WHEN TO INTERVENE: "DUE DILIGENCE" AND THE STATE RESPONSIBILITY TO PREVENT GENOCIDE

RACHEL BERNARD

I. INTRODUCTION

When Ukraine filed its application[1] instituting proceedings against Russia at the International Court of Justice (ICJ) on February 27, 2022, it set off new debates about specific State responsibilities in response to alleged mass atrocities.[2] Never before had a party accused of genocide brought the case before the ICJ, especially to seek what would essentially be a "negative" judgment—one that determined that genocide was not, in fact, occurring, and that therefore Ukraine was fulfilling its obligations under the Genocide Convention.[3]

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1. Application of Ukraine, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) (Feb. 26, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf [https://perma.cc/CZ3U-YPRA].

2. *See, e.g.*, Marko Milanovic, *Ukraine Files ICJ Claim against Russia*, EJIL: TALK! (Feb. 27, 2022), https://www.ejiltalk.org/ukraine-files-icj-claim-against-russia/ [https://perma.cc/393X-8LMN] (describing Ukraine's argument that Russia had manipulated the definition of genocide to justify an otherwise illegal invasion as creative). *See also* Rebecca Barber, *Does the 'Responsibility to Protect' Require States to go to War with Russia?*, JUST SECURITY (Mar. 25, 2022), https://www.justsecurity.org/80833/does-the-responsibility-to-protect-require-states-to-go-to-war-with-russia/ [https://perma.cc/9RJP-J9YY]; Lauren Baillie, *How to Achieve Accountability for Atrocities in Ukraine*, U.S. INST. PEACE (Apr. 21, 2022), https://www.usip.org/publications/2022/04/how-achieve-accountability-atrocities-ukraine [https://perma.cc/S68Z-B9LM].

3. Many of interventions in the instant case argue that the Court necessarily has jurisdiction over cases filed by the accused State, seeking an opinion that there has not been a violation of their international obligations. Since none of these interventions cite to previous cases where a State has successfully made this argument, it is necessarily inferred that this interpretation must be a novel argument. *See, e.g.*, Intervention of Denmark, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶¶ 27–30 (Sep. 16, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220916-WRI-01-00-

The other development of note is that an astounding thirty-two interventions have been filed in this case pursuant to Art. 63 of the ICJ Statute,[4] as of the publishing of this piece.[5] When the construction of a multilateral convention is in question, the Court allows signatory States to intervene and provide comments on what they believe is the appropriate reading of the provisions in question.[6] Any State availing itself of this right, however, agrees to be bound by the Court's judgment.[7] In *Ukraine v. Russian Federation*, the intervening States range from major UN and NATO powers such as France[8] and the United

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EN.pdf [https://perma.cc/N52G-TAW8]; Intervention of Portugal, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶ 26 (Oct. 7, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20221007-WRI-01-00-EN.pdf [https://perma.cc/NT4U-CG2Y]; Intervention of Malta, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶¶ 23–25 (Nov. 24, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20221124-WRI-01-00-EN.pdf [https://perma.cc/7QYE-QHT3]. *See also* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

4. Statute of the International Court of Justice, Art. 63, Jun. 26, 1945 [hereinafter ICJ Statute], https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf [https://perma.cc/4DNB-YZME].

5. Though thirty-two interventions were filed, only thirty-one of them have been deemed admissible at the current preliminary objections stage. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order on the Admissibility of the Declarations of Intervention, General List No. 172 (June 5, 2023) [hereinafter Intervention Admissibility Order]. The United States has a reservation to the compromissory clause (Art. IX) of the Genocide Convention, which prevents any construction of that provision from being binding on the United States. *Id.* ¶¶ 94–95. Since at the preliminary objections stage, the construction of any other provision is only relevant in so far as it pertains to the construction of Art. IX, and Art. 63 of the ICJ Statute only "permits States parties to a convention to intervene in relation to the construction of any of its provisions in question before the Court, provided that they are bound by the provision in question," the U.S. Intervention is necessarily inadmissible at the present stage. *Id.* ¶¶ 96–98 (emphasis added). This does not prevent the United States from filing a new intervention if the case reaches the merits stage. Since the instant analysis concerns a merits construction of the obligations in Art. I of the Genocide Convention, the views expressed in the U.S. Intervention are still considered here.

