Responsibility for Genocide: The State or The Individual?  
- The emergence of individual criminal responsibility from Nuremberg to Rwanda and Srebrenica

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Abstract

Before the Nuremberg Trials in 1945, individual criminal responsibility was not commonly used as states were held liable for breaches of international law. Even though genocide was not established as a crime at the time of Nuremberg, the majority of convicted individuals were held liable for crime against humanity, which criteria resembles genocide. In aftermath of Nuremberg, The Convention on the Prevention and Punishment of the Crime of Genocide was adopted, which criminalized genocide whether it was committed by individuals or states. In order for genocide to have occurred two legal criteria had to be fulfilled, the *actus reus* which is the physical action of genocide and the *dolus specialis* which is the intent to destroy a group based on their nationality, ethnicity, race or religion. Fifty years after Nuremberg, the international criminal tribunals for the former Yugoslavia and Rwanda were installed. Both tribunals were ad hoc and had emerged after internal conflicts where genocide was involved. The aim of both tribunals was to convict individuals for breaches of international humanitarian law. In 2007 and 2012, the International Court of Justice addressed state responsibility for genocide twice. In one of the cases, the focal point was on Serbia’s failure as a state to prevent genocide and punish individuals who had committed the crime on Bosnian territory. However in both genocide cases, the court targeted the collective action of several individuals that represented the state. Therefore the question of who in practice answers for genocide has become more prominent, especially in how individual and state responsibility is distinguished in the Genocide Convention. The present study found that individuals are held liable for genocide, but when state responsibility is issued, it is the actions of several influential individuals rather the action of one individual that is the focal point. The legal forum is therefore a fundamental factor in the allocation of responsibility for genocide.
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1. Introduction

Genocide as an international crime emerged after the adaptation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Convention), following the Nuremberg Trials in 1945. The Convention covers both questions of individual responsibility and state responsibility for genocide. Before the Nuremberg Trials, the practice of individual criminal responsibility had not been successful, as it was only states that were held responsible for violations of international law. Among the convicted individuals in Nuremberg, were those who held high-ranking military positions or influential positions that played a significant role in the expansion of the Nazi state. With the Nuremberg Trials, individuals were convicted of violations of international criminal law for the first time in modern history.

Fifty years later during the civil war in Yugoslavia, the International Criminal Tribunal for the former Yugoslavia (ICTY) was founded as an ad hoc tribunal by the United Nations Security Council (UNSC) Resolution 827.\(^1\) One of the aims of the UNSC Resolution 827 was to try the individuals responsible for violations against international humanitarian law committed on Yugoslav territory, with one of these being genocide. The Srebrenica massacre was considered to be genocide by the ICTY since the ethnic cleansing of Bosnian men fulfilled the criteria of genocide as provided in both the Convention and the ICTY Statute.\(^2\) Following the Rwandan genocide in 1994, the International Criminal Tribunal for Rwanda (ICTR) was created for the same fundamental purpose as the ICTY. The ultimate aim of these tribunals was to prosecute individuals and hold them responsible for inter alia genocide, which established individual responsibility as custom for violations of the Convention.

It was not until 2007 that state responsibility for genocide reappeared, when the International Court of Justice (ICJ) ruled on the Bosnia v. Serbia case.\(^3\) In its judgment, the ICJ concluded that Serbia was not directly responsible for committing the genocide in Srebrenica, but that

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2 According to art. 2 of the 1948 Genocide Convention, Genocide is defined as ‘killing or causing serious bodily or mental harm to a group or members of a group with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group’. Also see article 4 in the ICTY Statute.

it was responsible for not preventing the genocide and punishing those who had committed genocide. In 2012, Croatia similarly brought Serbia to trial with the same claim, yet the ICJ dismissed Croatia’s claim and rejected Serbia’s counter-claim as neither of their claims were supported by sufficient evidence.

The notion of international criminal responsibility was introduced through the Nuremberg Trials and has shaped the future practice of it, as the responsibility has become commonly used in international law. However, since the ICJ in recent years has handled two genocide cases where the state’s criminal responsibility was addressed, the question of who in practice is held responsible for genocide is not fully determined. As the Convention regulates both individual and state responsibility, the difference between the two responsibilities should be brought to light.

1.1 Purpose
The purpose of this thesis is to examine the difference between individual and state responsibility in context of genocide, as both instances actually target individual conduct. The focal point of the thesis is on the Convention and judgments of the Nuremberg Tribunal, ICTY, ICTR and the ICJ where individual responsibility and state responsibility have been assessed. Overall, the allocation of responsibility for genocide between the state and individual is a question that has not been discussed in depth in legal literature. However, since the application of the Convention has been variously implemented by legal bodies, an analysis can offer more insight in their differences which is in cohesion with the general aim of the thesis.

1.2 Research Question
The thesis endeavors to primarily answer the question of who in practice is responsible for genocide, whether it is the state or the individual. To answer this research question, the thesis will also explore questions regarding, the allocation of responsibility between an individual and the state in international humanitarian law, how the Convention has been

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applied to individuals and to states and how the allocation of responsibility for genocide has changed in the past century.

1.3 Method and Material

The research question is answered by using the legal dogmatic method along with elements of the historical method and comparative method. In order to see how the Convention has been implemented in the ICTR, ICTY and ICJ, their respective Statutes are compared to each other. The criminal cases from to each Tribunal will be analyzed and give insight on how individual and state criminal responsibility have been handled in practice. The jurisdiction of the Nuremberg Tribunal along with some of its cases holds a significant role in the thesis as the establishment of the tribunal was the starting point for the usage of individual responsibility in international law.

The fundamental basis of the legal dogmatic method is to distinguish relevant sources of law, as the method lays emphasis on the study of legal sources. A thorough analysis of the Convention, The Nuremberg Charter, the ICTY and ICTR Statutes must be done in order to understand their legal contents as a whole. The aim of a legal source can also be understood by studying the *travaux preparatoires* to the sources. Studying reports and Resolutions from the United Nations offers insight for the adaptation of the Statutes. Similarly, evaluating the International Law Commission’s Draft Articles on state responsibility can explain the reasons behind why state responsibility became legislated. Doctrine in turn is a source that systematically weaves all the sources together, presenting the construction of the law at hand. The doctrine used in the thesis will be commenting upon the content of the Convention, the usage of individual and state responsibility in international law, the drafting and the outcome of the tribunals and how their respective case law has affected the outlook on genocide. Ultimately, the legal dogmatic method clarifies how to comprehend the dogmatism of the surrounding law.

The thesis will to a limited extent also use the historical method, as the methodology clarifies how the allocation of responsibility has evolved during the past century. It is only by reviewing the preceding conditions that current circumstances can be grasped.  

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7 Sandgren, 2015, p. 53.
Examining the preceding events of the Nuremberg Tribunal, like the Versailles Peace Treaty and the Leipzig Trials, explains what influenced the development of responsibility for genocide, as it now can be allocated between individuals and states. When using this methodology a distinctive timeline is highlighted, where the thesis first handles the Nuremberg Tribunal before any of the other tribunals. When following this historical timeline, it will become clearer as to how individual responsibility became customary in international law with the installment of the ICTY and the ICTR. Likewise, by assessing Bosnia v. Serbia before Croatia v. Serbia will show how the former case influenced the latter and how state responsibility emerged again with these ICJ cases. The historical method is also efficient when wanting to understand and compare different events with each other using a comparative method.  

In order to provide an answer to the research question with the comparative method, the thesis first examines the Nuremberg Tribunal, then the ICTY and the ICTR, compare them with each other and later examines and compare the two ICJ cases and finally compare the two sets of responsibilities with each other. A comparison of norms and regulations invites one to see how different legal forums have developed legislations and approaches from each other. As an example, the ICTY and the ICTR will be compared with each other since they were established in quick succession and both have adopted the Convention in their Statutes. While the assessment and comparison of the Nuremberg, ICTY and the ICTR answers the allocation of individual responsibility, the comparison between the two genocide cases from the ICJ represents the foundation of state responsibility. The combination of the legal dogmatic method, the historical method and the comparative method will clarify the application of the Convention and how it in practice has affected the allocation of responsibility for individuals and states.

1.4 Outline
The thesis will first introduce the allocation of responsibility in international humanitarian law between individuals and states. This chapter will present the early attempts at holding individuals responsible for war crimes. Since genocide was not a crime until after the Nuremberg Trials, the emphasis is on war crimes to grasp the initial stages of individual responsibility.  


9 Sandgren, 2015, p.54.
responsibility. In this chapter the Convention will also be analyzed along with jurisdiction and general principles for states responsibility. The third chapter will present the emergence of the crime of genocide and how the installment of the Nuremberg Tribunal came to shape the future of individual responsibility. In this segment, the drafting of the Nuremberg Charter and its adaptation on responsibility will be discussed, along with how crime against humanity can resemble genocide. The fourth chapter handles the application of individual responsibility for genocide and will contain instances when tribunals have decided to convict an individual for the crime of genocide. Here the installment of the ICTY and the ICTR will be discussed along with relevant cases that each tribunal has handled. This chapter will conclude with a comparison between the Nuremberg Tribunal, the ICTY and the ICTR where individual responsibility in the tribunals will be evaluated. The fifth chapter introduces the application of state responsibility for genocide and presents the two cases from the ICJ where a state has been brought to trial for genocide. Even this chapter will finish with a comparison between the cases and determine the difference between placing liability on the state or an individual. The final chapter will conclude with an analytical discussion regarding allocation of responsibility between an individual and the state, the application of the Convention applied to individuals and to the state and how the allocation of responsibility for genocide has changed in the past century. Ultimately this thesis will explain in practice the circumstances in which an individual or a state can be responsible for genocide.

1.5 Delimitations
The thesis is limited to the question of responsibility for genocide in the context of individuals and states on an international scale. Since the scope is limited regarding this question, national tribunals will not be mentioned as the issue of state responsibility can be understood much better through an international perspective than from a domestic perspective. Even though it was installed in quick succession with the Nuremberg Tribunal, the International Military Tribunal for the Far East will not be considered in the thesis, since it did not handle the crime of genocide. The issue of genocidal rape, which is relevant because of its frequent use in both the ICTY and the ICTR, will also be excluded from the thesis as the focus will be on genocide only. Finally, the sanctions and consequences for committing genocide fall outside the scope of the present thesis.
2. The allocation individual and state responsibility in international humanitarian law

2.1 The allocation of individual responsibility

Individual responsibility was introduced to the international community with the Versailles Peace Treaty, becoming an exception from the general rule at the time. Violations of international humanitarian law were made by states and had to ultimately be answered by the states themselves. States would be held liable for war crimes and were issued with different sanctions, while individuals were not expected to be held liable. At first, the concept of individual responsibility did not manage to establish specific standards as a rule of law, but became successful when it was used in the Nuremberg Tribunal. The preceding events leading up to Nuremberg are therefore just as important to comprehend on how individuals eventually became liable for international crimes.

