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Genocide, Obligations *Erga Omnes*, and the Responsibility to Protect: Remarks on a Complex Convergence

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In 2007, the International Court of Justice declared that States have a duty to prevent genocide from occurring in another State since the prevention and punishment of genocide is a concern of every State and of the International Community as a whole. The doctrine of the responsibility to protect will be analysed in the light of the *erga omnes* and *erga omnes partes* character of the rules embodied in the Convention on the Prevention and Punishment of the Crime of Genocide. It is argued that, even though there are differences between the Court's decisions about genocide and the applicable regime regarding the consequences of serious violations of *erga omnes* obligations, however they are both consonant with the doctrine of the responsibility to protect since they are both inspired by the need to guarantee the protection of fundamental legal values.

Keywords: responsibility to protect; genocide; *erga omnes* obligations; State responsibility; countermeasures; Syria.

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1. Introduction

Genocide is considered one of the most heinous international crimes; consequently, the whole International Community has an interest both in punishing and preventing it. This responsibility lies primarily within every single State that has the duty not to commit genocide. One of the most serious problems is that States have limited means to prevent the occurrence of genocide in another country due to international law constraints that protect State sovereignty. However, it is indisputable that the commission of genocide violates legal interests that concern every State and respect for which is considered a fundamental value for the International Community. The doctrine of the responsibility to protect emphasises the collective dimension of the duties to prevent and punish genocide; the International Court of Justice (ICJ) in the 2007 *Bosnia and Herzegovina v. Serbia and Montenegro* case (*'Bosnian Genocide case'*) has asserted this collective dimension as well.¹

Even if genocide is not so frequent an occurrence as some believe, the problematic nature of reactions to genocide is not an obsolete academic issue: for instance, the United Nations (UN) acknowledged that in the ongoing crisis in the Middle East the self-proclaimed Islamic State likely committed genocide against religious minorities.² Therefore, even in order to build a more efficient strategy against the Islamic State, an analysis of the relations between the duties to prevent and punish genocide and the doctrine of the responsibility to protect in light of the law on obligations *erga omnes* can be useful.

2. A Brief Overview on the ICJ Case Law

Two Separate and Autonomous Duties to Prevent and Punish Genocide

The *Bosnian Genocide* case clarified the normative content of Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (*'Genocide Convention'* or *'Convention'*), according to which *'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 punish'*.³ The ICJ has been involved in this *'fascinating judicial saga'*⁴ arising from the Convention on a number of occasions. In 1951, the Court rendered a famous advisory opinion on *Reservations to Genocide Convention* stressing the importance of the humanitarian and civilizing purposes of the Convention.⁵ Then in 1993, it also passed two orders of provisional measures⁶ followed by a judgment on preliminary objections in 1996.⁷ More recently, the ICJ passed another judgment on the application of the Convention in 2015.⁸

Many international lawyers have commented on the *Bosnian Genocide* case as it presents several interesting legal aspects.⁹ However, for the purposes of the present essay, the ICJ's decision

is most relevant when it declares and explains the content of the duty to prevent genocide as independent from the duty to punish it.

Duties to prevent wrongful acts are not new in international law,¹⁰ but this case represents the first time that the ICJ made a clear distinction between the duty to punish and the duty to prevent genocide based on Article 1 of the Convention. The ICJ affirmed that this provision includes two separate but connected obligations, the duty to punish and the duty to prevent genocide;¹¹ accordingly, Article 1 is comprised of three elements: the qualification of genocide as an international crime both in times of peace and of war, the duty to prevent genocide, and the duty to punish it should prevention fail.¹² Punishment naturally implies a failure of the Convention, given that a genocide occurred and a number of people lost their lives; consequently, preventing genocide is extremely more satisfactory than punishing the perpetrators.¹³

According to the ICJ, the duty to prevent is an obligation of conduct and not a duty of result.¹⁴ States must do everything they can – including modifications to their own domestic laws – in order to prevent the commission of genocide. In case of failure, States will not be held automatically responsible for lack of prevention, but will be provided the opportunity to demonstrate that they had used the due diligence required by the Convention.¹⁵

In one of the most challenging parts of its decision,¹⁶ the ICJ affirmed that the obligation to prevent genocide is territorially unlimited, and therefore a State must prevent genocide also in relation to acts committed outside its borders,¹⁷ that is affirming that States have a duty to interfere in the sovereign sphere of another State that is about to commit genocide or to tolerate genocide taking place in its territory.

Extraterritorial application of certain treaties is not something new in the international law discourse. Although normally conventions bind States only for actions that occur within a particular State's borders, treaties bind States extraterritorially where a member State exercise its own jurisdiction outside its borders.¹⁸ Often treaties embody jurisdictional clauses that explain when and where a State party is bound by the provision of the convention. Similar clauses are based on the concept of State jurisdiction over individuals or territory and can be found for instance in Article 2 of the International Covenant on Civil and Political Rights and in Article 1 of the European Convention on Human Rights. By contrast, there is no such clause in the Genocide Convention; however, absence of such a clause is not a hindrance for its extraterritorial application since the ICJ's jurisprudence admits that even conventions without jurisdictional clauses can be applied extraterritorially following the State party's jurisdiction.¹⁹

