Advisory Committee
on Public International Law

The obligation of third states to prevent genocide

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Introduction

In the political and public debate, there is a serious lack of clarity about the precise legal nature and substance of the obligation of third states, such as the Netherlands, to prevent genocide.[1] For that reason, the Advisory Committee on Issues of Public International Law (CAVV) decided that it is desirable to issue an advisory report concerning this matter on its own initiative. The Netherlands, which has a constitutional obligation to promote the development of the international legal order,[2] can be expected to respond appropriately when a situation involving a serious risk of genocide arises. The purpose of this advisory report is to set out the relevant parameters.

The CAVV read the Minister of Foreign Affairs' letter to parliament of 4 July 2025, in which the minister presented to the House of Representatives the solicited and unsolicited legal advice received by the government concerning compliance by the Netherlands with the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[3] Appended to that letter was a copy of a decision note drafted by the Legal Affairs Department advising the minister to ask the CAVV to issue an advisory report about the scope of the obligation to prevent genocide. The CAVV read the decision note and the accompanying draft request for advice. The CAVV did not receive this request from the minister.[4] Since the CAVV had already decided to draw up an advisory report on its own initiative regarding the specific obligation that rests on third states to prevent genocide, the CAVV has not answered the exact questions contained in the draft request for advice. However, there is significant overlap between those questions and the questions identified by the CAVV.

The CAVV has previously advised the government on international law in relation to genocide. In 2017, the CAVV and the then External Adviser on Public International Law (EVA) worked together to prepare a joint advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians.[5] In that report, the CAVV briefly touched on the obligation to prevent genocide, stating that 'the obligation to prevent has not as yet been fully defined' and that 'the precise substance of the obligation and in particular what types of preventive actions and measures states are expected to take remain largely unspecified'.[6] In that advisory report, the CAVV did not specify the obligations of third states or the substance of the obligation to prevent genocide. The CAVV will do so in the present report.

The present advisory report is structured as follows. Section 1 sets out the scope and limitations of this advisory report. Section 2 describes the legal framework governing the obligation that rests on third states to prevent genocide. Section 3 addresses the nature of the obligation, and section 4 discusses which measures third states can take to discharge the obligation. The report concludes with a summary of its recommendations.

The CAVV adopted this advisory report on 21 July 2025.

– 1
Scope and limitations of the advisory report

This advisory report concerns the obligation to prevent *genocide*. Consequently, it does not address the obligation to prevent other international crimes, such as war crimes and crimes against humanity. This is because the obligation to prevent international crimes clearly has a legal basis in the Genocide Convention, but only in so far as that obligation relates to genocide.[7] Furthermore, that convention requires that disputes be submitted to the International Court of Justice (ICJ).[8] At present there is a case pending before the ICJ regarding possible violations of the obligation to prevent genocide.[9]

Furthermore, the advisory report is limited to the obligations of third states that are party to the Genocide Convention. Third states are all states other than those directly involved in a genocide. The latter category of states mainly comprises states with respect to which it is likely that genocide is being committed in their territory or in territory over which they exercise effective control, states that are occupying foreign territory, and states with respect to which it is likely that they or their citizens are involved in acts of genocide.

The present report does not address obligations of non-state actors in third states, such as businesses or individuals.

It focuses instead on the obligation that rests on third states to *prevent* genocide. Consequently, it does not examine the possible obligations of third states to punish genocide, nor does it address the criteria for determining third-country complicity in genocide.[10]

Lastly, rather than examining a specific situation, this advisory report more broadly examines all situations in which genocide occurs or could occur in the future, or in which, at any rate, there is a serious risk of genocide occurring.

– 2
Legal framework

The obligation to prevent genocide is codified in the Genocide Convention.[11] The convention was concluded in 1948 and entered into force in 1951. At present 153 states, including the Netherlands, are parties to the convention. Among other things, it imposes an obligation on states parties to prevent the crime of genocide. The scope of this obligation was clarified by the ICJ in 2007 in the *Bosnia Genocide* case.[12]

Article I of the Genocide Convention provides as follows: *'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.'* The ICJ considered that the duty to prevent genocide is linked to states parties' duty to punish perpetrators of genocide.[13] It recognised that punishing individual perpetrators can be one of the most effective means of preventing genocide.[14] Nevertheless the duty to prevent genocide is a separate obligation, with its own substance and scope.[15] In addition to the distinction between prevention and punishment, the ICJ also considered that there is a difference between violating the obligation to prevent genocide and complicity in genocide. According to the ICJ, complicity in genocide requires that some action has been taken, while the failure to prevent results from omission.[16]