2.1.1 Treaty of Versailles

Before Nuremberg and the Second World War (WWII), the international arena relied upon the Versailles Peace Treaty of 1919. The Treaty was signed in order to reassure a situation of peace between the European countries after the First World War (WWI). With the inclusion of art 227 in the Treaty, the allies wanted to arraign the German Kaiser Wilhelm II for a ‘for a supreme offence against international morality and the sanctity of Treaties’.\(^\text{10}\) This expressed a will to try the criminal responsibilities for individuals. However, during the time of the Treaty, the Dutch ensured that such a judicial procedure was not brought forward against the Kaiser and the liability was ended as such. The result of the Treaty was instead that the German state and their allies were declared responsible and guilty for starting WWI. The article that affirmed Germany’s responsibility was called the ‘War Guilt Clause’ which forced Germany and their allies to financially compensate the damages of the war.\(^\text{11}\)

The placement of responsibility on Germany resulted in heavy fines which led to a financially difficult situation for the state, which as a result was one of the reasons Nazi Germany rose to power. Soon after, the allies believed that placing liability on a state was not successful in preventing a future war. The Treaty was therefore a starting point to

\(^{10}\) The Peace Treaty of Versailles, 1919, Part VII Penalties, Article 227.

generate responsibility on individuals for committing war crimes, which played an important role 35 years later when the allies decided to establish the Nuremberg trials.

2.1.2 The trials of Leipzig

In the aftermath of WWI, the allies demanded a number of individuals belonging to the German military to be brought to trial. After many negotiations, Germany agreed to prosecute individuals from the military in their own Supreme Court in the German city Leipzig in 1921. They agreed to prosecute 12 individuals, were six of them eventually were acquitted. This brought much distress for the allies, as they wanted justice for their casualties during the war. For instance, one German official was sentenced to merely 6 months for being in charge of an English camp where prisoners were not well treated. The Leipzig trials were subsequently removed after Hitler rose to power. Even though the Leipzig trials were per se not a judicial success in bringing justice to the allies, who essentially were the victims of the WWI, the idea of a tribunal prosecuting individuals emerged from these trials.12

2.2 The allocation of state responsibility

States invoke a criminal responsibility when they have breached an international obligation. There are many cases where state responsibility has been assessed; the 1964 Barcelona traction case between Belgium and Spain and the 1986 Nicaragua Case between Nicaragua and the United States of America are two examples.13 These two cases had great influence on how judicial disputes should be handled when it came to state responsibility. However, responsibility could be somewhat avoided since each state has the right to sovereignty and the infringement of other states via the act of state doctrine. Yet in international law, there are certain obligations that are considered be of erga omnes and jus cogens character that go beyond the act of state doctrine. Erga omnes obligations apply to all states within the international field, since it invokes responsibility upon a state that is breaching international law. These lay the foundation of fundamental international law and are usually followed by the international community.

2.2.1 Act of state doctrine

The act of state doctrine implies that acts which are committed by a state, within its own territory, should not be the subject of judicial intervention by the governments of foreign states.\(^{14}\) When the principle of act of state doctrine is applicable, a court is prevented to exercise it judiciary power and determine the validity of a foreign state. The act of state doctrine is valid until it does not breach regulations that have been recognized in international law. Neither the Rwandan nor the Yugoslav government could therefore avoid the international community from interfering after their respective genocides. Also before the installment of the Nuremberg Tribunal, many war crimes had been committed in the Nazi state, whereas the use of the doctrine would no longer be justified. Another reason which spoke in favor of dismissing the doctrine and target individuals instead was that Nazi state ceased to exist after WWII, which implied that there was no state that could hold responsibility for the war crimes committed. As it is a doctrine and not a rule of law, the act of state does not have to be followed but rather become a guideline as a matter of principle when the international community can intervene in a state’s conflict and when it cannot.

2.2.2 Erga omnes obligation and jus cogens

The concept of erga omnes obligation was first developed by the ICJ with the Barcelona Traction Case. The case concerned losses allegedly suffered by Belgian shareholders in the Spanish Barcelona Traction. Belgium wanted to know whether their rights had been violated on account of its nationals having suffered infringement of their rights as shareholders in a Company not of Belgian nationality. The ICJ listed four instances where states have an erga omnes obligation to take responsibility i) when the act of aggression has been made, ii) when genocide has been committed or when human rights have been breached either through ii) slavery or (iv) racial discrimination.\(^ {15}\) The case emphasizes that states have obligations towards other states as well as to the entire international community, whereas maintaining their obligation to the latter is of importance in international law. States have a legal interest and continuing concern in preventing Conventions from being violated, which ultimately becomes erga omnes obligation.\(^ {16}\)

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\(^{15}\) *Belgium v. Spain*, Judgment 24 July 1964, para.33-34.

\(^{16}\) *Belgium v. Spain*, Judgment 24 July 1964, para. 33.
Jus cogens is mentioned in the Vienna Convention on the Law of Treaties as ‘a peremptory norm of general international law [...] accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.\textsuperscript{17} Norms like this are highly regarded in legal events, as it states that no derogation from the norm is permitted. The Vienna Convention regulates the legal treaties in international law and what rules applies to the states that have accepted the convention. Jus cogens play a primary role in judicial matters as it, among other things, lays a fundamental foundation for basic human rights and protects infringement of them. A jus cogens norm can usually not be exempted as it has been described as a set of principles and policy in international law and therefore enjoys a hierarchical superiority against other norms.\textsuperscript{18}

2.2.3 The Articles on Responsibility of States for Internationally Wrongful acts

The Draft Articles on Responsibility of States for Internationally Wrongful acts were conducted by the International Law Commission, which is a body under the UN, as an attempt to codify customary international law.\textsuperscript{19} In 2001, the Draft Articles were considered to be a valid legislation for state responsibility and became the Responsibility of State for Internationally Wrongful Acts (the Articles), and have been adopted by different courts.\textsuperscript{20} It tries to regulate general conditions for states under international law and their responsibility for wrongful acts.\textsuperscript{21} The opening paragraph of the Articles recognizes responsibility as ‘every internationally wrongful act of a state entails the international responsibility of that state’.\textsuperscript{22}

\textsuperscript{17} The Vienna Convention on the Law of Treaties, 1969, Article 53.

\textsuperscript{18} Case concerning Armed Activities on the Territory of the Congo (\textit{DRC v. Rwanda}), I.C.J., Separate Opinion of Judge Ad Hoc Dugard, 3 February 2006, para. 10.


\textsuperscript{21} Draft articles on Responsibility of States for Internationally Wrongful acts with commentaries, 2001, General Commentary (1) p.31.

The responsibility that the Articles refers to presents itself in ‘relations which arise under international law from the internationally wrongful act of a state, whether such relations are limited to the wrongdoing state and one injured state or whether they extend also to other states or indeed to other subjects of international law, and whether they are centered on obligations of restitution or compensation or also give the injured state the possibility of responding by way of countermeasures’.  

This definition shows the embodiment of responsibility and how an international obligation that binds states together eventually brings them together through different sets of responsibility. If one state commits a wrongful act, then all its relations with other corresponding states spark the international responsibility between them. The injured state in turn has the right to claim that the wrongdoing state maintains its responsibility of not committing the wrongful act. A wrongful act is considered to be ‘conduct consisting of an action or omission: (a) is attributable to the state under international law; and (b) constitutes a breach of an international obligation of the state’. The wrongful act can consist of an actual act or the absence of an act that triggers responsibility. For instance in the Tehran Hostage Crises case, the failure of the Iranian Authorities to interfere in the crises and to take appropriate measures to end the conflicts, contributed to a responsibility. For an act to be wrongful it has to be in breach of an obligation that the state previously had agreed to. It is not compulsory that the obligation has to be part of a Treaty since non-Treaty obligations have still resulted in liability. It also has to tie the act or the omission directly to the state.

Even if the conduct is done by a state organ, the Articles define that the conduct should be considered an act of state in international law regardless of the organs position in the given state. A state organ is any organ within the governmental territory of the state which is equally treated as central governmental organs of that state. State organ could be any entity or individual that operates in line with the domestic law of the State. State organ therefore indicates all individuals that together compound the organization of the State and act upon

24 Draft Articles, Article 2, p.34.
26 Factory at Chorzów (Affaire relative à l’usine de Chorzów), P.C.I.J., Judgment No. 8, 1927, Series A, No. 9, p. 21 cited in Draft Articles, Commentary Article 2 (7). In the case there was a breach of an engagement.
27 The Articles, Article 4.1.
its interests. Additionally, the Articles do not distinguish between individual’s superior or subordinate position, since both are acts of individuals who are representing their State.

The Articles also deems the conducts of individuals equal to the conduct of a state under international law if he acts accordingly to the instructions given or is under the control of the state.\textsuperscript{28} In the \textit{Prosecutor v. Tadić} case, the ICTY stressed that acts performed by private individuals are considered to be a state act if the state is exploiting such control over the individuals. To support with financial resources and equipment is considered to be a control measure.\textsuperscript{29} The Tadić case is therefore an example of when individual conducts can be equal to state conduct and whether the actions of a group can be directly attributed to the state or not.\textsuperscript{30}

\subsection*{2.3 Convention on the Prevention and Punishment of the Crime of Genocide}

The drafting of the Convention was initiated by a Polish lawyer named Lemkin, who had witnessed the massacre of the Jewish population during WWII and the outcome of the Nuremberg Trials. Lemkin believed that a convention was needed to regulate individual responsibility when the killing of groups based on their race, ethnicity, religion or nationality was done. Coincidentally, he was also the one who created the term ‘genocide’.\textsuperscript{31} Genocide could therefore not be used in the Nuremberg Trials since genocide was not a crime under international law before 1949. As a result, the Convention was adopted by the General Assembly of United Nations in 1949 and came into force in 1951.\textsuperscript{32}

The Convention regulates that genocide is not limited to have been committed during war, as it can occur during times of peace as well.\textsuperscript{33} This indicates that genocide is not limited to only occurring in times of war, which differentiates itself from crime against humanity because the crime only regulates killings before or during times of war. Punishing

\begin{footnotesize}
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\item[\textsuperscript{28}] The Articles, Article 8.
\item[\textsuperscript{30}] Draft Articles, Commentary 8 (5), p.48.
\item[\textsuperscript{32}] United Nations Treaty Series, \textit{Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations}, Volume 78, 1951, No. 1021, p.277-278.
\end{itemize}
\end{footnotesize}
individuals who have committed genocide along with individuals who have been unable to prevent genocide has also become criminalized in the Convention. This further implies that the actual committing of genocide is not the sole conduct that invokes responsibility upon oneself. Conducts that fall inside the scope of genocide must be committed with the ‘intent to destroy, in whole or in part, a national, ethnic, racial or religious group’. Genocide, regardless of how the actual crime is conducted, consists of two parts, the actus reus and the dolus specialis, the action of committing the crime and the specific intent to commit the crime. If a court is not provided with enough evidence that a party has killed members of a certain ethnic group with a dolus specialis, then the court cannot categorize the conduct as genocide. The intent of an actor thus plays a crucial factor in the assessment of the crime. Therefore, even preparing for genocide is punishable, which extends the scope of genocide as well. 35

The Convention is also directed to individual actors in the first place, where individuals ‘committing genocide [...] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’. This implies that an individual is to be brought to trial as any other individual, regardless of their political or military position. The Convention therefore emphasizes equality between individuals when issuing individual responsibility for genocide. Nevertheless, the Convention also encourages states to submit their ‘interpretation, application or fulfillment [...] of those relating to the responsibility of a state for genocide’ to the ICJ. This implies that the Convention is not merely focusing upon individual responsibility, but also includes responsibilities of states to abide by the convention. This also enables states that have signed the Convention to turn to the ICJ if they inter alia have disagreements with its legal content.

