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On the Controversial Illegality of the Unilateral Use of Force for the Prevention of Genocide: The 'Doubtfulness' Clause Adopted by the ICJ in the Case Filed by Ukraine Against Russia

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Abstract

The ICJ in its order dated 16 March 2022, decided that the legality of the unilateral use of force to prevent acts of genocide is 'doubtful'. Based on this order, it is possible to say that the ICJ provides a yellow light to unilateral use of force for the prevention of acts of genocide. But the ICJ expressed its opinion in this respect in 2007, underlining that every state may only act within the limits permitted by international law. The doctrine underscored that the unilateral use of force for the prevention of genocide was forbidden. In this situation, the following question arises: is it really doubtful? To find the answer to this question, it is necessary to examine the legal basis and means for the prevention of genocide. In this article, the legality of the unilateral use of force for the obligation to prevent genocide has been comprehensively discussed.

Keywords: Genocide, Jus Cogens, Erga Omnes Obligations, Responsibility to Protect, Aggression.

Soykırımın Önlenmesinde Tek Taraflı Kuvvet Kullanımının Tartışmalı Aykırılığı Üzerine: UAD'nin Ukrayna Tarafından Rusya Aleyhine Açılan Davada Kabul Ettiği 'Belirsizlik' Tespiti

Özet

Uluslararası Adalet Divanı (UAD), 16 Mart 2022 tarihli kararında, soykırım fiillerinin önlenmesi için tek taraflı kuvvet kullanımının hukukiliğinin 'belirsiz' olduğuna karar vermiştir. Bu karardan hareketle, UAD'nin soykırımın önlenmesi için tek taraflı kuvvet kullanımına sarı ışık yaktığını söylemek mümkündür. Aslında UAD bu konudaki görüşünü, her Devletin ancak uluslararası hukukun izin verdiği sınırlar içinde hareket edebileceğinin altını çizdiği 2007 tarihli kararında açıklamıştı. Doktrin, bu tespiti, soykırım fiillerini önlemek için tek taraflı kuvvet kullanımının yasaklanması olarak değerlendirmişti. Bu durumda akla şu soru gelmektedir: Gerçekten soykırımın önlenmesi için tek taraflı kuvvet kullanımının hukukiliği 'şüpheli' midir? Bu sorunun cevabını bulabilmek için soykırımın önlenmesinin hukuki zeminini ve araçlarını incelemek gerekir. Bu makalede, tek taraflı kuvvet kullanımı ile soykırımı önleme yükümlülüğü kapsamlı bir şekilde tartışılmıştır.

Anahtar Kelimeler: Soykırım, Jus Cogens, Erga Omnes Yükümlülükler, Koruma Sorumluluğu, Saldırı.

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Introduction

On 27 February 2022, Ukraine instituted proceedings against the Russian Federation and directed to the International Court of Justice (ICJ) the question whether Russia has the right under the Convention on the Prevention and Punishment of the Crime of Genocide (UNGC) to engage in military action initiated against Ukraine on 24 February 2022 and to hold Russia accountable for manipulating the notion of genocide to justify aggression.[1] Russia argued in its response that the dispute has nothing to do with the UNGC, and maintains that the dispute relates to the use of force under customary international law. Regardless, the question of whether the unilateral use of force to prevent genocide is legal under the international law has come to the fore once again. Moreover, when the ICJ found in its order dated 16 March 2022, "it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide,"[2] the legality of the unilateral use of force for the prevention of genocide deserves discussion. Until now, such an exception has not been considered due to the prohibition on the unilateral use of force, except for some opinions in the doctrine,[3] but the ICJ has mentioned the 'doubtfulness' of such a possibility. Since to say 'doubtful' about something is not to dismiss entirely its possibility,[4] it is possible to say that the ICJ yellow lighted the legality of the unilateral use of force for the prevention of genocide.

The prevention of genocide is an obligation for states parties to the UNGC. Also, the prevention of genocide is recognized as an *erga omnes*[5] obligation in international law. Furthermore, according to the United Nations (UN), the prevention of genocide is a duty of states within the scope of the "responsibility to protect[6] For these reasons, the issue of the unilateral use of force to prevent genocide should be examined in these respects as well. Finally, it is necessary to evaluate the legality of the unilateral use of force for the prevention of genocide in terms of international law in general.

