

# From “Never Again” to “Once More”: The Obligation of States Parties to the Genocide Convention to Prevent Genocide in Gaza

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After the shocking experience of the Holocaust during the Second World War, a new crime has been added to international law and domestic legislations: genocide. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted with the aim of preventing the recurrence of such atrocities. It is worrying that, despite the obligations of States Parties codified in it, including the obligation to prevent the commission of genocide, a number of genocides have been committed in recent decades. Since the launch of the Israeli attack on Gaza in October 2023, many experts first warned of the possibility of a new genocide, and later claimed that a genocide was already under way. The Republic of South Africa took the issue of a possible genocide to the International Court of Justice, which on 26 January 2024 recognised a *prima facie* case of a violation of the Genocide Convention. Since then, the Court has adopted several packages of provisional measures aimed at preventing genocide, which have failed to change the situation in Gaza, with that situation becoming increasingly serious over time and having now reached a level of destruction that is almost unimaginable. This is mainly due to the fact that Israel, the country against which the measures are directed, is not implementing them. What is problematic, however, is not only Israel's manifest disregard for international law, but also the passivity of the international community, particularly in terms of the duty to prevent genocide. This paper seeks to address these issues by focusing on the obligations of States Parties to the Genocide Convention. By referring to the Court's past jurisprudence, the authors identify how the numerous warnings by experts and the Court's findings on the possibility of genocide affect the obligation of prevention in question, and what measures States Parties to the Genocide Convention should take in this regard.

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## 1 The Re-emergence of Genocide

On 11 July 2024, the world commemorated the first Srebrenica Memorial Day, in order to preserve memory, express grief and pay respect to the victims of the genocide against the Bosniak population of Bosnia and Herzegovina, which took place almost thirty years ago, in front of the eyes of the international community. The armed forces of the Republika Srpska committed genocide despite the fact that Srebrenica was a “safe zone” established by the United Nations (hereinafter UN) Security Council under the protection of UN peacekeeping forces (Elewa, 2001). As on many other occasions, the representatives of numerous governments in the aftermath of the genocide pledged “never again” to allow such

atrocities, to act in a preventive manner, and to respond to early warnings of genocide, in order not to fail any other people as they manifestly failed the people in Srebrenica.

However, it seems that “never again” will be, worryingly, replaced with “once more”. Today, almost 2,000 kilometres away from Srebrenica, in a small coastal strip of land named Gaza, another massacre is being carried out. The actions of the State of Israel (hereinafter Israel) in Gaza have been qualified as a genocide by numerous experts on the topic. Even the International Court of Justice (hereinafter ICJ or the Court) found when examining the situation that *prima facie* violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide («Convention on the Prevention and Punishment of the Crime of Genocide», 1951) (hereinafter Genocide Convention) are plausible. Nevertheless, despite such warnings, several States continue to supply weapons to Israel and provide it with material as well as diplomatic support, and the remaining majority of States express their concerns over the situation in Gaza while continuing business as usual with Israel, hoping that one day the horrific situation in

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Gaza will end. As if “never again” is nothing but a phrase used after a genocide is committed in order to calm down the bad blood and to give the concerned people some consolation.

Noteworthy, “never again” is not merely an empty phrase. It has been translated into a legal obligation, codified in the Genocide Convention, which was adopted after the horrific events of the Holocaust perpetrated by Nazi Germany during the Second World War, in order to prevent their repetition (Schabas, 1999). Within the Genocide Convention (1951), the obligation to prevent genocide (alongside the obligation to punish the crime of genocide) is expressly enshrined in Article I (Schiffbauer, 2018). This means not only that States Parties must refrain from committing the crime of genocide, but that they also have to act in a preventive (and punitive) manner, whenever the possibility of genocide arises.

We argue that the time for the States Parties to the Genocide Convention to fulfil the promise of “never again” and to act upon the obligation to prevent genocide in Gaza is long past due. Drawing upon the timeline of warnings by qualified experts in the field, including the decisions issued by the ICJ, and relying on the broader corpus of ICJ jurisprudence, we demonstrate that there is a high risk that States Parties to the Genocide Convention are currently in violation of (at least) Article I of the Genocide Convention (1951). Against this background, we list certain measures which States Parties ought to take immediately, without hesitation, in order to preserve what remains of Palestinian life in Gaza.

The scope of the analysis conducted in this article covers solely the obligation to prevent genocide, as enshrined in Article I of the Genocide Convention (1951). The issue of complicity in genocide, which is another important issue, is not addressed. Regarding such complicity, it may suffice to mention at this point Nicaragua’s litigation against Germany before the ICJ (International Court of Justice [ICJ], 2024b). Nicaragua stated that by providing political, financial and military support to Israel, alongside defunding the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter UNRWA), “Germany is facilitating the commission of genocide and, in any case has failed in its obligation to do everything possible to prevent the commission of genocide” (ICJ, 2024h). Nicaragua sought provisional measures to be issued by the Court, which the Court denied and is yet to decide on the merits.

