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Prevent Genocide and Crimes Against
Humanity

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Larissa van den Herik and Emma Irving***

Introduction

Article I of the Genocide Convention reads, '[t]he 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'. This provision has been characterized as preambular given its soft and vague contents;¹ a legal but non-normative provision which fails to provide any specific direction as to the behaviour it proscribes.² The obligation to prevent is not elaborated by subsequent provisions of the Genocide Convention, apart from Article VIII's reference to the UN system, nor do the *travaux préparatoires* provide any further substantive guidance as to its content. In fact, as Schabas writes, 'while the Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means. Certainly, nothing in the debates about Article I provides the slightest clue as to the scope of the obligation to prevent'.³ Nonetheless and as is well-known, in the *Bosnia Genocide* case, the ICJ refuted Serbia's argument that Article I was merely hortatory and held that this provision did create independent obligations for States that were distinct from other provisions of the Convention.⁴ The Court also concluded that the provision was not territorially limited,⁵ and that it was an obligation of conduct and not one of result.⁶ The Court premised the extraterritorial obligation to prevent on a State's capacity to influence.⁷ Having identified such an independent and extraterritorial obligation to prevent, the Court underscored the relevance of due diligence in understanding its contents. The main function of the 'notion of due diligence', as the Court called it, was thus to

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¹ William A. Schabas, *Genocide in International Law; The Crime of Crimes* (Cambridge University Press, 2nd ed., 2009), 80.

² Cf. the different notions of soft law including binding but non-normative norms, as analysed by Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', *European Journal of International Law* 19 (2008), 1075 – 1093, at 1084.

³ Schabas, *Genocide in International Law* 2009 (n. 1), 81, as also cited by Tomka in his Separate Opinion to the ICJ, *Case Concerning 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 Reports 2007, 43, 308.

⁴ ICJ, *Bosnia Genocide* (n. 3), paras. 162-165.

⁵ ICJ, *Bosnia Genocide* (n. 3), para. 183.

⁶ ICJ, *Bosnia Genocide* (n. 3), para. 430.

⁷ ICJ, *Bosnia Genocide* (n. 3), para. 430.

substantiate a provision that had previously been labelled as normatively empty,⁸ while also allowing for differentiated obligations in a global context. The Court did not expressly use a due diligence approach in relation to each specific dimension, but its finding that the obligation to prevent 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’ implies a risk-assessment that, at the very least, has close synergies with procedural due diligence obligations.

This Chapter discusses the role of due diligence in operationalizing the obligation to prevent genocide, and extends the discussion to cover the customary obligation to prevent crimes against humanity. The Chapter takes the Genocide Convention and the ICJ’s *Bosnia Genocide* case and the literature thereon as starting points, while also analysing the ILC debates in the context of the draft Convention on Crimes against Humanity. The Chapter inquires how legal arguments and constructions in these settings expressly or impliedly draw on due diligence-vocabulary and approaches. In addition, the Chapter also explores whether due diligence-discussions and understandings in other areas can be transposed and further enrich the legal debate on the contours of the obligation to prevent genocide and crimes against humanity. The aim of the chapter is to determine whether and to what extent there is a unique approach to due diligence in a ‘prevention of mass atrocity’-setting.

Section 1 introduces the obligation to prevent genocide and crimes against humanity and argues that, despite different legal bases, the obligation to prevent genocide and the obligation to prevent crimes against humanity should be regarded as identical in scope, nature, and contents. Sections 2, 3, and 4 follow the proposed classification of two types of due diligence obligations concerning institutional capacity and procedural obligations.⁹ Sections 2 and 3 zero in on the duty bearer and contents of the extraterritorial obligation to prevent respectively. Section 2 interrogates how exactly a due diligence-approach allows for differentiated obligations. The sections also respectively discuss suggested parameters (section 2) and concrete preventive measures beyond the ICJ framework and the required institutional framework to identify such measures (section 3). In this context, the question whether state discretion on how best to prevent can be subjected to judicial or other monitoring processes is also raised. Section 4 explores synergies between procedural due diligence obligations and States’ duty of vigilance in the context of genocide and crimes against humanity. Drawing on ITLOS Seabed Disputes Chamber’s Advisory Opinion of 11 February 2011,¹⁰ this section specifically inquires how technological developments and capabilities inform risk-assessments in the context of the obligation to prevent genocide and crimes against humanity and whether new technologies intensify due diligence obligations. Finally, section 5 offers some overarching reflections on the

⁸ Cf. Separate Opinion Judge *ad hoc* Kreća, ICJ, *Bosnia Genocide* (n. 3), paras. 113-120, referred to by Orna Ben-Naftali, ‘The Obligation to Prevent and to Punish Genocide’, in Paola Gaeta, *The UN Genocide Convention; A Commentary* (OUP 2009), 27-57, 33.

⁹ See Introductory chapter by A. Peters, H. Krieger and Leonhard Kreuzer.

¹⁰ In this Opinion, the Chamber held, ‘The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge’, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS case no. 17, para. 117.

nature, content, scope, and function of due diligence as a means to operationalize the obligation to prevent genocide and crimes against humanity.

