

Article IX

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, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

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A. Introduction

- 1 Article IX is a central – although perhaps not one of ‘the most important’¹ – provisions of the Convention. It enables states to have recourse to the International Court of Justice (ICJ) – the UN’s ‘principal judicial organ’² – to settle disputes relating to the interpretation, application or fulfilment of the Genocide Convention. Through Article IX, state parties to the Convention can make use of the ICJ as an agency of settling inter-state disputes relating to genocide. Submission of disputes to the ICJ is one particular form of seeking the UN’s involvement in disputes about genocide; and Article IX can be seen as a special modality for the UN to take action (as Article VIII puts it) ‘for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III’. However, ICJ proceedings are a highly specific form of UN action against genocide, they follow a particular logic (that of binding judicial dispute settlement according to law), hence in practice, Article IX operates quite autonomously from Article VIII.
- 2 For one state party to accuse another of having breached the Genocide Convention inevitably is a highly charged matter, and the public character of the Court’s oral hearings only adds to this. (‘Court hears Balkans Genocide Case’ was one of the BBC’s main headlines on the opening day of the proceedings in the *(Bosnian) Genocide case* opposing Bosnia and Herzegovina on the one hand, and Serbia and Montenegro on the other.³) Because of the status and prestige of the ICJ, Article IX enhances the prospects of effectively enforcing the provisions of the Convention or at least raising awareness of violations. Seen from that perspective, Article IX can be said to ‘operationalise’ the quest for a world order based on law, in which major disputes (including those involving allegations of genocide) are submitted to an impartial forum for binding settlement according to legal standards.⁴ Yet recourse to the ICJ is no panacea. The ICJ is a court for inter-state disputes and it cannot impose criminal sanctions on individuals. ICJ proceedings are subject to procedural and jurisdictional rigours (to be explored below). They take time. Compliance may present a challenge. And states generally carefully weigh their options before instituting ICJ proceedings; they do not rush to the Court. All this limits the ICJ’s role as an ‘arbiter’ of disputes relating to genocide. Especially in on-going crises potentially involving acts of genocide, the ICJ – notwithstanding Article IX – is not able single-handedly to stop atrocities. But it is part of the international machinery for addressing disputes and it plays a role. That it can do so is due to Article IX.
- 3 From the ICJ’s perspective, Article IX is a highly relevant provision. As the Convention otherwise lacks a sophisticated, treaty-specific implementation scheme characteristic of other universal treaties protecting humanitarian values,⁵ Article IX has assumed major relevance as the key element of the Convention’s rudimentary enforcement system. In fact, it is the Convention’s only clause allowing state parties

¹ Robinson, Genocide Convention, 100.

² Article 92 UN Charter.

³ See <http://news.bbc.co.uk/2/hi/europe/4753874.stm> (26 February 2006).

⁴ Kolb rightly notes that compromissory clauses like Article IX are attempts to ‘secure progress with respect to the ideal of “peace and justice through law”’: Kolb, Compromissory Clause, in: Gaeta, Genocide Convention, 413.

⁵ For more on this see Introduction, mn. 26. The diverse UN strategies for the prevention and suppression of genocide are addressed in the commentary to Article VIII.

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to seek binding and authoritative pronouncements on questions relating to genocide. The Court's jurisdiction depends on the consent of states, and the inclusion, in a treaty, of a clause envisaging recourse to the ICJ is one of the most common ways of establishing such consent.⁶ That said, by no means do all universal treaties – let alone treaties touching upon politically sensitive matters – contain a so-called compromissory clause.⁷ The two UN Human Rights Covenants purposefully have none, and neither do the 1949 Geneva Conventions or their Optional Protocols. In fact, among the major universal law-making treaties setting out the international community's basic humanitarian standards, compromissory clauses permitting recourse to the ICJ (like Article IX) are the exception. This makes Article IX a special clause.⁸ Curiously, it is easier to bring a state before the ICJ to investigate potential breaches of the Genocide Convention than war crimes or crimes against humanity.

The previous comment may explain why, notwithstanding their general caution 4 in going to the Court, state parties have gradually begun to invoke Article IX and institute proceedings based on the Genocide Convention. To date, the provision has been invoked as the (sole or joint) basis of jurisdiction in fourteen cases,⁹ ten of which however were largely identical in scope. The subsequent paragraphs set out essential aspects of these cases and may provide an introduction to the type of issues brought before the Court on the basis of Article IX.

In the *Trial of Pakistani Prisoners of War*,¹⁰ Pakistan sought to prevent India 5 from handing over Pakistani prisoners of war to Bangladesh where they might have, *inter alia*, faced charges of genocide because of their alleged conduct during the conflict leading to Bangladesh's independence. In Pakistan's view, the handover would have violated Article VI of the Convention. India disputed the Court's jurisdiction and did not attend hearings. The case was settled before the Court had an opportunity to pronounce on the difficult jurisdictional and substantive issues.

In two separate cases concerning the *Application of the Convention on the 6 Prevention and Punishment of the Crime of Genocide*, Bosnia-Herzegovina¹¹ and Croatia¹² accuse(d) Serbia¹³ of having committed genocide, and of having failed to

⁶ While many features of the Convention reflect general international law, the regime of dispute settlement pursuant to Article IX is treaty-specific: unless a State is bound by Article IX, it cannot submit to the Court disputes about the interpretation and application of the Genocide Convention. The possibility of bringing genocide-related disputes before the Court on the basis of some other jurisdictional clause remains unaffected, but seems remote.

⁷ For more on this point see Tams, *Compromissory Clauses*, 461; Morrison, in Damrosch, 58; Charney, *AJIL* 75 (1981), 85.

⁸ See Tomuschat, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.), Article 36, 668–9.

⁹ This is remarkable since, at the time of writing, a total of no more than 153 cases had been entered in the Court's General List: see <http://www.icj-cij.org/docket/>.

¹⁰ *Trial of Pakistani Prisoners of War*, ICJ Reports 1973, 328 (provisional measures) and 347 (discontinuance).

¹¹ *Bosnian Genocide case*, ICJ Reports 1993, 3 and 325 (provisional measures); ICJ Reports 1996, 595 (preliminary objections); ICJ Reports 2007, 43 (merits).

¹² *Croatian Genocide case*, ICJ Reports 2008, 412 (preliminary objections); merits proceedings pending.

¹³ The case was initially brought against the Federal Republic of Yugoslavia, which would later change its name to 'Serbia and Montenegro'. In 2006, Montenegro became an independent State, while the Republic of Serbia continued the legal personality of the former State. As the ICJ clarified in its merits judgment in the (*Bosnian*) *Genocide case*, following Montenegro's independence, 'the

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prevent and punish it, during the Yugoslav wars of 1991–1995. Because of the complexity of the dispute, including the uncertain legal status of the states of former Yugoslavia,¹⁴ these proceedings led to protracted litigation, which in the Croatian case is still on-going. The substance of Bosnia's claims was addressed in the judgment of 26 February 2007, in which the Court pronounced on central aspects of the Convention, among them Articles I, II, III and VI.¹⁵ Hearings on the merits of the *Croatian Genocide case* are scheduled for 2014.¹⁶

- 7 In ten cases concerning the *Legality of Use of Force*, the Federal Republic of Yugoslavia¹⁷ challenged the use of force, by NATO member states, during the 'Kosovo campaign' of 1999.¹⁸ The case primarily concerned the use of force, but Serbia also asserted that the aerial bombardment amounted to genocide and invoked Article IX. At the interim stage of proceedings, the Court's dismissed this claim, holding that the bombardment could not even arguably be considered to amount to genocide.¹⁹ Its eventual judgment turned on more fundamental questions of jurisdiction: having been admitted as a new UN member in 2000, the Court held that Serbia did not have access to the UN's principal judicial organ in 1999, and thus dismissed the case.²⁰
- 8 In *Armed Activities on the Territory of the Congo*, the Democratic Republic of the Congo alleged that Rwanda, through its involvement in the Second Congo war, had violated a range of international treaties, including the Genocide Convention.²¹ Rwanda disputed the Court's jurisdiction, relying on the reservation it had made to Article IX. Against the strong dissent of a number of judges, the Court's majority upheld Rwanda's reservation and dismissed the case.
- 9 Given the high stakes of these proceedings, it is no surprise that Article IX has prompted controversy. Such controversy relates to its interpretation, but more fundamentally, touch upon two issues that, while often addressed in conjunction

Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent' (ICJ Reports 2007, 43, para. 77). In the following, both 'Federal Republic of Yugoslavia' and '(Republic of) Serbia' are used, depending on the context.

¹⁴ For details see Wood, MPYUNL 1 (1998), 231; as well as the ICJ's own summary: ICJ Reports 2007, 43, paras. 88–99. Between 2001 and 2003, these issues were addressed in the *Application for Revision case*, ICJ Reports 2003, 7.

¹⁵ For comment on the judgment see notably Mennecke/Tams, *Security & Peace* 25 (2007), 61; Simma, in: Safferling/Conze, *The Genocide Convention Sixty Years after its Adoption*, 259; Dimitrijevic/Milanovic, *Leiden-JIL* 21 (2008), 65.

¹⁶ For details see the information on the Court's website: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=73&case=118&code=cry> (accessed 3 June 2013).

¹⁷ See fn. 13 for comment on the various 'incarnations' of the former Yugoslavia.

¹⁸ While the applicant filed ten separate proceedings – against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America – the Court, for practical reasons and to avoid repetition, decided to merge aspects of the oral proceedings. The cases were not formally joined, though.

