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State Responsibility for Complicity in Genocide: The Requirement of Mens Rea

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Summary

This thesis seeks to analyze the international responsibility of states for genocide, and more particularly does so by looking closer at complicity in genocide and the mens rea element of the definition.

In 2007 the ICJ rendered its judgment in the *Genocide* case, where one of the key issues before the Court was whether a state could be held responsible for genocide under the Genocide Convention. The ICJ asserted that the Convention imposed an obligation on states to not commit genocide, and accordingly, that a breach of that obligation could be attributed to a state and thus result in the international responsibility of the state. This resulted in the question of how the mental element of genocidal intent, the mens rea of the crime, was to be understood in the law of state responsibility. The ICJ based itself upon the criminal proceedings of the ICTY in order to evaluate the presence of genocidal intent, and consequently, possibly ascribe it to the state. Additionally, while examining state complicity in genocide, the Court was faced with the issue of the mens rea requirement for complicity, which it however did not pronounce upon. Thus, it remains unsettled under international law what degree of genocidal intent is required for complicity in genocide.

This thesis takes the approach of analyzing how the genocidal intent of an individual perpetrator, whose acts are attributable to a state, affects the responsibility of that state for genocide. It analyzes the judgment of the ICJ and argues that under the current jurisprudence of the Court, the mental state of an individual is decisive in establishing state responsibility, due to the close relationship between individual criminal liability and state responsibility. Accordingly, the degree of mens rea required of an accomplice, will in turn affect the possibility of holding a state responsible for complicity in genocide.

Sammanfattning

Denna uppsats syftar till att analysera statsansvar för folkmord, och gör detta mer specifikt genom att undersöka frågan om ansvar för medhjälp till folkmord samt mens rea elementet i folkmordsdefinitionen.

År 2007 meddelade ICJ sin dom i the *Genocide case*, där en av de centrala frågorna för domstolen var ifall en stat kunde hållas ansvarig för folkmord under Folkmordskonventionen. ICJ konstaterade att konventionen ålade en förpliktelse på stater att inte begå folkmord, och således att en överträdelse av förbudet kunde resultera i statsansvar. Vidare uppstod frågan hur det mentala elementet av specialuppsåtet att 'helt eller delvis förrinta en skyddad folkgrupp' skulle förstås i termer av statsansvar. Domstolen förlitade sig på den straffrättsliga bedömningen gjord av ICTY för att undersöka ifall specialuppsåtet var närvarande, och vidare ifall det kunde tillskrivas en stat. Dessutom, medan ICJ undersökte ansvaret för medhjälp till folkmord, ställdes domstolen inför frågan, som den undvek att besvara, vilken nivån av mens rea som krävs för medhjälp till folkmord. Detta har resulterat i att det är fortsatt oklart under internationell rätt om en medhjälpare till folkmord behöver besitta specialuppsåtet för att hållas ansvarig.

Den här uppsatsen analyserar hur specialuppsåtet för folkmord hos en person, vars handlingar är hänförliga till en stat, påverkar statsansvaret för folkmord för den staten. Den fokuserar på domen av ICJ och argumenterar för att under den tolkning av internationell rätt som fastställts av domstolen, så är avsikten hos en individuell förövare avgörande för att etablera statsansvar, detta på grund av det nära förhållandet med individuellt straffrättsligt ansvar. Följaktligen så kommer nivån av mens rea som ställs upp för ansvar för medhjälp till folkmord påverka möjligheten att hålla en stat ansvarig för folkmord.

Abbreviations

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts; also, the draft articles
ICC	The International Criminal Court
ICJ	International Court of Justice; also, the Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission

1 Introduction

1.1 Background

In 1948 the Genocide Convention¹ was adopted and thereby imposed on all Contracting Parties an affirmation of genocide as an international crime.² Since then the ICJ has reaffirmed that the prohibition of genocide is of a customary character and thus universally binding.³ The definition of genocide is found in Article II of the Genocide Convention and reads as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Thus, the crime of genocide consists of three essential elements: a physical element (*actus reus*), a mental element (*mens rea*), and the protected group, as to which the physical and mental element has to be committed and directed against.

What distinguishes genocide from other crimes is the mental element, the requirement of genocidal intent. Therefore, the determination of whether such intent is present is crucial in establishing whether an individual accused is to be held liable for genocide and if not, possibly another offense under criminal law. Additionally, the accused may be prosecuted for

¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, (hereinafter referred to as ‘the Genocide Convention’ or ‘the Convention’).

² Genocide Convention, Article I.

³ *Reservations to the Genocide Convention*, Advisory Opinion, 28 May 1951, I.C.J. Reports 1951, p. 12.

secondary participation in genocide depending on the intent, but also the acts, of the individual.

