

The UN Genocide
Convention—
A Commentary

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STATE RESPONSIBILITY FOR COMPLICITY IN GENOCIDE

Paolo Palchetti

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1. Introduction

In 1978, the then Special Rapporteur of the International Law Commission (ILC) on the topic of state responsibility, Roberto Ago, proposed the adoption of a draft article entitled 'Complicity of a State in the internationally wrongful act of another State'.¹ This draft article dealt with the case in which a state aided and assisted another state in the commission of an internationally wrongful act; it provided that in such circumstances the fact of aiding and assisting constitutes in itself an internationally wrongful act for which the assisting state bears responsibility. Among the various cases of 'complicity', Ago also referred to the situation where assistance takes the form of provision of weapons to aid another state to commit genocide. In respect to such cases, Ago incidentally noted that 'Article III of the Convention on the Prevention and Punishment of the Crime of Genocide... includes "complicity in genocide" in the list of

¹ For the text of this provision, see R. Ago, 'Seventh Report on State Responsibility', *Yearbook of the International Law Commission* (1978), Vol. II, Part One, 31, at 60.

acts punishable under the Convention'; he added: 'It is not specified, however, whether complicity by another State in the commission of genocide by a particular government does or does not come within the terms of this provision.'² Thus, while Ago left open the question as to the exact scope of the obligation imposed on states by Article III(e) of the Genocide Convention, he found that a link might exist between the case of complicity under Article III(e) and the case of a state aiding and assisting another state in the commission of wrongful acts.

The draft article proposed by Ago was adopted on first reading by the ILC with minor modifications;³ after further changes made on second reading, it has become Article 16 of the ILC Articles on State Responsibility.⁴ Among the changes to Ago's original text, one concerned the use of the term 'complicity'. Several members of the ILC noted that it was not advisable for the ILC to use a term borrowed from internal criminal law.⁵ The ILC decided to discard the term 'complicity', finding that its use could have been a 'source of ambiguity or misinterpretation'.⁶

This brief excursus on the work of the ILC may help to clarify the possible meaning of the notion of 'complicity' when such a notion is used in relation to the conduct of a state. It is not clear, however, whether this may also apply to the notion of 'complicity in genocide' which is provided under Article III(e) of the 1948 Genocide Convention. When interpreting such a notion, account must be taken of the particular context in which this notion is used.

The Genocide Convention does not define the notion of 'complicity'. Article III simply provides that '[t]he following acts shall be punishable: ... (e) Complicity in genocide'. When interpreting this provision, one has to take into account the fact that, as clarified by the International Court of Justice (hereinafter referred to as the 'ICJ' or 'the Court'), Article III refers to both the criminal responsibility of individuals and the international responsibility

² *Ibid.*, at 58, note 114.

³ See Article 27 of the Draft Articles on State Responsibility, *Yearbook of the International Law Commission* (1978), Vol. II, Part Two, at 99.

⁴ Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 155.

⁵ See, for instance, the views held by Reuter, Ushakov and Sahović, *Yearbook of the International Law Commission* (1978), Vol. I, respectively at 229, 233 and 234.

⁶ Report of the Chairman of the ILC's Drafting Committee, *ibid.*, at 269. It can be observed that in legal literature the word 'complicity' has continued to be used to refer to the case of a state aiding and assisting another in the commission of an internationally wrongful act. See J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57 *British Yearbook of Int'l Law* (1986) 77; B. Graefrath, 'Complicity in the Law of International Responsibility', 29 *Revue belge de droit international* (1996) 370.

of states.⁷ As the same notion covers two distinct situations, different views might be taken as to its meaning depending on which element one regards as prevailing over the other. According to one view, emphasis may be placed on the fact that complicity is a notion which pertains primarily to criminal law and that the 1948 Genocide Convention is an instrument whose main aim is to criminalize certain conducts of individuals. Taking this into account, it may be argued that, even when referred to the conduct of a state, the notion of complicity should necessarily be interpreted in the light of the meaning given to this notion under the general principles of international criminal law.⁸ According to another view, following the suggestion made by Ago in 1978, in such a case the notion of complicity should be construed taking into account the general rules on state responsibility, and in particular the one codified in Article 16 of the 2001 ILC's Articles on State Responsibility. In this respect, it does not seem to be relevant that the term 'complicity' is not used in the current Articles on State Responsibility, the more so since, as noted above, it was essentially that notion that the ILC members had in mind when first drafting Article 16.⁹

