EXAMINING THE LEGAL BASIS OF ESTABLISHING *MENS REA* AS A PRE-CONDITION FOR ATTRIBUTION OF RESPONSIBILITY TO STATES FOR ACTS CONSTITUTING INTERNATIONAL CRIMES*

Abstract
The concept of State Responsibility under International Law is to the effect that all states are to be held responsible for any internationally wrongful act attributed to the State. Under the concept of State responsibility, a State cannot abdicate its responsibility on the grounds that the action was the action of an individual. There has been a reluctance to hold states accountable for violations of international law where these violations are considered international crimes. This has been justified on the grounds that states lack the requisite mens rea and so cannot be held liable. This work intends to dispel that notion and show that the doctrine of mens rea applicable to municipal criminal law ought not to be applied to the doctrine of state responsibility under international law.

Keywords: *Mens rea,* Attribution of Responsibility, International Crimes, States, Legal Basis

1. Introduction

The word, 'responsibility' has various meanings but it generally connotes 'accountability'. The Black's Law Dictionary defines it in relation to criminal law to mean a person's mental fitness to answer in court for his or her actions[1]. Borrowing from Hart, it went on to expand on the word, 'responsibility' thus: ;… To say that someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities….'[2] The concept of responsibility is not limited to just criminal law. Even under the law of contract, free will is a fundamental aspect of every contract and thus every man is bound by a contract freely entered to and the responsibilities accruing from same. The eggshell theory in law of Torts also dwells on responsibilities and consequences attached to a person's actions, as does the doctrine of 'strict liability'. Similarly, under international law, the principle of responsibility is also applicable. International law subscribes to the principle of state responsibility wherein every state is held liable for any internationally wrongful act attributed to the State.

2. The Nature of State Responsibility

International law is predicated on the foundation that all states are sovereign but equal. Therefore, States are thus, entitled to enjoy certain rights and are bound to perform certain obligations vis-à-vis their relationship with other states. These rights as enjoyed by States are conferred by treaties, conventions and various other international instruments. It should however be noted that some of these rights were already recognized and pre-existing under customary international law and thus, some of the treaties and international instruments are just reflective of customary international law. As stated above, under municipal law, responsibility can entail in respect of a criminal offence, a contractual agreement or even a tortuous act. Under international law, however, there is no distinction between the regime of responsibility to attach where there is an internationally wrongful act. Thus, be it a breach of what would normally constitute a purely contractual agreement under municipal law or whether the act or omission is a tort or crime, responsibility will attach to the state once the act or omission is attributed to the state. In *the Rainbow Warrior Arbitration*,[3] between New Zealand and France, the Tribunal affirmed that 'in the international law field, there is no distinction between contractual and tortuous responsibility. As far as the origin of that obligation is concerned, there is a single general regime of state responsibility. Nor does any distinction exist between civil and criminal responsibility as is the case in internal legal systems'. The doctrine of State Responsibility under international law is aptly captured by Article 1 of the International Law Commission's (ILC) Articles on State Responsibility which states that 'Every internationally wrongful act of a state entails the international responsibility of that State'.[4] State responsibility entails where the act is an internationally wrongful act. Shaw opines that the essential characteristics of state responsibility hinge upon certain basic factors viz:

1) The existence of an international legal obligation in force as between two particular states[5]. Obviously, there can be no responsibility attached in the absence of a right. A person cannot be held responsible for wrongdoing when there was no wrong done. There can only be wrong doing where there is an interference with or a breach of a person's right. In *the Spanish Zone of Morocco Claims case*, [6] Judge Huber stated that 'responsibility is the necessary corollary of a right. All rights of an

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[1] BA Garner (ed), *Black's Law Dictionary* (10th Edition, United States of America: Thomson Reuters, 2014) p. 1338.
[2] *Ibid*
[3] 1990, 20 RIAA, 217.
[4] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001, Art. 1
[5] MN Shaw, *International Law* (5th Edition, United Kingdom: Cambridge University Press, 2005) p.696.
[6] *Ibid.*

International character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.[7] However, it should be emphasized that responsibility will not only entail in situations where there are legal obligations existing between two states alone. Responsibility will entail irrespective of the number of states involved so long as states have binding legal obligations between them. In other words, where there exists international legal obligation between at least two states, then responsibility will entail in the event of a breach of said obligations;