In 2007 the ICJ ruled its final decision in the *Genocide* case⁴, concluding that the Respondent, Serbia and Montenegro (hereinafter referred to as ‘Serbia’), was not responsible for the commission of genocide⁵ nor had been complicit in genocide⁶, but that it had violated its obligation to prevent genocide.⁷ The acts constituting genocide were not attributable to Serbia and therefore did not entail its international responsibility, hence responsibility for commission of genocide was dismissed.⁸ When discussing complicity in genocide the Court noted that the question arose whether the accomplice had to act with genocidal intent or if knowledge of the principal perpetrator’s intent would be sufficient to establish liability for complicity. The Court did nonetheless never expand on this matter, and it remains unsettled what degree of mens rea is required for complicity in genocide.⁹

Genocide is defined to be an international crime, which thus primarily gives rise to criminal liability for individuals.¹⁰ However, the Convention also imposes obligations on states, resulting in that a state may be held internationally responsible for violations of the prohibition of genocide.¹¹ Hence, two systems of responsibility exist and consequently, the question appears how the two concepts relate to each other. Further, due to the decisive mental element of genocidal intent, which level required for complicity is unsettled, it is of relevance to examine how the intent, and the intent required, of an individual actor affect the international responsibility of a state.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007, (hereinafter referred to as ‘*Genocide case*’).

⁵ *Genocide case*, para 471(2).

⁶ *Ibid.*, para 471(4).

⁷ *Ibid.*, para 471(5).

⁸ *Ibid.*, para 395.

⁹ *Ibid.*, para 421.

¹⁰ Van Schaack, (2019), p. 290.

¹¹ *Ibid.*, p. 291.

1.2 Purpose and Research Questions

This thesis aims to analyze how the mental state of an individual, whose acts are attributable to a state, affects the international responsibility of the state for genocide. The purpose of this thesis is to investigate to what extent a state may be held internationally responsible for commission of or complicity in genocide and specifically how the mens rea requirement for complicity affects the international responsibility of a state for genocide.

The following research questions have been formulated and will be integrated into the inquiry:

- To what extent can a state be held internationally responsible for breaching an obligation in the Genocide Convention?
- What is the mental element of genocide and how is it understood when ascribing responsibility to a state for genocide?
- Under what circumstances may a state be held internationally responsible for complicity in genocide?
- What degree of mens rea has been argued to be required for complicity in genocide?

1.3 Limitations

The law of state responsibility is an extensive area of international law with various subtopics all of legal relevance. However, due to the space and time limit, this thesis will focus on the state responsibility for a violation of the prohibition of genocide as found in the Genocide Convention. The condition of ‘a breach of an international obligation’ will be its focal point. It will not provide a detailed account on questions of attribution to the state, nor will factors that may preclude wrongfulness be touched upon. It circles around the responsibility of either commission of or complicity in genocide and does not investigate further other ancillary offenses related to genocide or

the obligation to punish perpetrators. Individual criminal responsibility for genocide is not the subject of this research but will be examined to the extent necessary to determine state responsibility. Additionally, it does not seek to answer questions related to invocation of state responsibility for genocide, nor jurisdiction or admissibility before international courts. Further, this thesis does not attempt to conduct a comprehensive analysis of case law on the crime of genocide nor state responsibility.

1.4 Method and Material

The research conducted in this thesis has adopted the methodology usually known to jurists as the legal-dogmatic or legal doctrinal approach. This method of research has been described as “research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and [it] analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.”¹² Legal dogmatism contains three distinct features. Firstly, it is characterized by an internal perspective, meaning that the legal system constitutes the subject studied as well as the normative framework for analysis. External viewpoints, i.e., without legal character, are thus superfluous to the inquiry. Secondly, it adopts a systematical approach to the law and accordingly embraces a fundamental aim to create structure and coercive principles out of various legal materials. The third essential element of legal-dogmatic research is that present law is its focal point, as compared to e.g., the historical and comparative method, where other legal systems than the present law, *de lege lata*, are of interest.¹³ This approach is closely interconnected with the theory of legal positivism, which strictly focuses on *de lege lata*, and rejects the examination of *de lege ferenda*, what the law ought to be. Legal analysis conducted in a positivist spirit awards no relevance to extralegal arguments.¹⁴ The framework for this

¹² Smits, (2017), p. 5.

¹³ Smits, (2017), p. 5ff.

¹⁴ Simma and Paulus, (1999), p. 304.

thesis is the law of state responsibility, which is a question of international law, thus, this thesis has adopted an international perspective in its research. The content of international criminal law has also been relevant as genocide is an international crime giving rise to criminal responsibility of individuals. By using sources of international law as well as means of interpretation, the current law on state responsibility for genocide has been examined as described in the sources. Then, the compiled information has been analyzed by considering the authoritative value of the sources used, with the purpose of establishing the present law on how the mental state of an individual affects the international responsibility of a state for genocide.