6. ICJ Statute, Art. 63.

7. *Id.*

8. Déclaration d'intervention de la republique française [Intervention of France], Allegations de genocide au titre de la convention pour la prevention et la repression du crime de genocide (Ukr. c. Russ.) (Sep. 13, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220912-WRI-01-00-FR.pdf [https://perma.cc/6AJH-B44X].

Kingdom,[9] to frequent geopolitical victims of Russian aggression like Lithuania[10] and Latvia,[11] to States thousands of miles away from the alleged violations, like New Zealand.[12]

For the most part, there is nothing particularly remarkable about any of these interventions. All of the interventions are generally in agreement that the obligation to prevent genocide under Art. I of the Genocide Convention is an obligation *erga omnes*; all of the States agree that the language of Art. IX—allowing for disputes relating to the application, interpretation, and fulfillment of the Convention to be brought before the ICJ—does not make any distinction between whether the accuser or accused can bring the case.[13]

A few of the interventions, however, make a unique argument regarding preparatory measures prior to taking preventative actions. If the Court ultimately agrees with this interpretation, it could have ramifications on all State obligations to respond to and prevent violations of the Convention and could apply more broadly beyond even human rights law. These interventions generally begin by identifying the "due diligence" standard the ICJ set in its famous *Bosnia v. Serbia* opinion for whether a State has fulfilled its obligations to respond to genocide.[14] In that judgement, the Court noted that

> [a] State does not incur responsibility [for failure to prevent genocide] simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to

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9. Intervention of the United Kingdom, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) (Aug. 5, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220805-WRI-01-00-EN.pdf [https://perma.cc/QQK9-EAEX].

10. Intervention of Lithuania, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) (Jul. 22, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220719-WRI-02-00-EN.pdf [https://perma.cc/3YS7-LQQU].

11. Intervention of Latvia, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) (Jul. 21, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220719-WRI-01-00-EN.pdf [https://perma.cc/XT5M-Y6XA].

12. Intervention of New Zealand, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.) (Jul. 28, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220728-WRI-01-00-EN.pdf [https://perma.cc/YJ3H-QHQB].

13. *See, e.g.*, sources cited *supra* note 3 for examples of States making this argument.

14. *See, e.g.*, United Kingdom Intervention, *supra* note 9, at ¶ 58; Denmark Intervention, *supra* note 3, at ¶¶ 36–37; Lithuania Intervention, *supra* note 10, at ¶ 20.

> preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first . . . is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide . . . [which] must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.[15]

In particular, the interventions place a great deal of emphasis on the "due diligence" standard identified. The Court is a bit ambiguous about when this standard should be applied, but the rest of the paragraph suggests that it should be an *ex post* analysis, to be done once a State has acted in response to an alleged genocide. Conversely, the intervening States argue that the "due diligence" standard equally applies to States *ex ante* when determining how to respond to an alleged violation.[16] Essentially, they argue that the good faith employment of "all means reasonably available" to prevent genocide includes an obligation to engage in "due diligence" to determine whether or not genocide or the imminent threat thereof is even present.[17] This can (and, arguably, should) include relying on independent, third party investigations.

Latvia's intervention, for example, cites two ways this has been used successfully to lend credence to a State's allegations and allow them to meet such a high standard of proof:[18] The Gambia's use of the OHCHR's Independent International Fact-Finding Mission on Myanmar in its 2019 application related to violations against the

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15. Application of the Convention on the Punishment and Prevention of the Crime of Genocide (Bos. & Herz. v. Serb. & Montenegro), Judgement, 2007 I.C.J. Reports 43, 430 (Feb. 26) [hereinafter *Bosnia v. Serbia*] (emphasis added).

16. *See, e.g.*, United Kingdom Intervention, *supra* note 9, at ¶ 58; Denmark Intervention, *supra* note 3, at ¶¶ 36-37; Intervention of Australia, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶¶ 49–51 (Sep. 30, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220930-WRI-01-00-EN.pdf [https://perma.cc/7UE3-P746].

17. The notion of *pacta sunt servanda* obligates States to undertake their international obligations in good faith. Vienna Convention on the Law of Treaties, Art. 26, May 23, 1969, 1155 U.N.T.S. 331.