¹⁹ See e. g. ICJ Reports 1999, 124 (for the order in the case brought against Belgium). Because the Federal Republic of Yugoslavia had instituted ten separate proceedings (based on largely the same set of facts), the Court rendered ten (largely identical) orders on provisional measures, which are all reproduced in the 1999 volume of the ICJ Reports.

²⁰ ICJ Reports 2004, 279 (jurisdiction and admissibility) (for the case brought against Belgium; the Court's largely identical judgments in the cases brought against other States can also be found in the 2004 volume of the ICJ Reports).

²¹ *Congo Rwanda case*, ICJ Reports 2006, 6 (jurisdiction and admissibility); and the Court's earlier interim order: ICJ Reports 2002, 219.

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with Article IX, require to be addressed separately: *First*, states concerned at the prospect of judicial scrutiny have seen fit to enter reservations excluding the competence of the ICJ over questions of genocide. As is clear from the preceding summary, the ICJ has pronounced on the validity of such reservations; in fact cases relating to the Genocide Convention have shaped the modern law of reservations. While of particular importance for Article IX, the question of reservations is of broader relevance and treated in a separate chapter.²² *Second*, ICJ proceedings relating to genocide will typically involve questions of state responsibility, i.e. ‘the general conditions under international law for [a] State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom’.²³ That Article IX does not intend to exclude questions of responsibility *a limine* is plain from the wording and notably the passage ‘including [disputes] relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III’. Notwithstanding this language, for a long time, the interpretation of Article IX has been affected by uncertainties relating to the character of responsibility for state breaches of the Convention, which have ‘spilled over’ into discussions of the dispute settlement clause. In this respect, the ICJ’s judgment in the (*Bosnian Genocide*) has brought about welcome clarification. In it, the ICJ held that as a jurisdictional clause, Article IX is not determinative of the issue of state responsibility; while on substance holding that states indeed can incur (state) responsibility for committing acts of genocide pursuant to Article I.²⁴ The subsequent analysis of Article IX takes account of these overdue clarifications, while the relevant questions of interpretation are addressed in the commentary to Article I.

It is implicit in the preceding paragraphs that, by addressing disputes submitted 10 to it in line with Article IX, the ICJ can contribute to interpretation of the Convention’s provisions. This is but a normal side-effect of international adjudication: by setting out their views on a given norm, international courts establish ‘beacons of orientation’ that can guide the future application of the Convention.²⁵ The ICJ does not, it should be added, possess formal law-making powers; pursuant to Article 59 of its Statute, its decisions have ‘no binding force except between the parties and in respect of that particular case’.²⁶ Yet in a system lacking organised processes for the authoritative clarification of the law, ICJ pronouncements carry great weight and are rightly seen as ‘persuasive precedents’.²⁷ The relevance of these ‘persuasive precedents’ is acknowledged in the relevant chapters of this Commentary. For present purposes, it is sufficient to note that Article IX is the enabling clause that allows the ICJ to interpret the Genocide Convention, and thereby to

²² See the contribution on Reservations. Reservations made with respect to Article IX are addressed in paras 35–44 of that chapter.

²³ Hence the common description of the scope of responsibility under international law: see para. 1 of the ILC’s Introductory Commentary to the ASR. The Articles including the ILC’s explanatory commentaries, are reproduced in YbILC 2001, vol. II/2, 31

²⁴ ICJ Reports 2007, 43, paras. 166–79; and see Article I, 51–81.

²⁵ For general studies assessing the impact of ICJ dispute settlement on the clarification and development of international law see e.g. Lauterpacht, *The Development of International Law*; Shahabuddeen, *Precedent*; and the contributions to Tams/Sloan, *Development of International Law*.

²⁶ For comment see Brown, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.), Article 59, 1433–36, 1444–45.

²⁷ See e.g. *Continental Shelf*, dissenting opinion of Judge Jennings, ICJ Reports 1984, 148, para. 27.

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clarify the scope of its provisions. The preceding summary suggests (and the chapters on, for example, Articles I and VI confirm) that this ancillary benefit of binding dispute resolution should not be underestimated.

B. Drafting history

- 11 Given the ICJ's potential influence, the drafting history provides surprisingly little insights into interpretation of Article IX. The *travaux* reflect considerable confusion about the character of the responsibility incurred by breaches of the Convention, which overshadowed debates about the future Article IX.²⁸ In contrast, most other aspects of dispute settlement were addressed in passing only.
- 12 From the very beginning, drafts of the future Convention contained some form of compromissory clause. Article XIV of the Secretariat's draft provided in rather brief form that '[d]isputes relating to the interpretation or application of the Convention shall be submitted to the International Court of Justice'.²⁹ According to the Secretariat, the Court was the obvious forum to 'ascertain whether one of the parties had faithfully discharged his obligations', and was to be preferred to the more party-driven technique of arbitration.³⁰ In essence, the Secretariat's approach, subject to a number of clarifications and refinements, was confirmed during all stages of the drafting process; however, it was also somewhat obscured by addition to the text of the provision.
- 13 In the *Ad Hoc* Committee debates, the delegates from the Soviet Union and Poland – in line with their states' generally sceptical attitude towards international adjudication at the time – expressed concern at the prospect of international litigation about questions relating to genocide, which in their view should be addressed by domestic courts only.³¹ A proposed amendment to that effect however was defeated by 4 votes to 3; as a consequence, draft article X of the *Ad Hoc* Committee text retained a reference to the ICJ.³² To clarify that litigation *between treaty parties* was envisaged, the words 'between the High Contracting Parties' were added after 'Disputes' upon a proposal by the United States. The United States also suggested text to address the relationship between ICJ proceedings and criminal proceedings. Its amendment proposed to exclude ICJ proceedings on matters brought before international criminal tribunals ('...provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal').³³ This amendment was based on the assumption that the Convention would have to address the possibility of parallel proceedings before the ICJ and an international criminal court. At the time of the *Ad Hoc* Committee debates, this indeed seemed necessary, as the Convention drafts envisaged the establishment of an international criminal tribunal competent to try

²⁸ In this respect, the drafting process can indeed be said to have been a 'somewhat tormented' one: see Kolb, *Compromissory Clause*, in Gaeta, *Genocide Convention*, 408.

²⁹ UN Doc E/447, 10 (Draft Article XIV).

³⁰ UN Doc E/447, 50.

³¹ UN Doc. E/AC.25/SR. 20, 6. According to Mr. Morozov, '[m]atters concerning genocide should be handled by national courts. Defining genocide as something coming under international jurisdiction would be interfering with the sovereign rights of states' (*ibid.*).

³² UN Doc. E/AC.25/SR. 20, 6.

³³ UN Doc E/623, 27.

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génocidaires; hence the United States proposal was adopted.³⁴ Once that idea had been dropped in favour of a more flexible approach (with Article VI no longer establishing an international criminal court, but merely referring to a future one³⁵), many delegates considered the phrase to have become unnecessary and the Sixth Committee opted to delete it.³⁶

This clarified that the ICJ would play a role in inter-state disputes relating to the interpretation and application of the Convention. However, the *Ad Hoc* Committee draft did not contain any specific reference to disputes ‘relating to the responsibility of a state for genocide or for any of the other acts enumerated in article III’. This phrase was added after lengthy (and not always very focused) debates in the Sixth Committee about the nature of ICJ proceedings under what was to become Article IX. A joint amendment submitted by the United Kingdom and Belgium³⁷ emphasised that the provision would cover ‘disputes relating to the responsibility of a State for [acts of genocide]’. This amendment was part of a broader ‘strategy’, pursued by both states, to ensure a relevant role for the ICJ in disputes about genocide. The Sixth Committee had debated a similarly-worded amendment³⁸ at some length when discussing what was to become Article IV, but it was narrowly defeated.³⁹ The debate on Article IX in many respects was a reprise,⁴⁰ and it evidenced considerable confusion about the notion of ‘responsibility’ – which at the time had not yet acquired the firm meaning associated with it under contemporary international law.⁴¹ Many delegates feared that as the Convention declared genocide to be a crime, an inter-state dispute about ‘responsibility for genocide’ would require or enable the ICJ to impose criminal responsibility upon states. This was seen as highly problematic and not acceptable to a number of states.⁴² The precise designation of responsibility incurred by a state for breaching the Convention – criminal? civil? responsibility *simpliciter*? – remained uncertain. Yet, on the substantive question there was little disagreement that, by virtue of Article IX, it would be possible to seek an ICJ judgment on whether states had complied with provisions of the

³⁴ UN Doc. E/AC.25/SR. 20, 6. See Article X of the Secretariat Draft and Article VII of the *Ad Hoc* Committee Draft.

³⁵ See Article VI, mns 32–37.

³⁶ UN Doc. A/C.6/SR.105. The amendment (UN Doc. A/C.6/217) had been proposed by Iran and was carried by 22 to 8 votes, with 6 abstentions.

³⁷ UN Doc. A/C.6/258.

³⁸ See UN Doc. A/C.6/236 and Corr. 1: ‘Criminal responsibility for any act of genocide as specified in articles II and IV shall extend not only to all private persons or associations, but also to States, governments, or organs or authorities of the State or government. Such acts committed by or on behalf of States or governments constitute a breach of the present Convention.’

³⁹ UN Doc. A/C.6/SR.92, 95 and 96. After a wide-ranging debate, the amendment was narrowly defeated by 24 votes to 22: see UN Doc. A/C.6/SR.96. The United Kingdom and Belgium sought to re-open the debate about the role of the ICJ during the Sixth Committee debate on what was to become Article VI, but accepted that the substance of the matter had been covered already in the debates on Article IV: see UN Doc. A/C.6/252 for the proposed amendment and UN Doc. A/C.6/SR.99 for the debate.

