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**Legal and judicial systems and the prevention and punishment of  
genocide: Where are we today?**

**Vera Gowlland-Debbas**

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### ***Introduction***

I wish to focus on the prevention and punishment of genocide from the perspective of the International Court of Justice and the substantial contribution it has made to date in the clarification of the status, concept and scope of the prohibition of genocide, as laid down in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, as well as the implementation of the latter.

It is important to begin by stressing the Court's particular position within the UN system and the world community. There is no need to remind you that the Court has a dual role as both principal judicial organ of the UN and world court. The fact that its Statute forms an integral part of the Charter, means that the Court must constantly seek to promote the Charter's general purposes and principles, that it occupies an important place in the Charter's scheme for maintenance of international peace and security, that while retaining its judicial independence it must seek to cooperate with the political organs in giving effect to their decisions, and that even when acting as a World Court of general competence, it must simultaneously as it services the litigants, service also the United Nations, and – through the UN – the international community as a whole. Far from losing its business in the face of proliferation of other specialised tribunals, it has found itself regularly being enlisted in the process of shaping a constitutional law of the international community. Moreover, while not a human rights court it has been solicited in a growing number of cases involving inter alia serious violations of human rights such as the 2005 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case or the pending case which Georgia has brought against the Russian Federation on

the *Application of the International Convention on the Elimination of Racial Discrimination*. More specifically on genocide, the Court's mechanisms lie at the heart of Article IX which allows a State party to refer a dispute over interpretation or application of the Convention to it. The first such human rights case to be brought before the ICJ was the Advisory Opinion on Reservations to the Genocide Convention in 1951. It has subsequently had to tackle the question of genocide in the former Yugoslavia, both in the *case concerning the legality of the threat or Use of Force* which Yugoslavia brought against 10 NATO countries following on the Kosovo intervention, as well as the case which Bosnia brought against Yugoslavia *Application of the Genocide Convention* case which dragged on from 1993 in a first judgment of the Court right through to the ICJ's final and crucial judgment in 2007 with some extraordinary ramifications along the way.

What has been the record of the Court.

***I The Court has demonstrated the relationship between morality and international law***

As the ICJ stated in the *South West Africa cases*:

" The Court (as a court of law) ...can take account of moral principles only in so far as these are given a sufficient expression in legal form.<sup>1</sup> Morality can be taken into only where these can be seen as an integral element of the international legal order. As Judge Tanaka stated: "The historical development of law demonstrates the continual process of the cultural enrichment of the legal order by taking into consideration values or interests which had previously been excluded from the sphere of law." And indeed, there has been an evolution of the international legal system which has seen the creation and expansion of a domain of general or public interest, and a hierarchization of rules due to a growing value-oriented international law. Thus a core of fundamental norms of international law whose superiority lie in their protection of the fundamental interests of the international community have responded to the current imperatives of our globalised world for security, justice, a minimal ethical core, as well as for sheer survival. In its 1951 advisory opinion, the ICJ stated, in words to be reiterated in part in the later *Application of the Genocide Convention* case: "The origins of the (Genocide) Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law'

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<sup>1</sup>ICJ Rep.1966, *South West Africa cases* p.34.

involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations....The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. "<sup>2</sup> The Genocide Convention was also seen as endorsing in legal form "elementary principles of morality"<sup>3</sup>. As Judge Lauterpacht once said referring to such overriding principles of international law, these "may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations....."<sup>4</sup>

Hence we have seen secreted among other concepts that of *jus cogens* which serves to remove from States their traditional right to derogate by a treaty from a fundamental norm of international law on pain of nullity of the treaty, and that of *erga omnes* obligations which entitles every State to invoke their violation but also imposes on them a duty to protect them, as well as introducing the notion of aggravated responsibility whether State or international criminal responsibility of individuals. While there is great indeterminacy in the content of such an international public policy this has been left to be operationalised in State and IO practice and in the jurisprudence of international tribunals.