## 2 Timeline of Expert Warnings and the ICJ’s Findings on Gaza

Even at the beginning of the latest Israeli offensive on Gaza, which followed the 7 October Hamas attack, several experts began to express warnings that the actions of Israel in Gaza violate international human rights law<sup>3</sup> (Atul & Reginald, 2024), international humanitarian law (hereinafter IHL) (Al Jazeera, 2023),<sup>4</sup> and amount to collective punishment of the Palestinians for the actions of Hamas (Amnesty International, 2023; United Nations, Meetings Coverage and Press Releases, 2023). It has been established that Israel does not sufficiently care for the security of the civilian population (United Nations Human Rights Office of the High Commissioner, 2023b), and its blatant disregard for civilian lives has finally led to the harsh but substantiated claim that the actions and statements of Israel’s political representatives and the Israeli army constitute elements of the crime of genocide.<sup>5</sup>

This was followed by the filing of a lawsuit by the Republic of South Africa (hereinafter South Africa) before the ICJ in The Hague, alleging that Israel’s actions violated the Genocide Convention, and requesting that the Court impose provision-

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<sup>3</sup> Human rights as enshrined in the 1966 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) and 1966 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3), both applicable in the occupied Palestinian territories, according to the ICJ Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 2004).

<sup>4</sup> Droege and Rushing (2023) note that the principles of IHL (laws of war – the set of international rules that regulates the behaviour of parties to armed conflicts) apply in Gaza and explain that in the case of urban warfare the principles of IHL must be upheld just the same. As an example, they assert that in cases of doubt whether a certain civilian home or another civilian building is used for military action, it should be presumed that it is civilian until proven otherwise.

<sup>5</sup> Many of the warnings, however, came very early – already in October and early November of 2023, which demonstrates that a strong possibility of genocide being perpetrated had already existed back then (TWAIR, 2023; United Nations Human Rights Office of the High Commissioner, 2024c). These warnings were substantiated with evidence of indiscriminate bombing of densely populated areas as well as extremely concerning genocidal rhetoric, which led to Israel’s actions in Gaza being marked as a “textbook case of a genocide” (Segal, 2023).

al measures to prevent genocide.<sup>6</sup> The elements of genocide as an international crime are defined in Article II of the Genocide Convention (1951) as any of the following acts committed with the prerequisite intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group. South Africa asserted that all these acts, save for the last, were committed. It was also claimed that the evidence presented demonstrates genocidal intent (*dolus specialis*) (ICJ, 2023c).

Israel asserted that the appropriate legal framework for the conflict in Gaza is that of IHL and not the Genocide Convention (ICJ, 2024c). In that context, it claimed that the civilian casualties may be an unintended consequence of the lawful use of force against military objects in situations of urban warfare. Furthermore, Israel contended that its efforts to mitigate harm when conducting operations and to minimise hardship and suffering through humanitarian activities in Gaza clearly speak against genocidal intent (ICJ, 2024c).

The Court has not yet ruled on the merits of the case. Nevertheless, on 26 January 2024 it issued its first Order in the case, where it found that “at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the [Genocide] Convention” (ICJ, 2024c). The Court recognised that the facts and circumstances of the case are sufficient to conclude that “at least some of the rights claimed by South Africa and for which it is seeking protection are plausible” (ICJ, 2024c). The Court went on and explained that these rights are at least “the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III [of the Genocide Convention], and the right of South Africa to seek Israel’s compliance with the latter’s obligations under the Convention” (ICJ, 2024c).

<sup>6</sup> South Africa sought to protect two categories of rights, namely, the rights of the Palestinians in Gaza, as well as its own rights under the Genocide Convention. Regarding the first set of rights, South Africa claimed that Israel is responsible for committing genocide in Gaza and for failing to prevent and punish genocidal acts. Furthermore, it claimed that Israel has also violated other obligations under the Genocide Convention, including those concerning “conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide”. Regarding its own rights, South Africa also sought to protect its right to safeguard compliance with the Genocide Convention (ICJ, 2023c).

The Court’s findings, especially when considered together with the subsequent Orders, which are discussed later on, are elementary for substantiating and concretising the obligation of States Parties to the Genocide Convention to prevent genocide. The findings of the Court prove the existence of at least a *prima facie* case that Israel has committed the asserted violations of the rights protected under the Genocide Convention. In other words, it is at least plausible that Israel’s actions in Gaza point to the commission of acts of genocide under Article II of the Genocide Convention (ICJ, 2024c).

