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Kolb, Robert

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

Robert Kolb

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1. Introduction

Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention' or 'Convention') provides that the International Court of Justice (ICJ) has jurisdiction over:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III.

Apart from general and personal aspects already discussed in the previous chapters, this provision also raises interesting issues as regards: (i) the notion of

2. Disputes between Contracting Parties

In its contentious function, the ICJ is limited to adjudicating on inter-state 'disputes'. Thus, Article 38 of the ICJ Statute asserts that the Court 'is to decide in accordance with international law such *disputes* as are submitted to it' (emphasis added). Both the Statute and Article IX of the Genocide Convention reflect this jurisdictional limitation of the ICJ to hear and to decide only disputes.

2.1 Definition of 'Dispute'

For the purposes of its jurisdiction, the Court defined the meaning of the term dispute in the *Mavrommatis Palestine Concessions* case: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons'.¹ Since 1924, this definition has been relied upon in a constant line of case law, notwithstanding some slight variations in the formula used.² The definition is meant to be broad and is applied expansively in the jurisprudence

¹ PCIJ, Judgment (Preliminary Objections), *Mavrommatis Palestine Concessions* (Greece v. Britain), 30 August 1924, Ser. A, No. 2, at 11. As was aptly explained by Ch. de Visscher, *Théories et réalités en droit international public* (3rd edn. Paris: A. Pedone, 1960), at 458: 'Évitant d'adopter une position trop formelle qui l'eût conduite à des définitions trop complexes, propres à favoriser l'esprit de chicane, la Cour a ramené la notion du différend à ses données les plus simples'.

² See e.g.: PCIJ, Judgment, *Serbian Loans* (France v. The Kingdom of the Serbs, Croates and Slovenes), 12 July 1929, Ser. A, No. 20, at 16–8; ICJ, Advisory Opinion (first phase), *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 30 March 1950, ICJ Reports (1950), at 74; ICJ, Judgment (Preliminary Objections), *Right of Passage over Indian Territory* (Portugal v. India), 26 November 1957, ICJ Reports (1957), at 148–9; and Judgment (Merits) in the same case, 12 April 1960, ICJ Reports (1960), at 34; ICJ, Judgment (Preliminary Objections), *South West Africa cases* (Ethiopia v. South Africa; Liberia v. South Africa), 21 December 1962, ICJ Reports (1962), at 319; ICJ, Judgment (Preliminary Objections), *Northern Cameroons* (Cameroon v. United Kingdom), 2 December 1963, ICJ Reports (1963), at 27; ICJ, Judgment (Jurisdiction), *Aegean Sea Continental Shelf* (Greece v. Turkey), 19 December 1978, ICJ Reports (1978), at 13; ICJ, Advisory Opinion, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 26 April 1988, ICJ Reports (1988), at 27; ICJ, Judgment, *East Timor* (Portugal v. Australia), 30 June 1995, ICJ Reports (1995), at 99; 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) (hereinafter '*Bosnian Genocide case*'), 11 July 1996, ICJ Reports (1996-II), at 614–5; ICJ, Judgment (Preliminary Objections), *Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States), 27 February 1998, ICJ Reports (1998), 7, at 123; ICJ, Judgment (Preliminary Objections), *Land and Maritime Boundary* (Cameroon v. Nigeria), 11 June 1998, ICJ Reports (1998), at 314; ICJ, Judgment, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002, ICJ Reports (2002), at 13; ICJ, Order (Provisional Measures), *Avena and Other Mexican Nationals* (Mexico v. United States), 5 February 2003, ICJ Reports (2003), at 88; ICJ, Judgment (Preliminary Objections), *Certain Property* (Liechtenstein v. Germany), 10 February 2005, ICJ Reports (2005), § 24; ICJ, Judgment (Preliminary Objections), *Territorial and Maritime Dispute* (Nicaragua v. Colombia), 13 December 2007, ICJ Reports (2007), §§ 138ff.

of the Court.³ On these general aspects, the term ‘dispute’ contained in Article IX of the Genocide Convention does not differ from the mainstream 1924 definition. Rather, its mention in Article IX operates an implicit reference (*renvoi*) to the general definition provided for in the Court’s case law.

Moreover, the fact that the Court can hear only ‘disputes’ as defined in this jurisdictional context allows the defendant (exceptionally also the applicant, in *Monetary Gold*-type of situations),⁴ to raise a preliminary objection to the

³ Sometimes, the dispute is stretched quite far, eliciting some criticism even by moderate 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), at 598.

⁴ In the *Monetary Gold* case, the ICJ held that it could not exercise its jurisdiction on the merits if the question to be decided supposed a prior decision of a dispute with a third state not party to the proceedings: ‘The first Submission in the Application centers around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions—questions which relate to the lawful or unlawful character of certain actions of Albania *vis-à-vis* Italy—only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania. The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent’. See ICJ, Judgment (Preliminary Objections), *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, 15 June 1954, ICJ Reports (1954), at 32. However, if the decision of the court does not suppose a prior decision of the dispute with a third state, but its decision simply will indirectly affect the position of the third state once it will be rendered, the Court is not debarred from exercising the jurisdiction correctly conferred upon it: ‘In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania’s responsibility was a prerequisite for a decision to be taken on Italy’s claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru’s claim. Australia, moreover, recognizes that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom *previous* to the determination of Australia’s responsibility. It nonetheless asserts that there would be a *simultaneous* determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally precluded by the fundamental reasons underlying the *Monetary Gold* decision. The Court cannot accept this contention. In the *Monetary Gold* case the link between, on the one hand, the necessary findings regarding Albania’s alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical; as the Court explained ‘In order ... to determine whether Italy is entitled to

jurisdiction of the Court. It may contend that there is no dispute between the parties on the points made in the application.⁵

The formula used by the Court in 1924 suffers, however, from some imprecision at its fringes.

First, the Court is allowed to scrutinize a point of fact only to the extent that it is linked to a point of law: the facts at stake must be contemplated by a legal norm as a condition for its application. The alternative 'point of law or of fact' must therefore be understood with this qualification. In our context, the Court will not engage in a research of historical facts (e.g. on the statement that historically genocide has been committed in a certain context) if these facts are not the pre-condition for adjudging on legal claims presented by a party to the 1948 Convention.

Second, a conflict of interests will be covered by the jurisdiction of the Court only if it gives rise to a 'legal dispute';⁶ i.e. if the claimant or both parties subjecting a case to the Court frame their demands as entitlements on the basis of law. In our context, the claim of the plaintiff and the opposition of the respondent must be predicated on the 'interpretation, application on fulfillment' of the conventional rights and duties under the 1948 Convention. By definition, these raise legal questions and entitlements. Moreover, a 'conflict of interests' is not in itself a 'dispute'; a 'conflict of interests' is only the potential basis or source of a dispute. Hence, there can be a 'conflict of interests' without a dispute; and conversely, if there is a dispute, there will always be some form

receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her (...). In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction'. See Judgment (Preliminary Objections), *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 26 June 1992, ICJ Reports (1992), at 261–2. On this question, see H. Thirlway, 'The Law and Procedure of the International Court of Justice (continued), Questions of Jurisdiction and Competence (1954–1989)', 71 *British Yearbook of International Law* (2000) 151; C. Tomuschat, *supra* note 3, at 603–4.

⁵ This has been the case already in PCIJ, Judgment (Preliminary Objections), *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, 25 August 1925, Ser. A, No. 6, and Ser. C, No. 9-I, 24, No. 11, 340: Poland contended that the Court lacked jurisdiction on the grounds that no difference of opinion had arisen between the parties before the application was filed, and that the dispute, if any, did not fall under Article 23 of the Geneva Upper Silesia Convention of 1922 (a compromissory clause). The Court dismissed the objection. See M.O. Hudson, *The Permanent Court of International Justice, 1920–1942* (New York: Macmillan, 1943) 446.

⁶ The definition of a legal dispute has been a debated question for decades. Today, the 'subjective test' is accepted: on what does the plaintiff (or in case of special agreement: both parties) rely as a foundation of his claim: on legal norms or on extra-legal considerations? See e.g. A. Verdross, B. Simma, *Universelles Völkerrecht* (3rd edn., Berlin: Duncker und Humblot, 1984), at 888.

of conflict of interests. However, only the legal encapsulation of that larger conflict will be decisive.⁷

Third, it stands to reason that—apart from the question of intervention under Article 63 of the ICJ Statute—a dispute must not be confined to two parties and that the Court can possess one single set of jurisdiction in a multi-partite dispute. This must specifically be noticed in our context, since the obligations arising under the Genocide Convention have an *erga omnes* nature⁸ and are thus likely to produce disputes confronting more than two parties on each side. The extent to which the Court can join or merge different applications has to be decided according to its procedure (Article 47 of the Rules of Court 1978).

In some respects, the ICJ has itself lent more precision to its initial *Mavrommatis*-formula. Thus, in the Advisory Opinion on *Interpretation of Peace Treaties*⁹ and in the *South West Africa* cases,¹⁰ the ICJ stated that the existence of a dispute has to be established objectively and autonomously by the Court itself. The subjective claim of one party that there is a dispute is not decisive, since:

[a] mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.¹¹

The Court ultimately decides—if necessary *ex officio*—the question of the existence of the dispute¹² (Article 36(6) of the ICJ Statute). Whether the claim is brought forward rightly or wrongly is in principle a question belonging to the merits. However, in cases of flagrant inappropriateness of a request, the Court may consider that there is no true dispute instead of engaging in a time-consuming and costly merits phase, on a point which seems entirely manifest.¹³ The *Nicaragua*

⁷ See Dissenting opinion of Judge Morelli, ICJ, Judgment (Preliminary Objections), *South West Africa* cases, *supra* note 2, at 566–7. And see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris: Pedone, 1967), at 127.