18. Latvia Intervention, *supra* note 11, ¶ 47, nn.57–58.

Rohingya peoples, [19] as well as the United States' reliance on the findings of the Darfur Atrocities Documentation Project before making its unilateral declaration.[20] It is only after reviewing such credible evidence, and only then, that a State can take lawful action to prevent genocide (assuming such action is otherwise permitted under international law—a discussion for another day).[21] The table below identifies the interventions in *Ukraine v. Russian Federation* to date, and notes how far each State takes this argument. The States are listed in ascending chronological order, based on when their respective intervention was filed with the Court.[22] That order allows readers to see whether states taking a particular approach were aware of the legal positions of other States at the time.

State	Does it address Art. I?	Identifies "Good Faith" Obligation?	Identifies "Due Diligence" Obligation?	Failure to adhere to good faith is abusive?	Good faith is a barrier to lawful conduct under Art. I?	Defines or gives examples of "good faith"?
Latvia	Y	Y	N	Y	Y	Y
Lithuania	Y	Y	Y	Y	Y	N
New Zealand	Y	Y	N	Y	Y	Minimal
United Kingdom	Y	Y	Y	Y	Y	Y
Germany	N	N	N	N	N	N

19. Application and Request for Provisional Measures of Gambia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), ¶¶ 6–15, 49 nn.94, 97 (Nov. 11, 2019), https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf [https://perma.cc/W9JU-EUVQ].

20. Gen. Colin L. Powell, U.S. Sec'y of State, The Crisis in Darfur: Testimony Before the Senate Foreign Relations Committee (Sep. 4, 2004), https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm [https://perma.cc/T7CS-32VV].

21. *See, e.g.*, Denmark Intervention, *supra* note 3, ¶ 36; United Kingdom Intervention, *supra* note 9, ¶ 58; Intervention of Italy, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶ 46 (Sep. 15, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20220912-WRI-02-00-EN.pdf [https://perma.cc/25WR-YN9S].

22. Latvia filed the first intervention in *Ukraine v. Russian Federation* on July 21, 2022. Liechtenstein, on December 15, 2022, filed the most recent intervention.

United States[23]	Y	Y	Y	N	N	Y
Sweden	Y	Y	N	N	Y	Y
Romania	Y	Y	Y	N	Y	Y
France	Y	Y	N	N	Y	N
Poland	Y	Y	Y	N	Y	N
Italy	Y	Y	Y	N	Y	N
Denmark	Y	Y	Y	Y	Y	N
Ireland	Y	Y	N	N	Y	N
Finland	Y	Y	Y	N	Y	N
Estonia	Y	Y	Y	N	Y	Y
Spain	N	N	N	N	N	N
Australia	Y	Y	Y	N	Y	N
Portugal	Y	Y	N	Y	Y	N
Austria	N	N	N	N	N	N
Luxembourg	Y	Y	Y	Minimal	Y	Y
Greece	N	N	N	N	N	N
Croatia	N	N	N	N	N	N
Czech Republic	N	N	N	N	N	N
Bulgaria	N	N	N	N	N	N
Malta	N	N	N	Minimal	N	N
Norway	Y	Y	N	Y	N	N
Belgium	Y	Y	Y	Y	Y	Y
Canada and Netherlands	Y	Y	Y	N	Y	Y
Slovakia	N	N	N	Y	N	N

23. Though the U.S. Intervention is inadmissible at this stage, the arguments made therein are still considered in this analysis. *See supra* note 5 and accompanying text.

Slovenia	N	N	N	N	N	N
Cyprus	Y	N	N	N	N	N
Liechtenstein	Y	N	N	N	N	N

Though the ICJ noted that the specifics of its analysis in *Bosnia v. Serbia* were limited to the construction of provisions to prohibit certain acts under solely the Genocide Convention,[24] it is easy to see how this newer interpretation of the "due diligence" standard could be applied to other treaties requiring States to prohibit others from committing certain acts. It makes perfect sense that "good faith" includes having a reasonable and rational basis for any actions, and taking action without having conducted such an assessment would contravene the obligations of *pacta sunt servanda*. This norm would seem to apply regardless of the treaty's subject matter.