This gives rise to a need to establish what valid sources of international law there are. A distinctive feature of public international law as compared to domestic law is the character of the sources of law. The international community lacks an organ with authoritative legislative and executive functions, and those judicial organs that exist are not authorized with compulsory jurisdiction, resulting in that there is no clear hierarchy among the sources.¹⁵ In Article 38(1) of the ICJ Statute a codification of the recognized sources on international law can be found, which are: treaties, customary law and general principles of law. In addition to these sources, judicial decisions and doctrine may be used as subsidiary means to determine the content and scope of international norms.¹⁶ While no established hierarchy exists between the sources of international law, the acknowledged sources take precedence over the means of interpretation. Nevertheless, it can be noted that the decisions of the ICJ are often viewed as carrying high authoritative value for the determination of the content of law.¹⁷ Even though the Court's decisions are either judgments in contentious cases which are not universally binding¹⁸ or Advisory Opinions with no actual legal force.¹⁹ Additionally, dissenting opinions to judgments, written

¹⁵ Hall, (2007), p. 182.

¹⁶ Statute of the ICJ, 18 April 1946, Article 38(1).

¹⁷ Hall, (2007), p. 198.

¹⁸ See Statute of the ICJ, Article 59.

¹⁹ See Statute of the ICJ, Article 65.

by well-regarded judges, can if thoroughly argued for, be persuasive when interpreting the current law.²⁰

This thesis has to the largest extent used primary sources as a foundation for the research conducted. It has relied on ARSIWA in order to determine current customary international law, and thus, the present law, of state responsibility. The judgment of the ICJ in the *Genocide* case has been used as a starting point in order to identify and understand the scope of state responsibility for genocide as it exists under the Genocide Convention. Additionally, to establish the present law, the ruling of ICJ has been complimented with legal doctrine by recognized international law scholars on the crime of genocide. When needed, writings on international criminal law have been used to investigate the individual criminal liability for genocide. Lastly, the *Genocide* case and the declarations and dissenting opinion of three judges of the Court, have been used in combination with two selected decisions from the ICTY and commentaries in doctrine, to determine the possibility for state complicity in genocide, as well as examine the mens rea requirement of complicity.

1.5 Previous Research

State responsibility for genocide is a topic that has been subject to a significant extent of research, especially leading up to the judgment of the ICJ in the *Genocide* case in 2007, which was an important landmark in clarifying the content of the law. The ICJ touched upon and put forward its answers to several fundamental questions concerning the interpretation of the Genocide Convention. However, unresolved questions remain, one of them being the issue of the mens rea requirement for complicity in genocide. Prof. Milanović has critiqued the ICJ for not pronouncing on the degree of genocidal intent required of an accomplice and wherefore he has presented his own view on what degree is required.²¹ Likewise, Prof.

²⁰ Hall, (2007), p. 197.

²¹ See Milanović, (2007).

Schabas has expressed his take on how genocidal intent should be understood in terms of state responsibility, both in general and as it relates to complicity.²² This thesis aims to build on this discussion by concentrating on how the degree of mens rea required of an accomplice affects the international responsibility of a state. Thus, it adopts a viewpoint where emphasis is placed on state responsibility for complicity in genocide, rather than focusing on the question of individual liability of an accomplice.

1.6 Disposition

The following main part of this thesis consists of three sections. The first section will examine to what extent it is possible to hold a state internationally responsible for a violation of the prohibition of genocide by looking closer at the rules of state responsibility and the Genocide Convention. It will also discuss whether a state can breach an obligation of a criminal character. The second section will then go on to an inquiry of the mental element of the definition of genocide as found in the Genocide Convention and more specifically how the penal concept of intent can be translated into the law of state responsibility. The third section will examine complicity in genocide and to what extent a state can be held responsible for complicity. Different arguments on the degree of mens rea required for complicity will be closely looked upon. Lastly, in the third part, an analysis will be conducted and then the conclusion of the research will be presented in the final and fourth part.

²² See Schabas, (2009).

2 State Responsibility for Complicity in Genocide

2.1 State Responsibility for Genocide

2.1.1 Breach of an International Obligation

The draft articles by the ILC²³ are generally considered to reflect customary international law on state responsibility.²⁴ ARSIWA does not contain substantive rules that impose obligations on states, the often called ‘primary’ rules of state responsibility. Rather, the draft articles deal with the ‘secondary’ rules of state responsibility, i.e., the rules aimed at “determining the legal consequences of failure to fulfill obligations established by the ‘primary’ rules.”²⁵ For a state to be held internationally responsible for an internationally wrongful act two cumulative conditions need to be met: attribution and breach.²⁶ A breach of an international obligation is described in ARSIWA as “when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”²⁷ This entails an objective determination of non-conformity, meaning that the subjective intention of the perpetrator is indifferent in the determination of whether a breach is at hand or not, accordingly the notion of fault is not a necessary element for international responsibility. However, intent can be decisive if a breach has occurred or not when the substantive rule contains a constituent element of intent that needs to be met for it to be a violation of that obligation.²⁸ Due to the condition of genocidal intent, this is the case for the crime of genocide, which will be discussed further in section 2.2.2.

