Chapter 3  Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide

Philippa Webb*

1. Introduction

More than six decades after the adoption of the Genocide Convention, the law on genocide has become increasingly prominent due to its invocation by governments and civil society as regards mass atrocities in the Balkans, Rwanda, and the Sudan. When the Convention was drafted, there was only one international judicial institution in existence with jurisdiction to apply and enforce its terms: the International Court of Justice (ICJ), the jurisdiction of which was limited to state responsibility. Since then, the hypothetical reference in Article VI to a future ‘international penal tribunal’ that would address individual criminal responsibility has turned into a reality, with the establishment in the past two decades of the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). The European Court of Human Rights, the Inter-American Court of Human Rights, the Iraqi Special Tribunal and the Extraordinary Chambers in the Courts of Cambodia have also considered the law on genocide. National courts have heard dozens of cases, which are considered in another chapter in this volume.¹

The crime of genocide is one of a limited number of acts that can result in both state responsibility and individual responsibility.² The ICJ has jurisdiction

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* BA (Asian Studies)(Hons)/LLB (UNSW); LLM (Yale); JSD Candidate (Yale). Lecturer in Law, King’s College, London. Former Special Assistant and Legal Officer to President Rosalyn Higgins of the International Court of Justice (2006-2009) and former Associate Legal Adviser to Prosecutor Luis Moreno Ocampo of the International Criminal Court (2005-2006). The views expressed are the author’s own. I am grateful to Kirsten Roberts and the editors for their helpful comments.

1 See Chapter 14 by Cristina Fernández-Pacheco Estrada.

2 A. Nollkaemper, ‘Concurrence between Individual Responsibility and State Responsibility in International Law’, (2003) 52 ICLQ 615, at 618. Other acts in this category include the crime of aggression (recently included, but not activated, in the ICC
over state responsibility for genocide pursuant to Article IX of the Genocide Convention. The provisions of the Genocide Convention have been incorporated almost verbatim into the Statutes of the international criminal courts and tribunals mandated to prosecute individuals. As a result, the Genocide Convention is being interpreted and applied – through the lenses of state responsibility and individual criminal responsibility – by the ICJ, ICC, ICTY, and ICTR.

Although mature domestic legal systems have sophisticated rules of procedure governing the relationships among courts, these four international courts are operating in a horizontal, decentralized environment with no avenues of appeal, formalized notion of precedent, or official modes of coordination. Yet, their subject-matter jurisdictions overlap, and they can and do end up judging the same situations.

This chapter will examine how the recent practice of these international courts has brought to the fore the differences and commonalities between the prohibition of genocide as a penal norm for individuals and the prohibition as a *sui generis* obligation for states. At the ICJ, there have been six main decisions involving the law on genocide, of which the most important has been in the *Bosnia Genocide* case decided in 2007. Charges of genocide appear in nearly every case before the ICTR. As of June 2010, 30 persons had been convicted of genocide and sentenced by the ICTR. There have been several convictions for genocide

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3 Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 5; Statute of the International Criminal Tribunal for Rwanda, Art. 2; Rome Statute of the International Criminal Court, Art. 6.

4 In many situations, it is still unclear what should happen when more than one court has jurisdiction over the same case, when courts reach inconsistent decisions, or how one court should treat the decisions of another court: J. Martinez, ‘Towards an International Judicial System’, (2003) 56 Stanford Law Review 429, at 431.