⁴⁰ In fact, much of the debate was on points of order, with critics arguing the matter had already been settled: UN Doc. A/C.6/SR.105, e.g. at 449 (Mr. Morozov).

⁴¹ Kolb perceptively notes that in 1948, ‘the law of state responsibility was ... still in doctrinal childhood’: R. Kolb, Compromissory Clause, in Gaeta, *Genocide Convention*, 411.

⁴² As the Court, having analysed the drafting history, noted in the *Bosnian Genocide case*: ‘much of [the debate] was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted’ (para. 178).

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Convention prohibiting acts of genocide. Schabas' aptly summarises this aspect of the debate by noting that the amendment had 'provoked some confusion but little controversy'.⁴³ As a consequence, the joint amendment, introducing the express reference to 'disputes relating to the responsibility of a State' was carried by 18 votes to 2, with 15 abstentions.⁴⁴

- 15 Thus amended, the provision, but for drafting changes, had acquired its eventual form. There was to be a final twist, though. Towards the end of the Sixth Committee debates, the United Kingdom, Belgium and the United States moved to replace the reference to disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III' with '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'.⁴⁵ This amendment, which would have emphasised the criminal character of genocide ('crime of genocide', 'charges'), failed to attract the required (qualified) majority.⁴⁶ In the view of the Chairman, it would have meant a substantive change:

'[I]t was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties.'⁴⁷

- 16 In the light of this explanation, the 'tormented' aspect of the drafting history may be summarised as follows: *first*, Article IX was meant to permit proceedings about state responsibility for genocide; but *second*, that state responsibility was not criminal in nature. Much of the subsequent inter-state litigation based on Article IX would concern the implications of these statements.

C. Interpretation

- 17 Article IX permits states to refer disputes to the ICJ for decision; however it is silent on the conduct and outcome of ICJ proceedings. For the most part, these questions are not addressed in the Genocide Convention, but in the statutory provisions governing ICJ proceedings (notably the UN Charter, the ICJ Statute and the ICJ Rules⁴⁸) and in the rules of general international law governing remedies available in adjudication. The interpretation of Article IX has to take

⁴³ Schabas, *Genocide in Int'l Law* (1st ed.), 423.

⁴⁴ UN Doc. A/C.6/SR.105, 459.

⁴⁵ UN Doc. A/C.6/305.

⁴⁶ See the discussion in UN Doc. A/C.6/SR.131, 687–90.

⁴⁷ UN Doc. A/C.6/SR.131, 687 (Chairman).

⁴⁸ The UN Charter lists the ICJ as one of the 'main organs' of the Organization (Article 7) and sets out basic rules of its functioning in chapter XIV (Articles 92–96). The Statute of the ICJ ('ICJ Statute') is the central text establishing the Court and regulating the basic features of its functioning. A separate document, it forms an integral part of the UN Charter (Article 92 UN Charter). Pursuant to Article 93 para. 1 of the Charter, '[a]ll Members of the United Nations are *de facto* parties to the Statute of the International Court of Justice.' The ICJ's Rules of Court – adopted by the Court's judges in the exercise of their autonomous powers of self-regulation recognised by Article 30 of the Statute – contain more detailed rules on the conduct of proceedings and fill gaps left by the Charter and Statute.

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account of this ‘normative environment’, as it has an immediate bearing on the application of Article IX.

I. General features of ICJ proceedings

The ICJ is the principal judicial organ of the United Nations. It was established in 1946 and has its seat in The Hague.⁴⁹ Its jurisdiction comprises contentious proceedings, and advisory proceedings requested by UN organs and specialized agencies⁵⁰ (only the former of which are addressed by Article IX). According to Article 34 of the ICJ Statute, only states can be parties to contentious proceedings: as a consequence, Article IX’s system of dispute resolution is state-centred, and no equivalent to individual complaint procedures set up under human rights treaties exists (let alone provisions providing individual victims with direct recourse to international courts in proceedings against their state.) Article IX operates within these structural limits. It permits state parties to the Convention to rely on an international court to vindicate their legal positions – and notably to seek protection against acts of genocide. Governed by Article IX, ICJ proceedings can be instituted irrespective of any call for UN action pursuant to Article VIII. In practice, victims of genocide that will approach the ICJ will *also* approach other UN organs and nothing in the UN Charter or ICJ Statute precludes them from doing so.⁵¹ Between the (state) parties to a dispute, ICJ judgments are binding and final (Article 59). Unlike in many domestic legal systems, where courts are generally authorised to address claims, for the Court to be competent to entertain a dispute, a number of conditions need to be fulfilled.

1. Access to the court

The most obvious condition is that the parties must have access to the Court. This usually creates few problems, as the Court (as a UN organ) is open to all members of the United Nations, which in reality is the vast majority of the states of the world.⁵² Moreover, states not party to the Statute can have access to the Court if they have recognised – by way of a special declaration – the basic scheme of ICJ jurisdiction and expressed their willingness to comply with an eventual judgment.⁵³ This follows from Article 35 para. 2 of the ICJ Statute, which provides:

⁴⁹ ICJ Statute, Article 22. For useful information on the Court see e.g. Rosenne, *International Court of Justice*, in: MPEPIL. Rosenne, *Law and Practice*, and Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.) provide comprehensive accounts.

⁵⁰ Article 96 of the UN Charter, Articles 65–68 of the ICJ Statute; and see Oellers-Frahm, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.), Article 96, 207; Thirlway, *Advisory Opinions*, in MPEPIL.

⁵¹ In the *Tehran Hostages case*, the ICJ observed that there was nothing irregular in the ‘simultaneous exercise of [the] respective functions’ of the Security Council and Court: ICJ Reports 1980, 3, 21.

⁵² Article 35 para. 1 of the ICJ Statute; Article 93 para. 1 of the UN Charter. Pursuant to the former of these provisions, ‘[t]he Court shall be open to the states parties to the present Statute.’

⁵³ See Article 35 para. 2 of the ICJ Statute and SC Res. 9 (1946). A number of states, before becoming UN members, made such a Declaration covering disputes under the Genocide Convention: see e.g. the German Declaration, reproduced in Steinberger, *ZaöRV* 18 (1956), 750–1. For details see Zimmermann, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.), Article 35, 623–5.

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‘The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.’

- 20 While normally unproblematic, access to Court gave rise to major debates in the various proceedings on genocide that involved the Federal Republic of Yugoslavia (Serbia and Montenegro)⁵⁴ whose status with respect to the United Nations and the Genocide Convention was (as the ICJ put it) ‘not free from legal difficulties’.⁵⁵ The matter in many respects seems unique, and owes much to the peculiarities of the dismemberment of Yugoslavia during the 1990 s, so one ought not to overstate its general importance. However, it remains an important episode illustrating the challenges faced by the ICJ in applying its jurisdictional regime in proceedings between states whose status is uncertain. The issue arose due to the fact that between 1992 and 2001 – when the (*Bosnian*) and (*Croatian*) *Genocide cases* were brought against it and when it instituted proceedings in the ten *Legality of Use of Force cases* – it was not clear whether (the Federal Republic of) Yugoslavia was (still) a member of the United Nations.⁵⁶ During the 1990 s, it had claimed to continue the legal personality of the former Socialist Federal Republic of Yugoslavia (SFRY), which had been a member of the United Nations. By contrast, in 1992, the General Assembly and Security Council held the FRY could not ‘continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations’, that it ‘should apply for membership in the United Nations and ... not participate in the work of the General Assembly’.⁵⁷ This amounted to a rejection of the FRY’s claim to continuity, but stopped short of a suspension or termination of UN membership.⁵⁸ The uncertainties were only resolved when, in late 2000, after the end of the Milosevic regime, the FRY relinquished its claim to continuity and applied to be admitted as a new UN member (which it was).⁵⁹
- 21 Perhaps inevitably, uncertainties relating to its status affected the various proceedings brought by and against the FRY. In responding to the situation, the ICJ showed a surprising degree of pragmatism and flexibility. In the *Legality of Use of Force* judgment rendered in 2004, it held that, having been admitted as a new member in 2000, the FRY could *not* have been a UN member when it instituted proceedings.⁶⁰ It also held that non-UN members that had not made a Declaration required under SC Res. 9 (1946) could not have access to the Court on the basis of what Article 35 para. 2 refers to as ‘special provisions contained in treaties in force’: these terms were to be construed restrictively and covered only treaties concluded

⁵⁴ See fn. 13.

⁵⁵ *Bosnian Genocide case* (provisional measures), ICJ Reports 1993, 14, para. 18. At no time had the Federal Republic of Yugoslavia made a Declaration in the sense of Article 35 para. 2 and SC Res. 9 (1946).

⁵⁶ See the clear summary by Zimmermann, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.), Article 35, 615–6; and further Rosenne, BYIL 80 (2009), 217.

⁵⁷ SC Res. 777 (1992); GA Res. 47/1 (1992).

⁵⁸ On 29 September 1992, in a Letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, the Under-Secretary-General and Legal Counsel of the United Nations attempted to set out the ‘considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1’; however, this equally failed to clarify the situation: see UN Doc. A/47/485.

⁵⁹ SC Res. 1326 (2000); GA Res. 55/12 (2000).

⁶⁰ *Legality of Use of Force case*, ICJ Reports (2004), 279, para. 79.