On the Legality of the Unilateral Use of Force for the Prevention of Genocide Under the UNGC

The UNGC was adopted on 9 December 1948 and entered into force on 12 January 1951. Article I of this Convention says: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to

1 Terry D. Gill, "Remarks on the Law Relating to the Use Of Force in the Ukraine Conflict", 9 March 2022, available at https://lieber.westpoint.edu/remarks-use-of-force-ukraine-conflict/.

2 ICJ, Case concerning The Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order of 16 March 2022, s. 59.

3 For example, Kagan, Joshua M. "The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms, and State Responsibility", *San Diego International Law Journal,* Vol. 7, No 2, 2006, p. 461-490.

4 According to the Cambridge Dictionary, the term of doubt means that *"the condition of being uncertain*." Available at https://dictionary.cambridge.org/dictionary/english/doubt.

5 The concept of erga omnes obligations refers to some numerus clauses obligations that states have towards the international community as a whole and in whose protection all states have a legal interest, and the obligations of a state vis-à-vis another state. For further information, look at Ardit Memeti, "The Concept of Erga Omnes Obligations in International Law", *New Balkan Politics*, Vol. 14, 2013, p. 31-47.

6 Hannes Peltonen, "Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility, Communal Crime Prevention and International Law", *Uluslararası İlişkiler*, Vol. 7, No 28, 2011, p. 61.

punish." According to this article, all contracting states have an obligation not to commit genocide, as well as an obligation to prevent and to punish genocide.[7]

The obligation to not commit genocide is called as a norm of *jus cogens* by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Kupreškić case: "prohibiting … genocide (is) a peremptory norm of international law or jus cogens, of a non-derogable and overriding character."[8] This status is also confirmed implicitly in several cases of the ICJ,[9] In its advisory opinion concerning Reservations to the Genocide Convention, the court emphasized the binding character of the prohibition of genocide, even on States which did not subscribe to the convention: "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[10] In addition, almost all legal authors confirm the *jus cogens*[11] character of the prohibition of genocide.[12]

The two other obligations "to prevent and to punish" have different meanings. While the obligation to prevent aimed at precluding genocide from being committed, the other requires the imposition of a penalty when genocide has been committed.[13] Thus, the duty to prevent genocide is logically directed towards present and future genocide acts, while the obligation to punish is directed towards acts already committed.

Article IV of the UNGC gives the obligation to punish the criminals to the states: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Even though the UNGC does not contain an *aut dedere aut judicare*[14] provision like many other conventions on international crimes,[15] the universal jurisdiction over the crime of genocide is indisputable.[16] The ICJ, in its 1951 advisory opinion, has consistently asserted the view that genocide is a crime under customary international law,[17] and that every state is obliged to outlaw and punish genocide, even without a con-

7 A/HRC/41/24, Report on the prevention of genocide, Report of the Secretary-General, 24 June 2019.

8 ICTY, Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16, Trial Chamber II, 14 January 2000, §520 available at https://www.icty.org/en/case/kupreskic.

9 For example, ICJ, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia), Order of 8 April 1993, §49.

10 ICJ, Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 May 1951, p. 15-69, 23.

11 *Jus cogens* (or *ius cogens*) is a latin phrase that literally means "compelling law." Jus cogens norms or peremptory norms, are considered to be of such importance that States may not derogate from them via treaty or customary international law norms. For further information, look at Anne Lagerwall, "Jus Cogens", Available at https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml

12 For further information, look at: Jan Wouters and Sten Verhoeven, "The Prohibition of Genocide as a Norm of Ius Cogens and Its Implications for the Enforcement of the Law of Genocide", *International Criminal Law Review,* Vol. 5, 2005, p. 406.

13 Björn Schiffbauer, "The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention", *Genocide Studies and Prevention: An International Journal*, Vol. 12, No 3, 2018, p. 85.

14 The principle aut dedere aut judiciare is said for the obligation to exradite or prosecute. Raphael Van Steenberghe, "Aut Dedere Aut Judiciare", Available at https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0023.xml?rskey=UBnbKQ&result=6&q=opinio+juris#firstMatch.

15 The *aut dedere aut judicare clause* exists in various forms in 30 multilateral treaties and in 18 regional conventions. For more details, look at Claire Mitchell, "Aut Dedere, aut judicare: The Extradite or Prosecute Clause in International Law", Available at https://books.openedition.org/iheid/249.

16 Maximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", *American Journal of International Law*, Vol. 105, 2011, p. 3.