Norms reflecting ethical values, such as the prohibition of genocide, nevertheless do not totally encompass their ethical or moral counterpart, for only some aspects have been given legal treatment. For example acts to be qualified as genocide must conform to certain conditions, including that of intent. This has led to some frustration, for example at the International Court of Justice's dismissal of the relevance of the Genocide Convention in the *Nuclear Weapons Advisory Opinion*, for as Judge Weeramantry stated in his dissent: "If the killing of human beings, in numbers ranging from a million to a billion, does not fall within the definition of genocide, one may well ask what will".<sup>5</sup>

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<sup>2</sup> *Reservations to the Genocide Convention*, ICJ Rep. 1951, p.23. See also ICJ Rep.1993, p.23.

<sup>3</sup> ICJ Rep.1951, p.23.

<sup>4</sup> (1953 II) Yearbook of the International Law Commission 155 .

<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, p.61; see also Dissenting Opinion of Judge Koroma, p.16.

***II The Court has underlined the special status of the norm prohibiting genocide in international law.***

First the ICJ has given voice to the concept of collective interest embedded in multilateral treaties having a humanitarian purpose for in "a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties...".<sup>6</sup> (*Reservations to the Genocide convention case*)

Second, Judge Lauterpacht in the *Application of the Genocide Convention case*, underlined that the prohibition of genocide "has generally been accepted as having the status not of an ordinary rule of international law but of jus cogens. Indeed, prohibition of genocide has long been regarded as one of the few undoubted examples of jus cogens."<sup>7</sup>

Third, the Court underlined the fact that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*<sup>8</sup> Because of the universal character of the condemnation of genocide and the nature of the treaty on Genocide which protected a collective interest, and the cooperation required between States to combat it, the obligation of each State to prevent and to punish the crime of genocide under Article I is not territorially limited by the Convention.

Fourthly, the Court and its individual judges have referred, in a variety of contexts, to the "international community as a whole", a concept usually equated to the community of states, but also seen as personified or represented by the United Nations.<sup>9</sup> And in the *Advisory Opinion on Reservations to the Genocide Convention*, the Court underlined the very important role played by the General Assembly in the

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<sup>6</sup>ICJ Rep.1951, p.23.

<sup>7</sup> ICJ Rep.1993, Separate Opinion, p.440.

<sup>8</sup> ICJ Rep.1996, para.31.

<sup>9</sup>ICJ Rep.1966, Dissenting Opinion of Judge Tanaka, p.270.

continuing protection of the Genocide Convention. The Court pointed out that “not only did the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States and that express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention. The existence of a procedure for the settlement of disputes, such as that provided by Article IX, did not exclude the Assembly’s right to request an advisory opinion. This had certain legal consequences. The Convention as one of the means of effectuating the human rights purposes of the UN Charter constituted a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention. As pointed out by certain authorities it has a “legal interest” independent of though in parallel with the contracting parties, in interpretation and implementation of the public interests reflected therein.<sup>10</sup>

### ***III The Court has elaborated on the content of the norm***

In the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections 1996)*<sup>11</sup> a number of important principles have been reiterated by the Court.

Firstly the applicability of the Genocide Convention *both in time of peace and in time of war*, as stated in Article I of the Convention, and irrespective of the nature of the conflict has been recalled. What is important to note, in view of the growing permeability between human rights and the law of armed conflict, is the clear existence of one particular form of arbitrary deprivation of life which lies at the intersection of human rights and humanitarian law.

Second, the Court confirmed in 1996 at the preliminary objections stage that the Genocide Convention covered not only individual but State responsibility for the

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<sup>10</sup> P. Weis, "The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties", (1967) 42 BYIL 470-472, pp.49-50, who refers to the UN as "a party in interest". *Ibid.*, p.57.