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prior to the Statute of the Court.⁶¹ The 2004 judgment seemed to be at odds with the Court's earlier position, taken in 1996 at the preliminary objections stage of the (*Bosnian*) *Genocide case*, in which the Court had decided to exercise jurisdiction on the basis of Article IX of the Genocide Convention notwithstanding the FRY's uncertain status.⁶² This position was upheld in 2007, in the merits judgment in the (*Bosnian*) *Genocide case*, in which the Court considered itself bound by its earlier preliminary objections judgment and decided not to re-open question of access.⁶³ As a result, the FRY was considered *not* to have access as an applicant (in 1999) in proceedings against NATO states, but did have access (and could be sued) as a respondent by Bosnia and Herzegovina in the (*Bosnian*) *Genocide case*. To complicate matters further, in the (*Croatian*) *Genocide case*, where the matter was argued again, the Court held in 2008 that problems of access to the Court could be cured in the course of proceedings, such as when a party to proceedings became a UN Member *after* the claims were filed.⁶⁴

As noted at the outset, the conundrum posed by the 'Yugoslav' cases was not to be resolved lightly. It was indeed a 'rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization'.⁶⁵ However, the Court's own jurisprudence has added further twists: not surprisingly, its pragmatic and flexible handling of 'status' issues has drawn criticism from commentators who have spoken of 'fifteen years of inconsistency' and described the ICJ's jurisprudence as 'consistently inconsistent'.⁶⁶ That these general problems should have arisen in proceedings brought under Article IX is in some ways coincidental, as they owed more to general aspects of ICJ proceedings than to specific problems of the Genocide Convention. However, they illustrate that recourse to the ICJ in cases involving allegations of genocide will hardly be a straightforward matter.

2. Jurisdiction

Access to the Court is merely the first requirement for the Court to address a dispute. In addition, the Court must have jurisdiction to entertain the claims brought before it. While access to Court (outside special situations like those addressed in the preceding section) is usually a 'non-issue', jurisdictional challenges are a regular feature of ICJ proceedings. The governing principle – distinguishing ICJ proceedings from those before domestic courts – is that jurisdiction depends on the consent of the parties. In its Article 36, the ICJ Statute envisages three main

⁶¹ *Legality of Use of Force case*, ICJ Reports (2004), 279, paras. 113–4.

⁶² Hence the Court explicit finding that 'on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, [the Court] has jurisdiction to adjudicate upon the dispute' and thus could the 'proceed to consider the merits of the case': *Bosnian Genocide case* (preliminary objections), ICJ Reports 1996, 595, paras. 47(2)(a) and 46.

⁶³ *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 114. In addition, the Court rejected, in 2003, an attempt to have the 1996 proceedings revised in the light of the FRY's admission to the UN: see *Application for Revision*, ICJ Reports 2003, 7.

⁶⁴ (*Croatian*) *Genocide case*, ICJ Reports 2008, 412, para. 92.

⁶⁵ *Legality of Use of Force case*, ICJ Reports (2004), 279, para. 73.

⁶⁶ As indicated in the title of Blum's comment: Blum, AJIL 103 (2009), 264; and further Bordin, LPICT 10 (2011), 315.

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forms of expressing consent:⁶⁷ by virtue of a special agreement (*compromis*); by way of a unilateral declaration recognising the jurisdiction of the Court (so-called 'optional clause declarations'); and through a treaty clause envisaging the submission of disputes to the Court (so-called 'compromissory clauses'). Article IX belongs to the third category; it is one of the many compromissory clauses establishing (as Article 36 para. 1 of the ICJ Statute puts it) 'the jurisdiction of the Court [over] ... all matters specially provided for in ... treaties and conventions in force.'⁶⁸ Article 36 para. 1 of the ICJ Statute thus may be seen as an 'enabling clause' allowing states to rely on the Court as an agency of dispute resolution – and of course, it equally permits them to make the exercise of that jurisdiction subject to specific conditions. Article IX makes use of that enabling clause and also clarifies the scope of the Court's jurisdiction by describing the types of disputes that can be brought before the Court, viz. those concerning the 'interpretation, application or fulfilment of the ... [Genocide] Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III'.⁶⁹ As will be shown below, compared to other compromissory clauses, it is a fairly straightforward jurisdictional clause that does not make that jurisdiction subject to further, special conditions.

- 24 Article 36 para. 1 of the ICJ Statute, read in line with Article IX, is the primary basis of establishing the Court's jurisdiction over questions of genocide, but it is not the only one. As the different jurisdictional bases mentioned above are not mutually exclusive,⁷⁰ the Court can also entertain disputes relating to genocide on the basis of Article 36 para. 2 of the ICJ Statute or (although that may be an unlikely setting) a *compromis*. For the Court to be able to entertain jurisdiction under Article 36 para. 2, the disputing states must have submitted optional clause declarations covering questions of genocide. If this is the case, the Court's jurisdiction is not restricted to disputes about the interpretation, application or fulfilment of the Convention, but can comprise other matters as well.⁷¹ Finally, outside the realm of contentious proceedings, UN organs such as the General Assembly can request the Court to submit an advisory opinion on legal questions relating to genocide, as happened in the advisory proceedings concerning *Reservations to the Genocide Convention*.⁷² Article IX does not preclude such 'other' proceedings relating to

⁶⁷ See Rosenne, *Law and Practice*, 473–5; and further Tomuschat, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, *Statute of the ICJ* (2nd ed.), Article 36, 656. In addition to the bases of jurisdiction referred to in Article 36, two other (related) settings deserve to be mentioned: (i) Article 37 provides that compromissory clauses referring to the ICJ's predecessor, the PCIJ, can be 'transferred' to the ICJ; (ii) under the doctrine of *forum prorogatum*, parties can implicitly agree to proceedings.

⁶⁸ On the Court's website, the total figure of these clauses is put at just under 300 (see <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4>; accessed 3 June 2013). To this figure, clauses referring to the ICJ's predecessor, the PCIJ, have to be added, as they, too, can be invoked before the ICJ pursuant to Article 37 of the ICJ Statute. The number of such 'PCIJ clauses' is usually put at 400–500. On all this see Tams, *Compromissory Clauses*, 471–3.

⁶⁹ See *infra*, mns 35–49, for detail.

⁷⁰ See PCIJ, *Electricity Company of Sofia and Bulgaria*, Ser. A/B, No. 77 (1939), 76; ICJ, *Territorial and Maritime Dispute* (preliminary objections), ICJ Reports 2007, 832, paras 132–6.

⁷¹ Optional clause declarations currently in force are reproduced on the ICJ website: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>. See further Fitzmaurice, ICJ, *Optional Clause*, in MPEPIL.

⁷² ICJ Reports 1951, 15.

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genocide (whether advisory or contentious). However, it is important to appreciate that they do not implicate Article IX, but are based on a separate jurisdictional title.

Whether a specific dispute falls within the scope of a compromissory clause (or indeed another basis of jurisdiction) is a matter for the Court to decide. As a matter of principle, this is not disputed: the power of courts to determine their own jurisdiction is seen as inherent; and it is recognised in Article 36 para. 6 of the ICJ Statute.⁷³ Whether an application ultimately relates to matters governed by the Genocide Convention will often only become clear after an eventual judgment on the merits. The Court's jurisprudence – developed not least through the analysis of Article IX in the *Legality of Use of Force* cases – suggests that for an application based on Article IX to be admissible, the Court 'cannot limit itself to noting that one of the Parties maintains [that it does]', but has to ascertain that the breaches alleged are capable of falling⁷⁴ within the scope of the clause.⁷⁵ This will typically require applicants to make out at least a plausible case.

3. Fundamental aspects of proceedings

Proceedings brought on the basis of Article IX follow the general rules governing ICJ proceedings.⁷⁶ Pursuant to Article 43 of the ICJ Statute, they comprise a written and an oral phase, the former typically involving two rounds of written pleadings. If the respondent state challenges the Court's jurisdiction or the admissibility of the claim, it can request that these matters be addressed as part of preliminary proceedings (with separate written and oral phases, and a separate judgment) before the merits are considered.⁷⁷ As a consequence, proceedings before the ICJ can be lengthy: while the fourteen years of proceedings in the *(Bosnian) Genocide case* (from the institution of proceedings in 1993 to the Court's merits judgment in 2007) were exceptional, few cases are dealt with in less than three to four years. Notwithstanding the potential for interim relief,⁷⁸ this affects the influence of ICJ dispute settlement on the resolution of on-going conflicts.

As a general procedural requirement (which Article IX confirms expressly), the ICJ can only handle claims that relate to a 'dispute' between the litigant parties. This has usually⁷⁹ been interpreted liberally, as requiring a 'disagreement on a point of law or fact, a conflict of legal views or of interests'.⁸⁰ In proceedings brought under Article IX, such 'dispute' might for instance concern allegations of genocide by the applicant (and denied by the respondent), or duties to repress and punish genocidal acts. As the ICJ has clarified, in order to be capable of legal redress,

⁷³ See *Nottebohm case* (preliminary objections), ICJ Reports 1953, 111, 119; Tomuschat, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, Statute of the ICJ (2nd ed.), Article 36, 694.

⁷⁴ See *Legality of Use of Force* (Yugoslavia v. Belgium), ICJ Reports 1999, 124, paras. 38–40 (provisional measures).

⁷⁵ *Oil Platforms*, ICJ Reports 1996-II, 803, para. 16 (preliminary objections).

⁷⁶ Collier and Lowe provide a clear analysis of the general principles governing international proceedings (Collier/Lowe, *Settlement of International Disputes*, 189–273).

⁷⁷ See Article 79 of the Rules of Court; and see Talmon, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, Statute of the ICJ (2nd ed.), Article 43, 1158–70; Collier/Lowe, *Settlement of International Disputes*, 227–9.

⁷⁸ See *infra*, mns 33–4.

⁷⁹ But contrast the recent application of the requirement in the *Georgia v Russia case*, Judgment of 1 April 2011 (available at www.icj-cij.org).