17 ICJ, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia), Judgement of 26 February 2007, §385.

ventional basis.[18] Genocide has been viewed as one of the most heinous crimes in human history and described as the "*crime of crimes*" by the International Criminal Tribunal for the Rwanda (ICTR).[19] Therefore, the gravity of the crime compelled that no perpetrators of genocide should be allowed to escape from punishment.[20] State practice also supports this. In 2001, four Rwandans were prosecuted in Belgium for their crimes committed during the 1994 Rwandan genocide.[21]

The object and purpose of the UNGC as stated in Article I is not only to not commit genocide or to punish criminals, but also to stop ongoing genocide acts and prevent future ones.[22] In 2007, the ICJ confirmed that obligation and stated that this constitutes a 'due diligence' obligation.[23] The court stated more specifically that there exists:

> "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[24]

As it is clarified by the ICJ in its order dated 16 March 2022:

> "Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation. However, the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble."[25]

Article VIII of the UNGC orders that: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III." Also the ICJ notes that: "the acts undertaken by the Contracting Parties 'to prevent and to punish' genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter."[26] In the preamble of the convention, it is emphasized that: "in order to liberate mankind from such an odious scourge, international co-operation is required." When these findings are evaluated together, it is 'undoubtful' to say that the UNGC provides for joint measures to prevent genocide within the framework of the UN Charter.

The purpose of the UN is explained by Article 1/1 of the UN Charter as "to maintain international peace and security, and to that end: to take effective collective measures" and as it is determined by Article 24 of the Charter that all Contracting Parties conferred on the Security Council

18 ICJ, Advisory Opinion, 28 May 1951, 23.

19 ICTR, The Prosecutor v. Omar Serushago, 5 February 1999, § 15, available at https://www.refworld.org/cases,ICTR,48abd57927.html.

20 Wenqi Zhu and Binxin Zhang, "Expectation of Prosecuting the Crimes of Genocide in China", René Provost and Payam Akhavan (eds.), *Confronting Genocide*, Dordrecht, Springer, 2011, p. 178

21 Linda M. Keller, "Belgian Jury to Decide Case Concerning Rwandan Genocide", 25 May 2001, https://www.asil.org/insights/volume/6/issue/13/belgian-jury-decide-case-concerning-rwandan-genocide.

22 Andreas Zimmermann, "The Security Council and the Obligation to Preventnt Genocide and War Crimes", *Polish Yearbook of International Law*, Vol. 32, 2012, p. 308.

23 ICJ, Case Bosnia and Herzegovina v. Serbia, Judgement of 26 February 2007, §430.

24 Ibid, §431.

25 ICJ, Case Bosnia and Herzegovina v. Serbia, Judgement of 26 February 2007, §56.

26 ICJ, Case Ukraine v. Russian Federation, Order of 16 March 2022, §58.

the "primary responsibility" and agreed that: "the Security Council acts on their behalf", in order to "ensure prompt and effective action by the United Nations." The UNGC gives also the primary responsibility to prevent genocide to the Security Council of the UN. In addition, it is forbidden for states to use force unilaterally according to Article 2/4 of the Charter: "all Members shall refrain in their international relations from the threat or use of force." When the UN Charter provisions, to which the UNGC refers, are evaluated as a whole, the use of force for preventing acts constituting genocide could be determined by the decision of the Security Council; therefore, the unilateral use of force for prevention of genocide should not be possible according to the UNGC. So, all states are obliged to take all kinds of peaceful measures to prevent genocide, but this obligation cannot include the unilateral use of force.

Beside the UNGC, the legal basis and means of this obligation to prevent unilaterally acts constituting genocide should be discussed also from the *erga omnes* nature of this obligation.[27]

On the Legality of the Unilateral Use of Force for the Prevention of Genocide as an *Erga Omnes* Obligation

The concept of *erga omnes* appears in international law for the first time in the Barcelona Traction Case: "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."[28] The concept of *erga omnes* obligations refers to specifically determined obligations that states have as a whole.[29] According to Institut de Droit International, *erga omnes* obligations are defined as*:* "an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action."[30] So, to fulfill *erga omnes*,[31] every member of the international community has a legal interest in the protection of these norms and can enforce them even if they are not directly affected by the breach.[32]

27 Marco Longobardo, "Genocide, Obligations erga omnes, and the Responsibility to Protect: Remarks on a Complex Convergence", *The International Journal of Human Rights,* Vol. 19, No 8, 2015, p. 1207.