In the proceedings, Israel claimed that it is ensuring the right of the Palestinian civilians in Gaza to protection and that it has facilitated the distribution of humanitarian assistance throughout Gaza by, e.g., reopening bakeries with the assistance of the World Food Programme, supplying water, cooking gas and medical equipment, as well as decreasing the scope and intensity of the hostilities. Nevertheless, the Court recognised the existence of a risk of irreparable damage to the rights protected under the Genocide Convention and imposed a number of provisional measures aimed at mitigating the critical humanitarian situation in Gaza (ICJ, 2024c).

In particular, the Court stated that Israel must take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide Convention (1951); ensure with immediate effect that its military does not commit any acts described; take all measures within its power to prevent and punish the direct and public incitement to commit genocide; take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in Gaza; take effective measures to prevent the destruction and ensure the preservation of evidence related to the aforementioned allegations; and, finally, to submit a report to the Court on all measures taken – for which a deadline of one month was set (ICJ, 2024c). The provisional measures which the Court indicated create international legal obligations binding upon Israel, as it is settled law that such Orders are legally binding (ICJ, 2001). However, after the Order was rendered by the Court, Israel continued its actions virtually as if no measures were indicated, in some instances even intensifying its military operations and thus restricting<sup>7</sup> humanitarian aid in a manner that has further aggravated the humanitarian situation to previously unimaginable proportions (Amnesty International, 2024b; Johnson, 2024; Reidy, 2024).

<sup>7</sup> If not restricting the delivery of humanitarian aid to Gaza *per se*, Israel at least failed to prevent the attacks on humanitarian convoys by its armed settlers (Choukeir, 2024; Tondo, 2024).

Since then, South Africa requested<sup>8</sup> new packages of measures to be ordered by the Court in response to the changed situation in Gaza, specifically the alleged deliberate starvation of the population in Gaza by withholding humanitarian aid and the offensive on Rafah, which Israel had previously declared a “safe area” and then attacked (Al Jazeera, 2024a; Doctors Without Borders, 2024; Mackintosh & Gritten, 2024; Majid, 2024; United Nations Human Rights Office of the High Commissioner, 2024b). Based on the new request, the Court issued a second (ICJ, 2024f) and a third (ICJ, 2024g)<sup>9</sup> set of provisional measures, demanding, *inter alia*, a halt to the offensive on Rafah<sup>10</sup>, which the Israeli authorities so far have not only continuously disregarded (Moustafa Essawy, 2024), but have even clarified that they do not intend to respect in the future, arguing that they are “in any case complying with international law” (Reuters 2024). Additionally, Israel accused the Court of being anti-Semitic (McKernan, 2024),<sup>11</sup> and South Africa of acting as a “legal arm of Hamas” (Bassit, 2024; The Times of Israel, 2024b).

As regards the legal arguments of Israel, the most common are the statements that Israel is conducting its military operation on the basis of the right of States to self-defence and in accordance with IHL. However, as noted and substantiated by Tekavčič Veber (2024), the legal analysis of these claims shows that they are highly contested.<sup>12</sup> In this connection, it is worth highlighting the work of the UN Special Rapporteur,

Francesca Albanese, who, in her report titled Anatomy of a Genocide, noted that Israel uses the reference to “respect for international humanitarian law” (including the extremely permissive use of IHL terminology, such as human shields, collateral damage, safe zones, evacuations and medical protection) as a tactical humanitarian cover to legitimise the commission of genocide (Albanese, 2024).

Albanese (2024) conducted an independent expert legal analysis of Israel’s activities in Gaza and concluded that “there are reasonable grounds to believe that the threshold indicating Israel’s commission of genocide is met”. She concluded that genocide has been perpetrated with three sets of actions, namely the killing of the members of the group, causing serious bodily or mental harm, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Albanese furthermore explained that genocidal intent can be deducted from numerous dehumanizing and annihilatory statements made by Israeli officials, members of the military and other relevant actors (examples include, but are not limited to, the use of terms and phrases such as: “monsters”, “human animals”, “Gaza Nakba”, “Amalek”), which taken together with other examples of evidence point towards a “preconceived plan or policy”. She presented her findings in the historical context of “practices, leading to ethnic cleansing” as well as in the light of a theoretical premise that “genocide is inherent to settler colonialism” (Albanese, 2024).

The latter is extremely relevant in light of the recent ICJ Advisory Opinion on the “Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem” (ICJ, 2024a). In its Advisory Opinion, the Court recognised numerous violations of international law conducted by Israel, especially the prolonged occupation of Palestinian territory, illegal Israeli settlement policies, the discrimination of Palestinians (which in some areas amount to apartheid), and the violence perpetrated against them, to list a few (ICJ, 2024a). With this Advisory Opinion in mind, the Orders of the ICJ issued in the South Africa v. Israel case, displaying the plausibility of violations of the Genocide Convention, do not exist in a vacuum. These Orders should be perceived and understood in the context of a decades-long illegal Israeli occupation of Gaza, which, according to the Court, remains in place even after 2005 when Israel “officially withdrew” from Gaza. The Court eloquently explained that Gaza is still under *de facto* Israeli occupation as Israel remains capable of exercising key elements of authority over the strip (ICJ, 2024a).