Furthermore, genocide must be tried ‘by a competent tribunal of the state in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction

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34 The Genocide Convention, Article 2. Please see the five different conducts of genocide, namely (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
35 The Convention, Article 3.
36 The Convention, Article 4.
37 The Convention, Article 9.
with respect to those Contracting Parties which shall have accepted its jurisdiction’. As a result, both national and international courts have jurisdiction to handle genocide cases. As to date, 149 parties of the UN have ratified the Convention and it is now valid within international law. Lastly, the Convention also allows any competent organ of the United Nation to take appropriate actions necessary to prevent or suppress genocide. This indicates that the UNSC is legally entitled to intervene if signs of genocide are apparent.

2.3.1 Erga omnes, jus cogens and genocide
The Convention is an international obligation that all states must adhere to. The ICJ reaffirmed this in the Armed Activities on the Territory of the Congo Case where they declared that the Convention contains rights and principles which states have recognized, which with their recognition have made the Convention an erga omnes obligation. The Convention is accordingly a convention based on state consent. The ICJ affirmed the Convention as erga omnes in 1996 and is considered to be a part of customary international law.

An obligation also engages states with each other where international jurisdiction to such a breach must come into being. When an obligation is considered erga omnes, it implies that the obligation is important for the international community to protect. By having a rule or norm that is erga omnes, indicates that the maintaining of the rule or norm is of value. The interest of maintaining an erga omnes obligation is beneficial to the community. The regulations of the Convention are of jus cogens character, as the Convention is recognized by the majority of states in the international community, but also that it contains peremptory norm of general international law which is to protect people from being killed because of

38 The Convention, Article 6.
40 The Convention, Article 8.
41 Armed Activities on the Territory of the Congo (DRC v. Rwanda), I.C.J., Judgment 3 February 2006, para. 64.
their nationality, ethnicity, race or religion. Freedom of religion and persecution are jus cogens norms that should never be violated, either by individuals or by the state.

It has been argued that even though not all erga omnes obligations can be jus cogens, all jus cogens norms are erga omnes obligations, this because the norm is highly valued in the international community.\(^{44}\) It was through the development of the erga omnes and jus cogens that the Articles could be developed and eventually become a part of customary international law.

### 2.3.2 The Articles and genocide

With the commencement of the Convention, genocide was listed as considered to be an international crime. Furthermore, genocide is tied to preemptory ratified international treaties and can thus not be exempted.\(^{45}\) The Convention in turn binds the states to maintain their international obligation and not breach it. If however, a state has breached an obligation, the breach is considered to have lasted from the very first omission till the last omission has seen completion.\(^{46}\) Genocide is considered a composite act, since there needs to a systematic intent and a physical act to fulfill the crime. The intention of eliminating a group from society based on their nationality, ethnicity, race or religion must be established to fulfill the criteria. Genocide is therefore a combination of two essential parts that needs to be present. Even though composite acts are considered to be a series of wrongful acts, it does not exclude the fact that every single act is wrongful in itself. In other words, when a state is considered responsible for genocide it has breached a composite obligation of international law.

The Articles also regulate serious breaches of an obligation. A breach is considered serious if it involves a ‘gross or systematic failure by the responsible State to fulfill the obligation’ and a ‘certain order of magnitude of violation’ has been present.\(^{47}\) Breaches that are

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\(^{46}\) The Articles, Article 15.

\(^{47}\) The Articles, Article 40.
considered serious are prohibited and must be avoided. The ICJ has commented that such a serious breach can be slavery, racial discrimination and genocide. The state’s responsibility is therefore linked to the idea of not violating international obligations. When genocide is concerned, all the states that have ratified the Convention face a legal responsibility towards not breaching its content.

2.4 Conclusions
Both the Versailles Treaty and the Leipzig trials influenced placing responsibility upon individuals for war crimes, as they believed that actors should be held liable for crimes they have committed. As the international community developed a demand after WWI to prosecute individuals guilty of both instigating and committing war crimes, sheltering subjects of the state and avoiding responsibility for crimes was something that had to change. The act of state doctrine could furthermore not be implemented when concerning genocide, as it is a crime that relies upon an international obligation. Genocide can never be overlooked, as the doctrine implies, by regarding it as a domestic matter, as the crime is an international erga omnes obligation and protecting lives is a jus cogens norm. If a breach has been made, then the State has an international responsibility for allowing the breach to have happened.

The actions of individuals and the conduct of states are differentiated in relation to war crimes and their responsibilities have separate legal foundations. In some instances, individuals could be responsible for a state’s conduct, whilst a state can be held liable for the actions of a number of individuals. For the crime of genocide, both sets of responsibilities are incorporated in the Convention. The allocation of responsibility in international law has therefore evolved from only being applied by the state to focusing more on the individual and holding them liable for their actions.

48 Draft Articles, Commentary Article 40 (4).
3. The emergence of the crime of Genocide: The Nuremberg Trials

3.1 The Nuremberg Tribunal
The International Military tribunal of Nuremberg (Nuremberg Tribunal) was established *ad hoc* in 1945 in order to prosecute individuals who had an influential role in the Nazi state before and during WWII. The tribunal was the result of an agreement between the governments of United States, Great Britain, The Soviet Union and France, who essentially were allies in the war.49 Germany had lost WWII and was financially drained and could not offer much resistance to the agreement. When installing the tribunal the allies received questions on whether it would be consistent with international law, whereas they replied ‘we declare what international law is ... there won't be any discussion on whether it is international law or not’.50 As a result, the tribunal was legally authorized by the allies and ended the legal concerns whether the tribunal would be compatible with international law.

3.2 The Nuremberg Charter
The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (Nuremberg Charter) had the ambition to formally justify violators of international law and hold them responsible for crimes rather than placing liability on their state. According to the negotiations before the installment of the tribunal, the allies believed that the totality of WWII was due to the actions of 15-20 people and that these few individuals must stand trial for their unlawful actions. As a result, it was crucial for the individuals to publically stand before trial. The usual conduct would be to execute the individuals after the war, however one of the allies explained that by imposing a penalty without a proper trial would only increase the risk that the individuals would be portrayed as martyrs and as a result influence coming generations to a future Nazi uprising.51 It was therefore important to author a Charter that would highlight the shift in responsibility from the state to the individuals.

49 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 1945, Article 1-5, See also the opening paragraph in the Nuremberg Charter where it declares that the allies wanted to create a military Tribunal ‘for the just and prompt trial and punishment of the major war criminals of the European Axis’.
3.2.1 Shifting from state to individual responsibility

The Nuremberg Charter declared that acts committed by individuals would become crimes within the jurisdiction of the Tribunal and that those who had acted in the interests of the European Axis, whether as an individual or as an organization, would be punished. \(^{52}\) The crimes that are mentioned in the charter were crimes that usually states would be held liable for and not individuals. Hence, the principle of *nullum crimen sine lege* with the prohibition of creating *ex post facto* laws was overlooked when drafting the charter. This implied that even though a conduct was not considered a crime before the installation of the tribunal, it would henceforth be a crime within the context of the Tribunal but not in international law. The tribunal argued that despite the prohibition of *ex post facto* and *nullum sien lege*, the latter is a general principle of justice and would not be regarded for the Nuremberg Trials, as the Germans had acted unlawfully. Overall, the tendency of the tribunal was to prosecute individuals for international war crimes. It was believed that even though it would be unjust to target individuals, it would be more unjust if they were allowed to go unpunished.’\(^{53}\)

As a result, focus was shifted from indicting states to aim for the state subjects instead, since states were believed to be an abstract entity that could not commit international crimes per se. Breaches of international law are *de facto* committed by individuals and hence individuals had to be punished for conduct that were considered to be criminal according to international law.\(^{54}\) Conducts by individuals therefore activates liability on an international level and triggers international consequences, rather than remaining a national issue for its own government.

3.2.2 The issue of responsibility in the Nuremberg Charter

Individuals who would face responsibility were those who had ‘the official position of defendants, whether as Heads of State or responsible officials in Government Departments’ and that these positions would not free them or mitigate them from punishment.\(^{55}\) This

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\(^{52}\) The Nuremberg Charter, 1945, Article 6.


\(^{55}\) The Nuremberg Charter, 1945, article 7.
ensured that the governmental position of individuals would not be regarded under the jurisdiction of the tribunal. This implies that even immunity for the reason of certain political or military position would not be regarded as a justified reason for avoiding liability. For instance, what in modern times is called diplomatic immunity would not, according to this definition in the Charter, suffice in shielding international responsibility from oneself.

Additionally, immunity could not be claimed towards a state that is on the outer legal frames of international law. In one case, the tribunal stressed that all individuals not only have a national obligation, but also an international obligation to obedience. It was believed that individuals have international duties on their own. Therefore, immunity could not be granted to someone who has obeyed a state which has moved outside of its international legal competence. The tribunal indicated that individuals obeying unlawful commands of the state indirectly become responsible for the act in itself. This type of defense was also later called the ‘Nuremberg defense’ because the majority of the convicted would mainly base their argumentation around the fact that they were “just following orders” from someone who had a higher political or military position than themselves. When defenses like these were excluded, the chances of avoiding responsibility diminished and many of the indicted could be convicted in the tribunal.