The ICJ's conclusion on the extraterritorial application of the duty to prevent genocide is a novelty, however, since the obligations that arise from the Convention are not triggered by the

existence of a State's extraterritorial jurisdiction, but rather by the State's 'capacity to influence' the genocidal intent and course of action,²⁰ a totally new criterion.²¹ Because it is not easy to grasp the precise legal meaning of influence, a standard which is characterised by a clear factual nature that changes in relation to different circumstances, the possible behaviours of States cannot be identified once and for all,²² but rather should be asserted case-by-case on the basis of their 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide'.²³

The capacity to influence the perpetrators of genocide is the result of several qualitative and quantitative elements; with scant regard to accuracy,²⁴ the Court mentions the spatial proximity and geopolitical links as relevant factors, but the meaning of this statement is actually 'rather obscure'.²⁵ The result of this decision is that different States equally bound by the Convention are subject to the duty to prevent genocide in different ways, according to the principle that the more a State can do, the more it is expected. The ICJ thus broadened the scope of the duty to prevent genocide in relation to acts that occurred in another State's territory, while at the same time narrowing it by stressing that the duty to prevent does not have the same intensity for all the member States in order to avoid giving the impression that powerful States are always responsible for lack of prevention (since the Great Powers have sufficient military force to influence events in every corner of the world).²⁶

The Erga Omnes / Erga Omnes Partes Nature of the Duties Embodied in the Convention

On a number of occasions, the ICJ has remarked on the normative structure of the duties arising from the Genocide Convention. In the *Reservations* advisory opinion, it affirmed that the prevention and repression of genocide – the pivotal legal interests at the basis of the Convention – are not merely a concern of single contracting States, but rather affect the entire group of member States simultaneously.²⁷ This dictum was later used in the famous 1970 *Barcelona Traction* case when, for the first time, the ICJ mentioned the existence of the obligations *erga omnes*, including among them the duty to outlaw genocide.²⁸ Two and an half decades later, in 1996, the ICJ clearly stated that all the duties arising from Article 1 of the Genocide Convention are obligations *erga omnes*,²⁹ a conclusion that has been reiterated in the 2006 *Case concerning Armed Activities on the Territory of the Congo (New Application)*.³⁰ In the *Bosnian Genocide* case, the ICJ acknowledged that *the applicant* considered the duties of the Convention to be obligations *erga omnes*³¹ and, by not challenging this opinion, appeared itself to consider *erga omnes* the duties to prevent and punish genocide, in accordance with its past jurisprudence. More recently, dealing with the problem of the nature of the obligations arising from the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ICJ stated that the obligations contained in the Genocide Convention are *erga omnes partes*.³² Finally, in 2015 the ICJ restated that the obligations

embodied in the Genocide Convention are *erga omnes*.³³

Albeit these hints in the ICJ's case law are not perfectly cohesive, they are fundamental in order to understand which acts are permitted to contracting States when another State breaches its obligation under the Convention. Because the ICJ is the body institutionally devoted to the interpretation and application of the Convention when disputes arise pursuant to Article 9, its role in this process should not be underestimated. Slightly different is the situation in relation of the duty to prevent genocide *qua* international customary law, where the ICJ does not have the monopoly of the interpretation and application of the law but rather a highly regarded opinion.

According to the ICJ's dictum in the *Barcelona Traction* case, obligations *erga omnes* are 'obligations of a State towards the international community as a whole', and are 'the concern of all States'; consequently, '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection'.³⁴ Therefore, it is incorrect to say that obligations *erga omnes* are simply binding on all States irrespective of their express will – because this is the characteristic of all customary norms.³⁵ The key feature of obligations *erga omnes* is that all States have a legal interest in the respect of these obligations and can put forward a claim in the event of violations; in other words, the norms *erga omnes* protect legal interests that are so relevant for the whole International Community that every State is to a certain extent affected by their violation and is concerned with their implementation.³⁶ In the past, a violation of this kind of obligations formed the basis of the so-called international crimes of States envisaged by the International Law Commission in Article 19 of the 1976 Draft of Articles on the Responsibility of States for International Wrongful Acts ('DARSIWA'). More recently, the final 2001 Draft Articles, adopted under the direction of Professor James Crawford, centered the special regime of international responsibility on the serious breaches of peremptory norms, shifting from obligations *erga omnes* to the *jus cogens* category that was traditionally envisaged as a limit to States' treaty-making power.³⁷ Obligations *erga omnes* and *jus cogens* norms are not completely overlapping categories;³⁸ significantly, the DARSIWA still mentions *erga omnes* obligations in Article 48(1)(b), according to which 'obligation[s] [...] owed to the international community as a whole' are relevant for the new regime of aggravated international responsibility.³⁹

Obligations *erga omnes partes* are quite different. This category is formed by norms enshrined in multilateral conventions that promote pivotal interests at the basis of the agreement and are not of a synallagmatic nature but, rather, are due to the group on States parties to the Convention indifferently.⁴⁰ According to the International Law Commission, an *erga omnes partes* obligation is 'owed to a group of States' and is 'established for the protection of a collective interest of the group' at the basis of the decision to conclude a specific agreement.⁴¹ Even in this case, the

emphasis is on the legal interests protected by the norms that are not confined to the position of individual States but are concern of an entire group.