1. The Obligation to Prevent Genocide and Crimes against Humanity

A duty to prevent mass atrocity is morally anchored in considerations of humanity.¹¹ As noted by Toufayan, the core idea of a duty to rescue other human beings in danger may be traced back to the Code of Hammurabi, the Talmud, the Koran, and the Bible.¹² The concept of R2P can be regarded as the political manifestation of such a duty at the international level. This concept has some legal connotations, as it is linked to the legal categories of genocide and crimes against humanity. From a positivist perspective though, a legal basis for a duty to prevent mass atrocity must be found elsewhere. For genocide, as indicated, Article I of the Genocide Convention specifies a general obligation to prevent, which was vitalized and solidified by the ICJ in its *Bosnia Genocide* judgment. As for crimes against humanity, by lack of a global crimes against humanity convention, an obligation to prevent must be based on customary international law for the time being. Specifications can nonetheless be found in the ongoing work of the ILC on crimes against humanity, specifically also in the reports of ILC rapporteur Sean Murphy. Several articles, as adopted so far, concern prevention, thereby pre-empting a critique often voiced against the Genocide Convention that it was too vague and non-committal on the prevention part.¹³ Article 2 of the ILC articles on crimes against humanity is patterned upon the Genocide Convention and reads, ‘crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish’. Article 4 presents a more concrete obligation to take specific legislative, administrative, judicial, or other preventive measures. This provision is copied from human rights treaties and transnational criminal law treaties and, in contrast to Article 2, it is territorially and jurisdictionally limited.¹⁴ Article 4 also introduces an obligation to cooperate with other states and international organizations for preventive purposes, which may be said to have some synergies with Article 41 of the Articles on State Responsibility.

The commentary to draft Article 2 states that, ‘the content of this general obligation will be addressed through the various more specific obligations set forth in the draft articles that follow,

¹¹ ICJ, Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, 15, 12.

¹² Mark Toufayan, ‘A Return to *Communitarianism*? Reacting to “Serious Breaches of Obligations Arising under Peremptory Norms of General International Law” under the Law of State Responsibility and United Nations Law’, *Canadian Yearbook of International Law* 42 (2004), 197-251, 197.

¹³ Most eloquently by Reisman, who criticized the Nurembergian strategy of waiting for ‘mass killings to play themselves out and *then* to establish criminal tribunals’. Reisman rhetorically inquired, ‘if life is the most precious of things, ... should not acting to prevent *before* the fact, as opposed to acting to punish after the fact, be the primary technique of international law for dealing with mass murder?’, W. Micheal Reisman, ‘Acting *Before* Victims become Victims: Preventing and Arresting Mass Murder’, *Case Western Reserve Journal of International Law* 50 (2007), 57-85, 60, 59.

¹⁴ For a discussion of more territorially and/or jurisdictionally limited due diligence obligations, also in the human rights field, see the chapter of Federica Violi in this volume.

beginning with article 4'.¹⁵ Such a statement links the two provisions and seems to deny a separate existence for Article 2. In his first report, the Special Rapporteur instead differentiated more clearly between the different function and scope of the two prevention provisions, and connected the general prevention provision of Article 2 expressly with its counterpart in the Genocide Convention. The general and extraterritorial obligation to prevent in Article 2 is effectively an *obligation to rescue* with extraterritorial reach, just like Article I of the Genocide Convention. These are emergency obligations when atrocity crimes are on the verge of being committed or to prevent further escalation when they are already ongoing. Article 4, instead, is more truly preventative in nature as it obliges states to take measures in their own territory ensuring that the conditions in which crimes against humanity can be committed do not arise. Given the different territorial scope and function of the two provisions, it is important to underscore the autonomous status of Article 2, which is not only an opening provision but instead has as much independent legal value as the ICJ attributed to Article 1 of the Genocide Convention.

This chapter zeroes in on the general obligation to prevent of Article I of the Genocide Convention and draft Article 2 on Crimes against Humanity, which can also be called *obligations to rescue*. The chapter makes the claim that these are twin-provisions, not only in terms of having autonomous legal standing but also as regards contents. While generally appreciating the ICJ's observation that 'the 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',¹⁶ the obligation to prevent genocide and the obligation to prevent crimes against humanity can nonetheless be regarded as being the same in contents, scope, and nature. Such a conclusion is supported, in a literal sense, by the equivalent wording of the respective provisions ('undertake to prevent'), and the express references of the Rapporteur to the ICJ *Bosnia Genocide* Case in his reports. More substantively, the sameness of the two provisions flows from the similarity in structure of the two international crimes, the substantive overlap between the definitions of genocide and crimes against humanity,¹⁷ and the fact that they are mentioned equally in preventive and R2P contexts. For these reasons, the nature, scope, and contents of an obligation to prevent cannot but be identical for these two crimes despite their differing legal basis.¹⁸ Pursuant to this position, dicta of the ICJ as regards the scope, nature, and contents of the obligation to prevent genocide apply *mutatis mutandis* to the obligation to prevent crimes against humanity, and discussions in the context of the ILC's work on crimes against humanity also inform the obligation to prevent genocide.

¹⁵ United Nations, General Assembly, Report of the Sixty-seventh session, UN Doc. A/70/10, 4 May-5 June and 6 July-7 August 2015, 53.

¹⁶ ICJ, *Bosnia Genocide* (n. 3), para. 429.

¹⁷ Philippe Sands details how the intellectual fathers of respective crimes, Lemkin and Lauterpacht agreed on the value of human life as central, but had different views on approach. Lemkin underlined the necessity to focus on protection of the group as such, whereas Lauterpacht favoured a more individualized approach, Philippe Sands, *East West Street; On the Origins of Genocide and Crimes against Humanity* (Weidengeld and Nicholson 2016), e.g. 378-381.

¹⁸ As also suggested in the report of the Dutch Advisory Committee on Issues of Public International Law (CAVV), 'Advisory report on the scope for and the significance and desirability of the use of the term "genocide" by politicians', March 2017, available at www.cavv-advies.nl.