In its judgment of 26 February 2007 in the *Bosnian Genocide* case, the ICJ took an intermediate position on the interpretative question raised by Article III(e). The Court paid tribute to the fact that the Convention primarily deals with the criminalization of the conduct of individuals. It recognized that 'the concepts used in paragraphs (b) to (e) of Article III, and particularly that of "complicity", refer to well known categories of criminal law'.¹⁰ When interpreting Article III(e), it went so far as to take into account the meaning that is given to such a notion 'in certain national systems of criminal law'—an unusual step for a court which, unlike international criminal tribunals, only very rarely has accepted to have recourse to comparative law in order to interpret concepts or identify general principles.¹¹ Despite these references to

⁷ ICJ, Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007 (hereinafter '2007 Judgment'), ICJ Reports (2007), § 167. The author of this contribution wishes to acknowledge that he acted as counsel for Bosnia in the proceedings.

⁸ For this view, see M. Milanović, 'State Responsibility for Genocide', 17 *European Journal of Int'l Law* (2006) 553, at 566.

⁹ As remarked by Ago, 'the Commission could try to avoid the use of the term, provided that the situation referred to was made perfectly clear, and that it was realized that what was in issue was in fact complicity'. *Yearbook of the International Law Commission* (1978), Vol. I, at 241.

¹⁰ 2007 Judgment, *supra* note 7, § 167.

¹¹ *Ibid.*, § 419. On the reluctance of the Court to engage itself in a comparative analysis in order to determine general principles of law, see A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice*.

criminal law, however, the ICJ mainly relied on Article 16 of the ILC's Articles on State Responsibility to determine the content of the notion of complicity, as it found that there was

no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (e), of the Convention and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16.¹²

The Court's judgment has been criticized for failing to adopt a rigorous criminal law approach for determining the elements required for a state to be regarded as responsible for 'complicity in genocide'.¹³ In principle, however, the fact that Article III(e) uses the same notion to refer to both the criminal responsibility of individuals and state responsibility does not mean that the elements for complicity have necessarily to be found in the law relevant to the international criminal responsibility of individuals. The notion of complicity may have distinct meanings depending on the context in which it is used. Since the law of international responsibility of states provides for a category which is similar to that of complicity in criminal law, it seems reasonable that, when the notion of complicity is used to refer to the conduct of states as opposed to that of individuals, reference should be made primarily to the pertinent rules on state responsibility instead of focusing on the rules relating to the criminal responsibility of individuals. In this respect, despite some differences that might exist between these two concepts, the use of Article 16 of the ILC's Articles as guidance for determining the elements required for state complicity in genocide appears to be justified.

2. The Scope of the Notion of Complicity under Article III(e) of the Genocide Convention

Article III(e) of the Genocide Convention and Article 16 of the ILC's Articles on State Responsibility do not entirely overlap. Most notably, these two provisions differ in that, while Article 16 covers the case of a state aiding and

A Commentary (Oxford: Oxford University Press, 2006) 677, at 769–70 (§§ 258–259); G. Gaja, 'General Principles of Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), § 16.

¹² 2007 Judgment, *supra* note 7, § 420.

¹³ A. Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', 5 *Journal of Int'l Criminal Justice* (2007) 875, at 882–7; M. Milanović, 'State Responsibility for Genocide: A Follow-Up', 18 *European Journal of Int'l Law* (2007) 669, at 680–4.

assisting another state, the duty to refrain from complicity in genocide applies independently of whether genocide is committed by another state, an international organization or a group of individuals. Apart from this difference, which relates to the scope, so to say, *ratione personae* of each respective provision, it is less clear whether, for the purposes of state responsibility, the notion of 'complicity in genocide' covers exactly the same situations which fall within the scope of Article 16 of the ILC's Articles.

