Leiden Journal of International Law (2015), 28, pp. 893–897
 doi:10.1017/S0922156515000473

Balkanizing Jurisdiction: Reflections on Article IX of the Genocide Convention in *Croatia* v. *Serbia*

PAYAM AKHAVAN*

Abstract
When it first encountered the Genocide Convention in its 1951 Advisory Opinion, the International Court of Justice recognized that the treaty reflected the 'most elementary principles of morality'. Its provisions were to be read broadly, in light of the Convention's transcendent object and purpose. This expansive approach stands in contrast with the narrow interpretation of Article IX in the recent Judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* case. This article is a commentary on the retroactive obligation to punish genocide under the Convention with regard to acts occurring prior to its entry into force for that state. It concludes that the Court's narrow interpretation of its jurisdiction *ratione temporis* raises wider questions for its contemporary jurisprudence, namely, whether it will interpret human rights treaties enshrining fundamental values any differently than other international instruments.

Key words
Article IX; Croatia; genocide; ICJ; Serbia

When the International Court of Justice (ICJ) first encountered the Genocide Convention in its 1951 Advisory Opinion, it had been just three years since its adoption in 1948 by the UN General Assembly. It was an unprecedented treaty, revolutionary by the standards of the time, that together with the Universal Declaration of Human Rights marked a dramatic shift from a 'state-centric' to a 'human-centric' conception of international law. Seizing this historic post-war moment, the Court proclaimed that the principles contained in this new treaty 'are recognized by civilized nations as binding on States, even without any conventional obligation'.[1] In the shadow of the Holocaust, the Court recognized its 'purely humanitarian and civilizing purpose', and observed that its object is on the one hand 'to safeguard the very existence of certain human groups' and on the other 'to confirm and endorse the most elementary principles of morality'.[2] In the context of treaty interpretation, the Court emphasized that the Convention reflected 'a common interest' rather than 'the maintenance of a perfect contractual balance between rights and duties' of individual states, such

* Professor of International Law, McGill University and Visiting Fellow, Oxford University [payam.akhavan@mcgill.ca].

1 *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, 28 May 1951, [1951] ICJ 12.

2 Ibid.

that '[t]he high ideals which inspired the Convention provide ... the foundation and measure of all its provisions'.[3] This included the *clause compromissoire* under Article IX. The Court's logic was presumably that 'all its provisions' should be interpreted in a broad rather than restrictive fashion, in light of the Convention's transcendent object and purpose.

The Court's expansive approach in the Advisory Opinion of 1951 stands in marked contrast with the rather narrow interpretation of Article IX in its recent 3 February 2015 Judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (Judgment). The central question on jurisdiction in that case was whether the Convention applied to acts prior to 27 April 1992 when the Federal Republic of Yugoslavia (FRY) became a party to the Convention. In its earlier 2008 Judgment on Preliminary Objections, the Court had held 'that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*'.[4] At the merits stage, however, the Court noted that:

> the absence of a temporal limitation in Article IX is not without significance but it is not, in itself, sufficient to establish jurisdiction over that part of Croatia's claim which relates to events said to have occurred before 27 April 1992.

It emphasized that 'Article IX is not a general provision for the settlement of disputes' such that its temporal scope 'is necessarily linked to the temporal scope of the other provisions of the Genocide Convention'.[5] In answering the question of retroactive application, the Court observed that under Article I of the Convention, state parties undertake both 'to prevent and to punish' the crime of genocide, and concluded that:

> a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented. Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, thus points clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. Nothing in the text of the Genocide Convention or the *travaux préparatoires* suggests a different conclusion.[6]

The 'logic' that state obligations 'to prevent' cannot apply retroactively is persuasive. However, as the Court recognized, '[t]here is no similar logical barrier to a treaty imposing upon a State an obligation to punish acts which took place before that treaty came into force for that State'.[7] It pointed to the example of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[8] providing in Article 1 that it applies to the crimes specified therein 'irrespective of the date of their commission'. It concluded however that because '[t]here