²³ Draft articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the ILC*, 2001, Volume II, Part Two, (ARSIWA).

²⁴ Hobér, (2008) p. 550.

²⁵ *Yearbook of the ILC*, 1980, Volume II, Part Two, p. 27, para 23.

²⁶ See ARSIWA, Article 1 and 2.

²⁷ See ARSIWA, Article 12.

²⁸ Stern, (2010), p. 210.

In the *Genocide* case, Serbia disputed the jurisdiction of the ICJ with the argument that the Genocide Convention did not provide for state responsibility for acts of genocide as such. Rather, it advanced, the obligations imposed on states only related to the prevention and punishment of genocide.²⁹ By reference to the object and purpose of the Convention and the ordinary meaning of the term ‘undertake’, supported by the *travaux préparatoires* to the Convention, the Court concluded that Article I imposed an obligation on the Contracting Parties to prevent genocide.³⁰ From this, the Court deduced, followed a prohibition of the commission of genocide as well. Although the Convention lacks an explicit obligation on states to not commit genocide, the Court asserted that such a prohibition followed necessarily from the fact that genocide is affirmed to be a crime under international law and that states undertake to prevent its commission.³¹

2.1.2 Criminal Responsibility of States

During the drafting of ARSIWA, the question of state responsibility for international crimes was a controversial topic. There was discussion of including a distinction between responsibility for ‘international delicts’ and ‘international crimes’, a terminology which however was abandoned in the final draft. Thus, there is nothing in the rules of ARSIWA providing for criminal responsibility of states nor any state practice or *opinio juris* contesting to a different conclusion, resulting in that criminal responsibility cannot be ascribed to a state. However, an international crime committed by an individual whose actions are attributable to a state launches the ordinary doctrine of state responsibility, which entails that a state can be held internationally responsible for an international crime.³² This view was also reaffirmed by the ICJ in the *Genocide* case when Serbia put forward the argument that it could not be held responsible for the commission of genocide as international law did not acknowledge any criminal

²⁹ *Genocide* case, para 156.

³⁰ *Ibid.*, para 162-165.

³¹ *Genocide* case, para 166.

³² Milanović, (2006), p. 561f.

responsibility of states. The Court rejected Serbia's objection stating that: "the obligations in question in this case, arising from the terms of the Convention, ... are obligations and responsibilities under international law. They are not of a criminal nature."³³

Serbia further argued that only individuals, and not states, could be held responsible for genocide, as the Convention in its view was a "standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States."³⁴ The ICJ did not endorse this argument and instead went on to reference the existence of a 'duality of responsibility', as reflected in the Rome Statute of the ICC and ARSIWA. Both contain articles that imply that individual criminal responsibility and state responsibility are two separate notions and that the responsibility of one actor – an individual or a state – does not eliminate the responsibility of the other.³⁵

2.2 The Crime of Genocide

2.2.1 The Mental Element of Genocide

The mental element of a crime, the mens rea, is identified in Article 30 of the Rome Statute of the ICC to contain two components: intent and knowledge. They are further defined in said article as:

2. ... a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. ... "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ...

³³ *Genocide* case, para 170.

³⁴ *Ibid.*, para 171.

³⁵ *Ibid.*, para 173, (see also Rome Statute of the ICC, 17 July 1998, Article 25(4) and ARSIWA, Article 58).

Both components are present in the mental element of genocide, but in judicial decisions, the inquiry has tended to concentrate on the question of intent.³⁶

The “intent to destroy, in whole or in part, ... [the protected] group, as such”³⁷, often referred to as the genocidal intent, is the distinctive feature that sets genocide apart from other international crimes.³⁸ Thus, for the crime of genocide to have been committed, it is not sufficient that members of a protected group have been victims of the acts listed in Article II of the Genocide Convention. Additionally, it is necessary that these acts have been perpetrated against the individuals with the specific intent, *dolus specialis*, to destroy the group as such in whole or in part.³⁹ In addition to this specific intent, the perpetrator also needs to possess what is often referred to as a general intent, i.e., the acts of genocide committed must be carried out intentionally.⁴⁰

Furthermore, what characterizes international crimes, such as genocide, is the context in which they are committed. Thus, as to the knowledge requirement, it has been argued that the individual perpetrator should have to be aware of the factual circumstances resulting in a context of genocide, such as the existence of a genocidal plan. However, the ICTY has in its decisions been reluctant in requiring the accused to have knowledge of a genocidal context.⁴¹ The Trial Chamber in the *Jelisić* case interpreted the definition of genocide as not including a condition of the existence of a genocidal context, and thus adopted a viewpoint that knowledge of such did not form part of the mens rea of genocide. However, the Trial Chamber added that whereas a genocidal plan or circumstances was not necessary, the genocidal intent would be difficult to prove without the existence of such a

³⁶ Schabas, (2009), p. 242.