In the 2007 judgment in the *Bosnian Genocide* case, the ICJ observed that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide' and therefore that 'complicity results from commission'.¹⁴ If one accepts the Court's view on this point, then in this respect a difference could be found to exist between 'aiding and assisting' and 'complicity in genocide'. Article 16 of the ILC's Articles does not require that aid or assistance always consists of positive acts;¹⁵ the only requirement is that the conduct of the assisting state materially contributes to the wrongful act of the assisted state. Under certain circumstances, aid or assistance may also result from omission. As it has been recognized by the ILC, if a state deliberately allows its territory to be used by another state for committing a wrongful act against a third state, the conduct of the territorial state may certainly amount to a form of aid or assistance falling under Article 16 of the Articles on State Responsibility.¹⁶ It is difficult to see why, under similar circumstances, the conduct of a state which deliberately tolerates the presence on its territory of troops sent by another state for the commission of genocide could not be characterized as complicity under Article III(e). In fact, rather than admitting the existence of a discrepancy, it seems more correct to say

¹⁴ 2007 Judgment, *supra* note 7, § 432.

¹⁵ This point was made clear during the first reading of the Draft Articles on State Responsibility. Referring to the provision which has now become Article 16, the chairman of the ILC's Drafting Committee, Schwebel, observed that, under the text adopted by the Drafting Committee, 'the giving of such aid or assistance would be "wrongful" even if, under other conditions, the actions or omissions in question would be lawful under international law'. *Yearbook of the International Law Commission* (1978), Vol. I, at 270. On this issue, see M.L. Padelletti, *Pluralità di Stati nel fatto illecito internazionale* (Milano: Giuffrè, 1990), at 74.

¹⁶ For this example, see the ILC's commentary to Article 16. Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 157. See also the cases mentioned in the commentary to draft Article 12 adopted on first reading, which also contains a reference to the possibility to apply Article III(e) of the 1948 Genocide Convention to this type of case. *Yearbook of the International Law Commission* (1996), Vol. II, Part Two, at 65. For interesting considerations on this point, see P. Weckel, 'L'arrêt sur le genocide: le souffle de l'avis de 1951 n'a pas transporté la Cour', 111 *Revue générale de droit international public* (2007) 305, at 327.

that, contrary to the ICJ's view, complicity in genocide may also result from omission.¹⁷

An element which is required for both 'aid and assistance' and 'complicity in genocide' is the existence of a link between the act of assistance and the commission of the wrongful act. The text of Article 16 of the ILC's Articles does not explicitly mention this requirement. The ILC's commentary clarifies that aid or assistance, while not necessarily essential to the performance of the internationally wrongful act, should have at least 'contributed significantly to that act'.¹⁸ In the 2007 judgment in the *Bosnian Genocide* case, the ICJ probably had this requirement in mind when, while dealing with the question of the responsibility of Serbia for complicity in genocide, it took care to stress that 'the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as result of the general policy of aid and assistance... ' pursued by Serbia.¹⁹

Arguably, in this respect the notion of complicity under Article III(e) of the Genocide Convention overlaps with that of aid or assistance, in that the conduct of a state can certainly be qualified as complicity if that state aided, or assisted in, the commission of genocide within the meaning of Article 16 of the ILC's Articles. However, it is not clear whether that notion also applies to situations which are *excluded* from the scope of application of Article 16 of the ILC's Articles. When determining the meaning of 'complicity in genocide', the ICJ justified its reference to Article 16 on the assertion that 'there is no doubt that "complicity" ... *includes* the provision of means to enable or facilitate the commission of the crime'.²⁰ The use of the word 'includes' may suggest that, in the Court's view, the notion of complicity is not restricted to the case in which a state aids and assists another state in the commission of genocide.

