The Crime of Genocide and the Determination of Dolus Specialis for State Responsibility

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Abstract

The debate surrounding state responsibility for genocide and tracing intent in the artificial entity has resurfaced after the Gambia filed a case against Myanmar on November 11, 2019, alleging it of violation of genocide convention. Its preceding case before ICJ did little to elucidate the legal uncertainty that surrounds the standard of proof for dolus specilias as it applies to states. In both cases, the court has heavily relied on the ICTY's idea of intent to destroy. In the Bosnian Genocide case, the ICJ declared the failed responsibility of the state to prevent genocide in Srebrenica basing on ICTY's conviction of kirstic. Unlike these cases, ICJ has no criminal court or tribunal judgments to refer to in the Rohingya case. It is a challenge as well as an opportunity for the ICJ to set its ground in regard to genocide and genocidal intent. Opportunity, as it can dwell deep into its idea of identifying dolus specialis of state and challenge as the fact-finding system of ICJ, is not as robust as of ad hoc tribunals and Myanmar may not be supportive in providing relevant and trustworthy data. This paper aims to look into these dimensions of dolus specialis. It will look into the idea of 'dolus specialis' and how it has been interpreted by international courts, tribunals, commissions and Scholars concerning the state. It will further unravel the contradictory and inconsistent jurisprudential and scholarly outcome resulting in a widening gap on the understanding of 'intent to destroy' on state responsibility. Finally, the paper will identify the legitimate jolts which should be reformed in identifying dolus specialis of a state in the current Gambia v. Myanmar Genocide case.

Keywords: The Crime of Genocide; Dolus Specialis; State Responsibility.

Background

After a decades-long struggle, a nameless crime that shook the world in horror was finally identified. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations in Paris on December 9, 1948[1]. Article 2 of the convention defines genocide: "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" with an enumerated list of six acts. The chapeau of the definition envisions that there must be a proven "intent" on the part of perpetrators to physically destroy a national, ethnic, racial, or religious group as such.

Since its first codification in the 1948 Genocide Convention, the crime of genocide has been verbatim defined as one of the five prohibited acts committed with the 'intent to destroy', in whole or in part, of a national, ethnic, racial, or religious group, as such. The International Criminal Tribunal for the former Yugoslavia (ICTY) established by United Nations Security Council on 25 May 1993 to deal with crimes that took place during the conflicts in the Balkans in the 1990s defines genocide in Article 4 of the Statute. A year later on 8 November, 1994 International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994. Article 2 of the Statute of the Tribunal annexed to the resolution establishing the tribunal reproduced the same definition of genocide envisaged in the Genocide Convention and ICTY statues. International Criminal Court as a permanent international tribunal established with the adoption of the Rome Statutes on 17 July 1998 repeats the same definition of genocide in Article 6 including the requirement of 'special intent'.

Whereas any crime involves *mens rea*, the Genocide Convention elevates this element to a "special" or "specific" standard, *dolus specialis*. As Kai Ambos says, "Genocide is a crime with a double mental element, i.e. a general intent as to the underlying acts, and an ulterior intent with regard to the ultimate aim of the destruction of the group"[2]. It is this

1, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), adopted by GA Res. 260(III)(A), U.N. GAOR, 3d Sess., pt. 1, at 174, U.N. Doc. A/810 (1948)

2 Kai Ambos 'What Does 'Intent to Destroy' in Genocide Mean?" (2009) 91 International Review of the Red Cross 833

ulterior intent, or *dolus specialis*, that makes the crime of genocide so unique. It distinguishes genocide from war crimes, crimes against humanity, and crime of aggression. Though it is the determining facet, the intent is the most difficult element to determine. Unlike the objective criteria of general intent defined in Article 30 of the Statute of the International Criminal Court (ICC), special intent requires an additional subjective requirement that complements the general intent and goes beyond the objective elements of the offense definition[3].