28 ICJ, Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), Judgement of 5 February 1970, § 33. Till now, the ICJ has defined *erga omnes* obligations for six different situations: the outlawing of acts of aggression (*ICJ, Case Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, § 190*); the outlawing of genocide (*ICJ, Case Bosnia and Herzegovina v. Serbia, Judgment of 11 July 1996, §31*); protection from slavery (*ICJ, Case Belgium v. Spain, Judgement of 5 February 1970, § 34*); protection from racial discrimination (*ICJ, Case Belgium v. Spain, Judgement of 5 February 1970, § 34*); to respect the right to self-determination (*ICJ, Case concerning East Timor (Portugal v. Australia), Judgement of 30 June 1995, § 29*); and certain obligations under international humanitarian law (*ICJ, Advisory Opinin on Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory, 9 July 2004, § 155).*

29 Erika De Wet, "Jus Cognes and Obligations Erga Omnes", Erika de Wet and Iure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, Oxford University Press, 2012, p. 554.

30 Institut de Droit International, Resolution: Obligation Erga Omnes in International Law, Article 1, Krakow Session 2005, available at <http://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf>.

31 "What is needed are duties erga societatem, along with institutions of the global society which will - as does the Security Council in its field - enforce those duties themselves or authorize such enforcement", Ulrich Fastenrath, "Relative Normativity in International Law", *European Journal of International Law*, Vol. 4, No 1, 1993, p. 339.

32 Wouters and Verhoeven, *The Prohibition of Genocide,* p. 415; Ardit Memeti and Bekim Nuhija, "The Concept of Erga Omnes Obligations in International Law", *New Balkan Politics*, Vol. 14, 2013, p. 38.

The ICJ never called the prevention of genocide as *jus cogens,*[33] but the obligation to prevent the crime of genocide was accepted by the ICJ, among the obligations *erga omnes,*[34] in the Barcelona Traction Case and was repeated by the ICJ in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide as: "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*."[35] Therefore, all states are under an obligation to employ all means reasonably available to them, so as to prevent genocide as far as possible.[36]

In case of breach of *erga omnes* obligations, it can be assumed that there are four types of action that other states can take.[37] First, before states' responsibility, it could be accepted that to prosecute those who committed that act in a court established for the act infringed. In case of the obligation to prevent acts constituting genocide, to prosecute those who committed that act could be so late. In addition, the obligation to punish the criminals was mentioned in Article I, IV and V of the UNGC for that aim.

Secondly, to enforce *erga omnes* obligations in international law, it is argued that granting the right to sue other states under the *actio popularis*[38] for the responsibility of the state, meaning that all states can institute proceedings against states principally responsible for violation of *erga omnes* obligations.[39] The limited approach to appeal to the ICJ is also seen in the Resolution of the Institute of International Law "Obligations and Rights Erga Omnes in International Law" of 2005, Article 3*:*

> "In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation erga omnes and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation."[40]

According to this Article, the existence of a jurisdictional link between a state alleged to have

33 Manuel Ventura and Dapo Akande, Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention, 6 September 2013, available at https://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/.

34 "*Such obligations derive, for example, in contemporary inter- national law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*."ICJ, Case Belgium v. Spain, Judgement of 5 February 1970, § 34.

35 ICJ, Case Bosnia and Herzegovina v. Serbia, Judgement of 11 July 1996, §31.

36 ICJ, Case Bosnia and Herzegovina v. Serbia, Judgement of 26 February 2007, §429.

37 According to Christian J. Tams, enforcing obligations in international law could be in two ways. First of all, the countermeasures, and secondly, institute the ICJ proceedings, Christian J. Tams, *Enforcing Obligations Erga Omnes In International Law*, Cambridge, Cambridge University Press, 2005, p. 158 and 198. According to Yoshifumi Tanaka, there are three possible legal consequences of the breach of obligations erga omnes: "*(1) the obligation not to recognize illegal situations, (2) third-party countermeasures, and (3) the locus standi of not directly injured States in response to a breach of obligations erga omnes*", Yoshifumi Tanaka, "The Legal Consequences of Obligations Erga Omnes in International Law", *Netherland International Law Review*, Vol. 68, 2021, p. 1. Karl Zemanek has written three same enforcing ways: "*(1) Individual Criminal responsibility; (2) State Responsibility; (3) Humanitarian Intervention*", Karl Zemanek, "New Trends In the Enforcement of Erga Omnes Obligations", *Max Planck Yearbook of United Nations Law Online*, Vol. 4, No 1, 2000, p. 17.