While the Court did not elaborate on this issue, the main question arising in this respect is whether complicity under Article III(e) also covers the case where a state has incited, instructed or ordered another subject to commit genocide. To answer this question, one has to draw a distinction between different situations. In the first place, as pointed out by the Court in the 2007 judgment in the *Bosnian Genocide* case, if a state instructs or orders a group of individuals to perpetrate a genocide and the group commits the act in question, that state will be responsible for genocide. Under the general rules on

¹⁷ See Milanović, *supra* note 13, at 687; Cassese, *supra* note 13, at 884.

¹⁸ Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 156.

¹⁹ 2007 Judgment, *supra* note 7, § 422.

²⁰ *Ibid.*, § 419. The emphasis is added.

attribution to a state of an internationally wrongful act, in these circumstances the act of the group of individuals will be attributed to the state.²¹ Similarly, when incitement to commit genocide involves 'direction and control' or 'coercion' over the conduct of another state, within the meaning of, respectively, Articles 17 and 18 of the Articles on State Responsibility, the inciting state will be responsible for the genocide committed by the other state, and not for complicity in genocide.²²

Apart from these cases, the law of international responsibility does not include mere incitement among the situations which may give rise to the responsibility of a state for the acts of another.²³ Under certain circumstances, incitement may fall to be considered under Article III(c), which imposes on states parties the duty to refrain from '[d]irect and public incitement to commit genocide'. To the extent that incitement is not covered by Article III(c), as it might be the case, for instance, when incitement is not public but private, it may be asked whether it could fall within the scope of Article III (e). While a view to that effect would not find support in the general rules on state responsibility, a broad interpretation of the notion of complicity, which includes within the scope of Article III(e) the case where incitement substantially contributed to the decision of another state to commit genocide, could be justified having regard to the object and purpose of the Genocide Convention.

A question which was evoked at one stage of the long proceedings in the *Bosnian Genocide* case is whether a state can violate its obligation to refrain from complicity in genocide by taking part in the decision-making process of an international organization of which it is a member.²⁴ Reference may be made, for instance, to the case in which a state, acting as member of an organ of an international organization, sponsored and actively supported the adoption

²¹ The criterion of attribution referred to by the Court is that provided by Article 8 of the ILC's Articles on State Responsibility. See 2007 Judgment, *supra* note 7, § 419.

²² See also Articles 26 and 27 of the Draft Articles on the Responsibility of International Organizations, adopted on first reading by the ILC in 2006. Report of the International Law Commission on the Work of its Fifty-eighth Session, UN GAOR, 58th Sess., Supp. No. 10, UN Doc. A/61/10, at 261–2. On state responsibility for incitement to commit genocide, see Chapter 10 in this volume.

²³ According to the ILC, '[t]he incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction or control on the part of the inciting State'. Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 154.

²⁴ The reference is to the fact that in 1993 Bosnia considered the possibility to institute proceedings against the UK before the ICJ for the violation of Article III(e) of the Genocide Convention, claiming that, by supporting the continuation of the arms embargo decided by the UN Security Council, the UK had to be regarded as responsible for complicity in genocide. See J. Quigley, 'State Responsibility for Ethnic Cleansing', 32 *University of California Davis Law Review* (1999) 341, at 376.

of a measure which provides that the organization must supply arms to a group of individuals having territorial control over a certain area. If that state was aware that the group was about to commit genocide, it may be asked whether it could be considered to be responsible for complicity in genocide. This possibility could not be ruled out. While, in principle, a member state does not incur responsibility for the internationally wrongful acts of the organization, that state could be held responsible for the conduct that it has taken when acting within the framework of the organization.²⁵ In this respect, the possibility to hold the member state responsible for complicity in genocide, whether or not the international organization also incurs responsibility, should be assessed in the light of the factual circumstances of each case, and in particular taking into account the influence that that state was actually capable to exert on the activity of the organization.