Article VIII of the Genocide Convention contains the only other reference to the prevention of genocide: *'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.'* The ICJ has noted that the obligation to prevent extends beyond action taken by organs of the United Nations as referred to in article VIII.[17] In situations in which a UN organ, such as the Security Council or the General Assembly, takes action to prevent genocide, states parties remain bound by their individual obligation to prevent, as referred to in article I.

In the *Bosnia Genocide* case, the ICJ set out several characteristics of the prevention obligation, including its normative nature, the circumstances that trigger its application, its scope and its substantive content. Within the framework of the Genocide Convention, the obligation to prevent genocide is an obligation *erga omnes partes*.[18] Each state that is a party to the Genocide Convention therefore has this obligation towards every other state party, which in concrete terms means that each state party has an interest in compliance with the convention and can invoke

the responsibility of another state party.[19] The Genocide Convention thus generates a network of obligations and correlative rights between states parties.[20]

While each state party has an individual obligation to prevent genocide, in practice states parties must act jointly or concurrently in order to be effective. However, any state party has a duty to act, even if, on its own, it does not have the capacity to prevent genocide from taking place. The ICJ has explained that a state party could be in breach of its obligation even if a specific preventive measure taken by that state would not have been sufficient to prevent genocide from being committed (if that could even be proved).[21] The ICJ considered that: '*the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce*'.[22] The obligation to prevent genocide therefore does not relieve a state party of responsibility for failing to take preventive measures.

The obligation to prevent is not just an obligation to prevent the *commission* of genocide (article III (a), Genocide Convention). The CAVV takes the view that this obligation on states parties also applies to any preparatory acts, such as direct and public incitement to commit genocide (Article III (c), Genocide Convention).[23] In the *Bosnia Genocide* case, the ICJ clarified that the obligation to prevent genocide includes a duty to take deterrent measures against those suspected of *preparing* genocide.[24] This obligation therefore applies to preparatory acts as well as the commission of genocide.

The obligation to prevent genocide arises at the instant the third state learns of or should normally have learned of, and is thus aware of or should normally have become aware of,[25] the existence of a serious risk that genocide will be committed.[26] This entails actual or constructive awareness. This is a matter of evidence.[27] The ICJ does not explain what exactly constitutes constructive awareness. It can be inferred from the 'due diligence' character of the obligation to prevent genocide that a state is meant to take steps to acquire information from a combination of sources.[28] In concrete terms, awareness of the existence of a serious risk of genocide can be inferred from sources such as UN reports, from decisions of the ICJ in cases involving the commission of genocide,[29] from diplomatic notes, news items, posts and videos on social media, reports published by NGOs such as the International Red Cross and Amnesty International, and from answers to questions in parliament.[30]

Factors that point to the existence of a serious risk of genocide include the existence of acts that could constitute material elements of the crime and are directed against a protected group, the existence of a plan, policy or pattern of conduct that could point to the intent to bring about the destruction of the group, dehumanising statements, or ethnic cleansing as part of actions that constitute a material element.[31]

The obligation to prevent genocide arises at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed, but breach of that obligation occurs and responsibility arises only once it is established that a genocide was actually committed.[32] There is therefore a distinction between the instant the obligation to prevent arises and the moment at which it can be established that a breach of that obligation has arisen.

To date the ICJ has only once established that a genocide was committed, namely in the *Bosnia Genocide* case, and this is also therefore the only case in which the ICJ found a corresponding violation of the obligation to prevent genocide. There are a number of other cases currently pending before the ICJ in which states have made allegations of genocide, but the ICJ has not yet made a determination of genocide.[33] In some recent cases the ICJ has indicated provisional measures requiring the states concerned to prevent genocide.[34] If the ICJ determines that there is a real and imminent risk that rights under the Genocide Convention will be irreparably harmed, it may be assumed that a 'serious risk of genocide' exists and the obligation to prevent has arisen.[35]

– 3
Nature of the obligation to prevent genocide

The obligation to prevent genocide applies to every state party to the Genocide Convention[36] and is an obligation of conduct, not of result.

