

International Court of Justice

**Alleged Breaches of Certain International Obligations in respect
of the Occupied Palestinian Territory
(Nicaragua v. Germany)**

PRELIMINARY OBJECTIONS

submitted by the Federal Republic of Germany

21 October 2025

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Chapter 1

Introduction and Background

A. Introductory Observations

1. Germany submits these Preliminary Objections in response to the claims advanced in Nicaragua's Memorial dated 21 July 2025. Germany asks the Court to find that it lacks jurisdiction to hear Nicaragua's claims, and in the alternative, that the great majority of Nicaragua's claims are inadmissible.
2. Nicaragua's case is that Germany has violated international obligations flowing from a wide range of international legal rules e.g. relating to: the prevention and punishment of genocide, the fundamental principles of international humanitarian law, the right of peoples to self-determination and the prohibition of racial discrimination, segregation and apartheid. To sustain its claims, Nicaragua makes extended submissions on the Israeli-Palestinian conflict as well as multiple allegations of breach of fundamental norms by Israel. These are the springboard for claims concerning Germany's conduct vis-à-vis Israel and the Palestinian people.
3. As it has already indicated to the Court in the context of the present proceedings, Germany decisively supports international attempts to seek a solution to the Middle East conflict, which for decades has been a foreign policy priority of successive German governments. Germany's position is informed both by its principled commitment to Israel's security, and its strong and steadfast support for the rights of the Palestinian people. Germany remains committed to a two-State solution as the only path towards a lasting peace in the Middle East. Proceeding from these principles, Germany is doing its utmost to live up to its responsibility vis-à-vis both the Israeli and the Palestinian people.
4. Nicaragua has affirmed its desire to contribute towards the peaceful resolution of the Middle East conflict.¹ Germany does not doubt the sincerity of this desire. Nor does it doubt the important role to be played by this Court, which is a central element in the international framework for the peaceful resolution of disputes on the basis of

¹ See e.g. 'Nicaragua and Palestine', Press Release, 10 April 2025 (Annex 1).

international law. Germany has supported the Court for decades and greatly values its commitment to the careful analysis and thorough application of international law in disputes submitted to it on the basis of its Statute. At the same time, however, Germany can only regret Nicaragua's decision to have resort to the Court in the present proceedings.

5. Nicaragua has rushed to the Court with far-reaching claims that, while ostensibly directed against Germany, directly call into question the lawfulness of Israel's conduct. Nicaragua at no point sought to engage meaningfully with Germany about the substance of its claims. Such engagement was all the more required because of the highly unusual nature of the present proceedings: these centre on the Middle East conflict, i.e. a conflict to which neither Germany nor Nicaragua are parties. In saying this, Germany does not suggest that Nicaragua could not have any interest in the conflict. However, as an applicant asserting breaches of ancillary and other obligations against a third State that is not a party to the conflict, it was for Nicaragua to ensure that its allegations be fairly presented and crystallised into a dispute before any rush to adjudication. What is more, it is not open to Nicaragua to bring claims which depend on a series of determinations on breach of peremptory and other norms of international law by an absent party, i.e. Israel. Notwithstanding a belated attempt to repackage matters in its Memorial, Israel is and remains an essential and inevitable target of Nicaragua's claims.
6. Nicaragua is well aware of the defects in its case, both so far as concerns jurisdiction and admissibility. As the Court is aware, on 1 April 2025, in a wholly exceptional *volte face*, Nicaragua's Agent notified the Court of his country's decision to "discontinue the case".² Responding to a request by the Court's President and within the time-limits indicated therein, Germany placed on record its decision not to oppose the discontinuance of the proceedings.³ By the time it did so, Nicaragua – in another *volte face* – had approached the Court indicating its desire to revoke its decision to discontinue the present proceedings notified just six days earlier.⁴ For the reasons made known to the Court, in Germany's legal assessment, Nicaragua's further *volte face* was

² See Nicaragua's letter to the Court dated 1 April 2025, Doc. 164179; and further 'Nicaragua with Palestine Always!', Press Release, 4 April 2025 (Annex 2).

³ See Germany's letter to the Court dated 7 April 2025.