The definition of genocide does not itself mentions the term 'special intent' 'specific intent' or *'dolus specialis'* neither it provides the definition of 'intent to destroy' as much as it does not provide definition of any other criteria. How does one tell if the perpetrator has a '*dolus specialis* to destroy the group'? Can subjective '*dolus specialis*' have an objective element? International and National tribunals have dwelled into this matter in multiple cases of genocide but have not decided on any objective basis to identify the 'Intent to destroy'. In fact, almost every case or at least every tribunal has its own set of ideas about what constitutes 'intent to destroy', creating a diverse and sometimes contradictory outlook.

This idea of 'intent to destroy' is painted by almost all tribunals in regard to individual criminal responsibility. Attributing acts of genocide to a particular state proves to be extremely rare. Though convention imposes certain obligations on states, it does not explicitly provide that states themselves must not commit genocide or state could be held guilty for genocide. Nevertheless, the recent documents, adopted by the two different bodies, the Report of International Commission of Inquiry on Darfur and the Judgments of International Court of Justice (ICJ) on genocide in *Bosnia and Herzegovina* and in *Croatia* attempted to challenge the dilemma existing around the issue of state responsibility for genocide[4]. Though dealing with a similar issue, both have taken a different stand in reaching the conclusion. Like the Bosnia v. Serbia judgment, the ICJ in Croatia v. Serbia does little to elucidate the legal uncertainty that surrounds the standard of proof for *dolus specilias* as it applies to states. Yet, both favored that the evidence of this intent is to be sought, first, in the State's policy, alternatively, by indirect evidence. Croatian Judgment in regard to the standard of proof concluded that in the absence of direct evidence, "specific intent" is most likely established through inference, for states and individuals alike[5]. Whereas Darfur commission decided against genocide in Sudan concluding that the Government of Sudan has not pursued a policy of genocide lacking the crucial element of genocidal intent[6].

The debate surrounding state responsibility for genocide and tracing intent in the artificial entity has resurfaced after the Gambia filed a case against Myanmar on November 11, 2019, alleging it of violation of genocide convention. Its preceding case before ICJ did little to elucidate the legal uncertainty that surrounds the standard of proof for *dolus specilias* as it applies to states. In both cases, the court has heavily relied on the ICTY's idea of intent to destroy. In the Bosnian Genocide case, the ICJ declared the failed responsibility of the state to prevent genocide in Srebrenica basing on ICTY's conviction of *kirstic*. Unlike these cases, ICJ has no criminal court or tribunal judgments to refer to in the *Rohingya* case. It is a challenge as well as an opportunity for the ICJ to set its ground in regard to genocide and genocidal intent. Opportunity, as it can dwell deep into its idea of identifying *dolus specialis* of state and challenge as the fact-finding system of ICJ, is not as robust as of ad hoc tribunals and Myanmar may not be supportive in providing relevant and trustworthy data.

With these entire quandaries, the original question resurfaces, how can one trace *dolus specialis* of a cerebral less entity 'the state'? Shall *dolus specialis* be established through inference, for states and individuals alike? How '*dolus specialis*' intended for individual criminal responsibility is inferred for state responsibility? Should ICJ adopt a lenient approach to '*dolus specialis'* regarding state? Is an objective element of intent even a possibility?

This paper aims to look into these dimensions of *dolus specialis*. It will look into the idea of '*dolus specialis*' and how it has been interpreted by international courts, tribunals, commissions and Scholars concerning the state. It will further unravel the contradictory and inconsistent jurisprudential and scholarly outcome resulting in a widening gap on the understanding of 'intent to destroy' on state responsibility. Finally, the paper will identify the legitimate jolts which should be reformed in identifying *dolus specialis* of a state in the current Gambia v. Myanmar Genocide case.