Third states have a due diligence obligation, which means that the measures a state needs to take in order to comply with that obligation will depend on the actual situation.[37] The ICJ has clarified that the obligation must be interpreted within the specific context of the convention and the case under consideration.[38]

The ICJ found in the *Bosnia Genocide* case that '*responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.*'[39] This general interpretation of responsibility is related to the humanitarian purpose of the convention and the fact that the prohibition of genocide is a peremptory norm of general international law (*jus cogens* norm) that entails *erga omnes* obligations.[40] As a consequence, the obligation to prevent genocide has a certain 'gravity'.[41] This has consequences regarding how the obligation to prevent genocide is fulfilled and regarding accountability for the measures taken. The CAVV considers it important for third states to publicly account for the way in which they discharge their obligation to prevent genocide.[42] Public accountability is part of the obligation to prevent the violation of a *jus cogens* norm. The CAVV realises that the way in which a state publicly renders account will vary from country to country, and may depend on many factors, including democratic scrutiny of the government, a free press and an independent judiciary.

In contrast to due diligence obligations in international human rights law, in the Genocide Convention there is no judicial or quasi-judicial monitoring mechanism that has further elaborated upon the scope of the obligation.[43] The requirement for states parties to publicly account for their discharge of the obligation can, to a certain degree, compensate for the lack of an oversight mechanism.

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Measures to prevent genocide

It cannot be said in the abstract which measures states parties are required to take to prevent genocide.[44] In general, states parties have an obligation '*to employ all means reasonably available to them, so as to prevent genocide so far as possible*'; a state party incurs responsibility if it '*manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.*'[45] The measures concerned must have a deterrent effect on those committing or likely to commit genocide.[46]

The capacity to exert influence requires an assessment *in concreto* in each case and depends on multiple factors and parameters.[47] The ICJ refers to the geographical distance of the state concerned from the scene of the events, and the strength of the political ties and other links between the authorities of that state and the main actors in the events.[48] A state party's particular legal responsibility vis-à-vis another state or group due to a past colonial relationship or other ties that engender a particular responsibility for that state or group also plays a role.[49] In the CAVV's opinion this means that there is a connection between the degree of influence (be it economic, political or military) and the extent to which this obligation compels a state to take concrete action.

Whether or not a third state has acted in accordance with the due diligence requirement will in many cases depend on the relationship of that third state with the state that is the source of the serious risk of genocide.[50] The rationale behind this is that, if the relationship with the state that is the source of the risk is good, a measure to prevent genocide will carry more weight and therefore be more effective. An assessment *in concreto* will be required in each case. For example, a situation could arise in which a third state that is geographically close to the scene of the events *is unable* to exert any influence, while a third state located further away *is able* to do so.[51] An obligation to prevent genocide also arises for third states which themselves do not have strong political, military or economic ties but whose combined efforts, for example within the framework of an influential regional organisation such as the EU, could nevertheless influence events.[52] The obligation to prevent genocide is then fulfilled collectively, although it remains the case that individual states have a duty to take the initiative to draw attention to the issue at the international or regional level.

As a result of the obligation to prevent genocide, a third state may be required in specific cases

to characterise and condemn violations that indicate (a serious risk of) genocide as such.[53] The third state can then be expected to publicly explain which measures it is taking or intends to take to prevent genocide and why it believes those measures will be effective.

If diplomatic efforts – in the public eye and behind the scenes – prove ineffective, the obligation to prevent genocide requires states to change course and increase diplomatic pressure. After all, the obligation to prevent genocide requires that measures be effective and have a deterrent effect. If a third state, due to close economic, political and military ties, has a set of instruments at its disposal with which it can exert influence, it must use them to increase pressure.

The CAVV provides below a non-exhaustive overview of measures that it considers possible. The measures are presented in order of increasing severity, from mild to severe, from diplomatic to legal, from declaratory policy to action. These measures can be considered by the Netherlands both independently and in the framework of the EU.