⁸ See the Judgment (Preliminary Objections), *Bosnian Genocide* case, *supra* note 2, at 616, § 31.

⁹ Advisory Opinion, *Interpretation of Peace Treaties*, *supra* note 2, at 65.

¹⁰ Judgment (Preliminary Objections), *South West Africa* cases, *supra* note 2, at 328.

¹¹ *Ibid.* See also Judgment (Preliminary Objections), *Northern Cameroons*, *supra* note 2, at 27; ICJ, Judgment, *Nuclear Tests (Australia v. France; New Zealand v. France)*, 20 December 1974, at 271, 476; Judgment (Preliminary Objections), *supra* note 2, at 614, § 29.

¹² See e.g. Judgment (Preliminary Objections), *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 2, § 138.

¹³ *Ibid.*, § 138 *et seq.*, sovereignty over three islands, clearly attributed to Colombia under a 1928 Treaty.

case¹⁴ shows that the Court will not lightly engage in such an avenue: a retroaction of the merits as a sort of jurisdictional cut-off will be possible only exceptionally, when the principle of a proper administration of justice seems to require it. Essentially, the Court will test that there are actual antithetic claims by the parties on a point of law in the large sense (including facts related to legal points).

2.2 Temporal and Substantive Scope of the Dispute

Ratione temporis, the dispute must in principle be crystallized at the time of the seizing of the ICJ. The filing of the request against another state does not *ipso facto* create a dispute; otherwise, the distinct requirement that there be such a dispute would be deprived of any justification and effectiveness.¹⁵ However, the dispute must not necessarily be entirely constituted at the time of seizing.¹⁶ The request of the plaintiff can lend further precision to the pre-existing dispute; a dispute may evolve by incidents at the bar; the states may drop some aspects of their dispute or develop new ones in the process of adjudication.¹⁷ Hence, the dispute is not frozen at the date of filing, notwithstanding the sentence in the *Electricity Company of Sofia and Bulgaria* case, where the Permanent Court of International Justice (PCIJ) held that the applicant must 'prove that, *before* the filing of the Application, a dispute had arisen ...'.¹⁸ This holding of the Permanent Court only means that there must be some 'dispute' before the parties seize the Court; it does not mean that this pre-existing dispute cannot evolve or that the Court cannot take account of its partial or total transformation. A dispute continues to evolve and may be taken into account by the Court in its varying forms up to the date of judgment. A further and distinct question relates to the 'critical dates' of crystallization of disputes. This concept only helps to determine up to what extreme time-limit certain facts

¹⁴ ICJ, Judgment (Jurisdiction and Admissibility), *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), 26 November 1984, ICJ Reports (1984), at 426, and Judgment, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), 27 June 1986, ICJ Reports (1986), at 115–7; for a staunch (and in our eyes largely unfounded) criticism, see W.M. Reisman, 'The Other Shoe Falls: The Future of Art. 36(1) Jurisdiction in the Light of Nicaragua', in 81 *American Journal of Int'l Law* (1987) 166.

¹⁵ See Separate opinion of Judge Fitzmaurice, *Northern Cameroons*, *supra* note 2, ICJ Reports (1963), at 109.

¹⁶ S. Rosenne, *The Law and Practice of the International Court, 1920–1996* (3rd edn., The Hague, Boston, London: Nijhoff, 1997), Vol. II, at 521–3.

¹⁷ E.g., Judgment (Preliminary Objections), *Bosnian Genocide* case, *supra* note 2, at 614, § 28, where the Court ascertains that the claims by Bosnia and Herzegovina are indeed still opposed by Yugoslavia.

¹⁸ PCIJ, Judgment (Preliminary Objections), *Electricity Company of Sofia and Bulgaria* (*Belgium v. Bulgaria*), 4 April 1939, Ser. A/B, No. 77, at 83, emphasis added.

can be taken into account by the Court in a particular proceeding.¹⁹ It is thus related to the evidence allowed to prove a claim. Consequently, for the critical date doctrine, the dispute itself may certainly evolve; but the conduct allowed in evidence in order to establish certain (self-serving) claims on the merits may be limited to a certain period of time.

Ratione materiae, the dispute for the purposes of Article IX must relate to the Genocide Convention. This aspect will be commented on below. However, it must be noted from the outset that both aspects, the existence of a dispute and subject-matter jurisdiction, may be inextricably intermingled. Thus, in the *Bosnian Genocide* case (*Bosnia-Herzegovina v. Yugoslavia*),²⁰ the Federal Republic of Yugoslavia (FRY) denied the very existence of an ‘international dispute’ within the meaning of the Genocide Convention, amongst others on the grounds that the conflict occurring in certain parts of its territory was of a domestic nature and that Yugoslavia did not control the foreign territory where it took place. The Court rightly responded that the Convention applies in times of armed conflict and peace,²¹ i.e. at all times, so that the nature of the armed conflict is irrelevant; and that the obligations to prevent and suppress the crime are not territorially limited, but turn on the factual possibilities of action of a state (e.g. the presence of an alleged culprit on its territory). The answers to such questions consequently flow from an analysis of the material scope of the applicable convention; but they can also be framed as an aspect of a dispute within the meaning of the Genocide Convention.

2.3 Other Issues

The term ‘dispute’ certainly excludes from the purview of the Court so-called ‘situations’.²² This last term has never been clearly defined, except by its

¹⁹ The concept relates often to instances of effective display of state power in a territory or on a maritime space in the context of territorial and maritime sovereignty disputes. Self-serving unilateral conduct by a party—performing acts of sovereignty in the disputed territory after the crystallization of the dispute—would be encouraged if the interested party could later invoke these acts to its benefit at the ICJ. This would injuriously tilt the balance of adjudication and generally contribute to aggravate the dispute. See e.g. ICJ, Judgment, *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, 8 October 2007, ICJ Reports (2007), §§ 117ss. For the determination of a critical date in another context, see e.g. ICJ, Judgment (Merits), *Right of Passage over Indian Territory (Portugal v. India)*, 12 April 1960, ICJ Reports (1960), at 29. On the whole question, see L.I. Sanchez Rodriguez, *L’uti possideris* et les effectivités dans les contentieux territoriaux et frontaliers’, 263 *Recueil des cours* (1997) 275; M.G. Kohen, *Possession contestée et souveraineté territoriale* (Paris: Presses Universitaires de France, 1997), at 169 *et seq.*

²⁰ Judgment (Preliminary Objections), *Bosnian Genocide* case, *supra* note 2, at 615–7, §§ 30 *et seq.*

²¹ Article I of the Genocide Convention.

²² See Articles 34, 35(1), 36(1), of the UN Charter. ‘Situations’ are suited only for action by political organs, not by the ICJ.

negative: it is a state of general tension between two or more states (or an indefinite number of states), which has not yet been crystallized into neat positions opposing each other in the form of claims and denials of those claims (or counter-claims).²³ If political tension has not yet ripened into the concrete form of a dispute (claim and opposition), it is as yet unsuitable for adjudication. This is true as much for the compulsory jurisdiction under Article 36(2) of the ICJ Statute as it is for treaty-based jurisdiction under Article 36(1) of the Statute. Article IX of the Genocide Convention reflects this general requirement of the Statute and rules out 'situations'. On the other hand, a parallel and contemporary handling of a dispute by the ICJ and political organs of the UN (e.g. the Security Council) is possible and indeed frequent.²⁴ The Court will then be in a position only to handle the dispute; while the Security Council could act on a situation, e.g. a risk of genocide being committed. This parallel action may often occur in the case of genocidal situations: the *Bosnian Genocide* case of 1993–2007 bears testimony to this.

Furthermore, as has already been recalled, a dispute brought to the Court must be of a 'legal nature'. In the context of the compromissory clause, this general requirement is a special condition of jurisdiction *ratione materiae*. Thus, in the *Interpretation of the Statute of the Memel Territory* case, at the PCIJ, it was underlined by Lithuania that a particular contention was not founded on an alleged violation of the Memel Statute 'but on a criticism of the expediency of the political decisions of the Governor; and ... as such they do not fall within the terms of Article 17 of the Convention'; hence, it concluded, the Court possessed no jurisdiction.²⁵ The ICJ was confronted with the same type of argument in the *Jurisdiction of the ICAO Council* case.²⁶ If well-founded, such a contention will lead to a lack of jurisdiction on that point.

²³ On the concept of 'situation', see B. Conforti, *The Law and Practice of the United Nations* (2nd edn., The Hague, Boston, London: Kluwer Law International, 2000), at 162–4. Often, a situation will not be referred to particular states but involve an indefinite number of states, regionally or universally: see e.g. H. Kelsen, *The Law of the United Nations* (London: Stevens & Sons, 1951), at 388–9.

²⁴ See M. I. Papa, *I Rapporti fra la Corte internazionale di Giustizia e il Consiglio di Sicurezza* (Padova: CEDAM, 2006), at 145. See also Rosenne, *supra* note 16, at 127.