2. The nature and scope of the obligation to prevent: capacity of the duty bearer as the linking pin

Obligations to prevent are generally hard to classify under international law.¹⁹ Toufayan has made the point that the obligation to prevent genocide specifically is of *sui generis* character given the highly political, social, and cultural interests at stake and the same argument can be made for crimes against humanity.²⁰ There is also general agreement that the obligation must be one of conduct and not of result, and that a State can only be held responsible for failure to prevent if genocide has actually been committed.²¹ Those dissenting voices that rather regard the obligation to prevent genocide as one of result, have broader difficulties with the ICJ's extensive interpretation.²² They see the obligation to prevent genocide as mostly political in nature and they insist on territorially limited obligations based on notions of control rather than influence.²³

In the *Bosnia Genocide Case*, the Court reaffirmed that the Genocide Convention's rights and obligations were of an *erga omnes* character, although it has been questioned what the relevance of that finding was in the specific context of the case at hand.²⁴ The Court did not pronounce on potential *jus cogens* status of the obligation to prevent genocide, although its use of a slightly less demanding standard of proof might be indicative of the view that this status does not attach specifically to the obligation to prevent.²⁵ While some scholars still derive *jus cogens* status of the obligation to prevent from the peremptory character of the principal prohibition of genocide, arguing that the normative status of the prohibition would otherwise be rendered meaningless,²⁶ one can also argue that *jus cogens* status of a principal prohibition does not necessarily radiate to all ancillary rights and obligation surrounding the principal norm. In sum, the *jus cogens* status of the obligation to prevent remains undecided. It is also unclear how such status would affect its due diligence character, but the argument could be made that at the very least the *jus cogens* character of the preventive obligation or even only of the primary prohibition to which it attaches more forcefully obliges State to publicly explain how they took this obligation into account as part of their broader foreign policy decision-making vis-à-vis a certain situation of risk.

As to scope, the generically framed provisions containing the undertaking to prevent genocide and crimes against humanity are not expressly territorially limited. One of the noteworthy features of the 2007 *Bosnia Genocide Case* concerned the ICJ's confirmation of Article I's

¹⁹ See also the discussion between Crawford and Dupuy: James Crawford, 'Revising the Draft Articles on State Responsibility', *European Journal of International Law* 10 (1999), 435-460 and Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: on Ago's Classification of Means and Obligations of Result in Relation to State Responsibility', *European Journal of International Law* 10 (1999), 371-385.

²⁰ M. Toufayan, 'The World Court's Distress when Facing Genocide: A Critical Commentary on the *Application of the Genocide Convention Case (Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro))*', *Texas International Law Journal* 40 (2005), 233-261, 255.

²¹ ICJ, *Bosnia Genocide* (n. 3), paras. 432, 427, 431. Cf. articles 14(3) of the Articles on State Responsibility.

²² See e.g. Declaration of Judge Skotnikov, ICJ, *Bosnia Genocide* (n. 3), 339, 340.

²³ *Ibid.*

²⁴ Toufayan, 'The World Court's Distress when Facing Genocide' 2005 (n20), 249-250.

²⁵ ICJ, *Bosnia Genocide* (n. 3), para. 210. Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgement', 18 *European Journal of International Law* (2007), 695-713, 697.

²⁶ Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' 2009 (n8), 36.

independent and extraterritorial reach.²⁷ It held that, ‘the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question’.²⁸ The origins for construing an independent extraterritorial obligation to prevent lie first of all in the ICJ’s Advisory Opinion of 1951 which paved the way for a teleological interpretation of the Convention.²⁹ While reiterating the Convention’s object and purpose, the ICJ also referenced earlier qualifications of the genocide prohibition as *jus cogens* to support its findings that Article I of the Genocide Convention created a distinct obligation to prevent.³⁰ Judges Skotnikov opposed the extraterritorial reading, which he found ‘extraordinarily expansive’. Both Judges Skotnikov and Tomka argued that, if an extraterritorial obligation was accepted this had to be linked to the exercise of jurisdiction or control.³¹ The ICJ, instead, introduced a more flexible approach, and embraced a global duty to prevent.³²

Mitigating the universal reach of the obligation, the ICJ subsequently introduced the notion of due diligence and emphasised that responsibility for breaching the obligation would only be incurred if ‘the State manifestly failed to take all measures to prevent genocide which were within its power.’³³ It thus used the notion of due diligence to limit the scope of the extraterritorial obligation and to introduce the idea of differentiated responsibility. The suggested parameter to differentiate was ‘capacity to influence’. Factors that informed this capacity, as mentioned by the Court, were: (i) geographical distance of the State from the scene of the events, and (ii) strength of political and other links between the State and the main actors in the events. Tams has added to this that economic ties can also create relationships of dependence which may generate influence. He also pointed to the practical relevance of regularity of contact as a factor that will inform a State’s effective ability to reach out in time.³⁴ In addition, Tams referred to legal powers such as occupational regimes, that may be factors informing the notion of “capacity to influence”. Taking this one step further, membership of a regional organization could also be seen as a relationship that results in influence. Other special relations that may inform State’s

²⁷ As earlier found by the ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Judgment on Preliminary Objections of 11 July 1996, ICJ Reports 1996, 595, para. 31.

²⁸ ICJ, *Bosnia Genocide* (n. 3), para. 183.

²⁹ In this Opinion, the ICJ emphasized that the Genocide Convention was adopted for a purely humanitarian and civilizing purpose, and the accomplishment of this purpose was a common interest of the contracting states (ICJ, *Reservations to the Genocide Convention* (n11), 12.)

³⁰ ICJ, *Bosnia Genocide* case, paras. 161-162.

³¹ ICJ, *Bosnia Genocide* (n. 3): Separate Opinion of Judge Tomka, 271, para. 67; Declaration of Judge Skotnikov, 327, 338-339 (Judge Skotnikov’s obligation of result is closely linked to an obligation to prevent as envisaged in draft Article 4 of the Articles on Crimes against Humanity (United Nations, International Law Commission, Crimes against humanity, A/CN.4/L.892, 26 May 2007, 4)); Judge Kreca opposed the interpretation of Article I in even more absolute terms in his Separate Opinion (418, paras. 113-120).

