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*Andreas Zimmermann**

THE SECURITY COUNCIL AND THE OBLIGATION TO PREVENT GENOCIDE AND WAR CRIMES**

Abstract

This article addresses the question of the obligations of both, the Security Council as such, as well as of its individual members (including the five permanent members), when faced with genocide or in situations where violations of the Geneva Conventions are being committed, given that the contracting parties of the Genocide Convention are under a positive obligation to prevent genocide and are under an obligation to secure respect for the provisions of the Geneva Conventions.

INTRODUCTION

Thank you, Mr. Chairman, very much for giving me the floor and thank you for bringing me over to Warsaw and thanks to the Polish Academy of Sciences and the Polish Branch of the ILA for bringing us together to this what is really a round table indeed.

I will focus on obligations of the Security Council as such, but also those of individual States on the Security Council, when acting within the framework of Chapter VII in particular, to prevent the commission of certain serious violations of international law. More specifically, I will focus on two sets of treaty-based obligations, namely on obligations arising under the Genocide Convention and obligations under the four Geneva Conventions, and will then try to analyse what these obligations involve for the practice of the Security Council. Moreover, I will also focus on “internal” obligations of the Security Council and its members arising under the UN Charter itself.

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1. STATES AND THE OBLIGATION TO PREVENT GENOCIDE

As it is well-known, under Article 1 of the Genocide Convention all contracting parties are under an obligation not only *not to commit* genocide themselves, but are also under a positive obligation *to prevent* genocide committed by others. One ought to also recall that in 2007, the International Court of Justice, in the case brought by Bosnia Herzegovina against Serbia, confirmed that obligation and stated that this constitutes a due diligence obligation.¹ The Court stated more specifically that there exists:

a State's obligation to prevent and the corresponding duty to act, [which] arise[s] at the instant that the State learns of, or should normally have learnt of, the existence of a serious risk that genocide will be committed.²

By the same token, that duty also entails a duty to employ "all the means likely to have a deterrent effect on those suspected of preparing genocide."³

In order to further conceptualize this obligation, the Court came up with some factors as to which States have to act and in what manner, depending on the respective distance to the situation.⁴ What is more, the Court also found that, as circumstances permit, they are under a legal obligation to act, and, in particular, the Court was strict in confirming that there need not be a territorial link between the crimes to be committed but that third States, too, are subject to such a duty to prevent genocide.⁵

2. THIRD STATES AND THE COMMISSION OF WAR CRIMES

When it comes to war crimes, one has to recall common Article 1 of the four Geneva Conventions⁶ which reads: "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" [*à faire respecter la présente Convention en toutes circonstances*].

In analysing this provision, the International Committee of the Red Cross (ICRC) Commentary on Article 1 states that "the other parties must try to bring them to respect the Convention" ("*les autres parties doivent-elles chercher à la ramener au respect de la*

¹ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Rep 2007, pp. 43 et seq. (p. 222, para. 430).

² *Ibidem*, p. 221, para. 431.

³ *Ibidem*.

⁴ *Ibidem*, p. 221, para. 430.

⁵ *Ibidem*, p. 107, para. 153 f; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment of 11 July 1996, ICJ Rep. 1996 pp. 595 et seq. (p. 616, para. 31).

⁶ Cf., B. Kessler, *The Duty to "Ensure Respect" Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 German Yearbook of International Law 498 (2001).

Convention.⁷ And again it was the ICJ, in its Advisory Opinion of 2004 on the Israeli wall in the occupied Palestinian territories,⁸ which found that all contracting parties “are under an obligation to ensure that the requirements of the instruments in question are complied with.”⁹ As a matter of fact, in fulfilling this duty the contracting parties of the four Geneva Conventions met on at least two occasions to bring about Israel to abide by its obligations under the fourth Geneva Convention.¹⁰ And that obligation, under common Art. 1, not only relates to grave breaches of the four Geneva Conventions but, as the Court put it, “to the requirements of the instruments in question”, and thus also applies to possible violations of common Art. 3, that is to war crimes committed in non-international armed conflicts.¹¹

Thus, at least when genocide is being committed or when there is a real risk of genocide being committed, or where serious violations of the Geneva Conventions, including violations of common Art. 3, are being carried out, third parties are under an obligation to act. Yet, if these are the substantive obligations of States, the question arises what these obligations might involve for both the Security Council as such as well as for States contracting parties of the Genocide Convention and the four Geneva Conventions being members of the Security Council at the relevant time.