Two big questions arise when considering the extrapolation of this obligation. In discussing the duty to prevent genocide, the ICJ noted that "[t]he content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented."[25] If the "due diligence" standard is how this duty should be interpreted and what specific obligations are required of each State (because, as noted previously, the obligation is dependent on the specific resources of each State), then it is important to evaluate whether similar treaties would require the same standard. While the specific language of the treaty should not change how this "due diligence" standard is applied, the type of violation is a little bit trickier to navigate. Despite this difficulty, it is likely that broadly applying such a standard would be best for the current international system.

II. QUESTION OF SPECIFIC LANGUAGE

It is important to note that the language of Article I does not explicitly provide for specific methods of prevention. It only says that "[t]he Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish."[26] Previously, the Court in *Bosnia v. Serbia* read this provision to create a

24. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 429.

25. *Id.* (emphasis added).

26. Convention on the Prevention and Punishment of the Crime of Genocide, Art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

general obligation to utilize all methods reasonably available.[27] This includes a broad swath of potential options, so having a heightened "due diligence" standard in evaluating "whether genocide is occurring or whether there is a serious risk of genocide occurring" naturally makes sense.[28] So how does this compare to similar treaties that also have an obligation to prevent certain actions?

To jump start this analysis, it is helpful that the Court has previously identified instruments containing a similar obligation to prevent certain actions,[29] namely the: Torture Convention;[30] Protection of Diplomats Convention;[31] Convention on the Safety of United Nations and Associated Personnel;[32] and Terrorist Bombings Convention.[33] Unlike the Genocide Convention, each of these other treaties does provide specific examples of how such an obligation is to be carried out.[34] However, there are two noteworthy word choices that allow for the interpretation of "due diligence" standard under the Genocide Convention to map onto these other treaties.

First, many of the treaties say that States shall cooperate in the prevention of the named crimes "particularly (by)" the specified examples.[35] Art. 31(1) of the Vienna Convention (which has long been understood to reflect customary international law) says that the ordinary meaning of terms should be applied when interpreting a treaty.[36] In colloquial use, "particularly" is an adverb meant to highlight specifics within a larger group, rather than impose a limitation on

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27. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 430.

28. United Kingdom Intervention, *supra* note 9, ¶ 53.

29. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 429.

30. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

31. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Art. 4, Dec. 14, 1973, 1035 U.N.T.S. 167 [hereinafter Protection of Diplomats Convention].

32. Convention on the Safety of United Nations and Associated Personnel, Art. 11, Dec. 9, 1994, 2051 U.N.T.S. 363, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18 [https://perma.cc/9445-CPDB].

33. International Convention for the Suppression of Terrorist Bombings, Art. 15, Dec. 15, 1997, 2149 U.N.T.S. 256, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&clang=_en [https://perma.cc/8DP7-NRWN].

34. *See* treaty provisions identified *supra* notes 30–33.

35. Terrorist Bombings Convention, *supra* note 33, at Art. 15; Protection of Diplomats Convention, *supra* note 31, at Art. 4; Convention on the Safety of United Nations and Associated Personnel, *supra* note 32, at Art. 11.

36. Vienna Convention, *supra* note 17, at Art. 31(1).

allowable actions. Second, the Torture Convention lists specifics before ending its list with "or other measures."[37] Again, this is a qualifier meant to expand the list of acceptable options, rather than restrict it. If the interpretation of the language in the Genocide Convention is couched in having broad, encompassing language, there is no reason that such an interpretation cannot be mapped onto these other treaties, as they also have broad, encompassing language.

But what if the language were more limited? What if one were looking at a treaty such as CEDAW, which only discusses the State "undertaking" specific (mostly domestic) measures?[38] What if the treaty used negative obligations ("refraining from"), instead of the positive obligations thus far discussed ("must do")? For the purposes of conducting a due diligence investigation before accusing a State of violating its obligations, this is not a meaningful semantic difference. Vienna Convention Art. 26 requires that all parties to a treaty must perform their obligations in good faith;[39] this must necessarily include ensuring a thorough review of all of the available information before taking action.[40] Regardless of what the initial treaty obligation is, a State is still, at a minimum, arguing that another State has violated international law through the treaty violation. If the underlying obligation concerned a non-derogable right or a right *jus cogens*, then there are additional violations of international law at play. Either way, the State is accusing the other of (gross) misconduct, and it would be abusive to misappropriate or inappropriately use the dispute resolution and compromissory clauses of these instruments.