2) That there has occurred an act or omission which violates the obligation. The ILC Articles on State Responsibility[8] provides that there is a breach of an international obligation by a State 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.
3) The act or omission is imputable to the state responsible for the act or omission; and
4) Loss or damage has resulted from the unlawful act or omission.[9] Since responsibility entails accountability, it obviously follows that there must be loss or damage resulting from the said act or omission. In other words, every state in breach of her international obligations which results to an internationally wrongful act has an obligation to make reparation.[10]

3. Imputability

Shaw's opinions are reflective of Article 2 of the ILC's Articles on State Responsibility.[11] Article 2 provides as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> a) Is attributable to the State under International law.
> b) Constitutes a breach of an International obligation of the State.[12]

A state can only be held responsible for internationally wrongful acts or omissions attributed to the State or imputed to the state. Such acts or omissions can either arise as a direct result of the state's policies in which case the State is considered to be acting directly or they could be acts or omissions of the officials of the State. As stated earlier, a state acts through her officially recognized and appointed organs in exercising the functions of the state. In certain circumstances, such functions are exercised by quasi state bodies or by bodies appointed by the state for a specific purpose. The ILC articles make provisions for such scenarios in determining when a state ought to be held accountable in such circumstances. In certain other situations or circumstances, a state will still be held accountable despite the fact that the actions attributed to the state were not executed by official organs of the state or organs so appointed.

Conduct of Organs of the State

Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts states as follows:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the state.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[13]

Under Customary International Law, a state is liable for the actions of its agents and servants irrespective of the status of the servant or agent in the state.[14] Pursuant to Article 4 of the ILC Articles on State Responsibility[15], irrespective of the status of the organ of a state, the actions of that organ will be considered the actions of the State. For example, Nigeria is divided into the Executive[16], Judiciary[17] and Legislative[18] arms of government. The government further operates at the Federal, State and Local government level.[19] The actions of any of these organs

[7] *Ibid*
[8] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001, Art. 12
[9] *Ibid*
[10] See *the Factory at Chorzow case (Chorzow Factory Merits Case)* P.C.I.J Series A No 17, p.48.
[11] ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001
[12] *Ibid*
[13] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001 Art.4.
[14] See *the Rainbow Warrior Arbitration* (*Supra)*.
[15] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001 Art.4.
[16] Constitution of the Federal Republic of Nigeria 1999 (As amended) s.4
[17] Constitution of the Federal Republic of Nigeria 1999 (As amended) s.5
[18] Constitution of the Federal Republic of Nigeria 1999 (As amended) s.6
[19] Constitution of the Federal Republic of Nigeria 1999 (As Amended) s.3.

or arms of Nigeria will be considered the actions of Nigeria as a State. It does not matter whether the conduct complained of is the conduct of the Executive, Judiciary or Legislature. It does not matter whether the actions are the actions of the Federal, State or Local Government. Where the act or omission constitutes an internationally wrongful act, it will be attributed to Nigeria as a State.

An act may be attributed to a State even where the organ or official of the state exceeded the powers granted to him so long as they have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity.[20] Article 7 of the ILC Articles on State Responsibility[21] states as follows: 'The conduct of an organ of a state or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

It should be noted that the principle of *ultra vires* applicable in municipal law will not usually avail a state. It should be noted that pursuant to Article 7, both official organs and persons who are not organs or agents of the state will have their conduct attributed to the state even in situations where they exceed their authority or contravene instructions. In *Youman's claim* case[22], militia ordered by the Mexican government to protect threatened American citizens in a Mexican town joined the riot, during which the Americans were killed. The unlawful conduct of the militia was attributed to Mexico. In the *Union Bridge Company Claim* case[23], a British government official wrongly appropriated neutral property during the Boer War. The arbitration tribunal found Britain liable and commented that:

> Liability is not affected either by the fact that the official appropriated the property under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question.[24]

Conduct of Individuals

Article 9 of the ILC Articles on State Responsibility[25] states as follows

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 9 is in respect of acts which do not involve organs of government or acts perpetrated by persons empowered by government. However, in said situations, the government or organs of government are absent or have deliberately refused to act. Thus, other persons have taken it upon themselves to exercise elements of governmental authority or act in place of the government. In the *US Diplomatic and Consular Staff in Tehran* Case[26], several hundred Iranian students and other demonstrators took possession of the United States Embassy in Tehran by force. They did so in protest because the deposed Shah of Iran was admitted into the United States for medical treatment. The Iranian security forces did nothing to stop the demonstrators nor did they offer any resistance to the demonstrators. Rather, they disappeared from the scene. Some US nationals were held hostage by the demonstrators who took over possession of the embassy. The ICJ found as follows