38 Actio popularis may be defined as "*a right resident in any member of a community to take legal action in vindication of a public interest*", ICJ, Case Ethiopia and Liberia v South Africa, Judgement of 18 July 1966, § 88.

39 Tams, *Enforcing Obligations*, p. 197. The institution of an *actio popularis* in international law has been discussed for a long time. In the 1966 South West Africa case, the ICJ denied an *actio popularis* in international law and it insisted that the applicant States had to suffered direct injury. In the Barcelona Traction case, in spite of the fact that the Court provided no further precision with regard to a State's standing in response to the breach of *erga omnes* obligations, it has been claimed that the context seemed to suggest that the dictum of the Court was expressed in relation to a State's standing before the Court. The ICJ, in the Nuclear Tests cases, avoided examining this issue. Therefore, the jurisprudence of the ICJ has been inconclusive on this subject.

40 Institut de Droit International, Resolution, Article 3.

committed a breach of an *erga omnes* obligation and a state to which the obligation is owed, are requested.[41] But this option is not required for the UNGC anyway. Article IX of the Convention already gives the right to sue in such a case:

> "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."

Thirdly, to enforce *erga omnes* obligations in international law, all lawful and peaceful measures and sanctions within the scope of countermeasures have been suggested: "the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury."[42] The International Law Commission (ILC) calls this countermeasure in Article 22 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts*. In this context, states acts contrary to international law, meeting certain substantive and procedural conditions, may be legitimate. First, "countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act."[43] Second, states must act in accordance with the principle of proportionality, provisionally and reversibly. Finally, certain fundamental obligations which may not be subject to countermeasures.[44] But, the ILC left open the question whether any state may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured state.[45]

The measures taken by states other than injured states is discussed in Article 54 as: "This chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." The article speaks of 'lawful measures' rather than 'countermeasures'. In the commentary of this Article, the ILC gives an example linked with genocide as an example of lawful measure:

> "United States-Uganda (1978). In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda. The legislation recited that "[t]he Government of Uganda … has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide."[46]

The other examples given by the ILC are economic sanctions or other peaceful measures (e.g. breaking off air links or other contacts).[47]

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41 With the words of Linos-Alexander Sicilianos: "*Failing that, states not directly injured could be 'more royalist than the king'*", Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility", *European Journal of International Law*, Vol. 13, 2002, p. 1139.

42 Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 75, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

43 Ibid.

44 Ibid, p. 76.

45 Draft articles on Responsibility of States , p. 76.

46 Ibid, p. 138.

47 Ibid.

Thus, there is now a widespread belief in international law that there is a possibility to use non-military, mostly economic countermeasures to enforce *erga omnes* obligations unilaterally by a state if the collective interests of the international community are injured.[48] This conclusion was supported in Article 5 of the Resolution of the Institute of International Law of 2005:

> "Should a widely acknowledged grave breach of an erga omnes obligation occur, all the States to which the obligation is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; … (c) shall not recognize as lawful a situation created by the breach; are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach."

Although some authors mention the possibility to military countermeasures in the context of 'forcible self-help'[49] or 'armed countermeasures'[50] or 'forcible countermeasures',[51] there are much more objections to the possibility to use military countermeasures. First, the term of countermeasure excludes the use of force: "Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations."[52] Second, if it is termed 'lawful measures', the superiority of the principle of the prohibition on the use of force could not justify the lawfulness of these measures.[53] Third, the doctrine is against the use of force generally.[54] So, the unilateral use of force for preventing acts constituting genocide could not justified by the concept of countermeasures.

Lastly, to enforce *erga omnes* obligations in international law, it has been suggested that the use of force can be part of a humanitarian intervention. Humanitarian intervention is defined as "the forcible intervention by a state or a group of states, including by military means, in the sphere of sovereignty of another state in order to bring an end to massive assaults on human rights that the territorial state is not able or willing to stop."[55] In view of the new concept of 'Responsibility to Protect' (R2P), which comprises the duty to prevent, to stop and to remedy at least in the form of *ultima ratio* intervention to stop atrocities, which includes also the term of the humanitarian intervention, the legality of this option will be discussed together below.