⁴ See Nicaragua's letter to the Court dated 7 April 2025; as well as 'Nicaragua and Palestine', Press Release, 10 April 2025 (Annex 1).

devoid of legal effect: its notification of 1 April 2025 had the effect of discontinuing the present proceedings unless Germany, making use of the “protective” right afforded to it under Article 89(2) of the Court’s Rules, opposed such discontinuance within the time-limit set by the Court’s President.⁵ While it appears that the Court did not agree with Germany’s argument, it remains the case that the repeated and exceptional *volte faces* of Nicaragua are inconsistent with the conduct of a claimant that has suffered legal wrongs and that considers it has brought a substantial claim before the Court which the Court can determine.

7. As to the Memorial, Nicaragua’s claims as now presented differ significantly from those advanced in the Application and during the provisional measures proceedings before the Court. Specifically:

- (i) Nicaragua now invokes a wholly new jurisdictional basis, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), without any regard to the preconditions to seisin of the Court contained in that provision, which have evidently not been complied with.
- (ii) Whereas its Application instituting proceedings seemed to develop claims mainly with respect to events in the Gaza strip since 7 October 2023, it has now become clear that Nicaragua’s case has a much wider scope and implicates further and much more long-standing aspects of the conflict in the Middle East. To sustain its arguments on self-determination, international humanitarian law, and racial discrimination in particular, Nicaragua now presents a case against Germany (and Israel) that spans decades, and that relies on distant events, among them the first congress of the World Zionist Organisation in 1897,⁶ the “issuance of the Balfour Declaration by Great Britain in November 1917”,⁷ and the long-standing assistance of “powerful third States ‘protective’ towards Palestine’s

⁵ As the Court has had occasion to observe, the notification of the discontinuance under Article 89 of the Rules of Court “always takes the form of a unilateral communication from the applicant or claimant party”: see *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 20. While Article 89, paragraph 2, of the Rules of Court affords the respondent State the power to object to said continuance, this “right of objection given to a respondent State ... is protective”; its sole purpose is to “enable [respondent States] to insist on the case continuing” (*ibid.*).

⁶ See Nicaragua’s Memorial (21 July 2025), vol. I (‘Memorial’), para. 80.

⁷ See Memorial, para. 83.

‘coloniz[ation]’”.⁸ Nicaragua’s claims thus depend on assertions of decades-long violations of international law, centred on Germany’s long-standing “loyal relationship” with Israel.

8. These further allegations have no more merit than the allegations first made in Nicaragua’s Application, and Germany rejects them. Of more immediate importance, a significant number of Nicaragua’s claims, as presented in the Memorial, fall outside the scope of the Court’s jurisdiction under the optional clause declaration submitted by Germany under Article 36(2) of the Statute of the Court and the newly-invoked Article 22 CERD.
9. Germany reserves the right to raise further objections to the Court’s jurisdiction or the admissibility of Nicaragua’s claims.

B. Germany’s role in the wider context

10. Consistent with the nature of this phase of the proceedings, Germany does not engage with the numerous allegations of fact that Nicaragua has made in its Memorial, save with respect to the very limited facts relevant to these Preliminary Objections. This should not of course be misconstrued as an admission of any facts that would be a matter for a merits phase (if any).
11. What the Nicaraguan Memorial presents as “factual background”⁹ nonetheless calls for some remarks, in particular with a view to making the Court aware of certain developments concerning Germany that post-date the provisional measures hearings of April 2024.
12. As underlined during the provisional measures phase,¹⁰ respect for, as well as the promotion of, international law are cornerstones of Germany’s constitution and of its foreign policy. In particular, Germany has always been an advocate for the promotion and strengthening of international humanitarian law and humanitarian principles. These

⁸ See Memorial, para. 82.

⁹ See Memorial paras 78–308.

¹⁰ See CR 2024/16, pp. 8–13.

guide Germany's response to the Middle East conflict. Germany is doing its utmost to live up to its responsibilities vis-à-vis both the Israeli and the Palestinian people.