In the latest Advisory Opinion on the occupation of Palestinian territory by Israel, the Court elaborated not only on the legal consequences arising from the international wrongs

<sup>8</sup> The two new additional requests were filed on 12 February 2024 and 6 March 2024 (ICJ, 2024d, 2024e).

<sup>9</sup> Gureghian Hall (2024) wrote that this decision should be seen as the Court’s intervention “in its most forceful manner yet”, which is likely a consequence of the fact that “previous measures have gone largely unimplemented”.

<sup>10</sup> Immediately after the issuing of the Court’s order to Israel to stop the offensive in Rafah, warnings of Israel’s non-compliance with the order emerged (Corder, 2024).

<sup>11</sup> The allegation that the Court is anti-Semitic was used mainly as a justification for Israel’s non-compliance with the provisional measures issued by the Court (The Times of Israel, 2024a). It is noteworthy to stress that accusations of antisemitism, aimed at anyone who argues that Israel is violating international law, have been criticized heavily by several experts (including experts of Jewish origin) and have been marked as an “instrumentalization of antisemitism claim” (Gordon, 2024; Singer, 2024). The negative consequences of such instrumentalization of antisemitism can include the relativisation of a very real form of hatred and discrimination aimed at the Jewish population, and therefore drawing the line between Jewish people and the State of Israel should always be kept in mind.

<sup>12</sup> Ulfstein (2024) in his assessment of the legality of Israel’s actions explained why it is not possible to claim that these actions represent lawful self-defence and stated that they resemble more “expressions of illegal punishment or revenge”.

committed by Israel for Israel itself, but also on the legal consequences of the illegality of Israel's activities for other States (and the United Nations as such). The Court ruled on the legal consequences incumbent upon States of the international community based on the observation that at least some of the international obligations violated by Israel are of *erga omnes* nature, and are therefore, as previously decided in the Barcelona Traction case (ICJ, 1970), the concern of all States (ICJ, 2024a).

In this regard, the Court concluded that other States are under several obligations vis-à-vis the prolonged occupation of Palestinian territory. For example, States are required to distinguish in their relations with Israel between Israeli territory and the Occupied Palestinian Territory, which “encompasses, *inter alia*, the obligation to abstain from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory”. States are further required to abstain from entering into economic or trade relations with Israel concerning the Occupied Palestinian Territory or parts thereof “which may entrench its unlawful presence in the territory”. It is also paramount, in the opinion of the Court, for States to abstain, in the establishment and maintenance of diplomatic missions in Israel, from “any recognition of its illegal presence in the Occupied Palestinian Territory”. Lastly, States must take steps to prevent those trade or investment relations that “assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory” (ICJ, 2024a).

As regards the Occupied Palestinian Territory, the Court has unequivocally tasked States to exercise their duty of diligence in their relations with Israel so as not to recognise the results of the violations of international law committed against the Palestinians. A similar duty of diligence is asked of States Parties to the Genocide Convention concerning the current situation in Gaza. With the latest ICJ Advisory Opinion in mind, the article now turns to the obligation of States Parties to the Genocide Convention to prevent genocide in Gaza. The obligation to prevent genocide, relevant nowadays as ever, must be understood in the context of the Israeli practices in: 1) the Occupied Palestinian Territory as chronicled by the Court in general, and 2) in Gaza in particular.

### 3 The Obligation to Prevent Genocide Under Article I of the Genocide Convention

As the Court affirmed in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (ICJ, 1951), the Genocide Convention “was manifestly adopted for a purely hu-

manitarian and civilizing purpose”, and “its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality” (ICJ, 2022). The Genocide Convention (1951) therefore not only prohibits the commission of genocide and related acts under Article III, but also imposes two additional obligations on States Parties in Article I – the duty to prevent and the duty to punish genocide. Particularly in the light of Israel's past non-compliance with the provisional measures adopted by the ICJ and the indications that this practice of dismissing the decisions of the UN judicial body will continue, consideration is needed as to how the remaining States Parties should proceed to meet the Convention's criteria regarding their own obligation to prevent genocide.

With regard to the obligation to prevent genocide, it must be pointed out that it is fundamentally an obligation of conduct (Gaeta, 2007). States Parties are under an obligation to use all means reasonably available to them to prevent the commission of genocide, to the maximum extent possible. The standard for scrutiny whether a State has complied with the obligation to prevent genocide under the Convention is whether the State has exercised due diligence in its conduct (Helal, 2018). In the course of assessing the latter, the actual abilities of a particular State play an important role in determining the scope of due diligence.