3. OBLIGATIONS TO PREVENT GENOCIDE AND WAR CRIMES AND THE SECURITY COUNCIL

The first question one has to very briefly consider is whether acts of genocide or violations of the four Geneva Conventions amount to a situation which falls within the meaning of Art. 39 of the UN Charter.¹² As is well-known, the subsequent practice of the Security Council has confirmed ever since 1990 – and one might argue that this is

⁷ J. Pictet (ed.), *ICRC Commentary, Convention I, Art. 1/ CICR commentaires, Les Convention de Genève du 12 août 1949: Commentaire* (2nd ed.), 2006, Convention I, Art. 1, p. 26.

⁸ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion of the 9 July 2004, ICJ Reports 2004 pp. 136 et seq.; cf., A. Imsei, *Critical reflections on the international humanitarian law aspects of the ICJ wall advisory opinion*, 99 American Journal of International Law 102 (2005), pp. 114 et seq.; D. Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 American Journal of International Law 88 (2005).

⁹ *Ibidem*, p. 199, para. 158.

¹⁰ Conference of High Contracting Parties to the Fourth Geneva Convention of 1949, on 15 July 1999 and on 5 December 2001, declaration of 5 December 2001 in International Review of the Red Cross No. 847, pp. 661-695 (Implementation of the Fourth Geneva Convention in the occupied Palestinian territories: history of a multilateral process (1997-2001); UNGA A/ES-10/L.7 (2001) B; UNGA Res. 97 (58) (9 December 2003), UN Doc A/RES/58/97.

¹¹ ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, ICJ Rep 1986, pp. 14 et seq. p. 114, para. 219 f.; Kessler, *supra* note 6, pp. 498, 507 et seq.

¹² N. Krisch, in: B. Simma et al. (eds.), *The Charter of the United Nations. A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, vol. 1, Art. 39, marginal note 25.

by now even noncontroversial or at least almost noncontroversial – that those kinds of violations of international law do amount to, and may be characterized by the Security Council as, triggering the right of the Council to act under Chapter VII.¹³

Thus, violations of the Genocide Convention or war crimes trigger the primary responsibility of the Security Council under Art. 24 of the Charter and the ensuing duties laid down in paragraphs 1 and 2 of Art. 24.¹⁴ Indeed, Art. 24 of the Charter may be interpreted in a way to really imply certain duties. Art. 24 para. 2 refers to the discharge of duties by the Security Council when it states: “[i]n discharging these duties (...)”, and “duties” certainly imply that there are certain obligations on the part of the Council. Similarly, the French text of Art. 24 is even less ambiguous in that it refers to the fulfilment of the duties and then states that “*qu'en s'acquittant des devoirs que lui impose cette responsabilité, des devoirs que lui impose*” – thus “duties” are imposed upon the Council in the French text of Art. 24. And, again in Art. 24 para. 2, the Council has to act in the “*accomplissement de ces devoirs*”, i.e. in the fulfillment of these duties. Moreover, under Art. 24 para. 2, the Council “*shall act* (...)”. In that regard it is also interesting to note that the wording of the respective Dumbarton Oaks proposal had only referred to the fact that the Council “should act”, and that this wording was later changed to “shall act”.¹⁵