After this brief overview, one must verify whether the duty to prevent a genocide that is about to be committed or is occurring in the territory of another State is an obligation *erga omnes*, *erga omnes partes*, or both. Even though the ICJ lacked precision in its use of these categories, on the basis of a comparison between the normative structure of the Genocide Convention and the Convention against Torture, there is room to argue that all the duties enshrined in Article 1 of the Genocide Convention are obligations *erga omnes partes*. However, this is not an obstacle to asserting as well their *erga omnes* nature in the framework of general international law. The duties to prevent and punish genocide are also customary obligations,⁴² and their structure is obviously that of obligations *erga omnes* since they protect interests that are pertinent to every State of the International Community.

As a matter of treaty law, these duties are obligations *erga omnes partes*. As a matter of customary law, they are obligations *erga omnes*. After all, it is well established in international law that the same obligation can be part of both treaty and customary law, even with the coexistence of two different normative regimes.⁴³

3. Obligations *Erga Omnes* / *Erga Omnes Partes* Regarding Genocide and the Responsibility to Protect

Preliminary Observations

In the aftermath of the *Bosnian Genocide* case decision, some legal scholars have stressed that the extraterritorial duty to prevent genocide should be considered the legal basis for asserting the binding character of the responsibility to protect doctrine, for some of them even as a legal tool to justify the use of force with the purpose of saving civilians from mass atrocities.⁴⁴

In brief, the responsibility to protect is a doctrine based on the idea that sovereignty consists principally in the State duty to protect its own population; consequently, if a State does not want or cannot protect them, the responsibility for their protection falls upon the International Community, institutionally through the UN or upon every State in the case of UN inactivity. For some supporters of this doctrine, in the case of mass atrocities (such as genocide, war crimes, crimes against humanity, and ethnic cleansing), if the Security Council does not authorize the use of the force to protect civilians, other universal or regional organizations (and, finally, even singular States) could attack the perpetrators and put these atrocities to an end.⁴⁵

Actually, the dream of the responsibility to protect as the legal basis to use the force beyond the limits of the UN Charter when the Security Council is blocked by vetoes is not realistic and there is

no new international rule related to *jus ad bellum* and humanitarian intervention; accordingly, in 2005, the General Assembly endorsed the responsibility to protect only through the use of ‘appropriate diplomatic, humanitarian and other *peaceful means, in accordance with Chapters VI and VIII of the Charter*’,⁴⁶ excluding the emergence of a new customary rule regarding the use of force. State practice confirmed this conclusion in the case of Syria when, in 2013, a number of States willing to attack renounced due to the lack of a Security Council authorization.⁴⁷ Even the fact that the 2011 Libyan war was authorized by a Security Council resolution expressly mentioning the responsibility to protect did not prove useful for the promotion of this doctrine, given that several States disapproved of the attack because it did not merely protect civilians but led to the overthrow of the Libyan government. The responsibility to protect gained such a bad reputation in the aftermath of the 2011 Libyan war⁴⁸ that it has not been invoked in order to justify a military intervention since then,⁴⁹ except in situations clearly illegal such as the Russian annexation of Crimea.⁵⁰

With regard to the possibility that States use force as a means of implementing the duty to prevent a genocide, it is fundamental to stress that the ICJ clearly affirmed that ‘[t]he State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act *within the limits permitted by international law*’⁵¹ and that States have to ‘take such action as they can to prevent genocide from occurring, *while respecting the United Nations Charter and any decisions that may have been taken by its competent organs*’.⁵² The ICJ openly excluded the legality of humanitarian intervention based on the duty to prevent genocide pursuant to the ban on the use of force contained in the United Nations Charter.⁵³ Since the ICJ is the ultimate authority on the interpretation of the Convention and except for unexpected and unlikely changes in its jurisprudence, the duties enshrined in the convention cannot be interpreted in the sense that States can use the force outside the framework of the UN Charter.

Changing perspectives will prove useful in order to address the problem of the interferences that States have to or can undertake against another State that is committing or is about to commit genocide.

The Erga Omnes Character of the Genocide Convention Duties and Countermeasures

Acknowledging the fact that the Genocide Convention embodies obligations *erga omnes partes* that are also correspondent to customary obligations *erga omnes* could shed some light on the measures available for States willing to stop or prevent a genocide that is occurring in the territory of another State.

Among legal scholars, the possibility of States taking countermeasures in order to react to serious violation of an obligation *erga omnes* has been greatly debated. In 2001, the International Law Commission seemed to exclude this possibility given that only the State directly injured can take countermeasures, whilst other States can only invoke responsibility and, pursuant to Article 54 of the DARSIIWA, ‘take lawful measures [...] to ensure cessation of the breaches and reparation in the interest of the injured State.’ According to the commentary on Article 54, State practice in favour of countermeasures from States other than the injured is ‘embryonic’ and therefore not decisive.⁵⁴

The authoritative commentary should be analysed alongside the actual practice of States and it is necessary to face some issues arising from the drafting of the relevant provisions. First, it has been suggested that the ‘legal measures’ of Article 54 are countermeasures; in this context, the adjective ‘legal’ does not refer to acts *per se* licit, but rather to measures that would be illicit except for the fact that they are adopted as countermeasures against a wrongful act.⁵⁵ The opposite interpretation, according to which Article 54 refers only to acts that are *per se* legal, would render the provision superfluous because it would only restate the proposition that international law allows States to adopt allowed behaviours.⁵⁶