3 ibid

4 Tamar Mikaberidze, State Responsibility for Genocide in the Light of ICJ Genocide Judgments and Darfur Commission Report, (Mphil thesis Tallinn Law School 2016)

5 Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Croatia v. Serbia), ICJ judgment 3 February 2015 para147 https://www.icj-cij.org/public/files/case-related/118/118-20150203-JUD-01-00-EN.pdf accessed 10 September 2020

6 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004

Literature Review

What are the contours of the 'specific intent' requirement that makes the crime of genocide distinct from other international crimes? How has the concept of 'specific intent' intended for individual criminal responsibility found its space for the state? How the International Court of Justice and other international instruments have gone about determining 'specific intent' for the state? In the following, the approaches of the tribunals, commissions, international court of justice, and scholars to identifying '*dolus specialis*' is discussed, followed by challenges associated with the highly subjective deciding factor of genocide, especially in regards to the state.

Dolus specialis

When the term Genocide was coined by Raphael Lemkin in 1944[7] the requirement of special intent was not envisioned. Later, he helped prod the United Nations into formulating the Convention on the Prevention and Punishment of the Crime of Genocide in 1948[8] where special intent was considered a deciding factor for genocide. It was further confirmed by various instruments including the commentary on the 1996 Code of Crimes against the Peace and Security of Mankind. International Law Commission qualified genocide's specific intent as "the distinguishing characteristic of this particular crime under international law."[9] It in Art 17 commentary 5 states "that a general intent to commit one of the enumerated acts in the convention is not sufficient for the crime of genocide… the definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act. [10]"

This defining element of genocide, 'intent to destroy' has been used synonymously with the terms 'special intent', 'specific intent', and mainly '*dolus specialis'*. Scabbas believes that as hoc tribunals using the term *dolus specialis* or special intent instead of 'intent to destroy' has further complicated the issue of genocidal intent[11]. Though the convention does not specifically use the term '*dolus specialis*' or 'special intent' or 'specific intent', both international tribunals have used these term to characterize 'intent to destroy', the same precedence has been followed by other national, international and hybrid tribunals as well. Following the footstep, both ICJ and ICC have also accepted the notion of '*dolus specialis'*.

The question regarding using the term '*dolus specialis'* was specifically raised by the Office of the Prosecutor on appeal in the Jelisic case. Prosecutor argued that the concept of *dolus specialis* set too high a standard[12]. Appeal chamber dealt with the matter leniently saying simply that the Trial Chamber had used the term *dolus specialis* as if it meant "specific intent" to describe "the intent to destroy…as such"[13]. Alternatively, the normative requirement set out in the chapeau of the definition of genocide[14]. This explanation added largely on identifying '*dolus specialis*' as equivalent to 'intent to destroy' mentioned in the chapeau of Article II of Genocide convention.

A challenge in establishing genocidal intent is in obtaining evidence sufficient to prove, beyond a reasonable doubt, that the perpetrators' intentions to destroy the group, which is the most difficult task for the prosecutors.[15] As a specific intent offense, the mental state of the perpetrator for the commission of any of the underlying acts of genocide[16] can be considered as strong evidence. Yet, as *Akayesu* trial judgment confirms mental factor is difficult, even impossible, to determine.[17] Evidence of genocidal intent can be found most easily in cases where the accused has made their intent clear through public statements.[18] However, Josef Kunz argues that " A perpetrator will never admit the intent to destroy a group as such, but will tell the world that they are acting against traitors and so on."[19] This is why; ICTY and the ICTR have consistently held in the absence of a confession from the accused, the intent is inferred from inference, a certain number of presumptions of fact, circumstances, or factors, including circumstantial evidence.[20]

7 Lemkin, R., Axis Rule in Occupied Europe, Chapter IX Genocide- A New Term and New Conception for Destruction of Nations (2nd edn, The Lawbook Exchange, Ltd, 2008)

8 Gellately R and Kiernan B, 'The Study of Mass Murder and Genocide' in Robert Gellately and Ben Kiernan (eds), The Specter of Genocide: Mass Murder in Historical Perspective (CUP 2003)

9 Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Eighth Session, May 6-July 26, 1996, U.N. GAOR, 51st sess., U.N. Doc. A/51/10, art. 17 Commentary 5 (1996)

10 Ibid

11 W.A Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia (2001) 25 Fordham Int'l L.J. 23 (hereinafter W.A. Schabas (Fordham Article))

