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On What Grounds can a State be held Responsible and Liable for Genocide?

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ABSTRACT

The International Court of Justice (ICJ) gave a comprehensive meaning to the commitment to avert genocide, which is established in Article I of the Genocide Convention, in the Genocide case. According to the Court, this commitment is operational and Non-Preambular in comparison to the other responsibilities enshrined in the Convention. Furthermore, it would imply that nations have a responsibility to refrain from committing genocide. This latter conclusion is less than persuasive since it contradicts the Convention's historic roots and arises from an understanding that, rather than explaining the meaning of a treaty provision, it infers a new responsibility from it. According to the study, violations of the same primary norm do not establish criminal culpability of individuals or state liability for genocide under international law. The alternative perspective is neither supported by state practice nor international case law: although genocide can be committed irrespective of the presence of a state genocidal policy, the state's international accountability necessitates the presence of such a policy. There is also no need to demonstrate that the state as a whole, or one or several of its officials, had genocidal intentions in the criminal sense for the state's inter-national duty to develop. The Court's decision is founded on the idea that a state's global accountability for genocide implies the responsibility of an individual working on the state's behalf. This method is flawed because, in a criminal matter, the presumption of innocent empowers criminal courts to convince themselves that an individual committed a crime. The Court may have limited itself to interpreting Article I's commitment to avoid and prosecute genocide as having an autonomous element and finding, as it did, that Serbia had breached both of them. It didn't have to embark on a design of the Convention that was significantly hampered by a misunderstanding of the distinction between genocide as an internationally unlawful act of state and genocide as a crime with individual criminal responsibility.

Keywords: *Criminal Culpability of Individuals, Genocide Convention, International Court of Justice, Responsibility to refrain, State Liability.*

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I. WHY THE GENOCIDE CONVENTION DOES NOT OBLIGE STATES NOT TO COMMIT GENOCIDE

Among the numerous critical topics addressed by the International Court of Justice within the decision in the Genocide case,² the debate of which is if the 1948 Genocide Convention as well obligates nations to not to perpetrate genocide: it is an interesting dilemma from the standpoint of the connection between state responsibility and criminal responsibility of people under worldwide legislation.

None now would attempt to dispute that a norm in customary law prohibits nations from conducting genocide. It is widely assumed that this regulation does not merely exist, rather also falls under the purview of *jus cogens*.³ It is also said that violating it has far-reaching effects that go beyond those that would ordinarily result from regular wrongdoing.⁴ Consequently, the Court was forced to adjudicate on Serbia's asserted culpability over genocide underneath the 1948 Genocide Convention rather than customary law, so this judicial limitation significantly muddled matters. Furthermore, one may contend, as Serbia did,⁵ that the Convention somehow doesn't establish on signatory states the commitment not to undertake genocide, rather than limits itself to establishing punitive responsibilities for contracting nations. In other utterances/language, one might argue that perhaps the Genocide Convention is simply an agreement instituting court's cooperation between contracting governments must guarantee the protection and punitive measures of this horrendous crime through all the implementation of relevant statutory provisions, the practice of criminal matters, and the interdiction of accused persons of genocide.

The Court rejected this contention by using a broad reading of Article I of the Convention, which specifically says that parties to a contract must "avoid and condemn genocide." furthermore, it ruled that Article I does have an operative and non-preambular nature, i.e., 'it isn't to be understood only as a prelude to subsequent explicit allusions to law, indictment, and extradition,'⁶ rather 'generates liabilities different to those which exist in following Articles.'⁷

² Subašić-Galijatović, S., & Izmirlija, M. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. *LXI*, 96.

³ Liwanga, R. C., & Turner, C. (2021). Demystifying the Legitimacy of International Tribunals: Case Study of the International Court of Justice and Its Decisions on Armed Activities in the Congo. *Emory Int'l L. Rev.*, 35, 413.

⁴ Paparinskis, M. (2020). The Once and Future Law of State Responsibility. *American Journal of International Law*, 114(4), 618-626.

⁵ Property, C. WORK IN 2004-2005 prepared by the Registry of the Court.

⁶ Milaninia, N. (2018). Understanding Serious Bodily or Mental Harm as an Act of Genocide. *Vand. J. Transnat'l L.*, 51, 1381.

⁷ Hoffmann, T. (2020). The crime of genocide in its (nearly) infinite domestic variety. *The Concept of Genocide in International Criminal Law-Developments after Lemkin* (Routledge, 67-97).

It further ruled that, while Article I doesn't really '*expressis verbis* compel Governments to abstain from oneself committing crimes against humanity,' it has 'the impact... of prohibiting Governments from voluntarily murdering people.'⁸ This seems to be primarily because, even as Court stated, "the commitment to avoid genocide inherently includes the illegality of genocide conduct."⁹ As per the Court,

*it would indeed be contradictory if governments were obligated to protect human rights by individuals over those they have some influence but not prohibited from committing those very acts by their organ systems or individuals over those they have these effective hold that one's action is consistent with the Law involved under international law.*¹⁰

To summarise, the Genocide Convention, according to the Court, could perhaps necessarily lead both to global accountability of jurisdictions and criminal responsibility of individual citizens for extermination; that's also true given the concept that disparity of obligation is and persists being a "steady component of international law."¹¹

The Court's rationale doesn't appear convincing on two primary bases: the first is related to the early history of the Genocide Convention; the second is practical and primarily concerns the techniques and boundaries of international treaties. I'll go through these 2 (two) given angles briefly in turn.

(A) The Nuremberg Legacy and the Genocide Convention

The Genocide Convention has been conscripted in the immediate wake of the Nuremberg prosecution to offer body and blood to the Foreign Military Commission's well-known maxim that "offenses against international humanitarian law are perpetrated by men, not through different levels of abstraction, but instead just by penalizing persons who commit heinous acts can the safeguards of international humanitarian law be implemented."¹²

Consequently, for the very first point in history, prominent state officials who perpetrated horrendous acts on behalf of or even for the security of the province were tried in court and made responsible, irrespective of whether individuals engaged in their official position or status

⁸ Tsilonis, V. (2019). The Crime of Genocide and the International Criminal Court's Jurisdiction. In *The Jurisdiction of the International Criminal Court* (pp. 75-102). Springer, Cham.

⁹ Lingaas, C. (2018). The 'Contextual Elements' of the Crime of Genocide.