13. Like many other States, Germany has been tested by the conflict raging since 7 October. The entire international community is grappling with the political, moral and legal dilemmas posed by the situation in Gaza. Those responsible for German foreign policy have strived to strike the right balance between competing principles. Germany's approach to the conflict is the subject of vigorous debate in parliament, and in society at large, just as specific measures are scrutinised in proceedings before domestic German courts.
14. Germany remains deeply concerned about the devastating humanitarian situation in Gaza, notwithstanding the recent ceasefire. Since coming into office in May 2025, Chancellor Merz and Foreign Minister Wadephul have continued to engage in numerous bilateral talks, urging Israel to allow humanitarian aid into Gaza on a larger scale and to agree to a humanitarian ceasefire. In bilateral talks with Israel, Foreign Minister Wadephul has repeatedly called upon Israel to take immediate, comprehensive and durable measures to remedy the disastrous situation in the Gaza Strip. In addition, Germany has repeatedly called on the Israeli Government to refrain from taking any further steps towards an annexation of the West Bank. It considers Israeli settlements in the occupied territories unlawful and a serious obstacle to peace. Together with its international partners, Germany has consistently made clear that the implementation of a negotiated two-State solution is the only way to guarantee that both Israelis and Palestinians can live side by side in peace, security, and dignity.
15. On 8 August 2025, the Federal Chancellor announced that: "The German Federal Government will, until further notice, authorise no military equipment exports that can be used in the Gaza Strip."¹¹ More generally, Germany continues to uphold the highest standards when it comes to security cooperation and only authorises arms exports on the basis of detailed case-by-case scrutiny, a scrutiny that not only respects, but exceeds the requirements of international law.

¹¹ See Statement by Federal Chancellor Friedrich Merz, 8 August 2025, available at <https://www.bundesregierung.de/breg-en/news/statement-by-federal-chancellor-friedrich-merz-on-the-development-in-gaza-2377368>.

16. Germany continuously supports all efforts to work for a political solution that guarantees Israel's security and gives the Palestinians prospects for the future. It has worked intensively with international partners to contribute to the momentum that has led to the latest peace initiative, culminating in a ceasefire and the signature of the Gaza Peace Plan at a ceremony on 13 October 2025 in Egypt, with the attendance of Chancellor Merz. Germany is relieved that on the same day the remaining 20 surviving hostages were released, including four Germans. Germany will continuously support all efforts to put in place the necessary conditions for lasting peace in the region. In short, Germany continues to translate into day-to-day practice what it means to respect international law in circumstances as challenging as these.

C. The Structure of Germany's Preliminary Objections

17. Germany advances three preliminary objections. As follows from these objections, the Court does not have jurisdiction to entertain Nicaragua's claims. In the alternative, the great majority of Nicaragua's claims are inadmissible.
18. Chapter 2 sets out Germany's first preliminary objection. It shows that Nicaragua has failed to establish the existence of a dispute as between itself and Germany with regard to any of its claims and submissions. As a result, the Court has no jurisdiction over any of Nicaragua's claims.
19. Chapter 3 sets out Germany's second preliminary objection. It demonstrates that, even by reference to the alleged dispute put forward by Nicaragua, a significant number of its claims would fall outside the Court's jurisdiction. This is because these claims fail to meet the limitations *ratione temporis* on the Court's jurisdiction contained in Germany's optional clause declaration and the well-established preconditions to jurisdiction in Article 22 CERD. As detailed in Chapter 3, the Court lacks jurisdiction over the claims set out in paragraph 484(4)-(9) of Nicaragua's Memorial.
20. Chapter 4 sets out Germany's third preliminary objection. It demonstrates that, even if the Court were to find that it had jurisdiction to entertain Nicaragua's claims, the great majority of these would be inadmissible. All of Nicaragua's major claims require the Court to adjudicate upon the lawfulness of Israel's conduct in the absence of Israel's

consent or participation. As detailed in Chapter 4, this applies to the claims set out in paragraph 484(1)-(9) of Nicaragua's Memorial.

21. Chapter 5 contains Germany's submissions.

Chapter 2

There Was No Dispute Between the Parties When Nicaragua Instituted the Present Proceedings

A. Introduction

22. Nicaragua has failed to establish the existence of a dispute as between itself and Germany with regard to any of its claims and submissions as set out in Nicaragua's Application¹² and Memorial.¹³
23. The basic position on the relevant facts – which the Court will recall from the Provisional Measures hearing – is as follows: Nicaragua sent a note verbale, dated 2 February 2024, to Germany setting out some of its claims. However, that note verbale was sent to the generic public information email address of the Permanent Mission of Germany to the United Nations – not an address usually employed for official communications. As a result, the note verbale was not picked up until 13 February 2024. Almost simultaneously with the note verbale, Nicaragua issued a press release addressed to the world at large, in which it set out some of the claims contained in the note verbale. In neither document did Nicaragua refer to what are now central claims of its case as reflected in its Memorial.
24. Some days after the defective sending of the note verbale and the issuance of the press release, a German government press conference took place on 7 February 2024. During that press conference, Germany reserved its position as to the note verbale, which it had yet to receive, as well as with respect to the press release that informed of the sending of the note verbale. Upon receipt of the note verbale on 13 February 2024, Germany was actively considering its position, when Nicaragua made its Application to the Court – without allowing Germany reasonable time to formulate its position and respond to the note verbale.
25. No dispute had or could have crystallised between Nicaragua and Germany at the date of Nicaragua's Application. Germany had not yet responded to Nicaragua's claims, and it had not been allowed reasonable time to do so. It follows that nothing can be inferred