> No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized 'agents' or organs of the Iranian state. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages, cannot, therefore be regarded as imputable to that state on that basis… their conduct might be considered as itself directly imputable to the Iranian state only if it was established that, in fact, on the occasion in question, the militants acted on behalf of the state, having been charged by some competent organ of the Iranian state to carry out a specific operation.[27]

These actions of the demonstrators in storming the embassy and taking hostages could in no way be construed as exercising governmental authority. At that point, no responsibility attached to the state of Iran as no action was imputable to them. However, on 17 November 1979, the Ayatollah Khomeini who was acknowledged as the *de facto* government pursuant to the deposition of the Shah, endorsed the actions of the demonstrators and issued a

[20] Per Verzijl in *the Caire claims* case (supra).
[21] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001 Art.7.
[22] 4 RIAA, p 110 (1926).
[23] 6 RIAA, p 138 (1924).
[24] Hillier, p 343.
[25] International Law Commission's Articles on Responsibility of State for Internationally Wrongful Acts 2001 Art.9.
[26] ICJ Reports (1980), p. 3.
[27] *Ibid*

decree declaring that the hostages would not be released until the Shah was handed over for trial. The ICJ commenting on this action of the Ayatollah further stated thus:

> The approval given to these acts by the Ayatollah Khomeini and other organs of the Iranian State and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that state. The militants, authors of the invasion and jailers of the hostages had now become agents of the Iranian State for whose acts the state itself was internationally responsible.[28]

In *Yeager v Islamic Republic of Iran*[29], in the immediate aftermath of the Iranian revolution, some revolutionary guards who had taken over the performance of certain immigration and customs functions detained Mr Yeager. The Iran-United States Claims Tribunal held the conduct of the revolutionary attributable to the Islamic Republic of Iran on the basis that if the acts were not actually authorized by the government, then the guards at least exercised elements of governmental authority in the absence of official authorities in operations which the new government must have had knowledge and to which it did not specifically object. The tribunal stated as follows

> … attributability of acts to the state is not limited to acts of organs formally recognized under internal law. Otherwise, a state could avoid responsibility under international law merely by invoking its internal law. It is generally accepted under international law that a state is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the state. An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of official authorities and in circumstances which justified the exercise of those elements of authority.[30]

4. ICJ Decisions on Responsibility of States for Acts amounting to International Crimes

Irrespective of the nature of an international wrongful act or omission, state responsibility ought to attach once same is attributed to a state. Thus, whether the act or omission constituting an international wrongful act is one rooted in contract, tort or even a crime, state responsibility ought to attach if same is attributable to a state. Article 12 of the ILC Articles on State Responsibility[31] states that 'there is a breach of an international obligation by a State 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.

Although there is no concise definition of an international crime, certain acts or omissions are generally agreed by the international community to fall within the sphere of international crimes and states are under an obligation to refrain from said acts. Article 12, however, does not limit the acts which when engaged in constitute a breach of an international obligation nor does indeed the International Law Commission's Articles on Responsibility of States for Internationally Wrongfully Acts seek to exclude international crimes from wrongful acts which entail responsibility when attributed to a state. All that is required is that the wrongful act be attributed to the State. It is therefore surprising that there is a hesitation by the international community to attribute responsibility to states for international crimes particularly when bearing in mind that once an act is attributed to a state, state responsibility should attach irrespective of the nature of the act. It has been argued that states lack the requisite mental intent necessary to be held culpable for a crime and so ought not to be held responsible for same. An advocate of the notion that states should not be held criminally responsible for crimes stated thus:

> Some political theorists, philosophers, International Relations (IR) scholars, and lawyers have recently revived the idea of state crime. They argue that states should be held criminally responsible for atrocities such as aggression and genocide, much as corporations are held criminally responsible in domestic law. Critics reply that the idea of state crime is conceptually confused: 'it is untenable to treat [states'] *legal and moral personality* as anything other than metaphorical or 'as-if'; they therefore can neither commit crimes nor incur punishment'. States cannot commit crimes because they do not have intentions, and they cannot be punished because they cannot suffer. In addition, both proponents and critics of state crime worry about 'the danger of harming innocent individuals while ostensibly punishing delinquent states'. The debate about state crime revolves around two issues – intent and punishment…[32]