²⁵ PCIJ, Judgment, *Interpretation of the Statute of the Memel Territory (United Kingdom, France, Italy and Japan v. Lithuania)*, 11 August 1932, Ser. A/B, No. 49, at 328. The Court responded that there was a misunderstanding, since in fact the complaints were about a violation of the Statute. It implicitly recognized that a plea as to inexpediency could not stand as such.

²⁶ ICJ, Judgment, *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, 18 August 1972, ICJ Reports (1972), at 58–9, no appeal from the Council to the Court for prejudicial, but not illegal action: the dispute would be not about rights and obligations but about considerations of equity and expediency, 'such as would not constitute suitable material for appeal to a court of law' (at 59).

Finally, if there is no true dispute, i.e. the case is a 'moot' one, the ICJ can (or indeed must) refuse to adjudicate, and it can do so even *proprio motu*. This is true also under the régime of the compromissory clause. The classical passage on this question is to be found in the *Northern Cameroons* case:

[The] Court ... may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.²⁷

A dispute may become moot either because the parties are opposed with regards to a legal situation which belongs irremediably to the past (*Northern Cameroons*);²⁸ or because the applicant in fact obtained—in the view of the Court—by the respondent what he asked the Court for (*Nuclear Tests*);²⁹ or because the legal situation with respect to a claim is so crystal clear that the Court prefers to decline jurisdiction *in limine litis* rather than to engage into a merits phase devoid of any practical justification, the fate of the case being already decided (*Territorial and Maritime Dispute, (Nicaragua v. Colombia)*).³⁰ However, a dispute is not 'moot' simply because one party asks for an abstract (declaratory) rather than a concrete (with regard to particular facts) interpretation of a convention. Thus, the PCIJ noted in the *Certain German Interests in Polish Upper Silesia* case, that the applicant could ask for an interpretation of Article 23 of the Geneva Convention on Upper Silesia unconnected with concrete cases of application:

There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil.³¹

In the particular context of the Genocide Convention, whose fundamental humanitarian purpose has been heavily stressed by the Court, the request of

²⁷ Judgment (Preliminary Objections), *Northern Cameroons*, *supra* note 2, at 34.

²⁸ *Ibid.*, at 26 *et seq.*

²⁹ Judgment, *Nuclear Tests*, *supra* note 11, at 270–2, § 55 *et seq.* and 475–7, §§ 55 *et seq.*

³⁰ Judgment (Preliminary Objections), *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 2, §§ 138 *et seq.*

³¹ PCIJ, Judgment (Merits), *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, 25 May 1926, Ser. A., No. 7, at 18–9. Abstract questions may sometimes pose problems to the Court if formulated without any reference to the facts of the dispute, but this is a specific problem arising only in certain quite particular situations. See L.B. Sohn, 'Settlement of Disputes relating to the Interpretation and Application of Treaties', in 150 *Recueil des cours* (1976-II), at 249–50.

abstract interpretations, geared at the respect of the legality of the Convention rather than to the settlement of a specific dispute, must all the more be accepted. They are part and parcel of that particular nature of the Convention, i.e. of the general interest in its respect, or in other words, its *erga omnes* character. As the Court underlined:

[in] such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.³²

3. The Scope *Ratione Materiae* of the Jurisdiction of the Court

3.1 Interpretation, Application or Fulfillment of the Convention

The dispute submitted to the Court under the compromissory clause must concern, or at least be directly related, to the interpretation, application or fulfillment of the Genocide Convention. This is an aspect of subject-matter jurisdiction (jurisdiction *ratione materiae*).³³

The preliminary question as to whether a dispute truly concerns the 'interpretation, application or fulfillment' of the Convention or not, is included in the reach of the jurisdictional power of the Court. This solution flows from the fact that in cases of contested jurisdiction, the Court alone decides definitively on the existence or non-existence of its jurisdiction, in accordance with Article 36(6) of the ICJ Statute (*compétence de la compétence, Kompetenzkompetenz*).³⁴ Any other construction would deprive the compromissory clause of all its intended effectiveness: a state could simply contest that the dispute turns on a point of 'interpretation, application or fulfillment' in order to escape the jurisdiction of the Court.

The three terms under scrutiny are cast in the alternative ('or', not 'and'). It is thus sufficient that a dispute concerns interpretation, *or* application, *or* fulfillment in order to trigger the jurisdiction of the Court. This corresponds to the aim of the compromissory clause, which is to open the Court as largely as possible to all disputes touching upon the Convention. Moreover, as the three terms largely overlap, it would be completely artificial to require cumulating the three: interpretation is directly relevant for application, since application

³² ICJ, Advisory Opinion, *Reservations to the Genocide Convention*, 28 May 1951, ICJ Reports (1951), at 23.

³³ There is some arbitral and judicial practice on this aspect, see Sohn, *supra* note 31, at 228.

³⁴ It is also provided for in some treaties: *ibid.*, at 231.

supposes and contains interpretation; and fulfillment is largely a form of application. Hence, in a certain sense, each treaty dispute always turns at least indirectly on interpretation, application *and* fulfillment at once. On the substance, the three terms mentioned differ more or less slightly in their emphasis.³⁵

‘Interpretation’ turns on the discovery of the legal meaning and content of a provision. In a classical conception, interpretation logically precedes any application: the first determines the meaning and content of a legal provision, the second draws the consequences of that preliminary process in a series of acts of practical implementation of the provision at stake.³⁶ On the other hand, an interpretation is always implicit in any act of application: to implement in a particular way is to imply that the Convention requires precisely this action and not a different one. This, in turn, reveals the meaning that a party attaches to the terms or content of the provision. ‘Application’ is the practical implementation of a Convention. This term (or that of fulfillment) may cover many aspects linked to the implementation, e.g. the consequences of a breach of the treaty. ‘Fulfillment’ (or ‘execution’ or ‘implementation’, as many other compromissory clauses stipulate) is normally considered to be a specific form of application, namely that type of application directed at satisfying the obligations undertaken by the treaty or its general object and purpose. Hence, the term ‘fulfillment’ adds little to the term ‘application’, since the latter already contains it. One could however maintain, as the Indian delegate had underlined during the preparatory works,³⁷ that 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.³⁸ Hence, as the PCIJ formulated it in the *Mavrommatis Jerusalem Concessions* case, “application” is a wider, more elastic and less rigid term than “execution”.³⁹ It includes the term ‘execution’. The use of the term ‘execution’ (or ‘implementation’ or fulfillment’, as the case may be) in alternative to ‘application’ seems to be due in part to a usage in the 1920s and 1930s: in this epoch, the term ‘execution’ was often used in compromissory clauses. This tradition seems to have influenced the drafters of treaties after the war, even if the term ‘execution’ was more rarely

³⁵ *Ibid.*, at 247, 271.

³⁶ See R. Kolb, *Interprétation et création du droit international* (Bruxelles: Bruylant, 2006), at 26.

³⁷ This is the reason why the word ‘fulfillment’ had been maintained in the draft.

³⁸ Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, 437.

³⁹ PCIJ, Judgment, *Mavrommatis Jerusalem Concessions (Greece v. Britain)*, 26 March 1925, Ser. A, No. 5, at 48.

used at that juncture than the now more popular terms 'implementation' or 'fulfillment'.⁴⁰

Overall, the reason for inserting all the three alternative terms, as does the Genocide Convention, was to give a coverage as exhaustive as possible to the compromissory clause. The aim was thus to close down all possible loopholes weakening the jurisdictional reach of the Court. The purpose pursued in 1948 was to grant the Court a jurisdiction as wide as possible in the life of the Convention, forestalling all the potential subtle arguments denying jurisdiction on account of an insufficient link with that Convention. As the Court explained in the *Chorzów Factory* case:

[F]or a jurisdiction of this kind [excluding important aspects of the implementation of the treaty such as the consequences of its breach], instead of settling a dispute once and for all, would leave open the possibility of further disputes.⁴¹

The Court since then often insisted on the importance of giving interpretations to the compromissory clause enabling it to decide the whole dispute with finality and efficiency (*'vider le différend'*). It attempted carefully to leave no undecided inflammable material in the relations between the parties to the dispute.⁴² This aim underlying the compromissory clause calls for an extensive interpretation of the three terms 'interpretation, application or fulfillment': all disputes linked with the 'life of the Convention' shall, according to the will of the parties, be capable of unilateral submission to the ICJ. On the other hand, only disputes directly linked with the Convention shall be submitted to the Court. That is a further, and extremely important, aspect of subject-matter jurisdiction, to which it is time to turn.

3.2 Scope of the Convention and Other Related Rules of International Law

The compromissory clause refers back to all the provisions of the Genocide Convention. Thus, all the substantive rights and obligations, as set out in the various provisions of the Convention, are covered by the jurisdiction of the ICJ in case of disputes as to their interpretation, application or fulfillment. On the other hand, the compromissory clause itself is of adjectival nature; it does not create further substantive rights for the parties; the rights to be

⁴⁰ Sohn, *supra* note 31, at 271.

⁴¹ PCIJ, Judgment (Jurisdiction), *Factory at Chorzów (Germany v. Poland)*, 26 July 1927, Ser. A, No. 9, at 25.