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48 As a recent example, one could consider the international sanctions unilaterally levied against the Russian Federation after its annexation of the Crimea and occupation generally the Ukraine. Olena O. "Enforcement Of Obligations Erga Omnes in International Law: To The Issue Of Measures", 2019, p. 98; Longobardo, "Genocide, Obligations", p. 1209.

49 Richard B. Lillich, "Forcible Self-Help by States for Protect Human Rights", *Iowa Law Review,* Vol. 53, 1967, p. 325.

50 Antonio Cassese, "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *European Journal of International Law*, Vol. 10, No 1, 1999, p. 29.

51 Francesco Francioni and Christine Bakker, "Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali", *Transworld*, Vol. 15, 2013, p. 4.

52 Article 50 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

53 Although, James A. Green finds that the widespread uncritical acceptance of the prohibition's peremptory nature is concerning, he accepts that the norm is a cornerstone of the modern international legal system. So, in every approaches, there is a superiority of the principle of the prohibition to use of force. Look at. James A. Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force", *Michigan Journal of International Law*, Vol. 32, No 2, 2011, p. 257.

54 Andreas Zimmermann, "The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?", Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interests. Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press, 2011, p. 637; Christian J. Tams, "Individual States as Guardians of Community Interests", Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interests. Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press, 2011, p. 388.

55 Francioni and Bakker, "Responsibility to Protect", p. 3.

On the Legality of the Unilateral Use of Force for the Prevention of Genocide as the 'Responsibility to Protect' (R2P)

The term R2P was mentioned for the first time in the Report of the International Committee on Intervention and State Sovereignty (ICISS), which was organized by the Government of Canada in 2001.[56] In this report, the question of when it is appropriate for states to take coercive and in particular military action against another state for the purpose of protecting people at risk in that other state, if ever, was discussed. While this report was about the humanitarian intervention,[57] the committee preferred other alternatives measures to military action, including all forms of preventive measures and coercive intervention measures like sanctions and criminal prosecutions.[58]

The Committee accepted the option of military intervention for human protection purposes: "if there is serious and irreparable harm occurring to human beings, or imminently likely to occur, of the large-scale loss of life and large scale 'ethnic cleansing."[59] Consequently, the term of prevention has been used as the act of stopping the serious harms as a result of internal war, insurgency, repression or state failure from happening. Therefore, it also included genocidal intent, as a responsibility to prevent, as ground for using the military option.

At the same time, the Committee underlined that: "prevention is the single most important dimension of the responsibility to protect" and prevention options "should always be exhausted before intervention is contemplated."[60] The exercise of the responsibility to prevent "should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied."[61] Therefore, the responsibility to prevent has been understood as the policy to block the aggravation of the situation and should not include military measures. So, in despite of the R2P which authorize unilateral military intervention, the measures for the responsibility to prevent needed an action multilateral and collaborative.

At the UN World Summit convened to mark the 60th anniversary of the UN, the principle of the R2P became a concept of international law.[62] However, it was characterized differently from the ICISS Report, as a concept which gives each individual state the duty "to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[63] It is underlined that states have a responsibility to protect their populations through appropriate and necessary means, including military means. For the third states, the R2P includes "appropriate diplomatic, humanitarian and other peaceful means"[64] and it is obvious that these means did not include any military means.[65]

56 ICISS Report, available at https://www.idrc.ca/sites/default/files/openebooks/960-7/index.html.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.

62 A/RES/60/1, 16 September 2005, § 138 ff.

63 Ibid, § 138.

64 A/RES/60/1, 16 September 2005, § 139.

65 In the report of the High Level Panel on Threats, Challenges and Change, entitled "*A more secure world: our shared responsibility*", as a threat to the security of all the genocide should never be tolerated and the obligation to prevent the crime of genocide belongs the Security Council: "*the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing,*

The UN concept of R2P consists of three pillars: first, the responsibility of each State to protect its populations, relating to the principle that state sovereignty carried with it, the obligation of the state to protect its own people; second, the responsibility of the international community to assist States in protecting their populations, if the State was unwilling or unable to do so; and third, the responsibility of the international community to protect when a state is manifestly failing to protect its populations. The use of force for this purpose is permitted just only with Security Council authorization under Chapter VII of the Charter, as a last resort.[66] So, the R2P does not constitute an exception to the prohibition of the use of force, on the contrary, "it constitutes a political reason for the Security Council to act on the issue."[67]