³² ICJ, *Bosnia Genocide* (n. 3), para. 430. Scholars have argued that this was stretching the interpretation of Article I, Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgement’ 2007 (n25), 699. See also for analysis of the global duty, Christian Tams, ‘Commentary on Article I’, in Christian Tams/Lars Berster/Björn Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck/Hart/Nomos 2014), 46-48.

³³ ICJ, *Bosnia Genocide* (n. 3), para. 430.

³⁴ Tams, ‘Commentary on Article I’ 2014 (n32), 52.

capacity to influence may flow from former colonial ties, which would generally be captured by the ICJ's reference to political ties. In addition to parameters that link a State's capacity to prevent harm to its relation with the perpetrators, one may also broaden the spectrum and focus on relations between States and victims of genocide or crimes against humanity.³⁵ For instance, diaspora bonds may also effectively enable a third States to take measures to prevent that diaspora from genocide based on pre-existing relations and channels of communication with both the diaspora and the host State of the diaspora. Beyond the diaspora relation, the question can be raised as to whether refugee and asylum obligations vis-à-vis victims of genocide and crimes against humanity can come within the realm of an overarching obligation to prevent.³⁶ Hence, there is merit in understanding the capacity to influence as being broader than only concerning State-perpetrator relationships.

The concept of 'capacity to influence' also allows for more future-oriented approaches to the obligation to prevent genocide that would consider new types of duty bearers beyond the State, in particular social media companies like Facebook. Recent studies have shown that the role of new media in inciting violence goes much beyond offering a platform to extremists.³⁷ They map how incentive structures and social cues of algorithm-driven social media sites breed extremism organically, as posts figuring negative tribal emotions tend to score well and draw heavy engagement, thus radicalizing youth that is merely seeking to increase its numbers of followers or plaudits and likes. Platforms' actual capacity to influence and regulate online discussion is under scrutiny, and more generally debates on their role and responsibilities are in full flux, which may in turn also necessitate rethinking the concept of due diligence specifically as applied to non-state actors in relation to their potential independent obligation to prevent genocide and crimes against humanity.

3. The contents of an extraterritorial obligation to prevent and its relationship to decision-making processes

The due diligence character of the obligation to prevent genocide was also emphasised in another respect, namely as regards the contents of the obligation. The ICJ invoked the notion of due diligence to underline the need for assessment in concreto.³⁸ Forlati also referred to the 'structural impossibility to identify once and for all what behaviours would be required to fulfil the obligation of prevention'.³⁹ The obligation to prevent is not static and it is inherently context-specific. The outer frontier that is fairly clear is that States may only act within the limits

³⁵ Barbour and Gorlick supports this argument in the context of R2P, see Brian Barbour/Brian Gorlick, 'Embracing the "Responsibility to Protect": A Repertoire of Measures Including Asylum for Potential Victims', *International Journal of Refugee Law* 20 (2008), 534-566, 561-565.

³⁶ Sareta Ashraph/Makrina Finlay/Melinda Taylor, 'Asylum and the Duty to Protect the Yazidis from Genocide', *Opinio Juris*, 15 August 2018.

³⁷ Max Fisher and Amanda Taub, *New York Times*, 'How Everyday Social Media Users Become Real-World Extremists', 25 April 2018.

³⁸ ICJ, *Bosnia Genocide* (n. 3), para. 430.

³⁹ Serena Forlati, 'The Legal Obligation to Prevent Genocide', *Polish Yearbook of International Law* 31 (2001), 189-205, 201.

permitted by international law,⁴⁰ and hence the obligations to prevent genocide and crimes against humanity cannot be construed as independent bases for humanitarian intervention or other self-standing exceptions to the use of force.⁴¹ At the other end of the spectrum, the obligation ultimately shrinks the room for complete passivity and full inaction.⁴² Within these frontiers, the obligation to prevent does not contain a clear-cut positive obligation to resort to a specific type of action. Instead, it is highly discretionary, and it primarily obliges States to ‘interrogate their actions and choose a course of conduct (and make public the reasons for it)’.⁴³ Hence at the core of the obligation to prevent lies the obligation to make informed decisions about the most appropriate course of conduct, coupled with an obligation to explain those decisions and subsequent conduct. Specific measures that States can choose to take may be of a diplomatic, social, or economic nature, or other, and they may include the imposition of targeted sanctions, or instead the lifting of an arms embargo to enable another State to prevent genocide.⁴⁴ The obligation to prevent genocide or crimes against humanity can also have implications for decision-making on the sending or continuation of peacekeeping missions.⁴⁵ Under the Obama administration, the US policy on the prevention of atrocities included a wide range of measures also of a tech-nature, including sanctions specifically against individuals who commit human rights abuses via information technology, denial of entry to US territory, financial measures, and awards for innovation in order to encourage the development of innovative technologies for the prevention of atrocities.⁴⁶ The international community’s response to the risk of genocide in the Central African Republic (CAR) since 2012 may also provide examples of measures taken by States to prevent genocide. Regional organisations have imposed targeted sanctions, such as travels bans, and peacekeeping missions have been deployed by the African Union, France, the EU, and most recently the UN. The UN force, MINUSCA, remains deployed in the region. While high levels of violence in CAR persist and the risk of genocide is still present, it has been suggested that the presence of international military and police forces has prevented the situation from escalating into a crisis such as that seen in Rwanda.⁴⁷

Measures with more direct economic impacts or of semi-military nature are not necessarily always the most important or effective though. Uncritical attitudes or silent support conveying a message that certain atrocities will *de facto* be tolerated or ignored are also often very conducive to

⁴⁰ ICJ, *Bosnia Genocide* (n. 3), para. 430.