Arguably, not being able to defend oneself as per custom from that time and not being able to appeal one’s verdict, questions the validity of the tribunal. The legal validity is also doubtful in terms of the tribunal’s jurisdiction since it was restricted to only be applicable in the tribunal while the current international law at the time was not valid throughout the trials. All the decisions made in Nuremberg came to leave an impression on how international law would be today and thus being difficult to locate what was done wrong and what could have been made different. To whatever degree, the legal limits of the indicted were debatable and perhaps a release clause could have been made available.

3.2.3 Crime against humanity in the Nuremberg Charter

The mass killings of ethnic, racial and religious groups during the WWII can in modern legislation be considered to fall inside the scope of genocide. At the time of Nuremberg, the

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Convention on genocide had yet not been drafted. The crime that was applied for the mass killings was instead crime against humanity. The genocide of Tutsis in Rwanda during 1994 and the Bosnian men was 1995 is similar to the conducts made on the German citizens during the 1930-1940. It is therefore possible to draw parallels between the two crimes and consider that the judicial assessment of them is of interest.

However in the Nuremberg Charter, crime against humanity was divided into two parts, namely murder and persecution. The first part consisted of murder, extermination, enslavement, deportation and other inhumane acts. The latter part regulated the persecution of people belonging to a certain political, racial and religious groups in society. This part was aimed directly at the treatment of the Jews before and during the war. It was also the assessment of this part that made genocide emerge later on. The requirement for both parts was that the act must have taken place either before or during a war. This condition would eliminate any doubt of convicting individuals involved in WWII. The legality of the crime also stretched outside the domestic legal framework of the prosecuted. This entailed that the prosecuted could not rest his defense on the notion that the committed act was justified according to the law of his government. Influential Nazi leaders could therefore be convicted for following a valid Nazi law.

It is worth stressing that crime against humanity was not mentioned in the Versailles Treaty, the Treaty instead desired to make military personnel guilty of ‘committed acts in violation of the laws and customs of war’. The allies wanted to secure that any individual installed under the Nazi government, who had committed any of the acts mentioned in the article, would face responsibility. In order to properly place responsibility among the prosecuted, it was mentioned that anyone who participated in executing or conspiring to commit a crime, would be ‘responsible for all acts performed by any persons in execution of such plan’. This indicated that individuals who were prosecuted should be found guilty on all accounts possible, resulting in placing liability even on those who prepared committing war crimes. This extended the allocation of individual criminal responsibility, as Nazi leaders who had

57 United Nations General Assembly, 1949, p. 68
59 The Versailles Peace Treaty, 1919, Article 228,
60 The Nuremberg Charter, 1945, Article 6 last paragraph.
not actually engaged in battle or participated in the persecutions or slaughter of people, would face prosecution. For instance, Streicher who was the founder of anti-Semitic propaganda, was found guilty of crime against humanity but did not hold a military position nor did he execute any plan in murdering or prosecuting anyone. He was instead held responsible for spreading the propaganda before and during WWII. The tribunal stated that ‘In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution’. Streicher had therefore indirectly participated in the mass killings of the Jewish population via his involvement and encouragement in the spread of anti-Semitic content.

Göring was one of the major war criminals in Nuremberg, as he had been the highest ranking politician in the Nazi state after Hitler. He was convicted for war crimes and crimes against humanity for having enforced slave labor upon prisoner of war from the Soviet Union and France. Göring had also actively persecuted the Jewish population in all the conquered territories during the expansion of the Nazi state. The tribunal had also found anti-Jewish decrees signed by him to later constitute anti-Semitic laws in the state. Göring was convicted on all grounds, one of them being crime against humanity and was sentenced to death for his individual responsibility for these crimes. The tribunal believed that there was no chance of mitigation, as his political and military position in the state had him directly responsible for the crimes. Thus, having a leading role and being constantly involved in seeing international war crimes come to fruition, placed responsibility upon the individual.

3.3 Conclusions
The implicit idea after the Versailles Treaty was that only states could be held responsible for crimes committed within their territory. Legally, it was through the drafting and implementation of the Nuremberg Charter that international treaties were applied on the individual level. The charter eclipsed the fundamental basis of international law, as individuals were being prosecuted on retroactive laws. Furthermore, the charter issued that individuals no longer could defend themselves by stating that they obeyed orders, as even being involved with a crime would generate responsibility.

61 The International Military Tribunal Nuremberg v. Julius Streicher et al., Judgment 1 October 1946, p.120.
With the Nuremberg Tribunal, the criminal responsibility shifted to being placed on individuals instead. This shift occurred mainly to convict the individuals responsible for the escalation and continuation of WWII, since the allies believed the entire war was the result of a few individuals’ actions. The shift was also necessary as the Nazi state had ceased to exist and could not be held liable. It is argued that Nazi Germany was not to be held responsible because the different governments of the allies did not wish to be held responsible for their crimes during WWII as well.\(^63\) One crime being the two atomic bombs that were dropped in Japan on the orders of the United States. This and similar events are one of the reasons to why the outcome of the Nuremberg tribunal is called the victor’s justice.\(^64\) It is believed that the trials were tailored for punishing the losing parties were the individuals either received death penalties or various years of imprisonment, while other states were not held accountable for their conduct.

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\(^64\) Lippman, 1988, p.20.
4. The application of the Genocide Convention to individuals

4.1 The International Criminal Tribunal of the Former Yugoslavia

The former state of Yugoslavia faced an upheaval of sociopolitical and financial crises during the beginning of the 1990’s, which resulted in a civil war where the majority of war crimes were committed within the territory of Bosnia and Herzegovina. In July 1995, around 8 000 Bosnian Muslim men were systematically killed during this time in Srebrenica by the Bosnian Serb army. The events at Srebrenica were performed mainly by the armies and organs belonging to Republik Srpska (RS). RS was a self-proclaimed state within the territory of Bosnia and Herzegovina with its own President and military army. Although it was not internationally recognized, RS de facto enjoyed some independence and had control over important territories. The RS was successful due to the fundings received from the Serbian state, since Serbia and the RS shared close ties with each other in regards to political and financial matters.

Prior to the establishment of ICTY, different UN bodies had shown concern for the escalation of internal conflicts in the former Yugoslavia. In one report, the United Nations Commission on Human Rights (UNCHR) stressed that all states are bound by regulations of the Geneva conventions and their Additional Protocols. One of these conventions was the Genocide Convention that the former Yugoslavia had ratified and was obliged adhering to. While the conflicts in Yugoslavia were internal, the escalation of war crimes like genocide demanded an international solution to it. The ICTY hence became the first international tribunal to be established after Nuremberg. The purpose of the tribunal was to ‘prosecute people responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia’. The ambition was to provide for peace and security in the world and by holding individuals responsible would not only help to prevent future violations, but also to bring justice to victims of the committed crimes.

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68 UNSC Resolution 827, p.2,4.
When creating the tribunal, it was important to learn from the shortcomings of history, where the crimes committed were chosen retroactively in Nuremberg and thus went against the principle of *nullum siene lege*. The Statute of ICTY was created *ex ante*, as it ruled out the possibility to prosecute individuals for crimes retroactively. It was also important that the accused individuals had the possibility to appeal the tribunal’s decision, as this feature was left out in the Nuremberg Charter. The Appeals Chamber was therefore installed for the possibility to appeal. Furthermore, the ICTY was not installed according to the desire of a number of governments like in Nuremberg, but rather a demand from the whole international public, formally via the UN Security Council. In UNSC Resolution 827, the cooperation of all states with the ICTY is emphasized as collective efforts were needed to install an international tribunal. This made the idea of a fair tribunal much easier to comprehend than what history had experience with the Nuremberg Tribunal.

### 4.1.1 UNSC Resolutions 808 and 827
It was through sets of reports and resolutions from different UN bodies that the ICTY came about. Reports from the UNCHR contributed to Resolution 808, which had the ambition of giving the UNSC more insight in the ongoing situation in the former Yugoslavia. Resolution 808 in turn became a foundation for what would become Resolution 827 that decided upon the establishment of the ICTY. The Resolution wanted to create the ICTY for prosecuting individuals responsible for war crimes committed in the Yugoslav territory.

The drafting of the ICTY and its Statute therefore consisted of adaptations of a series of resolutions. Drafting is however not an efficient process, as proceedings can be lengthy and carry on for months and years. Since the conflicts in the area were escalating, an effective solution was needed to cease the violence. Another aspect that spoke in favor of a quick solution was that an implementation of a Resolution that was eventually going to constitute an international body, needed to be signed and ratified by all parties. In order to avoid any hindrance, the UNSC introduced a solution that would bind all states to the Council’s decision. Adhering to the UN Charter, if the aim of a resolution is to restore and maintain

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70 UNSC Resolution 827, Article 4, p.2.
71 UNSC Resolution 827, Article 2, p.2.
72 See UNSC Resolution 827, Article 8, p. 2-3 where the Security General urged for a quick implementation of the resolution in order to install the tribunal.
international peace and security, all states must abide by the council’s decision.73 Thus, the establishment of the ICTY became valid and justifiable in international law, since the tribunal ultimately would sustain peace in the international community.

4.1.2 The ICTY Statute

During the drafting of the Statute, the UNSC expressed that the ICTY should seek to place criminal responsibility on individuals.74 Much like the Nuremberg trials, liability could not be avoided by having followed orders from someone with a higher military or political position. As the tribunal wanted to prosecute individuals for war crimes committed in the Yugoslav territory, it limited the ICTY’s jurisdiction to only cover crime within the geographical area of the dissolved Yugoslavia.75 This in itself is different from the Nuremberg Charter jurisdiction, as the latter wanted individuals belonging to the European Axis to stand trial, rather than mapping the area of jurisdiction where crimes were committed. This inclusion in the Statute offered an expanded jurisdiction which was in accordance with the aim of the tribunal.