Second, the practice of countermeasures unilaterally taken in the collective interest, far from being nascent, is well-established with regard to peaceful countermeasures. According to State practice analysed by several authors, States adopt such countermeasures when a serious breach of an obligation *erga omnes* occurs and consider their response to be legal.⁵⁷ As a recent example, one could consider the international sanctions unilaterally levied against Russia after its annexation of Crimea. In the absence of a centralised decision by the Security Council, many Western Countries decided to freeze assets and limit commerce in violation of previous international agreements and general international law as a reaction to the Russian violation of the Ukrainian territorial integrity and sovereignty, even if the only directly affected State was Ukraine; these Western States adopted these measures on the basis of the belief that Russia’s actions violated legal interests that are not merely conferred to the Ukraine, but that are also pertinent to the International Community as a whole.⁵⁸ Consequently, the position according to which States can adopt pacific countermeasures against violations of obligations *erga omnes* appears well-grounded.⁵⁹ This same regime should apply equally to the case of the preparation or commission of genocide; all the States have an interest in preventing the genocide from being committed, and, therefore, they should be able to take every peaceful measure available, even if such measures might otherwise violate other international law rules.

However, this conclusion is only partially in line with the ICJ's findings since it concerns not a duty but a faculty of taking actual measures in order to prevent genocide. There is therefore room to argue that the duty to prevent genocide encompasses only lawful measures but that, at the same time, States can – and not must – take countermeasures pursuant to the *erga omnes* character of the customary duty to prevent genocide.

The matter is far more complex with regard to measures involving the use of force. Due to the general ban on the use of force in both conventional and customary international law, several commentators argue that States cannot adopt coercive countermeasures in order to put an end to the atrocities without a Security Council authorization, even in the case of a serious breach of obligations *erga omnes*, such as those embodied in the Genocide Convention.⁶⁰ However, the paralysis of the Security Council has hindered States' ability to respond to atrocities in the past. For instance, the Security Council's failure to pass a resolution in response to mass atrocities committed in Kosovo in 1999 brought some States to respond by attacking Serbia in operations conducted without UN authorization. After this crucial episode, Professor Antonio Cassese affirmed that

[T]his particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace [...] It would amount to an exception similar to that laid down in Article 51 of the Charter (self-defence).⁶¹

Professor Cassese was focused on a *de jure condendo* trend rather than clearly affirming the state of the law, but there is room for a broader debate.

Professor Paolo Picone, who has studied this issue in depth, believes that Article 51 codifies a forcible countermeasure against the specific violation of the ban on aggression that is an obligation *erga omnes*, the only breach of an obligation *erga omnes* that was clearly known when the UN Charter was adopted: countermeasures in response to genocide and other mass atrocities were not mentioned in the Charter simply because, at that time, States were not aware that a violations of these fundamental norms would affect the legal interests of every State and of the International Community as a whole; however, State practice has evolved and relevant events (culminating with the attack in Kosovo) tend to show that, in the case of paralysis of the Security Council and when international customary law allows such responses, as a last resort against a serious breach of obligations *erga omnes*, States can adopt forcible countermeasures that, although untied to the UN Charter, rather find their legitimisation in general international law⁶² and fit into the definition of legal measures provided by Article 54 of the DARWISA.⁶³ However, the possibility of taking forcible countermeasures against a serious breach of an obligation *erga omnes* is constrained by

several factors that should safeguard against abuses: the force employed should be necessary and proportionate, the action should respect international humanitarian law, and the action should end when the Security Council proves itself willing and capable of dealing with the situation.⁶⁴ This solution is particularly fit for cases in which there is not a State directly injured in the sense of the DARSIIWA because the author of the atrocities is the government that should react as injured State according to the same Articles.⁶⁵ Accordingly, the recent intervention of a coalition of Western States in Syria against the Islamic State, which is not justified by the request of the Syrian government, can be considered as the collective response to the violation of many *erga omnes* obligations perpetrated by the jihadists.⁶⁶

This fascinating theoretical construction has the value to envisage a response to mass atrocities that is based on legal argumentation and not on the moral evaluations at the basis of the traditional humanitarian intervention.⁶⁷ However, there are some elements of the practice and *opinio juris* that are not consistent, for instance, the large consensus on the definition of aggression adopted in 2010 in Kampala during the Review Conference of the Rome Statute of the International Criminal Court, which appears to be a manifestation of the International Community's belief that, even in the most tragic situations, force can be used only in ways allowed by the UN Charter.⁶⁸ Consequently the issue of forcible measures deserves further analysis beyond the scope of this essay. Regarding the specific breach of the obligations *erga omnes* related to genocide, though, State practice is thin and insufficient to conclude that general international law allows forcible countermeasures in this specific case, which is almost uncharted water since, fortunately, genocides have not been frequent in the recent past.

In conclusion, the *erga omnes* character of the duty to prevent genocide clearly allows States to adopt peaceful countermeasures in order to prevent or effectively repress at an early stage a genocide occurring in another State's territory, in accordance with the doctrine of responsibility to protect. By contrast, State practice related to the possibility of adopting forcible countermeasures for the prevention of genocide is still uncertain and it is highly doubtful whether force can be used beyond the limits of the UN Charter in this specific case.