⁸⁰ PCIJ, *Mavrommatis Palestine Concessions*, Ser. A., No. 2 (1924), 11.

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disputes must not have become moot, but retain their ‘actual’ relevance.⁸¹ Finally, pursuant to the so-called ‘indispensable third party rule’, the Court will not entertain claims brought against a state that has accepted the Court’s jurisdiction if they, in reality, implicate another state that has not consented to the Court’s jurisdiction.⁸² The application of this rule has posed considerable problems in practice, as often, one state’s allegations will in some way affect not only the respondent, but other states not bound by Article IX (and thus not subject to the Court’s jurisdiction). Read properly, for a third state to be an ‘indispensable’ third party, its conduct has to constitute the very subject-matter of the proceedings before the Court.⁸³ With respect to Article IX, one might e. g. think of proceedings brought against a state for failure to prevent genocidal conduct, if the acts in question had been committed by another, third, state not bound by Article IX. In this setting, the Court could only pronounce on the allegation (failure to prevent) if it took a stance on whether genocide had been committed by another state (not subject to its jurisdiction). Under these circumstances, it could indeed be said – adapting a phrase used by the Court – that ‘a finding ... regarding the existence or the content of the responsibility’ of the absent third party would not only ‘have implications for the legal situation of the two other States concerned’ but would be ‘needed as a basis for the Court’s decision’ on the claims before it.⁸⁴ If (and only if) this is the case, the ‘indispensable third party’ precludes the Court from exercising jurisdiction.

- 28 Furthermore, just as in many domestic legal settings, applicant states must establish a legal interest in the subject-matter of the dispute.⁸⁵ In regular inter-state litigation, this will usually be an individual legal interest, for instance resulting from a breach, by another state, that had specially affected the applicant state.⁸⁶ In the case of the Genocide Convention, such special effects may e. g. result from acts of genocide committed by one state against citizens of another state, which, because of the medium of nationality, injure that other state (the state of nationality) in its individual capacity.⁸⁷ However, if ICJ proceedings were always dependent on the

⁸¹ *Nuclear Tests*, ICJ Reports 1974, 253, paras. 55–9.

⁸² See *Monetary Gold*, ICJ Reports 1954, paras 19, 32; *East Timor*, ICJ Reports 1995, 90, paras. 23–35.

⁸³ This was implicitly accepted in the *Nauru case*, ICJ Reports (1992), 240, para. 55. For comment see Zimmermann, ZaöRV 55 (1995), 105.

⁸⁴ See the *Nauru case*, ICJ Reports 1992, 240, para. 55.

⁸⁵ Owing to different national traditions, this requirement is referred to in a variety of ways which are not always clearly distinguished. Common terms include *locus standi*, *jus standi*, legal interest, interest to sue, *intérêt pour agir*, capacity or special capacity, and right or cause of action. For details see Günther, Die Klagebefugnis, 20–8; Tams, Obligations *Erga Omnes*, 25–47; M’Baye, RdC 209 (1988 II), 223.

⁸⁶ Article 42 of the ILC’s Articles on State Responsibility (YbILC 2001, vol. II/2, 117) mentions common forms of individual legal injury.

⁸⁷ Traditional international law – shaped not the least by pronouncements of the ICJ and its predecessor, the Permanent Court of International Justice – considers the right to bring claims on behalf of nationals to be a right of the State itself: see *Mavrommatis Palestine Concessions*, PCIJ, Ser. A, No 2, 12: ‘It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.’

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showing of an individual legal interest, an important pattern of breaches could never be brought before the Court, namely acts of genocide committed by a state against its own population. Such acts of genocide amount to an international crime, but do not injure any other state in its individual capacity.⁸⁸ Not surprisingly, traditional international law – premised on a bilateral paradigm of reciprocal rights and duties between states – has struggled to come to terms with atrocities committed by a state against its own citizens.⁸⁹ Contemporary international law seems to have overcome these difficulties by recognising a category of ‘public interest obligations’ that can be enforced by each state, irrespective of an individual legal interest. The key pronouncement is the ICJ’s 1970 judgment in the *Barcelona Traction case*, in which the Court recognised that ‘in view of the importance of the rights involved, all states can be held to have a legal interest in [the] protection’ of certain fundamental obligations owed to the international community as a whole – which it called ‘obligations *erga omnes*’.⁹⁰ By virtue of this general legal interest, each and every state, irrespective of any individually sustained injury, has standing to institute proceedings before the ICJ in a form of ‘public interest litigation’, provided that the Court’s jurisdiction is established according to the rules outlined above. Since 1970, the Court’s approach to ‘community obligations’ has been confirmed and progressively refined. Of particular relevance are the ILC’s Articles on State Responsibility, adopted in 2001. In its Article 48 para. 1, the ILC drew on the *erga omnes* concept to formulate a more general rule governing responses against wrongful conduct, pursuant to which:

‘[a]ny State other than an [individually] injured State is entitled to invoke the responsibility of another State ... if: (b) the obligation breached is owed to the international community as a whole.’⁹¹

In its judgment in the *Questions Relating to the Obligation to Prosecute or Extradite case*, the ICJ clarified that, frequently, public interests will be protected through international treaties. Its reasoning, while developed in relation to the Convention against Torture (on which the proceedings were based), can be applied to the Genocide Convention:

‘The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were

⁸⁸ In its *Reservations* opinion, the ICJ formulated this in more sweeping (if perhaps simplistic terms), when noting that ‘[i]n [the 1948 Genocide] 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. Consequently, in a convention of this type, one cannot speak of individual advantages and disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.’ (ICJ Reports 1951, 15, 24)

⁸⁹ See e.g. *South West Africa*, ICJ Reports 1966, 6 (in which the ICJ controversially denied the applicant States’ legal interest to challenge the South African mandate over South West Africa/Namibia). This provoked an outcry and, indirectly, led to the acceptance of the *erga omnes* concept.

⁹⁰ ICJ Reports 1970, 3, paras. 33–4. For details see Tams, *Obligations Erga Omnes*.

⁹¹ Pursuant to paragraph 8 of the ILC’s explanatory commentary, Article 42, para. 1; lit (b) ASR ‘intends to give effect to the statement by ICJ in the *Barcelona Traction case*, where the Court drew ‘an essential distinction’ between obligations owed to particular States and those owed ‘towards the international community as a whole’ (YbILC 2001, vol. II/2, 118). For comment see Crawford, in *Essays Simma*, 221.

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required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.⁹²

- 30 While international law has progressively recognised a general right to bring proceedings in defence of public interests, it is not entirely clear which provisions of the Genocide Convention protect public interests – and thus can be enforced by all state parties. As regards the Convention’s core obligation, enshrined in Article I, not to commit genocide, the matter is beyond dispute. From 1970 onwards, it has been generally recognised that duties flowing from ‘the outlawing of acts of ... genocide’ qualify as obligations *erga omnes* and therefore can be enforced by means of public interest litigation;⁹³ as a consequence, all states parties to the Convention have standing to institute ICJ proceedings against another state that in their view commits genocide against its own population. The same would seem to apply to breaches of ancillary duties imposed by Article III lit. (b), (c), (d) and (e) of the Convention – although (as mentioned above) the ‘indispensable third party rule’ could act as a further procedural hurdle.
- 31 It is more difficult to assess whether *other* duties imposed by the Convention can equally be enforced by way of public interest litigation. In this respect, a differentiated approach is called for. The twin obligations to prevent and punish genocide, as set out in Article I, equally derive from ‘the outlawing of acts of ... genocide’ and should be seen as obligations *erga omnes*. By extension, and in the light of the ICJ’s consideration in the *Questions Relating to the Obligation to Prosecute or Extradite* case, the same would apply with respect to the obligation to comply with extradition requests in the sense of Article VII para. 2 of the Convention.⁹⁴ All these obligations are designed to facilitate the repression and punishment of genocide, that is the main objective of the Convention; this suggests that they, too, could be enforced by each state party to the Convention. By contrast, breaches of ‘lesser’ obligations – e. g. procedural obligations under Article XI para. 2 and XI para. 3, 2nd clause; or the alleged duty to respect the jurisdiction of the territorial state that was at stake in the *Prisoners of War* case – are not as closely related to the ‘outlawing of acts of ... genocide’. They are governed by the regular rules requiring the establishment of an individual injury.
- 32 That relatively fundamental questions such as standing *in judicio* should remain uncertain is due not least to the paucity of ICJ case-law based on the Genocide Convention. Despite the Court’s recognition of the *erga omnes* doctrine, states have so far rarely been inclined to institute ‘public interest proceedings’ before the ICJ. Proceedings relating to genocide follow this general trend: as the brief summaries provided above show, they have in all cases so far been brought by states that claimed to have been specially affected by breaches of the Convention – notably the

⁹² *Obligation to Prosecute or Extradite*, Judgment of 20 July 2012 (at www.icj-cij.org), para. 69.

⁹³ ICJ Reports 1970, 3, para. 34.

⁹⁴ The ICJ’s judgment in *Obligation to Prosecute or Extradite*, Judgment of 20 July 2012 (at www.icj-cij.org) would seem to support this by implication: as its title indicates, the case concerned the duty to prosecute or extradite torturers – i. e. the equivalent, within the Convention against Torture, of the duty to prosecute and punish individual perpetrators of atrocities. It was this obligation which the ICJ qualified as an obligations *erga omnes partes*.