¹⁰ Schiffbauer, B. (2018). The duty to prevent genocide under international law: naming and shaming as a measure of prevention. *Genocide Studies and Prevention: An International Journal*, 12(3), 11.

¹¹ Leme, R. (2018). Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections. *Am. U. Int'l L. Rev.*, 34, 89.

¹² Sajjad, T. (2020, April). In Search of Imperfect Justice: Genocidal Rape and the Legacy of Nuremberg and Tokyo. In *The Nuremberg War Crimes Trial and its Policy Consequences Today* (pp. 193-238). Nomos Verlagsgesellschaft mbH & Co. KG.

as state officials.¹³ That's only logical for the writers of the Genocide Convention to adhere to the Nuremberg legacies and devise a system to secure in the hereafter the culpability of anyone and everyone who, including serving as state officials, had perpetrated such a heinous crime as genocide. They envisioned a criminal tribunal with authority regarding genocide at the global scale to combat genocide.¹⁴ In the context of national legal enforcement, these were influenced by prior agreements on illegal problems, including counterfeiting,¹⁵ slavery,¹⁶ and violence against women and girls as well as children.¹⁷ As a result, they placed on contractual parties the responsibility to prohibit genocide, as defined by the Treaty, inside their judicial systems, to penalize it until it occurs on respective territory, as well as to repatriate accused génocidaires to some other party to the contract. The uniqueness of the Genocide Convention – and that's the primary and very glaring discrepancy from preceding (and therefore most immediately following) inter-national felonious norms – is whether it directed to ensure consequence for unlawful conduct that is ordinarily and had indeed heretofore been obligated by state officials thereunder to a government policy¹⁸ (or, at least, by private people who have taken benefit of the power structure and its official policy). As a result, it is unsurprising that the Convention, taking on the role of the Nuremberg Tribunal, includes a provision defining the insignificance of genocides perpetrated by people operating in the capacity of state officials.¹⁹ As it is previously stated, that it was a novel advancement, because even before World War II, jurisdictions had conclusively proved criminal treaties just to engage with multinational private lawbreaking, including such counterfeit money or trafficking in children and women, i.e. crimes were committed by private citizens with a multinational component that jeopardizes the mutual goals of jurisdictions.

In summary, I think that within the Genocide Convention, governments are obligated to stop the genocide from being an act of unlawful act, irrespective of whether acts are perpetrated by

¹³ Adanan, A. (2021). Reflecting on the Genocide Convention in its Eighth Decade How Universal Jurisdiction Developed over Genocide. *Journal of International Criminal Justice*.

¹⁴ Kingston, J. (2021). Contemporary Lessons from Nuremberg: An Irish Perspective on Foreign Policy and International Law. *Irish Studies in International Affairs*, 32(1), 197-212.

¹⁵ Shestak, V., & Ulyanova, E. (2020, October). Impact of the Nuremberg Trials on the Establishment and Development of International Criminal Law. In *For citations: Shestak, VA & Ulyanova, EK (2020). Impact of the Nuremberg Trials on the establishment and development of International Criminal law. Nuremberg: Court of Nations and world rule of law. International scientific and practical conference (24 June 2020). Moscow: Institute of State and*.

¹⁶ Meiches, B., & Benvenuto, J. (2019). Between Hagiography and Wounded Attachment: Raphaël Lemkin and the Study of Genocide. *Genocide Studies and Prevention: An International Journal*, 13(1), 4.

¹⁷ Jackson, J. (2021). Victors write the rules: Hypocrisies and legacies of the Nuremberg Trials. *Journal of Global Faultlines*, 8(2), 265-270.

¹⁸ Radhakrishnan, A. (2020). An Inherent Right to Health: Reviving Article II (c) of the Genocide Convention. *Colum. Hum. Rts. L. Rev.*, 52, 80.

¹⁹ Timothy, M. L. (2019). SIXTY YEARS FROM NUREMBERG: WHAT PROGRESS FOR INTERNATIONAL CRIMINAL JUSTICE?. *terAs Law Review: Jurnal Hukum Humaniter dan HAM*, 1(1).

state officials from any state²⁰. To argue, as the Authorities did, that perhaps the Genocide Convention further requires states to not execute people across one's organs contradicts the unique history of Nuremberg which motivated its drafters: whatever the Convention sought to accomplish was indeed the regulation of basic values of international human rights law via the danger and intrusion of nationwide stiff penalties, irrespective of if they are breached by persons acting as an agent of a state. So even though states cannot indeed be deemed 'criminal' ('violence is perpetrated by people, not just by different levels of abstraction'), maintaining that perhaps the Genocide Convention, as it enforces on jurisdictions the duty to prevent as well as persecute genocide as a violent act, furthermore encompasses the customary constitutional basis of provinces' obligation for genocide as just worldwide wrongdoing is not consistent with its epistemological and ontological foundations.²¹

Furthermore, because wrongful acts are, by definition, engaged by social entities including such states, establishing the universal jurisdiction of jurisdictions for genocide by implementing a proper standard, like that being stated in Article II of the Genocide Convention, which itself was conscripted concerning the criminal charges of individuals, is difficult, if not inconceivable. The difficulties which it undoubtedly meets when determining if a state has the *dolus specialis* of genocide, or perhaps the discourse about whether or not wrongdoing of genocide can indeed be decided to commit unless there is government action or propaganda of genocide, are indicative in this regard and therefore have greatly contributed to a long drawn debate.²²

Consequently, it would also be incorrect to argue that because the Genocide Convention is indeed a human rights and humanitarian pact that has little to do with nations' international recognition for genocide, universal duty does not emerge! What I am arguing now has nothing to do about the argument that personal criminal liability for illegal acts replaces global governmental accountability. ²³Upon that conversely, under global law, the concept of independent criminal culpability has slowly changed to supplement that of responsibility of states, and even when independent criminality coexists with an institutional sequence of lawbreaking organized, considered acceptable, or capitulated in by the state, as I will attempt to illustrate below. Individual people can entail criminal culpability within global law even

²⁰ Schabas, W. A. (2021). Nuremberg's Critics. *Irish Studies in International Affairs*, 32(1), 183-196.

²¹ Pillai, P. (2020). Expanding the Scope of Provisional Measures Under the Genocide Convention. *The Cambridge Law Journal*, 79(2), 201-204.

