purpose of the Convention, since it widens the opportunities to justify inaction.⁵⁰ In addition, it would appear to contradict another statement of the Court, according to which, for the purpose of assessing responsibility, “it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.”⁵¹

A more convincing construction, apparently adopted by the ICJ in its 1993 Order on provisional measures,⁵² implies that the obligation to prevent applies

⁴⁷ Early warning is one of the activities envisaged by the Foundation for the International Prevention of Genocide and Mass Atrocities, which was set up on October 18, 2010 under the auspices of the Hungarian Government.

⁴⁸ *Bosnia v Serbia*, *supra* note 6, p. 222, para. 431.

⁴⁹ *See notably*, the statement that responsibility for lack of prevention arises only in case of manifest breaches of the obligation set forth by Article I of the Convention, discussed, *infra*, in section 3.3.

⁵⁰ *But see*, Ben-Naftali, *supra* note 8, p. 39.

⁵¹ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430. *See further*, Ben-Naftali, *supra*, note 8, p. 42.

⁵² Order of April 8, 1993 *supra* note 42, p. 23, para. 45: “In the view of the Court, in the circumstances brought to its attention and outlined above in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future”. *Cf., also*, *Bosnia v Serbia*, *supra* note 6, p. 223, para. 432, in which only risk awareness is mentioned

exclusively on the basis of risk awareness, whereas the actual capacity to influence prospective *genocidaires* become relevant only for the purpose of identifying the activities that should be pursued in order to fulfill that obligation.

3.3. The content of the obligation

A common feature of all obligations of prevention is that they are usually understood as “best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.”⁵³ The ICJ confirmed that this is the correct reading of the obligation set forth by Article I of the Genocide Convention. According to the Court, “it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of State parties is rather to employ all means reasonably available to them so as to prevent genocide so far as possible.”⁵⁴

Furthermore, *Bosnia v Serbia* holds that the actual commission of genocide is a precondition of responsibility for an omitted prevention.⁵⁵ Whereas this stance confirms the approach followed by the ILC as regards obligations of prevention in general,⁵⁶ it seems unreasonable to exclude that responsibility may autonomously arise at least in case of flagrant omissions.⁵⁷

as a precondition in order for the obligation to prevent genocide to arise, and Judge Lauterpacht’s Separate Opinion appended to the Order on Provisional Measures of 13 September 1993, [1993] ICJ Rep. 441-442.

⁵³ Cf., the commentary to Article 14, par. 3, of the Draft Articles on State Responsibility (ILC Report on the Work of its Fifty-Third Session, Yearbook of the International Law Commission Yearbook (2001) (II), p. 62, para. 14).

⁵⁴ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430. The wording “obligation of conduct” is here explicitly used as identifying not obligations of specific performance, as suggested by ILC Special Rapporteur Roberto Ago in his classification of internationally wrongful acts, but rather obligations of means, along the lines of the approach later followed Special Rapporteur James Crawford during the second reading of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (See respectively, R. Ago, *Sixth Report on State Responsibility* (doc. A/CN.4/302 and Add.1, 2 & 3), Yearbook of the International Law Commission (1977) (II:1), p. 5 ff.; and *Second Report on State Responsibility* (doc. A/CN.4/49), p. 25, para. 57. For more on the issue, see, P.-M. Dupuy, *Reviewing the Difficulties of Codification: on Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 European Journal of International Law 366 (1999), p. 377.

⁵⁵ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 431.

⁵⁶ Cf., R. Ago, *Seventh Report on State Responsibility*, Yearbook of the International Law Commission (1978) (I:1), p. 33 ff.

⁵⁷ For a convincing criticism of the Court’s construction, see, Gattini, *supra* note 36, p. 702.

If genocide occurs, a test of due diligence applies, the critical issue being identification of the means that are “reasonably available”. In the ICJ’s words, the intensity of the action required depends on the actual capacity of a State to “influence effectively the action of the persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.”⁵⁸ Therefore, there is a structural impossibility to identify once and for all what behaviors would be required to fulfill the obligation of prevention. This does not mean however that compliance is left only to the State’s good will and assessment of political opportunity. While the relevance of those factors cannot be underestimated, the issue is also regulated by legal standards.

The task of a more precise identification of the content of positive obligations in the field of human rights, beyond the general “reasonableness” test accepted by the ICJ, is usually performed by the judicial or quasi-judicial bodies that monitor compliance with the relevant treaties. Their case-law and decisions provide guidance for future actions by the Contracting Parties. For instance, the Committee of Economic, Social and Cultural Rights considered that the right to the highest attainable standard of health, set forth by Article 12 of the Covenant, implies that public health and health care facilities have to “include the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs;”⁵⁹ respect for the principle of nondiscrimination is also required.⁶⁰ With reference to positive obligations stemming from the right to life, the European Court of Human Rights (ECtHR) has held Article 2 of the European Convention on Human Rights (ECHR) to be breached if the national authorities fail to do “all that could reasonably be expected of them to avoid a *real* and *immediate* risk to life of which they have or ought to have knowledge.”⁶¹ In specific contexts, this legal standard may be

⁵⁸ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430. The same approach to positive obligations was taken by other international courts or monitoring bodies. For the position of the ECHR, see, e.g., *Ilascu v Moldova and Russia*, (48787/99), July 8, 2004, para. 333. All ECtHR judgements are available at <http://www.echr.coe.int>.