⁴² See A. Orakhelashvili, 'Interpretation of Jurisdictional Instruments in International Dispute Settlement', 6 *The Law and Practice of International Courts and Tribunals* (2007) 159, at 181–2.

vindicated through the Court must be found elsewhere in the provisions of the Convention. Thus, the compromissory clause does not expand the jurisdiction of the ICJ to areas not covered in the other provisions of the Convention. In the *South West Africa* cases, the Court has consequently pointed out that

in principle, jurisdictional clauses are adjectival not substantive in their nature and effect; [they] cannot simultaneously and per se invest the parties with substantive rights the existence of which is exactly what they will have to demonstrate in the forum concerned. . . . Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal.⁴³

This *renvoi* of the compromissory clause to the provisions of the convention in which it is inserted determines the most peculiar feature of the Court's related jurisdiction: contrary to optional clause jurisdiction under Article 36(2) of the ICJ Statute, which is in principle unlimited (i.e. opening access to the Court for all disputes on international law), compromissory jurisdiction under Article 36(1) is in principle limited (i.e. opening access to the Court only for disputes as described in a special agreement or as enclosed within the four corners of a particular convention).

However, the question arises what exactly a convention comprises. It is not doubtful that the black letter provisions of a treaty are covered by the compromissory clause. But what happens with issues on the responsibility for the breach of that convention? What about conventions or protocols related to the main treaty bearing the compromissory clause? What about the customary rules on international law on treaty interpretation? What about customary international law to which a conventional norm may directly or implicitly make reference? What about the subsequent practice of the parties, eventually modifying the convention? What about the object and purpose of the treaty, if one accepts that this is also protected by international law (in analogy to Article 18 of the 1969 Vienna Convention on the Law of Treaties)? A series of normative circles thus appear, more or less intimately or loosely linked with the treaty. Are they covered by the compromissory clause?

The answer given to these questions depends largely on considerations of legal policy, and are thus variable in time. At a certain moment of history, or in a particular context, the Court may feel that the community of states, or some particular states in dispute, are likely to accept some bolder assertion of jurisdiction including such further normative circles into the treaty, with the

⁴³ ICJ, Judgment (second phase), *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, 18 July 1966, ICJ Reports (1966), at 39, §§ 64–5.

aim of effectively and finally settling the whole dispute. At other moments of history, the relations between states at large or between some particular states appearing at the Court may be more troubled. The Court may thus feel that some more conspicuous degree of judicial caution is required.

The choice to be operated depends on the relative weighing of the two following factors, placed in eternal tension. On the one hand, there is the laudable effort of the Court to expand its jurisdiction in order to be able to address the whole range of the dispute with all the applicable sources of international law. Its aim is then to settle that dispute completely and properly, without fragmenting international law and thus truncating the solution to a more or less artificial construct of particular law under the treaty, as opposed to a solution based on a consideration of all legally applicable sources. The polar star of the judge is here the principle of a 'proper administration of justice', of '*boni iudicis est ampliare jurisdictionem*',⁴⁴ of a constant drive to '*vider le diffèrend*', i.e. of effectiveness and finality of judgment.⁴⁵ On the other hand, there is the duty of the Court not to overstep the jurisdiction granted to it by the jurisdictional title, limited here to a particular treaty. Otherwise, it would commit an *excès de pouvoir*. The Court also has to take into account the fact that its jurisdiction is not mandatory but consensual, and that therefore its activity depends on the goodwill of its 'clients'. In this context, the Court must take studious account of the limitation of jurisdiction under Article 36(1) of the ICJ Statute and of the principle prohibiting *ultra vires* action. It might be laudable to settle a dispute rationally and completely, but the Court is not free to force upon the parties such a solution if they did not give an assent to it.⁴⁶ If the solution is 'truncated' on the merits, this is the responsibility of the parties and not of the Court. However, such a course might also diminish the usefulness of the compromissory clause and lead to some degree of dissatisfaction of the States with the dispute settlement of the Court. This in turn might not correspond to their implied will. The harmonization of these two diverging considerations poses

⁴⁴ A maxim which Judge De Castro wrongly thinks inapplicable to international tribunals: Separate opinion of Judge De Castro, ICJ, Judgment (Merits), *Fisheries Jurisdiction (Germany v. Iceland)*, 25 July 1974, ICJ Reports (1974), at 226.

⁴⁵ This interest is forcefully and convincingly argued by E. Cannizzaro and B. Bonafé, 'Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case', 16 *European Journal of Int'l Law* (2005) 481. See also Sohn, *supra* note 31, at 248; Orakhelashvili, *supra* note 42, at 181.

⁴⁶ Such an interpretation was stressed by the dissenting judges in the *Nicaragua* and *Oil Platforms* cases: see e.g. Dissenting opinion of Judge Schwebel, ICJ, Judgment (Preliminary Objections), *Oil Platforms (Iran v. United States of America)*, 12 December 1996, ICJ Reports (1996-II), at 882; Dissenting opinion of Judge Oda, *ibid.*, at 899–900, notably § 26. See also Reisman, *supra* note 14, in particular at 169–170, 172.

delicate problems of legal policy. No general answer as to the proper degree of judicial activism or caution could be given; all depends on the international environment and the perception of international adjudication by states at a given moment of history.

For the Genocide Convention in particular, some important questions as to the scope of the Convention arise: to what extent do customary evolutions on the crime of genocide fit into the conventional scheme? Further: to what extent are the general principles of criminal international law included in the Convention? And: to what extent is the ICC Statute indirectly part and parcel of the Genocide Convention, bearing in mind that its Article VI makes an explicit reference to an international criminal court to be established. Answers to these questions will be provided in the following pages.

A. *The Case Law of the ICJ*

If one examines the case law of the Court, one would note that it often undertook quite meticulous interpretations in this context.⁴⁷ It must be generally underscored that the Court has given great weight to the effectiveness requirements and has normally interpreted quite largely the jurisdictional reach of the compromissory clause. For example, it included into the reach of such clauses related conventional instruments (*Ambatielos* case);⁴⁸ or gave quite a broad reading to the Friendship, Commerce and Navigation treaties of the US, reading into them issues on the use of force and unfriendly acts (*Nicaragua* and *Oil Platforms* cases).⁴⁹ It thereby accepted that a treaty is linked to the general corpus of international law by a 'renvoi'-logic: the different terms of the treaty were held to refer to customary law institutions backing them, so that whole areas of that customary law could be imported into the treaty. The broad stance adopted by the Court as to the scope of the various compromissory clauses can be evidenced by some examples.

First of all, abstract or declaratory interpretations of a provision have been considered covered by the compromissory clause.⁵⁰ The same is true for the

⁴⁷ See the synoptic but nevertheless very extensive presentation in the various volumes of *Fontes Juris Gentium* and later *World Court Reports*, under the title 'Jurisdiction on the Basis of Treaties'.

⁴⁸ ICJ, Judgment (Preliminary Objections), *Ambatielos (Greece v. United Kingdom)*, 1 July 1952, ICJ Reports (1952), at 39. See G. Fitzmaurice, 'The Law and Procedure of the ICJ, 1951–4: Questions of Jurisdiction, Competence and Procedure', in 34 *British Yearbook of Int'l Law* (1958), at 73–4; J.I. Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice', 81 *American Journal of Int'l Law* (1987), at 873–6.

⁴⁹ 1984 Jurisdiction and Admissibility Judgment (*Nicaragua v. United States*), *supra* note 14, at 426; 1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 115–7, 135ff; Preliminary Objections Judgment (*Oil Platforms* case), *supra* note 46, at 810.

⁵⁰ Merits, *Certain German Interests in Polish Upper Silesia* case, *supra* note 31, at 7, 18: '[A compromissory clause can] cover interpretations unconnected with concrete cases of application. [...]

scope of applicability of a provision: the Court can inquire into the application but also on the applicability of a provision.⁵¹

Second, the violation of a treaty and its consequences (international responsibility) are considered to be a dispute on the interpretation and application of the Convention.⁵² Article IX of the Genocide Convention recalls that point expressly, by the clause 'including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III'.

Third, questions relating to the termination and suspension of the treaty bearing the compromissory clause are included in its reach.⁵³ Questions directly linked with the treaty application are equally included in the scope of the compromissory clause: e.g. the jurisdiction of a third organ, if it is regulated by the Convention (*ICAO Council* case);⁵⁴ disagreements between

There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty'. This can lead to declaratory judgments.

⁵¹ Judgment (Preliminary Objections), *Certain German Interests in Polish Upper Silesia* case, *supra* note 5, at 16: 'The differences of opinion ... may also include differences of opinion as to the extent of the sphere of application of Articles 6 to 22.'. See also Observation of Judge Anzilotti, *ibid.*, at 30.

⁵² See e.g. the Jurisdiction, *Factory at Chorzów (Germany v. Poland)*, *supra* note 41, at 23, 25: 'An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied without being able to lay down the conditions for the reestablishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause [the compromissory clause]; for a jurisdiction of this kind, instead of settling the dispute once and for all, would leave open the possibility of further disputes'. See also 1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 142; 1996 Preliminary Objections Judgment (*Bosnian Genocide* case), *supra* note 2, at 616, § 32; ICJ, Judgment *LaGrand (Germany v. United States)*, 27 June 2001, ICJ Reports (2001), at 485, § 48: 'where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation'. Separate opinion of Judge Jiménez de Aréchaga, *Jurisdiction of ICAO Council*, *supra* note 26, at 147.