¹² See Nicaragua's Application Instituting Proceedings containing a Request for the Indication of Provisional Measures (1 March 2024) ('Application'), para. 67.

¹³ Memorial, para. 484.

from any supposed silence of Germany in the two weeks between the receipt of the note verbale and the seisin of the Court by Nicaragua. Further, it is to be emphasised that the current case is exceptional – indeed unique – as it ultimately concerns hostilities in which neither the Applicant nor the Respondent is directly engaged: it is twice-removed from a usual bilateral dispute as it involves an Applicant asserting a right to act in pursuit of a public interest (a right that would reside in an unlimited pool of States) and a Respondent said to have violated ancillary obligations of prevention, of non-recognition, non-assistance, etc. (which are incumbent upon an allegedly unlimited pool of States). In such a setting, it is all the more important that the Court’s usual test for the determination of the existence of a dispute be stringently applied. This is necessary to avoid an unsuspecting State being brought before the Court before it has even formulated its position with respect to the claim being asserted.

26. As demonstrated in this Chapter:

- (i) the existence of a dispute is a prerequisite for the exercise of the Court’s jurisdiction under each of the heads of jurisdiction invoked in the present case; such a dispute had to have existed at the time of the filing of the Application (section B); and
- (ii) no dispute existed between Nicaragua and Germany under any of the heads of jurisdiction invoked by Nicaragua and/or with respect to any of its claims (section C).

B. The Existence of a Dispute as a Prerequisite for the Exercise of Jurisdiction

27. The existence of a dispute is a basic prerequisite for the exercise of the Court’s jurisdiction under any jurisdictional heading that may be invoked by an applicant.¹⁴ This includes, for the purposes of the present proceedings, the invocation of a compromissory

¹⁴ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 270–271, para. 55; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58: “The Court, as a court of law, is called upon to resolve existing disputes between States. Thus, the existence of a dispute is the primary condition for the Court to exercise its judicial function”.

clause (such as Article IX of the Genocide Convention¹⁵ or Article 22 CERD¹⁶), as well as the invocation of optional clause declarations submitted under Article 36(2) of the Statute of the Court.¹⁷ In all cases, the critical time for the determination of the existence of a dispute is the time of filing of the application.¹⁸ This means that a dispute must have already existed between the parties at the time that the applicant lodged its application with the Court.

1. The meaning and existence of a ‘dispute’

28. As the Court has consistently held, a dispute is “a disagreement on a point of law or fact; a conflict of legal views or interests”.¹⁹ It is inherent in the concept of ‘disagreement’ that there must exist some form of objectively determinable exchange between the parties that evinces statement and opposition. The need for an exchange that establishes opposition is inherent in the concept of a ‘conflict’ of legal views or (legal) interests.
29. The Court has confirmed that the existence of a dispute must be objectively determined.²⁰ It is “not sufficient for one party to assert that there is a dispute”.²¹ Rather, it falls to the Court to assess, in light of the evidence presented to it, whether “the two

¹⁵ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Preliminary Objections, Judgment, I.C.J. Reports 2024, p. 393, para. 40.

¹⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, pp. 84–85, para. 30.

¹⁷ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, pp. 444–445, para. 54; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 269, para. 33.

¹⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, pp. 84–85, para. 30; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, pp. 271–272, para. 39.

¹⁹ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

²⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, I.C.J. Reports 1950, p. 74.

²¹ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 270–271, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, para. 58. See also *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

sides hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”.²² In the *South West Africa* cases, the Court elaborated that “it must be shown that the claim of one party is *positively* opposed by the other”.²³

30. The Court’s jurisprudence yields clear guidance as to what amounts to a ‘claim’ of one party and as to when such a claim could be said to have been ‘positively opposed’ by another party.