⁵⁹ General Comment n. 14 (2000) of August 11, 2000, E/C.12/2000/4, p. 4, para. 12(a).

⁶⁰ *Ibidem*, p. 4, para. 12(b), and p. 6, paras. 18 ff.

⁶¹ *Osman v United Kingdom* (87/1997/871/1083), Grand Chamber, ECHR, October 28, 2008, para. 115. Emphasis added.

developed further, also by reference to soft-law sources, such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in cases where risks to life originate directly from police activity.⁶² In other instances, as in the case of enforced disappearances⁶³ or torture,⁶⁴ positive obligations identified as being part of the due diligence standard may be subsequently transposed in international agreements, thus becoming autonomous obligations of specific performance.

The Genocide Convention entrusts the ICJ with the function of interpreting the Convention and assessing compliance with its provisions. While *Bosnia v Serbia* admittedly did not go very far in clarifying what Serbia should have done in order to comply with its obligation to prevent genocide,⁶⁵ nonetheless some indicators can be drawn from the judgment. First of all, while distinguishing between the obligation to punish and the obligation to prevent genocide, the ICJ acknowledged that “one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent.”⁶⁶ The setting up of effective repression mechanisms that prevent the perpetrators from acting with impunity can thus be seen as one mechanism of compliance with the obligation to prevent. Nevertheless, especially in the light of the gravity and the scale of genocide, an approach based solely on repression is by no means satisfactory.⁶⁷

A second, more general indicator, concerns the need to act “within the limits permitted by international law.”⁶⁸ The current debate concerning the responsibility

⁶² See e.g., *Giuliani and Gaggio v Italy* (23458/02), Grand Chamber, ECHR March 24, 2011, para.154. The Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990.

⁶³ Cf., A. Annoni, *La responsabilità internazionale dello Stato per sparizioni forzate*, 88 Rivista di Diritto internazionale 667 (2005), p. 693.

⁶⁴ See, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart, Oxford/Portland: 2004; C. Tomuschat, *Human Rights Between Idealism and Realism* (2nd ed.), Oxford University Press, Oxford: 2008, p. 43; F. Jacobs & R.C.A. White, *The European Convention on Human Rights* (5th ed.), Oxford University Press, Oxford: 2010, p. 86; R. Pisillo-Mazzeschi, *Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme*, 333 Recueil des Cours 177 (2008), pp. 314, 323, 345 ff.; Cf., also: the instruments quoted *supra* note 46.

⁶⁵ Cf., the critical remarks of Judges Shi and Koroma in their joint declaration, *supra*, note 19, para. 6.

⁶⁶ *Bosnia v Serbia*, *supra* note 6, p. 219, para. 426. Cf., Quigley, *supra*, note 9, p. 282.

⁶⁷ Cf., Reisman, *supra* note 18, p. 40.

⁶⁸ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430.

to protect focuses on the precise identification of those limits, and more specifically on the legality of humanitarian intervention beyond the framework of Chapter VII of the Charter. As is well known, it is not likely that a broad consensus will be reached soon on this very complex⁶⁹ and critical⁷⁰ aspect. And since the issue did not arise under the circumstances of the *Bosnia v Serbia* case, it is not surprising that the Court did not take a stance on it.

On the other hand, taking into account the traditional reluctance shown by States and international organizations, including the United Nations, to take on their responsibilities in the prevention of genocide, shifting the focus from armed reaction to other ways and means through which this aim may be effectively pursued could prove useful.⁷¹ In this perspective, an effort could have been made to specify the *minimum* content of the legal obligation to prevent genocide, along the lines of the developments recalled above as regards other kinds of positive obligations. The ICJ instead followed an opposite route: while ascertaining that Serbia had not taken any steps whatsoever to avoid genocide⁷² – a finding that, in itself, can hardly be open to criticism – the Court also stressed that, as a matter of principle, “for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it *manifestly refrained* from using them.”⁷³ It may be asked why only manifest breaches of obligations to prevent genocide would give rise to responsibility? No similar statement is to be found in other international judgments dealing with similar issues: for instance, in *Congo v Uganda*⁷⁴ the ICJ assessed that Ugandan forces “took no action” to prevent ethnic conflict in the Ituri region, failed to prevent the recruitment of child soldiers in areas under its control and, more generally, “did not take measures” to ensure respect for human rights and international humanitarian law in the occupied territories.⁷⁵ However, nowhere in the judgment did the ICJ state

⁶⁹ See, Focarelli, *supra* note 2, p. 212; Juan E. Mendez, *Remarks on Intervention*, 40 Case Western Reserve Journal of International Law 87 (2007-2009), p. 88.