Procedural Consequences of the Erga Omnes / Erga Omnes Partes Qualification

The *erga omnes / erga omnes partes* character of the duty to prevent genocide also has relevant procedural consequences that will be examined here very briefly.⁶⁹

The ICJ, on the basis of the *erga omnes partes* character of the obligations embodied in the Convention against Torture, affirmed the *jus standi* of all the States members to the treaty when a serious violation occurs, irrespective of any special position as affected States.⁷⁰ In addition, the

Marshall Islands claim their *jus standi* in a number of recent cases pending before the ICJ on the *erga omnes partes* character of the obligations embodied in Article 6 of the 1968 Non-Proliferation of Nuclear Weapons Treaty and in the *erga omnes* character of the alleged corresponding customary norm;⁷¹ the cases are still pending and in the due time the ICJ might rule on these issues, if it will find that it has jurisdiction on these cases.⁷²

The acknowledgement of the *jus standi* is something less relevant than the opportunity to take countermeasures⁷³ because a controversy on genocide can only be triggered after the failure of the prevention, when the genocide has been committed and the International Community has failed to prevent it. However, the *erga omnes partes* qualification of the duty to prevent genocide could be useful in the future for assessing the admissibility of a claim brought by any member State to the Genocide Convention before the ICJ pursuant to Article 9. It could be argued that all contracting States can be considered parties to any dispute arising from the Convention thanks to the *erga omnes partes* nature of its provisions despite the unlikelihood of the ICJ recognizing *jus standi* of every State when an *erga omnes* obligation has been breached.

4. Conclusive remarks

After having briefly discussed the *Bosnian Genocide* case, the differences between obligations *erga omnes* and *erga omnes partes* and the issue of countermeasures as an effective response to mass atrocities, there is room to argue that there is a strong interplay between the doctrine of the responsibility to protect and of the obligations *erga omnes* regime in relation to the duties embodied in the Genocide Convention.

Apart from vainly attempting to create new rules on *jus ad bello*, the doctrine of the responsibility to protect aims to change the way in which States think of their sovereignty and attribute to the International Community an effective role in the protection of the human rights of individuals seriously persecuted by their own State. In this respect, obligations *erga omnes* allow States to intervene at least with peaceful countermeasures against a State that is responsible of mass atrocities against its citizens. The consonance between the regime of obligations *erga omnes* and the responsibility to protect is particularly clear in the case of the commission of a genocide, the crime of crimes since the conventional obligations arising from the Genocide Convention are *erga omnes partes* and they allow States not directly affected to complain against gross violations before competent international courts and tribunals, a goal consistent with the doctrine of the responsibility to protect, which aims to monitor the exercise of State sovereignty at an international level.

The convergence between responsibility to protect, treaty obligations and obligations *erga omnes* may be relevant in situations like the current fight against the Islamic State even where genocide has not been committed or prepared. Other obligations *erga omnes* are at the basis of the responsibility to protect and, at the same time, embodied in conventions that compel States to ensure respect of the treaty provisions; this is the case of international humanitarian law rules, which have been constantly and brutally violated in Syria and Iraq.⁷⁴

Notes on contributor

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¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (*Bosnian Genocide case*).

² See Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups (A/HRC/28/18, 13 March 2015)*.

³ On the Convention, see John Quigley, *The Genocide Convention, An International Law Analysis* (Aldershot: Ashgate, 2006); *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: OUP, 2009); William A. Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd edn. (Cambridge: CUP, 2009); *Convention on the Prevention and Punishment of the Crime of Genocide. A Commentary*, eds. Christian Tams, Lars Berster and Björn Schiffbauer (Munich / Oxford / Baden Baden: Beck / Hart / Nomos, 2014).

⁴ Orna Ben-Naftali, 'The Obligation to Prevent and Punish Genocide', in *The UN Genocide Convention*, 27–57, 35.

⁵ *Reservations to the Genocide Convention*, Advisory Opinion, 28 May 1951, para. 23.

⁶ *Application on the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order, 8 April 1993; *Application on the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order, 13 September 1993.

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 11 July 1996 (*Preliminary Objections*).

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015 (*Croatian Genocide case*).

⁹ See, *ex plurimis*, Olivier Corten, 'L'arrêt rendu par la CIJ dans l'affaire du crime de génocide (Bosnie-Herzégovine c. Serbie): vers un assouplissement des conditions permettant d'engager la responsabilité d'un État pour génocide', *Annuaire français de droit international* 53 (2007): 249–290; Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', *European Journal of International Law* 18 (2007): 695–713; Bruno Simma, 'Genocide and International Court of Justice', in *The Genocide Convention Sixty Years after its Adoption*, eds. Christoph Safferling and Eckart Conze (The Hague: T.M.C. Asser Press, 2010) 259–272.

¹⁰ See, generally, Mirko Sossai, *La prevenzione del terrorismo nel diritto internazionale* (Torino: Giappichelli, 2012); *La prévention des violations des droits de l'Homme*, eds. Emmanuel Decaux and Sébastien Touze (Paris: Pedone 2015).

¹¹ *Bosnian Genocide case* para. 425.

¹² Ben-Naftali, 'The Obligation to Prevent and Punish Genocide', 28.

¹³ *Ibid.*, 30. On the temporal scope of the duty to prevent genocide and its relationship with the duty to punish it, see Etienne Ruvebana and Marcel Brus, 'Before It's Too Late: Preventing Genocide by Holding the Territorial State Responsible for Not Taking Preventive Action', *Netherlands International Law Review* 62 (2015): 25–47, 28–33.