Accordingly, already under the wording of Art. 24 there are obligations inherent in the Charter to act. Similarly, if one considers the whole approach of the Uniting-for-Peace-resolution of the General Assembly,¹⁶ it might be safe to assume that it implies that the Security Council has certain duties, and it is only if those duties are not being fulfilled by the Security Council that the secondary responsibility of the General Assembly comes into play, which again implies certain duties incumbent upon the Security Council.¹⁷

Similarly, if we take it for granted that indeed member States have obligations under the Genocide Convention and under the four Geneva Conventions to act and if, furthermore, they transfer responsibility to the Security Council in that such violations

¹³ Cf., e.g. UNSC Res 688 (5 April 1991), UN Doc S/Res/688, operative para. 1; Res 794 (3 December 1992), UN Doc S/Res/794, operative para. 10; Res 1296 (19 April 2000), UN Doc S/Res/1296, operative para. 5; Res 1314 (11 August 2000), UN Doc S/Res/1314, operative para. 9; UNSC Res 1674 (28 April 2006), UN Doc S/Res/1674, operative para. 26; and most recently UNSC 1970 (26 February 2011), UN Doc S/Res/1970, operative para. 2 (a).

¹⁴ A. Peters in: Simma, *supra* note 12, vol. 1, Art. 24, marginal note 15.

¹⁵ Dumbarton Oaks Proposals for the Establishment of a General International Organization of 7 October 1944 in US Dept. of State, Dumbarton Oaks Documents on International Organization, Chapter IV, Section B, 5.

¹⁶ UNGA Res. 377 (V) (3. November 1950), UN Doc A/Res/377 (V) operative para. 1.

¹⁷ *Ibidem*; cf. Ch. Tomuschat, *Uniting for peace*, 76 *Friedenswarte* 289 (2001); J. Andrassy, *Uniting for Peace*, 50 *American Journal of International Law* 563 (1956); D. Zaum, *The Security Council, the General Assembly, and war: the uniting for peace resolution*, in: V. Lowe et al. (eds.), *The United Nations Security Council and war: the evolution of thought and practice since 1945*, Oxford University Press, Oxford: 2008, pp. 154 et seq.

of the Genocide Convention and of the Geneva Conventions do amount to threats to peace or breaches of peace, and if States have transferred their responsibility, we cannot assume that States wanted to transfer their obligations to abide by the Genocide Convention and the Geneva Conventions respectively to the Security Council, and not at the same time also oblige the Security Council to act on their behalf, because they would by that token violate the aforementioned obligations. Therefore, that again implies that by transferring obligations or transferring powers to the Security Council, States implicitly also transfer at the same time their obligations that come with it.

Moreover, as already mentioned, under Art. 24 of the Charter, the Security Council shall act in accordance with the purposes and principles of the United Nations, and obviously human rights protection constitutes one of the major purposes and principles of the organization. If one thus shares the general view that under Art. 24 of the Charter the Security Council has certain duties and obligations, at least when it comes to genocide and war crimes triggering Arts. 24 and 39, one might ask how to operationalize these obligations.

Obviously, the Security Council has a wide margin of appreciation when acting under Chapter VII, since Arts. 39, 40, and 42 refer to deciding “what measures shall be taken”.¹⁸ Obviously, therefore, the Security Council is merely under an obligation of conduct and that is indeed what the Court stated in its genocide judgment, namely that “the obligation to prevent genocide is only an obligation of conduct”¹⁹ – yet at least it does constitute a (legal) obligation of conduct. We might now compare this holding with the jurisprudence of the European Court of Human Rights in *Ilascu*,²⁰ where a certain territory was not under the *de facto* control of the respective contracting party. Nevertheless, the Court found that the contracting party still had positive obligations to try its best to prevent violation of Arts. 2 and 3 of the European Convention on Human Rights occurring in that territory.²¹ If one were to transfer that idea, taking into account that both the right to life and the prohibition of torture under Arts. 2 and 3 of the European Convention, like the prohibition of genocide and war crimes, form part of *ius cogens*, we may also transfer the holding in *Ilascu*, namely that the Security Council is at least under an obligation to make a *bona fide* attempt to cope with the obligations arising under both Art. 1 of the Genocide Convention and common Art. 1 of the Geneva Conventions.²²

This approach is confirmed by the holding of the ICJ in its Wall opinion, where the Court, albeit quite cautiously, stated that “the Security Council, should consider

¹⁸ Art. 39 of the UN Charter.