12 Ibid

13 Prosecutor v Jelisic (Judgment) IT-95-10-A (July 5, 2001), Para 51

14 W.A. Scabas (Fordham Article) (n 5)

15 International commission of jurist

16 Prosecutor v Krstić (appeal judgment), para 20

17 Prosecutor v Akayesu (Trial Judgment) ICTR-96-4-T, (2 September 1998) para 523

18 W.A. Schabas, Genocide in International Law (CUP 2009), at 265

19 Josef L Kunz, 'The United Nations Convention on Genocide' (1949) 43 (4) The American Journal of International Law, 743

20 The Prosecutor v Popović et al, (Appeal judgment) IT-05-88-A, (30 January 2015), para 468; Prosecutor v Stakić (appeal judgment), para 55; Prosecutor v. Krstić (appeal judgment) para 34; Prosecutor v. Jelisić (appeal judgment) para 47

Hence, almost every other case or at least every other tribunal or commission has come up with their own set of ideas regarding '*dolus specialis*' which is often contradictory to each other. One such special case is *Milorad Trbic*[21] case in the Court of Bosnia and Herzegovina (CtBiH) and the *Nikolic*[22] case (part of the *Popovic* et al. case at the International Criminal Tribunal for the former Yugoslavia, ICTY)[23], Despite both belonging to the same brigade with *Nikolic* as a superior to *Tribic*, both tribunals took a completely different stand on illustrating *dolus specialis*. Another interesting example is of *Kayishema and Ruzindana*[24] where ICTR took a consistent and methodical pattern of killing as evidence of *dolus specialis*, seven months later ICTY in *Jelisic*[25] case completely undermined the earlier judgment rejecting the consistent and methodical pattern as evidence of intent. Multiple cases in ICTY and ICTR have favored one or another theory of knowledge-based, purpose-based, and structure-based in determining intent. Preferring one theory and undermining the other is a common occurrence within and across tribunals. Al-Bashir's case of ICC rejected the knowledge-based theory of determining intent yet in 2016 ICTY in *Karadzic* judgment took it as partial evidence of the presence of genocidal intent. One of the reasons for judicial interpretation of genocidal intent to vary within and across the criminal tribunals according to Dana Buns is because these tribunals confuse genocide's collective commission with the perpetrators' individual intent[26].

Recently some discussions have started that by only focusing on intention to destroy, it is extremely difficult to curb and limit the crime of genocide due to its seriousness[27]. Various authors like Kjell Anderson[28], Alexander K.A. Greenawalt[29], Kai Ambros[30], Dana Bunns[31], and even Schabas has argued for rethinking the 'special intent' requirement for genocide. Kjell Anderson argues that "The currently predominant model of genocidal intent, which requires elusive (and often fictive) proof of the intent to destroy the group, does not reflect well the reality of genocide as a systematic crime involving many perpetrators with a range of motives."[32] Favoring the theories of determining intent, Kai Ambos argues that there should be a combined structure where low-level perpetrators need only possess knowledge while high and mid-level perpetrators need to harbor a genocidal purpose.[33]

ICJ and other international instruments on *Dolus specialis* of State

With all these theories, debates, criticisms surrounding '*dolus specialis*' concerning the individual, the world was not prepared for dealing with this specific intent in the state. While turning to the issue of assessing the crime of genocide in the context of international state responsibility, the discussion becomes more controversial as historically it was conceived in the context of individual prosecution[34]. Evidenced in Nuremberg Tribunals Judgment, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[35]. The Genocide Convention imposes some obligations upon states but it does not provide explicitly that states may be held responsible for the commission of it. From the Nuremberg and Tokyo trials to ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to the development of hybrid, internationalized criminal tribunals and finally, to permanent International Criminal Court (ICC), the idea of '*dolus specialis*' of state for the commission of genocide was never imagined.[36] Understandably, as it is hard to conceive of a state with a specific intent[37].