31. As regards the notion of a ‘claim’, the Court has held that:

“While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428–429, para. 83), the exchanges must refer to the subject-matter of the treaty *with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.*”²⁴

32. While this is with specific reference to a treaty being invoked before the Court, the reasoning is applicable to any exchanges which are relied upon in order to establish the existence of a dispute, including under Article 36(2) of the Statute of the Court.

33. As regards the response, the Court has made clear that, for there to be a dispute, the other State must not be “deprived of *the opportunity to react* before the institution of proceedings to the claim made against its own conduct”.²⁵ It is only in this way that

²² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

²³ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, *Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328. (emphasis added).

²⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 84–85, para. 30 (emphasis added).

²⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 272, para. 40 (emphasis added).

positive opposition, or “the opposing attitudes [of the parties] relating to the performance of [their] obligations”,²⁶ can be established.

34. Germany accepts that in appropriate circumstances, the Court may infer from a respondent’s silence that it rejects the future applicant’s claims, and therefore that there is ‘positive opposition’.²⁷ However, this requires that the “respondent *has failed* to reply to the applicant’s claims”²⁸ in “circumstances where a response is called for”.²⁹ Whether such a response was indeed called for, in turn, “depends on the particular circumstances of each case”, including the period of time during which a respondent maintained its silence after being presented with the claim, the clarity of the claims as formulated, and the history of prior diplomatic exchanges between the parties bearing on the same subject-matter.³⁰

2. The critical time for the existence of a dispute

35. The Court determines whether it has jurisdiction over the claims submitted, and whether these claims are admissible, by reference, “as a general rule”, to the time of filing of the application.³¹ This also applies, as the Court has explicitly found, to the determination

²⁶ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

²⁷ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 505, para. 71; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89.

²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 505, para. 71.

²⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, pp. 84–85, para. 30.

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 507, paras 75–76. See also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 33, para. 73 (for a discussion of circumstances in which “[one party] could not have misunderstood the position of [the other party] over such differences”).

³¹ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, I.C.J. Reports 2009, p. 148, para. 46; see also *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Preliminary Objections, Judgment, I.C.J. Reports 1988, p. 69, para. 66.

of whether a dispute exists between the parties.³² Indeed, since the Court's function is to decide "such disputes as are submitted to it" in accordance with Article 38 of its Statute, "such disputes" must exist "at the time of their submission".³³

36. It follows that developments taking place since the date of the seisin of the Court by the applicant cannot serve to establish the existence of a dispute that did not exist at the time of filing. The Court draws an important distinction between the existence of a dispute at the time of filing of the application, and the confirmation, clarification of the subject-matter, or disappearance of the dispute subsequent to the filing of the application.³⁴ Conduct, including statements, subsequent to the filing of the application may be relevant for all these latter purposes, but it cannot serve to create a dispute where none existed at the time of the filing of the application.³⁵

3. The requirement of a 'dispute' in the particular context of the present case

37. As is clear from the foregoing, in assessing whether there existed, at the critical time, a dispute between the parties, the Court has been mindful of the particular context in which the parties' exchanges took place. The particular context of the present case is significant, not least to determine the "circumstances" in which "a response [would be] called for" as described above.
38. As has been indicated already, the present case is exceptional in that it involves claims by an applicant asserting a right to act in defence of a public interest against a respondent said to have violated ancillary obligations of prevention, of non-recognition, non-assistance, etc., in relation to a conflict in another part of the world. The Court, in other

³² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 84–85, para. 30; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 32, para. 73; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 271, para. 39.

³³ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 271–272, para. 39.

³⁴ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 272, para. 40.

³⁵ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 444–445, paras 53–55.

words, is not faced with a potential dispute emerging in the usual, bilateral setting of inter-State proceedings. Rather, the situation is *twice* removed from a classic bilateral dispute. Neither Nicaragua nor Germany are directly involved in the events on the ground that call the instruments or rules invoked by Nicaragua into application. Neither is a direct participant in the events taking place in Israel or the Occupied Palestinian Territory.

