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THE COMPROMISSORY CLAUSE OF THE CONVENTION

Robert Kolb

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1. Introduction

Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the 'Genocide Convention' or 'Convention') embodies a so-called 'compromissory clause' attributing compulsory jurisdiction to the International Court of Justice ('ICJ') under Article 36(1) of the Statute of the Court¹ for disputes arising under and with respect

¹ 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations *or in treaties and conventions in force*' (italics added).

to the Convention. This chapter analyses what was the main aim and principal hope when the clause was inserted into the Convention and will deal with some general issues relating to the importance of the compromissory clause enshrined in Article IX of the Genocide Convention.

2. The Drafting History of Article IX

The preparatory works of the Genocide Convention² bear testimony to a somewhat tormented drafting history of Article IX, whose great importance was fully grasped:³ it meant compulsory jurisdiction by an international judicial body on a question of relatively high-scale political sensitivity. The main controversial points⁴ during the preparatory stage were the proper relationship of the ICJ with the international criminal court to be established (distinction of the respective jurisdictions);⁵ and the extent to which the ICJ could handle claims on the responsibility of a state for improper conduct of its own organs in the context of a genocide (criminal law convention or also convention on the responsibility of states?). The first of these points gave rise to less debates, than the second.

The drafting process underwent different stages, which will be briefly examined in turn.

2.1 The First Draft

In the first draft of the Secretary General (26 June 1947), draft Article XIV was brief and much less clear than the actual version of Article IX. It read as follows: 'Disputes relating to the interpretation or application of this

² As to these *travaux*, see: N. Robinson, *The Genocide Convention, A Commentary* (New York: Institute of Jewish Affairs, 1960) 99ff; J. Quigley, *The Genocide Convention, An International Law Analysis* (Aldershot/Burlington: Ashgate, 2006), 227ff; Separate Opinion of Judge Tomka, ICJ, Judgment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 27 February 2007, ICJ Reports (2007), §§ 50ff ('2007 Judgment').

³ Thus, Robinson, *supra* note 1, at 100, could write in 1960: 'Article IX may well be considered as one of the most important in the Convention'.

⁴ Other minor problems were easily solved, such as e.g. the proposal by Haiti to grant the right of recourse to the ICJ also to individuals and social groups (UN Doc. A/C.6/249). It was rightly rejected by the Sixth Committee as incompatible with the peremptory rule of the ICJ Statute according to which only states can be parties to a contentious case at the Court. See *infra*, Chapter 21 of this volume, section 2, 'Parties to Disputes before the ICJ and the *Erga Omnes* Nature of the Convention'.

⁵ See e.g. the suggestion of the US in Doc. A/401, at 243.

Convention shall be submitted to the International Court of Justice'.⁶ This clause left open the modalities through which the Court could be seized, i.e. unilaterally or through a special agreement. The commentary of the Secretary-General stressed only that the Court would be the most suitable organ to settle difficulties in the handling of the Convention, '[s]ince the Convention is not intended to regulate the particular relations between States but to protect an essential interest of the international community' so that a dispute 'should not be settled by an authority arbitrating between two or more states exclusively, for then its decision would lack any claim to be binding on other States'.⁷ By this statement, the Secretary-General did obviously not mean that a decision by the Court would be legally binding on non-parties to the dispute, contrary to Article 59 of the Statute.⁸ He rather underscored the enhanced value of precedents set by the main judicial body of the UN with regard to all member states of that organization. In a communication dated 30 September 1947, the US suggested inserting the words 'between any of the High Contracting Parties' after the word 'dispute', since only states may be parties to cases before the Court.⁹ Moreover, the US argued that it would be appropriate to avoid concurring jurisdiction of the ICJ with that of the international criminal court to be established. It thus proposed the insertion of the following proviso: '... provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a tribunal referred to in Article VII'.

2.2 The Draft of the *Ad Hoc* Committee

In the *ad hoc* Committee¹⁰ of the Economic and Social Council (ECOSOC), where the first draft was discussed by member states,¹¹ the compromissory clause was opposed by some states proving no sympathy for compulsory jurisdiction by an international tribunal.¹² However, by respectively 4 votes to

⁶ Doc. E/447, at 10.

⁷ *Ibid.*, at 50.

⁸ Article 59 of the Statute of the ICJ reads as follows: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

⁹ Doc. A/401, at 243, reproduced in Doc. E/623, at 27. The draft proposed by the US is printed in E/623, at 38, as Art. XI.

¹⁰ Established in E/621/Add.1, at 11–2.

¹¹ See Doc. E/AC.25/SR.7 *et seq.*

¹² The USSR and Poland, see Doc. E/AC.25, SR. 20, at 6; ECOSOC, Official Records, 3rd Year, 7th Session, Supplement no. 6, Doc. E/794, at 13–4. The USSR considered that only national courts should handle matters concerning genocide and that the compulsory jurisdiction of the ICJ was unduly interfering with the sovereign rights of states. Poland added that the Court could

3, 5 votes to 2 and 4 votes to 1, it was first decided to maintain the clause and second to amend it according to the two aforementioned US proposals.¹³ By virtue of a renumbering, this clause now became Article X of the draft. The main addition at this stage thus concerned the effort to avoid any concurrent jurisdiction between the ICJ and the criminal tribunals, national and international, charged with prosecuting the crime of genocide. In this context, no neat distinction was made between the substantive jurisdiction over the crime (criminal tribunals) and the adjunctive jurisdiction over the proper application of the Convention (ICJ).

2.3 The Sixth Committee Debate

The second draft was subjected to lengthy discussions in the Sixth Committee of the UN General Assembly. The discussion on Article X extends from the 103rd meeting to the 105th meeting.¹⁴ The main debate was centered upon the joint Belgian/UK amendment which read as follows:

Any dispute between the High Contracting Parties relating to the interpretation, application *or fulfilment* of the present Convention, *including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV*, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties.¹⁵

Sir Gerald Gray Fitzmaurice (as he later became), on behalf of the UK, explained the thrust of the amendment.¹⁶ The problem was that draft Article VII (on jurisdiction to try genocide, which later became current Article VI)

be seized by special agreements so that there was no need for a special clause in the Genocide Convention. Moreover, according to Poland, recourse from a national judgment to the ICJ with the charge that the Convention had not been properly applied was not acceptable. Generally, the attention was focussed during this stage on national and international criminal prosecution of genocide, especially through the international criminal court to be established.

¹³ Thus, the clause now read (Article X): 'Disputes *between any of the High Contracting Parties* relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, *provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal*' (accepted amendments italicized). See ECOSOC, Official Records, 3rd Year, 7th Session, Supplement no. 6, Doc. E/794, at 19.

¹⁴ Doc. A/C.6, SR. 103–105, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 428 *et seq.*

¹⁵ Doc. A/C.6/258, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Annexes to the Summary Records of Meetings, at 28.

¹⁶ Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings, 21 September–10 December 1948, at 430.

had been confined to the criminal responsibility of individuals; the responsibility of states had been excluded. Some delegations felt that it was necessary, for the proper fulfillment of the duties assumed under the Convention, to complement this individual criminal responsibility with state responsibility. This aim of providing a supplementary set of 'teeth' to the Convention motivated the joint amendment. The ensuing discussion in the Committee revealed the great confusion prevailing on that aspect. Many delegations confused the 'criminal responsibility' aspect with the 'civil responsibility' aspect (states to be held criminally responsible or not?),¹⁷ and further the responsibility for commission of the crime of genocide by the state itself with the responsibility for improper fulfillment of the duties to prevent and suppress genocide (primary or secondary responsibility).¹⁸ Furthermore, the precise form of 'civil' responsibility prompted doubts, such as the choice between pecuniary reparation for damages done to foreign citizens or to local individuals, as opposed to more abstract remedies to control the proper application of the Convention. It cannot be said that these aspects were finally truly clarified. True, the UK representative clearly stated that only 'civil responsibility' was at stake;¹⁹ but it is not certain that all delegations understood exactly what that meant, perhaps also because the law of state responsibility was in 1948 still in its doctrinal childhood. The scope of the Belgium/UK amendment seems to have been that—in the classical frame of a compromissory clause founding the jurisdiction of the ICJ—any state party could claim the responsibility of other states parties for violation of their obligations under the Convention.²⁰ What exactly these

¹⁷ E.g. *ibid.*, at 433, 438.

¹⁸ E.g. *ibid.*, at 441–2.

¹⁹ *Ibid.*, at 440.

²⁰ Some delegates here raised the point that the obligations at stake would concern in most cases the population of the state committing the injury, so that third states would have no legal standing to claim damages through some form of diplomatic protection, none of their citizens being involved. To this, the UK delegate responded that he had not thought of pecuniary reparations for injuries done to individuals (which implied that he had thought of an inter-state mechanism which was allowed to control the proper implementation of the Convention). The whole controversy shows one of the many misconceptions during the debates. See Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 443 (Mr. Abdoh, Iran), and at 444 (response by Mr. Fitzmaurice, as he then was). This point was still debated after the adoption of the Convention, e.g. in the 'advice and consent' procedure at the US Senate: see Robinson, *supra* note 1, at 103. The proper scope of the clause was to a large extent grasped by the Greek representative, Mr. Spiropoulos (a professor of international law), when he said that it was a reference to 'civil' responsibility of states found in innumerable clauses conferring jurisdiction to the ICJ (*ibid.*, at 445). As was stated by Robinson, *supra* note 1, at 101: 'Genocide could rarely be committed without the participation or tolerance of the State; if the Convention were not to provide against such action, it could not accomplish its purpose'. The state must be at least held accountable to the duties of prevention and punishment set out in the Convention.

obligations were, depended upon the interpretation of the Convention; the positions could thus differ.

Overall, the prosecution of individuals by an ICC having been abandoned because that court was not at that time established, the jurisdictional clause of the ICJ became the sole way by which the obligations of states under the Convention could be internationally sanctioned through a tribunal.²¹

Some other minor points were further discussed, and sometimes led to an amendment.