III. QUESTION OF TYPE OF VIOLATION

It has now been established that treaties with language similar to the Genocide Convention include a broad range of measures available to signatory States. Does this mean that all of these treaties should also be understood to include the "due diligence" obligation prior to action?

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37. Torture Convention, *supra* note 30, at Art. 2.

38. Convention on the Elimination of All Forms of Discrimination against Women, Art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], https://www.ohchr.org/sites/default/files/cedaw.pdf [https://perma.cc/RH6V-HYP3].

39. Vienna Convention, *supra* note 17, at Art. 26.

40. *See, e.g.*, Joint Intervention of Canada and the Netherlands, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), ¶ 31 (Dec. 7, 2022), https://www.icj-cij.org/public/files/case-related/182/182-20221207-WRI-02-00-EN.pdf [https://perma.cc/4E99-78TJ]; Australia Intervention, *supra* note 16, ¶¶ 50–51; Italy Intervention, *supra* note 21, ¶ 46.

The Court partly justifies its interpretation of the requirement for a preliminary investigation prior to taking preventative measures under the Genocide Convention by emphasizing that accusing another State of perpetrating or failing to prevent genocide is incredibly serious, and thus requires evidence that is "fully conclusive."[41]

The four treaties previously identified by the ICJ either directly address or otherwise implicate a non-derogable right, just as the Genocide Convention does.[42] As such, it is not a stretch to hold allegations of these violations to a similar standard of proof. In all of these cases, a State is being accused of violating a right or obligation of the highest order (arguably, this is particularly meaningful in an international system that generally lacks a hierarchy for sources of law). Since such an allegation goes beyond just a treaty violation, it seems only natural that it be backed by substantial, meaningful, and trustworthy evidence.

However, the list of rights *jus cogens* is limited—the ILC Draft Conclusions on the topic lists only eight currently recognized preemptory norms—and there are many treaties concerned with preventing human rights violations that do not overlap with this list.[43] Treaties like the ICCPR[44] and the ICESCR[45] concern significant human rights issues, but States have the freedom to derogate from

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41. *Bosnia v. Serbia*, 2007 ICJ ¶ 209 (comparing *Corfu Channel (United Kingdom v. Albania)*, Judgment, I.C.J. Reports 1949, ¶ 17).

42. INT'L L. COMM'N, *Draft Articles on Peremptory Norms of General International Law*, *in* Rep. on the Work of Its Seventy-First Session 141, 146–47, U.N. Doc. A/74/10 (Sep. 13, 2019) [hereinafter *ILC Draft Articles on Preemptory Norms*], https://legal.un.org/ilc/reports/2019/english/chp5.pdf [https://perma.cc/J3AU-NVYW] (identifying eight norms considered to be preemptory norms of international law or *jus cogens*). The Torture Convention addresses, *inter alia*, the prohibition on torture. Torture Convention, *supra* note 30. The Protection of Diplomats Convention and the Convention on the Safety of United Nations and Associated Personnel both implicate*, inter alia*, the prohibition on torture and basic rules of international humanitarian law. Protection of Diplomats Convention, *supra* note 31, at Art. 2; Convention on the Safety of United Nations and Associated Personnel, *supra* note 32, at Art. 9. The Terrorist Bombings Convention addresses, *inter alia*, the prohibition on crimes against humanity, and implicates the basic rules of international humanitarian law. Terrorist Bombings Convention, *supra* note 33, at Art. 2.

43. *ILC Draft Articles on Preemptory Norms*, *supra* note 42, at 146–47.

44. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND [https://perma.cc/KMQ9-CWKC].

45. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en [https://perma.cc/DN5N-R24B].

many of them in exigent circumstances.[46] Should the due diligence requirement apply only for alleged violations of the highest level of international norms? This is where the argument starts to diverge slightly from established principles of international law and becomes more focused on policy considerations.