39. More specifically, Nicaragua accepts that it “does not act for its own interest”, but asserts a right to initiate proceedings on the basis of the *erga omnes (partes)* concept, as one of an open-ended number of States potentially so entitled.³⁶ Germany, in turn, is accused of having violated obligations of prevention and of non-recognition, a duty to ensure another State’s respect for international humanitarian law, and rules against complicity – as one of an (again) open-ended number of States that are bound by such obligations and that might be so accused.
40. In this setting the requirement of the existence of a dispute serves a particularly important function, and the general criteria established in the Court's jurisprudence need to be applied with particular care. Precisely because a potentially open-ended number of potential respondents is faced with an open-ended number of potential applicants, it is essential to ensure that a dispute has indeed crystallised between the applicant and the respondent specifically, and does not simply float in the ether as a potential claim of all against all.

C. The Absence of a Dispute Regarding Each of Nicaragua’s Claims

41. Nicaragua has failed to establish that there existed a dispute between itself and Germany on 1 March 2024, when it instituted the present proceedings. Germany turns first to the key facts taking place prior to Nicaragua’s institution of proceedings on 1 March 2024 (sub-section 1), before demonstrating the absence of any dispute with respect to Nicaragua’s claims as set out in its Application and Memorial (sub-sections 2 to 5 below).

³⁶ See Memorial, para. 12(b).

1. Central factual developments

42. Nicaragua relies on three events in order to establish the existence of a dispute between itself and Germany with respect to all claims: the sending of a note verbale by Nicaragua to Germany dated 2 February 2024;³⁷ a press release addressed to “the people of Nicaragua and the international community” published on 1 February 2024; and a press conference of the German Federal Government that took place on 7 February 2024.³⁸
43. As regards the note verbale:
- (i) In its note verbale dated 2 February 2024, Nicaragua “informed Germany of its claim”³⁹ in particular – as detailed below – stating its “opinion” that “Germany is engaged in a gross and systematic failure to fulfill [sic] its obligations under the 1948 Genocide Convention” and referring to the breach of obligations under international humanitarian law.⁴⁰ Nicaragua did not mention other claims (e.g. claims under CERD), or other legal concerns.
 - (ii) Nicaragua sent its note verbale as an attachment to a cover message sent from a “@yahoo.com” email address to the generic public information email address of Germany’s Permanent Mission to the United Nations in New York (“info@new-york-un.diplo.de”).⁴¹ It thereby addressed an institution that has no competence whatsoever to deal with bilateral German-Nicaraguan matters.
 - (iii) As regards the form of communication, the generic email account of Germany’s Permanent Mission to the United Nations in New York is not customarily used for official diplomatic communications. Significantly, Nicaragua did not use the standard form of diplomatic communication via sealed note verbale transmitted by the Ministry of Foreign Affairs of Nicaragua in Managua to the German Embassy in Managua. Nor did it use, as an informal digital alternative, the standard email accounts used in its previous diplomatic correspondence with

³⁷ While Nicaragua describes the note verbale as “dated 2 February 2024”, the document provided in Annex 1 of its Application bears the date of 1 February 2024. In the following, Germany follows Nicaragua’s description.

³⁸ Memorial, paras 20–24.

³⁹ Application, para. 27.

⁴⁰ Note Verbale from the Ministry of Foreign Affairs of Nicaragua to the German Federal Foreign Office. 2 February 2024 (Nicaragua’s Application, Annex 1), p. 7.

⁴¹ See Annex 3.

Germany, such as the email addresses of the Ambassador and assistant at the German Embassy in Managua. Nor, finally, did it use the usual communication channels via the Embassy of Nicaragua in Berlin to the German Ministry of Foreign Affairs in Berlin – or standard email accounts as an alternative. Notably, Nicaragua had regularly used these standard forms of bilateral diplomatic communication to raise other matters with Germany. To give just one example, during the very days Nicaragua reached out from a “@yahoo.com” email account to the generic email account of the German mission in New York to raise questions of genocide, it relied on standard forms of communication in relation to administrative matters of diplomatic relations.⁴²

- (iv) German diplomats in New York picked up the email forwarding Nicaragua’s note verbale on 13 February 2024. The German Permanent Mission confirmed receipt of Nicaragua’s note verbale on 14 February 2024, without engaging with the substantive matters raised in it.⁴³
- (v) Germany understands that Nicaragua addressed equivalent notes verbales to three other States, namely the United Kingdom, The Netherlands, and Canada. These were likewise not sent using usual diplomatic communication channels, e.g. in case of the Netherlands the note verbale was sent to its generic public information email address – and were likewise only picked up with significant delay.