<sup>11</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Provisional Measures)*, ICJ Rep. 1993 (Preliminary Objections), ICJ Rep.1996.

actual perpetration of acts of genocide and not just responsibility of the State to prevent or to punish it. In addition it broadly interpreted Article III as meaning that contracting States are also under the obligation to refrain from engaging in any of the types of conduct envisaged there, namely, conspiracy, direct and public incitement, attempt to commit genocide or complicity in genocide. Even though such categories were found in the framework of criminal law, “it would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State even though quite different in nature from criminal responsibility can be engaged through one of the acts, other than genocide itself”. Article IV does mention after all the commission of an act of genocide by “rulers” or “public officials.

Such concurrent responsibility of the state and individual is now accepted in a series of international crimes such as aggression, crimes against humanity, etc. and is reflected in the Rome Statute (Article 25(2) and Article 58 of the Articles on State Responsibility for International Wrongful Acts of the International Law Commission (ILC).

The Court was not saying of course that a State was criminally responsible. It will be recalled that Article 19 which spoke of State crimes was removed from the Articles on Responsibility.<sup>12</sup>

In the context of State responsibility, however, several problems arise.

a) how do we ascribe specific intent to a State. The Court has been criticized for insisting on the mens rea rather than looking for an overall state policy. A State can only commit genocide through the acts of its officials. The Court stated that mere knowledge was not enough, the perpetrators had to actually possess genocidal intent, i.e. intent to destroy a particular group as such in whole or in part, to actually achieve the results. The provisions of Articles II are peppered with such words as:

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<sup>12</sup> The ILC 1996 Draft Articles on State Responsibility provided in Article 19 (3c) that the commission of genocide, inter alia, gave rise to an aggravated form of responsibility, by constituting an international crime.

“deliberately” “intended” “inflicting” “imposing”, etc. They are by their very nature conscious, intentional or volitional acts – specific intent or *dolus specialis*. Moreover, the intent must be to destroy at least a substantial part of the particular group, that is a part significant enough to have an impact on the group as a whole, although can be within a geographically limited area. “The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group.”

The Court distinguished “ethnic cleansing” from genocide, although it may occur in parallel to acts of genocide.

In the *Legality of the Use of Force* in which Serbia brought a case against 10 NATO members, the Court underlined that mere use of force against another State did not constitute genocide and considered that NATO’s bombardments against Serbia did not demonstrate the necessary intent to destroy a national, ethnical, racial or religious group.

b) how was complicity to be defined? It defined complicity in the sense of the Convention which included the provision of means to enable or facilitate the commission of the crime; complicity in the context of the international law rules on state responsibility was equated to the “aid or assistance” furnished by one State for the commission of a wrongful act by another State. This could not be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.

c) What is the test of attribution of the acts of individuals to the State? The Court here insisted on a test it had already laid down in a previous case, that of *Nicaragua*, namely that the perpetrators conduct could be attributed to the Serbian state either because the perpetrators were state organs or if they were non-state actors, because their conduct could be attributed to Serbia because they acted on the instructions of, or under the direction or control of, the State concerned. Here the court departed from another test used by the ICTY, namely one of overall control.

On all these counts, the ICJ held in its Judgment of 2007 that Serbia was not responsible for committing genocide, nor for conspiracy, incitement or complicity in genocide, since although it made a finding that genocide had occurred at Srebrenica in July 1995, these acts were not attributable to the Serbian state, nor had Serbia knowledge of the intent of the forces of the Republika Srpska to perpetrate genocide.

#### ***IV The Court has elaborated on the implementation of the norm***

The most interesting aspect of the judgment of 2007 is the Court's elaboration of the obligation to prevent and the obligation to punish genocide under the Convention, under Article 1 of the Convention. These were two distinct obligations. Serbia was responsible for violating both in on the one hand failing to prevent the genocide in Srebrenic and on the other by not transferring Ratko Mladic who had been indicted for genocide to the ICTY and by its failure to cooperate with the Tribunal.