¹⁴ *Bosnian Genocide case*, para. 430.

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- ¹⁵ Sheri P. Rosenberg, 'Responsibility to Protect: A Framework for Prevention', *Global Responsibility to Protect* 1 (2009): 44–477, 467.
- ¹⁶ '[A] significant new development' according to Simma, 'Genocide and International Court of Justice', 262.
- ¹⁷ On the territorial scope of the Genocide Convention, see Marko Milanovic, 'Territorial Application of the Convention and State Succession', in *The UN Genocide Convention*, 473–493.
- ¹⁸ For an overview, see Pasquale De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Torino: Giappichelli, 2002); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: OUP, 2011); Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Brill, 2013).
- ¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 112; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, Order, 15 October 2008, para. 109.
- ²⁰ *Bosnian Genocide* case, para. 430.
- ²¹ Gattini, 'Breach of the Obligation to Prevent', 699–700.
- ²² Serena Forlati, 'The Legal Obligation to Prevent Genocide: Bosnia v Serbia and Beyond', *Polish Yearbook of International Law* 31 (2011): 189–205, 201.
- ²³ *Bosnian Genocide* case, para. 430.
- ²⁴ Anne Peters, 'The Security Council's Responsibility to Protect', *International Organizations Law Review* 8 (2011): 1–40, 11.
- ²⁵ Gattini, 'Breach of the Obligation to Prevent', 701.
- ²⁶ Simma, 'Genocide and International Court of Justice', 262.
- ²⁷ *Reservations to the Genocide Convention*, 23: 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention'.
- ²⁸ *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, para. 34. For some remarks on the relationship between this decision and the 1951 advisory opinion, see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: OUP, 1997) 92–94.
- ²⁹ *Preliminary Objections*, para. 31.
- ³⁰ *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Uganda)*, Judgment, 26 February 2006 (*Armed Activities* case), para. 64.
- ³¹ *Bosnian Genocide* case, para. 147 and 185.
- ³² *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012 (*Belgium v. Senegal* case), para. 68.
- ³³ *Croatian Genocide* case, para. 87.
- ³⁴ *Barcelona Traction, Light and Power Company, Limited*, para. 33.
- ³⁵ Roberto Ago, 'Obligation *Erga Omnes* and the International Community', in *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, eds., Joseph H.H. Weiler, Antonio Cassese and Marina Spinedi (Berlin: Walter de Gruyter, 1988) 237–239.
- ³⁶ According to the Institut de Droit international 'an obligation erga omnes is: (a) 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' (Institut de Droit international, Krakow session, Resolution of 27 August 2005, Article 1(a), www.idi-ii.org/idiE/resolutionsE/2005_kra_01_en.pdf, (accessed 17 June 2015)). See also Paolo Picone, 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes*', in *The Law of Treaties beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford: OUP, 2011), 411–424, 414–416.
- ³⁷ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Article 53.
- ³⁸ On the distinction between peremptory norms and obligations *erga omnes*, see Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', *European Journal of International Law* 13 (2002): 1127–1145, 1136–1137; Paolo Picone, 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes*', 411–424.
- ³⁹ On the ILC's shift from peremptory norms to obligation *erga omnes*, see Paolo Picone, 'Obblighi *erga omnes* e codificazione della responsabilità degli Stati', *Rivista di diritto internazionale* 88 (2005): 893–954.
- ⁴⁰ Sicilianos, 'The Classification of Obligations', 1134–1136; Paolo Picone, 'Le reazioni collettive ad un illecito *erga omnes* in assenza di uno stato individualmente leso', *Rivista di diritto internazionale* 96 (2013), 5–47, 21.
- ⁴¹ DARSIIWA, Article 48(1)(a). See also the definition of the Institut de Droit international, Krakow session, Resolution of 27 August 2005, Article 1(b).
- ⁴² Ben-Naftali, 'The Obligation to Prevent and Punish Genocide', 43–44; Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide', in *The UN Genocide Convention*, 397–406, 405.
- ⁴³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 26 November 1984, para. 73.

⁴⁴ See, for an overview of the different opinion, Sarah Mazzocchi, ‘Humanitarian Intervention in a Post-Iraq, Post-Darfur World: Is There now a Duty to Prevent Genocide Even Without Security Council Approval?’, *Annual Survey of International and Comparative Law* 17 (2011): 111–128; Luke Glanville, ‘The Responsibility to Protect Beyond Borders’, *Human Rights Law Review* 12 (2012): 1–32, 15–28; Very significantly, Bruno Simma, who served as a judge during the trial, patently affirmed about his contribution to the decision: ‘I would call it my court’s specific contribution to the development (and continued vitality) of the “responsibility to protect”’ (Simma, ‘Genocide and International Court of Justice’, 264).

⁴⁵ For the early theorization of this doctrine, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 17 June 2015). Some references can be found in the Security Council resolutions 1873 (S/RES/183, 17 March 2011), 1975 (S/RES/1075, 30 March 2011), 2085 (S/RES/2085, 20 December 2012). See, among others, Carlo Focarelli, ‘Ahead to the Past? Responsibility to Protect and the Global System’, *Groningen Journal of International Law* 1 (2012): 1–10; *Responsibility to Protect: From Principle to Practice*, eds. Julia Hoffmann and André Nollkaemper (Amsterdam: Pallas, 2012); *Responsibility to Protect (R2P): A New Paradigm of International Law?*, ed. Peter Hilpold (Leiden / Boston: Brill / Nijhoff, 2015).

