On State Responsibility for Complicity in Genocide: Will South Africa’s “All-In Strategy” Be Effective?

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Introduction

As is known, in its recent application brought against Israel before the ICJ, South Africa (SA) invoked the international responsibility of the Respondent for all acts under Article III of the 1948 Genocide Convention. Much can be found in the blogosphere on more general and procedural aspects arising from this potentially landmark case, including the effect of the order on provisional measures rendered by the Court on 26 January (e.g., here, here, here, here and here), the Applicant’s legal standing (here and here) and the possible implications for third States (here and here).

However, while the great majority of pieces have focused on questions revolving around the principal offence claimed by SA under Article III(a), namely that Israel is committing genocide against the Palestinians living in the Gaza Strip (“direct” genocide), no attention was devoted (I apologize in advance for any possible oversight) to the “ancillary” claims made by SA, in particular that of complicity in genocide under Article III(e). Starting from precedent ICJ case law on this point, the present post shall offer some brief thoughts on this question. The alleged failure by Israel also to prevent or punish complicity in genocide, as well as the (indirect) participation of third States in the conflict as a possible form of complicity in genocide, are not dealt with.

The Controversial Content of the Crime of Complicity in Genocide in Interstate Responsibility

No precedent exists in which an international court has held a State responsible for complicity (or conspiracy or incitement) in the commission of genocide as of today. Therefore, while the crime of “direct” genocide is still a controversial issue when dealing with State responsibility, the crime of complicity is, if possible, even more obscure.

In general terms, “complicity is frequently conceived of as a minor or secondary form of criminal conduct, indicative of a lesser degree of responsibility on the accomplice’s part” (Berster, 175). But when the concept is applied to genocide, “[t]he ‘accomplice’ is often the real villain, and the ‘principal offender’ a small cog in the machine” (Schabas, 340). The crime in question includes at least two categories of conduct. On the one hand, inducement (or instigation) is the act of “prompting the principal perpetrator to commit genocide by evoking in him the decision to carry out an act under Article II lit. (a)-(e) [of the Genocide
Convention (Berster, 176). On the other hand, assistance (or aiding and abetting) covers “all contributions which enable, facilitate or intensify the commission of the principal offence” (ibid., 177). Usually, complicity is equated in whole or in part with the second set of conduct mentioned, namely aiding and abetting (see, for example, Declaration of Judge Keith, para. 4). However, it is evident that these conducts fit best for the determination of individual criminal responsibility, whereas their application in the realm of State responsibility is a more complex task. In fact, the provision on State complicity in genocide is a specific rule (Jackson, 202), whose contours remain nebulous.

Some insights on such a concept were given by the ICJ in the Bosnian Genocide case, in which the Court was called upon to determine whether the provision by the Federal Republic of Yugoslavia of political, financial, and military aid to authorities of the Republika Srpska, a non-state entity operating in Bosnia and Herzegovina, could be qualified as a form of complicity in genocide. According to the majority of judges, the 1948 Convention includes the obligation on States to refrain from complicity in genocide, although this concept “refer[s] to well known categories of criminal law and, as such, appear[s] particularly well adapted to the exercise of penal sanctions against individuals” (ibid., para. 167). The Court went on to stress the relation of independence existing between the regimes of individual and State responsibility for complicity, by stating that the latter can arise under the Convention “without an individual being convicted of the crime or an associated one” (ibid., para. 182).

Importantly, the Court found “untenable both logically and legally” that the same set of conduct of a State can give rise to its responsibility for genocide, attempt to commit it, and complicity at the same time, while acknowledging this (theoretical) possibility for acts amounting to genocide, conspiracy, and direct and public incitement (ibid., para. 380). Consequently, and despite the fact that complicity in genocide is dependent upon the commission of genocide (ibid., para. 180), judges specified that “acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility” (ibid., para. 381). To put it differently, a State can be held responsible for complicity in genocide only when it is shown that genocide has been committed, but the two crimes must be attributed to different actors. This is because “[b]eing of a qualitative nature, the distinction between genocide and complicity in genocide implies that they are mutually exclusive” (separate opinion of Judge ad hoc Kreća, para. 151).