It would appear that the critics and opponents of the notion that States ought not to be held criminally responsible are relying on municipal law doctrines and principles in support of their position. While international law and

[28] *Ibid*
[29] (1987) 17 Iran-US CTR, p. 92
[30] Hillier, p.342
[31] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001.
[32] S Fleming, 'Leviathan on trial: should states be held criminally responsible?' https://www.cambridge.org/core/journals/international-theory/article/leviathan-on-trial-should-states-be-held-criminally-responsible accessed on 25/05/2021

municipal law sometimes share similar doctrines and principles, they are distinct aspects of law with different areas of application. Municipal law principles ought not to govern international law principles. The International Law Commission's Articles on State responsibility as stated above does not limit or distinguish acts that are international wrongful acts. Once a state is bound by an international obligation, acting contrary to same amounts to a breach of that international obligation and constitutes an internationally wrongful act whether the act or omission in question can be classified as a crime or a *delict*.

The issue of intent does not arise under the principle of state responsibility as once a wrongful act is attributed to a state, it entails responsibility. Thus, where a wrongful act or omission which also falls within the category of international crimes is attributed to a state, allowing the state avoid liability on the grounds that the *mens rea* of the crime is missing ought not to be applicable under international law. The doctrine of state responsibility does not distinguish between civil and criminal acts in attributing responsibility under international law and the principles applicable to municipal law ought not to be applied. Individual responsibility is distinct and separate from state responsibility and requires that *mens rea* be established but state responsibility does not. While some other international instruments provide for individual responsibility, the ILC Articles is focused on State responsibility. For example, Article 30 of the Rome Statute[33] provides as follows: '1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'.

However, the ILC articles on State responsibility contain no such provisions. Once there is a breach of an international obligation constituting a wrongful act and said breach is attributed to a state, then state responsibility attaches. The doctrines of state responsibility and individual responsibility respectively are separate doctrines under international law and inputting the issue of mental element to states before they can be held internationally responsible for crimes amounts to blurring the lines of separation. In the *Croatia v Serbia* case[34] decided by the International Court of Justice, Croatia filed an application against the Federal Republic of Yugoslavia (FRY) 'for violations of the Convention on the Prevention and Punishment of the Crime of Genocide'. As basis for the Court's jurisdiction, Croatia invoked Article IX of that Convention to which, according to it, both Croatia and Yugoslavia were parties.

The Court, in its judgment, stated that in order to determine whether Serbia was responsible for violations of the Convention, the Court would need to decide: (1) whether the acts relied on by Croatia had taken place and, if they had, whether they were contrary to the Convention; (2) if so, whether those acts were attributable to the Socialist Federal Republic of Yugoslavia (SFRY) at the time that they occurred and engaged its responsibility; and (3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility. Noting that the Parties disagreed on these questions, the Court considered that there existed between them a dispute falling within the scope of Article IX of the Convention (disputes… relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III) and that it therefore had jurisdiction to entertain it. The Court further noted that, in reaching that conclusion, it was not necessary for it to decide the aforementioned questions, which were matters for the merits.

The Court in considering the merits of the claim recalled that, under the terms of the 1948 Convention, the crime of genocide contains two constituent elements. The first is the physical element, namely the acts perpetrated (which are set out in Article II and include, in particular, killing members of the group (subparagraph *(a)*) and causing serious bodily or mental harm to members of the group (subparagraph *(b)*). The second is the mental element, namely the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The Court noted that this mental element is the essential characteristic of genocide and distinguishes it from other serious crimes. It is a specific intent *(dolus specialis)*, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved. The Court explained that the aim must be the physical or biological destruction of the protected group, or a substantial part of that group. 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), but it can also be inferred from a pattern of conduct, when this intent is the only inference that can reasonably be drawn from the acts in question. Regarding Croatia's claim, the Court considered that, in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA (the army of the SFRY) and Serb forces had committed killings of and caused serious bodily or mental harm to members of the Croat national or ethnic group. In the view of the Court, these acts constituted the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. The *actus reus* of genocide having been established, the Court turned to the question whether the acts that had been perpetrated reflected a genocidal intent.