The next key question is when exactly the obligation to prevent the commission of genocide becomes active for States Parties. In the Bosnia Genocide case (ICJ, 2007), the ICJ specified the particular point in time at which States Parties to the Convention must carefully examine whether they are investing sufficiently in the prevention of genocide. The Court stated, importantly, that such an obligation is not activated only after it has been definitively established by the competent institution(s) that genocide is already taking place – this, according to the Court, would be absurd, since the purpose of the duty to prevent genocide is precisely to prevent the commission of genocide (ICJ, 2007). The duty to prevent genocide must therefore be already complied with when the State “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed” (emphasis added). It is precisely from that moment onwards that a State is obliged under the Genocide Convention to use all mechanisms reasonably available to it to deter potential perpetrators from committing this international crime (ICJ, 2007).

The ICJ already highlighted in its jurisprudence certain elements that may assist States Parties in assessing the existence of the standard of a serious risk. Thus, a State will be responsible for a breach of the obligation to prevent genocide even if at the time when it could and should have acted there was not

complete certainty that genocide would be or was being committed. All that matters is whether the State was aware, or in the normal course of events could and should have been aware, of a serious risk of acts being committed which might lead to genocide (ICJ, 2007). In the case of the genocide in Bosnia and Herzegovina, a clearly identified concern at the level of the international community about the possibility of genocide in Srebrenica, the knowledge of State authorities of the dangers for the targeted population, as well as that these dangers “seemed to be of an order that could suggest intent to commit genocide, unless brought under control” (emphasis added), were elements sufficient for the ICJ to conclude that the State (*in concreto* Serbia and Montenegro) either was or could and should have been aware of the risk of genocide (ICJ, 2007).

By analogy to the present-day case of the conflict in Palestine, especially in Gaza, it may be concluded that the duty to prevent genocide for States Parties to the Genocide Convention was triggered when the risk of commission of genocide was clearly identified internationally and the relevant facts were presented that suggest the existence of a special intent on the part of the Israeli leadership. Regretfully, we observe that these conditions for the existence of a serious risk of genocide were fulfilled a long time ago. If not before, the serious risk materialised when the ICJ issued the first Order in the *South Africa v. Israel* case on 26 January 2024, confirming the *prima facie* possibility that genocide might be occurring in Gaza (ICJ, 2024c).

This possibility of a breach of the Genocide Convention was increasingly reaffirmed with every new set of provisional measures issued by the Court. In addition to the numerous warnings that the conditions for the existence of special intent amongst the Israeli leadership are present, such as the legal analysis conducted by the UN Special Rapporteur Albanese (2024), it is also worth noting that the forced displacement of people and the targeting of children may also be evidence of genocidal intent.<sup>13</sup> Taking the aforementioned into account, we conclude that the obligation to prevent genocide for States Parties, enshrined in Article I of the Genocide Convention (1951), has been active for several months by now. It is therefore crucial to assess what kind of measures States Parties to the Genocide Convention should take in order to fulfil their due diligence obligation of preventing genocide.

<sup>13</sup> This was the opinion of Canada, Denmark, France, Germany, the Netherlands, the United Kingdom and France when intervening in the case of the *Gambia v. Myanmar* (ICJ, 2023b). See also the reasoning in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case between the Gambia and Myanmar (ICJ, 2023a). For more details on the issue of genocidal intent and the duty to prevent genocide in Palestine see Sultany (2024).

#### 4 Measures to Be Taken by States Parties to the Genocide Convention

The measures aimed at preventing genocide that are available to States Parties<sup>14</sup> are of a dual nature. The first set of measures can be taken by States Parties unilaterally, according to their own sovereign decision, and the second set of measures can be pursued in multilateral forums – within the framework of international and supranational organisations of which the States Parties are members. The precise determination of measures depends on each State Party’s capabilities, nevertheless some guidance may be provided.

The measures indicated below address the main means which are used by Israel to, *prima facie*, engage in the commission of genocide. These means include: the bombing of critical infrastructure and densely populated areas, direct shootings, as well as the complete siege of Gaza, resulting in the deprivation of food, water, medical equipment and other life-sustaining goods (Albanese, 2024; ICJ, 2024d, 2024e). With regard to mass bombings and shootings, the States Parties that provide Israel with weapons and other materials used in its military operations should adopt measures aimed at ensuring that those means are not used in the potential commission of genocide. According to Bastaki (2024), the most basic and clear duty within the obligation of States to prevent genocide is to stop providing weapons to Israel after the risk that Israel is committing genocide has been recognized. States Parties that allow their territory to be used as a trade route for delivery of weapons should also take appropriate measures to prevent those weapons that might be used in the commission of genocide from reaching Israel.<sup>15</sup> Furthermore, cooperation with Israeli institutions (public and private) linked to the Israeli army and its activities in Gaza should be suspended.