First, the Haitian proposal to open access to the ICJ to individuals and groups claiming that genocide was committed upon them was rejected as being incompatible with Article 34 of the ICJ's Statute.²² The statements of the Haitian delegate in defense of the proposed amendment, although benevolent by their humanitarian flavor, show disquietingly the extent to which some delegates, apparently not trained in international law, can misconceive technical aspects of a legal nature.²³

Second, the USSR and the socialist states, who were opposed to any compulsory jurisdiction of an international tribunal, sought to make the UN Security Council the sole guardian of the proper fulfillment of the Convention.²⁴ Their argument was that in cases of commission of genocide, the great urgency of the matter does not allow for court proceedings. The argument, appealing as it might seem, was however besides the point: nowhere did the Genocide Convention preclude action by the Security Council;²⁵ it just added the possibility for the state parties to seize the Court if there was a legal dispute on the interpretation or application of the Convention. Action by the Court and the Council could then proceed in parallel. It can hardly be said that this addition weakened the Convention or was inadequate.²⁶ The result of these debates was

²¹ As the French representative Mr. Chaumont (also a professor of international law) pointed out, this was regrettable: 'While regretting the fact that the problem of the international punishment of genocide should be dealt with solely on the level of disputes between States ...': *ibid.*, at 431.

²² *Ibid.*, at 431 (France), 432 (Brazil), 434 (Iran), 435 (Peru), 440 (Bolivia).

²³ *Ibid.*, at 436–7, 445; and Syria (Mr. Tarazi) in support: *ibid.*, at 434. The point is that Article 34 of the Statute represents a form of peremptory law relative to the Court's functioning, which cannot be derogated from by other agreements unless the Statute itself is modified. The limitation to states is a mandatory and objective limitation of access to the Court in contentious cases, as it stands today. See R. Kolb, *Théorie du ius cogens international* (Paris: Presses Universitaires de France, 2001), at 343 *et seq.*

²⁴ Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 435 (Poland), at 439 (Czechoslovakia), at 440 (USSR), Robinson, *supra* note 1.

²⁵ *Ibid.*, at 436 (Netherlands), at 443 (Iran), etc.

²⁶ *Ibid.*, at 444 (UK).

the addition of a second paragraph to draft Article X (as it then was), reading as follows (Australian amendment):

With respect to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.²⁷

At a later stage this paragraph was made autonomous by way of renumbering and became Article VIII of the Genocide Convention.²⁸

Third, there was an Iranian amendment proposing to delete the last part of the draft of Article X, beginning with the words 'provided that...'. It was due to the fact that any reference to an international criminal tribunal had at that stage been deleted from Article VII, so that it also appeared superfluous in Article X. This amendment was carried by 22 votes to 8.²⁹

Fourth, an Indian amendment was adopted. It proposed to replace the words according to which the Court could be seized 'at the request of any of the High Contracting Parties' with the words 'at the request of any of the parties to such dispute'.³⁰ Conversely, a proposal to delete the word 'fulfillment' as being a superfluous doubling of the word 'application' was rejected. It was felt that this word went somewhat beyond simple application.³¹ Finally, draft Article X was adopted by an overall vote of 18 to 2, with 15 abstentions.³² The General Assembly made no substantive amendments to the compromissory clause.

3. Compromissory Clauses: General Remarks

Compromissory clauses pursue a double aim, that of strengthening a particular treaty by providing a means to better guarantee its proper application (legal security *inter partes*), and that of promoting the rule of law in international society in general (legal security *inter omnes*). Thus, with regards to the aim of providing teeth to a specific convention, a more general finality is added, namely that of securing progress with respect to the ideal of 'peace and justice through law'.

²⁷ *Ibid.*, at 454, 457.

²⁸ Doc. A/760 & Corr. 2, GAOR, 1948, at 498.

²⁹ Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, at 453–4.

³⁰ *Ibid.*, at 437, vote at 447. The UK had accepted that amendment: *ibid.*, 444.

³¹ *Ibid.*, at 447. According to the Indian delegate, the word 'application' included the study of circumstances in which the Convention should or should not apply, while the word 'fulfillment' referred to the compliance or non-compliance of a party with the provisions of the Convention: *ibid.*, at 437.

³² *Ibid.*, at 459.

The first aim suggests a micro-analysis of a particular compromissory clause; the second aim suggests a macro-analysis of a compromissory clause seen as a web of engagements towards peaceful settlement of disputes.³³

The creation of the Permanent Court of International Justice (PCIJ), and later the ICJ, greatly facilitated the blossoming of such compromissory clauses. In the earlier days, when only arbitration was available to judicially settle disputes among states, any special agreement of submission of a case to arbitration supposed a full-fledged spelling out of the composition of the tribunal, of the procedure to be followed, of the mandate given to the arbitrators, of the scope of litigation submitted to it, etc. The PCIJ was for the first time in history a standing body, with a pre-constituted judicial bench as well as rules of competence and procedure. Hence, a short clause inserted in any treaty could easily confer jurisdiction to it without having to solve all the other questions in each single agreement of *compromis* (special agreement). The Statute of the Court operated as one great bracket, in which these further questions were solved once and for all.³⁴

Taking up this last point, it is important to observe that Article 36(1) of the ICJ Statute, by referring to 'treaties and conventions in force' is the controlling constitutional provision operating a form of *renvoi* to the special compromissory clause in the various treaties. This signifies, legally, that compromissory clauses do not in themselves create the jurisdiction of the Court. Their effect of attribution of competence to the ICJ is not autonomous but results from the necessary two-tier interplay between Article 36(1) of the ICJ Statute and the particular clauses. As the ICJ has often stressed, it is allowed to act only on the basis of its own Statute.³⁵ If the Statute did not, in one form or another, provide

³³ As J.I. Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice', in 81 *American Journal of Int'l Law* (1987), at 860, points out under a slightly different perspective: 'The formal purpose of domestic and international adjudications is to resolve particular disputes by enforceable court orders. But the broader role of adjudication is the promotion of general adherence to legal obligations by members of the community'.

³⁴ This facilitation of the compromissory clause was noted by many commentators. See e.g. M.O. Hudson, *The Permanent Court of International Justice, 1920–1942, A Treatise* (New York: Macmillan, 1943), 445: 'The establishment of a permanent judicial agency greatly facilitated the inclusion in international instruments of clauses concerning the settlement of disputes'; L. Sohn, 'Settlement of Disputes Relating to the Interpretation and Application of Treaties', 150 *Recueil des cours* (1976-II), at 244: as the Statute of the ICJ contains all the necessary constitutional/procedural provisions, the compromissory clause can be limited to defining the scope of jurisdiction conferred.

³⁵ ICJ, Judgment, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 27 June 1986, ICJ Reports (1986), at 59. Derogations to the Statute at the wish of particular parties have not been heeded by the Court: see PCIJ, Order, *Free Zones (France/Switzerland)*, 19 August 1929, Ser. A., No. 22, at 12.

by *renvoi* for compromissory clauses, the Court could not act on their basis as its competence flows exclusively from the provisions of the Statute. Thus, in a sense, compromissory clauses are subordinated or auxiliary to the constitutional provision of the Statute which directs and completes them. Contrary to what happens under arbitration, the Court is not the agent of particular parties subjecting a case to it. Rather, the Court is an independent judicial body. It adjudicates exclusively on the basis of its constitutive instrument, i.e. according to the rules therein laid down not by the particular customers of a single case subjected to the Court, but by all the state parties to the Statute.³⁶ The Statute thus represents an objective law for the particular states wishing to make use of the Court; and the compromissory clause represents a subjective obligation linked to the objective law of the Statute.

However, the precise conditions under which the Court can be seized are laid down in the particular compromissory clause. The Statute limits itself to confer the ability of compromissory clause to create a jurisdictional bond; the clauses will spell out the concrete modalities under which this bond will be able to attach in a particular context. As the ICJ recalled in the *South West Africa* cases (second phase) (1966): 'The faculty of invoking a jurisdictional clause [of a treaty] depends upon what tests or conditions of the right to do so are laid down by the clause itself'.³⁷ There is thus a peculiar sharing of labour: the jurisdictional force of the compromissory clause flows from the Statute; the precise conditions of jurisdiction *ratione materiae, personae, loci* and *temporis* depend on the particular compromissory clause. In other words, the principle of the jurisdictional power is laid down in the Statute, the concrete scope

³⁶ See ICJ, Judgment (Preliminary Objections), *Nottebohm (Liechtenstein v. Guatemala)*, 18 November 1953, ICJ Reports (1953), at 119. In the words of E. Borel, *Les problèmes actuels dans le domaine du développement de la justice internationale* (Zürich, Leipzig: Orell Füssli, 1928), at 12: '[La juridiction permanente] n'est plus l'œuvre des Parties comparaisant devant elle; elle n'est plus un simple organe créé par les Etats en litige. Elle est, par excellence, le pouvoir judiciaire international institué par la communauté juridique des Etats réunis dans la Société des Nations.... Par sa constitution, elle est placée virtuellement en dehors des Parties'. A. Sanchez De Bustamante Y Sirven, *La Cour permanente de justice internationale* (Paris: Recueil Sirey, 1925), at 152. '[L]e juge ou le tribunal, établi d'avance, [est] soumis à des règles (...) antérieures et supérieures à la volonté de chaque plaideur (...). Le judiciaire n'est pas la création concrète et spéciale de tous les plaideurs, mais il existe avant eux et au-dessus d'eux et s'exerce de haut en bas ...'. See also Dissenting opinion of Judge Pessôa, PCIJ, Judgment, *Serbian Loans case (France v. Kingdom of Serbs, Croats and Slovenes)*, 12 July 1929, Ser. A, No. 14, at 65; Dissenting Opinion of Judge Novacovitch, *ibid.*, at 80; Observation of Judge Pessôa, *Free Zones case*, *supra* note 35, at 49; Observation by Judge Kellogg, *Free Zones case*, *supra* note 35, at 32–3.