According to this resolution, a decision to use military means, "to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity", is possible only if it is "in accordance with the Charter, including Chapter VII … in a timely and decisive manner, through the Security Council."[68] So, the permission to use force unilaterally to prevent the crime of genocide given by the ICISS was rejected by world leaders.[69]

Conclusion: On the 'Doubtfulness' of the Use of Force to Prevent Genocide in International Law in General

On 26 February 2022, Ukraine applied to the ICJ against the Russian Federation concerning "a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide."[70] In its application, Ukraine argued that the dispute between the parties concerns the question whether, "as a consequence of the Russian Federation's unilateral assertion that genocide is occurring, the Russian Federation has a lawful basis to take military action in and against Ukraine to prevent and punish genocide pursuant to Article I of the Genocide Convention."[71] Ukraine also asserted that "nothing in the Convention authorizes the Russian Federation to use force against Ukraine as a means to fulfil its obligation under Article I thereof to prevent and punish genocide."[72]

In its order dated 16 March 2022, for the first time, the ICJ mentioned the 'doubtfulness' of the use of force to prevent genocide, according to the international law: "moreover, it is doubtful that the

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which can properly be considered a threat to international security and as such provoke action by the Security Council" (A/59/565, 2 December 2004, § 200). After that, in the Secretary-General's report "*In Larger Freedom: towards development, security and human rights for all*" Kofi Annan confirmed that: "*Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security*" and recommended that: "*the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force*" (A/59/2005, 21 March 2005, § 125).

66 Ivan Šimonović, "The Responsibility to Protect", *UN Chronicle,* Vol. 53, No 4, 2017, p. 18.

67 Naim Demirel, "Uluslararası Hukukta İnsani Müdahale ve Hukuki Meşruiyet Sorunu", *FSM İlmi Araştırmalar İnsan ve Toplum Bilimleri Dergisi,* No 1, 2013, p. 169.

68 A/RES/60/1, 16 September 2005, § 139.

69 Hakkı Hakan Erkiner and Emerant Yves Ombga Akoudou, "The Concepts of the Responsibility to Protect and Human Security within the United Nations: Return on the Meanings.", *İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi,* Vol. 27, No 1, 2021, p. 427; Ümmühan Elçin Ertuğrul, "Koruma Sorumluluğu: İnsani Müdahaleyi Makyajlamak", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 20, 2016, p. 444.

70 ICJ, Case Ukraine v. Russia, Order of 16 March 2022, § 1.

71 Ibid, § 31.

72 Ibid, § 36.

Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide."[73] That aspect was not the subject matter of the earlier cases of the court.[74] Although neither Ukraine[75] nor Russia[76] found the possibility of using unilateral force to prevent the genocide in accordance with the UNGC, it is meaningful that the court made such a determination.

As discussed above, neither the preamble, nor the Article I of the UNGC arouse any 'doubt' that might make states consider the possibility of unilateral use of force. Moreover, Articles VIII and IX of the UNGC also show the parties the way to be followed. So, there is no doubt that the UNGC does not authorize a contracting party's unilateral use of force in the territory of another state for the purpose of preventing or punishing an alleged genocide. The need to prevent or punish genocide or other atrocity crimes only justifies "measures adopted according to the UN Charter and following UN procedures."[77]

Furthermore, while discussing the admissibility of the application, the ICJ underlines that it does not have any evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory: "At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory."[78] While fulfilling its duty to prevent genocide, if every state may only act in accordance with and within the limits permitted by international law,[79] Articles VIII and IX of the Convention,[80] and Article 1 of the Charter,[81] the court would not need any evidence regarding the alleged genocide committed on the territory of Ukraine to judge Russian's military actions in the Ukrainian territory.

On this background, the question that comes to mind: if the ICJ had enough evidence substantiating the allegation of the genocide, what would it decide regarding Russia's use of force? We can conclude that the court may find lawful the 'special military operation' carried out by Russia by understanding the court's determination of 'doubtfulness' clause, which may allow using of force unilaterally to prevent genocide.

That is why Judge Robinson in his separate opinion felt obliged to underline that: "It is therefore possible to interpret the duty under Article I to prevent and punish genocide as precluding the

73 Ibid, §59.

74 For example; ICJ, Case on Legality of Use of Force (Yugoslavia v. USA and Spain), Order of 2 June 1999 or ICJ, Case on Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 23 January 2020 or ICJ, Case Bosnia and Herzegovina v. Serbia and Montenegro, Judgement of 26 February 2007.