This set of measures is especially relevant for, but not limited to, those States Parties to the Convention that are the main providers of weapons to Israel (United Nations Human Rights Office of the High Commissioner, 2024a). It is extremely concerning that many States, including the United States of America (hereinafter USA), the United Kingdom, Germany, and Italy, continue to supply weapons to Israel even months

<sup>14</sup> This paper is limited only to obligations of States Parties to the Genocide Convention. However, the plausibility of genocide enshrined in the ICJ (2024c) interim Order from 26 January 2024 is also relevant for other subjects of international law. For a detailed analysis on the obligation of States and corporations stemming from the findings of the ICJ in the aforementioned Order, see Pirotta, 2024.

<sup>15</sup> This issue was raised in several instances, including on the occasion when a ship, allegedly transporting weapons to Israel, docked in a Slovenian harbour (STA, 2024).

after the risks of genocide have been identified (Gritten, 2024). The obligation to cease immediately all deliveries of weapons and ammunition to Israel was also highlighted by numerous UN experts back on 23 February 2024, when it became clear that Israel would not comply with the provisional measures pronounced by the ICJ (United Nations Human Rights Office of the High Commissioner, 2024a). A good example of an act of a State stopping the export of weapons and ammunition to Israel is the decision of a Dutch appeals court of 12 February 2024 in which the court ordered the Netherlands to halt the export of F-35 fighter jet parts to Israel (Wright, 2024). Other States Parties to the Genocide Convention ought to follow suit.

The next set of measures is aimed at addressing the horrific humanitarian situation in Gaza. This could be achieved by exercising diplomatic pressure against Israel – the one party of the conflict that can undertake the most to improve the humanitarian situation in Gaza (ICJ, 2024a). Additionally, States could take advantage of their diplomatic leverage towards achieving an immediate ceasefire (as already demanded by the UN Security Council; UN News, 2024a) and to request the Israeli authorities to stop their deliberate blockade of life-saving aid (United Nations Human Rights Office of the High Commissioner, 2023a). Simultaneously, efforts aimed at the continued facilitation of activities which can deliver life-saving aid into Gaza are necessary. This has been done by several States Parties via, for example, air deliveries. Nevertheless, according to Amnesty International, air deliveries are not a sufficient alternative to delivery by land (Amnesty International, 2024a; Barrucho, L., & BBC Arabic, 2024). The USA, for example, constructed a portable harbour on the shores of Gaza through which, it claimed, aid could be delivered. After having operated for merely 25 days, the aid pier was shut down, signalling that the harbour failed to meet its promised objectives (Al Jazeera, 2024b; Al Joundi, 2024).

With practical measures encompassing the facilitation of on-the-ground aid, it is important to implement appropriate techniques for the delivering of aid to the people in need. Looking at the example of the USA, the measures which were aimed at improving the situation in Gaza often caused even greater devastation. This is the case due to the deaths of civilians that occurred because of the air deliveries – either as those deliveries landed in the sea and people drowned trying to retrieve the goods, or as sometimes people were directly hit and killed by the packages falling from the air (BBC, 2024; Salman et al., 2024).

Another important measure in this regard would be to strengthen and support the work of the UNRWA, which has “by far the greatest capacity to aid and assist those in Gaza as well as access to different parts of the Strip” (Bastaki, 2024). However,

sixteen States withdrew their funding of the UNRWA, based on terror allegations made by Israel regarding a few UNRWA members, which left the organisation significantly weaker and jeopardised their life-saving activities in Gaza even further (Bastaki, 2024). Despite the fact that several States after some time resumed their funding, UNRWA remains weakened to this day and it is not yet free from the risk of becoming completely inoperative. Another major risk for the distribution of life-saving aid in Gaza stems from the recent Israeli decision to end its cooperation with UNRWA (UN News, 2024b). This would have disastrous consequences for the remaining population in Gaza and other Palestinian refugees, as in the present circumstances, “it is not feasible for any other body to take over the task from UNRWA” (Kolekar, 2024).

Sadly, delivering aid into Gaza does not guarantee that those in need will benefit from it since, notoriously, more than 100 civilians were indiscriminately shot by Israeli forces (with more than 700 injured) while they were collecting aid, with this bloodshed now unofficially being referred to as “the flour massacre” (Polglase et al., 2024). Another example of a horrific misuse of humanitarian aid is the “Nuseirat massacre” in which, according to UN experts, the Israeli army (allegedly assisted by foreign military personnel) camouflaged themselves as a humanitarian aid truck and perpetrated one of the most severe massacres in Gaza, killing at least 274 civilians while saving 4 hostages who, arguably, could have been saved by means of a ceasefire months ago (United Nations Human Rights Office of the High Commissioner, 2024c). Bastaki (2024), relying on the ICJ decision in the Bosnia Genocide case (ICJ, 2007), lists amongst the measures that should be taken by States Parties to the Genocide Convention (1951) in order to prevent genocide in Gaza the cutting of links (especially military links) between Israel and States Parties to the Convention, providing a positive example of such practice – the decision of the Japanese government which decided, after the Court’s decision of 26 January 2024, to suspend cooperation between the Japanese company Itochu Aviation and the Israeli military contractor Elbit systems (ICJ, 2024c).