The general obligation to punish is realized by other provisions of the Convention which include:

a) The duty to prosecute imposed by Article VI which is the obligation to bring perpetrators to justice before domestic courts. This in contrast to Article 1 is subject to an express territorial limit, i.e. the duty to prosecute is on the state in the territory of which the genocide was committed. But the Court does not rule out a broader application of this duty when it concludes that the Convention "certainly does not prohibit States . . . from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed". Moreover, it has been pointed out that the Court does not necessarily exclude universal jurisdiction under general international law. Nor is excluded the duty on State Parties to arrest persons accused of genocide who are in their territory, even if the crime of which they are accused was committed outside it. Nor the possibility of extraditing suspected perpetrators as foreseen by Article VII. After all the punishment of genocide should be similar to that exercised over international crimes, such as war crimes and crimes against humanity. It is now accepted that there is such an obligation over certain core crimes such as torture or forced disappearances.

b) The obligation to cooperate with a competent international penal tribunal which

may have jurisdiction with regard to persons charged with genocide. Unlike the ICC the ICTY statute has primacy over national courts. . The Court also holds that ‘[T]he nature of the legal instrument by which such a court is established is without importance’,<sup>77</sup> with obvious reference to the ICTY established pursuant to a Security Council resolution under Chapter VII of the Charter.

As to the duty of preventing genocide, the Court points out that that obligation is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. Responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. The Court borrows here from the notion of “due diligence”. The Court refers to the capacity to influence effectively the action of persons likely to commit, or already committing genocide which depends on such factors as geographical distance, strength of political and other links between the State and the perpetrators. It is clear however that States may only act within the limits permitted by international law. This duty to prevent arises at the instant that the State learns of the existence of a serious risk that genocide will be committed.

The Court thus holds that the obligation to prevent does not require knowledge that genocide is occurring or is about to be perpetrated; it is sufficient for the relevant state to be aware of the risk of genocide.

The Court had already stated in its order on provisional measures of 8 April 1993 that the obligation to prevent involves ‘ positive obligations ’ ,<sup>31</sup> i.e., the obligation to do one’s best to ensure that such acts do not occur.

Also a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. According to the Articles on State Responsibility, it is only at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs ( Article 14, paragraph 3). Which begs the

question as to why it should not be possible to hold responsible a state which manifestly breached its obligation to prevent a violation of a peremptory norm of international law, even if the event was averted at the very brink owing to the intervention of third parties.

The Court, after noting that the FRY ‘was in a position of influence over the Bosnian Serbs’ and that it had been enjoined by the Court, in two Orders on provisional measures issued in 1993, to ensure that no genocide be committed, goes on to state that although it [the Court] has not found that the information available to the Belgrade authorities indicated as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it. It has been pointed out that the obligation to prevent not being territorially limited the Court substitutes the concept of jurisdiction with the vague notion of “capacity to effectively influence”.

Another preventive measure is the obligation in Article V, in which the Contracting Parties ‘undertake to enact ... the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III’ Prevention here is linked to punishment as deterrence.

The Convention also refers to prevention in Article VIII where it is said that any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide. In view of the potential paralysis of the Security Council, the General Assembly has an important role in peace maintenance and human rights which the Court in the *Wall* case has underlined and which the Court points out runs in parallel with that of the Security Council in view of the erosion of Article 12 in the practice of States. The General Assembly’s role is not reduced to that of condemnation. It can establish a fact-finding commission and even initiate the establishment of an ad hoc criminal tribunal or chamber along the lines of its action in setting-up the Cambodian one based on an agreement between Cambodia and the UN. In the case of Palestine, the General Assembly followed up its endorsement of the Court’s advisory opinion by establishing a register of damages to serve as a basis

for compensation. It has the competence to establish a peacekeeping force (see *Expenses* case) although it has not done so since the first operation in Suez UNEF. Under the Uniting for Peace Resolution the General Assembly could also recommend the use of force thereby authorizing or legitimizing such use along the lines of the Security Council. It has however never resorted to that part of the resolution.

At any rate, the Court stated that the obligation on each contracting state to prevent genocide is ‘ both normative and compelling ’, that ‘ it has its own scope ’, and the states parties were bound by the ‘ obligation to take such action as they can to prevent genocide from occurring ’.