[33] Rome Statute of the International Criminal Court 1998 Art.30

[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) https://www.icj-cij.org/en/case/118 accessed on 25/05/2021

In the absence of direct proof of such intent (for example, the expression of a policy to that effect), the Court examined whether it had been demonstrated that there existed a pattern of conduct from which the only reasonable inference to be drawn was an intent on the part of the perpetrators of the acts to destroy a substantial part of the group of ethnic Croats. The Court considered that this was not the case. In the absence of evidence of the required intent, the Court found that Croatia had not proved its allegations that genocide or other violations of the Convention had been committed. It thus dismissed Croatia's claim in its entirety.

The court in seeking to attribute *mens rea* to States in order to determine whether or not the offence of genocide as provided by the Convention had been established was an error. Article II of the Genocide Convention[35] states 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 groups, as such….'

Article IV[36] further states that persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. A state acts through its constituent organs or agents. Thus, a holistic reading of Articles II and IV show that the intent required to be proved is not intent on the part of the state but intent on the part of the person so acting. This is succinctly provided for in Articles V and VI which respectively provide as follows:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.
>
> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with regard to those Contracting Parties which shall have accepted its jurisdiction.

Clearly, from the above provisions, states that are contracting parties to the Convention have an obligation to not only enact municipal law preventing and punishing genocide but they are also enjoined to punish those who perpetrate genocide. The Convention even recognizes that a question of state responsibility may arise in the case of a breach of this obligation to prevent and punish genocide. It would appear that it was this provision that was mis-interpreted by the courts in deciding on the question of *mens rea* of the states involved. Article IX[37] states that disputes between the contracting parties relating to the interpretation, application or fulfillment of the convention, including questions relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

It must once again be emphasized that the issue of state responsibility is an issue to be decided by the international instrument on state responsibility and not the genocide convention. The ILC article on State responsibility, while not giving a specific definition of a wrongful act makes it clear that a wrongful act is a breach of an international obligation and is an act characterized by the International Community as wrongful. Clearly, genocide is a wrongful act as provided by the Genocide Convention. The Genocide Convention does provide for when State Responsibility should entail for acts of genocide but does however state that it is for the International court to so decide. This, the court ought to do in accordance with the provisions of the ILC Articles on State Responsibility. Thus, where the acts categorized as genocide were attributable to Serbia, then the court ought to have found Serbia responsible for same. In *Bosnia Herzegovina v Serbia*[38], the court arrived at a different decision from the decision rendered in the *Croatia v Serbia*[39] case. On 20 March 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis for the jurisdiction of the Court. Subsequently, Bosnia and Herzegovina also invoked certain additional bases of jurisdiction.

The Court, in its Judgment, after determining that massive killings and other atrocities were perpetrated during the conflict throughout the territory of Bosnia and Herzegovina, found that these acts were not accompanied by

[35] Convention on the Prevention and Punishment of the Crime of Genocide 1948
[36] *Ibid*
[37] *Ibid*
[38] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) https://www.icj-cij.org/en/case/91 accessed on 25/05/2021.
[39] *Supra*

the specific intent that defines the crime of genocide, namely the intent to destroy, in whole or in part, the protected group. The Court did, however, find that the killings in *Srebrenica* in July 1995 were committed with the specific intent to destroy in part the group of Bosnian Muslims in that area and that what happened there was indeed genocide. The Court found that there was corroborated evidence which indicated that the decision to kill the adult male population of the Muslim community in *Srebrenica* had been taken by some members of the VRS (Army of the *Republika Srpska*) Main Staff. The evidence before the Court, however, did not prove that the acts of the VRS could be attributed to the Respondent under the rules of international law of State responsibility. Nonetheless, the Court found that the Republic of Serbia had violated its obligation contained in Article 1 of the Genocide Convention to prevent the *Srebrenica* genocide. The Court observed that this obligation required States that are aware, or should normally have been aware, of the serious danger that acts of genocide would be committed, to employ all means reasonably available to them to prevent genocide, within the limits permitted by international law.

The Court further held that the Respondent had violated its obligation to punish the perpetrators of genocide, including by failing to co-operate fully with the International Criminal Tribunal for the former Yugoslavia (ICTY) with respect to the handing over for trial of General Ratko Mladić. This failure constituted a violation of the Respondent's duties under Article VI of the Genocide Convention.