3. The Subjective Requirement for State Complicity in Genocide

The fact that a state aids or assists a group of individuals, another state or an international organization, which is about to commit a genocide, does not necessarily imply that that state has to be regarded as responsible for complicity in genocide. An indispensable requirement for state complicity in genocide is that aid or assistance be given for the commission of the genocide. It is not clear, however, whether Article III (e) requires that the assisting state shares the intention of the principal perpetrator or whether instead it only requires that that state has knowledge of the fact that the assisted subject will use the aid or assistance to commit genocide.

This question was given considerable attention by the parties during the proceedings in the *Bosnian Genocide* case. In particular, one of the parties held the view that there would be a difference in this respect between Article III(e) of the Genocide Convention and Article 16 of the ILC's Articles on State Responsibility: while complicity in genocide would require that the assisting state shares the genocidal intent of the principal perpetrator, the knowledge of the specific intent of the principal perpetrator would suffice for a state to be responsible for aiding and assisting another state in the commission of

²⁵ For the view that a state may commit an internationally wrongful act when acting within an organ of an international organization, see G. Gaja, *Fourth Report on Responsibility of International Organizations*, UN Doc. A/CN.4/564/Add.1, at 5.

genocide under Article 16.²⁶ The Court appears to have discarded this view, as it found, in general terms, that there is no distinction of substance between complicity in genocide and aid and assistance under Article 16.²⁷ This general statement of the Court seems to imply that, in Court's view, the subjective element for 'aiding and assisting' is the same as for complicity in genocide. The Court, however, did not shed light on the problem of whether intent or knowledge is required for complicity. Starting from the premise that responsibility for complicity in genocide presupposes, at the least, that the accomplice is aware of the specific intent of the principal perpetrator, the Court did not find it necessary to establish whether the accomplice also has to share the specific intent of the principal perpetrator, as it found that, with regard to the events in Srebrenica, it was not proved that Serbia had knowledge that the aid supplied would be used to commit genocide.²⁸

Since Article III(e) does not define the subjective element required for a state to be regarded as responsible for complicity in genocide, it seems appropriate to look for guidance in Article 16 of the Articles on State Responsibility. In this respect, it can be observed that, while the text of Article 16 requires that the assisting state acts 'with knowledge of the circumstances of the internationally wrongful act', the ILC's commentary appears to set up a higher threshold to transform assistance into an international wrongful act. It requires that the state 'intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.²⁹ While the ILC's commentary is not entirely clear on this issue, it seems, however, that, by requiring an 'intent to facilitate', the commentary simply means that the act of aiding and assisting must be a deliberate act. In other words, the assisting state must have the general intention to aid and assist the wrongdoing state even if it knows that, with its aid, it will facilitate the commission of the wrongful act. This does not mean that, for the assisting state to incur responsibility, that state must desire that the wrongful act be committed and that it acted with that specific intention.³⁰ The assisting state may be indifferent to the consequences of its

²⁶ See the view held by the counsel for Bosnia, Pellet. Verbatim Record, public sitting held on Tuesday 18 April 2006, CR 2006/31, at 39–44.

²⁷ 2007 Judgment, *supra* note 7, § 151.

²⁸ *Ibid.*, §§ 422–3.

²⁹ Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 156.

³⁰ For this view, see Quigley, *supra* note 6, at 108–17; Padelletti, *supra* note 15, at 226–7. *Contra* Graefrath, *supra* note 6, at 375. On the relevance of the distinction between general intent and specific intent in relation to complicity, see Milanović, *supra* note 13, at 683. For a broad interpretation

conduct. Nowhere in the commentary is reference made to this stringent requirement. Thus, if one relies on the analogies with Article 16 in order to determine the elements required for complicity in genocide, then one may find in the work of the ILC clear support of the idea that complicity of a state in genocide does not presuppose that the assisting state shares the genocidal intent of the principal perpetrator.