Furthermore, a measure that could be taken to contribute to the prevention of genocide is following the initiative of South Africa, which, when initiating the proceedings before the ICJ (2023c), stated that it was also filing the action to fulfil its own obligation to prevent genocide. States could thus join South Africa’s case via intervention in the proceedings or at least express concern regarding Israel’s blatant disregard for the provisional measures issued by the Court and demand compliance with the Orders. The competent authorities of States Parties could also initiate criminal proceedings against suspects on the basis of universal jurisdiction to prosecute the possible commission of genocide (as well as crimes

against humanity) and incitement to commit genocide. This takes place quite smoothly online and in digital media (IFEX, 2024), where plenty of violence against Palestinians goes unchecked (Fatafta, 2024; Law for Palestine, 2024; Qadi, 2024). States Parties could adopt measures aimed at welcoming refugees from Palestine, especially the sick and injured, as well.<sup>16</sup>

In multilateral forums, States Parties to the Convention that are also members of international organisations, e.g., the European Union (hereinafter EU), could cooperate towards adopting sanctions against Israel for the possible commission of genocide – in a similar manner, albeit on a different premise, to the sanctions imposed on the Russian Federation for its acts of aggression against Ukraine (Meissner & Graziani, 2023). The EU itself should take on a more (pro)active role in the fight against potential genocide, especially as it is currently facing severe criticism of double standards in addressing violations of international law. Within the system of the UN, State Parties to the Genocide Convention should strongly advocate for the end of hostilities, starting with a lasting ceasefire and followed by the peaceful exercise of the right to self-determination of the Palestinian people in line with the recent Advisory Opinion on the Occupied Palestinian Territory (ICJ, 2024a).<sup>17</sup>

Moustafa Essawy (2024) elaborates on the particular, additional obligations of the permanent five Members of the UN Security Council (hereinafter P5), which are under the “responsibility not to veto” (RN2V) in matters not concerning their individual vital State interests, but also not to obstruct the passage of UN resolutions aimed at authorising peacekeeping missions for civilian protection purposes for which there is otherwise majority support. For the current situation in Gaza, this means that the P5 must not veto resolutions implementing the obligation to prevent genocide as enshrined in Article I of the Genocide Convention, which includes resolutions on a ceasefire proposal. Furthermore, Members of the Security Council should adopt specific measures aimed at ensuring compliance with the measures listed in the ICJ Orders, validating and strengthening the role of the Court as the judicial organ of the UN.

Finally, Member States of the UN, especially Members of the UN Security Council, must ensure that Israel complies

with its obligations stemming from international law as recognised by the ICJ in its jurisprudence. It is the duty of all UN Member States to facilitate the implementation of these *rationes decidendi* and *obiter dicta* (Mishra, 2015).

## 5 Concluding Remarks

The Genocide Convention provides in Article I that it is mandatory for all States Parties to *prevent* genocide from occurring (Schiffbauer, 2018). States Parties must thus not only refrain from committing the crime of genocide, but they should also act in a preventive and punitive manner if the possibility of genocide arises. The obligation to prevent genocide is an obligation of conduct (Gaeta, 2007). States Parties are under an obligation to use all means reasonably available to them to prevent the commission of genocide.

The duty to prevent genocide must be complied with when the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. In the course of the article, we have observed that the conditions for the existence of a serious risk of genocide were fulfilled, if not before, then when the ICJ (2024c) issued the first Order in the South Africa v. Israel case on 26 January 2024, confirming the *prima facie* possibility that genocide might be occurring in Gaza. Therefore, the obligation to prevent genocide for States Parties, enshrined in Article I of the Genocide Convention (1951), has been active for several months at this stage. Precisely for these reasons, several possible measures were discussed which the States Parties to the Genocide Convention could (and should) pursue to comply with their obligation to prevent genocide.

Despite all the mechanisms in place, we are once again witnessing a (too) slow response from the international community, especially from States Parties to the Genocide Convention (1951), to another highly probable case of genocide. Numerous States continue to supply weapons and other military equipment to Israel, insisting on the premise of Israeli legitimate and lawful self-defence, while completely disregarding the plethora of warnings of the extreme likelihood that Israel is committing genocide. The international community, and in particular States Parties to the Convention, must therefore undertake more in order to ensure that Israel ceases the hostilities and improves the humanitarian situation in Gaza.