⁴¹ Tams, ‘Commentary on Article I’ 2014 (n32), 51. But see Ben-Naftali, ‘The Obligation to Prevent and to Punish Genocide’ 2009 (n8), 43-4.

⁴² Tams, ‘Commentary on Article I’ 2014 (n32), 54.

⁴³ Tams, ‘Commentary on Article I’ 2014 (n32), 53.

⁴⁴ Tams, ‘Commentary on Article I’ 2014 (n32), 53; Separate Opinion of Judge Lauterpacht in ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Order for Provisional Measures of 13 September 1993, ICJ Reports 1993, 325, 435-442.

⁴⁵ See for an analysis of how the obligation and ability to prevent was treated in Dutch courts in relation to Srebrenica, André Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, *Journal of International Criminal Justice* 9 (2011), 1143–1157.

⁴⁶ Obama White House Archives, ‘Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities’, 23 April 2012.

⁴⁷ Peter Bouckaert, Human Rights Watch, stated in an interview: ‘I think we need to understand that a Rwanda was averted in the Central African Republic, the kind of massacres we witnessed 20 years ago because of the presence of these peacekeepers.’ (Henry Hullah, ‘Criminals are in charge of the Central African Republic’ says Human Rights Watch Director’, Amanpour blog, 18 November 2014).

creating the conditions in which mass atrocity takes place. In this context, the friendly reception of Rwandan Ministers at the Champs Elysées in the run up to the genocide in February 1994, as well as Rwanda's continued seating at the Security Council during the genocide, have been heavily criticized as conveying the wrong message. Less well-known, but also relevant in this respect, is the support of important segments of the international community for the RPF before, during, and after the genocide, despite the fact that this actor's character may be less benign than often assumed.⁴⁸ In a different vein, decisive action can also be deemed to have counterproductive effects. In relation to Syria, former Dutch diplomat Nikolaos van Dam has observed that the imposition of sanctions by Western States, coupled with demands for accountability, has in fact resulted in diminished leverage over Assad and has thus eroded the West's capability to influence. This has resulted in less opportunities to effectively contribute to the prevention of further violence and atrocities.⁴⁹ Paradoxically therefore, it seems that in certain situations if a State takes measures to comply with the obligation to prevent this might reduce its capacity to influence and thereby lessen the intensity of the obligation as it applies to that State.

These examples illustrate the intensely discretionary nature of the obligation to prevent genocide and crimes against humanity, which is tied to the different views that exist in concrete situations of how best to handle a certain crisis. The examples thus underscore that, at its core, the obligations to prevent genocide and crimes against humanity concern an obligation to make well-informed decisions and to publicly explain action in atrocity situations in light of an overarching obligation to prevent rather than it being a precisely delineated substantive obligation. Such an understanding of the obligation corresponds with the view of due diligence as being a technique that transposes complex and controversial inquiries on content to less controversial questions on informed decision-making and process.⁵⁰ This then evokes the question regarding a proper institutional framework to ensure and test how decision-making in third States with capacity to influence takes place, and whether the aim of preventing genocide and crimes against humanity has a proper place in broader foreign policy discussions regarding a concrete situation. In democratic States, members of parliament may play an important role in putting situations on the agenda and verifying whether State responses and action are adequate.⁵¹ Ultimately, and *ex post facto*, the ICJ may check whether indeed a State has done all that could reasonably be expected to prevent atrocities in a given situation. The question is whether there is a need for institutional machinery in between those extremes in which the obligation to prevent could be gradually clarified, or at least a platform that would encourage States to publicly justify their actions. In his preparations for a convention on crimes against humanity, the Special Rapporteur considered it best to have States select an appropriate monitoring mechanism, which might then also be connected to the Genocide Convention,⁵² and the question of finding an appropriate institutional

⁴⁸ See generally, André Guichaoua, *From War to Genocide: Criminal Politics in Rwanda, 1990-1994*, (University of Wisconsin Press 2015).

⁴⁹ See generally, Nikolaos van Dam, *Destroying a Nations: The Civil War in Syria* (I.B.Tauris & Co. Ltd. 2017).

⁵⁰ Martti Koskeniemi, as referred to in Tim Stephens and Duncan French, 'ILA Study Group on Due Diligence in International Law; Second Report', July 2016, 3.

⁵¹ See e.g., House of Commons Foreign Affairs Committee: Violence in Rakhine State and the UK's response, 6 December 2017. See more generally on the role of parliaments in foreign policy, Stelios Stavridis and Davor Jančić, *Parliamentary Diplomacy in Europe and Global Governance* (Brill 2017).

⁵² United Nations, International Law Commission, Provisional summary record of the 3348th meeting, A/CN.4/SR.3348, 2 June 2017, 6.

framework or platform in which due diligence can effectively be exercised remains open. Suggestions for a monitoring committee on the obligation to prevent genocide have been put forward,⁵³ but obviously these are highly contentious and seen as too intrusive in questions of foreign policy. Rather than a monitoring body therefore, and in conformity with the view of the core of the obligation to prevent being a procedural obligation to make informed decisions and to explain, the appropriate mechanism could also be a platform on which States with capacity to influence are invited to explain their specific conduct vis-à-vis a given situation. Without going into institutional details, the existence of such a platform linked to the Genocide and (future) Crimes against Humanity Convention would gradually clarify the notion of ‘capacity to influence’ while also recording how and what decisions States make in response to a certain situation taking account of their overarching obligations to prevent genocide and crimes against humanity.