One of the most relevant parts of the Court’s analysis is the connection it made between the notions of complicity and “aid and assistance” under Article 16 of the Articles on State Responsibility (ARS). The Court first clarified that, unlike in individual criminal responsibility, the assistance provided by a State to individuals acting under its instructions or controlled by it does not entail complicity of that State in the crime of genocide, but only that the conduct of such individuals may be attributed to the State (Bosnian Genocide case, para. 419). In substance, the finding of such links between the main perpetrator and the accomplice (the State) “absorbs” the complicity of the latter, which would be responsible for “direct” genocide. Then, the Court stated that – given the lack of a specific rule on complicity in the law of
international responsibility – the legal criteria for assessing the aid and assistance furnished by a State in the commission of an internationally wrongful act of another State under Article 16 ARS (namely, knowledge of the circumstances of the internationally wrongful act and international wrongfulness of the act if committed by that State) could be applied to the present case to establish the complicity of Serbia in the genocidal acts committed by a non-state actor (ibid., 420). However, it was rightly observed that Articles III(e) of the 1948 Convention and 16 ARS do not entirely overlap (e.g., Palchetti, 384 ff.).

Finally, the Court declared that for complicity to occur, it must ascertained “beyond any doubt” that the accomplice was “at the least” fully aware of the dolus specialis of the principal perpetrator (ibid., paras. 421 and 422); in other words, the lack of “full awareness” by the accomplice of the specific intent of the main perpetrator is sufficient for the Court to exclude the commission of the crime of complicity. In so doing, the Court seems to require on the part of the accomplice something more than its dolus eventualis or recklessness, that is, the mere acceptance of the risk that the main perpetrator would act with specific intent (with regard to the application of this standard in criminal proceedings for complicity in genocide, see ICTR, Prosecutor v. Jean Paul Akayesu, para. 541). Moreover, by maintaining that the accomplice shall have at least “acted knowingly”, the Court apparently leaves open the possibility that sharing the dolus specialis of the principal perpetrator might also be required. The application of such a high standard has come under criticism (e.g., declaration of Judge Bennouna, 322 ff.; dissenting opinion of Judge ad hoc Mahiou, para. 125 ff.; Cassese, 883 ff.; Bufalini, 576 ff.).

To summarize, in the Bosnian genocide case the Court made (more or less) clear the following points: a) the Genocide Convention contains the prohibition for States of complicity in genocide; b) prohibition of genocide and complicity in it are alternative (and not cumulative) crimes in relation to the same facts; c) State responsibility for complicity in genocide is dependent upon the commission of genocide, but can be ascertained regardless of any criminal conviction in relation to the same facts; d) assistance of a State to persons or entities controlled or instructed by it in the commission of genocide is not relevant for complicity but only for the attribution of conduct to that State; e) State complicity in genocide is tantamount to “aid and assistance” as provided in general law on international responsibility; f) the principal perpetrator can also be a non-state actor; and g) at least the full awareness (but not the mere recklessness) by the accomplice of the dolus specialis of the principal perpetrator is necessary for the crime of complicity to be envisaged.

As is shown below, most of these elements do not emerge in SA's application.

The (Empty) Claim of Israel's Complicity in Genocide Made by South Africa

To put a long story short, there is practically no legal argumentation in SA's application in support of the claim of Israel's complicity in genocide. SA merely lists the violation of this provision and the duty to prevent or punish it (ibid., paras. 110, 118 and 133). That is it. No
further indications can be inferred from the oral proceedings on the request for provisional measures. In his pleading, Du Plessis merely mentions the protection from acts of complicity in genocide as one of the “core rights” of Palestinians in Gaza to be protected by the provisional measures requested (pp. 49 and 51, paras. 7 and 12). Again, that is it. Thus, it seems fair to say that the claim of complicity in genocide made by SA against Israel is, as of today, utterly unsubstantiated.

Even if the dispute is still at an early stage, the silence of SA on this claim is quite puzzling. If the dispute gets to the merits stage, the Applicant will have the chance to better frame it. However, in light of the elements furnished in the Bosnian genocide case, some problems can already be introduced.

First, SA seems to place the crimes of genocide and complicity in it at the same level. It does not claim, as it would instead appear correct in light of the nature of the crimes in question, that Israel shall be found responsible for the crime of genocide or, alternatively, of complicity in genocide. No differentiation is made between the two acts whatsoever. Readers probably recall that in the Croatian genocide case, in respect of Croatia's claim and Serbia’s counter-claim, Serbia requested the ICJ to adjudge and declare that Croatia had violated its obligation not to commit genocide or, alternatively, that it had committed the act of complicity in genocide, among others. As the application currently stands, SA seems to imply that the crimes of genocide and complicity were committed by the State of Israel with regard to the same actions, a solution that the ICJ has correctly excluded.