Kevin Aquilina and Klejda Mulaj however find it puzzling that despite genocide is a collective crime against groups and inconceivable without the involvement of the state, no government involvement in the commission of genocide has been held responsible for it[38]. William Schabas asserts that even though the Convention does not clearly stipulate for state criminality, states have still often been accused of committing genocide since it is difficult to imagine the

21 Prosecutor v. Tribic (Trial Chamber Judgment) X-KR-07/386 (16 October 2009) at 774

22 The Prosecutor v Popović et al (Trial Chamber) IT-05-88-T, (10 June 2010)

23 Kjell Anderson, 'Judicial Inference of the 'Intent to Destroy': A Critical, Socio-legal Analysis' (2019) 17 (1) Journal of International Criminal Justice, 125. Anderson has dissected this very aspect in detail, he further elaborated on the setbacks of the specific requirement of dolus specialis in genocide.

24 Prosecutor v. Kayishema and Ruzindana (Trial Chamber Judgment) ICTR-95-1 (21 May 1999)

25 Prosecutor v. Jelisic (n 13)

26 Dana Burns, 'Dolus Specialis, How the Judicial Interpretation of Genocidal Intent Devalues Genocide Special Status' (Human Rights Thesis, Central European University)

27 Moeen Ahmed, 'Whether Specific Intent To Destroy (Dolus Specialis) Is Required For Genocidal Crime Or Mere Prior Knowledge Is Sufficient?' (2015) https://ssrn.com/abstract=2677182 accessed 20 September 2020

28 Kjell Anderson (n 23)

29Alexander K.A. Greenawalt, 'Rethinking Genocide Intent, The case for a knowledge-based interpretation, the meaning of intent' (1999) 99 Columbia Law Review 2259

30 Kai Ambos (n 2)

31 Dana Burns (n 26)

32 Kjell Anderson (n 23)

33 Kai Ambos, (n 2)

34 Tamar Mikaberidze (n 4)

35 W. A. Schabas, 'State Policy as an Element of International Crimes'(2007-2008) 98 J. Crim. L. & Criminology 953 cited from France et. al. v. Goering et. al., 22 IMT 411, 466 (Int'l Mil. Trib. 1946)

36 Marko Milanovic, 'State Responsibility for Genocide' (2006) 17 (3) The European Journal of International Law 2

37 W.A. Schabas (n 18) at 444

38 Mulaj, K and Aquilina, K, 'Limitations in Attributing State Responsibility under the Genocide Convention' (2018) 17 Journal of Human Rights 123

commission of genocide without "some form of state complicity or involvement[39]. The recent documents, adopted by the two different bodies, the Report of International Commission of Inquiry on Darfur and the Judgments of International Court of Justice on genocide in Bosnia and Herzegovina and in Croatia attempted to deal with the dilemma existing around the issue of state responsibility for genocide[40].

Article IX of the genocide convention gives authority to ICJ to look into the responsibility of the state for genocide. Though, fourteen cases have been filed before the ICJ pursuant to article IX,[41] excluding the current Gambia vs. Myanmar case, it has made its decision only in two cases. ICJ thought it necessary to clarify its stand on Article IX in the 2007 Genocide judgment confirming in paragraph 32 "Genocide Convention does not exclude any form of State responsibility"[42]. Expounding that states can be held liable for the commission of genocide. Despite numerous debates surrounding the interpretation of Article IX of the Genocide Convention, this dissertation for the analysis of *dolus specialis* stands on ICJ's judgment and assumes the responsibility of the state for genocide.

