INDIVIDUAL CRIMINAL LIABILITY AND COLLECTIVE CIVIL RESPONSIBILITY: DO THEY REINFORCE OR CONTRADICT ONE ANOTHER?

THOMAS FRANCK*

Article IX of the Genocide Convention[1] provides:

> 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.

Disputes . . . relating to the responsibility of a state for genocide . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. This provision of the Genocide Convention, inspired by the Nuremberg trials, was one of the great innovations of the early years following World War II. But laws evolve, and the Genocide Convention is almost fifty-five years old. Much has happened. Genocide, once thought to have been banished forever from the human capacity for evil, has reasserted itself as a deliberately chosen instrument for the conduct of politics: in Rwanda, Croatia, Bosnia and, probably, Dafur.

It can be argued that the responsibility of states that commit genocide has been mitigated by events that have occurred since the Genocide Convention entered into force. Chief among these is the momentous development of a criminal jurisdiction for the punishment of certain international crimes, including genocide. Now that we have the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR), and the International Criminal Court (ICC), each with an extensive investigatory and prosecutorial capability, is it really still useful and necessary for the International Court of Justice (ICJ) to play its determinative role under Article IX of the Genocide Convention?

---

* Murray and Ida Becker Professor of Law Emeritus, New York University School of Law.

1. Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Jan. 12, 1951, 78 U.N.T.S. 277.

This very question was raised by two judges of the ICJ in 1996, during the *preliminary objections* phase of the Genocide Case brought by Bosnia against the former Yugosloavia, in which I acted as counsel for Bosnia. Permit me to share with you some of the observations I made to the Court last April. Since the pleadings have closed, but the Court has yet to render its opinion, it should not be amiss for me to place these views before you as an issue of law far transcending the merits of the case in which they were raised.

In a Joint Declaration appended to an earlier, that is, 1996, decision of the Court pertaining to its jurisdiction in the Genocide Case, Judges Shi and Vereschchetin discussed the creation and mandates of the ad hoc ICTY and the ICC, and the bearing of those developments on this case. They said, in part:

> The determination of the international community to bring *individual perpetrators* of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action. . . . Therefore, in our view, it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the applicant has raised. . . .[2]

As to why their Court may no longer be the proper venue, the two judges cited a then-recent article by Britain's Chief Prosecutor at the Nuremberg War Crimes Trials, Sir Hartley Shawcross. They quoted approvingly his recent opinion that: "There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs."[3]

Does the ICJ, in discharging its responsibility under Article IX to establish the "responsibility" of a state for genocide, risk trenching on the jurisdiction now assigned to the ICTY and ICC? And does it risk perpetuating a notion of "collective guilt"?

First, as to the matter of duplication of functions. Quite clearly, the drafters of the Genocide Convention intended to provide both for punishment of individuals who participate in a genocidal enterprise and for the responsibility of states which put the machinery and resources of the nation at the disposal of such an enterprise. Articles IV, V and VI of

---

2. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1996 I.C.J. 595, 632 (July 11) (Joint Declaration of Judges Shi and Vereschetin) (emphasis in original).

3. Hartley Shawcross, *Let the Tribunal do its Job*, N.Y. TIMES, May 22, 1996, at A17.

the Convention establish the modalities for punishing individual perpetrators, while Article IX concurrently establishes the means by which the ICJ will attribute state responsibility. Evidently, the drafters saw the two remedies as distinct, unduplicative and both necessary to an effective regime for ridding the world of the scourge of genocide.

The creation of an international criminal process for addressing individual criminal responsibility in no way alters the importance of the ICJ's playing its assigned role in addressing state responsibility for genocide. It merely realizes the development forseen by the Convention in Article VI, which envisions the creation of "an international penal tribunal" for the trial of "persons" as an alternative to such persons' trial "by a competent tribunal of the State in the territory of which the act was committed[.]"[4] If anything, the Convention expected the jurisdiction of national criminal courts to be supplemented or replaced by international criminal tribunals when it came to the trial of individuals, but certainly it envisioned no comparable effect on the jurisdiction, or the importance, of this Court in making determinations of state responsibility.