¹⁹ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 1.

²⁰ European Court of Human Rights, *Case of Ilascu and Others v. Moldova and Russia*, Judgment of 8 July 2004, Application no. 48787/99 ECHR 2004-VII pp. 179 et seq.

²¹ *Ibidem*, p. 77, paras. 331, 333.

²² A. Zimmermann, *The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?*, in: U. Fastenrath et al. (eds.), *From bilateralism to community interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford: 2011, p. 645.

what further action is required to bring to an end the [underlying] illegal situation".²³ It thus seems that the Court in the Wall opinion similarly took the position that, at least somewhat, the Security Council is under an obligation to cope with such violations of international law, notwithstanding its discretion how to act.²⁴

That brings us to our next question, namely, what are the obligations of individual member States of the Security Council when voting in the Council?

4. OBLIGATIONS TO PREVENT GENOCIDE AND WAR CRIMES AND MEMBERS OF THE SECURITY COUNCIL

First, it is important to note that all members of the Security Council, including the five permanent members, are contracting parties of both the Genocide Convention and the Geneva Conventions. Thus, all States deliberating within the framework of the Security Council are bound by the Genocide Convention and the Geneva Conventions and, therefore, the question arises what are their obligations when they exercise their voting rights in the Council generally, and, more specifically, when they vote in favour of a given draft resolution, when they abstain, or when they, as permanent members, eventually exercise their veto? One may recall that in *Behrami* and *Saramati*, it was the European Court of Human Rights²⁵ which found that individual contracting parties of the European Convention on Human Rights are not bound by their obligations arising under the Convention when voting in the Security Council.²⁶ One might wonder, though, whether indeed that approach is first, convincing, and second whether it is also relevant in the case at hand.

First, it might be argued that this result reached by the European Court of Human Rights is not convincing because the Court gave no reason why a State contracting party of the European Convention on Human Rights should be fully dispensed of its obligations under the Convention within the framework of an international organization and its organs such as the United Nations and the Security Council. Yet, second, even if one were to follow *arguendo* the approach taken by the European Court of Human Rights, it would only apply to (positive) obligations arising under a regional instrument

²³ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, *supra* note 8, pp. 135 et seq. (n. 40) (p. 200, para. 160).

²⁴ K. Ipsen, *Völkerrecht* (5th ed.), C. H. Beck, Munich: 2004, p. 118.

²⁵ European Court of Human Rights, Decision as to the Admissibility of Application no. 71412/01 (*Agim Behrami and Bekir Behrami against France*) and Application no. 78166/01 (*Ruzhdi Saramati against France, Germany and Norway*), 2 May 2007; cf., M. Milanovic & T. Papić, *As bad as it gets*, 58 *International and Comparative Law Quarterly* 267 (2009); P. Klein, *Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme*, 53 *Annuaire français de droit international* 43 (2007); Ph. Lagrange, *Responsabilité des Etats pour actes accomplis en application du Chapitre VII de la Charte des Nations Unis*, 112 *Revue Générale de Droit International Public* 85 (2008).

²⁶ ECtHR, *Agim Behrami and Bekir Behrami against France* (decision as to the admissibility), n. 88, para. 149.

such as the European Convention on Human Rights, since it is safe to assume that the underlying idea of the European Court of Human Rights in *Behrami* was that it cannot be that European members of the Security Council would carry with them in their backpack their obligations arising under the European Convention on Human Rights when voting in the Security Council, while other members of the Security Council from other regions of the world would then carry with them their respective obligations stemming from other treaties. Yet, when it comes to the Genocide Convention and the Geneva Conventions, the legal situation is fundamentally different given that all member States on the Security Council, to still use the previous picture, carry the very same backpack with them since they are all bound by the Genocide Convention and the Geneva Conventions. Accordingly, the assumed danger that European State members of the Security Council would raise in the deliberations limitations arising under the European Convention on Human Rights, and African States those arising under the African Charter on Human and People's Rights, and so forth, simply does not arise in the case at hand. Therefore, even if one were to assume, as a matter of principle, the *Behrami* and *Saramati* holding to be a correct one, it would not, at least when it comes to the Genocide Convention and the Geneva Conventions, hold true.