3 Ibid., p. 23.
4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412, para. 123.
5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, para. 93 [hereinafter *Croatia v. Serbia* Judgment].
6 Ibid., para. 95.
7 Ibid., para. 96.
8 754 UNTS 73.

https://doi.org/10.1017/S0922156515000473 Published online by Cambridge University Press

is no comparable provision in the Genocide Convention',[9] retroactive application is precluded. In support of this conclusion, it noted furthermore that '[t]here is no indication that the Convention was intended to require States to enact retroactive legislation' to punish acts of genocide.[10]

This reasoning, however, is not entirely persuasive. It is well established, for instance, that comparable obligations to protect the 'right to life' in human rights treaties – such as the European Convention on Human Rights – apply to acts which took place prior to its entry into force for a state party, even absent an express provision to this effect. In the recent *Case of Janowiec and Others* v. *Russia*, the Grand Chamber of the European Court of Human Rights confirmed the settled principle that 'the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty capable of binding the State even when the death took place before the critical date'[11] when the European Convention on Human Rights entered into force for that state. There is no reason in principle why a similar 'separate and autonomous duty' to investigate could not apply to the obligation 'to punish' genocide under the Genocide Convention with regard to facts occurring prior to the critical date on which a state became bound by that obligation.

The ICJ's reference to the Convention's *travaux préparatoires* in support of the view that the obligation 'to punish' is limited to 'future' acts [i.e. after entry into force of the Convention for a State] is also inconclusive. The Court correctly observed that

> [t]he negotiating history of the Convention ... suggests that the duty to punish acts of genocide, like the other substantive provisions of the Convention, was intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past.[12]

This exclusion of retroactivity, however, relates to the *nullem crimen sine lege principle* and not to subsequent commission of genocide occurring prior to the critical date of the Convention's entry into force for a particular state. State representatives' statements by state representatives on 'future' punishment of genocide referred to 1948 as the critical date – i.e. when genocide was formally recognized as a crime under international law – and not the date on which a state became party to the Convention. It is apparent that the issue on the delegates' minds at that time was the unprecedented recognition of crimes against humanity – presaging and 'belonging to the same *genus* as genocide'[13] – in the 1945 Statute of the International Military Tribunal at Nuremberg. Absent either conventional or customary law, the introduction of this new crime was justified by reference to 'general principles' that could be 'extrapolated from the unanimous condemnation in domestic legal systems of homicide and some lesser forms of persecutions'.[14] Perhaps this helps explain the Court's

9 Judgment, para. 96.
10 Ibid.
11 *Case of Janowiec and Others v. Russia* (ECHR), *Application Nos. 55508/07 and 29520/09, Judgment* (21 October 2013), para. 131.
12 *Croatia v. Serbia* Judgment, *supra* note 5, para. 97.
13 *Prosecutor v. Kupreškić*, Judgement, Case No. IT-95–16-T, T. Ch., 14 January 2000, para. 636.
14 R. S. Clark, 'Crimes against Humanity', in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990), at 194.

https://doi.org/10.1017/S0922156515000473 Published online by Cambridge University Press

invocation of 'general principles' in regard to genocide in its 1951 Advisory Opinion, as mentioned above. That states in 1948 were concerned with the retroactive application of crimes against humanity – and by extension, genocide – is confirmed by the *travaux préparatoires* on Article 15(2) of the 1966 International Covenant on Civil and Political Rights,[15] indicating that inclusion of 'general principles of law' as a basis for satisfying the *nullem crimen sine lege* principle was primarily intended to 'eliminate any doubts regarding the legality of the judgement rendered by the Nuremberg and Tokyo Tribunals'.[16] Thus, the Court's observation that the negotiating history contains 'no suggestion that the Convention under consideration was intended to impose an obligation on States to punish acts of genocide committed in the past'[17] relates more properly to retroactive application of criminal law to events prior to 1948 rather than the retroactive scope of treaty obligations *ratione temporis*.