³⁷ ICJ, Judgment (second phase), *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, 18 July 1966, ICJ Reports (1966), 37, § 60.

of the power is spelled out in the compromissory clause. The interplay of both creates the concrete jurisdictional bond.

Interestingly, the compromissory clause contained in Article IX of the Genocide Convention has been the subject of scrutiny by the ICJ in the context of admissibility of reservations to it,³⁸ and has been invoked as a basis of contentious jurisdiction in four series of cases.³⁹ With this record, Article IX of the Genocide Convention is the most frequently invoked single compromissory clause. Moreover, it is probable that it will continue to be regularly brought to fore.

4. The Jurisdiction of the Court under Article IX

4.1 Mandatory but Subsidiary Jurisdiction

Article IX bestows the Court with the jurisdiction to adjudicate on the disputes included in the material scope of the jurisdictional grant. The attribution of jurisdiction is mandatory. The Court, if regularly seized, will have a mandatory jurisdiction to which all state parties to the Convention, not having inserted reservations to Article IX, are subjected.

On the other hand, this jurisdiction is subsidiary in the sense that a contracting party may, but must not, invoke it. The applicant or both parties together may prefer any other suitable organ of dispute settlement, ranging from direct negotiations, to mediation, conciliation, arbitration or involving an organ of an international organization. It is also possible that none of the state parties take action with respect to dispute settlement. Hence, a legal settlement of the dispute, and even a settlement at all, is not imposed and not guaranteed; it is only rendered possible. Contrary to what happened with the competence of the Council under Article 15 of the League of Nations Covenant, the jurisdiction of the Court is not made compulsory if the parties do not agree on any other

³⁸ See ICJ, Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 28 May 1951, ICJ Reports (1951) 15.

³⁹ Case concerning *Trial of Pakistani Prisoners of War (Pakistan v. India)*; Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Federal Republic Yugoslavia (Serbia Montenegro))*; Case Concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*; *Cases concerning the Legality of the Use of Force, Serbia-Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States*, i.e. NATO-States responsible for the bombing of 1999, 2004); and *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)*.

method of settlement.⁴⁰ It not only remains dependent upon the formal seizing on the part of one contracting party, which may occur, but which may also not occur; moreover, this seizing remains optional. Thus, the dispute might be settled by any other means than the Court; by the Court itself; or it might not be settled at all. The point is simply that Article IX guarantees a forum to the party who wants a binding dispute mechanism. This subsidiarily compulsory forum is a judicial one (unlike Article 15 of the League Covenant, where this forum was a political one). It therefore applies the law and consequently the decisions delivered are binding.⁴¹ The aim of this choice was to profit from both advantages of adjudication: (i) the relative de-politicization of the dispute by the application of legal rules; (ii) the corresponding bindingness of the decision, lending teeth to the Convention. In any case where the jurisdiction of the Court is disputed, the Court decides (Article 36, § 6). This is true also for contentions as to the regularity of the seizing.

The jurisdiction of the Court under the compromissory clause will only be ousted if the parties clearly made the choice of another forum. Such a choice of another forum will not be presumed; it will have to be established positively to the satisfaction of the Court. Thus, in the *Minority Schools of Upper Silesia* case, the PCIJ grappled with the partition of jurisdiction in minority cases between the Court and the Council of the League of Nations. The Court held that its jurisdiction could only be ousted 'in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority'.⁴² It added that such a concurring jurisdiction was lacking in the present case, the Council's jurisdiction to hear individual petitions differing from the jurisdiction of the Court on inter-state disputes. In the case of a special agreement (e.g. for arbitration) concluded later than the compromissory clause, the Court might defer to it in consideration of the *lex posterior* rule. But it is not bound to give effect to it, since the titles of jurisdiction are concurrent and a new one does not annul the older one (see section 4.2 below). Furthermore, once a tribunal or another decisional body is seized, the ordinary rules of *litispendence* might apply. However, the Court will scrutinize to what extent this other body possesses comparable powers to settle

⁴⁰ Article 15 (1), at the beginning, reads as follows: 'If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council'.

⁴¹ A decision applying the law is binding precisely because it expresses the law as it stands: the law is binding upon the parties.

⁴² PCIJ, Judgment, *Minority Schools of Upper Silesia (Germany v. Poland)*, 26 April 1928, Ser. A, no. 15, pp 22–3. See Sohn, *supra* note 34, at 248.

the dispute. In the context of genocide, an arbitration tribunal may not have the same authority as the ICJ (which is the principal judicial organ of the organization that has adopted the Genocide Convention, namely the UN). The seizing of a political organ will not sterilize the applicability of the compromissory clause under Article IX of the Genocide Convention. Practice shows that the ICJ exercises a parallel jurisdiction to that of such organs, namely the Security Council of the UN. Each of the two organs acts in its sphere of competence (legal and political, respectively). Finally, it may be recalled that an appeal is possible from a first instance dispute settlement body if the treaty bearing the compromissory clause allows it. The *ICAO Council* case⁴³ illustrates the point. In the Genocide Convention, there is no similar provision.

4.2 The Jurisdiction of the Court under Article IX and Other Titles of Jurisdiction

In case of a plurality of titles of jurisdiction, the Court has stressed in its jurisprudence that each title is independent from the others and that the titles can be invoked alternatively or cumulatively.⁴⁴ Each title can be invoked in order to enlarge the jurisdiction of the Court with respect to an alternative title conferring narrower jurisdiction. Thus, for example, the optional declaration under Article 36(2) of the ICJ Statute can be invoked in order to broaden the scope of the compromissory clause jurisdiction, itself limited to a treaty. The reservations and limitations attached to one title apply only to it and do not affect the other titles. Thus, the reservations under the optional declaration cannot be transferred to the compromissory clause and vice versa. The principle *lex posterior derogat priori* is not applicable: a later, more restrictive optional declaration, is not considered as an expression of intention to subject oneself to the Court only to a reduced degree, so that previous compromissory

⁴³ ICJ, Judgment, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, 18 August 1972, ICJ Reports (1972) 46.

⁴⁴ The Court recalled this settled principle in the Judgment (Preliminary Objections), *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, 13 December 2007, §§ 121ff. This principle of 'mutual independence' and 'additionality' was first stressed by the PCIJ in the Judgment (Preliminary Objections), *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, 4 April 1939, Ser. A/B, no. 77, 76. See H. Thirlway, 'The Law and Procedure of the ICJ (continued), Questions of Jurisdiction and Competence (continued)', 70 *British Year Book of Int'l Law* (1999) 11; see R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Dordrecht, Boston, London: M. Nijhoff, 1993) 33. A neat distinction between the respective scope of various titles of jurisdiction can be difficult, as a compromissory clause may reproduce or refer to the optional clause system: ICJ, Judgment (Jurisdiction and Admissibility), *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 20 December 1988, ICJ Reports (1988), at 84–5.

clause would be held to be derogated by this later expression of will (and vice versa). Finally, the compromissory clauses are not a *lex specialis* to the optional declarations, derogating from them (or vice versa). Rather, the aggregate jurisdiction of the Court in a case flows from the addition of the proper scope of each applicable title. The presumption, according to the Court, is that a multiplicity of jurisdictional obligations by states shows their intention to open up new ways of access to the Court rather than to close old ways, or to allow them to cancel each other out. Hence the principles permeating the subject-matter are those of 'independence' and 'addition' of the respective titles. Furthermore, if two (or more) equally broad bases of jurisdiction exist, the Court may freely choose between them.⁴⁵ The principle of mutual independence also prevails between a contentious procedure on the basis of compromissory clause and the faculty of the appropriate UN organs to request an advisory opinion. In particular, the existence of a compromissory clause in a treaty does not indirectly exclude the request of an advisory opinion on questions covered by the treaty.⁴⁶

4.3 The Advisory Jurisdiction of the Court and Article IX

In the *Interpretation of the Peace Treaties* case,⁴⁷ the three states concerned by the proceedings (Bulgaria, Hungary and Romania) were not members of the UN. However, since the Peace Treaties they had concluded gave the Secretary General of the UN certain functions with respect to the application of their compromissory clause, the General Assembly of the UN was considered to be empowered to request an advisory opinion on this subject-matter. The powers of the organization around the functioning of the compromissory clause created the necessary link *ratione materiae* allowing the UN General Assembly to request the opinion. The Genocide Convention having been concluded under the auspices of the UN and touching upon a matter of general interest, the power of the appropriate UN organs to request an advisory opinion can not, *a fortiori*, be doubted. Such a request has led to the Court's opinion of 1951.⁴⁸

⁴⁵ Jurisdiction, *Border and Transborder Armed Actions* case, *supra* note 44, at 90, § 48.

⁴⁶ Advisory Opinion, *Reservations to the Genocide Convention*, *supra* note 38, at 19–20.

⁴⁷ ICJ, Advisory Opinion (first phase), *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 30 March 1950, ICJ Reports (1950) 65, at 67 and 71. See G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris: A. Pedone, 1967), at 80; H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens and Sons, 1958), at 355, mentioning the point in passing.

⁴⁸ Advisory Opinion, *Reservations to the Genocide Convention*, *supra* note 38.

5. The Seizing of the Court by a State Party

In general, there are three families of compromissory clauses: (i) those allowing unilateral seizing on the lines of Article IX of the Genocide Convention; (ii) those requiring a special agreement between the parties to a dispute, and which must therefore be analysed as *pacta de contrahendo*;⁴⁹ (iii) and those silent of this point, which are now customarily interpreted as allowing unilateral seizing by virtue of elementary considerations of *effet utile*.⁵⁰ The presumption is thus always in favor of unilateral seizability of the Court. However, in the case of Article IX of the Genocide Convention, this point is made clear in the text itself: Article IX allows a unilateral seizing of the ICJ by any party to a dispute.