Diplomatic methods include *naming and shaming*: this entails expressing criticism of the unacceptable practices in the state concerned through public channels, such as press statements and social media posts[54] and possibly presenting the issue to international institutions (such as the Special Adviser to the UN Secretary-General on the Prevention of Genocide,[55] the UN Human Rights Council and its Special Rapporteurs, UN bodies such as the General Assembly and the Security Council[56]) or regional entities (for example the African Union Special Envoy on the Prevention of Genocide and Other Mass Atrocities).[57] The resolutions or reports of these institutions can influence the reputation and international status of the state concerned.[58] In addition, a third state can lodge a *diplomatic protest*,[59] either directly or through diplomatic channels. The Dutch ambassador in the country concerned can deliver a *diplomatic note* to or undertake a *démarche* at the Ministry of Foreign Affairs of that state;[60] or the ambassador of that country can be summoned by the Dutch Minister of Foreign Affairs. A stronger variant of this would be to recall the Dutch ambassador for consultations.[61]

Acts of *retorsion* are measures which, though unfriendly, are not unlawful,[62] such as imposing or tightening visa requirements (including increasing the costs and making procedures more onerous), revoking overflight rights, not awarding government contracts (in so far as this is lawful under WTO law), imposing entry restrictions or bans on specific individuals,[63] refusing to supply arms or other military equipment,[64] discouraging investments in the state concerned (for example by not providing consular assistance to companies that invest in that state), or suspending a convention if this is allowed under the terms of the convention (for example if the convention contains a human rights clause).

Another option is taking *countermeasures* or reprisals. These are measures that are in themselves unlawful, but that become lawful when they are taken as a proportionate response to induce a state that has violated international law to comply with its legal obligations.[65] Such measures may include non-compliance with particular treaty obligations or the freezing of certain assets.

Lastly, a state can bring proceedings against another state before the ICJ, provided that both are parties to the Genocide Convention and have not lodged a reservation excluding the jurisdiction of the ICJ.[66] As part of a prevention strategy it may be appropriate to support international justice mechanisms such as the International Criminal Court (ICC). A state that is party to the Rome Statute of the ICC could refer a situation in another state to the ICC Prosecutor under Article 14 of the Rome Statute.

In closing, the CAVV notes that third states, when faced with comparable situations involving a serious risk of genocide, must be consistent in speaking out and taking measures. It is important to practice consistency and *not* uphold double standards, to ensure the effectiveness of measures and interventions, the credibility of third states and the integrity of international law.

Conclusion and advice

In this advisory report, the CAVV has examined the nature and substantive content of the obligation of third states, such as the Netherlands, to prevent genocide. On the basis of this examination, the CAVV has arrived at the following conclusions and recommendations:

1 Every third state that is a party to the Genocide Convention has an individual obligation to prevent genocide, wherever in the world there is a serious risk that genocide will be committed.

2 A third state has a duty to act even if, on its own, it does not have the capacity to prevent a genocide from taking place.

3 A third state may be held responsible for breaching the obligation to prevent genocide only if a genocide actually takes place. The state incurs responsibility if it manifestly fails to take measures to prevent genocide.

4 The obligation to prevent genocide arises at the instant that the third state becomes aware of, or should normally have become aware of, the existence of a serious risk that genocide will be committed. If the ICJ determines that there is a real and imminent risk that rights under the Genocide Convention will be irreparably prejudiced, then it may be assumed that a 'serious risk of genocide' exists.

5 The obligation to prevent genocide has a certain 'gravity'. This has implications for how the obligation to prevent genocide is fulfilled and for accountability for the measures taken. The third state can be expected to publicly account for the way in which it has discharged its obligation to prevent genocide.

6 The duty that rests on the third state is a due diligence obligation and is dependent on its capacity to exert influence on persons likely to commit, or already committing, genocide. The state is required to employ all means reasonably available to it to prevent genocide. This will vary from state to state and from case to case.

7 Third states are required to take measures that are likely to have a deterrent effect on those suspected of committing or preparing to commit genocide. The capacity to exert influence depends on multiple factors. An assessment *in concreto* must be made in each case. As a rule, more can be expected of a third state that has strong ties and a good relationship with the state that is the source of the risk of genocide.

8 International law has no clear or fixed rules prescribing which measures should be taken to prevent genocide. Third states must assess on a case-by-case basis the adequacy and effectiveness of the measures to be taken. Measures of increasing severity can be taken, ranging from mild (diplomatic measures) to severe (retorsion and reprisals). If certain measures appear to lack a deterrent effect, the state concerned should take more far-reaching measures, provided it has the capability to do so.

9 Third states, when faced with comparable situations involving a serious risk of genocide, must be consistent in speaking out and taking measures.