Such measures should be taken promptly, not only after international courts and institutions officially recognise that genocide is being committed (or was being committed). Especially in this regard it is noteworthy to recall once more that the ob-

<sup>16</sup> An example of a good practice is the rehabilitation programme offered at the University Rehabilitation Institute of the Republic of Slovenia – URI Soča, and, if necessary, at other medical institutions in Slovenia, for children injured in the latest conflict in Gaza (Ministry of Foreign and European Affairs of the Republic of Slovenia, 2024).

<sup>17</sup> It is argued that States should put more effort into the realisation of the two-state solution (Abrams, 2024; Hilal, 2007). However, the two-state solution remains controversial (Talhami, 2016).



ligation to prevent is not activated only after it has been definitively established by the competent institution(s) that genocide is already taking place – this would be absurd since the purpose of the duty to prevent genocide is precisely to prevent the commission (or continuation) of genocide (ICJ, 1951).

To allow genocide to be committed despite the countless warnings clearly expressing a serious risk of that happening demonstrates a direct violation of the Genocide Convention (1951). To let genocide occur once more will have devastating consequences not only for the people in Gaza (who will pay the highest price), but to all people in the world enjoying the right to live free from genocide conferred on them by the Genocide Convention (1951). This is the case as selective compliance with international law, which we are witnessing now in Gaza, undermines the international legal system from within. The system is losing its legitimacy in the eyes of the people who are watching these atrocities on their phones daily and are therefore asking themselves how it is possible that something like this can happen despite all the laws we have put in place to prevent it (Hasan & Buheji, 2024). The failure of States to adopt measures to prevent genocide even after Orders were issued by the ICJ also undermines the role of the Court as the main judicial organ of the UN, whose decisions are not mere recommendations, but are final and binding upon the parties to a particular dispute.

The international community bears a collective duty not to fail the Palestinian people in Gaza as it failed the Bosniaks in Srebrenica. Instead of staying hesitant now and inquiring *ex-post* how genocide in Gaza was possible, vowing once more a “never again”, concrete steps should be taken right now, unilaterally by States, and collectively in multilateral forums, to safeguard the Palestinian people from the imminent danger of genocide. After all, only decisive international preventive action to address the possibility of genocide will be in line with the spirit of the Genocide Convention as explained by the ICJ (1951) in its Advisory Opinion on “Reservations to the Convention on Genocide”: “in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention” (emphasis added).

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## Od »nikoli več« do »ponovno«: Obveznosti držav pogodbenic Konvencije o genocidu za preprečevanje genocida v Gazi

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Po pretresljivi izkušnji holokavsta v času druge svetovne vojne je bil v mednarodno pravo in domače zakonodajne akte dodan nov zločin: genocid. S ciljem preprečiti, da se tovrstne grozote še kdaj ponovijo, je bila sprejeta Konvencija o preprečevanju in kaznovanju zločina genocida. Zaskrbljujoče je, da je bilo navkljub obveznostim držav, kodificiranih v njej, vključno z obveznostjo preprečevanja izvršitve genocida, v zadnjih desetletjih izvršenih kar nekaj genocidov. Od začetka izraelskega napada na Gazo v oktobru 2023 so številni strokovnjaki najprej opozarjali na možnost izvršitve novega genocida, kasneje pa trdili, da je genocid že v teku. Republika Južna Afrika se je z vprašanjem morebitne izvršitve genocida obrnila na Meddržavno sodišče, ki je 26. januarja 2024 pripoznalo *prima facie* možnost kršitve Konvencije o genocidu. Od takrat dalje je Sodišče sprejelo več svežnjev začasnih ukrepov, usmerjenih v preprečevanje genocida, ki pa niso uspeli spremeniti situacije v Gazi. Slednja je sčasoma postajala vse hujša in je trenutno dosegla stopnjo uničenja, ki je skoraj nepredstavljiva. Razlog za to je predvsem v tem, da je Izrael – država, zoper katero so ukrepi naslovljeni, ukrepe povsem prezrl. Problematično pa ni zgolj eklatantno nespoštovanje mednarodnega prava s strani Izraela, temveč tudi pasivnost mednarodne skupnosti, predvsem z vidika dolžnosti preprečevanja genocida. Prispevek skuša nasloviti to problematiko tako, da se osredotoči na obveznosti preostalih držav pogodbenic Konvencije o genocidu. S sklicevanjem na preteklo sodno prakso Sodišča avtorja ugotavlja, kako številna opozorila strokovnjakov in ugotovitve Sodišča o možnosti genocida vplivajo na dotično obveznost preprečevanja genocida ter katere ukrepe bi države pogodbenice Konvencije o genocidu morale v zvezi s tem sprejeti.

**Ključne besede:** Konvencija o genocidu, Gaza, genocid, okupirano palestinsko ozemlje, Izrael

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