Moreover, it must be noticed that the compromissory clause in Article IX of the Genocide Convention contains no further limitations, e.g. as to previous negotiations.⁵¹ Such restrictive conditions may prompt delicate problems⁵²—all of which are avoided in the Genocide Convention. Article IX of the Convention is in this respect a model of clarity and simplicity, opening the seizing of the Court as largely as possible.

⁴⁹ E.g. Article 11(2) of the Antarctic Treaty of 1959 (UNTS, Vol. 402, at 80: 'Any dispute... shall, with the consent, in each case, of the parties to the dispute, be referred to the International Court of Justice for settlement').

⁵⁰ Cf. C. Szafarz, *supra* note 44, at 30; V. Starace, *La competenza della Corte internazionale di Giustizia in materia contenziosa* (Naples: Jovene, 1970), at 93–7. In the case law of the Court, see the Judgment, *United States Diplomatic and Consular Staff (United States v. Iran)*, 24 May 1980, ICJ Reports (1980), 27, § 52; Judgment (Jurisdiction and Admissibility), *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, 15 February 1995, ICJ Reports (1995) 15. As to the maximum of effectiveness thus conferred to compromissory clauses, see C. Tomuschat, 'Article 36', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006), at 623–4. The Court also stressed that aspect in the two mentioned cases, in the *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, *ibid.*, at 19, §§ 35–6.

⁵¹ On this question, see M.M. Ahi, *Les négociations diplomatiques préalables à la soumission d'un différend à une instance internationale*, Ph.D. thesis (Graduate Institute of International Studies: Genève, 1957); M. Bourquin, 'Dans quelle mesure le recours à des négociations diplomatiques est-il nécessaire avant qu'un différend puisse être soumis à la juridiction internationale', *Essays in Honor of J. Basdevant* (Paris: Pedone, 1960) 43; S. Torres Bernardez, 'Are Prior Negotiations a General Condition for Judicial Settlement by the ICJ?', *Essays in Honor of J. M. Ruda* (The Hague: Kluwer Law International, 2000) 507.

⁵² See e.g. Jurisdiction, *Border and Transborder Armed Actions* case, *supra* note 44, 88–90; ICJ, Provisional Measures, *Lockerbie (Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom)*, 14 April 1992, ICJ Reports (1992), 7 and 118, § 9.

6. The Jurisdiction of the Court and the *Tempus Regit Actum* Principle

Problems may exist with regard to the compulsory jurisdiction of the Court over facts arising before the critical date of the entry into force of the Convention for the parties to the dispute. In principle, the jurisdictional titles under the optional clause system of Article 36(2) of the ICJ Statute are not temporally limited: it is considered that the parties wish a full adjudication of all their disputes, with no regard as to when the facts of the dispute originated. Thus, many optional declarations under Article 36(2) of the Statute contain explicit reservations limiting the competence of the Court to disputes arising after a certain date or excluding the competence as to disputes arising from facts, reasons or causes prior to the date of deposit of the declaration.⁵³

As far as compromissory clauses are concerned, the general rule as to the non-retroactivity of treaties enshrined in Articles 4 and 28 of the 1969 Vienna Convention on the Law of Treaties, and specially recalled in certain conventions,⁵⁴ may be held to limit the temporal reach of jurisdiction without any necessity to invoke a specific reservation. Here too, then, the optional clause system appears to impose a closer knit of obligations (the presumption being against time limitation) than the compulsory clauses system (the presumption being in favor of time limitation). Thus, a retroactive application of the compromissory clause was not presumed in the *Ambatielos* case.⁵⁵ Article 32 of the applicable treaty stated that it shall come into force immediately upon ratification. The Court held that this must encompass all the clauses of the treaty, including the compromissory clause contained in Article 29—unless there is a ‘special clause or any special object necessitating retroactive interpretation’.⁵⁶ However, that jurisprudence has not been confirmed in the

⁵³ See J.G. Merrills, ‘The Optional Clause Today’, 50 *British Year Book of Int’l Law* (1979) 96; J.G. Merrills, ‘The Optional Clause Revisited’, 64 *British Year Book of Int’l Law* (1993) 213; Tomuschat, *supra* note 50, at 634–6. The quite extensive case law is discussed, including the often subtle distinctions made by the Court.

⁵⁴ See e.g. the European Convention on the Pacific Settlement of Disputes (1957), containing a compromissory clause in Article 1, but recalling in Article 27 that it will not apply to disputes concerning facts or situations prior to the entry into force of the Convention. The ICJ gave a contrived application to that clause in Judgment (Preliminary Objections), *Certain Property (Liechtenstein v. Germany)*, 10 February 2005, ICJ Reports (2005), §§ 28ff.

⁵⁵ ICJ, Judgment (Preliminary Objections), *Ambatielos (Greece v. United Kingdom)*, 1 July 1952, ICJ Reports (1952), at 40–1.

⁵⁶ *Ibid.*

Bosnian Genocide case.⁵⁷ The Federal Republic of Yugoslavia had claimed the benefit of non-retroactivity of the compromissory clause contained in Article IX of the Genocide Convention, attempting to limit its reach to 'events subsequent to the different dates on which the Convention might have become applicable between the parties'.⁵⁸

The Court answered thus:

In this regard, the Court will confine itself to the observation that the Genocide Convention—and in particular Article IX—does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end.⁵⁹

It therefore concluded that its jurisdiction extended to all the relevant facts which have occurred since the beginning of the conflict.

This pronouncement can be read at least in three different ways: (i) in the case of State succession, the successor state enters into the position of the predecessor so that there is legal continuity and no new critical date (if the Court intended to found its reasoning on this aspect, it seems odd that it did not say a word about it); (ii) the Genocide Convention is a special treaty, since it has a fundamentally humanitarian object and purpose requiring such a liberal interpretation (the Court mentions this aspect at the end of its aforementioned reasoning); (iii) the Court intended generally to bring the compromissory clause system in line with the optional clause system, establishing the general presumption of temporal non-limitation of the titles of jurisdiction, unless there is an apposite reservation. It is not easy to choose among the last two readings. The last interpretation would be the most desirable, and in line with the maxim '*boni iudicis est ampliare jurisdictionem*' so often applied in the context of a compromissory clause. It is often artificial to uphold or even to require contrived temporal fact-constructions. Indeed, it is often easy to base new claims on old facts so that a new dispute is said to emerge. The Court would simplify the matters if no such temporal limitations applied at all. The non-retroactivity principle does not require such a limitation: it only requires that the compromissory clause does not apply itself before the treaty enters into force. Under the solution given in the *Genocide* case, the compromissory

⁵⁷ ICJ, Judgment (Preliminary Objections), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 11 July 1996 ('1996 Preliminary Objections Judgment') ICJ Reports (1996-II).

⁵⁸ 1996 Preliminary Objections Judgment, *supra* note 57, at 617, § 34.

⁵⁹ *Ibid.*

clause would then apply only from the moment the treaty enters into force and not retroactively; but the facts giving rise to disputes would not be temporally limited.

7. The Jurisdiction of the Court and the Termination or Suspension of the Convention

If a treaty is suspended or terminated on account of a material breach or a fundamental change of circumstances, or on any other ground, it cannot be argued that the compromissory clause is itself thenceforward inapplicable because of the suspension or termination of the instrument containing it. The compromissory clause has a special status within a treaty. In case of termination or suspension, it is severable from the other provisions for the purposes of dispute settlement, as Article 60(4) of the 1969 Vienna Convention on the Law of Treaties recalls. Its object and purpose is to provide a means of settlement of disputes on the interpretation or application of the treaty. Such disputes may arise out of claims purporting to suspend or terminate the treaty, if not undertaken consensually. It would be contrary to that object and purpose, granting a means to settle through the Court all disputes on the treaty, to leave open a gap in the context of suspension or termination. As the Court put it:

[A merely unilateral suspension of a treaty could not] per se render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that [this] treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter.⁶⁰

Thus, a challenge to the treaty does not annul the operation of the compromissory clause but rather calls it into action. This conclusion, of course, also applies to the Genocide Convention and Article IX.

In addition, if a treaty is validly denounced or otherwise validly terminated (any dispute as to termination may be brought to the Court under the compromissory clause), the compromissory clause will cease to apply as soon as termination occurs. However, if an application is brought to the Court before

⁶⁰ Judgment, *Appeal Relating to the Jurisdiction of the ICAO Council*, *supra* note 43, at 53–4, § 15, letter *b*). See also, on the argument of fundamentally changed circumstances: Judgment (Jurisdiction), *Fisheries Jurisdiction (Germany v. Iceland; United Kingdom v. Iceland)*, 2 February 1973, ICJ Reports (1973) 21, at 65. See Tomuschat, *supra* note 50, at 622; Sohn, *supra* note 34, at 255.

that critical date, the Court will retain jurisdiction over the case up to a final decision (principle of the *forum perpetuum*).⁶¹

The Genocide Convention may be denounced under Article XIV. Thus, the discussed principle may apply to it.

Conversely, the compromissory clause will operate only from the day the treaty enters into force for a particular state party or the day a provisional application under Article 25 of the 1969 Vienna Convention on the Law of Treaties is agreed upon.

⁶¹ See ICJ, Judgment (Preliminary Objections), *Nottebohm (Liechtenstein v. Guatemala)*, 18 November 1953, ICJ Reports (1953), at 123; ICJ, Judgment (Preliminary Objections), *Right of Passage over Indian Territory (Portugal v. India)*, 26 November 1957, ICJ Reports (1957), at 142; Judgment (Jurisdiction), *Armed Activities In and Against Nicaragua (Nicaragua v. United States)*, 26 November 1984, ICJ Reports (1984), at 416, § 54; and Judgment (Merits), 27 June 1986, ICJ Reports (1986), at 28, § 36; ICJ, Judgment (Preliminary Objections), *Lockerbie (Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom)*, 27 February 1998, ICJ Reports (1998), at 23–4, § 38. See R. Szafarz, *supra* note 44, at 39.