Unlike in the *Croatia v Serbia* case, the court considered whether or not the acts of genocide by certain officials could be attributed to Serbia and although it found that it could not, it however found that Serbia had failed in her obligation to prevent and punish the crime of genocide. Thus, in the instant case, the court was concerned with the *mens rea* of the state agents rather than the state itself and in line with the ILC Articles on State responsibility considered whether the actions of the agents could be attributed to the State and whether the State was in breach of her international obligations. This was a proper application of the doctrine of state responsibility. A refusal to invoke state responsibility for acts amounting to international crimes, on the grounds of absence of *mens rea*, amounts to unnecessarily limiting the doctrine of state responsibility. As already seen above, some internationally wrongful acts can also amount to international crimes and the doctrine of state responsibility in such situations ought to be applicable.

In the *Iran v USA*[40] case, the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America with respect to the destruction of Iranian oil platforms. The Islamic Republic founded the jurisdiction of the Court upon a provision of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, signed at Tehran on 15 August 1955. In its Application, Iran alleged that the destruction caused by several warships of the United States Navy, in October 1987 and April 1988, to three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a fundamental breach of various provisions of the Treaty of Amity and of international law.

The Court delivered its Judgment on 6 November 2003. Iran had contended that, in attacking on two occasions and destroying three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, the United States had violated freedom of commerce between the territories of the Parties as guaranteed by the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. It sought reparation for the injury thus caused. The United States had argued in its counter-claim that it was Iran which had violated the 1955 Treaty by attacking vessels in the Gulf and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the United States and Iran. The United States likewise sought reparation.

The Court first considered whether the actions by American naval forces against the Iranian oil complexes were justified under the 1955 Treaty as measures necessary to protect the essential security interests of the United States. Interpreting the Treaty in light of the relevant rules of international law, it concluded that the United States was only entitled to have recourse to force under the provision in question if it was acting in self-defence. The United States could exercise such a right of self-defence only if it had been the victim of an armed attack by Iran and the United States actions must have been necessary and proportional to the armed attack against it. After carrying out a detailed examination of the evidence provided by the Parties, the Court found that the United States had not succeeded in showing that these various conditions were satisfied, and concluded that the United States was therefore not entitled to rely on the provisions of the 1955 Treaty.

[40] *Oil Platforms (Islamic Republic of Iran v. United States of America)* https://www.icj-cij.org/en/case/90 accessed on 25/05/2021.

The Court then examined the issue of whether the United States, in destroying the platforms, had impeded their normal operation, thus preventing Iran from enjoying freedom of commerce 'between the territories of the two High Contracting Parties' as guaranteed by the 1955 Treaty. It concluded that, as regards the first attack, the platforms attacked were under repair and not operational, and that at that time there was thus no trade in crude oil from those platforms between Iran and the United States. Accordingly, the attack on those platforms could not be considered as having affected freedom of commerce between the territories of the two States. The Court reached the same conclusion in respect of the later attack on two other complexes, since all trade in crude oil between Iran and the United States had been suspended as a result of an embargo imposed by an Executive Order adopted by the American authorities. The Court thus found that the United States had not breached its obligations to Iran under the 1955 Treaty and rejected Iran's claim for reparation. In regard to the United States counter-claim, the Court found that none of the ships alleged by the United States to have been damaged by Iranian attacks was engaged in commerce or navigation between the territories of the two States. Nor did the Court accept the generic claim by the United States that the actions of Iran had made the Persian Gulf unsafe for shipping, concluding that, according to the evidence before it, there was not, at the relevant time, any actual impediment to commerce or navigation between the territories of Iran and the United States. The Court accordingly rejected the United States counter-claim for reparation.

Again, it would appear that the Court, in the instant case, lost sight of what the doctrine of state responsibility entailed. Having found that the United States had violated its obligations not to use force, then the court ought to have found the United States responsible for said breach and ordered reparations as certain installations had been damaged by the actions of the United States. The condition of said installations ought to have affected the nature of reparation ordered and not the order of reparation itself. State responsibility ought to attach irrespective of the severity or nature of the act complained of so long as said act is an internationally wrongful act, be it a criminal act or a civil act.

5. Conclusion

As earlier stated, it is not all breaches of international law that amount to international crimes. The principle of state responsibility however does not distinguish between responsibility for acts or omissions amounting to international crimes and responsibility for acts or omissions amounting to other breaches of international law which do not fall within the agreed categories of international crimes. The international community similarly ought not to apply any such distinction. Responsibility ought to attach regardless of the classification of the act or the omission. It is however conceded that the nature of the act or omission itself may affect the degree of responsibility to be attached. The doctrine of *mens rea* should not be invoked as a tool to aid states in escaping liability or responsibility for international wrongful acts attributed to them.