4.1.3 Individual responsibility in the ICTY Statute

The Statute introduced six different types of individual responsibility to the tribunal’s jurisdiction: planning, instigating, ordering, committing, aiding and abetting, and lastly superior responsibility.76 Planning, instigating and ordering a crime are all acts which do not necessarily imply that the prosecuted has committed the crime per se. It is for this reason that some crimes in the Statute have additional criteria of either committing the crime or have the conspiracy to commit, much similar to regulation for genocide in the Convention.77

The conspiracy to commit implies that there is an established plan to commit the crime. Therefore, the individual making a plan, either for oneself or for others to commit a crime,


74 United Nations report of the Security General Pursuant to paragraph 2 of UNSC Resolution 808, (S/25704 and Add.1), 1993, para 56-58

75 Cf. ICTY Statute, Article 1.


77 Referring to the actus reus and dolus specialis of genocide. See Genocide convention Article 3.b and ICTY Statute, Article 3.b.
was considered to be personally liable for the outcome of that crime. Instigating a crime implies that the individual has influenced someone other than himself to commit a crime and which without his influence; the crime would not have come to pass. This directly links the individual to the crime, as it is by his influence that a crime has been committed. As a result he must be held responsible for his instigating role in the crime. Individual responsibility by ordering a crime means that the individual has ordered someone, not necessarily his subordinate, to commit the crime. If someone committed a crime because of an order, then the order has had significant impact on the person. Simultaneously, planning, instigating and ordering a crime must have been done with intent. One cannot plan, instigate nor order someone to kill someone else without having intent of the person dying as a result of one’s actions. Committing a crime indicates that an individual physically engages himself to commit a crime and sees that the crime comes to a completion. A crime like genocide, where the dolus specialis plays a significant role, has therefore been incorporated in the Statute in order to determine the intention of the prosecuted.

The Commission criteria also includes the specific ICTY doctrine of Joint Criminal Enterprises (JCE) which indicates that individuals who share a common purpose for a crime, should each be held responsible for their involvement in the crime, even if it was a selective few of them that actually committed the crime. Although the Statute did not contain the JCE doctrine, it was introduced by the ICTY in the Tadić case and been used since as a legal framework in cases where multiple people were prosecuted. In the case of Popović, the Trial Chamber believed him to be a part of a JCE to kill male Bosnian Muslims in Srebrenica. He had arranged transportations to and from Srebrenica and separated the men from crowds knowing that they were to be executed. He had also visited several prisons and coordinated logistics “on-site” for two of the mass executions. Popović’s actions showed without reasonable doubt that he had the intention of fulfilling the common plan of murder. Albeit many others were involved in the JCE and Popović did not personally kill Bosnian Muslims, but by being one of the many involved ensuring the mass killings were committed, showed that he was striving for a common plan together with the others. This

pluralistic criterion therefore assured that those involved in completing a crime are also charged with individual responsibility. Instead of merely aiming for individuals who had actually committed crimes, the ICTY had expanded the allocation of responsibility to incorporate all involved with war crimes in order to fully protect and maintain the peace and security.

For Aiding and Abetting a war crime, the individual needed to have assisted in making the crime in question come to pass. In the case of Blagojević et al, the Tribunal claimed that even using resources and hiring personnel for making the crime easier to commit, fulfills the criteria of aiding and abetting. In the case, the general had ordered truck drivers to drive to a location and dig mass graves where the dead bodies of Bosnian Muslims were supposed to be thrown in. The aid in digging graves and driving buses to the mass graves were all a chain of events in order for seeing the crime come to fruition.82

For superior responsibility, the ICTY placed responsibility on individuals that could not control their subordinates from committing crimes. This type of individual responsibility needed to fulfill three criteria in order to be applicable; i) there had to be a superior and subordinate relationship established ii) the superior had the knowledge that a crime was being committed by his subordinate iii) the superior did not take actions in order to prevent the crime from happening or punish the subordinate if the crime had been committed.83 In the case of Krnojelać, who persecuted and detained Muslims and other non-Serb civilians on political, racial or religious grounds to commit acts of torture, beatings and murder, was convicted for both his individual responsibility and his superior responsibility for *inter alia* crime against humanity.84 In other words, it was for Krnolejač’s weakness as a superior to preventing crimes he was criminally responsible for his subordinate’s crimes.

The Statute also issued the ‘Nuremberg defense’ as a way for the subordinates to place responsibility on their superiors instead if ‘justice so required’ the tribunal to do so.85 Within the jurisdiction of the tribunal, the ICTY now had the possibility to mitigate the individual’s

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85 ICTY Statute, Article 7.3
punishment if he had truly had no other choice than to follow the orders of his superior. One case from tribunal is the famous case of Erdemović. Erdemović was a soldier belonging to the Bosnian Serb army and had been a part of the mass killings in Srebrenica. After some time, he voluntarily admitted to his crimes, first via a journalist and later to the tribunal where he demanded receiving punishment for his crimes. However, he stated that he did not commit the crimes out of a free will, rather he was forced to obey orders otherwise he would have lost his own life. He later showed great remorse for the victims and their families and contributed greatly to the case via his cooperation with the prosecutor. The ICTY Statute therefore developed a broader meaning to individual criminal responsibility by the way of assessing responsibility through different perspectives. This overall resulted in a thorough applicability to the cases presented and enabled an easier understanding to the legal criteria given.

4.1.4 The individuals convicted for genocide in the ICTY
Genocide had been recognized as an international crime forty years prior to the establishment of the ICTY. The tribunal had assured in its Statute that it had the competence to prosecute individuals for breaches of the Genocide Convention. The ICTY managed to convict seven individuals guilty for genocide in regards to the mass killings of Bosnian Muslim in Srebrenica. All were either of high-ranking military or had a political influence in Republik Srpska.

Krstić was the first individual and had the highest-ranking military position at the time to be convicted of aiding and abetting genocide in Srebrenica. It was also with this case that the Srebrenica massacre was recognized as genocide. Krstić had been promoted the rank of General and had sole responsibility over the Srebrenica area during the time of the genocide. Karadžić had been the president of RS and had participated in a joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from

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87 See ICTY Statute, Article 2.1 “The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949”.

88 Among the convicted were Krstić, Popović, Beara, Nikolić, Karadžić, Mladić and Tolimir. All were convicted on different counts of genocide.

Mladić in turn had been the military commander of the Bosnian Serb army and was held criminally responsible for the genocide of Bosnian Muslims in Srebrenica. Mladić was the last one to be found guilty of genocide in late 2017.

Milosević, who was the Head of State of Serbia, was prosecuted for two counts of genocide on Bosnian Muslims and Bosnian Croats in the Bosnia Herzegovina territory. The focal point of his trial was that he had failed to prevent genocide from happening and his reservation from punishing those who have committed genocide. Milosević died during his trial and left the question open of to what extent a Head of State can be found responsible for crimes committed within the state’s territory. As it is difficult to prove a direct connection between a Head of State and each soldier who performs the crime, a prosecution towards a Head of State needs more evidence. Whether a Head of State can be convicted for failing in his superior responsibility could, thus, not be established by the ICTY.

### 4.2 International Criminal Tribunal for Rwanda

Prior to the Rwanda genocide, mass killings of Hutus by the Tutsis had resulted in a hostile situation between the two groups in the country. Twenty years later when the Hutu president was killed in an airplane crash, the tension and hostility had sparked and led to violent killing of Tutsis. For a period of approximately 100 days, 1 million people were massacred. The different from the mass killings during the Nazi-era and the ones in Srebrenica was that the Genocide in Rwanda received wide support from it Hutu citizens that actively participated the killings of Tutsis. The leading factor to this could be the large scale propaganda sent through government-owned radio channels. These quick set of events culminated the demand of an international tribunal, similar to the one established for the former Yugoslavia.

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Like the ICTY and merely 18 months after, the ICTR was established ad hoc in 1994 by the UNSC Resolution 955. The Resolution declared that the jurisdiction of the tribunal had to extend to ‘prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States’. The ICTR was thus installed to convict those responsible for the violations between the Hutu and Tutsis in Rwanda from April to July 1994.

4.2.1 The ICTR Statute

The aim of the ICTR was to convict the individuals responsible for the offences committed in violation of international humanitarian law. The jurisdiction and the competence of the ICTR relied upon its own Statute. The killing of Tutsis was a systematic plan and intent of the Hutus to destroy in whole or in part, a group based on their nationality, ethnicity or race. It was therefore evident that the events that had occurred in Rwanda during April-July were considered to be genocide in accordance with the Statute. Perhaps that is why the first crime to be mentioned in the ICTR Statute is genocide. The definition and criteria for the crime are identical to the Convention and in the ICTY Statute. The interpretation of criminal responsibility for prosecuted individuals drew resemblance to the ICTY Statute, where six types of responsibility was presented; planning, instigating, ordering, committing, aiding and abetting and superior responsibility.

4.2.2 The individuals convicted of genocide in the ICTR

Similar to the ICTY, it can be interpreted that individuals who held an influential position were the ones who were held liable for the genocide according to the cases that the ICTR handled. Among the convicted were local mayors, politicians and those in military power.

Kambanda was the highest-ranking politician to be convicted in the ICTR. He was the Prime Minister of Rwanda and the only head of government who pleaded guilty of genocide. His plea could however not be considered a mitigation factor due to the level of seriousness of

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96 See ICTR Statute, Article 6.
his crimes. The ICTR found it alarming that he held such a high political position and allowed the atrocities to occur. They believed that Kambanda had abused his authority since ‘he and his government were responsible for maintenance of peace and security’.\textsuperscript{97} Furthermore, being the Prime Minister had him entrusted both from Rwanda and from the international community, to protect the Tutsi population and prevent the Hutu population from contributing to the escalation of the genocide. These grave breaches made him individually responsible for genocide as he had not used his political ‘duty and authority to protect the population’.\textsuperscript{98} The greater part of individuals convicted for genocide were those who had failed to prevent subordinates from committing and participating in genocide.\textsuperscript{99}

The ICTR also convicted individuals who necessarily did not have a political or military position, but still were involved with genocide. One was Muhimana, who was a conseiller that personally engaged in the atrocities of the Tutsi population. Muhimana occupied a position of influence in the commune that he resided in and used this position to participate in the killings of Tutsis.\textsuperscript{100} There are other cases where individuals had been convicted by the ICTR and did not hold a military or political position in society. In some instances the accused had not actively participated in genocide, but had either been passive and let people be killed, or they had instructed the military where Tutsis were hiding. The ICTR convicted them for being bystanders, aided, or abetted for the crime to take place.\textsuperscript{101} The ability to be passive in the turn of events was still an action that has led to the culmination of a crime. It was therefore of importance to locate the liability in all events of the crime, from the one who planned, to the instigator, even to the one who showed the way to the victims and finally to the ones who committed crime.

Similar to Nuremberg, the conduct of spreading propaganda and broadcasting hostility was also found to fall within the allocation of genocide. This was brought forward in the Nahimana, Barayagwiza and Ngeze case. They had been responsible for the broadcast of

\textsuperscript{97} Prosecutor v Kambanda, (ICTR-97-23), I.C.T.R, Judgement, 4 September 1998, para 44.
\textsuperscript{98} Prosecutor v Kambanda, Judgement, 4 September 1998, para. 46, 50 & 61.
\textsuperscript{100} Prosecutor v Muhimana (ICTR-95-1B-T), I.C.T.R, Judgement 28 April 2005, para 604-614.
hate speech towards the Tutsis and encouraged radio listeners in a campaign to perform ‘acts of violence, killings, torture and ill-treatment, rapes and destroy properties’. The individuals were deliberately using the radio to instigate the local population to commit genocide and consequently had to face responsibility for their roles in the genocide. The ICTR shed light upon the allocation of individual responsibility for genocide and clarified the concept further. Even though Nahimana, Barayagwiza and Ngeze sat behind microphones and did not actually come near the genocide per se, their influential role and encouragement had them responsible and ultimately guilty of genocide.