4. When to prevent genocide: risk, due diligence and new technology

The obligation to prevent genocide and crimes against humanity is temporally limited, and will be triggered by the existence of certain circumstances. According to the ICJ, the obligation is activated at the moment when a State is ‘aware, or should normally have been aware, of the serious danger that acts of genocide would be committed’.⁵⁴ The threshold is therefore one of actual or constructive awareness of the *risk* of genocide, not certainty that genocide would in fact take place.⁵⁵

Establishing that a State was *in fact* aware of the risk of genocide or crimes against humanity is a question of evidence. In the *Bosnia Genocide Case*, the ICJ referred to documents detailing meetings between Milosevic and third State officials⁵⁶ to determine that ‘the dangers were known’ to the Belgrade authorities, leading the Court to hold that ‘it must have been clear that there was a serious risk of genocide’.⁵⁷ Establishing that a State ‘should normally have been aware’ is a more complex matter, as it requires a determination of the knowledge that can be imputed to a State in the absence of evidence of actual knowledge. The ICJ provides no guidance on how this constructive knowledge is to be determined, and in the absence of such guidance two approaches can be suggested.

Under the first approach, the constructive knowledge element serves to cover those situations where actual knowledge cannot be proven, but where the accessibility and widespread availability of information is such that a reasonable person can be expected to have been aware. The second approach is more far reaching, and involves interpreting ‘should normally have been aware’ as imposing a positive obligation on States to take steps to inform themselves of situations of risk. Under this approach, the obligation to prevent genocide and crimes against humanity includes procedural obligations, such as the carrying out of risk assessments. The substantive obligations

⁵³ See e.g., Etienne Ruvebana, *Prevention of Genocide under International Law; An Analysis of the Obligations of States and the UN to Prevent Genocide at the Primary, Secondary and Tertiary Levels* (Intersentia 2014), 255.

⁵⁴ ICJ, *Bosnia Genocide* (n. 3), in para. 431, the Court states, ‘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’.

⁵⁵ Tams, ‘Commentary on Article I’ 2014 (n32), 49.

⁵⁶ ICJ, *Bosnia Genocide* (n. 3), paras. 436-7.

⁵⁷ ICJ, *Bosnia Genocide* (n. 3), paras. 438.

to prevent are therefore activated not only when a State actually knew of the risk of genocide or crimes against humanity occurring, but also in situations where a diligently carried out risk assessment would have brought the risk to the State's attention.

For both approaches, the crucial question is what information was available to States concerning the risk of genocide or crimes against humanity. This can relate to the information which was passively available to a State, under the first approach, and/or the information that would have come to the State's attention when actively carrying out a risk assessment, under the second approach. Traditional sources of information include diplomatic communications, public information, media coverage, and reports of governmental and non-governmental organisations;⁵⁸ however, these sources are increasingly supplemented by new sources of information arising as a result of technological developments. Digital technologies now allow for information to be gathered from areas that are otherwise hard to reach – due to security, infrastructure, etc. –, and they allow for a larger volume of information to be gathered than was previously possible. This can contribute to a more accurate and granular understanding of events on the ground and potential risks. Ascertaining the range of information available to States therefore requires an understanding of what these technologies have to offer. A sample of three digital technologies will be outlined below: satellite imagery, social media and radio monitoring, and mobile phone technology. Following a discussion on the types of information produced by these technologies, some key questions will be raised concerning how they may affect the triggering of prevention obligations.

Satellite imagery itself is not a new technology, and has been used by State intelligence agencies for many years. However, following a loosening up of regulations in the 1990s, satellite images have been increasingly used to document atrocities in geographical areas that are otherwise challenging or impossible to access.⁵⁹ Examples of such efforts include the documentation of prison camps in North Korea, and the documentation of conflict and violence in Sri Lanka, Nigeria,⁶⁰ Sudan,⁶¹ and Myanmar.⁶² In addition to documentation, there is now a move to use satellite imagery as a tool for preventing atrocities. When taken over a period of time, satellite images can show troop movements, troop build-up in a given area, and the strengthening of military infrastructure.⁶³ Such events are listed by the Office on Genocide Prevention and the Responsibility to Protect (OGPRP) as factors that can indicate a risk of genocide or crimes

⁵⁸ Tams, 'Commentary on Article I' 2014 (n32), 49.

⁵⁹ Nathaniel A. Raymond/Brittany L. Card/Isaac L. Baker, 'A New Forensics: Developing Standard Remote Sensing Methodologies to Detect and Document Mass Atrocities', *Genocide Studies and Prevention* 8 (2014), 33-48, 33.

⁶⁰ In relation to North Korea, Sri Lanka, and Nigeria, see Christoph Koettl, 'Sensors Everywhere: Using Satellite and Mobile Phones to Reduce Information Uncertainty in Human Rights Crisis Research', *Genocide Studies and Prevention* 11 (2018), 36-54, 41-45.

⁶¹ The report 'Sudan: Anatomy of a Conflict' was the first retrospective analysis of archival satellite imagery on a large scale to document a conflict over a multi-year time frame (Harvard Humanitarian Initiative, 'Sudan: Anatomy of a Conflict', 2013).

⁶² Human Rights Watch, 'Burma: Satellite Imagery Shows Mass Destruction', 19 September 2017; The Guardian, "'Everything is gone": satellite images in Myanmar show dozens of Rohingya villages bulldozed', 24 February 2018.

⁶³ Nathaniel A. Raymond/Benjamin J. Davies/Brittany L. Card/Zaid Al Achkar/Isaac L. Baker, 'While We Watched: Assessing the Impact of the Satellite Sentinel Project', *Georgetown Journal of International Affairs* 14 (2013), 187.

against humanity.⁶⁴ Furthermore, satellite images can indicate bombardment patterns, damage to buildings, and fresh grave sites, all of which can help to identify when violence is escalating to the point where a risk of genocide or crimes against humanity is present.⁶⁵ In 2011, the Satellite Sentinel Project (SSP) was established to use satellite imagery to monitor potential threats to civilians along the border between Sudan and the soon-to-be-independent South Sudan.⁶⁶ SSP communicated regular reports to the international community concerning risks of genocide and crimes against humanity in South Sudan, thereby bringing this to the attention of States.