²² Plajzer, E. (2018). Does the international crime of genocide always require a genocidal policy?. *Perth International Law Journal*, 3, 88-95.

²³ Schiffbauer, B. (2018). The duty to prevent genocide under international law: naming and shaming as a measure of prevention. *Genocide Studies and Prevention: An International Journal*, 12(3), 11.

without the state standing solely accountable for their illegal activities when done by its intermediaries or agents if there is no trend of state wrongdoing.²⁴ Assume a police officer who murders a foreign official. According to national law, each police officer is legally accountable for homicide. Furthermore, whether there is an intergovernmental organization requiring provinces to help stop and penalize homicides of foreign ambassadors, to criminalize those murderers, to penalize their offenders, as well as – if demanded – to apprehend people to some other party to the contract, that police officer has engaged a transnational crime, i.e., the brutal murder of a foreign official. 'If the requirement on governments to prosecute and punish incidents of murder of foreign ambassadors grows so important to the world community because it becomes conventional, then that police officer has perpetrated a genuinely transnational crime, since the ideals it safeguards are of universal importance²⁵. Regrettably, whenever it happens to come to the government whereby the police officer originally belonged and its global obligation, that government could be held liable for a variety of wrongdoings, such as failing to defend the foreign official, failing to persecute the police officer, or failing to apprehend the police officer to a state party. The notion that perhaps the police had murdered an individual under international human rights law, combined with the knowledge that – underneath the appropriate norms of imputation – the officer's behavior might be regarded state activity, does not allow one to conclude that now the state had broken a law²⁶! The government can impose universal jurisdiction for violence if only, following the international felonious regime, there is indeed a commensurate rule acknowledged to states with much the same subject matter as the criminological one, i.e., a foreign rule which generates in the same definitions for the felonious efforts of individuals as well as the foreign culpability of jurisdictions for violence. This seems to be extremely unlikely to happen if it is under international treaties, personal criminal liability can emerge independent of the presence of a practice of wrongdoing coordinated, sanctioned, or capitulated by state authority²⁷. Let me offer you a contradictory instance: assume if a state official from a nation, like Italy, cooperated in the acts of terrorism of September 11, 2001, while operating in his official role. This official may undoubtedly be prosecuted with terrorism and held accountable for a massive global crime. But could anyone say that Italy as a whole is to blame for the 11 September assaults and

²⁴ Özsu, U. (2020). Genocide as fact and form. *Journal of genocide research*, 22(1), 62-71.

²⁵ Peters, A., Krieger, H., & Kreuzer, L. (2020). Due diligence: the risky risk management tool in international law. *Cambridge International Law Journal*, 9(2), 121-136.

²⁶ Bryant, E., Schimke, E. B., Nyseth Brehm, H., & Uggen, C. (2018). Techniques of neutralization and identity work among accused genocide perpetrators. *Social Problems*, 65(4), 584-602.

²⁷ Paquette, E. (2020). Reconciliation and Cultural Genocide: A Critique of Liberal Multicultural Strategies of Innocence. *Hypatia*, 35(1), 143-160.

so qualifies as a "terror organization"? The same logic may be used to genocide. The Genocide Convention unequivocally bans genocide as well as allows for the criminal charges of its offenders on a case by case basis. This restriction, as well as the specific criminal culpability that it entails, may unquestionably be established in international human rights law²⁸. Hardly anything, therefore, supports the inference that the ban of genocide for governments has the same meaning as the worldwide prohibitions at the criminal stage, as the Court has immediately assumed in its decision. It is undoubtedly difficult to conceive of two different forms of obligation, but – precisely even though they are tremendously distinct – these two aspects of personal accountability (criminal culpability of individual people with that of the government) can be prompted by the violation of two separate fundamental rules, each of which can be influenced by the precise definition of their intended recipients and the repercussions of the illegal behavior about them.²⁹ This is a concern, though, that I shall discuss briefly below.³⁰

(B) The Obligation to Prevent the Commission of the Crime of Genocide Does Not Give Rise to an Obligation for States Not to Commit Genocide

As previously stated, the Court argues in a key line of its decision that the requirement on governments not to commit atrocities may be deduced from the commitment to avoid genocide, which is clearly stated in Article I of the Convention. Furthermore, it is easy to see how these two duties are from different species.' The former (the responsibility to prohibit) is a behavior responsibility, as stated by the Court later in the ruling, "in the respect that a State might be under a responsibility to accomplish, whichever the conditions, in avoiding the committing of genocide." This commitment compels nations to "use all reasonable efforts at their disposal to prevent violence as much as practicable."³¹ Furthermore, as the Court reminded out, a state violates the commitment to prohibit if it ceases to intervene once the law has been broken or once 'the State know[s] of, or should usually have discovered of, the presence of a real danger that genocide will [have indeed been] perpetrated.'³² Yet, as the Judge upheld clear, if genocide is not performed, a government cannot be made accountable for failing to take action to prevent something that did not happen.³³

²⁸ Lu, C. (2018). Responsibility, Structural Injustice, and Structural Transformation. *Ethics & Global Politics*, 11(1), 42-57.

²⁹ Williams, T. (2020). *The Complexity of Evil: Perpetration and Genocide*. Rutgers University Press.

³⁰ Altanian, M. (2019). Genocide Denialism as an Intergenerational Injustice. In *Intergenerational Equity* (pp. 151-162). Brill Nijhoff.

³¹ Wilkes, R. (2020). Does reconciliation and racial justice necessitate a struggle against white supremacy?. *Canadian Review of Sociology/Revue canadienne de sociologie*, 57(1), 147-168.

³² Nuzov, I. (2020). Post-conflict justice: extending international criminal responsibility to non-State entities. In *International Humanitarian Law and Non-State Actors* (pp. 229-262). TMC Asser Press, The Hague.