Second, if SA were to better differentiate between the two crimes in the future, the question remains of who or what entity would be the principal perpetrator. Unlike the Bosnian and the Croatian genocide cases, in which military and paramilitary groups other than the “official” armed forces of the States were involved, the present dispute relates to acts of the Israel Defence Forces only, namely de jure organs of the State of Israel. In its application, SA indeed always refers to acts committed by “Israel” (SA's application, e.g., paras. 43, 47, 49). For the sake of clarity, SA did claim that the conduct of Israel causing the violation of, inter alia, Article III of the 1948 Convention includes that of its State organs, State agents, but also of “other persons and entities acting on its instructions or under its direction, control or influence” (ibid., para. 110); similarly, one of the provisional measures upheld by the Court requested Israel to ensure that any “military or irregular armed units which may be directed, supported or influenced by it, as well as any organisations and persons which may be subject to its control, direction or influence” (ibid., para. 144) ceased all military activity in Gaza. Notably, SA used the exact same phrasing as the one used by The Gambia in its 2019 application against Myanmar (ibid., paras. 111 and 132), in which the crime of complicity in genocide was also invoked. However, SA's application makes no mention of who or what these persons and entities consist of, and it is admittedly hard to make any definitive assumption in this regard. In any case, having the ICJ maintained in the Bosnian genocide case that a genocidal act being committed on the instructions or under the direction of a State is only relevant for attribution purposes and “no question of complicity would arise”
from it (ibid., para. 419), any genocidal act committed by these persons or entities would be attributed to Israel and possibly qualified as “direct” genocide. Outside these possibilities, a hypothetical option for SA would be to argue that the blocks by Israeli protesters of aid convoys bound for Gaza conceivably amount to the genocidal act of “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” under Article II(c) of the 1948 Convention and were carried out with the complicity (i.e., aiding and abetting) of the Respondent.

Third, SA shall have to demonstrate that the conditions under Article 16 ARS are met and that Israel is (at least) “fully aware” of the principal perpetrator’s specific intent, whose conduct should not be attributed to it. As previously mentioned, this is not an easy task. SA has attempted to prove only Israel’s specific intent for “direct” genocide. In any case, given that the genocidal acts complained of by SA appear to be exclusively attributable to the State of Israel, these legal operations remain obscure. What is the entity that has committed genocide in circumstances known by Israel? The problem of attribution of conduct, which was present in the Bosnian genocide case, does not arise here, or if it does, it does so to a much lesser extent.

Conclusion

The inclusion of the claim of complicity in genocide in SA’s application resembles a sort of “all-in strategy”, which is short of legal substantiation. As previously shown, no constitutive element of the crime at stake, as (in part) clarified by the ICJ, is today present in SA’s submission. The present dispute indeed concerns acts allegedly committed by de jure organs of Israel, and in this respect, it differs from the Bosnian and Serbian genocide cases, where entities other than State armed forces were involved. It is equally difficult to uphold the complicity of Israel in the commission of genocidal acts by private individuals.

The decision of SA to claim Israel’s complicity in genocide can be at most justified in light of a possible (but improbable) evolution of the war scenario. In the event that paramilitary groups, armed units, or (groups of) private individuals that do not constitute organs of the Respondent nor are controlled or instructed by it intervened on the ground, SA could refer, in the remainder of the proceedings, to genocidal acts perpetrated by these actors with the complicity of Israel. From a post-bellum perspective, the possibility can also be conceived of Israeli right-wing activists establishing settlements in the Gaza Strip and committing genocidal acts against the Palestinians living there with the complicity of the State.

Be that as it may, SA’s main goal is clearly to get Israel’s responsibility for “direct” genocide. If this claim fails, that of complicity may (theoretically) work as a sort of “safeguard clause”, but only as long as the Court finds that the crime of genocide has been committed by other persons or entities whose acts are not legally attributable to Israel. It is self-evident that the
chances that this is going to work are very scarce today. In light of what precedes, the dispute most likely won’t provide any further insight into the content of the State crime of complicity in genocide.