Although this report addresses only the obligation to prevent genocide, the CAVV would note that third states may also have obligations to prevent other international crimes, such as crimes against humanity and war crimes.[67] They also have a duty to ensure that they are not complicit in these crimes and do not contribute to them in another way.[68]

List of abbreviations

CAVV
Advisory Committee on Issues of Public International Law

EVA
External Adviser on International Law

Genocide Convention
Convention on the Prevention and Punishment of the Crime of Genocide

ICJ
International Court of Justice

ILC
International Law Commission

ICC
International Criminal Court

UN
United Nations

WTO
World Trade Organization

Endnotes

1 See Report of a debate on the Middle East held by the Permanent Committee on Foreign Affairs on 21 January 2025 [in Dutch only], Parliamentary Papers, House of Representatives 2024/25, 23 432, no. 558; and Letter to parliament from the Minister of Foreign Affairs, Response to requests concerning the Genocide Convention and assessment of reports by NGOs [in Dutch only], Parliamentary Papers, House of Representatives 2024/25, 23 432, no. 546.

2 Article 90 of the Constitution of the Netherlands ('The government shall promote the development of the international legal order.')

3 Letter from the Minister of Foreign Affairs, Undertaking regarding advice on compliance by the Netherlands with the Genocide Convention, Parliamentary Papers, House of Representatives 2024/25, 23 432, no. 567 and the appendices: 'Decision note proposing that the CAVV be requested to issue an advisory report on the obligation to prevent genocide' and 'Request for advice to the CAVV concerning the obligation to prevent genocide'.

4 At any rate, not by the time the text of this advisory report was adopted on 21 July 2025.

5 CAVV and EVA, *Advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians*, Advisory report no. 28, 3 March 2017. On 28 June 2023 the CAVV also published advisory report no. 42 entitled 'International legal issues surrounding the characterisation of the Holodomor as genocide'. That report does not address the obligation to prevent genocide, but instead examines the use of the term genocide to characterise historical injustices.

6 CAVV and EVA, *Advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians*, Advisory report no. 28, 3 March 2017, p. 12.

7 Convention on the Prevention and Punishment of the Crime of Genocide of 1948, 9 December 1948, *Dutch Treaty Series* 1960, 32 (Genocide Convention), article I. Article 4 of the (non-binding) ILC, 'Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019', *Yearbook of the International Law Commission, 2019*, vol. II, Part Two, provides for an obligation to prevent crimes against humanity. In 2024, it was decided to open formal negotiations concerning a convention based on these articles, Resolution of the UN General Assembly, 'United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity', 12 December 2024, UN Doc. A/RES/79/122. With regard to international humanitarian law, the Geneva Conventions (1949) do not explicitly provide for an obligation to prevent violations, although Common Article 1 (of the Geneva Convention relative to the Protection of Civilian Persons in Time of War) does refer to the obligation 'to respect and to ensure respect for the present Convention in all circumstances'.

8 Article IX, Genocide Convention.

9 ICJ, 1 March 2024, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), Application instituting proceedings and a request for the indication of provisional measures*.

10 For a broader analysis see, for example, I. Pietropaoli, 'Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza', Al-Haq Europe and SOMO, 2024; R. van Alebeek, 'Het Nederlands Israël-beleid, Door de lens van verplichtingen onder internationaal recht in relatie tot schendingen gepleegd door een ander' [The Netherlands' policy on Israel through the lens of obligations under international law in relation to violations committed by others], *Nederlands Juristenblad* 2025/1779.

11 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, *Dutch Treaty Series* 1960, 32 (Genocide Convention).

12 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, paras. 428-438 (*Bosnia Genocide*).

13 Ibid., paras. 425 and 426.

14 Ibid., para. 426.

15 Ibid., para. 427.

16 Ibid., para. 432.

17 Ibid., para. 427.

18 ICJ, 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, I.C.J. Reports 1996*, p. 595, para. 31.

19 See ICJ, 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, paras. 68-69: 'These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide (…) It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*.' See also: ICJ, 22 July 2022, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, paras. 107-113.

20 See also *Separate Opinion of Judge Lauterpacht*, para. 86, accompanying: ICJ, 13 September 1993, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325.

21 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 430.

22 Ibid.

23 For another opinion, see C.J. Tams, L. Berster and B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary* (second edition), Beck-Hart-Nomos 2024, p. 55.