44. As regards the press release:

- (i) In a press release dated 1 February 2024, i.e. preceding the date of the note verbale dated 2 February 2024, Nicaragua informed “the people of Nicaragua and the international community” that it had sent diplomatic notes to the four governments of the United Kingdom, The Netherlands, Canada and Germany.⁴⁴ The press release was posted online at <https://www.el19digital.com/articulos/ver/titulo:148879-gobierno-de-nicaragua-impedir-y-detener-el-genocidio-en-palestina>.

⁴² See Annex 4.

⁴³ Note Verbale from The Permanent Mission of the Federal Republic of Germany to the United Nations to the Permanent Mission of Nicaragua to the United Nations, 14 February 2024 (Nicaragua’s Application, Annex 2).

⁴⁴ Press Release, 1 February 2024 (Nicaragua’s Application, Annex 3).

- (ii) As detailed below, the press release highlights that Nicaragua had urged these governments to halt weapons deliveries to Israel “as it is plausible they might have been used to facilitate or commit violations of the Genocide Convention”, and warns that by suspending support for UNRWA, the four governments would “disregard their obligations under ‘rules of international law’”.⁴⁵ Nicaragua also stated that “it has notified the governments of the United Kingdom, Germany, The Netherlands and Canada of its decision to hold them responsible under international law for gross and systematic violations to the Convention on the Prevention and Punishment of the Crime of Genocide, international humanitarian law and customary law”.⁴⁶ No other claims are mentioned.

45. As regards the press conference:

- (i) On 7 February 2024, at a governmental press conference held in Berlin, a representative of the German Federal Foreign Office was asked about the press release and the note verbale of the Nicaraguan Government. She was asked in particular (a) to confirm receipt of the note verbale; and (b) to indicate how Germany intends to react to the steps being taken by Nicaragua.⁴⁷
- (ii) The representative confirmed that the Federal Foreign Office was “aware of a press release”, but noted that “nothing else” (other than the press release) “is known”.⁴⁸ “Accordingly”, she continued, “we have no reason to comment further”.⁴⁹ She also noted that “we ... reject the relevant content of the press release”.⁵⁰

46. At no point prior to 1 March 2024 did Nicaragua reach out to the Germany to pursue points mentioned in the note verbale or the press release. Specifically:

⁴⁵ Press Release, 1 February 2024 (Nicaragua’s Application, Annex 3).

⁴⁶ Press Release, 1 February 2024 (Nicaragua’s Application, Annex 3).

⁴⁷ Statements by a spokesperson of the German Federal Foreign Office at the Governmental Press Conference, 7 February 2024 (relevant extracts in Nicaragua’s Application, Annex 4), p. 1 (‘Press conference statement’)

⁴⁸ Press conference statement (Nicaragua’s Application, Annex 4), p. 2.

⁴⁹ Press conference statement (Nicaragua’s Application, Annex 4), p. 2.

⁵⁰ Press conference statement (Nicaragua’s Application, Annex 4), p. 1.

- (i) Germany's note verbale of 14 February 2024 acknowledging receipt of Nicaragua's note verbale was not met with any response or follow-up.
- (ii) Following 14 February 2024, Germany was actively considering its response and seeking co-ordination with the three states – The Netherlands, the United Kingdom, and Canada – that had received similar notes verbales. This process was on-going when, 15 days after Germany had acknowledged receipt of Nicaragua's note verbale, Nicaragua instituted the present proceedings.

47. As explained below, in light of these considerations there was no dispute between Nicaragua and Germany with respect to any of Nicaragua's claims on the critical date of 1 March 2024, when Nicaragua initiated the present proceedings.

2. Nicaragua's racial discrimination, non-recognition and non-assistance, and prosecution claims

48. In its submissions numbered (8), (9) and (10) in its Memorial, Nicaragua requests the Court "to adjudge and declare that Germany has breached and continues to breach international law" ...
- (i) "by failing in its obligation not to recognise as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and not render aid or assistance in maintaining the situation created by the continued illegal presence of Israel in the Occupied Palestinian Territory" (the 'non-recognition and non-assistance claim'),⁵¹
 - (ii) "by providing unlawful assistance to Israel's commission of racial discrimination, segregation and apartheid against the Palestinian people" (the 'racial discrimination claim'),⁵² and
 - (iii) "by refusing to prosecute, bring to trial and punish persons responsible for, or accused of grave crimes under international law, including war crimes and

⁵¹ Memorial, para. 484(8).