⁵³ *Jurisdiction of ICAO Council*, *supra* note 26, at 64–5, notably: 'This contention [that the unilateral proclamation of a suspension or a termination of a treaty encompassed the compromissory clause and divests the Court of its jurisdiction] would be equivalent to saying that questions that *prima facie* may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative. The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension, – whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable'.

⁵⁴ *Jurisdiction of ICAO Council*, *supra* note 26, at 54. This may include the question as to whether this organ committed irregularities of procedure, even if the Court will refrain from controlling such points on an appellate level: *ibid.*, at 69–70; see also the dissent of several judges on the self-restraint

the parties as to the extent and scope of their respective rights in fishery resources and the adequacy of measures to conserve them in an agreement dealing exclusively with the extension of fisheries jurisdiction into the sea through an exclusive fisheries zone of Iceland (*Fisheries Jurisdiction* case);⁵⁵ issues of the use of force under a Friendship, Commerce and Navigation-Treaty (*Nicaragua* and *Oil Platforms* cases);⁵⁶ validity of measures taken by the Security Council of the UN claimed to be at variance with the conventional rights under the 1972 Montreal Convention on the safety of civil aviation, as a preliminary question for the lawfulness of action by the US and the UK relying on these measures in contrast to their duties under

of the Court in this particular case: Separate opinion of Judge Jiménez de Aréchaga, *ibid.*, at 153–4; Dissenting opinion of Judge Morozov, *ibid.*, at 157–9; Dissenting opinion of Judge Nagendra Singh, *ibid.*, at 166. See further: PCIJ, Judgment (Preliminary Objections), *Interpretation of the Statute of the Memel Territory (United Kingdom, France, Italy and Japan v. Lithuania)*, 24 June 1932, PCIJ, Ser. A/B, No. 47, at 248.

⁵⁵ ICJ, Judgment (Merits), *Fisheries Jurisdiction (United Kingdom v. Iceland)*, 25 July 1974, ICJ Reports (1974), at 21. The compromissory clause in the 1961 exchange of notes stipulated that the Court was invested with jurisdiction with respect to ‘a dispute in the relation to the extension of fisheries jurisdiction around Iceland’. The Court held that ‘it would be too narrow an interpretation of the compromissory clause to conclude that the Court’s jurisdiction is limited to giving an affirmative or negative answer to the question of whether the extension of fisheries jurisdiction ... is in conformity with international law. ... [T]he dispute between the Parties includes disagreements as to the extent and scope of their respective rights in the fishery resources and the adequacy of measures to conserve them’. The same result was reached by several judges in their Separate opinions: De Castro (*ibid.*, at 102), Dillard (*ibid.*, at 64–5: ‘Furthermore, the terms used to describe the “dispute” are by no means restricted to the fact of extension but to “a dispute in relation to such extension”’, emphasis in the original), Waldock (*ibid.*, at 122–3: ‘The compromissory clause itself does not refer to an extension of fishery *limits* but to an extension of fisheries *jurisdiction*, a term apt to cover any form of an attempt by Iceland to extend her authority over fisheries outside the 12-mile limit ...’, emphasis in the original). Some judges in their Separate or Dissenting opinions reached a different result. They followed a course of restrictive interpretation of compromissory clause in deference to sovereignty, directly opposed to that of the liberal interpretations of the Court: Dillard (Separate opinion, *ibid.*, at 63: ‘The reference in the Exchange of Notes to a “dispute” must be strictly confined to the kind of dispute contemplated by the parties in negotiating and framing the Exchange of Notes. ... At no relevant time was there a dispute concerning preferential rights or conservation. Quite the contrary, it concerned only the extension itself and whether it could be held well founded under international law’); Gros (Dissenting opinion, *ibid.*, at 127–8: ‘I cannot accept the argument that a form of words as precise as “dispute in relation to the extension of fisheries jurisdiction” can be interpreted as impliedly including any connected question which one of the Parties may have had occasion to refer to in the course of the negotiations preceding the 1961 agreement, if the other Party refused to make that question the subject of the agreement itself’); Petráň (Dissenting opinion, *ibid.*, at 152); Onyeama (Dissenting opinion, *ibid.*, at 173).

⁵⁶ 1984 Jurisdiction and Admissibility Judgment (*Nicaragua v. United States*), *supra* note 14, at 426; 1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 115–7, 135; 1996 Preliminary Objections Judgment (*Oil Platforms* case), *supra* note 46, at 810–2.

the Convention (*Aerial Incident at Lockerbie* case);⁵⁷ etc. On all these matters, the construction of the Court has normally been quite liberal.

Fourth, questions flowing from related treaty instruments may be held to be covered by a compromissory clause. Thus, for example, a compromissory clause in a Mandate Agreement was held to include Protocol XII to the Lausanne Peace Treaty of 1923 since Article 11 of the Mandate Agreement referred explicitly to other 'international obligations accepted by the Mandatory' (*Mavrommatis* case).⁵⁸ Further, a compromissory clause inserted into a Treaty of 1926—this Treaty referring to a previous treaty on the same subject-matter between the two contracting states—was held to import the still applicable provisions of the older treaty into the jurisdictional reach of the Court as stipulated in the newer 1926 Treaty (*Ambatielos* case).⁵⁹ For the Genocide Convention of 1948, a question of this type may arise in its relations with the Statute of the International Criminal Court (ICC).⁶⁰ Article VI of the Genocide Convention provides a form of reference to an ICC later to be established. It is thus legally possible to establish a link between the Genocide Convention with the ICC established in Rome in 1998, and to subject to the ICJ a dispute on the functioning of the ICC, the obligations of states to cooperate with it, the validity of a Security Council Resolution under Article 16 of the ICC Statute,⁶¹ etc., but only in the context

⁵⁷ *Lockerbie* case, *supra* note 2, at 16. *Contra*: Dissenting opinion of Judge Schwebel (*ibid.*, at 65–6: 'Libya's complaint that the Security Council has acted unlawfully can hardly be a claim under the Montreal Convention falling within the jurisdiction of the Court pursuant to that Convention'); Dissenting opinion of Judge Oda (*ibid.*, at 89–90: the requested extradition under the Resolution 748 of the Security Council of the UN is not a matter falling within the provisions of the Montreal Convention); Dissenting opinion of Judge Jennings (*ibid.*, at 100: the validity of the Security Council measures is not a matter 'arising under the provisions of the Convention but one concerning the interpretation and application of the United Nations Charter; and to pretend that it is one that comes within Article 14, paragraph 1, of the Convention is not free from absurdity').

⁵⁸ Preliminary Objections, *Mavrommatis Palestine Concessions*, *supra* note 1, at 269.

⁵⁹ Preliminary Objections, *Ambatielos*, *supra* note 48, at 46.

⁶⁰ See Cannizzaro and Bonafé, *supra* note 45, at 485–6, note 5: '[T]he Rome Statute can be considered as an implementation of the Genocide Convention providing under Art. VI that "persons charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". ... Thus, the principle according to which the jurisdiction of the Court should be strictly connected to the applicable law (the Genocide Convention) clashes with the principle of consent (the subsequent ratification of the Rome Statute). ... Arguably, the Court should still apply the first agreement while taking into account later provisions which modify its obligations. Moreover, to rule out the possibility of the Court taking into account the subsequent treaty provisions would lead to the paradoxical result that the dispute would be settled according to a legal regime that applied only in part'.

⁶¹ Can the Security Council temporarily suspend any action by the ICJ under the Genocide Convention in the same way it can suspend action by the ICC under Article 16 of the ICC Statute? In one sense, this must be denied. Such a power—derogating from the ordinary rule of independent

of a situation of genocide. If such an interpretation were given to Articles VI and IX of the Genocide Convention, there would result a quite broadly concurring jurisdiction of the ICJ and the ICC. However, the ICC is not an inter-state court. It deals only with criminal prosecution cases. Therefore, the type of questions that the ICJ could settle by this extension of jurisdiction, some of which were mentioned above, could arise at the ICC only as preliminary points raised by the defense counsel, by the prosecutor or by the Court *proprio motu*. If these matters were shifted to the ICJ, it could function as a sort of controlling organ on the inter-state dispute aspects of the functioning of the ICC. A sort of sharing of work could then develop, whereby the criminal prosecutions proper would be the business of the ICC, whereas the inter-state disputes linked with its work could (and perhaps progressively would) be subjected to the ICJ. It remains to be seen how far the ICJ will be ready to 'incorporate' the ICC Statute into the Genocide Convention by way of a conjunct reading of Article VI and IX. On the other hand, for the definition of genocide, the ICC does not differ from the 1948 Convention. In this respect, the ICC Statute does not indirectly modify the jurisdictional reach of the ICJ through a change of the material scope of the crime therein defined.