The ICTR closed down in 2014 after being active for roughly 17 years. Out of 93 indicted people, 89 individuals were found guilty of genocide on different counts. The number of individuals responsible for genocide was therefore higher than the individuals convicted in the ICTY and Nuremberg.

4.3 Conclusions
The Nuremberg tribunal shaped how the ICTR and the ICTY would come to be formed. All three tribunals were similar in the sense that they all were created ad hoc and drew attention to individual criminal responsibility for genocide. Even though genocide was not a crime at the time of the Nuremberg Tribunal, the cases still revolved around mass killings of people based on their nationality, ethnicity, race or religion which is similar to the criteria of genocide.

The similarity of both the ICTY and the ICTR is that they were created around the same time in history and were ad hoc to their respective conflicts. Both tribunals dealt with genocide and targeted individuals for their responsibilities towards it. The Statutes for both tribunals were identical to the Convention’s definition of genocide. The difference between them is that more individuals were convicted for genocide in the ICTR than in the ICTY. A reason for that is the sociological and political outlook on the actual genocide that took place in respective countries. The genocide that the ICTY brought up drew international attention due to the fact that Srebrenica genocide occurred on a UN safe area. The genocide in Rwanda took place in the entire country, resulting in an internal conflict rather than an

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international one. This might explain why more individuals were convicted for committing genocide while not as many in the ICTY. Another reason could be that the Rwandan genocide was prolonged for 100 days in the entire country, while evidence for genocide in the ICTY was only found in the city of Srebrenica which lasted for a few days. Although stronger evidence for conviction could be found in a prolonged crime than in a crime that took place for a few days, the total number of victims of genocide is irrelevant when the Convention is applied. It could however still be a plausible explanation.

The difference between three tribunals is that the ICTR and ICTY formally started out as internal crises, while the Nuremberg Tribunal was brought to attention after WWII. Another significant difference is that Nuremberg did not bring up genocide per se, as genocide was not a crime at that time. The corresponding crime against humanity was however used and resulted in the conviction of several individuals. Another notable difference is the Nuremberg Charter was drafted and the tribunal prepared by selected countries, namely those who had won WWII. Meanwhile, the ICTY and ICTR Statute and tribunals were drafted through resolutions from the UNSC that essentially needed approval of several countries before its installation.

However, the drafting of the Nuremberg Charter, the ICTY and the ICTR Statutes also present similarities, where the two latter has drawn influence from the former. All three jurisdictions targeted individual criminal responsibility for genocide. When issuing individual responsibility, the ICTY and ICTR Statutes were identical since both focused on people who held military or political positions and individuals who contributed to the crimes either by ‘planning, instigating, ordering, committing or aided and abetted in the planning, preparation or execution of a crime’. Similar to Nuremberg, if the prosecuted was the Head of State or was a responsible governmental official, they were not allowed to use that position as a means of receiving a milder punishment or relieve their criminal responsibility. The Statute thus did not allow immunity to pierce its way through the Statue. Furthermore, a superior could not place responsibility on his subordinate instead of himself for not committing the crimes per se. If the superior was in such position that he could have prevented the subordinate to commit the acts, he should be criminally responsible for the act if he refrained from preventing it. Likewise, the ICTY and ICTR Statutes regulated that

103 ICTY Statute, Article 7.1 and ICTR Statute, Article 6.1.
superior responsibility did not relieve the subordinate from responsibility either. Additionally, the ICTY and ICTR allowed mitigating the prosecuted’s punishment if ‘justice so required’. This mitigating clause was included in the Statutes from those who would use the ‘Nuremberg defense’ during trial, as a possibility to mitigation had to exist if there was a high probability that the prosecuted was innocent and had no choice but to obey orders from their superior.

The application of individual responsibility has developed from having never being considered in international law, to seeing the establishment of two international tribunals that targets individuals inter alia for their responsibility for genocide. Each individual can therefore become responsible for their role in genocide, whether it be large or small.

104 ICTY Statute, Article 7.4 and ICTR Statute, Article 6.4.
5. The application of the Genocide Convention to the state

At present, there are only two cases in international law where states have been indicted and only one case where the state has been convicted for their responsibilities for genocide. Both these cases regard state responsibility surrounding the conflicts in the former Yugoslavia. Both cases referred to the rulings of the ICTY and thus used them as evidence, which legitimized the ICTY as a legal tool in other judicial proceedings.\(^{105}\)

5.1 The International Court of Justice

The ICJ is the standard international forum when applying the Convention. According to the regulation in the Convention, the ICJ is qualified to interpret and apply the Convention including those relating to the responsibility of a state for genocide at the request of one of the parties.\(^{106}\) The jurisdiction of ICJ furthermore comprises in the repair of breaches to an international obligation, with one of them obligations being the Convention.\(^{107}\) Whilst other tribunals like the ICTY or ICTR may only focuses on individual criminal responsibility, the ICJ focuses on placing the responsibility on the collective actions of larger group of individuals. Furthermore, the decision of the ICJ cannot be the subject of appeal nor does it have binding force, except between the parties and the case at hand.\(^{108}\)

5.2 Bosnia and Herzegovina v. Serbia and Montenegro

After the events in Srebrenica, the state of Bosnia and Herzegovina filed a registry for the ICJ for an application to try the former Yugoslavia regarding their state responsibility for the genocide of Bosnian Muslims committed by militia belonging to Republik Srpska. The RS consisted of Bosnian Serbs and was not a recognized republic, but acted within the Serbian territory. As mentioned in the previous chapter, the majority of individuals convicted for genocide in the ICTY had all high-ranking military or political positions in RS. It was the first time in history that an international court was to decide whether a sovereign state could be responsible for genocide. Even though the Convention was authored six decades prior to the judgment, the application of state responsibility for genocide had not come about earlier.


\(^{106}\) Genocide Convention, Article 9.

\(^{107}\) The Statute of the International Court of Justice,1945, Article 36.2 (d).

\(^{108}\) ICJ Statute, Article 59-60.
During the years of the trial, the former Yugoslavia had dissolved and changed its name to Serbia and Montenegro and thus became called that in the case.

Bosnia claimed that Serbia was responsible for genocide on three grounds: for its officers committing genocide, for its state organs failing to prevent its officers for committing genocide and that Serbia had failed to punish individuals who had committed genocide.109 Serbia first argued that the Convention could not be interpreted that a state can be liable for an individual’s conduct of genocide, but agreed that a state can be held responsible for not preventing or punishing the same individuals. This implies that a state has an overall responsibility over its territory and is liable for any breaches of international law within that territory. If genocide, which is an obligation that Serbia has abided to, has occurred on Serbian territory then it has to be responsible for the totality of that breach.

5.2.1 Responsibility for committed genocide

In order to prove genocide, a court must find whether the two criteria of the crime have been fulfilled; namely the actus reus and the dolus specialis. The ICJ found that the genocide in Srebrenica fulfilled the criterion since the mass killings had been committed with specific intent by members of RS.110 When the ICJ concluded that genocide had occurred in Srebrenica, the following part would be to assess whether Serbia could be held accountable for the genocide.

Since Serbia had control over RS, the ICJ drew parallels to the 1986 Nicaragua v. United States of America case were the Contras was a non-state actor under the control of the United States. The ICJ distinguished two different sets of control, there either had to be a complete dependence or an effective control over the given situation.111 In the case, it was not necessary to prove individuals or other entities where in complete dependence on the state, it was more important to prove that the state had effective control over them and that they only followed the instructions from the state.112 If Serbia had effective control over the RS in Srebrenica, then it would be directly responsible for the violations of humanitarian

109 Jørgensen, 2003, p.266. These claims were all breaches of Article 9 in the genocide convention, however with article 9 follows breaches of article 1-6 in the convention.
laws that they had committed. Bosnia could however not provide sufficient evidence that the massacres in Srebrenica were committed via instructions from Serbia or under the direction of organs of Serbia. Evidence could also not found that Serbia had effective control over RS, as evidence instead proved that the crimes were committed by individuals belonging to RS militia, who were under no influence of the Serbian government.\(^{113}\)

The ICJ found it unable to prove that a state could be held responsible for an organ that was acting on behalf of a public authority and not on Serbia’s behalf. The militia was formally acting in the favor of the RS and not Serbia and thus an adequate line could not be drawn between Serbia and the militia, as the latter was not completely dependent upon the former. Neither could RS nor its militia ‘be regarded as mere instruments through which Serbia was acting’, since both relied upon their own autonomy.\(^ {114}\) Serbia did not engage in complicity of genocide and could as a result, not be held liable for committing genocide in Srebrenica.\(^ {115}\)

### 5.2.2 Preventing and punishing genocide

Whether responsibility for genocide could be allocated for not taking appropriate action to prevent it, the ICJ stressed that responsibility is not acquired when the desired result is not achieved, but is acquired if the State had ‘failed to prevent genocide which were within its power, and which might have contributed to preventing the genocide’.\(^ {116}\) Since it now was established that RS and its militia had committed the genocide, Serbia declined having any ties to the RS and stressed that the RS had operated on their own accord. However, as all events had happened on Serbian territory, Serbia’s responsibility for preventing the genocide could not be overlooked.

One aspect that spoke against Serbia’s failure to prevent the genocide was the specific instructions that it had received from the ICJ before events in Srebrenica, where Serbia was obliged to ensure that no military or similar armed units would not influence or commit any

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acts of genocide. With receiving instructions beforehand and still fail to abide by its obligation, is another factor the ICJ noted that shifted the outlook Serbia's international responsibility to prevent the genocide. The instructions proved that, not only was the international community aware of the hostile situation, but also that Serbia had to be reminded of its responsibility as a state and its obligation towards the Convention. Also, as the genocide was imminent, the ICJ believed the likelihood that Serbia was unaware of the serious risks of shown violence of the RS militia were, very small, since there was documentations that showed Serbia’s awareness of the occupation of Srebrenica. Evidence was also brought forward that Serbia had given aid and equipment to the RS that helped them immensely when exceeding their powers in the territory. These and other circumstances ensured the ICJ with enough evidence that Serbia was informed of the genocide and did not take appropriate measures to prevent it. With a jus cogens agreement like the Convention came an erga omnes obligation that Serbia had agreed to be responsible for. Even though Serbia tried to disassociate itself with RS, since RS and its militia were not directly under the authority of Serbia and Serbia did not de facto order the genocide, they did however observe the genocide and could have intervened. Because evidence proved that Serbia was aware of the risk of genocide but failed preventing it, the ICJ found that Serbia had violated its international obligation to prevent the Srebrenica genocide.