³³ Leers, A. (2020). Acknowledging the Unthinkable: Memory Politics after Genocide and the Contestation of the

In comparison, the latter commitment (not to perpetrate genocide) is a result of responsibility. This commitment is violated, as per the Court, whenever a state official or any person whose actions are traceable to a state commits genocide or any of the crimes enumerated in Article III of the Genocide Convention.³⁴ Throughout this case, the Court believes that "that there's no purpose in considering if [that State] met with its requirement of deterrence concerning the identical actions, as logic implies that a Government cannot have satisfied a responsibility to prevent genocide where it took part."³⁵

What happens, therefore, whenever a state official – functioning in his official role – participates in a genocide committed elsewhere, in another government, a genocide which is not organized, planned, or sanctioned by the government upon which he lives, and that his government is proactively attempting to avoid? Consider a soldier serving in a UN peacekeeping mission abroad, i.e., in a nation where genocide is taking place (say, Rwanda in 1994). This soldier, working as a state official, might participate in the genocide which his country is attempting to stop by numerous measures, such as deploying a military exercise at the behest of the UN. Regardless of the humanitarian goal of the military action, the soldier may possess genocidal intentions and kill individuals of the intended victim-group, together with a few other 'local' offenders, to contribute to the bodily annihilation of the organization³⁶. If we adopt the Court's logic, we must determine that even the country whereby the soldier serves is responsible for something like an act of vengeance (since it was perpetrated by an individual or entity whose behavior is traceable to the State).³⁷ We also would infer that another state must have struggled to reach its commitment to preventing violence concerning the same crime, since, as the Court concluded, "logic says that a State cannot have satisfied a responsibility to prohibit genocide where it currently participated."³⁷ In these other circumstances, per the Court's logic, the government whereby the soldier corresponds is only accountable for genocide because of the unlawful act of one of its troops. Furthermore, it must be held accountable for failing to fulfill its duty to protect against genocide, despite sending a combat operation to the different nation where genocide was being perpetrated, possessing no grounds to suppose that the serviceman would take part in the genocide, possessing embraced

State.

³⁴ Aquilina, K., & Mulaj, K. (2018). Limitations in attributing state responsibility under the Genocide Convention. *Journal of Human Rights*, 17(1), 123-139.

³⁵ Bachman, J. (2020). Cases Studied in Genocide Studies and Prevention and Journal of Genocide Research and Implications for the Field of Genocide Studies. *Genocide Studies and Prevention: An International Journal*, 14(1), 4.

³⁶ Longobardo, M. (2019). Is the Duty to Prevent Genocide an Obligation of Result or an Obligation of Conduct according to the ICJ?(blogpost). *EJIL: Talk!*.

³⁷ Morris, P. S. (2018). Economic genocide under international law. *The Journal of Criminal Law*, 82(1), 18-34.

all appropriate steps to criminalize genocide, as well as having taken into custody, tried, and punished appropriately the soldier upon that grounds of this legislation. Isn't this a little much? Certainly, treaties in existing global law could be interpreted more broadly than the previous, because the doctrine of state's rights dominated the world community. The concept and practice of stringent exegesis, which states that constraints on state's rights cannot be assumed or deduced by inference (in dubio Mitius),³⁸ is now susceptible to certain other, increasingly permissive rules and standards. That is, it could also be used only after all other concepts and requirements have been exhausted.³⁹ Moreover, the Court's position appears to go far, towards the extent where, rather than being utilized to make it clearer of a regulation, liberal techniques or concepts of exegesis are being used to derive additional responsibilities to those already set for in a specific treaty.⁴⁰

According to the same reason, this does not appear to be obvious or perhaps even rational to argue – as the Authorities did – because the need to avoid genocide, as a behavior responsibility, 'necessarily entails' the right not to perpetrate it. Within that respect, two distinct sets of commitments, within each set of requirements, are necessary. The commitment of police officers to inhibit the deaths of innocents doesn't entail or indicate that they have been obligated not to commit this crime which they are obligated to stop. Another set of responsibilities does have this breadth and substance, therefore, putting the applicable limitations on persons, especially police officers⁴¹.

Simply put, it is rational to argue that when laws are placed on certain objects to prohibit specific behavior from occurring, such activity must ultimately be unconstitutional. Furthermore, the need to prohibit some event from happening is evidence that law specifically barring it exists. It adds another layer of protection to the rule prohibiting the behavior. Normally, this is due to the core ideals that the latter upholds. It is, obviously, not the foundation of the ban of the activity itself! That's also valid in worldwide law, important in foreign criminal law⁴². Treaties may be required for governments to arrange their collaboration to combat kinds of crime that substantially imperil their mutual goals or insult principles of key

³⁸ Bitensky, S. H. (2018). The plot to overthrow genocide: State laws mandating education about the foulest crime of all. *Marq. L. Rev.*, 102, 51.

³⁹ Niti, N. (2021). Re-evaluating Economic Genocide: When Policy Becomes Predator. *Journal of Arts and Humanities*, 10(11), 01-10.

⁴⁰ Dunlap, A. (2021). The politics of ecocide, genocide and megaprojects: interrogating natural resource extraction, identity and the normalization of erasure. *Journal of Genocide Research*, 23(2), 212-235.

⁴¹ Nuzov, I. (2020). Post-conflict justice: extending international criminal responsibility to non-State entities. In *International Humanitarian Law and Non-State Actors* (pp. 229-262). TMC Asser Press, The Hague.

⁴² Grotić, V. C. (2019). Crime of Genocide before the International Court of Justice. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 40(3), 1033-1049.

significance to the world community. By way of these treaties, governments can bind nations to criminalize a certain behavior under their regulatory frameworks to prosecute those who engage in it, as well as to undertake all in their ability to eliminate it. Why does one conclude from this that signatory nations are likewise expected to be deemed globally liable for actually committing behavior that they wished to avoid and condemn as criminal groups of such treaties? Crimes are committed not by private people, but rather by government officials operating in their official role⁴³. But even so, whenever a state official commits a criminal act (for example, killing, theft, etc) – even though it's an infraction criminalized and punished by multilateral obligations (for example, counterfeit money, enslavement, or human trafficking) – it doesn't follow logically that now the state is worldwide aware of having engaged that crime! Regarding international standards of assignment, the behavior of a government official or agent comprises state action; nevertheless, as I have previously stated³⁴, for the government to bear universal jurisdiction, the crime also must represent illegal substance activity. It is illogical to argue that the responsibility of governments to suppress the criminal act, i.e., the commitment to prohibit illegal behavior by people, inevitably entails the treaty obligations of nations not to engage in such behavior as jurisdictions (i.e., through their agents and representatives)⁴⁴. Consider the 1949 Convention for Suppression of the Traffic in Persons as well as the Exploitation of Others' Prostitution. This agreement requires governments to penalize anybody who compels other individuals into prostitution. Furthermore, signatory nations are specifically required by Article 16 of the Convention "to take... steps for the prohibition of prostitution."⁴⁵ Can anyone be willing to argue that even a government is internationally liable for prostitute exploitation simply because one or all of its officials, operating in their official role, committed such a violent offense? If one applies the Court's rationale, one might reply in the affirmative, inferring from the liability of states to take action to prevent sex trafficking and the global moral duty for them not, across their officials, to engage in acts of sex work profiteering; and conclude that, as a result of the criminal activity one of its officials, the government is nationally and globally liable for itself needing to be prostituted a human being⁴⁶.