One of the challenges for ICJ in both cases was to see the prospects of '*dolus specialis'* to identify the state responsibility. Though the concept of intent is well developed in criminal law, both domestic and international, but it does not fit well with State responsibility[43]. ICJ in the Bosnian genocide case though recognized that the finding of genocide requires proof of the specific intent to destroy the protected group, failed in addressing how a '*dolus specialis*' intended for an individual can be inferred for the state.[44] ICJ however very briefly acknowledged

> *"the dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent[45]"*

ICJ also indicated on ascribing intent to a state by virtue of the intentions of key agents or organs[46] However, due to its requirement of a higher standard of proof (often considered impossible), the Court failed to undertake a cumulative analysis of evidence derived from state policy or circumstantial evidence in determining '*dolus specialis*'.[47]

Like the Bosnia v. Serbia judgment, the ICJ in its second judgment on Croatia v. Serbia does little to elucidate the legal uncertainty that surrounds the standard of proof for *dolus specialis* as it applies to states. ICJ in on Croatia v Serbia also acknowledged 'intent to destroy' as an essential characteristic of genocide, which distinguishes it from other serious crimes[48]. According to court evidence of this intent is to be sought, first, in the State's policy, while at the same time accepting that such intent will seldom be expressly stated, alternatively, the *dolus specialis* may be established by indirect evidence, i.e., deduced or inferred from certain types of conduct.[49] Following the ICJ's 2007 genocide Judgment it concluded that the existence of intent to destroy had not been established, holding none liable for genocide as such.

The same phenomenon can be seen in the report of the International Commission of Inquiry on Darfur which, looked for a State plan or policy rather than 'intent'.[50] However, Darfur took a more rigid and regressive stand than ICJ. ICJ based the state responsibility of Serbia to prevent genocide on ICTY's *kristic case*. Dafur disagreed with the *kristic* judgment and concluded that "the Government of Sudan has not committed genocide because the element of intent by the government "appears to be missing" calming "policy of attacking, killing, and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group based on racial, ethnic or religious grounds."[51] This decision of Darfur was much criticized internationally. However, the commission also took the scale of atrocities, systematic nature of the crime, and racially motivated statements can also be indicative of genocidal intent[52].

39 W.A. Schabas (n 12) at 419

40 Tamar Mikaberidze (n 4)

41 W.A. Scabas (n 12) at 499

42 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgment July 11, 1996, Para. 32 https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf accessed 10 September 2020 (hereinafter ICJ 2007 genocide judgment)

43 Ibid para. 517

44 Susana SáCouto, 'Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case against Serbia and Montenegro' (2007) 15(1) Human Rights Brief 2

45 ICJ 2007 Genocide Judgment, n (42), para. 373

46 ICJ 2007 Genocide Judgment, n (42) para 376

47 Susana SáCouto (n 44)

48 Croatia v Serbia (n 5) para 132

49 Ibid, Para 143

50 Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para 518

51 Ibid para 515-520

52 Ibid para 513

Allegations of State responsibility for genocide have also been made before international human rights tribunals and treaty bodies. A petition alleging that Guatemala had committed genocide was declared admissible by the Inter-American Commission on Human Rights in 1999[53]. In its report, the Commission said the massacre took place 'within the framework of a genocidal policy of the Guatemalan State carried out with the intention of totally or partially destroying the Mayan indigenous people'[54] where court followed the pattern of Darfur, seeing 'policy of state' rather than intent.

Quandaries and Wrangles

All these instruments along with ICJ judgments did little to elucidate the legal uncertainty surrounding '*dolus specialis*' of state and how can it be identified in an abstract non-cognitive entity. One common answer that all these documents possess is through 'state policy' which both the ICJ cases agree is very difficult to ascertain. It is true that legal entities, like states, cannot form intent in the sense of a natural person, given that they are an amalgamation of many different institutions and actors[55]. But, should 'intent of state' be seen in a higher threshold of collectivity in state policy? Various authors have argued in favor of and against this requirement. Kjell Anderson argues, in genocide, normative expectations are communicated through state ideologies, which seek to demonize and exclude the victim group from the moral community, as well as through the observable acts of state agents and peers.[56] For him, state ideologies along with state agents and state organs action can be an actual source of finding the genocidal intent. Schabas argues that a better approach to examine State 'intent' can be from the standpoint of State ideologies[57]. BethVan Schaack, argues that at a minimum, such a genocide determination would be justified if it could be shown that a state or an organization had developed, and implemented, a clear or formal plan or policy to destroy a protected group in whole or in part[58].