Is such state responsibility tantamount to a determination of "collective guilt"? It is undisputable that, to blame an entire people, the population of the state, for the acts of the state would be to assert a discredited notion of "collective guilt." We all celebrate the emergence of a human rights regime that recognizes the rights of the individual as distinct from, and sometimes even in opposition to, those of the state. We recognize and celebrate the emergence of a parallel system of personal legal accountability. And we should, therefore, agree that, in this modern age of individual rights and duties, it is untenable to blame an entire *polis*–the whole citizenry–for the wrongs committed *either* by individual criminals *or* by a criminal government.

Obviously, it would be unconscionable to resuscitate the hoary notions of collective guilt, the guilt of all Serbs or all Rwandan Hutus. Collective guilt is the discredited detritus of an age when individuals were legally indistinguishable from, and mere serfs of, their ruler: the king or state. But, just as obviously, even in the new era of individual rights and responsibilities, the state has not ceased to exist. It is, and it acts, and it must be held accountable. When the state commits a great evil, it cannot be allowed to escape responsibility by the punishment of a few leaders. As pointed out in *Oppenheim*, acts committed by individuals as agents of the state constitute quite separate wrongs of the principal and the agent. Those

4. *Supra* note 1, art. 6.

acts are directly, and not merely vicariously attributable to the state which authorized, permitted, or failed to take reasonable measures to prevent or punish those acts.[5] These "preventive and remedial obligations of the state . . . are themselves obligations for the breach of which . . . the state bears direct responsibility."[6]

In this way modern international law distinguishes between the criminal acts of a person—whether prime minister, field commander, prison capo, or leader of a private militia—and the failure of a state to live up to its solemn legal obligations to other states. Although claims in both circumstances may proceed from the same facts, they involve the breach of quite separate obligations. And there must be separate remedies for both kinds of wrongs.

Thus, in holding a state accountable under Article IX of the Convention, there can be no question of collective guilt, and none, either, of double jeopardy in the law that is meant to constrain genocide.

Behind these somewhat technical legal issues, however, there is a larger moral question: Is it *fair* that the entire state be held accountable for the actions initiated by its leaders and executed by its organs?

If Article IX were to be applied by the ICJ against a state, would such a finding of state responsibility not be likely to impose an unfair burden on all its citizens, regardless of whether they did, or did not, support or tolerate the acts of the regime that had violated to prohibition against genocide?

In response, it is once more necessary to emphasize that a finding of state responsibility is not tantamount to a determination of the people's collective guilt. Clearly, there were Serbs, as also there were Hutus, who understood the enormity of what was being done in their name, and who opposed the regime's genocidal actions. But, as Professor Michael Walzer, the eminent Princeton philosopher, has pointed out, even though "it cannot be said that every citizen is the author of every state policy," nevertheless, "every one of them can rightly be called to account." He explains that,

> citizenship is common destiny, and no one, not even [the regime's] opponents . . . can escape the effect of a bad regime, an ambitious or fanatic leadership, or an overreaching nationalism. But if men and women must accept this destiny, they can sometimes do so with a good conscience, for the acceptance says nothing about their

5. LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 501–02 (Sir Robert Jennings & Sir Arthur Watts eds., 1992) (1905).

6. *Id*. at 502.

> individual responsibility. The distribution of costs is not the distribution of guilt.[7]

The distribution of costs, not the distribution of guilt, is what Article IX is about. It is both fair and right that the citizenry of every state that visits serious injury on a people should have to bear at least significant parts of the cost of compensating and restituting the victims.

That act of sharing the burden of reconstituting the victim is, in itself, good enough reason not to abandon the concept of state responsibility for genocide merely because individuals may also be held accountable in another international tribunal. That sharing is an essential part of the healing process.