To summarise, I believe that under a particular interpretation of the Genocide Convention, the duty to thwart genocide, outlined in Article I, 'merely' provides to enforce on signatory

⁴³ Onyinkwa, B. (2018). The Concept of Protected Groups' under the Genocide Convention in Relation to Developments in International Law Through Jurisprudence and Emergence of Similar Deserving Groups. Available at SSRN 3167229.

⁴⁴ Beloff, J. R. (2020). *Foreign Policy in Post-Genocide Rwanda: Elite Perceptions of Global Engagement*. Routledge.

⁴⁵ Schiffbauer, B. (2018). The duty to prevent genocide under international law: naming and shaming as a measure of prevention. *Genocide Studies and Prevention: An International Journal*, 12(3), 11.

⁴⁶ Özsu, U. (2020). Genocide as fact and form. *Journal of genocide research*, 22(1), 62-71.

countries a particularly unique duty of reasonable care and thoroughness, attempting to make them the protectors of a regime (that prohibits the commission of an offense of genocide by any individual) that they regard as fundamentally important, and thus responsible once they do not consider taking their responsibility seriously. The responsibility of preventive under the Convention compels public bodies to do all possible whenever genocide is done by who, i.e., if the individual behaves as a private citizen or as a state official⁴⁷. Rather, the Court reasoned that the consenting parties' commitment to avoiding genocide solely extends to the action of "individuals to whom they share a similar influence," even though it would be absurd to claim that nations are permitted to commit atrocities via their organ. According to the Court, the need to avoid is meaningless when it comes to the action of state officials and delegates, because when they perpetrate genocide, the government is itself liable for and can, by definition, have fulfilled with the attempt to protect. Moreover, this is essentially tautological rationale: it assumes what can be proved, namely the responsibility to protect the guilty party pertains to only the actions of individual citizens and therefore does not apply to the acts of agents of the state, because states cannot commit violence through their intermediaries under this duty of mitigation⁴⁸.

II. NOT JUST A QUESTION OF ATTRIBUTION: THE CONTENT OF THE PRIMARY RULE OBLIGING STATES NOT TO COMMIT GENOCIDE

When dealing with deeds that can partake individuals' self-responsibility under international human rights law, one would be inclined to suggest that such a main rule – once broken by a government official or individual authorized – can lend credence to the government's diplomatic recognition for the correlating wrong action. Yet, worldwide practice does not wholly support this premise⁴⁹. On the alternative, there seem to be grounds to suppose that two types of accountability are fully separate from one another from the outset, i.e. since they are activated by non-identical core norms.

Examine acts of war, particularly the serious breaches of rules entrenched in the 1949 Geneva Conventions, especially their link to universal jurisdiction. If a soldier executes a captive of war, the government is immediately liable for violating the regulations on the laws and customs of war, except if the government can establish that perhaps the soldier was not at fault. No one

⁴⁷ Karstedt, S., Nyseth Brehm, H., & Frizzell, L. C. (2021). Genocide, Mass Atrocity, and Theories of Crime: Unlocking Criminology's Potential. *Annual Review of Criminology*, 4, 75-97.

⁴⁸ Peters, A., Krieger, H., & Kreuzer, L. (2020). Due diligence: the risky risk management tool in international law. *Cambridge International Law Journal*, 9(2), 121-136.

⁴⁹ Sands, P., & Main-Klingst, L. (2022). Genocide Convention (Convention on the Prevention and Punishment of the Crime of Genocide). In *Elgar Encyclopedia of Human Rights*. Edward Elgar Publishing Limited.

would argue that for the government to be held liable, it must also be proven that the military meant to murder or behaved recklessly. Furthermore, such evidence will be required to demonstrate the soldier's legal guilt for the associated terrorist act or the severe breach, and the state will bear the burden to prove⁵⁰.

Furthermore, none of us would argue that a government is accountable for armed conflicts focus on a particular case or a slew of cases of prisoner-of-war executions unless it has been formed that all these offenses were perpetrated on a massive scale, i.e., if they form what Röling defined as system criminality.⁵¹ Whenever there is proof of systemic illegality, one may conclude that to demonstrate the government's guilt for armed conflicts, one can forgo asking whether the person who operated on behalf of the nation had a violent mindset in every specific incident (*Mens rea*). What is required here is evidence of the presence of a campaign of abuse and the ability to deduce from such a trend the state's political and military officials' acceptance in, if not endorsement of, the unlawful conduct of their followers.⁵²

Compare the proposed, it may be said, could be extended to genocide. If according to whatever the Court ruled, one believes that perhaps the Genocide Convention is an agreement that requires governments to prohibit and prosecute genocide as a serious crime done by persons, there is also no reasonable cause to suppose that the Convention's definition of genocide also extends to state culpability. As I have attempted to establish above, the International Law commission intended to ensure the prosecution of people who commit genocide, irrespective of whether or not they operate as state officials. The Convention defines genocide on legal grounds, which is not surprising given that this definition had to be approved by agreement of the parties in their penal judicial codes in place to avert and condemn genocide⁵³. Why, therefore, do we insist on using the same definition to explain the obligation of nations to stop genocide?

The responsibility on jurisdictions not to commit genocide, in my opinion, stems from international human rights law rather than the Genocide Convention. It arose from the onset in legal systems of a set of core international laws for the world community, known as *jus cogens*. This conventional rule upon that duty of provinces not to commit genocide 'allured,' such as it

⁵⁰ Gaeta, P. (2020). Head of state immunity as a bar to arrest. In *Contemporary Issues Facing the International Criminal Court* (pp. 84-98). Brill Nijhoff.

⁵¹ Berkes, A. (2018). The standard of 'Due Diligence' as a result of interchange between the law of armed conflict and general international law. *Journal of Conflict and Security Law*, 23(3), 433-460.