⁴⁶ General Assembly, *2005 World Summit Outcome Document* (A/RES/60/1, 24 October 2005), para. 139 (emphasis added).

⁴⁷ On the possibility to intervene in Syria without authorization from the Security Council, see Saira Mohamed, ‘The U. N. Security Council and the Crisis in Syria’, *ASIL Insights* 16, no. 11 (2012), www.asil.org/insights/volume/16/issue/11/un-security-council-and-crisis-syria (accessed 17 June 2015); Dapo Akande, ‘Self Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?’, *EJIL: Talk!*, 6 December 2012, www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/ (accessed 17 June 2015); Carsten Stahn, ‘Syria and the Semantics of Intervention, Aggression and Punishment. On “Red Lines” and “Blurred Lines”’, *Journal of International Criminal Justice* 11 (2013): 955–977.

⁴⁸ Enzo Cannizzaro, ‘Responsabilità di proteggere e intervento delle Nazioni Unite in Libia’, *Rivista di diritto internazionale* 94 (2011): 821–824, 823–824; Bruno Pommier, ‘The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond’, *International Review of the Red Cross* 93 (2011): 1063–1083, 1079; Jeremy Sarkin, ‘Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era? How its Third Pillar Ought to be Applied’, *Groningen Journal of International Law* 1 (2012): 11–48, 21 and 23.

⁴⁹ The responsibility to protect is not mentioned in the UK governmental statement *Chemical Weapon Use by Syrian Regime - UK Government Legal Position*, 29 August 2013, www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position (accessed 17 June 2015).

⁵⁰ Meg Sullivan, ‘Justifying Crimea: President Putin Invokes R2P’, *Brown Political Review*, 11 April 2014, www.brownpoliticalreview.org/2014/04/justifying-crimea-president-putin-invokes-r2p/ (accessed 17 June 2015).

⁵¹ *Bosnian Genocide* case, para. 430.

⁵² *Ibid.*, para. 427.

⁵³ Simma, ‘Genocide and International Court of Justice’, 262; William A. Schabas, *Unimaginable Atrocities* (Oxford: OUP, 2012) 116–118; Marco Longobardo, ‘L’obbligo di prevenzione del genocidio al di fuori del proprio territorio come base della responsabilità di proteggere. Rilievi critici’, in *Un Diritto senza terra? Funzioni e limiti del principio di territorialità nel diritto internazionale e dell’Unione europea / A LackLand Law? Territory, Effectiveness and Jurisdiction in International and EU Law*, ed. Adriana Di Stefano, (Torino: Giappichelli, 2015) (forthcoming).

⁵⁴ See commentary on DARSIIWA, Article 54, in James Crawford, *Report of the International Law Commission on its fifty-third session*, 137, para. 3.

⁵⁵ A countermeasure is ‘the act of non-compliance, by a State, with its obligations owed to another State, decided upon in response to a prior breach of international law by that other State and aimed at inducing it to respect its obligation’ (Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2005) 20). See, generally, Carlo Focarelli, *Le contromisure nel diritto internazionale* (Milano: Giuffrè, 1994).

⁵⁶ On this point, see Sicilianos, ‘The Classification of Obligations’, 1143; Giorgio Gaja, ‘In tema di reazioni alle violazioni di obblighi erga omnes’, in *Ordine internazionale e valori etici*, ed. Nerina Boschiero (Napoli: Editoriale Scientifica, 2004), 43–46, 45.

⁵⁷ For the practice on countermeasures in case of violation of obligations erga omnes, see Linos-Alexander Sicilianos, *Les réactions décentralisées à l’illicite: des contre-mesures à la légitime défense* (Paris: LGDJ, 1990), 155–174; Tams, *Enforcing Obligations Erga Omnes in International Law*, 207–249.

⁵⁸ Emanuele Cimiotta, ‘Le reazioni alla “sottrazione” della Crimea all’Ucraina. Quali garanzie del diritto internazionale di fronte a gravi illeciti imputati a grandi potenze?’, *Diritti umani e diritto internazionale* 8 (2014): 491–504.

⁵⁹ Institut de Droit international, Krakow session, Resolution of 27 August 2005, Article 5(c). See also Luigi Condorelli and Laurence Boisson De Chazournes, ‘Quelques remarques à propos de l’obligation des États de “respecter et faire respecter” le droit international humanitaire “en toutes circonstances”, in *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet*, ed. Christophe Swinarski (Genève / Dordrecht: Comité International de la Croix-Rouge / Martinus Nijhoff Publishers, 1984), 17–35, 31–32; Giorgio Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concept’, in *International Crimes of State*, 150–160, 155–156; Karel Wellens, ‘General Observations’, in *Public Interest Rules of International Law: Towards Effective Implementation*, eds. Teruo Komori and Karel Wellens (Farnham: Ashgate, 2009) 15–51, 43; Christian J. Tams, ‘Individual States as Guardians of Community Interests’, in *From Bilateralism to Community Interests. Essays in Honour of Judge Bruno Simma*, eds. Ulrich Fastenrath et al. (Oxford: OUP, 2011) 379–405, 389–392.