Fifth, there is the question of 'defence on the merits'. If an objection to the jurisdiction under a compromissory clause is inextricably linked to the merits, the Court can declare it to be not exclusively preliminary in character and defer its decision on it to the later stage of the merits (formerly this was called 'joinder to the merits').⁶² Thus, the Court declared that certain preliminary objections to the coverage of the compromissory clause concerning the

jurisdiction of each organ—supposes a specific provision. Such a provision exists only for the ICC and not for the ICJ. On the other hand, the Security Council could use its general powers under Chapter VII (maintenance of international peace and security) and require from the state parties to a proceeding at the ICJ to suspend (or even to terminate?) their case (alternatively: not to seize the Court for a certain time). The question then arises as to whether the Security Council possesses such a power under Chapter VII. This could, at best, be admitted only as a short-term temporary measure, and with the utmost restraint, as it constitutes a blow to the principle of the rule of law. On this point, see E. Klein, 'Paralleles Tätigwerden von Sicherheitsrat und internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten', in R. Bernhardt *et al.* (eds) *Völkerrecht als Rechtsordnung – internationale Gerichtsbarkeit—Menschenrechte: Festschr. für Hermann Mosler herausgegeben von Rudolf Bernhardt* (Berlin, Heidelberg, New York: Springer Verlag, 1983), at 479–81. See already Dissenting opinion of Judge Alvarez, ICJ, Judgment (Preliminary Objections), *Anglo-Iranian Oil Company (United Kingdom v. Iran)*, 22 July 1952, ICJ Reports (1952), at 134. The *Lockerbie* cases gave rise to important shortcomings, when the Council acted to some extent with the avowed aim of frustrating the pending proceedings before the Court. See K. Skubiszewski, 'The International Court of Justice and the Security Council', in *Essays in Honor of R. Jennings* (Cambridge: Cambridge University Press, 1996), at 606.

⁶² Article 79(7) of the Rules of Court 1978. Cf. H. Thirlway, 'The Law and Procedure of the ICJ, 1954–1989 (continued), Questions of Procedure', 72 *British Yearbook of International Law* (2001) 140.

material scope of treaty provisions were not preliminary in nature and could not be taken into account in order to defeat the jurisdiction of the Court under the compromissory clause. Rather, the Court framed them as 'defences on the merits'. Thus, in the *Nicaragua* case, the US had argued that certain forcible measures adopted by its government for security reasons were ostensibly excluded from the scope of the Friendship, Commerce and Navigation Treaty ('FCN Treaty') by the saving clause contained in Article XXI of the treaty ('measures ... necessary to protect its essential security interests'). Hence, questions relating to the use of force would be excluded from the material scope of the treaty and therefore not be covered by the compromissory clause. The Court declined to follow that line of argument. It held that such a defence related to the merits of the dispute. The threshold for jurisdiction was only that a claim falling into the reach of one of the clauses of the treaty had been proffered by the applicant:

This article [article XXI] cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction.⁶³

In other words: as the exemption clause of Article XXI requires interpretation, the dispute is about 'interpretation or application' of the treaty; the appropriateness of a certain interpretation, even if doubtful, is a question related to the merits and does not hamper the jurisdiction of the Court.⁶⁴ Thus, the allegation of an injury related to treaty rights is sufficient to trigger jurisdiction; there is no heavy burden of proof as to the required nexus or credibility of the claim. The Court will only brush aside manifestly unfounded contentions on the jurisdictional stage. This liberal interpretation was later confirmed in the *Oil Platforms* case:

⁶³ 1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 116, § 222. *Contra*: Dissenting opinion of Judge Oda, *ibid.*, at 246; Dissenting opinion of Judge Schwebel, *ibid.*, at 306; Dissenting opinion of Judge Jennings, *ibid.*, at 538. In the same critical vein, cf. W. M. Reisman, 'Has the International Court Exceeded its Jurisdiction?', 80 *American Journal of Int'l Law* (1986) 128; W. M. Reisman, *supra* note 14, at 166. See also Charney, *supra* note 48, at 881–3. It must certainly be admitted that the reasoning of the Court is somewhat short.

⁶⁴ Moreover, the Court favored the relaxed test that Nicaragua had to show 'a reasonable connection' between the Treaty and the claims submitted to the Court: 1984 Jurisdiction and Admissibility Judgment (*Nicaragua v. United States*), *supra* note 14, at 427. The Court held this to be fulfilled: 'Taking into account these Articles of the Treaty of 1956 [FCN], particularly the provision in, *inter alia*, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances [...] there is a dispute between the Parties, *inter alia*, as to the "interpretation or application" of the Treaty....' (*ibid.*, at 428).

The Court sees no reason to vary the conclusions it arrived at in 1986. It accordingly takes the view that Article XX, paragraph 1 (d), does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise.⁶⁵

By this device, the Court further expanded the scope of jurisdiction under the compromissory clause, even if some restriction may slash back at the merits stage.

Sixth, the extent of jurisdiction under a compromissory clause can be expanded by way of *forum prorogatum*, exactly as the jurisdiction under any other title conferring jurisdiction to the Court.⁶⁶ Thus, the competence under Article 36(1) of the ICJ Statute can potentially be enlarged to the same extent as that under Article 36(2). The limitation of the compromissory clause to the 'present Convention' can thus be abandoned by the parties to a dispute, expressly or by conduct.

Only on one aspect did the Court propound a restrictive interpretation. Its holding in this context remained an erratic block in the case law on the scope of the compromissory clause. In the *Nicaragua* case, the Court declared that there was as rule of customary international law requiring the parties to a treaty to abstain (after signature, but also after entry into force of the treaty) to act in any way which would deprive the treaty of its object and purpose. The obligation to implement the treaty thus extends farther than a simple respect to its black letter law contents. This rule of customary law, if admitted, is clearly linked with the treaty. Notwithstanding this incontrovertible fact, the Court chose a restrictive interpretation:

It should however be emphasized that the Court does not consider that a compromissory clause of the kind included in Article XVIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose.⁶⁷

⁶⁵ 1996 Preliminary Objections Judgment (*Oil Platforms* case), *supra* note 46, at 811, § 20. *Contra*: Dissenting opinion of Judge Schwebel, *ibid.*, at 875–6, 882; Dissenting opinion of Judge Oda, *ibid.*, at 899–900.

⁶⁶ ICJ, Order (Provisional Measures), *Bosnian Genocide* case, 13 September 1993, ICJ Reports (1993), at 341–2; but see also Separate opinion of Judge Lauterpacht, *ibid.*, at 416. Furthermore, see H. Thirlway, 'The Law and Procedure of the ICJ (continued), Questions of Jurisdiction and Competence, 1954–1989', 69 *British Yearbook of Int'l Law* (1998), at 30; and R. Kolb, *La bonne foi en droit international public* (Paris: Presses Universitaires de France, 2000), at 632–4.

⁶⁷ 1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 136, § 271. The Court therefore based its jurisdiction (on that aspect of the dispute) on the optional clause of both states. In the same sense, Dissenting opinion of Judge Jennings, *ibid.*, at 539; and Dissenting opinion of

A logical error and an inconsistency vitiate the reasoning of the Court on this question. If the immediate basis of the obligation not to deprive the treaty of its object and purpose is rooted in customary law, the obligation is incurred under the treaty and only under the treaty. But for the treaty, the obligation would not concretely exist for the parties. In other words, customary law refers that particular obligation to the treaty and incorporates it therein. Hence, the dispute is about the 'application' of the treaty. The situation is exactly the same as for state responsibility following the breach of the treaty: here too the consequences of the breach are not regulated by the treaty but by customary international law; and yet the Court did affirm that its jurisdiction under a compromissory clause extended to these consequences of breach, since they indeed refer to the particular treaty at stake and are problems linked with its 'application'.

B. Scope of the Convention and Extra-Treaty Rules

A related question is to what extent extra-treaty legal sources (to which there is no formal *renvoi*) can be considered incorporated into the treaty for the purposes of the compromissory clause. The Court has normally chosen once again extensive interpretations. Thus, customary international law on treaty interpretation or otherwise necessary for the application of a particular treaty clause (e.g. customary law on the use of force in the context of the construction

Judge Oda, 1996 Preliminary Objections Judgment (*Oil Platforms* case), *supra* note 46, at 897. On this duty of state parties not to take action stultifying the treaty once they ratified or acceded to it, see Kolb, *La bonne foi*, cit. *supra* note 66, at 283 *et seq.*, with many further references. According to Jennings (*loc. cit.*): 'Suppose hostilities, or even war, should arise between the parties to an FCN-Treaty, then the Court under a jurisdiction clause surely does not have jurisdiction to pass upon the general question of the lawfulness or otherwise of the outbreak of hostilities or of war, on the ground that this defeated the object and purpose of the treaty. ... If it were otherwise, there would be no apparent limit to the kinds of dispute which might in certain circumstances be claimed to come under such a jurisdiction clauses. The conferment of such a potentially roving jurisdiction could not have been within the intention of the parties when they agreed the jurisdiction clause...'. There is no doubt that the 'object and purpose' doctrine may considerably enlarge (even excessively enlarge) the jurisdiction of the Court under a compromissory clause, especially if all substantive contentions in that respect are framed as 'defences to the merits'. As far as the 'object and purpose clause' is concerned, its proper interpretation is not to prohibit all more or less remote acts having some detrimental effect on the treaty, but only acts contrary to good faith, i.e. having the effect of directly defeating the treaty and done normally with some form of deliberation to that effect. On the other hand, acts allowed under international law are not indirectly prohibited by the object and purpose-clause (e.g. exercising the right of self-defence). The ICJ clearly stressed this necessity of restriction when it affirmed that not all 'unfriendly acts' can be included in the prohibition (1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 136-7): The object and purpose clause does manifestly neither cover nor rule out a declaration of war or hostilities. The Court could thus uphold a preliminary objection under the doctrine of 'manifest' excess from the material scope of the treaty, rather than framing an artificial defence on the merits.

of the saving clause, Article XX(1)(d) of the FCN Treaty (*Iran v. United States* case),⁶⁸ was considered within the reach of the compromissory clause. By the same token, any subsequent practice between the contracting parties hardening into a legal rule applicable to them and related to the way a treaty is to be interpreted or applied is covered by the compromissory clause.