³⁷ Genocide Convention, Article II.

³⁸ Schabas, (2009), p. 256.

³⁹ *Genocide* case, para 187.

⁴⁰ Cassese, (2013), p. 118.

⁴¹ Schabas, (2009), p. 243f.

context.⁴² Furthermore, recklessness on behalf of the accused has been argued to be sufficient in establishing knowledge under certain circumstances. Thus, if the perpetrator was reckless to whether there was a risk that a genocidal plan existed and if their actions would contribute to the destruction of the protected group, that may lead to the knowledge requirement being fulfilled.⁴³

2.2.2 Genocidal Intent by States

As asserted previously, in general, state responsibility for an internationally wrongful act is not dependent upon the determination of fault by the state, as compared to criminal law where the question of intent and fault often is decisive for individual responsibility.⁴⁴ However, genocide constitutes as an exception due to the genocidal intent which is constitutive for the definition of the crime. Thus, the question arises of how the penal concept of a mens rea element is to be understood in the law of state responsibility.⁴⁵

Before the judgment in the *Genocide* case was rendered, it was argued that there was no need to attribute genocidal intent to a state. This was asserted to emanate from the ‘secondary’ nature of the rules on state responsibility, whereas the question of the *dolus specialis* concerns the primary rules. Thus, culpability on behalf of the state was said to not be of relevance when establishing whether a state had breached one of its international obligations. Rather, what needed to be shown was that the perpetrators of the criminalized acts possessed the specific intent and crucially that these acts, of individuals or organs, were attributable to the state.⁴⁶

In the judgment of the *Genocide* case, the ICJ commenced with concluding that massive killings had been committed throughout the territory of Bosnia and Herzegovina, but that it had not been shown that the perpetrators of

⁴² *Prosecutor v. Jelisić*, (Judgment), IT-95-10-T (14 December 1999), paras 100–101.

⁴³ Schabas, (2009), p. 253f.

⁴⁴ Nollkaemper, (2003), p. 634.

⁴⁵ Van Schaack, (2019), p. 291.

⁴⁶ Milanović, (2006), p. 568.

those executions had acted with genocidal intent. The Court based its conclusion on examining the criminal proceedings against said perpetrator by the ICTY, in which genocidal intent had not been proven.⁴⁷ Only as for the massacre in Srebrenica of July 1995, the ICJ concluded that genocidal intent was present and accordingly did so by relying on the determination done by the ICTY.⁴⁸ However, the ICJ attested that the ability of the Court to determine if genocidal intent is at hand or not, is not dependent upon whether another court or tribunal has made a prior assessment on the individual criminal responsibility for genocide. The proceeding before a court of individual liability was affirmed to be separate from that of state responsibility, and consequently, a state may be held internationally responsible for genocide even if no individual is convicted of the crime.⁴⁹

The method of the Court has been criticized and argued to indicate that individual criminal responsibility has become a prerequisite for state responsibility. This is deemed to be problematic as it seems to diverge from fundamental principles of criminal law that an interstate court could rule on questions relating to the criminal responsibility of an individual, especially considering how the guarantees of a fair trial are to be upheld without a proper assessment by a competent criminal court or tribunal.⁵⁰ Whereas in principle, the fault of a state may be separate from the fault of an individual, it has been questioned if this difference is preserved when examining state responsibility for genocide, as the responsibility of the state seems to heavily be dependent upon the responsibility and intent of a few individuals.⁵¹

Due to the context of genocide and its collective and often widespread nature it can be noted that it at large is difficult to imagine genocide being committed without the involvement of a state.⁵² Hence, another approach

⁴⁷ *Genocide case*, paras 276–277.

⁴⁸ *Ibid.*, para 295 and 297.

⁴⁹ *Ibid.*, paras 181–182.

⁵⁰ Gaeta, (2007), p. 644ff.

⁵¹ Nollkaemper, (2018), p. 634.

⁵² Schabas, (2009), p. 512.

has been put forward as to how genocidal intent could be understood in terms of state responsibility. According to this viewpoint, state policy or plan should be examined rather than ‘intent’. The existence of such a plan or policy would correspond to the state possessing genocidal intent comparable to the *dolus specialis* possessed by individuals under criminal law.⁵³ A similar reasoning could be said to have been adopted by Bosnia and Herzegovina, the Applicant in the *Genocide* case, as it argued that a pattern of acts could constitute as evidence of an overall plan to commit genocide, and as such, evidence of genocidal intent.⁵⁴ The Court however maintained that the specific intent needed to be supported by specific circumstances or by a general plan, which had not been shown in the present case, and added that for a pattern of conduct to serve as evidence: “it would have to be such that it could only point to the existence of such intent.”⁵⁵

2.3 Complicity in Genocide

2.3.1 Complicity under International Criminal Law

The criminal responsibility of accomplices, i.e., those who aid, abet, counsel and procure or otherwise participate in a criminal offense, is well established under criminal law.⁵⁶ In international criminal law, complicity to a crime consists of three elements: 1) the commission of a crime, 2) a material contribution to that crime by the accomplice, and 3) an intention or recklessness, on behalf of the accomplice, that the crime be committed. Thus, firstly, the principal offense must be proven to have been committed by another person. However, this principal perpetrator needs not be convicted, charged nor even identified for the accomplice to be held liable. Secondly, the material act of the accomplice must have had a substantial effect on the commission of the crime. Lastly, for the third condition to be

⁵³ Schabas, (2009), p. 518.