THE SCOPE *RATIONE PERSONAE* OF THE COMPULSORY JURISDICTION OF THE ICJ

Robert Kolb and Sandra Krähenmann

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1. Introduction

Jurisdiction of the International Court of Justice ('ICJ' or 'the Court') to
disputes under a compromissory clause is limited to the parties having
accepted or acceded¹ (to) the treaty which contains that clause. The treaty must
be in force and the compromissory clause must not be stymied by a reservation
limiting the competence of the Court. Hence, the competence of the Court
under the compromissory clause is purely *inter partes*: it is a web of jurisdic-
tion connecting all the parties having subjected themselves to the treaty and to the

¹ The conclusion of a treaty is not enough, as it does not yet create a binding obligation to carry it out.
It is only when the treaty is made provisionally applicable under Article 25 of the Vienna Convention on the Law of
Treaties of 1978, the compromissory clause is also rendered applicable, unless the opposite is stated.

clause. Furthermore, the state parties to a proceeding at the ICJ must have ratified or acceded to the Statute of the Court (Article 35(1)), or otherwise be allowed by the Security Council to appear at the Court under conditions fixed in Resolution 9 (1946) of the Security Council (Article 35(2)).²

The Security Council thus allowed recourse to the Court under certain conditions. However, according to the construction of the Court in the *Legality of the Use of Force* cases, § 1 of Article 35 is the rule, to be construed broadly, and § 2 the exception, to be interpreted narrowly.³ Hence, the Court interpreted the clause 'special provisions contained in treaties in force' contained in Article 35(2) of its Statute as extending only to treaties already in force at the moment of the adoption of the Statute. It held that this was the object and purpose of this clause as evidenced in the *travaux préparatoires*. This means that a state party to a treaty with a compromissory clause can invoke the clause against a non-member of the Statute only if the treaty is older than 1945; if the treaty is concluded thereafter, it must become a party to the Statute before being allowed to use the instrumentality of the Court. The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the 'Genocide Convention' or 'Convention') is in the last category, since it was concluded in 1948. According to the interpretation of the Court, the aim of Article 35(2) of the Statute is exclusively to preserve as much as possible the jurisdictional *acquis* of the Permanent Court of International Justice (PCIJ), in particular with regard to former enemy states having accepted the competence of the old Court but now, for a transitory time, held aloof from the UN system.

This rather unconvincing interpretation—perhaps the Court wished to avoid some embarrassment with NATO-states' action in Yugoslavia—overlooks that the main aim of the Charter and Statute-rules on peaceful settlement of disputes is to open as largely as possible to all states the different settlement-devices of the UN, with a view to contributing as much as possible to the peaceful and effective settlement of disputes. The effect of the Court's interpretation is to limit the personal reach of the compromissory clause to parties to the Statute plus to some old PCIJ-titles of jurisdiction, excluding parties to conventions concluded after 1945 if they are not equally parties to the ICJ Statute. Fortunately, there are today hardly any state non-members of the UN and non-parties to the Statute. Therefore, this question will

² See H. Thirlway, 'The Law and Procedure of the ICJ (continued): Questions of Procedure', 71 *British Year Book of Int'l Law* (2001) 57.

³ E.g. ICJ, Judgment (Preliminary Objections), *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, 15 December 2004, ICJ Reports (2004), at 279.

fortunately gain relevance only in the troubled and transient situations of the creation of new states.

2. Parties to Disputes before the ICJ and the *Erga Omnes* Nature of the Convention

Only states may be parties in contentious cases before the ICJ (Article 34 of the ICJ Statute). This provision is peremptory: it cannot be set aside by special agreement of the parties to a dispute. Consequently, if a treaty is open to non-state parties, the compromissory clause would have to take account of this fact and possibly provide for ICJ jurisdiction in the disputes among states and some other device (e.g. arbitration) in the disputes with the non-state entities. The Genocide Convention is open only to states (Article XI(1)): the members of the UN therein mentioned are necessarily states (Articles 3 and 4 of the UN Charter); and any non-member state invited to join the Convention by the General Assembly is obviously also a state.

If a dispute initially concerns the relations between a state and individuals or other non-state entities, but is later transferred to the inter-state level by the exercise of diplomatic protection, two or more states confront each other. The dispute has become an inter-state dispute. In this situation, the personal condition of jurisdiction of the Court is satisfied. Thus, the PCIJ recalled in the *Appeal From a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Peter Pázmány University)* case that:

[t]he fact that a judgment was given in a litigation to which one of the Parties is a private individual does not prevent this judgment from forming the subject of a dispute between two States capable of being submitted to the Court.⁴

The PCIJ had paved the way for such a transformation of a semi-private litigation into an international dispute in the *Mavrommatis Concession* case, through the celebrated and at that time revolutionary dictum:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.⁵

⁴ PCIJ, Judgment, *Appeal From a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University) (Czechoslovakia v. Hungary)*, 15 December 1933, Ser. A/B, No. 61, 221.

⁵ PCIJ, Judgment (Preliminary Objections), *The Mavrommatis Palestine Concessions (Greece v. UK)*, 30 August 1924, Ser. A, No. 2, 12. The Court insisted also on the following aspect: 'In

This aspect is practically relevant for the purposes of the Genocide Convention. The litigation on the Convention will in most cases involve the treatment of individual victims of the crime or suspected of having committed the crime, be it under the lens of prevention or under that of suppression. This origin of the dispute does not hamper litigation at the ICJ according to the compromissory clause. As soon as one state party takes up the case against another state party in the perspective of the proper interpretation or application of the Convention, the dispute is placed on the inter-state level and the ICJ can exercise its jurisdiction.

It is worth observing that the Genocide Convention has an *erga omnes* character, twice stressed by the ICJ.⁶ This means that the contracting states do not only have *interests of their own*, which they can vindicate by a claim based on the violation of their particular legal rights. Obviously, that course of claiming for the infringement of one's own rights remains open to a state: as was the case when Bosnia asserted it was a victim of genocidal policies by the then Federal Republic of Yugoslavia (FRY). The *erga omnes* character moreover means that the contracting states also have a *common interest* rooted in the accomplishment of the purposes of the Convention. Thus, any party has a legal interest entitling it to invoke the compromissory clause against any other party to the Convention when any point of interpretation or application of that treaty is at stake.⁷

This aspect does not touch upon the jurisdiction of the Court but on the admissibility of a request, in particular upon the requirement of a legal interest (*locus standi in judicio*).⁸ In ordinary inter-state litigation, the applicant must show that he suffered an injury—by an act or omission of the defendant—in

the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State.... Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States'.

⁶ ICJ, Advisory Opinion, *Reservations to the Genocide Convention*, 28 May 1951, ICJ Reports (1951), at 23; ICJ, Judgment (Preliminary Objections), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 11 July 1996 ('1996 Preliminary Objections Judgment') ICJ Reports (1996-II), at 616, § 31.

⁷ Cf. S. Rosenne, *The Law and Practice of the International Court*, Vol. II (Leyden: Sijthoff, 1965), at 520.

⁸ The ICJ clearly separates both aspects, as the *East Timor* case shows: ICJ, Judgment *East Timor (Portugal v. Australia)*, 30 June 1995, ICJ Reports (1995), at 102, § 29. This has elicited some criticism in the dissenting opinions and in legal writings, but has also been defended by significant authors. See e.g. C. Tomuschat, 'Article 36', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006) 606.

his own legally protected interests.⁹ When *erga omnes* obligations are at stake, the applicant is considered to possess such a legal interest even if his own legal rights were not infringed. The allegation of a violation of the Convention suffices, since precisely all state parties are considered to have an interest in the proper application of such a Convention. To some extent, this is true in all multilateral conventions;¹⁰ but only in some of them, embodying 'integral' obligations owed to all other contracting parties ('*erga omnes*'), a law-suit at the ICJ would properly lie under the requirement of *locus standi*. The *erga omnes* character of the rights and obligations enshrined in the Convention has thus a particular procedural impact: it dispenses from the traditional requirement of *locus standi*. No proof of infringement of the personal rights of the applicant is necessary. On the other hand, the jurisdiction of the Court must still be established: the compromissory clause is the basis for it in the context of the Genocide Convention.

3. State Succession and Non-Recognition of States

When has a state become a party to the Genocide Convention? In the ordinary course of events, the critical date is the receipt of the notification of ratification or accession by the depositary. However, difficult problems may arise in the situation of state succession.¹¹ The *Bosnian Genocide* case evidenced complicated problems in this respect. On 27 April 1992, the FRY declared that it would respect all the obligations of the former Socialist Federal Republic of Yugoslavia (SFRY). It claimed to represent the legal continuation of that former state, a claim rejected by the other states having formed the SFRY and by the international community, through the General Assembly of the UN. Bosnia-Herzegovina proclaimed its independence on 6 March 1992. This independence was still hardly effective at that date. Bosnia-Herzegovina was admitted as a member state in the UN on 22 May 1992. It notified its succession to the Genocide Convention on 29 December that year. This notification of succession was circulated to the other parties to the Convention on 18 March 1993. The Court supposed that the notification of succession had retroactive effect

⁹ ICJ, Judgment (second phase), *South West Africa cases* (*Ethiopia v. South Africa; Liberia v. South Africa*), 18 July 1966, ICJ Reports (1966) 17; ICJ, Judgment (second phase), *Barcelona Traction Light and Power Company, Limited* (*Belgium v. Spain*), 5 February 1970, ICJ Reports (1970) 30.

¹⁰ See B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris: Pedone, 1973).