⁷⁰ See, Joyner, *supra* note 2; Ben-Naftali, *supra* note 8, p. 44.

⁷¹ See, Mendez, *supra* note 69, at 89. *Cf.*, also, Secretary-General Kofi Annan’s Action Plan to Prevent Genocide, SG/SM/9197 of 7 April 2004.

⁷² *Bosnia v Serbia*, *supra* note 6, p. 225, para. 438.

⁷³ *Ibidem* (emphasis added).

⁷⁴ *Armed Activities on the Territory of the Congo (Congo v Uganda) (Merits)* [2005] ICJ Rep., p. 168 ff.

⁷⁵ *Ibidem*, pp. 240-241, paras 209-2011. As regards the lack of prevention of looting and exploitation of natural resources by private parties in the same region, the Court assessed that “rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities.” *Ibidem*, p. 253, para. 248.

or imply that Uganda was responsible only because that State's omissions were manifest. In *Osman*, the European Court of Human Rights specifically rejected this kind of interpretation, which had been put forward by the United Kingdom as regards its positive obligations stemming from the right to life under Article 2 of the Convention. In the ECtHR's words, applying a standard of "gross negligence or wilful disregard" in that context would be "incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2."⁷⁶

The Court's different treatment of this issue in *Bosnia v Serbia* does not seem to rely on a parallelism with the high standard of proof that the ICJ set as regards genocidal acts in themselves: that standard was justified in the light of the egregious nature of these acts⁷⁷ while, for the reasons set out above, a breach of the obligation of prevention is not perceived to be as serious as genocide itself. Such an approach could rather be explained by taking into account some specific features of the obligation to prevent genocide, to which the Court hinted when it stressed that it did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts."⁷⁸ One of those specificities lies in the very broad territorial scope of the obligation of prevention which, it should be recalled, binds States also with regard to situations occurring outside their jurisdiction, whereas this is not usually the case in the field of human rights.⁷⁹ Furthermore, while the scale of genocide (which affects groups, not individuals, and is thus easier to foresee in advance) in some respects facilitates preventive action, the complexity of situations of risk amplifies the discretion left to those who may be responsible for taking such action. Setting a high threshold for assessing responsibility ensures that any such finding rests on a firm legal basis and cannot be criticized as being politically biased.

⁷⁶ *Osman v United Kingdom*, *supra* note 61, para. 115.

⁷⁷ *Bosnia v Serbia*, *supra* note 6, p. 130, para. 210. Cf., W.A. Schabas, *What is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?*, 47(2) *Politorbis* 33 (2009), p. 44.

⁷⁸ *Bosnia v Serbia*, *supra* note 6, p. 220, para. 429.

⁷⁹ As regards humanitarian law, it is well known that Common Article 1 binds State Parties to "respect and ensure respect" for the Geneva Conventions of 1949. This implies an obligation for Contracting parties to seek compliance by other States with the relevant standards (cf. ICRC, *Commentary to common Article 1*, available at <http://www.icrc.org/ihl.nsf/COM/375-590004?OpenDocument>, accessed March 9, 2012). Such an obligation is deemed to exist also in respect of customary humanitarian law (cf., J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, 3rd ed., Cambridge University Press, Cambridge: 2009, p. 509).

CONCLUSION

The obligation to prevent genocide is a legally binding obligation both under the 1948 UN Convention and customary international law. As with all obligations of due diligence, it does not pre-determine the behavior required in order to comply with it. While the task of specifying the content of positive obligations in the field of human rights is usually performed by judicial or quasi-judicial bodies entrusted with the task of monitoring compliance with the relevant treaties, the peculiarities pertaining to the obligation to prevent genocide have led the ICJ not to follow the same approach as regards the interpretation of Article I of the Genocide Convention. Whereas the Court did give some indications as to the way in which the obligation to prevent genocide should be implemented, it also stressed that only manifest breaches of that obligation could give rise to international responsibility.

Nevertheless, the development of legal standards for genocide prevention could be pursued in other ways. The UN Convention could be complemented by specific instruments – including some soft law instruments, such as guidelines. These should concern not only the highly controversial issue of humanitarian intervention, but also identify a minimum standard of conduct for preventing genocide which would limit a State's discretion in reacting to risks of genocide. If such guidelines and/or standards were enunciated, noncompliance therewith would point at the existence of a breach of the obligation to prevent genocide and give rise to responsibility, even if the omission was not as blatant as Serbia's. Should the relevant rules be legally binding, their breach would give rise to responsibility even in cases when genocide is actually averted. Reaching consensus on such rules is a challenge for the next decade – and a good test for the commitments undertaken within the framework of the responsibility to protect.