Accordingly, States voting in the Security Council have to take into account their obligations under international law as they arise under the Genocide Convention and the four Geneva Conventions. It is also important to realize that the issue of Art. 103 of the Charter of the United Nations simply does not arise at this stage because Art. 103 of the Charter only comes into play once obligations under the Charter have arisen. This is however not yet the case where the Security Council is still deciding on whether to adopt measures (and if so which ones) under Chapter VII. As long as no such measure has yet been adopted, there are no obligations whatsoever arising under the Charter yet. Accordingly, Art. 103 of the Charter is a non-issue at this stage.²⁷ There is, therefore, no reason to assume that individual members of the Security Council are not bound by their obligations under the Genocide Convention and under the four Geneva Conventions to prevent genocide and to ensure respect for the Geneva Conventions when voting in the Council.

One might then wonder what this could mean in the actual practice of the Security Council. It probably does not mean that all States have to vote in favour of any given draft resolution, since every member of the Security Council has some discretion whether in a given situation a certain measure would indeed prevent genocide and would indeed ensure respect for the Geneva Conventions. But at the very least, member States of the Security Council, whether permanent or non-permanent members, are under the obligation to take their obligations under the Genocide Convention and under the Geneva Conventions into account, and they cannot rely on political grounds to veto or vote against a draft resolution simply for other reasons, unless they were willing to violate their positive obligations under the Genocide Convention and the four Geneva

²⁷ A. Paulus & J. R. Leiss, in: Simma, *supra* note 12, vol. 2, Art. 103 marginal note 38.

Conventions as described above. In particular, where a regional organization is willing to act under Chapter VIII, Security Council members would, as a matter of principle at least, not be enabled, legally speaking, to veto a resolution which eventually would authorize a regional organization to take enforcement measures under Chapter VIII.²⁸

These positive treaty-based obligations would, however, as has been shown, be limited to situations of genocide and war crimes. It would not cover situations where 'only' crimes against humanity are in the process of being committed. If one were to transpose that to the situation in Syria, we have to note that the situation at a certain point in time reached the threshold of a non-international conflict, and it is probably safe to assume that significant violations of common Art. 3 have been committed, or are in the process of being committed. In such a scenario a "blanket veto policy", vetoing *any* possible action by the Security Council under Chapter VII, would indeed run counter to the obligations arising at least under the four Geneva Conventions.

CONCLUDING OBSERVATIONS

Within the context of the conflict in Syria, the Russian foreign minister Lavrov has been quoted as stating that "the Council in Syria is acting as it was supposed to act when the Charter was drafted in 1945", thereby referring to the voting system within the Security Council as drafted in 1945, including the veto of the permanent members. Yet, while he was right that the voting system in the Security Council has not changed since 1945, substantive international law has significantly changed ever since the Genocide Convention was adopted in 1948 and the Geneva Conventions were adopted in 1949, and what is more Russia, just like all other members of the Security Council, has since then also acceded to these instruments with the ensuing positive obligations to prevent genocide and to ensure respect for the Geneva Conventions. So while it might thus be true that the Security Council is acting as it was supposed to act in 1945 when it comes to procedure and voting, its members have in the past years not always acted in the way they must act under current modern international law.

²⁸ Cf., generally, Z. Deen-Racsmany, *A Redistribution of Authority between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security?*, 13 *Leiden Journal of International Law* 297 (2000).