¹¹ See C. Hillgruber, 'Die Jurisdiktionsgewalt des IGH nach Art. IX Genozidkonvention und ihre Grenzen', 53 *Zeitschrift für öffentliches Recht (ZöR)* (1998), at 368.

to the day of membership to the UN. Hence, Bosnia would have been a party to the Convention since 22 May 1992.¹² Why did it not admit retroaction on the day of independence, as Bosnia has claimed? The reason is that the Genocide Convention is a multilateral treaty with restricted accession. Article XI of the Genocide Convention provides that any member state of the UN, or non-member state of the UN invited to accede by the General Assembly of the organization, can become a party to that Convention. Since Bosnia became a member of the UN on 22 May 1992, its accession to the Genocide Convention took effect on that day.¹³ The position taken by the Court is thus that the FRY was a party to the Convention by its declaration of continuation of the former SFRY,¹⁴ and that Bosnia became (probably)¹⁵ a party by way of notification of succession taking effect on the day of becoming a member of the UN.

This position of the Court—friendly to the continuity of application of this fundamentally humanitarian Convention—has been criticized on two sides: on the one hand, for not being sufficiently ‘continuationist’; on the other hand, for not being sufficiently ‘consensualist’. According to the first criticism, modern international practice has evidenced that state succession into human rights law treaties and other fundamentally humanitarian conventions (such as the Genocide Convention) is automatic. The declaration or notification of succession is a merely declaratory act, proclaiming a succession having automatically operated at the day of independence (for the Genocide Convention its effect would be legally delayed to the day of accession to the UN or of acting upon the invitation of the UNGA).¹⁶ According to the second criticism, any retroactive participation of a notification of succession to the day of independence or of UN membership supposes the consent of the other treaty parties. If these parties do not object or protest

¹² 1996 Preliminary Objections Judgment, *supra* note 6, at 609–11, §§ 16ff.

¹³ *Ibid.*, at 611, § 19, at the end.

¹⁴ But this is not free from difficulties: Hillgruber, *supra* note 11, at 366–7. It is doubtful whether the FRY fulfilled the conditions of Article XI of the Genocide Convention on the date of the filing of the Bosnian application, since it was not invited to accede to the Convention by the UN General Assembly, nor was it recognized as being identical with the former SFRY. Indeed, Res. 47/1 of the General Assembly (22 September 1992) states that ‘the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations ...’. This did not happen before the year 2000. The Court thus decided to give effect to the unilateral position of the FRY to its own detriment: namely that the FRY was the continuation of the former SFRY and that it was thus a member of the UN. A constitutive legal effect is thus attached to that unilateral statement.

¹⁵ Since the Court left formally open the possibility that an automatic succession could have taken place: 1996 Preliminary Objections Judgment, *supra* note 6, at 611–2, §§ 21–3.

¹⁶ See A. Zimmermann, *Staatenmachfolge in völkerrechtliche Verträge* (Berlin: Springer, 2000), 543ff.

against the retroaction of succession, it will be granted; if some parties object, retroaction is excluded in their regard, while it will be allowed in regard to those who do not protest.¹⁷ There is no space at this juncture to provide substantive comments on these thorny problems of state succession. We may simply note, first that the ICJ took a middle ground position; second, that it may be difficult to assume automatic succession *ex lege* to humanitarian treaties, in view of reluctant state practice as opposed to the more generous practice of international institutions; and third, that the acquiescence of the other parties to the Genocide Convention does not seem necessary in case of a notification of succession, since the Convention is objectively open to all the states fulfilling the conditions of Article XI. To this automatic accession all the state parties have given their consent by ratifying the Convention, including Article XI.

Another problematical issue is that of *non-recognition of states*. What happens if two states having ratified or acceded to the Genocide Convention do not recognize each other? Is the compromissory clause operative between them? In the *Bosnian Genocide* case, the Court was faced with this argument. The FRY claimed that the two states (itself and Bosnia-Herzegovina) did not recognize one another and that thus the Court had no jurisdiction. However, the ICJ could escape a principled answer to the question, since it found that recognition had since been granted through Article X of the Dayton Agreement 1995.¹⁸

There seems to be no reason of principle why a state not recognizing another could not bring a case to the Court through a special agreement or on any other treaty-based title—even if this might *ipso facto* imply recognition. The ICJ Statute imposes only some objective requirements which the Court has to scrutinize *ex officio*: (i) that an entity is a state according to public international law (Article 34 of the ICJ Statute), which does not suppose recognition (recognition being only declaratory and not constitutive); and (ii) that it is a state party to the ICJ Statute or a state-authorized to appear at the Court (Article 35 of the ICJ Statute). Subjective aspects concerning only the particular interests of the disputants, such as non-recognition, are left to their sphere. The states concerned can object to such jurisdiction if they deem it necessary, as they can also renounce to object. However, if they wish to restrict the action of the Court to states recognized by themselves, they have

¹⁷ See Hillgruber, *supra* note 11, at 371–80.

¹⁸ 1996 Preliminary Objections Judgment (*Bosnian Genocide* case), *supra* note 6, 612, § 25. It therefore left open the general question: § 26.

to make known their objection by way of reservations *before the seizing* of the Court in a concrete case. Thus, the defendant state cannot resist the jurisdiction of the Court when it is seized by another state, unless the defendant entered a reservation to the effect of excluding non-recognized states in the provision bearing the compromissory clause or in the optional declaration of Article 36(2) of the ICJ Statute. Indeed, in the optional clause system there are a series of declarations excluding the jurisdiction of the Court for the declaring state with respect to any state not recognized by it.¹⁹ Without this reservation, the Court could assume jurisdiction. It is obviously very rare that litigation at the ICJ between non-recognizing states takes place.

4. The Problem of Reservations to the ICJ Jurisdiction

4.1 Reservations to Compromissory Clauses

Reservations may be engrafted on a compromissory clause. The question if such reservations are permissible depends on an interpretation of each single compromissory clause in the light of the intentions of the parties and of the object and purpose of the agreement. A compromissory clause can be an essential clause in the economy of a compact, and not a severable procedural clause of minor importance. This position is illustrated by the *Fisheries Jurisdiction* case. The Court noted that the ability of the applicants to have recourse to the ICJ in the case of unilateral extension of exclusive fisheries jurisdiction into the sea by Iceland, was an essential element of the conventional *quid pro quo*.²⁰ The fact that a bilateral agreement was at stake evidenced more clearly the fundamental importance of this respective balance of obligations. The preparatory works expressed this. The same case-by-case approach must prevail also in the context of multilateral conventions.

¹⁹ See e.g. the Declaration of India (18 November 1974), § 8. These declarations are printed in the *Yearbook* of the ICJ or on its website (www.icj-cij.org).

²⁰ Judgment (Jurisdiction), *Fisheries Jurisdiction (United Kingdom v. Iceland)*, 2 February 1973, ICJ Reports (1973), 9ff, 13: 'The real intention of the parties was to give the United Kingdom Government an effective assurance which constituted a *sine qua non* and not merely a severable condition of the whole agreement: namely, the right to challenge before the Court the validity of any further extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-miles limit'. See also the Separate Opinion of Judge Dillard at the Merits phase, ICJ, Judgment (Merits), *Fisheries Jurisdiction (United Kingdom v. Iceland)*, 25 July 1974, ICJ Reports (1974), 54–5: '[The compromissory clause] was no mere severable clause of minor significance but an essential element of the entire agreement'.

A further point with respect to reservations must be raised already at this juncture. In the context of the optional clause system (Article 36(2) of the ICJ Statute), the Court allows the defendant to raise by way of reciprocity reservations contained in the optional declaration of the applicant, even if the defendant has not made in his own declaration any reservation, or at least not the type of reservation he wishes to invoke. Thereby the Court re-establishes the jurisdictional equality between the parties and does not give an improper incentive to accumulate protective reservations. Under the compromissory clause system, reservations are also allowed. However, the optional clause-reciprocity does not apply. The defendant will be able to rely only on the reservations he entered on the compromissory clause when ratifying or acceding to the treaty. Thus, the optional clause system is a closer knit of jurisdiction, imposing a web of interrelated clauses; whereas the compromissory clause remains shrouded in the ordinary rules of treaty application, where such a cross-raising of reservations is not applicable.²¹

4.2 Reservations to Article IX and the Law on Reservations to Treaties

The question as to whether a state may stymie the jurisdiction of the Court with a reservation to Article IX is closely linked to, and indeed contributed to, the development of the law of reservations in general. Before turning to the different stages of this development and the ensuing debates, two preliminary remarks are required.

First, the scope of the problem needs to be underlined. Currently, 17 out of the 140 state parties have made a reservation to Article IX.²² Several states, albeit not systematically, objected to such reservations, specifying in certain instances that such reservations are deemed incompatible with the object and purpose of the Convention.²³

Second, the issue arose because the Genocide Convention is silent on reservations. The *travaux préparatoires* do not shed much light on the question. The first draft of the Secretary-General did not include a provision on reservations because it was considered doubtful whether reservations, in particular general

²¹ On reciprocity in general: S. Torres Bernardez, 'Reciprocity in the System of Compulsory Jurisdiction and in other Modalities of Contentious Jurisdiction exercised by the ICJ', in E.G. Bello and B.A. Ajibola (eds), *Essays in Honor of T.O. Elias* (Dordrecht e.a.: Nijhoff, 1992) 291.

²² Algeria, Bahrain, Bangladesh, China, India, Malaysia, Montenegro, Morocco, Rwanda, Serbia, Singapore, Spain, UAE, USA, Venezuela, Vietnam, and Yemen; see Multilateral Treaties deposited with the Secretary-General: Status as at 17 August 2008, available at: <http://treaties.un.org>.