Another factor that the OGPRP lists as indicating a risk of genocide and crimes against humanity is an increase in inflammatory rhetoric, propaganda campaigns or hate speech targeting protected groups or individuals.⁶⁷ Of the 10 stages of genocide identified by the NGO GenocideWatch, dehumanisation through hate speech is listed as number 4,⁶⁸ and hate speech is a phenomenon that can be detected in the run-up to many genocide and crimes against humanity events.⁶⁹ Identifying increases in hate speech is therefore important in understanding when a risk of such events arises. Digital technologies have allowed for more widespread monitoring of the media forms that are often used for circulating hate speech, including radio and social media.

Radio played an important part in disseminating hate speech prior to, and during, the genocide in Rwanda,⁷⁰ and radio is still a primary communication tool in many parts of the world. However, given the large number of stations and the many hours of broadcasts, monitoring the radio for hate speech can be prohibitively resource intensive. The UN programme Global Pulse sought to overcome this challenge by developing a digital tool for analysing radio content.⁷¹ The tool converts verbal broadcasts into text, and then searches for keywords and phrases to identify sections of broadcast that merit closer analysis. The tool was piloted in Uganda for the purpose of gathering information relating to the Sustainable Development Goals, but by adapting the keywords and phrases, the technology could also be used to identify hate speech.

In addition to radio, any attempt to monitor hate speech must include the monitoring of social media. In Myanmar for example, there was a spike in hate speech on Facebook prior to the 2017

⁶⁴ United Nations, Office on Genocide Prevention and the Responsibility to Protect, Framework of Analysis for Atrocity Crimes: A Tool for Prevention, 2014, 16-17.

⁶⁵ Raymond/Card/Baker, 'A New Forensics' 2014 (n 59), 35.

⁶⁶ See generally, Raymond/Davies/Card/Al Achkar/Baker, 'While We Watched' 2013 (n 63) and Ben Yunmo Wang/Nathaniel A. Raymond/Gabrielle Gould/Isaac Baker, 'Problems from Hell, Solution in the Heavens?: Identifying Obstacles and Opportunities for Employing Geospatial Technologies to Document and Mitigate Mass Atrocities', *Stability: International Journal of Security & Development* 2 (2013), 1-18.

⁶⁷ OGPRP, Framework of Analysis, (n 64), 16-17.

⁶⁸ Gregory Stanton, 'The Ten Stages of Genocide', available at www.genocidewatch.org. The stages correspond with Lemkin's writings on the different phases of genocide, Raphael Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace 1944).

⁶⁹ Gregory Gordon argues that a connection between hate speech and atrocities can be traced from ancient Egypt and ancient Rome, through the first and second world wars, through the genocide in Rwanda and the war in the Balkans, to the modern day in Sudan, Myanmar, and Ivory Coast (Gregory S. Gordon, *Atrocity Speech Law* (Oxford University Press 2017), 29-58).

⁷⁰ See generally Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press, 2007); Catherine A. MacKinnon, 'Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T', *American Journal of International Law* 98 (2004), 325-330.

⁷¹ UN Global Pulse, 'Using machine learning to analyse radio talk in Uganda', 2017.

escalation of violence against Rohingya Muslims.⁷² Given social media's accessibility and its ever growing reach, hate speech posted on these platforms can reach a very large audience in a short time and play a significant role in fuelling tensions. As with radio, monitoring social media is challenging due to the amount of content; to take the video sharing platform YouTube as an example, 400 hours of video are uploaded every minute.⁷³

A number of initiatives have endeavoured to use technology to monitor and identify hate speech on social media; more recent developments are building on this and seeking to prevent hate speech from escalating. The Umati Project was established in 2012 to monitor hate speech on social media in Kenya during election periods.⁷⁴ The first phase of the project relied on manual monitoring, which laid the groundwork for hate speech to be monitored and detected automatically. An important part of the automation process is compiling a list of keywords and phrases that a computer programme can then searched for. To that end, the organisation PeaceTech Lab is compiling a lexicon of terms that are used in hate speech in South Sudan, in an effort to tailor automated monitoring tools to the particularities of the region.⁷⁵ More recent developments are moving from monitoring social media to also predicting the occurrence of hate speech. Software being developed by the NOHATE project will identify hate speech on social media and may eventually predict when an online discussion will escalate into hate speech.⁷⁶ This enables preventive measures to counter instances of hate speech. With the tools already in existence, and the tools under development, real-time information on rising levels of hate speech and the risks associated therewith can be made available to States more quickly.

Satellite imagery and radio and social media monitoring collect information indirectly, in the sense that those moving on the ground and those posting to social media do not intend to signal a risk of genocide or crimes against humanity. Information collected directly is also of great value, including speaking to individuals on the ground about events taking place in their surroundings and the possible risks they are facing. This can provide insights that other types of information do not, such as a pattern of attacks on a particular target group, patterns of discrimination, and significant differences in the socio economic positions of different groups. These issues are also included in the OGPRP list of factors that can indicate a risk of genocide or crimes against humanity.⁷⁷ While gathering such information may traditionally have meant conducting face-to-face interviews and travelling to the region, mobile phone technology allows for such information to be gathered remotely, on a larger scale, and in a more cost effective manner.⁷⁸

Initiatives of this types are being carried out by organisations such as the UN World Food Programme (WFP), which use messaging apps such as WhatsApp to be used to collect

⁷² Micheal Safi, The Guardian, 'Revealed: Facebook hate speech exploded in Myanmar during Rohingya crisis', 3 April 2018.