Moreover, Serbia had not shown any interest in bringing justice to the victims or punish those who had committed genocide. Although individuals from RS and the militia where on Serbian territory, Serbia did not convict them in their own national courts nor did Serbia cooperate with the ICTY. According to the intelligence services of Serbia, the state knew where Mladić was residing but ‘refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the

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119 Cf. Bosnia v. Serbia, Judgment 26 February 2007, para. 437. EU negotiator Carl Bildt had pressed the Serbian president in July 1995 to prepare access for the UNHCR within the Srebrenica territory to assist the residing people there, (Bosnia v. Serbia, para 436) Additionally during Milosević ICTY trials, the US General Clark testified that when meeting the president, he too expressed concern about the people and wondered how Milosević could have allowed Mladić to ‘have killed all those people at Srebrenica?’, whereas the president had replied ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me’.
fugitive”. For this reason, Serbia was convicted of both failing to prevent and punish those who had committed genocide in Srebrenica.

5.2.3 Dissenting opinion
Vice-President of the ICJ, Al-Khasawneh, left a dissenting opinion on the final judgment in the Bosnia v. Serbia case. In his belief, Serbia had made it clear that they were aware of the actions of RS and should not have been acquitted on the ground of committing genocide. Al-Khasawneh was certain that if the ICJ had used more thorough methods to assess the given evidence from Bosnia, responsibility could have been placed on Serbia for breaching an international obligation. He believed that state responsibility had been invoked because he was certain that the involvement of Serbia in RS militia were considered the one of an accomplice. If the ICJ had acknowledged this aspect, then there would have been a direct link between the genocide in Srebrenica and the Serbian state. Al-Khasawneh furthermore criticized the use and comparison of the methods used in the Nicaragua case, and that they were not relevant in dealing with a genocide case. He implied that using the Nicaragua method would only result in a same result as in Nicaragua case and not generate an alternative result.

In sum, Al-Khasawneh believed that the ICJ did not have enough experience to manage a crime like genocide, which lead to that certain matters could have been handled differently in Bosnia v. Serbia and perhaps generated another outcome. This also shows the sensitivity of the ICJ in a field where state responsibility had not been tried before. It is therefore why dissenting opinions like Al-Khasawneh’s are important to revise, as they highlight which aspects the ICJ could improve and how it can handle similar cases differently in the future.

5.3 Croatia v. Serbia
In 1999, Croatia filed a report to the ICJ to convict Serbia for their breaches of the Genocide Convention in Croatia when armed conflict between the two states had begun in 1991. Serbia issued a counterclaim where Croatia should be held responsible for the genocide of Serbs during a military operation in 1995. This genocide case was the second and the most

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122 Dissenting Opinion, Judgment 26 February 2007, para. 60.
recent case in history for a state was brought to trial for its responsibility regarding the breach of the Convention. This case also provided another attempt for the ICJ to try Serbia for its responsibilities during the Yugoslav conflicts.

One aspect that differentiated this case from the previous genocide case was that even though the ICJ found that the physical element of genocide had been fulfilled, the so-called actus reus, the mental element dolus specialis could not be proven. Croatia argued that Serb forces systematically committed acts that constituted the actus reus of genocide when they attacked and occupied Croatian territories and forced displacement of Croats. The ICJ believed that forced displacement of people could not show without reasonable doubt that Serbia had the intent of systematically destroying the Croat population.123 Many other events indicated that, although Croat population was captured, the Serb armies did not kill them.124 This was different from the genocide in Srebrenica, were Bosnians were captured, displaced and killed immediately. Comparing it to Srebrenica, the ICJ found that the acts committed towards the Croats were not in line with the Convention of wanting to destroy the Croatian population. The dolus specialis is a requirement that enables the genocide. Croatia could not supply the ICJ with enough evidence that the acts committed by Serbia had the intent of destroying the Croats, in whole or in part.125 As a result, the question of responsibility under the Convention could not arise and be applicable for Serbia. Additionally Serbia could not be convicted for preventing or punishing those who had committed genocide, since genocide had not occurred.

The counterclaim that Serbia had issued revolved around a military operation that targeted the Serb population and captured Serbs were not allowed to return home. Serbia claimed that Croatian armed forces had performed the actus reus of genocide against the Serb population during the operation.126 The ICJ did find evidence for this claim, however the intent that characterized genocide was not present. They furthermore agreed that the actus reus of

123 Croatia v Serbia, Judgment 3 February 2015, para. 377.
124 Croatia v Serbia, Judgment 3 February 2015, para. 431-435.
125 Croatia v Serbia, Judgment 3 February 2015, para. 394 and 440-441.
126 Croatia v Serbia, Judgment 3 February 2015, para. 499.
genocide was present, however that the dolus specialis of systematically killing Serbs was not fulfilled.\textsuperscript{127} 

Serbia also presented an ‘existence of a pattern of conduct indicating genocidal intent’ in where several instances were brought forward to strengthen their claim towards Croatia. This claim stemmed from various Croatian military operations during 1992 to 1995, which Serbia claimed that Serbian population was facing a policy of systematic discrimination.

Here, the ICJ referred to the previous case regarding the genocide in Srebrenica and stressed that ethnic cleansing does not directly constitute genocide, as genocide requires an intent to physically destroy a targeted group in society and not “not merely a desire to expel it from a specific territory” as had happened in the case.\textsuperscript{128} If a pattern of conduct were to be intercepted as evidence for a specific intent, there needs to be a reflection of that intent in one point of the series of conducts taken place. As genocide had evidently occurred in Srebrenica, it was difficult for the ICJ to interpret ethnic cleansing as violent as what had happened in Srebrenica. Furthermore, they could not see in the pattern of a series of acts committed, during or before the Croatian military operations, that genocide had occurred or that the criteria of dolus specialis had been fulfilled against the Serb population in Croatia.\textsuperscript{129} 

Another interesting factor that showed the impartiality of the ICJ was when the court assessed that individual responsibility does not have to determine the state’s responsibility in the same matter. In the case, the Court noted that even though not one high ranking of Croatian descent had been convicted for genocide in the ICTY, did not rule out the possibility of the Croatian state being responsible for genocide. Likewise, if the majority of individuals convicted for genocide in the ICTY had been of Serbian origin, did not indicate that the State of Serbia should be responsible for genocide either.\textsuperscript{130} The individuals convicted in the ICTY therefore did not draw out a prerequisite for granting state responsibility.

\textsuperscript{127} \textit{Croatia v Serbia}, Judgment 3 February 2015, para. 499, 513-515. 
\textsuperscript{129} \textit{Croatia v Serbia}, Judgment 3 February 2015, para. 510-511, 515. 
5.4 Conclusions

Both of the cases before the ICJ are the only cases to date to be brought before trial to try state responsibility for genocide. The ICJ decided that genocide had taken place in one of the cases, due to the fulfillment of actus reus and dolus specialis criteria.

What differentiates trying individual responsibility from state responsibility is that for the former, the ICJ questioned the collective actions of people who took the form of a state. When allocating state responsibility for genocide, the actions of every individual is not significant, but rather the official conducts of the state are. How the state responded to international warnings and instructions and how its military operated are the focal points when the question of state responsible is at hand. Although the committing of genocide is done by individuals, it is the essential plan and official idea behind it that is the aim. Can the state become responsible for the wrongful actions of its subjects? Tribunals like the ICTY deals with individual’s responsibilities for their crimes, while ICJ deals with the States answering to other states and the international community at an institutionalized level, since the aim is to repair breaches of international obligation which ultimately binds all states together.

As individuals can be indicted for international crimes, the state in question also has to answer why international crimes even could occur under their watch. Therefore, a state has to answer for its responsibilities to the international community to why they could not keep their obligations of keeping peace and security.

In Bosnia v. Serbia, the Serbian government claimed that the genocide was committed by an unrecognized state within Serbia's territory, which in turn would free Serbia from any responsibilities to the genocide. While in Croatia v. Serbia, both states claimed the military of the respective state should be held liable. None of the instances brought up either by Serbia or Croatia were considered to be genocide. Genocide is crime where the intent and the physical attributes of the crime have to be fulfilled. The ICJ therefore had to dismiss both Croatia and Serbia claims in their entirety.

Nevertheless, the two cases provide good insight into how the ICJ may wish to condemn genocide, but becomes limited by the lack of sufficient legal details regarding state responsibility. For instance, they could have linked Serbia's involvement or control over RS
and its militia if it had changed its way of analyzing the evidence given. As Al-Khasawneh mentioned, if parallels had not been drawn to the Nicaragua case and a different method had been used, then even the outcome of the judgment could have changed. However, since the ICJ had no legal precedent to refer to, they decided that the connection between the US government and the Contras was similar to the Serbia and RS. As a result, the outcome of Bosnia v. Serbia case became similar to the Nicaragua case where a proper connection between the two could not be found. The international realm had seen individuals become responsible for genocide both in ICTY and ICTR, but as the Convention regulates and actualizes state responsibility, it is important that these two cases took place. The crime of genocide can be brought to a national and international court and by starting in the ICJ, opens up the possibilities for similar cases to be tried where states have yet not been held responsible.

Although state responsibility for committing genocide had not been established prior to Bosnia v. Serbia, and Serbia was ultimately not found guilty of genocide, it was still a progress that it was found guilty of not preventing or punishing genocide. As now, a few dimensions have been introduced to the international community on how state responsibility for genocide can be assessed and how it can improve. The codex of genocide is already complicated with its two cumulative criteria. For a court to try evidence and ultimately determine that a state had an deliberate intention of wanting to systematically kill a group in society is difficult and in need of more guidelines. If the ICJ had not tried both cases, then questions would arise on when a judicial organ would target the state and its responsibilities. It would also be of concern why ICJ had observed two genocides taking place, namely the one in Srebrenica and in Rwanda, and ceased to take any legal action. Instead, the ICJ vitalized the issue and indicated that genocide like other international crimes can be brought to trial and that the ICJ has jurisdiction to decide in it.
6. Concluding discussion

As cases from the ICJ have shown, it is not only individual responsibility that is tried for genocide but also the state in itself, as the Genocide Convention allows placing the responsibility on either individuals or states. As mentioned, the crime of genocide contains two essential parts, namely the *actus reus* and the *dolus specialis*. The actus reus of genocide is just as important as the dolus specialis. This indicates that the actual crime has to be committed with a special intent of seeing the crime coming to fruition. The allocation of responsibility for genocide is therefore dependent on the limited criteria of genocide. As seen in the cases that were brought up in the ICTY, many prosecuted were not found guilty for genocide because evidence did not prove that they had special intent of committing genocide. It is difficult to prove an intent to destroy a group since the Convention has been created to prevent genocide from ever taking place. Cases that were brought to the ICTY, ICTR or the ICJ were all criminal cases, which emphasized that guilt had to be proven without any reasonable doubt. This meant that evidence had to be clear and its validity unquestioned. If there was hint that the intent could be doubted, then there would be reasons for the intent not existing at all. A serious crime such as genocide needs a high threshold in order to match the seriousness of crime, regardless of whether an individual or a state becomes responsible for it. The criteria of dolus specialis is important and must be apprehensible by the court when deciding the allocation of responsibility.