One would have wanted more guidance on what is now in more general terms debated as the duty or responsibility to protect. Could one read into what the Court says about the duty to prevent a collective responsibility ’ of all states to impede the commission of genocide by another? The obligation of each and every State to prevent their flagrant violation was reiterated in the recent September 2005 General Assembly World Summit Outcome document, in which all States members of the United Nations pledged that: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means “to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”, and that “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by case basis should peaceful means be inadequate.” What indeed is the relationship between the duty to prevent and the responsibility to protect. There have also been proposals for SC reform, urging the permanent members not to cast their veto when it comes to genocide.

Apart from the duty to prevent, there is under the Articles on State Responsibility, an obligation on States to cooperate to bring to an end through lawful means a serious breach by a State of a peremptory norm of general international law nor to render aid or assistance in maintaining that situation. At the same time, the Court has underlined not a right, but a *duty*, of third States under customary international law to react to breaches of certain obligations. In the context of humanitarian law, the ICJ, in *Nicaragua*, held that there was an obligation on the United States under common

Article I of the Geneva Conventions, not only to "respect" the Conventions, but "even 'to ensure respect' for them 'in all circumstances'". Thus the Court in the *Wall* case called on all States not to recognize or to assist in maintaining the illegal situation created by the construction of a wall in the occupied Palestinian territory.

#### **V Who can bring a case to the International Court of Justice**

Article IX is the dispute settlement clause which entitles a State to bring a case before the ICJ. in regard to disputes arising from the application or interpretation of these instruments including the question of the responsibility of a State for genocide. This was the basis on which the genocide cases were brought before the Court.

The fact that the Convention embeds a collective interest means that it bestows a right on any State party, apart from the one directly injured one, to invoke a violation of the treaty.

But it is clear that in the absence of a jurisdictional link, claims relating to obligations *erga omnes* could not be accommodated within the Court's institutional structures which are still largely based on the traditional bilateralism of international law. A debate had ensued over the ambiguity of Yugoslavia's status as a member of the UN and hence as a party to the Court's statute. The Court however refused to be drawn into this debate and was obscure in its reasoning.

Moreover, unlike the Human Rights Committee and the ECHR, the ICJ has not accepted that reservations which bore on the Court's jurisdiction are contrary to the object and purpose of the Genocide Convention so that in the *Legality of the Use of Force*, and in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)* the ICJ has taken these reservations at face value and has held that as a result it manifestly lacked jurisdiction. Eighteen States have made reservations to the dispute settlement clause.

#### **VI The outcome of a case being brought before the ICJ**

But what is the outcome of the Court's judgment? Bosnia had stated that it and its

citizens were entitled to full compensation for the damages and losses caused as well as, guarantees of non-repetition. This is what the ICJ called for in the *Wall* case after having determined the illegality of the construction of a Wall and its associated regime, stating that Israel had to make reparation for all damage caused.

In the *Genocide case*, the Court however considered that it was enough to make a declaratory judgment which would serve as a form of satisfaction, which is a non-monetary form of reparation.

### ***Conclusion.***

I have tried to outline the contribution of the ICJ but also to draw attention to its limitations. Faced with cases which bring up such fundamental norms of international law, the ICJ cannot always respond to expectations of the world community. It is an institution set up in a world where bilateral and subjective relations between States prevailed and the famous Lotus case principle that whatever states had not consented to was permitted was the golden rule. The Court moreover has been resistant to pressure from non-state actors, today the most important vehicles of the “dictates of the public conscience” yet denied access except perhaps in one form under Article 50 of the Statute.

But as early as 1948, Judge Alvarez had pointed out that the upheavals of the Second World War had ushered in a world of social interdependence in which many obligations existed without the consent of States. After all as President Rosalyn Higgins has pointed out, cases are not just the application of rules to facts. The Court must always decide between conflicting norms by reference to a “judicial lodestar” as she called it (*Nuclear Weapons Opinion*). That lodestar in this case should be the maximum protection of the fundamental values of the international community as a whole.