⁵⁴ *Genocide* case, para 370.

⁵⁵ *Ibid.*, para 373.

⁵⁶ Schabas, (2009), p. 339.

fulfilled, it is necessary that the accomplice acted with intent and knowledge of the principal perpetrator's act, and additionally, was aware of their own contribution to the commission of the crime.⁵⁷

Complicity is sometimes described as 'secondary participation', however, as to genocide, this label has been argued to not reflect the reality of the crime. The 'principal perpetrator' performing the criminalized acts can often be said to play an inferior role in the execution of the overall crime, whereas the person ordering and giving instructions, the 'accomplice', while not physically conducting the crime themselves, may be characterized as the actual leader and accordingly seen as the most iniquitous, resulting in a predominant demand for the prosecution of this person.⁵⁸

The Statutes of the ICTY and ICTR contained two provisions on complicity. Firstly, a substantive genocide provision which repeated Article III of the Genocide Convention, stating complicity in genocide as punishable.⁵⁹ Further, the Statutes included a general provision for accessory liability in relation to all crimes within the tribunals' jurisdiction, including genocide, providing liability for "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime."⁶⁰ Due to these two separate provisions of liability for accomplices, the case law of the ICTY and ICTR has not been consistent, and the different chambers of the tribunals have reached conflicting conclusions as to whether a difference exists between 'complicity in genocide' and 'aiding and abetting genocide'.⁶¹

⁵⁷ Schabas, (2001), p. 446f.

⁵⁸ Schabas, (2009), p. 340.

⁵⁹ See Statute of the ICTY, 25 May 1993, Article 4(3)(e) and Statute of the ICTR, 13 October 2006, Article 2(3)(e).

⁶⁰ See Statute of the ICTY, Article 7(1) and Statute of the ICTR, Article 6(1).

⁶¹ Milanović, (2007), p. 680.

2.3.2 State Complicity in Genocide

After the ICJ had concluded that Serbia could not be held internationally responsible for the commission of genocide it turned to examine whether responsibility could be established for other modes of participation.⁶² In particular, the Court focused on the question of complicity in genocide, the criminalization of which is found in paragraph (e) of Article III in the Genocide Convention. The Court noted that giving instructions or orders to someone to commit a crime, which in domestic criminal law often is regarded as a form of complicity, would in the examination of state responsibility for genocide result in the state being held responsible for commission of genocide, and not for complicity. State complicity in genocide would therefore inherently take the form of enabling or facilitating the commission of the crime. Additionally, the Court noted that ‘complicity’, while not being a notion found in the terminology of state responsibility, was similar to the customary rule of ‘aid or assistance’. The codification of said rule is found in Article 16 of ARSIWA, which provides for the international responsibility of one state for providing aid or assistance in the commission of a wrongful act by another state. Consequently, the ICJ concluded that for a state to be held internationally responsible for complicity in genocide, it had to be shown that organs or persons – whose acts are attributable to the state – had provided ‘aid or assistance’ in the commission of genocide, in a manner similar to the concept found in the law of state responsibility.⁶³

2.3.3 Requirement of Mens Rea for Complicity in Genocide

In the *Krstić* case, the Appeals Chamber of the ICTY referenced the *travaux préparatoires* of the Genocide Convention where the drafters had agreed to that complicity in genocide must be deliberate, and thus, the Appeals

⁶² *Genocide* case, para 416.

⁶³ *Ibid.*, paras 419–420.

Chamber concluded that complicity required the showing of genocidal intent.⁶⁴ However, aiding and abetting genocide – a separate form of liability from that of complicity according to the ICTY – was said to not require genocidal intent of the accomplice, but rather that awareness of the principal perpetrator’s intent would suffice.⁶⁵

In the examination of the responsibility of Serbia as complicit in genocide, the ICJ made a remark about the relationship between the *dolus specialis* of genocide and the motives of the accomplice. It asserted that the question arose whether the accomplice had to share the genocidal intent of the principal perpetrator in order to be held liable for complicity in genocide or if knowledge of such intent was sufficient. However, the Court never answered this question as it instead turned to establish that such a determination would only be necessary if it were shown that the accomplice at the least was aware of the genocidal intent of the principal perpetrator, which the Court was not convinced was at hand in the case before it.⁶⁶