The scope of responsibility in the Convention furthermore extended itself not only to individuals who committed the crime but also to states, thus both can *de facto* and *de jure* answer to genocide. Since a state consists of a limited number of people, the actions of those people are considered to fall under the State, as they simultaneously can be held responsible individually as well. As the ICJ found that the RS militia had committed the genocide in Srebrenica, the influential people of that militia were convicted in the ICTY.\textsuperscript{131} Genocide as a crime has therefore not become any easier or any harder to prove, even with the ICJ, ICTY and ICTR having applied it. The burden of proof is still on the applicant and they have to provide with enough evidence to secure that the respondent really had the intent of destroying the whole or part of a group belonging to a certain religion, ethnicity nationality or race. In order for a court to establish that intent for genocide has been present, the judges

\textsuperscript{131} See section 4.5.
need to evaluate the motives of the criminal in order to understand his actions. When however judging for a state, such an evaluation is not possible as focus instead is upon a group of people rather than one single person. Therefore, concluding if a state had the intention for genocide taking place will be difficult if not impossible to prove. When states are brought to trial, they initially are ruled upon an objective and if they have affected another state when violating the international obligations, however when dealing with the subjective elements of genocide, the issue becomes more complicated. The crime of genocide is also a crime which has to have subjective characteristics in order to be fulfilled, otherwise other crimes will be taken into question and genocide will be ruled out of the equation.

It was uncommon for individuals to stand trial for war crimes before the Nuremberg Tribunal. Although the Leipzig trials and the Versailles Peace Treaty were a starting point for placing criminal responsibilities upon individuals, it was not until Nuremberg where the usage of individual responsibility became successful. As genocide was not a crime until after Nuremberg, breaches of crime against humanity managed to convict individuals instead. The essential idea was that the entire WWII was a result of the actions of few individuals. That mindset sheds lights on the possibility that even if a state has formally committed a wrongful conduct, it is still individuals that are actually committing the conducts and as a result must become liable for their actions. With the drafting of the Convention afterwards, the ambition was to forever regulate individual responsibility on an international level for the mass killings of others after Nuremberg.\textsuperscript{132}

It was not until fifty years later that individual responsibility for genocide would resurface again. The concept of individual responsibility had evolved and could now include much more people in the crime. Within the jurisdiction of the ICTY and ICTR, which drew resemblance from the Convention, individuals could be indicted for their planning, instigating, ordering, committing, aiding and abetting and lastly superior responsibility for genocide. The ICTY also adopted the doctrine of Joint Criminal Enterprises, where individuals who shared a common ambition for committing a crime, would each be held responsible for the outcome of the crime. This method allowed the tribunals some ease in cases where several individuals were involved in the same crime, which assured that

\textsuperscript{132} See section 2.3.
everyone involved eventually would become convicted. The ICTY and ICTR were much like the Nuremberg Tribunal as they also targeted individuals and not states. Certainly, if the Nuremberg Tribunal had not been established then neither the ICTY nor the ICTR would have existed or been able to draft successful Statutes that targeted individuals for genocide.

Even after the ICTY and the ICTR, the modern world has continued the example of Nuremberg and also tried individuals for war crimes. In 2011, two Cambodian state officials were indicted for genocide and other war crimes after the conflicts forty years prior in the country.\textsuperscript{133} Even in 2008, the International Criminal Court issued a warrant for arrest of the president of Sudan for inter alia being responsible for genocide in Darfur.\textsuperscript{134} These events show that the responsibility for genocide has evolved from initially being a matter of the state to later becoming a matter of individuals. The allocation of individual responsibility for genocide has changed from individuals being directly responsible to becoming indirectly responsible, especially after the provisions in the Statutes where six different types of responsibilities were introduced.\textsuperscript{135} Furthermore, individual responsibility has developed from being the exception of the standard rule at the time of Nuremberg, to now becoming customary in international law.

Today, the international community has not only duty to keep the peace and security in the world, but also to bring justice to victims of war by indicting violators of international law. States in turn have a responsibility towards the international community to withhold the peace in the world. For an act to become internationally wrongful, it had to be in breach of an obligation that the State had agreed to.\textsuperscript{136} As genocide was both erga omnes and jus cogens character, breaches of the Convention became internationally wrongful and invoked the state’s responsibility. At present, state responsibility for genocide has been applied twice by the ICJ. In Bosnia v. Serbia, the ICJ found Serbia not responsible for genocide but guilty for not doing enough to prevent or punish individuals who had committed genocide. In Croatia v. Serbia, the ICJ found neither of the parties to be able to prove that genocide had occurred in order to try their respective responsibilities towards it. As a result, the Bosnia v.

\textsuperscript{133} The secretary of State, Samphan and Prime minister, Chea was indicted for inter alia genocide in 2010, Extraordinary Chambers in the Courts of Cambodia, \textit{Case 00/02}, <https://www.eccc.gov.kh/en/case/topic/1298> Checked April 23 2018.
\textsuperscript{134} The Prosecutor v. Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), I.C.C., Case information Sheet.
\textsuperscript{135} See section 4.13 and 4.2.1.
\textsuperscript{136} See section 2.2.3.
Serbia case is the only case that provides some legal depth to state responsibility for genocide. However, the Croatia v. Serbia case highlighted the limits of the Convention, as both the actus reus and dolus specialis must be fulfilled for the conduct to be classified as genocide. Intent must be proven in order for the responsibility to be made possible. Although genocide did occur in Rwanda, the state was never brought to trial for its responsibilities during the genocide. One reason could be that the genocide could have been interpreted as an internal crisis within the state’s own territory and did not involve other states. Within the jurisdiction of ICJ, there had to be a request of one of the parties and as the genocide did not involve another State and Rwanda did not make a request, Rwanda’s responsibility was not assessed.137

The role of state organs operating directly under the state was also a topic which was addressed in one of the genocide cases. In Bosnia v. Serbia, it was stated that the genocide was performed by the RS militia that was a state organ to a self-proclaimed state within the Serbian territory. A direct link from the genocide to Serbia’s government was however hard to prove. When a state organ within a state’s territory has breached the Convention, the state could claim that it had no control over the state organ or the group within the territory, but at the same time it have to prove that the state really did not have any possibilities of preventing or stopping this state organ. This was Serbia’s defense when it came to RS and its militia. However, it leaves the question with how many warning signs can be presented until a state should start to act? It is easy to dodge responsibility and shift focus elsewhere, but it cannot be avoided that states have a vast responsibility over everything that occurs within their own territory, which can be anything from a direct state organ or indirect organ acting within the state. A state can by consequence not avoid responsibility for the group or the armies that perform genocide. If responsibility is being placed on some other entity than the state, it should be beyond reasonable doubt that the state could not avoid genocide from happening by having taken all measures possible to prevent it. Although much cannot be brought from this legal field yet, the allocation of state responsibility for genocide has been carried out in careful thought to resonate with the Convention and its criteria for genocide.

Whether an individual or a state answers to genocide is difficult to answer, as the answer is intertwined with both options. A state has not been held responsible for committing

137 See section 6.1.
genocide as to date, but been the subject of not preventing or punishing genocide. Furthermore, when a state’s responsibility was questioned focus had been on the actions of certain individuals where their actions have been regarded as equal to acting on behalf of the state, as the Articles mentioned.\textsuperscript{138} Therefore, even a soldier who is under the command of a high official can be seeing committing the act as on behalf of the state that he represents. When targeting the individual’s responsibility, people are indicted for their respective roles in the crime. Even though the majority of the convicted individuals where those who represented the state via their political or military positions, both the ICTY and ICTR managed to include individuals who did not hold such high positions. For instance, the Rwandan priest who had shown where Tutsis were hiding, played a significant role in seeing genocide coming to fruition, same as the individuals who drove the Bosnian Muslims in buses to Srebrenica. The ICTR case of the radio broadcasters is another example of such an indirect connection and how merely the encouragement of an international crime can result in responsibility. This adaptation of the Convention is positive for continuous development of international criminal justice. The tribunals have therefore succeeded in bringing forth the notion that each individual can been responsible for their own actions and for the ultimate outcome of such actions.

The difference between the Nuremberg, ICTY, and ICTR with the ICJ is that the former tribunals targeted one individual's actions whilst the ICJ focused upon a number of individuals’ collective actions as a state. This because state responsibility does not encompass the responsibility of only one person, but rather the conducts of key individuals who are considered liable for the outcome of certain conducts. One’s own actions are evaluated in a tribunal similar to the ICTY, while it is the state’s actions towards the international community that is evaluated in a court similar to the ICJ. In Croatia v. Serbia, the ICJ stressed that convicted individuals in one tribunal does not draw out a prerequisite for the state of those individuals to also be responsible for the crime as well.\textsuperscript{139} Therefore, the allocation of responsibility for genocide has developed in the past century from only targeting states, to now have the option of both holding individuals and states responsible. The similarity between the allocations of responsibility is that in both instances individuals are convicted, while the actual focus on responsibility is the difference between them. The Convention does not mention or suggest any penalties or sanctions as result of committing

\textsuperscript{138} See section 2.2.3
\textsuperscript{139} See section 5.3.
genocide, as this have been left for the courts to decide. A state cannot be convicted for life imprisonment while an individual can, which is why individuals and states need corresponding courts respectively.

Consequently in practice, individuals are responsible for genocide, however the allocation of responsibility fundamentally depends on which legal forum that is appointed the matter. Forums like the ICTY and ICTR are rarely installed since they require many efforts from the international community to draft and adopt resolutions that all member states have to agree upon, which consumes much time and financial efforts. National legal forums may not have the same issues, but their instalment and realization offer other difficulties as well. Regardless of whether the individual or the state is made responsible, history has shown that both options are possible for preventing and punishing genocide.
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