Reference to Article 16 and to the work of the ILC may also help to clarify another aspect concerning the subjective requirement for complicity under Article III (e). In the judgment in the *Bosnian Genocide* case, the ICJ drew a distinction between complicity in genocide and violation of the obligation to prevent genocide, finding that while complicity presupposes, at the least, that the accomplice must have given support to the perpetration of genocide 'with full knowledge of the fact', for a state to incur responsibility for breach of the obligation to prevent genocide 'it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed'.³¹ Whatever the merits of this distinction, what is of interest here is the Court's finding that it is not sufficient for complicity in genocide that the accomplice knew or must have known that its assistance could eventually be used for the commission of genocide. It must be remarked that this holding finds support in the work of the ILC on Article 16. In its commentary on the draft article adopted on first reading, the ILC clearly stated that 'it is not sufficient that the State providing aid or assistance should be aware of the eventual possibility' that such aid or assistance is used by the recipient state for unlawful purposes.³² This seems to imply that the assisting state incurs responsibility only if it has full knowledge that its assistance will be used to commit a wrongful act.³³

of the requirement for 'aiding and assisting', see H. Ascensio, 'La responsabilité selon la Cour internationale de Justice dans l'affaire du génocide bosniaque', 111 *Revue générale de droit international public* (2007) 285, at 298.

³¹ 2007 Judgment, *supra* note 7, § 432. The ICJ's view on this point has been criticized by Cassese, *supra* note 13, at 883, on the ground that the Court failed to rely on the criminal law requirements for complicity as they have been set out by international criminal courts. For similar criticism, see Milanović, *supra* note 13, at 683.

³² See the ILC's commentary to draft article adopted on first reading, *Yearbook of the International Law Commission* (1996), Vol. II, Part Two, at 195. See also the view held on this point by J. Crawford, *Second Report on State responsibility*, UN Doc A/CN.4/498/Add.1, at 10.

³³ See Quigley, *supra* note 6, at 112.

4. The Temporal Extension of the Duty To Refrain from Complicity in Genocide and the Obligations Incumbent on the Assisting State in Order to Avert Responsibility

As noted above, two requirements have to be met before a state can be held to have violated the duty to refrain from complicity in genocide. In the first place, a state must supply aid and assistance to the perpetrators of the genocide; the second requirement is that the assisting state must have acted in full knowledge of the facts. A breach of the obligation imposed by Article III(e) only occurs when both these requirements have been satisfied. Thus, a state incurs responsibility for complicity in genocide only from the moment it supplies aid to the perpetrators in full knowledge that the aid supplied will be used to commit genocide.

A consequence of this state of affairs is that, if the assisting state wants to avoid responsibility for complicity in genocide, that state, as soon as it becomes fully aware that genocide is about to take place or is under way, must suspend or terminate all forms of aid or assistance that may be used for the commission of the genocide. It would not be enough for that state simply to protest or object to the conduct of the assisted state or group of individuals.³⁴ To the extent that the duty to refrain from complicity in genocide implies an obligation on states to terminate the aid or assistance given to the perpetrators of genocide, it can be said that Article III(e) complements the general duty to prevent genocide imposed on states by Article I of the Genocide Convention. The main difference in this respect, apart from the fact that complicity requires full knowledge of genocidal intent of the principal perpetrator, is that while the duty to prevent genocide leaves to states a certain latitude in assessing the measures to be taken to prevent genocide, Article III(e) imposes on the states the obligation to suspend or terminate all assistance which may facilitate the commission of genocide.³⁵

When a state is bound by a treaty to provide arms or other aids to another state which is about to commit genocide, the question may arise as to whether that state incurs responsibility if it refuses to comply with its obligation. To answer this question, account must be taken of the *jus cogens* character of the

³⁴ See Quigley, *supra* note 6, at 123–4.