⁶⁰ Gaja, ‘In tema di reazioni alle violazioni di obblighi *erga omnes*’, 46; Tams, ‘Individual States as Guardians of Community Interests’, 388. With regard to genocide prevention, see Andreas Zimmerman, ‘The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?’, in *From Bilateralism to Community Interests*, 629–645, 637.

⁶¹ 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* 10 (1999): 23–30, 29. See also Francesco Francioni, ‘Balancing the Prohibition of Force with the Need to Protect Human Rights: A Methodological Approach’, in *Customary International Law on the Use of Force: A Methodological Approach*, eds. Enzo Cannizzaro and Paolo Palchetti (Leiden: Brill, 2005), 269–292, 277–278.

⁶² This theory was principally developed by Paolo Picone and this article is not the proper place to analyse it in depth. Among many works, see ‘La “guerra del Kosovo” e il diritto internazionale generale’, *Rivista di diritto internazionale* 83 (2000): 326–360; ‘La guerra contro l’Iraq e le degenerazioni dell’unilateralismo’, *Rivista di diritto internazionale* 86 (2003): 337–393.; ‘L’évolution du droit international coutumier sur l’emploi de la force entre obligations “*erga omnes*” et autorisations du Conseil de Sécurité’, in *Customary International Law on the Use of Force: A Methodological Approach*, 305–319; ‘Le reazioni collettive ad un illecito *erga omnes*’, 5–47.

⁶³ Paolo Picone, ‘Il ruolo dello Stato leso nelle reazioni collettive alla violazioni di obblighi *erga omnes*’, *Rivista di diritto internazionale* 95 (2012): 957–987, 972–974.

⁶⁴ Picone, ‘La “guerra del Kosovo” e il diritto internazionale generale’, 344–345; Cassese, ‘*Ex iniuria ius oritur*’, 27; Francioni, ‘Balancing the Prohibition of Force with the Need to Protect Human Rights’, 285–287.

⁶⁵ E.g. the situation in Syria where there is not an injured State regarding the violations committed by the government against its own civilians (Picone, ‘Le reazioni collettive ad un illecito *erga omnes*’, 9).

⁶⁶ Paolo Picone, ‘Unilateralismo e guerra contro l’ISIS’, *Rivista di diritto internazionale* 98 (2015): 5–27.

⁶⁷ According to Francesco Francioni and Christine Bakker, ‘Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali’, *Transworld* (2013): 1–19, 4: ‘The difference between the second [i.e. traditional humanitarian intervention] and the third doctrinal strands [i.e. admissibility of forcible countermeasures] is that the second relies on a moral-political theory justification, while the third is based on a legal argument.’

⁶⁸ William A. Schabas, ‘Attacking Syria? This Is the Crime of Aggression’, PhD Studies in Human Rights, 30 August 2013, humanrightsdoctorate.blogspot.co.uk/2013/08/attacking-syria-this-is-crime-of.html (accessed 17 June 2015).

⁶⁹ On the relevance of obligations *erga omnes* on the ICJ’s jurisdiction, see Paolo Picone and Maria Irene Papa, ‘La giurisdizione della Corte internazionale di giustizia e obblighi *erga omnes*, in *Comunità internazionale e obblighi “erga omnes”*, ed. Paolo Picone, 3rd edn (Napoli: Jovene, 2013) 675–721.

⁷⁰ *Belgium v. Senegal* case, paras. 68–70. For some interesting remarks, see Maria Irene Papa, ‘Interesse ad agire davanti alla Corte internazionale di giustizia e tutela dei valori collettivi nella sentenza sul caso *Belgio c. Senegal*’, *Diritti umani e diritto internazionale* 7 (2013): 79–104.

⁷¹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Application instituting proceedings against Pakistan, 24 April 2014, para. 35–36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Application instituting proceedings against the Republic of India, 24 April 2014, para. 40–41; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. U.K.)*, Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland, 24 April 2014, para. 85–86.

⁷² Many scholars are skeptical about the chance that these cases reach the merit phase due to an alleged lack of ICJ’s jurisdiction. See Marco Roscini, ‘The Cases Against the Nuclear Weapons States’, *ASIL Insights* 19, no. 10 (2015), www.asil.org/insights/volume/19/issue/10/cases-against-nuclear-weapons-states (accessed 17 June 2015); Katherine Maddox Davis, ‘Hurting More than Helping: How the Marshall Islands’ Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court’, 11 March 2015, papers.ssrn.com/sol3/papers.cfm?abstract_id=2577111 (accessed 17 June 2015).

⁷³ Professor James Crawford, who is against the admissibility of countermeasures, frankly wrote: ‘Better to give States standing to the Court to protect what they perceive as global values than to leave them only with non-judicial means of dispute settlement, whether in the guise of countermeasures or under the rubric of “responsibility to protect”’ (James Crawford, ‘Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for International Wrongful Acts’, in *From Bilateralism to Community Interests*, 224–240, 225).

⁷⁴ According to Article 1 common to the Four 1949 Geneva Conventions, States parties must respect and ensure respect of the conventions. For the relationship between this provision and the responsibility to protect, see Laurence Boisson de Chazournes and Luigi Condorelli, ‘De la responsabilité de protéger, ou d’une nouvelle parure pour une notion déjà bien établie’, *Revue Générale de Droit International Public* 110 (2006): 11–18. For the *erga omnes* character of some international humanitarian law norms, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 155 and 157.