In the context of the Genocide Convention, numerous points have been developed by subsequent or customary practice. Thus, for example, Article VI, makes provision—apart from international prosecution—only to the principle of territoriality. However, it is today largely accepted that genocidal acts can be prosecuted on the basis of other titles of jurisdiction, including the universality principle.⁶⁹ Moreover, the Genocide Convention is an international criminal law instrument. Therefore, it must be understood as embedded in the general principles and the surrounding customary rules of that branch of the law. These aspects must be considered within the reach of the compromissory clause under the *Oil Platforms*-practice of the ICJ.

In the *Bosnian Genocide* case, the ICJ insisted on its jurisdiction under the Convention as opposed to a general jurisdiction dealing with other areas of international law. Thus, the Court recalled that it is not competent, under a compromissory clause, to hear claims related to human rights law or to international humanitarian law (even of *erga omnes* or *jus cogens* character), if not directly related to a provision of the Genocide Convention.⁷⁰ This does not seem an implicit disclaimer of, or correction to, its earlier case law; rather, it appears as a reminder that Article IX of the Genocide Convention refers in the first place to the contents of that Convention, and that any other source of international law must be brought within its four corners by way of a meticulous analysis. The Court consequently only stressed the intrinsically limited jurisdiction under the compromissory clause, unless enlarged by *forum prorogatum* or by the complement of optional clauses.

C. Standard of Evidence

There remains the question as to the standard of evidence applied by the Court regarding whether particular facts are related to a provision of the treaty bearing the compromissory clause. Will a simple contention by the applicant suffice

⁶⁸ ICJ, Judgment (Merits), *Oil Platforms (Iran v. United States)*, 6 November 2003, §§ 40 et seq. In favour of this extension, see e.g. Tomuschat, *supra* note 3, at 622; Cannizzaro and Bonafé, *supra* note 45, at 481.

⁶⁹ See Chapter 11 in this volume.

⁷⁰ ICJ, Judgment (Merits), *Bosnian Genocide* case, 27 February 2007, ICJ Reports (2007), § 147.

(subjective system)? Will a simple, not absurd or not unreasonable, contention by the plaintiff suffice (moderate subjective system)? Must the Court ascertain that the claimed facts fall under one provision of the treaty *prima facie*, reasonably, with a preponderant probability, with a high degree of certainty, etc. (objective systems)? It may immediately appear that the standard to be applied cannot be too exacting on the jurisdictional phase, since that would completely entangle the jurisdictional question into the merits.⁷¹ If that happened, the forum of the Court would be difficult to access for the states having subscribed to a compromissory clause. This, in turn, would be contrary to the policy ideal of a Court providing an open and easy access. Moreover, the Court is not well armed on the preliminary stages, not having yet heard full argument, to decide questions of interpretation of single provisions. It also stands to reason that the standard for admitting jurisdiction will vary according to the stage reached: it will be lower in the first preliminary phases (e.g. provisional measures, where the Court traditionally requires only *prima facie* jurisdiction) and somewhat higher in later preliminary phases (e.g. jurisdiction and admissibility, eventually also in the merits phase, if certain points of jurisdiction had been transferred to it).

On the whole, the case law of the Court displays considerable uncertainties as to this standard of evidence.⁷² Materially, the Court required most often something like an 'arguable construction', a 'construction which can be defended', having a 'plausible character' i.e. a reasonable probability (*Ambatielos* case);⁷³ or a 'reasonable connection' (*Nicaragua* case);⁷⁴ or the 'capacity of falling under' the treaty provisions (*NATO-Bombing* cases).⁷⁵ The

⁷¹ This also depends on the compromissory clause at stake: if the text of the compromissory clause requires a scrutiny of questions inextricably linked with the merits, the Court may well have to entertain a closer analysis at the jurisdictional stage. Thus, Article VI of the Pact of Bogotá 1948 contains a compromissory clause excluding from the jurisdiction of the Court 'matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of conclusion of the present Treaty'. This may imply entering into a close scrutiny of the content of such other treaties. See the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 2, §§ 43ff.

⁷² See, for the case law up to the *Nicaragua* case, Charney, *supra* note 48, at 860ff; thereafter, Tomuschat, *supra* note 3, at 624–6. The PCIJ had normally applied a quite exacting objective standard of evidence, requiring full examination of the violation of a treaty's provision: see e.g. Judgment (Preliminary Objections), *Mavrommatis Palestine Concessions*, *supra* note 1, at 16.

⁷³ ICJ, Judgment (Merits) *Ambatielos (Greece v. United Kingdom)*, 19 May 1953, ICJ Reports (1953), at 18.

⁷⁴ 1984 Jurisdiction and Admissibility Judgment (*Nicaragua v. United States*), *supra* note 14, at 427.

⁷⁵ ICJ, Order (Provisional Measures), *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, 2 June 1999, ICJ Reports (1999), at 137–8, §§ 38–40.

most frequently applied standard is thus that the Court will verify whether, assuming the factual allegations advanced by the applicant correspond to reality, they would *probably* constitute a breach of the applicable treaty. These standards were however applied unevenly: in the *Nicaragua* case, the subjective allegations of Nicaragua were largely taken on their face value and the competence under the FCN Treaty easily admitted;⁷⁶ on the other hand, in the *Oil Platforms* case, the Court moved to a more objective application of that standard, by stating that:

The Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty ...⁷⁷

Furthermore, the Court sometimes found that a violation was 'manifest' and thus had not to be established by any argument (*Tehran Hostages* case);⁷⁸ while it other times found that a violation was manifestly excluded (*NATO-bombing* cases).⁷⁹ This 'manifestness-standard' is not a departure from the 'probability-standard': it just appeared to the Court that on the facts a contention was more than probable in a particular case. Thus, the 'manifestness-standard' satisfied *a fortiori* the 'probability-standard'; the last was not abandoned for a new one on the lines of the first.

The required standard of evidence would gain by some further clarification. On the other hand, the Court perhaps clings to leaving that matter shrouded in some studied mystery, in order to keep discretionary freedom of action in

⁷⁶ 1984 Jurisdiction and Admissibility Judgment (*Nicaragua v. United States*), *supra* note 14, at 428, § 83, the Court finding that there is 'no doubt' on the existence of a dispute as to the interpretation or application of the FCN-Treaty basing itself on the allegations of Nicaragua. It did not examine at that stage the important arguments of the US related to the saving clause on national security measures (see also 1986 Merits Judgment (*Nicaragua v. United States*), *supra* note 14, at 116, § 222). The interpretation of the saving clause was construed as 'defence on the merits'.

⁷⁷ 1996 Preliminary Objections Judgment (*Oil Platforms* case), *supra* note 46, at 810, § 16. Judge Higgins requires a quite strict reading of that objective standard: see Separate opinion of Judge Higgins, *ibid.*, at 856, § 32.

⁷⁸ ICJ, Judgment, *United States Diplomatic and Consular Staff (United States v. Iran)*, 24 May 1980, ICJ Reports (1980), at 25. The taking of hostages in the embassy and consulates of the US in Iran was manifestly in breach of the Vienna Convention on Diplomatic Relations 1961, and the Vienna Convention on Consular Relations 1963.

⁷⁹ See e.g. the ICJ (Provisional Measures) *Legality of Use of Force (Yugoslavia v. United States)*, 2 June 1999, ICJ Reports (1999), at 923–6, §§ 21 *et seq.* The manifest incompetence hang on two aspects: (i) the reservation of the US to Article IX of the Genocide Convention; (ii) the fact that the bombing had not been performed with the special intent to destroy a particular national, ethnic, religious or racial group.

the particular cases subjected to its judicial scrutiny. On the other hand, the partial lack of clarity of its course exposes it to criticism of arbitrariness.

D. Some Specific Issues under the Genocide Convention

The compromissory clause of the Genocide Convention extends to situations of genocide committed in armed conflict (international or non-international) as well as in peacetime, since the Convention does not limit its reach in this respect (Article I).⁸⁰ Moreover, the state parties have undertaken to prevent and punish genocide wherever it happens in the world, subject to the means they concretely have at their disposal. This may depend, *inter alia*, on their links and influence on a foreign government, where genocidal acts take place; or on the presence of an alleged culprit on their territory.⁸¹ The compromissory clause is thus not limited to disputes arising from action confined within the territory of the obliged state.⁸² The Convention has an extraterritorial reach.

Finally, it must be noted that while the Genocide Convention in 1948 was considered to be limited to state obligations of prevention and prosecution of persons intending to commit, or having committed, genocide (criminal law perspective),⁸³ the Court interpreted the scope of the Convention in a broader way. It held that Article I of the Convention, obliging the state parties to prevent and suppress genocide by private individuals, *a fortiori* includes the obligation to prevent and suppress genocide committed by state organs themselves. In sum, the obligation to prevent others included by necessity the prohibition to commit oneself. Thus, a state may engage its responsibility not only by the

⁸⁰ 1996 Preliminary Objections Judgment (*Bosnian Genocide case*), *supra* note 2, at 615–6, § 31. See S. Maljean-Dubois, 'L'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), arrêt du 11 juillet 1996, exceptions préliminaires', 42 *Annuaire français de droit int.* (1996), at 375–7. On the whole case, see P. Puoti, *La questione iugoslava davanti alla Corte internazionale di Giustizia* (Naples: Ed. Scientifica, 2004).