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home state of citizens allegedly suffering genocide committed by a foreign state (*Bosnia and Herzegovina and Croatia* in the two *Genocide case*, the Federal Republic of Yugoslavia in *Legality of Use of Force*, etc.). By contrast, where states have been accused of committing genocide against their own population, foreign states have so far not made use of the potential for ICJ enforcement. This presumably reflects uncertainties about the ICJ's willingness to accept forms of 'public interest litigation' just as much as scepticism about the impact of its pronouncements. It is worth noting, though, that contemporary international law does recognise the possibility of judicial action against states accused of genocide. In this respect, it has gone beyond the narrow approaches advocated by states – like the United States and the Philippines – in and shortly after 1948.

4. Interim proceedings

While its proceedings tend to be lengthy, it is worth noting that the ICJ has 'the 33 power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'.⁹⁵ Where an applicant state asserts that genocide is on-going, provisional measures will be of essential relevance. As interim proceedings usually follow a tight time-frame, the Court assesses only summarily whether it has jurisdiction to entertain a dispute, and whether, in view of the urgency of the situation, it should order interim relief with a view to safeguarding rights of the parties. This requires, both, an assessment of the possible harm caused 'on the ground'⁹⁶ as well as a summary assessment of the strength of the applicant's case on the merits.⁹⁷ As a consequence, provisional measures will only be ordered if, in view of the ICJ, the jurisdictional title invoked 'appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded'⁹⁸ and if 'the rights asserted by a party are at least plausible'.⁹⁹ Pursuant to Article 41, ICJ orders are binding;¹⁰⁰ in practice, however, unless the Court is backed up by international pressure, compliance may be difficult to ensure.¹⁰¹

While designed to ensure interim relief, provisional measures are incidental 34 proceedings that serve to preserve rights of the parties that are at issue in the proceedings. This explains the need for a plausible case on the merits (as assessed summarily by the Court); moreover, it also means that requests for provisional measures cannot go beyond what could be requested in the proceedings in the main. The (*Bosnian*) *Genocide case* exemplifies that this can entail a considerable narrowing of requests for relief: in its first order on provisional measures, faced with

⁹⁵ Article 41 of the ICJ Statute. For comment see notably Oellers-Frahm, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, Statute of the ICJ (2nd ed.), Article 41, 1026.

⁹⁶ For example, in the *Pakistani Prisoner of War case*, where the applicant itself had requested time for negotiations, the Court decided not to order provisional measures as the matter was not (no longer) urgent: see ICJ Reports 1973, 328.

⁹⁷ Oellers-Frahm provides many further details: Oellers-Frahm, Article 41, in Zimmermann/Tomuschat/Oellers-Frahm/Tams, 1038–50.

⁹⁸ *Fisheries case* (provisional measures), ICJ Reports 1972, 12, para. 17.

⁹⁹ See e.g. *Obligation to Prosecute or Extradite* (provisional measures), ICJ Reports 2009, 139, para. 57.

¹⁰⁰ Perhaps curiously, this was discussed for a considerable time, but ultimately settled in *LaGrand*, ICJ Reports 2001, 466, paras. 99–109.

¹⁰¹ See further *infra*, mn. 54.

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far-reaching requests by Bosnia and Herzegovina, the Court drew a clear line between matters relating to genocide as governed by the Genocide Convention, and broader issues such as self-defence or state survival – while the former were granted, the latter were dismissed.¹⁰² This is but another illustration of the restricted character of the Court’s jurisdiction.

II. Specific features of Article IX

35 Article IX operates within the general framework governing ICJ proceedings, but adds some particular features. Notably it specifies the scope of the Court’s jurisdiction and the modalities under which state parties can make use of it.

1. Disputes ‘shall be submitted ... at the request of any of the parties to the dispute’

36 To begin with the final part of the provision, disputes covered by Article IX ‘shall be submitted to the International Court of Justice at the request of any of the parties to the dispute’. This clarifies the application of Article IX in two respects. *First*, notwithstanding the principle of consensual jurisdiction, cases under Article IX can be brought unilaterally. As acceptance of Article IX expresses consent to see future disputes litigated before the ICJ, it does not matter that, once a case has been brought, one of the parties to the dispute (the respondent state) would prefer to avoid recourse to the Court in that particular instance. Should the respondent state consider the particular matter to be outside the scope of Article IX, it can always object to the exercise of the Court’s jurisdiction, including by raising preliminary matters. *Second*, the term ‘request’ underlines that the Court’s involvement in disputes about genocide depends on the willingness of disputing states to refer matters to it: ICJ proceedings have to be requested; the Court does not investigate matters *proprio motu*.¹⁰³ And even if the Convention has been violated, states are not required to institute proceedings; quite to the contrary, they usually do not do so lightly.

2. Disputes ‘between the Contracting Parties’

37 Using language typical of compromissory clauses, Article IX clarifies that ICJ proceedings must relate to disputes ‘between the Contracting Parties’, that is state parties to the Convention that have accepted Article IX. This is an obvious restriction, which follows from the *pacta tertiis* principle.¹⁰⁴

38 Beyond that, the words can also be read as embodying a temporal restriction: in order to be ‘Contracting Parties’, the parties to the dispute must have been bound by the Convention when the dispute arose. If a state party denounces the Convention pursuant to Article XIV (which so far has not occurred), the compromissory clause will cease to apply from the moment the denunciation becomes effective.¹⁰⁵

¹⁰² See *Bosnian Genocide case* (provisional measures), ICJ Reports 1993, 3, paras: 33–39.

¹⁰³ To describe the Court’s jurisdiction as ‘mandatory but subsidiary’ (as Kolb does) does not seem to capture this entirely: see Kolb, *Compromissory Clause*, in: Gaeta, *Genocide Convention*, 416.

¹⁰⁴ *Mavrommatis Palestine Concessions*, PCIJ, Ser. A, No. 2 (1924), 11.

¹⁰⁵ See Article XIV, mn. 13; and further Kolb who also discusses scenarios in which a compromissory clause might ‘survive’ the suspension and termination of a treaty and permit

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However, if proceedings have been instituted prior to the date on which the denunciation became effective, the ICJ will retain jurisdiction to decide the case.¹⁰⁶

While these questions – relating to disputes between states that have ceased to be ‘Contracting Parties’ – seems generally agreed, there is much debate about disputes preceding the entry into force of the Convention for (one of) the parties to a dispute. This matter is often addressed under the rubric of ‘retroactivity’; however, it raises two distinct issues: the first concerns the temporal scope of application of the Convention *as such*. This is the general dimension of retroactivity, which has been addressed elsewhere:¹⁰⁷ while the matter is controversial, the better view is that the Convention – as a treaty – does *not* apply retroactively. This means that (even though Article I ‘confirms’ the criminal character of genocide) the Convention as such cannot be applied to atrocities preceding its entry into force. Furthermore, as regards particular state parties, the Convention only imposes obligations (or creates rights) from the moment that particular state became bound by it. Finally, in instances of state succession where the predecessor state had been a party, the successor state does *not* automatically succeed to the Convention. These views inform the interpretation of Article IX. They suggest that, just as the Convention more generally, so its dispute settlement clause should be construed in line with the presumption against retroactivity. Admittedly, the ICJ has not always been entirely clear on this point. In the (*Bosnian*) *Genocide case*, it rejected the respondent’s claim based on ‘non-retroactivity’ and noted that

‘the Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservations to that end.’¹⁰⁸

The ICJ’s more recent jurisprudence however points in a different direction, and is more in line with the general presumption against retroactivity: In *Application of the International Convention on the Elimination of all Forms of Racial Discrimination*, the Court was faced with a similar argument in relation to the similarly-worded dispute settlement clause applicable, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Having assessed whether statements preceding Georgia’s accession to CERD could be relied on as evidence of a dispute between the parties, the Court noted that even if Georgia had specifically raised concerns about racial discrimination (which it had not),

‘before [Georgia] became party to CERD in July 1999 ... such dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention’.¹⁰⁹

As the discussion indicates, controversies relating to the Convention’s temporal scope of application have at times ‘spilled over’ into the interpretation of Article IX. Article IX in itself is not the place to settle them once and for all: as the dispute

parties to challenge the validity of such action (Kolb, *Compromissory Clause*, in: Gaeta, *Genocide Convention*, 423–4). Given the fairly straightforward construction of Article XIV, such cases would however seem unlikely to arise under the Genocide Convention.

¹⁰⁶ See e.g. ICJ, *Nicaragua case* (preliminary objections), ICJ Reports 1984, 392, para. 54.

¹⁰⁷ See especially Introduction, mns 50–5.

¹⁰⁸ *Bosnian Genocide case* (preliminary objections), ICJ Reports 1996, 595, para. 34.

¹⁰⁹ *Georgia Russia case*, Judgment of 1 April 2011 (at www.icj-cij.org), para. 64.

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settlement system is designed to ensure compliance with the substantive regime of the Convention, it should be applicable to the extent that the Convention as a treaty is applicable. If – as set out in the commentaries to Articles I and XI – it is construed as a ‘regular’, non-retroactive treaty, then the same should hold true for Article IX.

- 42 In practice, the application of these principles may give rise to considerable difficulties, as many disputes can be looked at from different angles, and can evolve over time. In the *Certain Property case*, faced with a similar problem under a different compromissory clause, the ICJ clarified that, in order to determine whether a dispute was covered *ratione temporis* by a compromissory clause, it was necessary to identify the ‘source or real cause’ of the parties’ disagreement.¹¹⁰ While no doubt general and in need of specification, this indeed would seem a useful guideline. It implies that a considerable number of disputes about atrocity crimes (including those alleged to have involved acts of genocide whether) will not be actionable under Article IX.