Criticism was directed at the ICJ for its avoidance in answering the legal question of the mens rea requirement for complicity in genocide, with some of the judges of the case stating their opinions on the question in declarations and dissenting opinions.⁶⁷ Judge Bennouna argued that the accomplice should not be required to share the genocidal intent with the principal perpetrator, as that would result in complicity being equated to co-participation, a separate notion from that of complicity.⁶⁸ Judge Keith supported this view in his declaration as well, however also noting that “complicity is often equated in whole or in part with aiding and abetting.”⁶⁹ He argued that the mens rea required of an aider and abettor should be knowledge of the principal perpetrator’s genocidal intent, as this approach

⁶⁴ *Prosecutor v. Krstić*, (Judgment), ICTY-98-33-A, (19 April 2004), para 142.

⁶⁵ *Ibid.*, para 140.

⁶⁶ *Genocide case*, paras 421-422.

⁶⁷ Milanović, (2007) p. 681. (See also *Genocide case*, Declaration of Judge Bennouna, p. 362, and Dissenting opinion of *ad hoc* Judge Mahiou, para 125).

⁶⁸ *Genocide case*, Declaration of Judge Bennouna, p. 322.

⁶⁹ *Genocide case*, Declaration of Judge Keith, para 4.

corresponds with the domestic criminal law of many states as well as serves the purpose of penalizing those who knowingly assist a principal perpetrator in the commission of a crime. Additionally, he maintained that this approach would be in accordance with the judgment of the ICTY in the *Krstić* case.⁷⁰ However, also declaring the argument of the Appeals Chamber – that complicity in some circumstances would require genocidal intent of the accomplice – to be unpersuasive. Keith argued that the tribunal misinterpreted the *travaux préparatoires* of the Genocide Convention regarding that complicity in genocide was agreed upon to be deliberate. According to him, that complicity must be deliberate should be understood as indicating “that the actions had to be ‘deliberate’ in the sense of knowing of the perpetrator’s intent; the intent did not have to be shared.”⁷¹ *Ad hoc* Judge Mahiou also argued that the accomplice does not have to share the genocidal intent, but that awareness would be sufficient, and further stating that “all the underlying reasoning [of the ICJ in the *Genocide* case] relies on the notion that knowledge is sufficient to result in complicity.”⁷²

Prof. Milanović has also argued that complicity requires a lower degree of *mens rea*.⁷³ He has noted that the Genocide Convention in itself does not provide for individual criminal responsibility for genocide⁷⁴, but rather imposes obligations on the Contracting Parties to criminalize genocide domestically, which includes the criminalization of accessory responsibility and other modes of participation in genocide. Therefore, ‘complicity’ as used in the Convention, does not retain a uniform definition as its content varies between the national law of different states. Complicity in genocide may thus present itself in various forms, including but not limited to instigation, providing assistance before and after, and aiding and abetting. Hence, he reasons that the degree of *mens rea* required for complicity is

⁷⁰ *Genocide* case, Declaration of Judge Keith, paras 5-6.

⁷¹ *Ibid.*, para 7.

⁷² *Genocide* case, Dissenting opinion of *ad hoc* Judge Mahiou, para 125.

⁷³ Milanović, (2007), p. 680.

⁷⁴ *Ibid.*, p. 681, note 57.

dynamic, “as complicity is not a distinct criminal offense but a general term for various forms of participation in an offense.”⁷⁵

On the other side, Prof. Schabas adopts a slightly different view. He differentiates between a ‘purpose-based’ and ‘knowledge-based’ approach to the mental element of genocide, and where the purpose-based approach according to him excessively focuses on the intent of a few specific individuals. For this reason, he argues for an approach that recognizes the collective nature of the crime, where state plan or policy should be used as a base for establishing genocide.⁷⁶ Then, the central question of whether a genocide has been committed at all could be answered without the need to investigate the specific intent of individual perpetrators, and accordingly, knowledge of the state plan or policy – in combination with a material act with substantial effect on the commission of the crime – would amount to complicity in genocide.⁷⁷

⁷⁵ Milanović, (2007), p. 682.

⁷⁶ Schabas, (2009), p. 242f.

⁷⁷ *Ibid.*, p. 351f.

3 Analysis

It is arguably important to provide for the criminalization of accessory participation in genocide, such as complicity, as the crime inherently is committed in a collective manner with participation by a large array of persons, not all executing the actual criminalized acts. Thus, criminal liability of accomplices is often essential in holding high-ranking officials and leaders responsible. Further, due to this collective, and often widespread nature, it is also argued that states frequently are involved in one way or another in the commission of genocide, hence, state responsibility for genocide is conceivably also an important factor in creating a comprehensive scheme of responsibility for genocide.