⁸¹ 2007 Merits Judgment (*Bosnian Genocide case*), *supra* note 70, §§ 153–4, 183; 1996 Preliminary Objections Judgment (*Bosnian Genocide case*), *supra* note 2, at 616, § 31. See S. Maljean-Dubois, *supra* note 80, at 379–82.

⁸² Many international conventions are today interpreted as not being territorially limited; thus the compromissory clauses are extended extraterritorially. See e.g. the interpretation of Article IV(1) of the US/Iran FCN-Treaty of 1955, 1996 Preliminary Objections Judgment (*Oil Platforms case*), *supra* note 46, at 815–6, particularly § 35. On the contrary, the grant of certain specific rights, such as minority rights, can be limited to the territory of the state, in conformity with the principle of effectiveness (in the sense that the state only there displays effective power and is thus able to grant minority protections): see 1996 Preliminary Objections Judgment (*Bosnian Genocide case*), *supra* note 2, at 619–20, § 38.

⁸³ A UK amendment to extend the responsibility under the Genocide Convention to the commission of the crime by state's organs was defeated by 24 votes to 22: UN Doc., A/C.6/236, *Official Records of the General Assembly*, Part I, Sixth Committee, Annexes, 1948, at 24.

failure to prevent or punish, but also by all the criminal acts enumerated in Article III of the Convention if one of its organs commits them (forms of complicity). This liberal—albeit contested—interpretation⁸⁴ was based on arguments relating to the object and purpose of the Genocide Convention, which is fundamentally humanitarian, and also to the phrase ‘including ...’ contained in Article IX. Consequently, the material scope of the Genocide Convention is considerably enlarged, and with it the reach of the compromissory clause contained in Article IX. The background and a critical appraisal of this extension are discussed in the commentary to Article I of the Genocide Convention.

3.3 Disputes Relating to the State Responsibility for Genocide

Article IX of the Genocide Convention specifies that the jurisdiction of the Court *includes* disputes relating to the responsibility of contracting states for genocide or for any of the other acts enumerated in Article III of the Convention.

The use of the verb ‘to include’ suggests that the scope of jurisdiction *ratione materiae* is not widened by the insertion of that particular provision. Its aim seems merely to stress one aspect of that competence, considered to be of importance or otherwise noteworthy. The aforementioned provision would thus be meant to be declaratory, not constitutive.⁸⁵

The clause was initially proposed by the UK and Belgium in order to stress the point that issues of state responsibility for genocide could be brought before an international tribunal. At the moment the two governments proposed this clause, Article VI did not encompass the jurisdiction of ‘a competent international tribunal’. It thus left jurisdiction in matters of genocide solely to the domestic tribunals of state parties. It stands to reason that these tribunals were not suitable for adjudging on issues of inter-state responsibility. However, the responsibility thereby envisaged was not a criminal one. G. G. Fitzmaurice,

⁸⁴ 2007 Merits Judgment (*Bosnian Genocide case*), *supra* note 70, § 166, and 1996 Preliminary Objections Judgment (*Bosnian Genocide case*), *supra* note 2, at 617, § 31. This was a novel approach, which was contested by a series of dissenting judges and whose novelty was stressed by legal writings. See A. Cassese, ‘On the Use of Criminal Law Notions in Determining State Responsibility for Genocide’, 5 *Journal of Int’l Criminal Justice* (2007) 875; P. Gaeta, ‘On What Conditions Can a State be Held Responsible for Genocide?’, 18 *European Journal of Int’l Law* (2007) 632; P.M. Dupuy, ‘Crime sans châtiement ou mission accomplie?’, 111 *Revue générale de droit international public* (2007), at 245–6. For the dissenters, see e.g. Dissenting opinion of Judge Owada, 2007 Merits Judgment (*Bosnian Genocide case*), *supra* note 70, §§ 38ff. See already Declaration of Judge Oda, 1996 Preliminary Objections Judgment (*Bosnian Genocide case*), *supra* note 2, at 628–9. And see S. Maljean-Dubois, *supra* note 80, at 382–4.

⁸⁵ On the interpretation of this clause, see Separate opinion of Judge Tomka, 2007 Merits Judgment (*Bosnian Genocide case*), *supra* note 70, § 53.

the UK representative, said that the responsibility mentioned in the amendment was the international civil responsibility of states for the violation of the Convention, not a criminal responsibility (of the state or of individuals).⁸⁶ India proposed to delete that part of the amendment, arguing that the word 'responsibility' was ambiguous. Thus, the UK, Belgium, and the US, proposed an alternative drafting, claimed to express the same substance:

including disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in Article III has been committed within the jurisdiction of another Contracting Party ...⁸⁷

In short terms, the clause embodied the substance of the old *dictum* of the PCIJ according to which issues of responsibility for breach of a treaty are part and parcel of the scope of the compromissory clause.⁸⁸ But the clause here referred back to the obligations under the Genocide Convention and did not envisage, in 1948, a responsibility for the commission of genocide by state agents themselves.

As already discussed, the Court advanced the clause under scrutiny in order to justify a broad reading of the state parties' obligations under the Genocide Convention, encompassing within them issues of state responsibility for genocidal acts of its own agents.⁸⁹ This responsibility remains limited to a civil responsibility; it does not grant the Court a criminal responsibility. However, the Court could be required to establish whether the agents of a state have committed the crime. This will necessitate an application of the elements of genocide as defined in criminal law and a meticulous analysis of the facts and evidence—a task for which the Court may not appear particularly well equipped.⁹⁰ If the crime turns out to have been committed by state

⁸⁶ UN Doc. A/C.6/SR.103, 440.

⁸⁷ UN Doc. A/C.6/SR.131, 687.

⁸⁸ Judge Tomka, 2007 Merits Judgment (*Bosnian Genocide* case), *supra* note 70, § 54, rejects the idea that the clause could be limited to this, since that would make it largely superfluous under the doctrine of *effet utile*. It was indeed already laid down by the PCIJ that issues of responsibility came within the scope of a compromissory clause. However, it seems that the drafters wanted to stress precisely that point. Further, Judge Tomka contends that the clause could also be understood 'as the power of the Court to determine that in a particular case a State has to bear the consequences of the crime of genocide, committed by an individual found to be criminally liable, because a certain relationship existed between the individual perpetrator of the genocide and the State in question' (§ 56) (attribution of acts to the state). The Court adopted this interpretation and went even beyond.

⁸⁹ *Supra*, § 3.2.D, at the end, and see Chapter 16, § 3.2 of this volume.

⁹⁰ See Tomuschat, *supra* note 3, at 621. A particular problem may arise if there is not—as in the *Genocide* case—a criminal tribunal on whose findings of evidence the ICJ could rely: see A. Gattini, 'Evidentiary Issues in the Genocide Judgment', 5 *Journal of Int'l Criminal Justice* (2007) 903. Moreover, there may be conflicts of jurisdictional holdings and of evaluation of proofs between the ICJ and the various international criminal tribunals. This is an inevitable result of the

agents themselves, the Court will be able to draw the consequences under the ordinary law of inter-state responsibility. This two-tier analysis (commission of the crime/responsibility) does not apply to the duties of prevention and punishment of alleged culprits. Here, the Court must just ascertain whether a state could have exercised these duties according to the standard of due diligence. The existence of genocide must not be proved: a credible allegation that there has been one, or the risk of there being one, are sufficient to trigger the due diligence duties.

The responsibility of the state is triggered only by its own acts or omissions. As the PCIJ recalled in the *Interpretation of the Statute of the Memel Territory*:

The obligatory jurisdiction of the Court which Lithuania accepted in Article 17 of the Memel Convention cannot be regarded as extending beyond acts for which she is herself responsible.⁹¹

In our context, this responsibility can be for acts (committing genocide) as well as for abstentions (not preventing, not punishing). The point is only that the particular link to a state party must always be established. This can be done by proving that a person was a *de jure* organ or agent of a state; or that it was a *de facto* organ; or that its conduct can be attributed to the state under the rule of 'effective control'.⁹²

These considerations show that the ambit of the compromissory clause under Article IX is in no way as predetermined as it might at first sight appear. On the contrary, it may expand or be restricted according to the interpretation of the substantive law of the Convention as performed by the Court. The link between the compromissory clause and the substance of the Convention is thus at once intimate and mobile.

multiplication of international tribunals, unless there is some procedure for reference of some legal points to the ICJ or a system of appeal to the ICJ.

⁹¹ Preliminary Objections Judgment, *Interpretation of the Statute of the Memel Territory*, *supra* note 54, at 329.

⁹² See 2007 Merits Judgment (*Bosnian Genocide* case), *supra* note 70, §§ 385ff, a solution which has elicited applause but also criticism in legal writings. Cf. M. Milanović, 'State Responsibility for Genocide: A Follow-Up', 18 *European Journal of Int'l Law* (2007) 694 (*pro*); A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia', *ibid.*, 649 (*contra*); J. Griebel and M. Plücker, 'New Developments Regarding the Rules on Attribution? The ICJ's Decision in *Bosnia v. Serbia*', in 21 *Leiden Journal of International Law* (2008) 601.

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Edited by

PAOLA GAETA

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