⁵² van den Herik, L. J., Irving, E. I., Krieger, H., Peters, A., & Kreuzer, L. (2020). Due Diligence and the Obligation to Prevent Genocide and Crimes against Humanity. *Due Diligence in the International Legal Order*, 200-216.

⁵³ Rapp, K. (2021). Social media and genocide: The case for home state responsibility. *Journal of Human Rights*, 20(4), 486-502.

is, numerous components of the 1948 Convention's definition of genocide, and yet stayed neutral of that Convention⁵⁴. When it comes to civil liability, genocide had also long been considered a heinous crime that necessitates a methodical assault on human rights. For instance, when opening on the erstwhile Article 19 on so-called offenses of regions in 1976, the ILC regarded 'a large-scale or structured practice implemented in disdain of the privileges and sanctity of human being,' including such 'genocide,' as just a revealing instance of an offense committed, thus also recognizing that genocide – as an especially significant wrong action of state – always presumes management system.⁵⁵ The International Labour Organization did a similar stance in 2001, clearly stating that "the ban of... genocide, by [its] quite a nature, requires[s] a deliberate infringement on a huge scale."⁵⁶ Furthermore, no endeavor ever has been made to argue that a government was guilty of genocide without the need for an accusation that the government was seeking a genocidal strategy against a specific group. Anytime it has been claimed that a government has committed genocide, there seems to be a methodical act of aggression on a specific group, ostensibly following a regulatory declaration of intent. This was true of the Ottoman Empire's intrusions on Kurds, as well as the Nazis' assassination attempts on Jews and Tutsis in Rwanda. In the case of Darfur, the UN Public inquiry determined that threats against so-called Indigenous societies could not have been classified as violence perpetrated by Sudan exactly because the Committee has been unable to show proof of a state's presiding political officials' murderous intent, suggesting that there had been no evidence of a genocide step in a process.⁵⁷

On the other hand, when it comes to genocide as such conduct of independent criminality, it is easily noticeable that Article II of the Genocide Convention (as well as the correlating rule of international human rights law) doesn't explicitly necessitate the presence of a genocide strategy or practices for the crime to occur.⁵⁸ The ICTY and indeed the ICTR have indeed captured this stance on personal criminal culpability. The two ad hoc Tribunals regarded that the presence of a genocide step in a process can be a valuable material in illustrating a specific person's genocidal intent; however, they governed out that the whole strategy or strategy is a

⁵⁴ Trapp, K., & Robinson, E. (2018). Extra-Territorial “Fiduciary” Obligations and Ensuring Respect for International Humanitarian Law. *McGill Law Journal/Revue de droit de McGill*, 63(3-4), 677-700.

⁵⁵ De Wet, E. (2018). Complicity in violations of human rights and humanitarian law by incumbent governments through direct military assistance on request. *International & Comparative Law Quarterly*, 67(2), 287-313.

⁵⁶ Ho, A. The Legitimation of International Criminal Law: Tracing a history of the norms of International Criminal Law through four major International Criminal Tribunals.

⁵⁷ Standish, K. (2021). Everyday genocide: femicide, transicide and the responsibility to protect. *Journal of Aggression, Conflict and Peace Research*.

⁵⁸ Rimmer, S. H., Palmer, E., & Bikundo, E. (2021). Postscript: International criminal justice futures. In *Futures of International Criminal Justice* (pp. 239-249). Routledge.

lawful fundamental component of the genocide convention.⁵⁹ To summarise, provinces are obligated not to commit genocide, but not in aspects exactly equal to those encapsulated in the Genocide Convention. As a violent act, genocide necessitates the accused's particularly unique intent (*dolus specialis*); however, in some cases, it could also be decided to commit in the absence of a government genocidal strategy or maybe even a collaborative violent act.⁶⁰ In way of comparison, genocide, as a heinous crime committed by jurisdictions of outstanding gravity, always necessitates the presence of a genocidal strategy and thus a structure of pervasive and structured violence against a specific group. To establish the state's universal jurisdiction, moreover, there will be no need to prove that the condition as a whole – or one of its officials – fostered mass exterminations in the strict sense. It is a necessity that only applies to persons' criminal responsibility. In the absence of direct proof of a genocidal strategy, it'd only be sufficient to demonstrate that, given the global pattern of abuse, the main objective of the state's strategy cannot but just be the annihilation of the specific population as such.

Simply by perceiving that criminal obligation is a certain something and state responsibility is very another is it conceivable completely to bring to completion the thought that there is - under global regulation - a double system of obligation regarding genuine infringement of basic liberties and different standards of worry for the worldwide local area accordingly⁶¹. These two particular lawful systems plan to safeguard similar qualities, yet from various perspectives, and they apply to various subjects. It is just normal that they are set off by decisions that, albeit seeking after similar targets, are not indistinguishable in content since they work at an alternate level. Since states are dynamic elements and have an aggregate aspect, it isn't unreasonable or ridiculous to keep up with that they can submit decimation just when there is an approach or plan against a designated bunch. This necessity is superfluous to guarantee that, at the singular level, slaughter isn't submitted. If one moves from the aggregate/state aspect to that of people, it is simply sensible to concentrate upon the outlook of the individuals who have a criminal mental demeanor towards a specific gathering and expect to seek after its destruction - with or with no state support⁶².

⁵⁹ Bayer, J. (2021). High-impact hate speech by persons of authority: A lower threshold needed?. *Hungarian Journal of Legal Studies*, 61(3), 269-284.

⁶⁰ Koursami, N. (2018). Contextual Elements in Prevailing Case Law: Application of the Legal Definition of Genocide or an Interpretative Contortion. In *The 'Contextual Elements' of the Crime of Genocide* (pp. 85-115). TMC Asser Press, The Hague.

⁶¹ Mikanagi, T. (2021). Application of the Due Diligence Principle to Cyber Operations. *International Law Studies*, 97(1), 42.

⁶² Frulli, M. (2020). The Promise of International Criminal Justice: Achievements and Failures in Protecting Human Dignity. In *Human Dignity and International Law* (pp. 52-70). Brill Nijhoff.

