

ZOOM IN

The question:

The latest wave of genocide cases before the International Court of Justice: Unpacking substantive and procedural issues

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It may sound way too bold to claim that the 1948 Genocide Convention ('the Convention') has served, directly or indirectly, as the catalyst for fundamental change and development of systemic questions of international law. Yet, if one looks at the handful of cases in which the International Court of Justice ('the Court') dealt with the Convention, a clear pattern emerges. From the very first (advisory) case where the Convention ended up before the Court,¹ passing through cases dismissed for several reasons,² and getting to the former Yugoslavia cases,³ one cannot but recognize that crucial issues have always been at stake: reservations to treaties, essential questions of State responsibility, such as attribution of conduct or the relationship between individual and State responsibility, the interplay between the Court and other international tribunals, and so on. While this may be explained in part by chance, there is no doubt that,

¹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15.

² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6; *Legality of Use of Force (Yugoslavia v Belgium)* (Provisional Measures) [1999] ICJ Rep 124.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595; *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43; *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412; *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3.

far from being merely a ‘judicial monument to the atrocities of the past’,⁴ the Convention also serves as a driver of change.

It is then not surprising that also the most recent genocide cases on the Court’s docket⁵ are proving to be extremely promising in terms of fundamental questions they raise, perhaps even more so than past cases, as they arise within a context of significant evolution in both State and Court practice. Most of these questions lie at the intersection between substance and procedure, and it does not feel excessive to say that the way these questions are – and will be – addressed by the relevant actors involved in the process of interpretation and application of the Convention before the Court will resonate in the law and practice to come.

By way of example, one may refer to the question of the role of States acting as *omnes* in the context of recent genocide proceedings. The Court has already provided important insights as to this question, driven by applications filed by non-injured States and/or by third-States intervention, which, as known, have proliferated unprecedentedly in the context of such proceedings. Aside from the issue of standing before the Court, the practice resulting from the most recent cases is likely to contribute significantly to the clarification of many issues surrounding the legal implications of obligations *erga omnes partes*.

Other questions relate more specifically to the Court’s management of genocide cases, especially when requests for provisional measures require an urgent reaction, which must be balanced with cautious approach to avoid prejudging issues related to the merits. The *South Africa v Israel* case, among others, epitomizes the need for such a balance, as reflected in the provisional measures proceedings in the case so far.

The procedural questions relating to incidental proceedings intersect with more substantive issues, such as the assessment of the *mens rea*, the relationship between State and individual responsibility, the question of

⁴ WA Schabas, ‘Genocide’ (2023) Max Planck Encyclopedia of Public International Law para 42.

⁵ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*; *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)*.



complicity, as well as, more generally, the interplay between international humanitarian law and the Genocide Convention. Indeed, even if the pending genocide cases are still on a preliminary stage, due to the most recent developments in the Court's case law on procedural issues – think for example of the 'plausibility' requirement for the prescription of provisional measures – the abovementioned substantive issues inevitably surfaced, or are likely to surface, also at this stage.

It is precisely against the background of the substantive and procedural issues raised by the latest wave of genocide cases before the Court that QIL asked five international legal experts (Béatrice Bonafé, Juliette McIntyre, Roger O' Keefe, Helen Duffy and Giulia Pinzauti) to reflect on the potential of these cases, especially in terms of the evolution they could bring about in addressing fundamental questions of international law.