However, in international instruments dealing with the crime of genocide, state policy or plan is not envisaged as a separate element for the crime of genocide[59]. In particular, neither the Genocide Convention nor ICC Statute makes it explicit requirement[60]. Following this stand, other authors have argued for a much lenient ground of finding intent. Dugo, Habtamu, and Joanne Eisen, rather than following the traditional ideology of ICJ and Tribunals, have impressively argued their own set criteria based on scholarly literature. They believe that '*dolus specialis*' of states can be traced in the mental state of the rulers[61]. Further, they identify two prime criteria to identify the *dolus specialis* of state: first, evident hateful motive toward the group which is also argued by Schabas (p. 294), and second, Exclusionary ideologies argued by Jason Campbell and Barbara Harff. Exclusionary ideologies can be identified first on Religious Hatred Based on History and second based on Nationality, race, ethnicity, and fear. Melanie O'Brien adds that the experience of refugees can be taken as strong evidence of intent.

Amabelle C. Asuncion despite lauding the step taken by ICJ to held state responsible under genocide criticizes this approach of ICJ[62]. She believes that ICJ created the concept 'civil genocide' which reduces the gravity of genocide and undermines the nature of the genocide convention[63]. Further, she criticizes that ICJ has taken a very high threshold to prove genocidal intent[64]. Kent notes that "the idea, in Bosnia at least, that a plan of action directed at the destruction of non-Serb groups needed further evidence to be proven beyond all reasonable doubt seems farcical to the victims and equally far-fetched to academic experts"[65]

Paul Behrens in criticizing the judgment of Croatia v Serbia argues that the court has lost sight of certain elements of the specific intent of individuals which would have deserved detailed evaluations[66]. Readjustment of focus towards those elements which did not require detailed investigation of the mindset of the perpetrators, like state policy, the pattern of the conduct was the chief reason why the ICJ held that the acts committed against the Croat group were not

53 W.A. Scabas (n 12) at 518

54 W.A. Scabas (n 12) at 518 cited from Case of Plan de Sa´nchez Massacre v. Guatemala, Judgment of 29 April 2004 (Merits), para. 3.

55 BethVan Schaack, 'Determining the Commission of Genocide in Myanmar', (2019) 17 Journal of International Criminal Justice 28

56 Kjell Anderson (n 23)

57 W.A. Scabas (n 12) at 518

58 BethVan Schaack (n 55)

59 Tamar Mikaberidze (n 4)

60 Ibid

61 Dugo, Habtamu, and Joanne Eisen, 'Proving Genocide in Ethiopia: The Dolus Specialis of Intent to Destroy a Group.' (2017) 10(7) Journal of Pan African Studies, 133

62 Amabelle C. Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?' (2010) 20 (4) EJIL 1195

63 Ibid

64 Ibid

65 Gregory Kent, 'Genocidal Intent and Transitional Justice in Bosnia: Jelisic, Foot Soldiers of Genocide, and the ICTY', (2013) 27(3) East European Politics and Societies 564

66, Paul Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia' (2015) 28 LJIL 923

committed with the required *dolus specialis*[67]. Though this is a safe and often tempting alternative for international courts, tribunals, and commissions, it always does not lead to logical conclusions. *Bosnian* genocide case did not agree on the 'very pattern of the atrocities' which it considers a broad proposition to demonstrate genocidal intent.[68] Further, in the Croatian case court took the scale of violence at a macro level. [69] The author believes that though ICJ aided the development of international law in significant aspects, yet, it was by a concept of genocide as a macro phenomenon as it was driven by a concept with its reliance on the pattern and its emphasis on scale, its rejection of the individualized perspective and of so-called 'isolated incidents'[70]. He believes that though 'individual criminal responsibility' and 'state responsibility' are different ICJ could have relied on the identified *dolus specialis* grounds which would have made much sense. ICJ should not have taken genocide as a large-scale event, divorcing it from individual circumstances.