3. Disputes ‘relating to the interpretation, application or fulfilment of the present Convention’

- 43 By referring to disputes ‘relating to the interpretation, application or fulfilment of the present Convention’ Article IX clarifies the substantive scope of the Court’s jurisdiction. There are different aspects to this, some obvious, some less so. Three observations seem in order.
- 44 *First*, Article IX covers disputes about ‘the present Convention’. As no particular aspect of the Convention is excluded, this suggests that all rights and obligations enshrined in the Convention can form the subject of inter-state litigation: it is the ‘present Convention’ in its entirety that is referred to.¹¹¹ Conversely, the reference serves a limiting function: jurisdiction under Article IX covers disputes under the Convention only, but not disputes relating to other rules of international law, even where they are intertwined with allegations of genocide. This restriction is, both, an obvious consequence of the ancillary character of dispute settlement clauses like Article IX (which only go as far as ‘their’ treaty) and a crucial limitation on the ICJ’s role. As the Court noted in its 2007 judgment in the (*Bosnian*) *Genocide case*, it has ‘no power to rule on alleged breaches of other obligations, not amounting to genocide, particularly those protecting human rights in armed conflict.’¹¹² That was so, it continued, ‘even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.’¹¹³ As was noted above, because many other universal treaties do not envisage recourse to the ICJ as a dispute settlement agency, states intending to raise before the Court large-scale atrocities have in practice been required to present their case exclusively as a case about genocide – while leaving to a side legal rules ‘protecting human rights in armed conflict.’¹¹⁴ The result has been a set of artificially ‘truncated’ proceedings, most prominently in the (*Bosnian*) and (*Croatian*) *Genocide cases*, in which the bulk of atrocities (war crimes, crimes

¹¹⁰ *Certain Property* (preliminary objections), ICJ Reports 2005, 6, para. 46.

¹¹¹ But see *infra*, mn. 46, for comment on problems relating to State responsibility.

¹¹² ICJ Reports 2007, 43, para. 147.

¹¹³ ICJ Reports 2007, 43, para. 147.

¹¹⁴ ICJ Reports 2007, 43, para. 147.

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against humanity, other human rights violations below the threshold of genocide) could not be addressed for lack of jurisdiction. That such truncation of disputes is undesirable (both for the claimant state and the ICJ) need hardly be stated; however, it is but a natural consequence of the consensual character of ICJ jurisdiction and the unwillingness of states to include compromissory clauses into other universal treaties of a humanitarian character.¹¹⁵

Second, by mentioning ‘the interpretation, application or fulfilment’ of the Convention, Article IX seeks to give a more precise description of the types of disputes with which the Court may be seized. The use of language is similar, but more expansive, than that used in other compromissory clauses, which typically only mention disputes relating to the ‘interpretation and/or application’ of treaties.¹¹⁶ However, not much should be read into this. The Court’s jurisprudence confirms that the terms ‘interpretation’ and ‘application’ do not have any fixed and categorical meaning. They are used as alternatives and overlap significantly. ‘Interpretation’ is typically understood as the process of ‘explaining the meaning’ of a legal norm; ‘application’ is ‘the action of putting something into operation’ in a given case.¹¹⁷ Very often, disputes about the application of a particular treaty will be based on differences of interpretation; at the same time, differences of interpretation will only become relevant if some form of treaty application is at least considered.¹¹⁸ As the Court has had occasion to observe, the addition of the term ‘fulfilment’ does not seem to affect this general assessment: ‘fulfilment’ may be taken to refer to an application that ‘meets the requirements’ of a norm.¹¹⁹ Disputes about the ‘fulfilment’ of the Convention will typically implicate the application (and possibly interpretation) of the Convention. On that basis, it may indeed be said that the addition of the word ‘fulfilment’ ‘does not appear to be significant’.¹²⁰ If anything, it confirms the impression that ‘by inserting all three alternative terms’, drafters had sought to ‘give a coverage as exhaustive as possible to the compromissory clause’ and to ‘close down all possible loopholes’.¹²¹

Third, for the avoidance of doubt, Article IX mentions one type of dispute expressly, namely disputes ‘relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III’. As noted above, the inclusion of this clause owes much to the peculiarities of the drafting process;¹²² its existence confirms that state parties can indeed incur responsibility, under Article I, if they commit genocide¹²³ – which had, as noted elsewhere, remained disputed until the

¹¹⁵ For more on this point see Tams, *Compromissory Clauses*, 461.

¹¹⁶ In his Declaration appended to the preliminary objections judgment in the *Bosnian Genocide case*, Judge Oda described the clause as ‘unique as compared with the compromissory clauses found in other multilateral treaties’ as it mentioned the word ‘fulfilment’ alongside the normal ‘application/interpretation’: ICJ Reports 1996, 625, para. 5. However, that seems to overstate the differences of formulation: as noted by Judge Tomka at the merits stage of the same case, the term ‘fulfilment’ ‘does not add anything to the substantive obligations of the parties’: ICJ Reports 2007, 310.

¹¹⁷ Oxford Dictionary, entries ‘interpretation’ and ‘application’ (no. 2).

¹¹⁸ See similar considerations in Kolb, *Scope Ratione Materiae*, in: Gaeta, *Genocide Convention*, 451–2.

¹¹⁹ Oxford Dictionary, entry ‘fulfilment’ (no. 2).

¹²⁰ *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 168.

¹²¹ Kolb, *Scope Ratione Materiae*, in: Gaeta, *Genocide Convention*, 451.

¹²² See *supra*, mns 11–5.

¹²³ The ICJ made the point expressly in the *Bosnian Genocide case*, where it observed: ‘The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for

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merits judgment in the (*Bosnian*) *Genocide case*.¹²⁴ Once that is accepted, the inclusion of the clause is perhaps of lesser relevance for the interpretation of Article IX than might be assumed: it no doubt serves a declaratory function, clarifying that disputes in the sense of Article IX can involve questions ‘relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III’. However, this hardly expands (nor less restricts) the scope of the Court’s jurisdiction: since the early days of international adjudication, it has been accepted that questions relating to responsibility for treaty breaches are disputes relating to the ‘application’ of a particular Convention and thus covered by compromissory clauses.¹²⁵ In other words, even without a special clause, a dispute ‘relating to the responsibility of a State for genocide’ would be a dispute ‘relating to the interpretation, application or fulfilment of the present Convention’ and thus covered by Article IX.¹²⁶

- 47 In his Separate Opinion in the (*Bosnian*) *Genocide case*, Judge Tomka suggested the express reference to disputes relating to responsibility would have been required because of the criminal nature of genocide, which the Court otherwise might not have been competent to address. In his assessment, the special clause recognised

‘the power of the Court to determine that in a particular case a State has to bear the consequences of a crime of genocide, committed by an individual found to be criminally liable, because a certain relationship between the individual perpetrator of the genocide and the State in question.’¹²⁷

Whether this ‘power’ it had to be recognised expressly may be a matter for debate. That it exists indeed seems agreed.

4. No further preconditions

- 48 Finally, Article IX is also relevant for what it does not say. Notably, it does not make recourse to the ICJ dependent on other conditions. A quick glance at other compromissory clauses suggests that such other conditions are indeed very common, and over time have become more common. Three types of such ‘further conditions’ may be mentioned by way of illustration. *First*, many treaties require a prior attempt to settle the dispute by diplomacy, or the passage of time after the dispute has arisen, before permitting recourse to binding dispute resolution.¹²⁸ *Second*, many treaties offer a choice of binding dispute settlement procedures. Some expressly allow the parties to agree on some other form of dispute resolution

genocide and the other acts enumerated in Article III of the Convention.’ (ICJ Reports 2007, 43, para. 169).

¹²⁴ For details see Article I, mns 51–81.

¹²⁵ See PCIJ, *Chorzów Factory case*, Ser. A, No. 9, 21: ‘It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations which may be due by reason of failure to apply a convention are consequently differences relating to its application.’

¹²⁶ Kolb, *Scope Ratione Materiae*, in: Gaeta, *Genocide Convention*, 468–9.

¹²⁷ *Bosnian Genocide case* (merits), separate opinion of Judge Tomka, ICJ Reports 2007, 310.

¹²⁸ See e.g. Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations (500 UNTS 241), which refers to disputes ‘between the High Contracting Parties as to the interpretation or application of the present Treaty, *not satisfactorily adjusted by diplomacy*’ (emphasis added).

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(such as arbitration). Others envisage a hierarchy between binding dispute settlement options, for instance with arbitration as the default choice and ICJ proceedings as the alternative should the parties fail to agree on the arbitral process.¹²⁹ *Third*, increasingly compromissory clauses set up dispute resolution mechanisms that are optional – i.e. that require acceptance, or that permit states to opt out of binding dispute resolution altogether by way of simple declaration – that is, without the need to enter a reservation.¹³⁰ A provision that combines all three of these options is Article 27 of the 2004 UN Convention on Jurisdiction of States and Their Property,¹³¹ which runs as follows:

Article 27

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval or, of accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.
4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.'

As is clear, by comparison, Article IX is a straightforward compromissory clause 49 that views the ICJ as the only and immediately available forum for dispute settlement. At the time of drafting, this indeed seemed the most natural approach, as treaties concluded between World War I and the 1960s envisaged dispute settlement by the PCIJ or ICJ almost as a matter of course.¹³² From the *travaux*, it is clear that at the time, it was taken for granted that the Genocide Convention should follow the (then) standard approach. Since 1948, states have become much more cautious in drafting treaty clauses, and much more inclined to set up specialised mechanisms for monitoring and scrutinising treaty compliance. Both developments are reflected in the design of dispute settlement provisions of the major 'world order treaties' agreed since 1948. As regards the Genocide Convention, the cautious attitude of states has resulted in a considerable number of reservations entered with respect to Article IX.¹³³ Yet outside that particular field, Article IX remains unaffected by subsequent developments in treaty drafting: an increasingly rare example of a straightforward compromissory clause.