75 Ukraine asserted that, "*rather than taking military action to prevent and punish genocide, the Russian Federation should have seized the organs of the United Nations under Article VIII of the Convention or seized the ICJ under Article IX thereof*", ICJ, Case Ukraine v. Russia, Order of 16 March 2022, § 31.

76 According to the Russia, "*it is clear from the plain language of the Convention that it does not regulate the use of force between States*", Ibid, § 32.

77 Matteo Colorio, "Ukraine at the International Court of Justice: Does Genocide Justify the Use of Force?", 7 March 2022, available at https://internationallaw.blog/2022/03/07/ukraine-at-the-international-court-of-justice-does-genocide-justify-the-use-of-force/.

78 ICJ, Case Ukraine v. Russia, Order of 16 March 2022, § 59.

79 Ibid, § 57.

80 Ibid, § 56.

81 Ibid, § 58.

force used by Russia in its 'special military operation' in Ukraine."[82] Also, Judge Bennouna opposed this determination in his Declaration appended to the Order of the Court: "the Convention does not cover, in any of its provisions, either allegations of genocide or the use of force allegedly based on such allegations."[83] Judge Bennouna added that even if the allegation was to serve as a pretext for an unlawful use of force, linking artificially the unlawful use of force to the UNGC does nothing to strengthen that instrument.[84]

The court could only have contented itself by maintaining that the obligation to prevent genocide did not include such a unilateral use of force. Or, taking into account Russia's official statement,[85] the court could have stated that the operation that took place was not covered by the convention. However, in this situation, the court would not have the jurisdiction to hear the case. In order to have such jurisdiction,[86] the ICJ gave the yellow light to the possibility of using unilateral force to prevent genocide. Unfortunately, the states intervened to the case and participated in this approach.[87] Whereas the legal characterization of Russia's 'special military operation' was made by the UN General Assembly as "aggression",[88] neither the UNGC nor Article 51 of the UN Charter provides a legal basis to legitimize Russia's 'special military operation'.

In recent decades, international law has witnessed more discussions about the opportunity to stretch the existing exceptions or to add new exceptions to the prohibition of the use of force of Article 2/4 of the UN Charter.[89] However, it is generally accepted that the only exceptions to the prohibition of the use of force are the right to self-defense under Article 51 and the authorization by the Security Council in accordance with Chapter VII of the Charter.[90]

Apart from the discussion of the nature *jus cogens* of the prohibition of the use of force,[91] *jus cogens* rules prohibit derogation, but they may contain exceptions.[92] Hence the unilateral use of force to prevent genocide could be accepted outside the scope of the prohibition and could be accepted as a new exception. However, as in any case, to create new exceptions to the prohibition runs the risk of manipulation in an attempt to cover up acts of aggression, as the recent example of Russia's operation against Ukraine shows.[93]

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82 Seperate Opinion of Judge Robinson, §29, available at https://www.icj-cij.org/en/case/182.

83 Declaration of Judge Bennouna, §5, available at https://www.icj-cij.org/en/case/182.

84 Declaration of Judge Bennouna, §11.

85 By a letter dated 24 February 2022 to the Security Council, the President of the Russian Federation explained that he had decided, "*in accordance with Article 51 of the Charter of the United Nations . . . to conduct a special military operation*", ICJ, Case Ukraine v. Russia, Order of 16 March 2022, § 39.

86 As Russia submits that: "*in order to "glue" the Convention to the use of force for the purposes of invoking its dispute resolution clause, Ukraine has claimed that the Russian Federation commenced its "special military operation" on the basis of allegations of genocide committed by Ukraine*", Ibid, § 32.

87 Look at the Declaration of Intervention of New Zealand (28 July 2022): https://www.icj-cij.org/public/files/case-related/182/182-20220728-WRI-01-00-EN.pdf and the Declaration of Intervention of Lithuania (25 July 2022): https://www.icj-cij.org/public/files/case-related/182/182-20220719-WRI-02-00-EN.pdf.

88 A/RES/ES-11/1, 2 March 2022, §2.

89 Colorio, "Ukraine at the".

90 Declaration of Judge Bennouna, §5.

91 Look at Green, "Questioning the Peremptory".

92 Sondre Torp Helmersen, "The Prohibition of the Use Of Force As Jus Cogens: Explaining Apparent Derogations", *Netherlands International Law Review,* Vol. 61, No 2, 2014, p. 176.

93 Colorio, "Ukraine at the".

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