Due to the character of genocide as an international crime, some issues are present when adopting the definition – formulated with individual criminal responsibility in mind – into the law of state responsibility. While confirming the ‘duality of responsibility’, where criminal liability is a separate and parallel determination to that of state responsibility, the approach of the ICJ demonstrated the close relationship between individual criminal liability and state responsibility for genocide. In the evaluation of the mental element of the crime, the Court in the *Genocide* case relied heavily upon the case law of the ICTY when determining whether genocidal intent was present. This was done both to establish whether a genocide had been committed in general, but also as to the question of if genocidal intent could be ascribed to Serbia. Genocidal intent of a state, according to the ICJ, is thus, determined by the genocidal intent of individuals or organs whose acts are attributable to that state.

Likewise, complicity is a notion of criminal law not directly found in the law of state responsibility. The ICJ focused on the similarities with the concept of international responsibility for aid or assistance and concluded that if a person or organ of a state provides aid or assistance in the

commission of genocide, the state is held responsible for complicity. International criminal tribunals have to a varying degree established a difference between complicity in genocide and aiding and abetting genocide, where additionally, the requirement of mens rea varies between these forms. In the case law of the ICTY, genocidal intent is not required of an aider and abettor, but for complicity, the *dolus specialis* has to be shown. As state complicity is based on individual actors, the question arises if providing ‘aid or assistance’, is equal to ‘aiding and abetting’ in criminal law, or if state responsibility is another form of complicity, and correspondingly, what degree of mens rea is required for state complicity.

Based on the judgment of the ICJ, a state official giving orders to commit genocide would necessarily possess the genocidal intent, and while the person would not carry out the criminalized act themselves, the state would be held responsible for commission of genocide, whereas the individual would presumably be charged for complicity. In this situation, the mental state of the individual is decisive in holding the state responsible.

If the individual, acting on behalf of or under the control of the state, furnished aid or assistance to perpetrators of genocide, the crucial question for state responsibility remains the same: the mental element. However, with the addition of a need for a more detailed account of the two components of knowledge and intent. If the individual acts with genocidal intent, both components of intent and knowledge are fulfilled, and the state would be held responsible for complicity. Respectively, if not acting with genocidal intent and oblivious to the intent of the perpetrator, the state would not be held responsible. The disputed situation arises if the person is aware of the perpetrator’s genocidal intent, but does not share it, in this case, only one of the two components of the mental element is met, and the question is if this suffices for complicity or not.

Thus, while unsettled what degree of mens rea is required for complicity in genocide, it appears that the level of genocidal intent that is required of an

accomplice for criminal liability, will in turn affect the possibility of holding a state responsible for complicity in genocide. Hence, it can be concluded that, according to the current jurisprudence of the ICJ – which substantial weight in interpreting international law cannot be denied – the mental state of an individual is decisive in determining the genocidal intent of a state, and subsequently, whether the state has breached one of its international obligations and therefore can be held internationally responsible for genocide.

4 Conclusion

International law is characterized by the lack of an organ with authoritative legislative and executive powers. Thus, the content and scope of international norms are often left to courts and jurists to identify when the primary sources do not provide for clear and unambiguous descriptions. The judicial decisions of the ICJ are generally viewed as having persuasive value as a means to determine the current law. Hence, resulting in that the reasoning of the Court – where the mental state of an individual acting on behalf of the state is fundamental in determining state responsibility – will generally have to be considered to serve as a representative reflection of the law of state responsibility for genocide. While criticism has been directed at the judgment in the *Genocide* case by different legal scholars who instead have argued for other ways of reasoning, there is as of right now no universal consensus in the international community to another approach than that adopted by the ICJ. However, international law is constantly evolving and the decision of the ICJ is not legally binding, thus the decision by the Court should not be viewed as constituting any prejudice to that state practice and *opinio juris* may result in the evolvement of the law and its interpretation.

It is conceivable that the assessment of state responsibility for a breach of an international obligation consisting of an international crime would have to consider international criminal law. However, the close interconnection between individual criminal liability and state responsibility for the crime of genocide, when viewed in a broader context, may result in the determination of state responsibility being turned into a quasi-criminal proceeding. In the *Genocide* case, this might not have been an issue, as there was case law from a criminal tribunal for the ICJ to rely upon, but if a proceeding is instituted against a state for state responsibility, where no prior judicial decisions on the criminal liability of individuals exist, it may be problematic for an interstate court to rule on the genocidal intent of individuals with the

purpose of establishing state intent, as the criminal law character of such an evaluation requires that fundamental principles of criminal law are upheld and respected.

Additionally, it can be argued that an individual being held responsible for genocide, and thus, having breached an obligation that gives rise to criminal liability, does not necessarily have to be identical to the international obligation imposed onto states, resulting in that the fairly direct translation made by the Court might not be completely sound. For this reason, further research should be conducted on the effects resulting from the close relationship between international criminal law and state responsibility. Both taking into account the effects for an accused individual, but also how this developed approach affects the possibility of holding a state responsible.

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