²³ E.g. the objections by the Netherlands, Mexico and the UK, *ibid*.

ones, should be allowed. The permissibility of limited reservations was to be decided by the General Assembly.²⁴ The *ad hoc* Committee did not consider it necessary to include such a provision.²⁵ The issue was not discussed in the Sixth Committee. However, when explaining their vote on the draft, several delegates pointed out that their governments might make reservations to the Convention.²⁶ The Greek delegate, Mr. Spiropoulos, reacted by pointing out that such states could not become a party to the Genocide Convention without the consent of other contracting States.²⁷ Considering this point to be 'an interesting though purely theoretical, legal problem', the Belgium delegate, Mr. Kaeckenbeeck, replied that the Committee did not have to take a decision as to the legal implications of reservations at this stage.²⁸ Hence no debate on the issue took place. At best, the *travaux préparatoires* indicate that reservations are not prohibited. However, they do not provide any guidance as to what kind of reservations and as to the legal effect of objections thereto.²⁹

A. The 1951 ICJ Advisory Opinion on Reservations to the Genocide Convention

(i) Background

The USSR and other socialist states,³⁰ not surprisingly, given their hostility to compulsory jurisdiction by an international court,³¹ formulated reservations to Article IX of the Genocide Convention upon signature. In addition, Bulgaria and the Philippines tendered their ratification/accession with reservations,

²⁴ Article XVII and its commentary, Doc. E/447, 55.

²⁵ Report of the sub-committee on final provisions, Doc. E/AC.25/10, 5 and the unanimous adoption of its proposal by the full *ad hoc* committee, Doc. E/AC.25/SR.23, 7.

²⁶ Doc. A/C.6, SR. 133, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, 703–14; some delegations specifically referred to the possibility of reservations to Article IX, e.g. 705–6 (India), 710 (Peru).

²⁷ *Ibid.*, 711.

²⁸ *Ibid.*

²⁹ See the opposite conclusions drawn from the *travaux préparatoires* by the majority and the joint minority opinion in 1951 Advisory Opinion (*Reservations to the Genocide Convention*), *supra* note 6, 22 (majority), 40–1 (joint Dissenting opinion of judges Guerrero, McNair, Read and Hsu Mo). They agreed that reservations were admissible (*contra*: Dissenting opinion Judge Alvarez, *ibid.*, 50ff), but disagreed on the regime applicable to them.

³⁰ The USSR, the Byelorussian SSR, Ukrainian SSR and Czechoslovakia signed the Genocide Convention with a reservation to Article IX in December 1949. For the text of these reservations, see Report of the Secretary-General of 20 September 1950, Annex II: Status of Signatures, Ratifications, Accession and Reservations with regard to the Convention on the Prevention and Punishment of the Crime of Genocide, Doc. A/1372, § 3. They withdrew their reservations in the wake of the end of the cold war, see Multilateral Treaties deposited with the Secretary-General.

³¹ See *supra*, Chapter 20 of this volume.

inter alia, to Article IX.³² Several other states objected to these reservations.³³ Uncertain as to the legal effects of such objections, the UN Secretary-General, in his capacity as the depositary of the Genocide Convention, sought the advice of the General Assembly.³⁴ The question was urgent since the date of entry into force of the Genocide Convention depended on its answer. The discussions in the Sixth Committee³⁵ bear witness to the profound divergences among states with regards to: (i) the organ to which the question should be referred, and (ii) the system to be followed by the Secretary-General pending a decision by such an organ.

The opinion was divided between the ICJ and the International Law Commission (ILC). As a compromise, the question concerning reservations to the Genocide Convention was submitted to the ICJ while the ILC was asked for a report on reservations to multilateral treaties in general.³⁶

Three different positions were advocated. The USSR and other socialist states argued for an absolute sovereign right to become a party to a treaty with reservations.³⁷ European states mostly defended the traditional unanimity rule, perceived to reflect existing law.³⁸ Many Latin American states and the US argued that the flexible Pan-American system should be applied.³⁹ No decision had to be taken since the urgency of the question was removed with the simultaneous deposit of five instruments of ratification on 14 October 1950 which allowed the Genocide Convention to enter into force regardless of the status of the Philippines and Bulgaria.⁴⁰

³² Bulgaria acceded to the Genocide Convention with a reservation to Article IX on 21 July 1950, the Philippines ratified the Genocide Convention with a reservation to Article IX on 7 July 1950, *ibid.*, §§ 17–8.

³³ Ecuador, Guatemala, and the UK, *ibid.*, §§ 6–15.

³⁴ Report of the Secretary-General of 20 September 1950, Doc. A/1372, §§ 1–3. After an analysis of: (i) the traditional rule of unanimous consent by all states concerned, practised by the League of Nations; and (ii) the more flexible practice of the Pan-American Union which enabled a state to become a party to a treaty with reservations regardless of objections thereto, the Secretary-General concluded that the unanimity rule was more appropriate for the Genocide Convention in the light of its law-making character. For a discussion of the League of Nations practice, the early UN practice and the Pan-American Union practice, see J.M. Ruda, 'Reservations to Treaties', 146 *Recueil des cours* (1975) 95, at 111–39.

³⁵ Doc. A/C.6, SR. 217–225, Official Records of the Fifth Session of the General Assembly, Sixth Committee, Summary Records of Meetings 5 October–4 December 1950, p. 31ff; for an overview of the debates, see C.G. Fenwick, 'Reservations to Multilateral Treaties', 45 *American Journal of Int'l Law* (1951), 145–8.

³⁶ See General Assembly Resolution 478(V), adopted on 16 November 1950.

³⁷ Doc. A/C.6, SR. 217–225, at 59–63 (USSR).

³⁸ *Ibid.*, e.g. at 34 (UK), 38 (France), 42 (Netherlands), etc.

³⁹ *Ibid.*, e.g. at 32 (US), 33 (Uruguay), 49 (Mexico), etc.

⁴⁰ *Ibid.*, at 59.

(ii) The Opinion of the Court

Stressing the 'special characteristics'⁴¹ of the Genocide Convention, in particular its universal aspiration and *erga omnes* nature, the Court famously established the compatibility of a reservation with the object and purpose of a treaty as the guiding criterion to determine the permissibility of reservations and objections thereto.⁴² The traditional rule of unanimity was rejected.⁴³

The Court was well aware of the inherent dangers of the object and purpose criterion. Its application by individual states could result in divergent views on the compatibility of a given reservation. The ensuing practical disadvantages of this system, in particular the uncertainty of the status of a state having tendered a reservation and the fragmentation of treaty relationships, were acknowledged.⁴⁴ The obligation to apply the object and purpose criterion in good faith was to moderate these difficulties. In case of a dispute on the compatibility of a reservation with the object and purpose, states parties to the Genocide Convention could seize the Court through a special agreement or through the mechanism provided for in Article IX.⁴⁵ If the reservation was engrafted on Article IX, such reservations would presumably prevent the Court from adjudicating a dispute on their validity.⁴⁶ The Court was apparently willing to accept this result. Finally, although answering abstract questions relating to reservations to the Genocide Convention in general, it was quite clear that reservations to Article IX were principally at stake, given the context of the opinion.⁴⁷

⁴¹ 1951 Advisory Opinion (*Reservations to the Genocide Convention*), *supra* note 6, at 23.

⁴² *Ibid.*, at 24. ⁴³ *Ibid.*, at 25.

⁴⁴ For this reason, the Court could not give a definite answer to the question as to whether a state who maintained a reservation to the Genocide Convention which was objected to by another state could become a party to the Genocide Convention, *ibid.*, at 26. In addition, the Court recognized that a state could be excluded from the Genocide Convention at a later stage, namely after judicial determination of the compatibility of its reservation with the object and purpose of the Genocide Convention, *ibid.*, at 26; see also the joint Dissenting opinion on the difficulty to apply the object and purpose criterion and its practical consequences, *ibid.*, at 42–3.

⁴⁵ *Ibid.*, at 27. The majority's assumption that such dispute might be resolved through adjudication proved to be unfounded in practice. As of today, the Court has never been seized of such a dispute.

⁴⁶ Joint Dissenting opinion, 45. However, as shown by the later practice, the Court can evaluate the validity of a reservation to Article IX 'incidentally', i.e. if a case is brought on the basis of Article IX and the responding state entered a reservation to it, see ICJ, Judgment (*Jurisdiction and Admissibility*), *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, 3 February 2006, ICJ Reports (2006), §§ 64–70.

⁴⁷ The dissenting judges emphasize the 'realistic' background of the case, 1951 Advisory Opinion (*Reservations to the Genocide Convention*), *supra* note 6, at 31.

Although the Court's opinion was initially met with harsh criticism,⁴⁸ the object and purpose criterion had a long lasting impact on the law of reservations with the ILC finally adopting it in the 1966 the Draft Articles on the Law of Treaties,⁴⁹ which eventually became the 1969 Vienna Convention on the Law of Treaties.⁵⁰

B. The Object and Purpose Criterion and the Genocide Convention

The 1951 Advisory Opinion did not resolve the problem of reservations to Article IX. Instead, the Court provided us with an analytical framework for tackling the issue: compatibility with the object and purpose. At this juncture, it is not necessary, nor possible, to dwell upon all the ambiguities and difficulties related to this criterion.⁵¹ However, the problem of Article IX illustrates in an exemplary way two issues which frequently arise.

First, it is difficult to apply the compatibility test in an objective manner since every determination of the object and purpose of the treaty is inevitably tainted by subjective considerations.⁵² The practice of states does not

⁴⁸ E.g. G.G. Fitzmaurice, 'Reservations to Multilateral Conventions', 2 *Int'l and Comparative Law Quarterly* (1953) 1; the criterion was criticised as well in the ILC report on multilateral reservations requested by the General Assembly. Both the advocates of a more flexible system and those defending the unanimity rule rejected it, Report of the ILC to the General Assembly, *Yearbook of the International Law Commission*, 1951, Vol. II, 125–31; for the discussions in the ILC, see *Yearbook of the International Law Commission*, Vol. I, 1951, 152–74. The reaction of states was more positive. The discussions in the Sixth Committee on the ICJ Advisory Opinion and the ILC report reveal a slim majority in favour of a flexible system, either the Pan-American system or an extension of the object and purpose criterion to multilateral treaties in general or at least humanitarian treaties, Doc. A/C.6, SR. 264–278, Official Records of the Sixth Session of the General Assembly, Sixth Committee, Summary Records of Meetings 7 November 1951–29 January 1951, p. 69ff. For a discussion of the ICJ opinion, the ILC report and reactions thereto by states and scholars, see J.M. Ruda, *supra* note 34, at 139–52; C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *British Yearbook of Int'l Law* (1993), 245, at 246–53; P. Hilpold, 'Das Vorbehaltsregime der Wiener Vertragskonvention', 34 *Archiv des Völkerrechts* (1996) 377, at 389–93.