It comes down to a balancing act between wanting to avoid baseless accusations (and avoid misuse of international dispute resolution measures or other countermeasures), while simultaneously wanting to protect the vital human rights of all peoples in all circumstances. Violations of rights *jus cogens* are easier to identify precisely because there is no derogation permitted; a State is either in conformity with them, or it is violating them. Many other human rights have more grey area to them. When is it merely cultural, versus prohibited discrimination? What about practices that lie in the overlap of free religion and the right to bodily autonomy? Sometimes, there is simply no concrete proof available to meet a higher standard of "fully conclusive." Requiring that such a standard be met for all levels of violations in order to successfully bring a claim against another State could very easily result in many non-preemptory norm violations going unreported.

On the other hand, though, there are considerable concerns that if the burden of proof were lower, claims could be used as mere pretext for interfering in another State's affairs. "Slippery slope" arguments are generally unpersuasive, but the possibility of what could essentially amount to the civil version of malicious prosecution between States is troubling. It is not difficult to see a future in which States take advantage of a lower burden of proof in order to tie up others' resources in "petty claims," or even cover up their own violations. With this in mind, one is forced to argue for the universal application of the higher burden. Such a burden would allow for only those sufficiently strong cases to be successful. In a system that already struggles with enforcement, resources would be best spent on these types of cases. This position is further strengthened by the importance placed on norms of state sovereignty.

IV. CONCLUSION

It has long been held that States have a "good faith" obligation to interpret treaties "in a reasonable way and in such a manner that [the

46. ICCPR, *supra* note 44, at Art. 4; ICESCR, *supra* note 45, at Art. 4 (allowing for limitations to the enumerated rights "for the purpose of promoting the general welfare in a democratic society").

treaty's] purpose can be realized."[47] As the United Kingdom rightfully points out in their *Ukraine v. Russia* intervention, to abusively carry out the due diligence assessment would be inconsistent with this principle.[48] The *travaux préparatoires* of the Genocide Convention reflect this perspective, illustrating that a variety of proposals were ultimately shot down because of concerns that they could be used to meddle in another State's internal affairs, or otherwise harass them.[49] Such a due diligence requirement protects against misuse and ultimately helps safeguard States against unsubstantiated violations of state sovereignty (one of the oldest, if not the oldest, international law principles still respected today). Though the invocation of state sovereignty as a defense to human rights violations has largely eroded over time,[50] States are still generally hesitant to go further than verbal condemnations, in light of this historic maxim.[51] At the end of the day, all of these arguments are really about the same issue: the freedom of States to control what occurs within their borders, free of outside general interference. Allegations of human rights violations, in contravention of a treaty, should be the exception to this rule, not the rule to which sovereignty is the exception. A higher burden of proof across the board for all human rights violations would best uphold this

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47. Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. Reports 7, 142 (Sept. 25), https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf [https://perma.cc/Y5QW-NBG3]; Vienna Convention, *supra* note 17, at Art. 26.

48. United Kingdom Intervention, *supra* note 9, ¶ 54.

49. *See, e.g.*, U.N., Econ. & Soc. Council, Summary Records of the 218th Meeting, U.N. Doc. E/SR.218 (Aug. 26, 1948) (statement by Mr. Katz-Suchy, Pol.), *reprinted in* 1 THE GENOCIDE CONVENTION: THE *TRAVAUX PRÉPARATOIRES*, 1230 (Hirad Abtahi & Philippa Webb eds., 2008).

50. *See, e.g.*, Carrie Booth Walling, *Human Rights Norms, State Sovereignty and Humanitarian Intervention*, 37 HUM. RTS. Q. 383, 386 (2015) (noting that, since the end of the Cold War, "the revocation or temporary suspension of sovereignty has been justified by states seeking to protect fundamental human rights and uphold international humanitarian law.").

51. In responses to recent unilateral uses of force (i.e., those interventions not coordinated through the UN), an overwhelming majority of States—but especially those making up the Non-Aligned Movement—decry such interventions as illegal and violations of state sovereignty. *See, e.g.*, Mehrnusch Anssari and Benjamin Nußberger, *Compilation of States' Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020*, JUST SECUIRTY (Jan. 22, 2020), https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/ [https://perma.cc/86T9-HDTZ]; Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai and Elvina Pothelet, *UPDATE: Mapping States' Reactions to the Syria Strikes of April 2018*, JUST SECURITY (May 7, 2018), https://www.justsecurity.org/55790/update-mapping-states-reactions-syria-strikes-april-2018/ [https://perma.cc/8TAT-ABBA].

principle and allow States to feel more confident in these instruments and institutions.