¹²⁹ The most prominent example is Article 287 of the UN Law of the Sea Convention, which mentions four alternative modes of binding dispute resolution. Further flexibility is provided by Articles 281, 282.

¹³⁰ Examples are given by Tams, *Compromissory Clauses*, 477–8.

¹³¹ For comment see the analysis by Tams, in: O'Keefe/Tams, *UN Convention on Jurisdictional Immunities*.

¹³² Trends are assessed in Tams, *Compromissory Clauses*, 461.

¹³³ No less than 17 state parties have made such reservations: see the information provided in Annex 4 and the special commentary on Reservations, mns 35–44.

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III. The outcome of ICJ proceedings

- 50 Proceedings before the ICJ, unless settled by the parties, result in a binding judgment. Where the respondent state raises preliminary objections (notably disputing the Court's jurisdiction), the Court addresses them in a separate judgment before beginning to hear the merits of the claim. ICJ judgments are final¹³⁴ and subject only to subsequent proceedings relating to revision (in the light of new facts) or interpretation (to resolve uncertainties as to the meaning of the Court's judgment).¹³⁵ The content of the judgment depends on the nature of the parties' submissions and the outcome of the Court's deliberations. If it has no jurisdiction or if the claims are inadmissible, the Court will dismiss the case (as happened for instance in *Legality of Use of Force cases*). If an application alleging violations of the Genocide Convention is unfounded, the case will be dismissed on the merits. If the applicant's claims are (partially) well-founded, the Court will declare that conduct by the responding state has violated the Convention (as happened in the *Bosnian Genocide case*).
- 51 In addition to a declaration of illegality, applicants often request the Court to pronounce on the consequences of such a breach, or remedies. Neither the Genocide Convention nor the ICJ Statute or Rules spell out the remedies available in ICJ proceedings relating to genocide; yet as noted above, such claims are encompassed by the Court's jurisdiction under Article IX.¹³⁶ The substantive regime of remedies forms part of the general rules of state responsibility, as set out in the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).¹³⁷ Part Two of these Articles in essence provides for two obligations. *First*, states responsible for breaches of international law are obliged to cease wrongful conduct that is on-going; and in exceptional cases – e.g. of repeated breaches – may also be required to 'offer appropriate assurances and guarantees of non-repetition'.¹³⁸ *Second*, the law of state responsibility requires responsible states to make reparation, aimed at 'wip[ing] out all the consequences of the illegal act'.¹³⁹ While the meaning of cessation is typically clear – breaches of the Convention must be brought to an end – reparation requires some further clarification.
- 52 As set out in the ASR, depending on the circumstances, reparation may consist of restitution, compensation and/or satisfaction. Which of these is applicable primarily depends on the character of the wrongful act. Pursuant to Article 35 ASR, *restitu-*

¹³⁴ Article 59 ICJ Statute.

¹³⁵ See Articles 60, 61 ICJ Statute. As far as jurisdiction under Article IX is concerned, the proceedings in *Application for Revision* (ICJ Reports 2003, 7) provide an example in point.

¹³⁶ *Supra*, mn. 46.

¹³⁷ YbILC 2001, vol. II/2, 31.

¹³⁸ See Article 30, lit. (a) and (b) ASR. As the ILC notes in its explanatory commentary to Article 30 ASR (at para. 4), '[c]essation is often the main focus of the controversy produced by conduct in breach of an international obligation' (YbILC 2001, vol. II/2, 89). In proceedings brought under Article IX, applicant states have inevitably claimed that alleged breaches of the Convention must stop. By contrast, guarantees and assurances of non-repetition have so far played a limited role in international proceedings. Intended to provide 'safeguards against the repetition of the wrongful act ... or, when the wrongful act affects ... nationals, assurances of better protection of persons and property' (ILC, commentary to Article 30 ASR, para. 12; YbILC 2001, vol. II/2, 91), they come into play notably where breaches have been repeated and systematic.

¹³⁹ PCIJ, *Chorzów Factory case*, Ser. A, No. 9, 47.

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tion is designed to ‘re-establish the situation which existed before the wrongful act was committed’. With respect to obligations arising under the Genocide Convention, this might, e.g., involve the return of forcibly transferred children or the rescinding of national amnesty laws covering genocide.¹⁴⁰ As clarified by Article 36 ASR, *compensation* is designed to remedy damages that can be financially assessed and that cannot be made good by way of restitution. As such, it would notably cover losses resulting from acts of genocide as prescribed by Article II. Finally, pursuant to Article 37, *satisfaction* is the appropriate form of reparation to ‘wipe out’ non-material damage resulting from wrongful conduct. This can take the form of an apology, of guarantees against future breaches, or of an inquiry into the causes of a breach.¹⁴¹ Very frequently, the ICJ has considered its own declaratory judgment itself to amount to satisfaction.¹⁴²

As appears from the illustrations given in the preceding paragraph, the ICJ’s 53 jurisprudence provides rather little guidance on the specific content of remedies for breaches of the Convention. This reflects the fact that despite the considerable number of cases instituted under Article IX, the Court, as of today, has only upheld applicants’ claims on the merits in one single case, namely the (*Bosnian*) *Genocide case*. In addressing remedies, the Court was guided by the ILC’s Articles on State Responsibility. In pronouncing on the remedies owed for the particular breach found to have taken place in that case – viz. failure to prevent and punish genocide – its approach however was noteworthy: in particular the FRY’s failure to prevent genocide from occurring did not trigger a duty to make financial compensation for the losses.¹⁴³ In the view of the Court, as it had not been shown that through active conduct, the FRY could have stopped the genocide at Srebrenica, there was no ‘causal nexus between the Respondent’s violation of its obligation of prevention and the damage resulting from the genocide’; hence ‘financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide’.¹⁴⁴ The finding, while closely tied to the facts of the case, may suggest that where states violate their duty to prevent genocide, tangible remedies may be difficult to obtain. By contrast, in dealing with the failure to punish suspected *génocidaires*, the Court was more specific, demanding, in the *dispositif*, that Serbia ‘transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and ... co-operate fully with that Tribunal’.¹⁴⁵

Finally, it is worth noting that even where ICJ judgments obtained on the basis of 54 Article IX order remedies like restitution or compensation, they are typically declaratory: the Court decides that a particular remedy is owed. Unlike in domestic systems of judicial procedure, the ICJ Statute sets up no institutional mechanisms for the execution of judgments. Under Article 94 para. 2 of the UN Charter, the UN

¹⁴⁰ For further examples, see the ILC’s commentary to Article 35 ASR (YbILC 2001, vol. II/2, 96–8).

¹⁴¹ See the ILC’s commentary to Article 37 ASR for details (YbILC 2001, vol. II/2, 105–7).

¹⁴² See e.g. *Corfu Channel case*, ICJ Reports 1949, 4, 35–6; and (for proceedings under Article IX), *Bosnian Genocide case* (merits), ICJ Reports 2007, 43, para. 463.

¹⁴³ *Bosnian Genocide case*, ICJ Reports 2007, 43, paras. 461–2.

¹⁴⁴ *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 462.

¹⁴⁵ *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 471(8).

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Security Council can enforce judgments,¹⁴⁶ but it has so far not made use of this potential. Compliance with ICJ judgments therefore is a matter largely left to the parties, or to international pressure. Nevertheless, compliance only exceptionally is a problem as in most cases states have accepted adverse judgments by the Court.¹⁴⁷ In the case of Article IX, the finding that a particular state has violated the Genocide Convention will carry a particular weight.

D. Concluding observations

55 Article IX is a central element in the Convention's enforcement regime. It reflects the Convention's origins in an era in which provisions for inter-state dispute settlement before the ICJ were considered the norm. Were the Convention to be negotiated today, it is unlikely that states should agree on an enforcement system relying exclusively on inter-state enforcement, and placing so much emphasis on the ICJ. Concerns about state sovereignty, and too powerful a role for the ICJ, are reflected in the large number of reservations made against Article IX. In practice, parties to the Convention have not made frequent use of Article IX; however that may be about to change. In the first two decades since its entry into force, no cases were brought under the provision. Since then, the provision has been used, but practice shows that cases relating to genocide – at least where breaches of Article I are alleged – pose particular challenges. In the one case that has been decided on the merits, the ICJ rendered a balanced judgment; however the circumstances of the proceedings have affected the ICJ's impact as a dispute settler. Experience so far suggests that, contrary to what Article IX may suggest, disputes relating to genocide are in practice addressed 'out of court'; while the ICJ can get involved in the dispute settlement process at a later stage. By contrast, even in the absence of a regular jurisprudence, the ICJ – through cases brought under Article IX – has been able to contribute in important measure to the interpretation and clarification of the Convention's provisions. The *Bosnian Genocide case* in particular has shown it to be a rather important 'agent of legal development'¹⁴⁸ of the Convention's rules. Its pronouncements, though formally binding only *inter partes*, have become part of the wider interpretative process and enjoy considerable authority. This indirect effect may be as important as the Court's role as a dispute settler.

¹⁴⁶ Article 94, para. 2 provides as follows: 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.'

¹⁴⁷ For much more on this see Schulte, Compliance with ICJ Decisions; Oellers-Frahm, in: Zimmermann/Tomuschat/Oellers-Frahm/Tams, Statute of the ICJ (2nd ed.), Article 94, 186.

¹⁴⁸ See the title of Sir Franklin Berman's contribution to Tams/Sloan, Development of Int'l Law by the ICJ, 7.