⁷³ Malachy Browne, The New York Times, 'YouTube Removes Videos Showing Atrocities in Syria', 22 August 2007.

⁷⁴ iHub Research, 'Building an Intelligent Umati Monitor', July 2015.

⁷⁵ PeachTech Lab, 'Social Media and Conflict in South Sudan: A Lexicon of Hate Speech Terms'.

⁷⁶ Freie Universität Berlin, 'A Machine to fight the Hate: Researchers develop software to detect hate speech online', 7 March 2018.

⁷⁷ OGPRP, Framework of Analysis, (n 64), 11, 18.

⁷⁸ Nielsen/World Food Programme, 'Revolutionizing Data Collection: World Food Programme and Nielsen Use Scalable Mobile Surveys in Today's Changing Technological Landscape', 6, June 2015.

information about food security, including photographs. The WFP compiles the information it collects into reports and a vulnerability map, allowing for the information about food security in a region to be disseminated to States and other relevant actors. Programmes of this type could be (and possibly already are) adapted to collect information relevant to atrocity prevention. Instead of inquiring about the price of a kilo of flour, individuals could be asked about violent events in their area, about who is the target of these attacks, how often attacks occur, and so on. Such information can then be compiled and distributed to States to bring situations of risk to their attention.

Digital technologies can increase the amount of information available to States, making it harder for States to argue that they did not, and should not, have known of the risk of genocide or crimes against humanity. While in the past States may have reasonably argued that they lacked actual or constructive knowledge of events taking place in remote and non-permissive regions, technology means that such arguments are more difficult to make today, and will likely be increasingly difficult to make in the future.

If one accepts the second approach to the ‘should have known’ criterion, namely that States have the procedural obligation to actively conduct risk assessments concerning the risk of genocide or crimes against humanity, the impact of these digital technologies is possibly greater still. In an advisory opinion, the ITLOS Seabed Disputes Chamber noted that what is required by due diligence may change over time, and that ‘measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge’.⁷⁹ With this in mind, questions can be raised regarding the scope and content of States’ procedural obligations, and in particular, whether and to what extent States are required to utilise digital technologies when carrying out risk assessments. If a State fails to include satellite imagery in its risk assessment for an area, can that State be considered to have acted sufficiently diligently? Is a State obliged to monitor social media to determine whether there is an increase in hate speech? The same questions can be asked for other digital technologies also. Taking the inquiry one step further, one can consider whether an obligation to include digital technologies in risk assessments also involves an obligation to develop digital technologies that are fit for purpose. As discussed above, digital technologies developed for other purposes – such as monitoring the sustainable development goals or understanding food insecurity – could potentially be adapted to the atrocity prevention context. Are States under an obligation to take such a step? There will be a point when a State will be deemed have sufficiently discharged its procedural obligations, but the increasing availability of digital technologies will play a role in determining when that point is reached.

5. The obligation to prevent genocide and crimes against humanity as a due diligence obligation

The prohibitions of genocide and crimes against humanity are without any doubt *jus cogens* norms. Whether the obligation to prevent also has *jus cogens* status remains undecided, but the more

⁷⁹ ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n10), para. 117.

interesting question for this chapter is whether the *jus cogens* status of the primary norm impacts on the due diligence nature of the obligation to prevent and renders this of a unique nature and completely different from other due diligence obligations in international law. This does not seem to be the case *per se*.

In the specific context of the obligation to prevent genocide and crimes against humanity, the function of the notion of due diligence was to insert some realism and place limits on the obligation's universal reach, as well as to introduce the concept of differentiated obligations corresponding with capacity. The concept of 'capacity to influence' also allows for the future consideration of other duty holders in addition to states, such as social media corporations.

Effectively, through the notion of due diligence the State's discretion to decide upon its own foreign policy is respected, while a dimension of accountability is introduced as a State is expected to make informed decisions that also take account of its obligation to prevent. Furthermore, the State needs to be able to explain its actions and how they contributed to prevention in situations where there is a real risk that genocide or crimes against humanity will be committed. The core of the obligation to prevent as a due diligence obligation is then the obligation to make informed decisions and to publicly explain how this is done.

In their article on Risks in International Law, Wouter Werner and Fleur Johns analysed the relationship between uncertainty, knowledge and risk. They highlighted the belief that an increase in scientific knowledge would also enlarge the scope of social and legal responsibilities, especially the responsibility to prevent possible future harm.⁸⁰ In the particular context of preventing mass atrocity, the emergence of new technologies may certainly intensify due diligence obligations of States, especially those with strong cyber- and other capacities. Yet, as also pointed out, new technologies have led to *over*production of information and scientific knowledge, and this overproduction may in turn pose limits to the possibility of transforming uncertainty into manageable risks. Coupled with the highly discretionary nature of the obligation to prevent genocide and crimes against humanity, the question what is due in terms of preventive responses is not easily answered in the abstract. The emphasis lies perhaps foremost with the issue of diligence in the form of procedures and institutions. This then underscores the suggested need for a platform or other institutional mechanism connected to the Genocide and (future) Crimes against Humanity Convention. Such a forum would function as the site where the obligation to prevent can gradually be clarified and substantiated on the basis of concrete cases and situations. This line of thinking stresses the procedural nature of the obligation to prevent genocide and mass atrocity as a due diligence obligation and in that sense, it can ultimately be concluded, that the obligation or its due diligence nature is not fundamentally different or even unique. Its specialty rather flows from the gravity of the underlying norm, which makes it even more important to take the obligation serious despite its inevitable elusiveness.

⁸⁰ Fleur Johns and Wouter Werner, 'The Risks of International Law', *Leiden Journal of International Law* 21 (2008), 783–786, 784.