24 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, para. 431: '(…) if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.'

25 Ibid., para. 432.

26 Ibid., para. 431: '(…) a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.'

27 For example, awareness was inferred from documents of meetings between Slobodan Milošević and officials of third states showing that the risks were known to the authorities in Belgrade. Ibid, para. 438.

28 See L. van den Herik and E. Irving, 'Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity', in H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford 2020, p. 210. They describe constructive awareness as a 'should have known' criterion which includes an information duty.

29 On the plausible risk of genocide, see in particular ICJ decisions on provisional measures in cases concerning allegations of genocide: ICJ, 23 January 2020, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, para. 56; ICJ, 26 January 2024, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024,* p. 3, para. 54. On this topic see

also I. Pietropaoli, 'Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza', Al-Haq Europe and SOMO, 2024, p. 22.

30 If there are strong bilateral ties, the chance is greater that a third state will have information about the risk of genocide. See B. Schiffbauer, 'The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention,' *Genocide Studies and Prevention: An International Journal,* Vol. 12-3, 2018, p. 91: 'The closer a State was involved in the respective situation (for example geographically, by bilateral relations or as a host for refugees), the better it knows the facts and thus can assess whether or not genocide was present.'

31 On these factors with regard to Gaza, see 'Note on the definition of genocide in relation to the situation in Gaza', pp. 5-7, appended to: Letter from the Minister of Foreign Affairs, Undertaking regarding advice on compliance by the Netherlands with the Genocide Convention, Parliamentary Papers, House of Representatives 2024/25, 23 432, no. 567.

32 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, para. 431; article 14, paragraph 3 of the draft articles on state responsibility (ARSIWA), in: ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

33 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening)*; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel); Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany).*

34 ICJ, 23 January 2020, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, para. 86 (1); ICJ, 26 January 2024, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024*, p. 3, para. 86 (1).

35 ICJ, 26 January 2024, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024*, p. 3. This determination was made in the context of the provisional measures proceedings, without prejudice to possible findings in subsequent proceedings on the merits.

36 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 461.

37 Ibid, para. 430: 'In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance.' O. Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary*, Oxford Commentaries on International Law, 2009, p. 40.

38 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, para. 183, para. 429; ICJ, 5 February 1970, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, paras. 33, 34.

39 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 430.

40 Ibid., para. 162: 'Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent.'; ICJ, 28

May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, para. 23. See also ICJ, 23 January 2020, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, para. 41: 'In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity.'; ICJ, 22 July 2022, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, paras. 106, 107.

41 On the special nature of this obligation, see T. Stephens and D. French, *ILA Study Group on Due Diligence in International Law - Second Report*, 2016; M. Milanović, State Responsibility for Genocide: A Follow-Up', *European Journal of International Law*, Vol. 18-4, 2007, p. 685. It need not be specified in this respect whether the obligation to prevent genocide is *itself* a *jus cogens* norm. For discussion on this matter, see: O. Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary*, Oxford Commentaries on International Law, 2009, p. 36 (which argues that it is a *jus cogens* norm); ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, para. 210; A, Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', *European Journal of International Law* 18-4, 2007, p. 697 ('presumably, that breach of the duty of prevention does not itself constitute a violation of *jus cogens*').

42 See also L. van den Herik and E. Irving, 'Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity', in H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford 2020, p. 205; C.J. Tams, L. Berster and B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary (second edition)*, Beck-Hart-Nomos 2024, p. 58.

43 This rule can be viewed against the backdrop of the broad, extraterritorial obligation to prevent genocide. States' positive obligations under human rights conventions are typically territorially limited. See also H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford 2020, p. 368.

44 S. Forlati, 'The Legal Obligation to Prevent Genocide: Bosnia v. Serbia and Beyond', *Polish Yearbook of International Law* Vol. 31 2011, p. 201; H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford 2020, p. 12; C.J. Tams, L. Berster and B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary (second edition)*, Beck-Hart-Nomos 2024, pp. 55, 56: it is a 'best efforts' obligation that is independent of the outcome.

45 ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 430.

46 Ibid., para. 431.

47 Ibid., para. 430.

48 Ibid., para. 430.

49 Tams refers to this as a 'legal prerogative'. C.J. Tams, L. Berster and B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary (second edition)*, Beck-Hart-Nomos 2024, p. 57.