There is, however, another reason why state responsibility must not be allowed to fall into desuetude.

In the 1951 *Reservations* advisory opinion, the ICJ had observed that the Genocide Convention, more than any other treaty, had been "adopted for a purely humanitarian and civilizing purpose." In other words, the Convention has a hortatory function. That "civilizing purpose" is to teach all persons, everywhere, that they cannot escape responsibility for egregious wrongs committed in their name. In this sense, the role of the ICJ in carrying out the function assigned it by the Genocide Convention is an essential part of the answer to some undesired side effects of the growth of individual criminal responsibility. These are described by Professor Mark Drumbl, who points out that "the deliberate choice by international criminal justice institutions to selectively blame a handful of individuals . . . erases . . . the involvement of ordinary [persons] . . . [and, thus] leads to a retributive shortfall, insofar as only a few people receive their just deserts, while many powerful states and organizations avoid accountability."[8]

State responsibility, in respect to genocide, speaks not of collective guilt but of the obligation of a state to share in remedying the consequences of its violation of international law. It summons the people of the victim state and the victimizer state to work together to ameliorate the damage done, to display a new determination to work together, to rebuild, to reconstitute. As the Permanent Court of International Justice said in the *merits phase*, *Factory at Chorzow* case:[9] the essential principle

---

7. MICHAEL WALZER, JUST AND UNJUST WARS 297 (Basic Books 1977).

8. Mark A. Drumbl, *Sands: From Nuremberg to The Hague* (book rev.), 103 MICH. L. REV. 1295, 1314 (2005).

9. The Factory at Chorzon (Germany v. Poland) 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

contained in the actual notion of an illegal act—a principle which seems to be established by arbitral tribunals—is "that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[10]

It is a shared determination to "wipe-out all the consequences of the illegal act" that, alone, could usher in a new era in the places where genocide has occurred. Article IX can promote that determination.

And then there is the future. In shaping it, the law can play several important "civilizing" roles. It can summon persons everywhere to display the courage to oppose criminal activities by their own governments. It can proclaim that a nation's tolerance of, or complicity in, egregiously illegal conduct cannot be expiated by punishing a few notorious leaders. It can ensure that the burdens—and, under Article IX, they are civil, not criminal—of reconstituting that which was illegally destroyed is shared and does not come to rest exclusively on the victims.

Important steps forward have been taken by the introduction of a functional notion of personal criminal responsibility, implemented by a legitimate international criminal judiciary. Those developments have encouraged us to hope that our generation has made significant progress out of the despondency of the past. To quote ICTY Judge Theodor Meron, speaking at Sarajevo as President of that tribunal,

> Those who drafted, on the heels of the Second World War and the Holocaust, the Convention for the Prevention and Punishment of the Crime of Genocide, were animated by the desire to ensure that the horror of a state-organized deliberate and massive murder of a group of people purely because of their identity will never recur in the history of mankind.[11]

What a terrible bargain it would turn out to be if personal criminal liability would have been achieved at the cost of state responsibility. And what a misunderstanding of the requisites of justice.

In modern international law, the state no longer owns the individual; rather, the individuals collectively own the state. With the privilege of that new status, the people who constitute the modern state must willingly accept their share in state responsibility, not try to shirk it. When a state deliberately leads, helps, trains, arms, clothes, pays and inspires those who

10. *Id.* at 40.

11. Press Release, Address by ICTY President Theodor Meron, at Protucari Memorial Cemetary, U.N. Doc. CT/P.I.S./860-e (June 23, 2004).

do commit genocide, then, while the passive citizenry does not share the perpetrators' guilt, it does share responsibility for the enormity of what was done in the citizenry's name *and the citizens' responsibility to help make amends*. Only thus can the law hope to end the recurring nightmare of recrimination and revenge that plagues the scenes of genocide.

In sum: genocide is a hydra-headed monster. It warrants a multi-faceted response. The heralded advent of individual liability should not cloud our understanding of the continued importance of state responsibility.