³⁵ Another possible difference concerns the temporal extension of the duty to prevent genocide, since it is not clear whether that duty applies also when the acts of genocide have already been committed. See A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *European Journal of Int'l Law* (2007) 669, at 704.

rule prohibiting genocide. It might be held that, when performance of an obligation leads a state to assist another state in the violation of a *jus cogens* rule, the non-performance is excused. During the second reading of the Draft Articles on State Responsibility, a rule to that effect was formulated by the Special Rapporteur, James Crawford. In particular, he proposed to include in the Draft Articles a rule providing justification for non-performance of an obligation in the case where its performance would produce, or assist in, a breach of a peremptory rule.³⁶ While the rule proposed by Crawford does not appear in the text adopted by the ILC in the 2001, it is noteworthy that the discussion within the ILC did not reveal any disagreement on the principle embodied in his proposal.³⁷ Leaving aside this possible justification for non-performance, it might also be argued that, since averting genocide amounts to an essential interest of the international community, necessity might be invoked in order to justify the failure to aid the perpetrator of the genocide.³⁸

The prohibition of genocide being a 'composite obligation' within the meaning of Article 15 of the ILC's Articles on State Responsibility, a breach of this obligation extends over the entire period during which any of the genocidal conducts provided in Article II are being committed.³⁹ During the same period, states which are fully aware that genocide is being committed are under a duty to refrain from providing any forms of aid or assistance which may be used in the perpetration of genocide. In this respect, the duty imposed on states by Article III(e) parallels the duty which is incumbent on states under Article 41(2) of the Articles on State Responsibility. Pursuant to that provision, which applies more generally to cases of serious breaches of an obligation

³⁶ See draft Article 29 *bis*, which provided that '[t]he wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law'. In Crawford's view, this provision would have covered situations such as the case 'where weapons promised to be provided under an arms supply agreement were to be used to commit genocide or crimes against humanity'. Crawford, *Second Report on State responsibility*, UN Doc A/CN.4/498/Add. 2, at 43.

³⁷ Draft Article 29 *bis* was reformulated in the negative and has become Article 26 of the Articles on State Responsibility, which provides that '[n]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law'.

³⁸ The ILC commentary to Art. 25 of the Articles on State Responsibility clarifies that the 'essential interest' whose protection may justify a plea of necessity 'extends to particular interests of the State and its people, as well as of the international community'. Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 202.

³⁹ On the qualification of genocide as a composite act, see the ILC's commentary to Article 15. Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/56/10, at 146-7.

arising under a peremptory norm of general international law, states are prohibited from rendering aid or assistance in maintaining the situation created by a serious breach of obligations of this nature.

5. Concluding Remarks

By imposing on states a duty not to be an accomplice (*rectius*: aid or assist) in genocide, Article III(e) of the Genocide Convention potentially assumes great importance as a means for deterring the commission of acts of genocide. The prospect of being held complicit may induce states to distance themselves from situations involving the possible commission of genocide, thereby bringing pressure on the perpetrator to stop ongoing acts. This becomes particularly important in the case where the possible perpetrators of acts of genocide are private individuals or groups of private individuals. Under the current rules of attribution—and particularly under those identified by the ICJ in the judgment in the *Bosnian Genocide* case—the possibility to hold a state responsible for the acts of individuals which do not have the status of organs of that state under its internal law is subjected to strict conditions whose existence, in most cases, would be extremely difficult to prove.⁴⁰ In this kind of situation, there is a high risk that a state can escape responsibility despite its involvement in the activity of the group. By directly sanctioning the fact of aiding or assisting those individuals, Article III(e) imposes on the assisting state to bear responsibility for its contribution to the commission of the genocide.

In practice, however, the scope of responsibility for complicity in genocide is limited by the requirement that the assisting state be fully aware that the supply of aid or assistance will facilitate the commission of genocide. This requirement sets up a high threshold for qualifying a conduct as complicity in genocide. The consequence is that in most cases the conduct of states having links with the perpetrators of genocide will be considered under the obligation to prevent genocide rather than under Article III(e).

⁴⁰ The ICJ applied two distinct tests, which provide that, for the conduct of individuals to be attributed to the state, it has to be demonstrated, respectively, that the individuals acted in 'complete dependence' on the state or that they acted in accordance with that state's instructions or under its 'effective control'. See 2007 Judgment, *supra* note 7, §§ 385–407.

PART VI

ENFORCING THE
CONVENTION THROUGH
THE UNITED NATIONS

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