Having concluded that the substantive provisions of the Genocide Convention are not retroactive, the Court went on to consider two alternative arguments that supported the premise that a dispute over acts said to have occurred prior to the critical date nevertheless fall within its jurisdiction. The first alternative argument was based on Article 10(2) of the ILC Articles on State Responsibility, which provides that

> [t]he conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

Croatia had argued that acts 'committed by various [Serbian] armed groups' on Croatian territory 'were attributable to a "Greater Serbia" movement' and thus were attributable to the FRY irrespective of the date on which it emerged as a 'new State'. In rejecting that contention, the Court held that:

> even if Article 10(2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".[18]

This conclusion is rather curious because it is not clear what other purpose this provision could conceivably serve if 'it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State'. Furthermore, this view is inconsistent with jurisprudence, such as the *Bolívar Railway Company* claim, recognizing that states are responsible for conduct arising from 'a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result'.[19]

15 999 UNTS 171.
16 M. Bossuyt, *Guide to the Travaux Préparatoires of the ICCPR* (1987), at 331.
17 *Croatia v. Serbia* Judgment, *supra* note 5, para. 97.
18 Ibid., para. 104.
19 *Bolívar Railway Company* claim, UNRIAA, Vol. IX, 445, at 453 (1903).

https://doi.org/10.1017/S0922156515000473 Published online by Cambridge University Press

It is noteworthy that notwithstanding these rather restrictive interpretations of Article IX, the Court ultimately found that it had jurisdiction to consider Croatia's entire case, whether before or after the critical date of 27 April 1992, based on the second alternative argument that the FRY succeeded to the obligations of the Socialist Federal Republic of Yugoslavia (SFRY). The Court noted that its conclusion regarding jurisdiction *ratione temporis* under Article IX does not apply to the dispute over 'whether the SFRY was responsible for acts of genocide allegedly committed when the SFRY was a party to the Convention . . . '.[20] In finding that it had jurisdiction 'to rule upon the entirety of Croatia's claim', it distinguished the merits of the dispute, emphasizing that:

> it is not necessary to decide whether the FRY, and therefore Serbia, actually succeeded to any responsibility that might have been incurred by the SFRY, any more than it is necessary to decide whether acts contrary to the Genocide Convention took place before 27 April 1992 or, if they did, to whom those acts were attributable.[21]

The Court, however, never reached the question of FRY's succession to the SFRY because it found on the merits that acts of genocide had not been established.[22]

The Judgment's findings on jurisdiction would perhaps be less remarkable if they applied to an instrument other than the Genocide Convention. As the Court observed in its 1951 Advisory Opinion when it first encountered the Convention, it is distinguished from other treaties because it reflects 'a common interest' rather than 'the maintenance of a perfect contractual balance between rights and duties' of individual states, and that in interpreting its provisions, including Article IX, '[t]he high ideals which inspired the Convention provide . . . the foundation and measure of all its provisions'.[23] The Court's narrow interpretation of its jurisdiction *ratione temporis*, including its exclusion of 'continuing situations' such as the 'autonomous duty to investigate' at the time of the critical date, and negation of the legal effect of Article 10(2) of the ILC Articles on State Responsibility, raises broader questions for its contemporary jurisprudence; namely, whether, for better or worse, it will interpret human rights treaties[24] enshrining peremptory norms any differently than other international instruments.

---

20 *Croatia v. Serbia* Judgment, *supra* note 5, para. 115.
21 Ibid., para. 117.
22 See articles in this Symposium on *mens rea* and *actus reus*.
23 *Reservations Advisory Opinion* (1951), *supra* note 1, at 23.
24 It is recognized that the Genocide Convention is not a human rights treaty *stricto sensu* in so far as it applies state responsibility in regard to the prevention and punishment of an international crime. For purposes of interpretation however, it shares the communitarian and humanitarian object and purpose that is characteristic of human rights treaties.