Melanie O'Brien believes that with this rigid consideration of *dolus specialis* and a higher burden of proof this is a great burden on The Gambia to ensure the evidence presented is comprehensive enough for the ICJ to reach a finding of genocide[71]. Further, she believes that ICJ fact-finding mechanisms not being as superior to ad hoc tribunals can be an additional problem in determining the evidence of intent[72]. ICJ also has to face the new-world problem in the Gambia case in tracing *dolus specialis* from the electronic news system and social media conversation. However, she concludes that rather than still concentrating on the traditional approaches of finding intent, it is an opportunity for ICJ to identify a reasonable ground for intent.

Research Questions

1. Can '*dolus specialis*' intended for individual criminal responsibility be adequately inferred for state responsibility?
2. What are the challenges in the determination of 'dolus specialis' for state responsibility?

Research Methodology

The present research proposes to embark on comparative analysis and extensive review of the jurisprudence of international courts, tribunals, and commission on the subject of '*dolus specialis'* of state. Naturally, the research is most likely to rely extensively on primary sources, most prominently case laws of the International court of justice. Two previous cases decided by ICJ concerning genocide along with the current Gambia vs. Myanmar case will be the center of the research. It will further look into the idea of '*dolus specials'* of states identified by the Darfur commission report and other international criminal tribunals and few other commissions. The selected cases are those that figure prominently in the relevant secondary literature and those that the tribunals themselves treat as authoritative on the subject. Besides case laws, international treaties and commission reports will also figure majorly in the work. Reports of International Organizations, comments of monitoring bodies, and commentaries of the relevant conventions and treaties shall also be relied on. The research relies equally extensively on secondary sources like journal articles, book chapters, blog posts, and newspaper articles.

Chapterization

Chapter I Introduction

This chapter provides the background of the dealt subject. It will concisely lay down the reviewed literature. It will also include the research questions and explain the adopted methodology and the objective of the dissertation.

Chapter II The crime of Genocide and *Dolus Specialis*

67 Ibid

68 ICJ 2007 Genocide Judgment, n (42) para. 373

69 Croatia v. Serbia (n 5) para 512

70 Paul Behrens, (n 66)

71 Melanie O'Brien, Rohingya Symposium: The Rohingya Cases before International Courts and the Crime of Genocide, (opinio juris, 25 August 2020)

72 Ibid

Since the genocide definition does not elaborate on the concept of 'intent to destroy' or '*dolus specialis'*, this chapter looks into the jurisprudence of international law, case laws, and scholarly writings, to comprehend international law's conception of and definition of '*dolus specialis'*.

Chapter III *Dolus specialis* and State Responsibility

State responsibility for the commission of genocide was a largely debated subject in international law. The expressions of the Convention leave unsure whether a state has an essential obligation not to commit genocide. This was the crucial question that ICJ had to deal with in the first genocide case. Now as an established fact that a state can be held liable for commission of genocide, immense question surrounds how the double mental element of state can be traced. Hence, this chapter discusses in detail how the international court of justice and other international commissions have approached the subject of state responsibility for genocide and *dolus specialis* of state. It proposes to trace the apparent trajectory from *travaux preparatoire*s of genocide convention to the court's decision in adopting this approach. Moreover, it will look into the continued relevance of 'intent to destroy' in the current Myanmar genocide case. Finally, it will deal with the limitations of the approach, as demonstrated by Tribunals and genocide-scholars, including international lawyers.

Chapter IV Comparative Analysis

This chapter takes up the comparative approach in unraveling the contradictory and capricious jurisprudential outcome and a widening gap on the understanding of 'intent to destroy' for state responsibility. The chapter proposes to detail the contours of this approach. For this, it will in-depth analyze the stand taken by ICJ and Darfur commission. This chapter also proposes to explore the novel and radical approach taken by scholars. Basing on it, the paper will look into the apparent absence of coherence between the court, commission and scholars approach in principle. Analyzing the entire aspect, it will cognitively analyze the challenges and opportunities for ICJ in dealing with the Gambia vs. Myanmar case.

Chapter V Conclusion

This chapter shall provide the concluding observations. It will lay down the findings in light of the research question and the reviewed literature.

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