III. SOME OF THE REASONS WHY STATE RESPONSIBILITY FOR GENOCIDE CANNOT BE GROUNDED IN INDIVIDUAL CRIMINAL LIABILITY FOR GENOCIDE

If one acknowledges the Court's position and therefore retains that a nation is guilty of genocide or any of the actions mentioned in Article Article III where "a group or person whose deeds are lawfully consistent with the Law undertakes a few of the acts codified by Article III of the Convention,"⁶³ culpability for genocide is now a kind of prerequisite of due process. As a result, there is a requirement to demonstrate that individuals or groups operating on service of the state perpetrated genocide, rendering their state globally liable for its commission.

Legal representatives for Serbia argued well before the Grand jury that within order to form a state's universal jurisdiction for genocide, a proficient felonious tribunal must first create the obligation for the genocide of the person acting in the interests of that state. This reasoning was dismissed by the Court. It was held that it "could imply there will be no legal remedy obtainable under the General assembly in certain easily and quickly plausible situations," ie when genocide is accused of committed by the rulers of a nation and "they will not be tried in court because, for example, people are very in the regulation of the authority of the State... so there is no global punitive judicial body able to adjudicate over the illegal actions."⁶⁴ Whatever the Court rebuffed was the notion that the Court's prosecutorial role be conditional on a domestic or international tribunal exercising jurisdiction over the case. The Court was unequivocal on this juncture:

*the various procedures accompanied by, and abilities obtainable too, this Court as well as and tribunals attempting people for criminal offenses need not imply there is a lawful tavern to the Court itself concluding that mass murder or either act codified in Article III have indeed been dedicated. The Court has the authority to do under its Statute while imposing the standard of evidence applicable to allegations of extraordinary seriousness.*⁶⁵

In effect, the Court believed itself capable not only to determine governments' global culpability for genocide, and to determine if people had committed crimes against humanity or any of the actions enumerated in Article III. To assess if Serbia breached the Genocide Convention by committing crimes against humanity, the Jury had to examine whether 'an instrument of the Government, or a set of individuals whose conduct [were] legally traceable

⁶³ Leme, R. (2018). Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections. *Am. U. Int'l L. Rev.*, 34, 89.

⁶⁴ Anderson, K. (2019). Judicial Inference of the 'Intent to Destroy' A Critical, Socio-legal Analysis. *Journal of International Criminal Justice*, 17(1), 125-150.

⁶⁵ Wilson, A. (2022). Intersectionality and Genocide. *Mystērion: The Theology Journal of Boston College*, 1(2), 78-101.

to the State, perpetrated some of the acts forbidden by Article III of the Convention.⁶⁶ As a result, it was only logical for the Court to declare that it was competent to convince itself, however incidentally, that a specific individual whose actions were traceable to the government had committed atrocities. The Court's reasoning has the advantage of making it plain – if indirectly – that actions qualifying violations of international law, including such genocide, whenever committed by state agencies in their official role cannot be deemed private activities. Concerning the topic of exemption from international criminal matters of people suspected of crimes an unlawful act while operating in their official position, national case law advocated the position that global offenses must always be judged to correspond to the private sphere. Its objective was to reject the application of so 'immunity *ratione Materiae*': In summary, domestic arbitral tribunals held that a state official cannot be immune from international criminal matters simply because he or she operated in the position of a state official, because inter-national crimes must be perpetrated in a personal setting. This viewpoint has been expressed by several of Their Lordships, for example, in the Pinochet case⁴⁸, and has been reiterated by the Tribunal itself in the Arrest Warrant case.⁶⁷ Furthermore, as a critic correctly pointed out, this legal concept implies that global crimes committed by state officials, because they are deemed private activities, cannot be imputed to the government as such and do not involve its global responsibility.⁶⁸ In the current case, the Grand jury impliedly – but unequivocally – dismissed the claim that global crimes are, by definition, occurrences of personal criminal activity and thus can never have been credited to a state by presuming that individuals who committed genocide could indeed involve the state's global accountability for their actions if they responded as state officials.

The methodology took by the Court, nonetheless, isn't flawless. The most pertinent deficiency concerns the thought that a between state court, which isn't invested with criminal purview, can truth be told find that a given individual has perpetrated a demonstration of decimation or some other of the crook acts recorded in Article III of the Genocide Convention⁶⁹. In criminal regulation, it is clear that nobody can be considered responsible for having disregarded a crook rule until an equipped criminal council has so found. This is so a direct result of the essential rule of the assumption of guiltlessness, which orders that the criminal conduct of an individual

⁶⁶ van den Herik, L. J., Irving, E. I., Krieger, H., Peters, A., & Kreuzer, L. (2020). Due Diligence and the Obligation to Prevent Genocide and Crimes against Humanity. *Due Diligence in the International Legal Order*, 200-216.

⁶⁷ Stahn, C. (2018). ICTY and the New Law on Genocide. In *New Challenges to International Law* (pp. 126-140). Brill Nijhoff.

⁶⁸ Karstedt, S., Nyseth Brehm, H., & Frizzell, L. C. (2021). Genocide, Mass Atrocity, and Theories of Crime: Unlocking Criminology's Potential. *Annual Review of Criminology*, 4, 75-97.

⁶⁹ Sato, H. (2021). *Multilayered Structures of International Criminal Law*. Springer International Publishing.

be laid out at preliminary, and with every one of the assurances and protections of a fair preliminary.

It is therefore that, with all due regard, I consider the methodology taken by the Court innately flawed. I question that the Court had the power and the capability to make a finding - and already Bosnia and Herzegovina the likelihood to demonstrate and Serbia to challenge - on the conceivable commission by people, during the unfurling of the equipped conflict, of global violations including the wrongdoing of massacre⁷⁰. How might a between state council determine, and a state effectively demonstrate or invalidate before it, that one, some, or even numerous people occupied with criminal direct without a legitimate criminal preliminary? They just may not, legitimately, yet additionally for all intents and purposes.