⁴⁹ Draft Article 16, *Yearbook of the International Law Commission*, 1966, Vol. II, at 179.

⁵⁰ Vienna Convention on the Law of Treaties 1969, Art. 19. Unlike in the ICJ Advisory Opinion, the object and purpose criterion in the 1969 Convention applies only to reservations, not objections thereto. For an overview of the work of the ILC on the law of reservations since its report in 1951, see J.M. Ruda, *supra* note 34, at 156–75.

⁵¹ The ILC has been reconsidering the question of reservations since 1993; on the object and purpose criterion, see Tenth Report on Reservations to Treaties, Report by Alain Pellet, Special Rapporteur, 2005, Doc. A/CN.4/588.Add.1, §§ 54–146.

⁵² For attempts to establish a methodology to determine the object and purpose of a treaty, see J. Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', 8 *Finnish Yearbook of Int'l Law* (1997) 138; I. Buffard and K. Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?', 3 *Austrian Review of International and European Law* (1998) 311; K. Zemanek, 'Reexamining the Genocide Opinion: Are the Object and Purpose of a Convention Suitable Criteria for Determining

provide us with much guidance because states frequently do not indicate the reasons for their objections or use the 'object and purpose' criterion without any further explanation.⁵³ With regard to reservations to Article IX, it can be argued that the object and purpose of the Genocide Convention is to be found in its substantive provisions, i.e. the definition of the crime of genocide. However, an equally tenable argument leads to the opposite conclusion: if one of the main aims of the drafters was to secure the implementation by 'giving teeth' to the convention, then the compromissory clause of Article IX was clearly of the essence of the undertaking. The point would then have been to avoid adopting another convention with only normative proclamations, but to ensure its proper execution by the states parties. Moreover, if the crime of genocide was already firmly established in customary international law, as some claim, the object and purpose of the Genocide Convention would not have been principally its codification, but rather its institutional repression.⁵⁴

The recent practice of the ICJ settled the issue but without providing any insights as to the object and purpose of the Genocide Convention. In the *Legality of Use of Force* cases against the US and Spain, the ICJ gave effect to their reservation to Article IX without addressing the issue of validity since the point was not raised by Yugoslavia.⁵⁵ In a later case, the Democratic Republic of Congo (DRC) challenged the validity of the Rwandan reservation

the Admissibility of Reservations?', in N. Ando et al. (eds), *Liber amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002) 335; U. Linderfalk, 'On the meaning of the 'object and purpose' criterion, in the context of the Vienna Convention on the Law of Treaties, Article 19', 72 *Nordic Journal of International Law* (2003) 429.

⁵³ In most instances, states do not object to reservations. Thus, the court's assumption that states would scrutinize reservations with regards to the object and purpose criterion proved to be wrong. See C. Redgwell, *supra* note 48, at 268ff; P. Hilpold, *supra* note 48, 404ff, and *Armed Activities on the Territory of the Congo (New Application: 2002)*, *supra* note 46, Joint Separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, § 11. With regard to the reservations to Article IX, a small number of state parties have objected to them, with a few relying on the object and purpose criterion, e.g. Brazil, Greece, Mexico and the Netherlands, see Multilateral Treaties deposited with the Secretary-General: Status as at 17 August 2008, available at: <http://treaties.un.org> (last visited 1 April 2009).

⁵⁴ In this sense, see J. Quigley, *The Genocide Convention, An International Law Analysis* (Aldershot/Burlington: Ashgate, 2006), at 220–21.

⁵⁵ ICJ, Order (Provisional Measures), *Legality of Use of Force (Yugoslavia v. Spain)* 2 June 1999, ICJ Reports (1999) 761; §§ 29–33; ICJ, Order (Provisional Measures), *Legality of Use of Force (Yugoslavia v. United States)*, 2 June 1999, ICJ Reports (1999) 916, §§ 21–5; in his dissenting opinions, Judge *ad hoc* Kreća criticised the Spanish reservation on policy grounds, but did not consider it incompatible with the object and purpose, see Dissenting opinion of Judge Kreća, § 5 (*Yugoslavia v. Spain*), and § 8 (*Yugoslavia v. United States*).

to Article IX.⁵⁶ Without an in-depth analysis of the object and purpose of the Genocide Convention, the Court found that:

[i]n the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.⁵⁷

In the light of the rather poor reasoning of the Court, five judges wrote a separate opinion in relation to this paragraph.⁵⁸ Emphasizing the desirability to have judicial monitoring of the Genocide Convention, they concluded that:

it is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.⁵⁹

Secondly, the status of the criterion is in dispute. Proponents of the so-called 'permissibility school' argue that the validity of the reservation needs to be assessed objectively in the light of the object and purpose criterion.⁶⁰ Advocates of the so-called 'opposability school' take the position that the validity of reservations is determined subjectively by the objections or lack of objections of state parties. In this last version, the object and purpose criterion is reduced to a 'mere doctrinal assertion'.⁶¹ Without venturing into an analysis of this debate,⁶² it suffices to note for the present purposes that the recent ICJ practice remains ambiguous on this point. On the one hand, the ICJ itself determined the validity of a reservation to Article IX.⁶³ This seems to support the permissibility school. On the other hand, the ICJ noted in all the NATO and DRC cases that the applicant state had not objected to the reservation. However, it refrained from drawing any conclusions from this finding.⁶⁴

⁵⁶ *Armed Activities on the Territory of the Congo (New Application: 2002)*, *supra* note 46, §§ 53–70.

⁵⁷ *Ibid.*, § 67; *contra*, dissenting opinion of Judge Koroma.

⁵⁸ *Ibid.*, Joint Separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

⁵⁹ *Ibid.*, § 29.

⁶⁰ E.g. D.W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties', 48 *British Year Book of Int'l Law* (1976–77), at 67ff.

⁶¹ J.M. Ruda, *supra* note 34, at 190; see also P-H. Imbert, *Les réserves aux traits multilatéraux, évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris: Pedone, 1978), at 134–7.

⁶² For an overview, see First Report on the law and practice relating to treaties, by Alain Pellet, Special Rapporteur, *Yearbook of the International Law Commission*, Vol. II, Part One, 1995, 142–4.

⁶³ *Armed Activities on the Territory of the Congo (New Application: 2002)*, *supra* note 46, § 67.

⁶⁴ *Legality of the Use of Force (Yugoslavia v. Spain)*, *supra* note 55, § 32; *Legality of the Use of Force (Yugoslavia v. United States)*, § 24; *Armed Activities on the Territory of the Congo (New Application: 2002)*, *supra* note 46, § 68.

This reference was probably an additional, but not determinative, argument in support of the Court's conclusion. Nonetheless, one wonders whether it would have made a difference if the applicant state had objected to the reservation, and in particular if that objection had been justified with the object and purpose criterion. The better view is that it should not make a difference. First, this would reduce the object and purpose criterion to a purely relative matter, differing from one state party to the other according to their subjective reactions. Second, the typically 'legal' objection based on the incompatibility with the object and purpose would not have a different effect to an objection raised on political motives. The object and purpose-objection is geared towards the collective interest of maintaining the integrity of the convention, whereas the objection for political motives seeks to secure particular interests. Given this aim, it would be surprising if the effect of the first were as relativistic as the effect of the second.

4.3 Some Final Remarks

The compromissory clause inserted into Article IX of the Genocide Convention was considered by its drafters to be an important asset of that text. It lent some added strength to it, providing it with 'teeth'. Thus, the Genocide Convention was not drafted to be another of the innumerable normative treaties in international relations. While the other treaties are far from being a 'scrap of papers', they are nevertheless to some extent *leges imperfectae*, since they are deprived of a regular implementation mechanism. In the context of the odious scourge of genocide, states were expected to assume a binding obligation of judicial dispute settlement. This is all the more remarkable as the settlement of this difficult and eminently political question, i.e. genocide, was mainly entrusted to a judicial body, applying exclusively legal rules. To some extent, the drafters of the Genocide Convention thus sought to 'de-politicize' the application of the Convention and the prevention or punishment of genocide, while ensuring that proper application could be obtained by compulsory means.

Against this backdrop, it is regrettable that many states—the former Socialist states, later also many Western states, added reservations to Article IX, excluding the compulsory jurisdiction of the ICJ. In its recent case law, the Court refrained from striking down these reservations by declaring them invalid. The Court thus deferred to the sovereignty of the reserving states. However, had the reservation been declared void, the Court could not necessarily have upheld its jurisdiction. Probably, it was fair to say that the reserving states would not have ratified or acceded to the Convention without their

Article IX reservation. If that construction were true, under the rules of Article 44(3), of the 1969 Vienna Convention on the Law of Treaties, the reservation would not be separable from the declaration of ratification or accession. The declaration of ratification or accession would then itself be deprived of legal validity. The result would then have been that the Court would not only be deprived of jurisdiction, but that a series of states would be judicially declared not to be a party of the Convention at all.

Overall, it can be said that by the practice of reservations to Article IX, this essential clause of efficacy of the Convention has been considerably weakened. That course, unfortunately, provides one of the many examples of lofty engagements by states, which are later, behind the scenes, partially stymied by counter-moves rooted in a triumphant conception of sovereignty and mistrust of international adjudication. Unilateralism in action and implementation of rules remains, today, all too often the main mode of inter-state behavior. On the other side of the fence, the many (often small- and medium-sized) states having accepted Article IX without any reservation must be commended. The future fate and effectiveness of Article IX mainly depends on the evolving practice of its reservations.