50 See M. Longobardo, 'Due Diligence in International Humanitarian Law', in: H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford 2020, p. 184 and P. de Sena, 'La "due diligence" et le lien entre le sujet et le risque qu'il faut prévenir: quelques observations', in *Le standard de due diligence et la responsabilité internationale*, SFDI 2018, pp. 243-254.

51 E. Ruvebana, *Prevention of Genocide under International Law: An analysis of the obligations of States and the United Nations to prevent genocide at the primary, secondary and tertiary levels*. Thesis, fully internal (DIV), University of Groningen, 2014, p. 172, which refers to the opportunity France had to prevent the genocide in Rwanda in 1994.

[52] ICJ, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, *I.C.J. Reports 2007*, p. 43, para. 430: 'the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce'. See also L. van den Herik and E. Irving, 'Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity', in H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order*, Oxford 2020, p. 206; E. Ruvebana, *Prevention of Genocide under International Law: An analysis of the obligations of States and the United Nations to prevent genocide at the primary, secondary and tertiary levels*. Thesis, fully internal (DIV), University of Groningen, 2014, p. 172; C.J. Tams, L. Berster and B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary (second edition)*, Beck-Hart-Nomos 2024, p. 58; Glanville (2021), p. 114.

[53] As a state party, the third state has the right to require compliance with the obligations under the Genocide Convention. See also B. Schiffbauer, 'The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention', *Genocide Studies and Prevention: An International Journal*, Vol. 12-3, 2018, pp. 86-87, with reference to research into the effectiveness of naming and shaming.

[54] See, with critical observations about the effectiveness of *naming and shaming*, M. Krain, 'J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?', *International Studies Quarterly* Vol. 56-3, 2012, pp. 574-589.

[55] https://www.un.org/en/genocide-prevention/prevention-genocide-related-crimes/special-adviser

[56] R.J. Barber, 'Cooperating through the General Assembly to end Serious Breaches of Peremptory Norms', *International and Comparative Law Quarterly*, Vol. 71, 2022, pp. 1-35.

[57] https://www.peaceau.org/en/article/au-special-envoy-on-preventing-genocide-atrocities-assumes-duty

[58] J. Verbeke, *Diplomacy in Practice: A Critical Approach,* Routledge, 2023, p. 200.

[59] See J.C. McKenna, *Diplomatic Protest in Foreign Policy: Analysis and Case Studies,* Loyola University Press, 1962.

[60] See I. Roberts, 'Diplomatic Communication', in I. Roberts (ed.), *Satow's Diplomatic Practice,* 8th Edition, Oxford University Press, 2023, p. 117 (diplomatic note), p. 121 (démarches).

[61] J. Verbeke, *Diplomacy in Practice: A Critical Approach,* Routledge, 2023, p. 200.

[62] See also article 54 of the draft articles on state responsibility (ARSIWA), in: ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

[63] See E. Denza, 'The Diplomatic Mission, The Corps, Breach of Relations, and Protection of Interests', in I. Roberts (ed.), *Satow's Diplomatic Practice, 8th Edition,* Oxford University Press, 2023, p. 157.

[64] See e.g. Spain's recent cancellation of an agreement to purchase Israeli anti-tank missiles: https://www.timesofisrael.com/spain-reneges-on-325m-purchase-of-anti-tank-missiles-from-israels-rafael/

[65] See article 49 of the draft articles on state responsibility (ARSIWA), in: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

[66] See also the proceedings pending before the International Court of Justice: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening)*; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel); Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany).*

[67] On crimes against humanity, see for example B. Nanyunja and V. Todeschini, 'The "Obligation to Prevent" in a Future Crimes Against Humanity Convention', *Just Security* 27 September 2024. On obligations to respect the Geneva Conventions (1949) concerning international humanitarian law, see in

particular Common Article 1 (of the Geneva Convention relative to the Protection of Civilian Persons in Time of War). For an argument *against* third-state obligations under this article, see M.N. Schmitt and S. Watts, 'Common Article 1 and the Duty to "Ensure Respect"', *International Law Studies* 96, 2020, p. 674.

68 J.A. Trampert, *State Responsibility for Complicity in and Other Contributions to International Crimes and Serious Human Rights violations,* PhD Thesis, fully internal, University of Amsterdam, 2024.