The Reliance was placed so extensively on ICTY decision rules to judge on the matter presented before it because of the obvious practical difficulties it had to encounter. This may explain why the Court finally determined, as the ICTY has already done previously, that only the death of 7,000 males in Srebrenica, combined with the wholesale deportation of children and women, constitutes genocide. This may also clarify why the Jury later adopted a level of proof comparable used by violent criminal courts (i.e., the 'point possible suspicion' standard), rather than reaping the benefits of some metrics used by judges, like the European Court of Human Rights or perhaps the Inter-American International court, when confronted with accusations of severe human rights abuses by the states concerned⁷¹. In such cases, the courts used a less severe and rigorous level of proof than perhaps necessary in criminal cases, and certain cases proceeded so far as to declare that the rule *actori incumbit probatio* did not apply on behalf of the respondent state. The argument for adopting less strict evidentiary criteria is when state entities are charged with perpetrating extremely serious injustices, they cannot simply offer evidence or reject the claims. This is especially true when relying on the complete help of the state in issue to establish the veracity of the charges.⁷² The Court, on the other hand, chose not to use this strategy, without saying why. It even chose not to order Serbia to completely reveal several redacted papers that, as per Bosnia, were critical in establishing Serbia's guilt for the Srebrenica atrocity. Thereby, the Court passed up a once-in-a-lifetime chance to consider and deliberate on the significant disparities that emerge among responsibility of states and specific criminal culpability – mostly from the standpoint of the

⁷⁰ Aquilina, K., & Mulaj, K. (2018). Limitations in attributing state responsibility under the Genocide Convention. *Journal of Human Rights*, 17(1), 123-139.

⁷¹ Jorritsma, R. (2018). Where general international law meets international humanitarian law: attribution of conduct and the classification of armed conflicts. *Journal of Conflict and Security Law*, 23(3), 405-431.

⁷² Ramsden, M. (2021). The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects. *Human Rights Law Review*, 21(3), 671-695.

level of proof.

IV. WAS IT NECESSARY FOR THE COURT TO FIND THAT THE GENOCIDE CONVENTION OBLIGES STATES NOT TO COMMIT GENOCIDE?

The Court observed that Serbia was not liable for destruction or some other of the demonstrations recorded in Article III, yet just for neglecting to forestall the commission of annihilation in Srebrenica and neglecting to rebuff its supposed culprits by not giving them over to the ICTY⁷³. All in all, after expressing that the Genocide Convention likewise obliges states themselves not to submit massacres or different demonstrations recorded in Article III, the Court couldn't presume that Serbia was globally mindful in such a manner. Ultimately the Court applied the Genocide Convention as a 'simple' instrument of worldwide criminal regulation, expecting states to keep people from participating in slaughter and obliging them to surrender asserted génocidaires to a capable international criminal council.

It is conceivable that the Court needed to grow every one of the possibilities of the Genocide Convention, in this way taking a dynamic substitute the field of assurance of basic liberties. Seemingly the point was to affirm plainly that states bear worldwide responsibility for the criminal disposition of their organs. Be that as it may, the Court did as such by dint of legitimate thinking which isn't enticing. Rather than revealing some insight into the complicated relationship, in contemporary worldwide regulation, between individual criminality and state liability, the Court followed some unacceptable way⁷⁴. It neglected to get a handle on the way that the previous type of liability was becoming independent from the last option, and the appropriate significance of the idea of state liability regarding genuine infringement of commitments of essential significance for the worldwide local area all in all. As I have focused on above, the individual criminal risk for violations, for example, destruction can emerge no matter what the presence of a state destructive approach or mission. In circumpositions where that approach is missing, to consider a state liable for destruction only because a state official exhibited a destructive mentality or played out a destructive demonstration is equivalent to minimizing the idea of the massacre as a global unjust demonstration of genuine worry to the worldwide local area overall⁷⁵.

Overall, one gets the feeling that now the Court went down that road as it interpreted the

⁷³ Gaita, R. (2018). *Genocide* (pp. 202-223). Routledge.

⁷⁴ Frulli, M. (2018). The Draft Articles on Crimes Against Humanity and Immunities of State Officials: Unfinished Business?. *Journal of International Criminal Justice*, 16(4), 775-793.

⁷⁵ Adnyani, N. K. S. (2021). Prohibition of Violations of Heavy Human Rights. *International Journal of Social Science and Business*, 5(1), 140-148.

Genocide Convention through the prism of the historic events that transpired in Bosnia and Herzegovina during the military confrontation and, in a manner, subordinated the Convention beneath the specific details of the case. Mass murders in Bosnia and Herzegovina were carried out by people and individuals or groups who aren't de jure organs of Serbia but may have been determined to be its de facto organs. Furthermore, Serbia had supplied major military and financial assistance to the Bosnian-Serb authorities, and – on the surface – may have been held liable for assisting and abetting the incidence of genocide. Regrettably, under the plain text of the Genocide Convention, which has been the only document bestowing authority upon that Courts in cases, governments are not obligated to abstain from participating in genocide or providing aid and support to genocide offenders⁷⁶. The Court's urgency to pronounce on the atrocities committed in Bosnia - Herzegovina and offer a law relating to their commission likely compelled it to interpret the Genocide Convention outside its intended form and depth. Also, it ultimately led to a failed attempt to use criminal law concepts to prove a state's purported international culpability for genocide.

It is contradictory that, whilst emphasizing that the Genocide Convention also compels states not to execute people, the Court had only been able to establish that Serbia had broken the duty to stop and condemn genocide. The Court may have arrived at the same result by merely interpreting the Convention as an international treaty requiring subscribing nations to avoid and suppress genocide⁷⁷. As firmly developed, the Court wasn't authorized to apply conventional global standards requiring states not to commit or encourage genocide: its competence in this instance was limited to the Genocide Convention. Consequently, the Court may very well have constrained itself to understand Article 1 of the Convention's pledge to avert and prosecute genocide as a clause that is not merely a prelude and prologue towards the provisions that follow but imposes an independent responsibility. As a result, the Court could have indicated that the respondent state violated Article I of the Convention by failing to stop genocide by individuals to whom it exerted influence and authority, as well as failing to seek retribution, who occurred to within its authority after the genocide had taken place⁷⁸.

This is by and large what the Court in the occasion held. It might have come to a similar result without leaving upon a construction of the Convention considerably damaged by a confusion of the vary slaughter as a worldwide unfair demonstration of a state and destruction as

⁷⁶ Blustein, J. (2018). Conceptions of Genocide and the Ethics of Memorialization. In *Multidisciplinary Perspectives on Genocide and Memory* (pp. 21-47). Springer, Cham.

⁷⁷ Williams, T. (2020). *The Complexity of Evil: Perpetration and Genocide*. Rutgers University Press.

⁷⁸ Kinseth, A. (2019). The Trouble of Proving Genocidal Intent” The modern Rohingya Crisis in Historical and Political Context.

wrongdoing including individual criminal risk.