⁵² Memorial, para. 484(9).

apartheid, whether or not such persons are German nationals” (the ‘prosecution claim’).⁵³

49. Neither the note verbale nor the press release relied upon by Nicaragua mention the terms “racial discrimination”, “segregation”, or “apartheid”. Neither document contains any hint that Nicaragua considered Germany to be in breach its obligations of non-recognition and non-assistance, which, as is clear from its Memorial, it seeks to derive from Articles 40 and 41 of the ILC Articles on State Responsibility.⁵⁴ Still less do the note verbale or press release mention anything resembling Nicaragua’s prosecution claim.
50. In light of these considerations, it is clear that Nicaragua, prior to 1 March 2024, had not formulated any claims (let alone claims “of sufficient clarity”⁵⁵) regarding racial discrimination, non-recognition and non-assistance, and prosecution. On the basis of the note verbale and press release, Germany was simply not in a position “to identify that there is, or may be, a dispute with regard to th[ese] subject-matter[s]”.⁵⁶
51. It follows that no dispute existed between Nicaragua and Germany with respect to Nicaragua’s claims set out in paragraph 484(8)-(10) of the Memorial.⁵⁷

3. Nicaragua’s self-determination claim

52. In its submission numbered (7) in its Memorial, Nicaragua requests the Court “to adjudge and declare that Germany ... has breached and continues to breach its

⁵³ Memorial, para. 484(10).

⁵⁴ See Memorial, paras 75–77.

⁵⁵ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 84–85, para. 30.

⁵⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 84–85, para. 30.

⁵⁷ For the avoidance of doubt, even if Nicaragua had articulated its claims regarding racial discrimination, non-recognition and non-assistance, and prosecution in its note verbale and/or press release, for the reasons set out in sub-sections 4–5 below, this would have not been sufficient to establish the existence of a dispute with Germany as to these claims.

conventional and customary law obligations, including the obligation to facilitate and co-operate in bringing about the Palestinian people's right to self-determination".⁵⁸

53. No such claim was set out in the press release or the note verbale. These documents refer to self-determination only in passing, in the specific context of the funding of UNRWA, and only as part of the purported factual background, not in any way as a separate claim. Both in the press release and in the note verbale, Nicaragua claims that "the recent announcement on the suspension by Germany of its funding to the UNRWA ... contributes to ... the apparent objective of ... preventing the exercise of [the Palestinians'] right to self-determination".⁵⁹ The note verbale continues by stating Nicaragua's "opinion that these *facts* reveal that Germany is engaged in a gross and systematic failure to fulfill [sic] its obligations under the 1948 Genocide Convention".⁶⁰ As is clear from this context, at no point prior to its Application did Nicaragua claim that Germany was violating the right to self-determination. Again, Germany was not in a position "to identify that there is, or may be, a dispute with regard to this subject-matter".⁶¹
54. It follows that no dispute exists between Nicaragua and Germany with respect to its self-determination claim set out in paragraph 484(7) of the Memorial.⁶²

4. Nicaragua's Genocide Convention claims

55. In its submissions numbered (1), (2) and (3) in its Memorial, Nicaragua requests the Court "to adjudge and declare that Germany ... has breached and continues to breach its obligations under the Genocide Convention in particular the obligations provided in Article I by ... failing to prevent the ongoing genocide against the Palestinian people; ... by providing aid, including military equipment, to Israel that could be used in the

⁵⁸ Memorial, para. 484.

⁵⁹ Note Verbale (Nicaragua's Application, Annex 1), p. 6.

⁶⁰ Note Verbale (Nicaragua's Application, Annex 1), p. 7 (emphasis added).

⁶¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 84–85, para. 30.

⁶² For the avoidance of doubt, even if Nicaragua had articulated a claim relating to self-determination in its note verbale and/or press release, for the reasons set out in sub-sections 4–5 below, this would have not been sufficient to establish the existence of a dispute with Germany as to this claim.

commission of genocide by Israel; [and] in Article III(e) by being complicit in genocide by providing aid, including military equipment to Israel that has been used in the commission of genocide by Israel”.⁶³

56. Unlike the claims discussed in sub-sections 2 and 3, Nicaragua did raise claims with respect to potential violations of the Genocide Convention in its note verbale addressed to Germany and referred to them in its press release of 1 February 2024. However, by the time it instituted the present proceedings, no dispute with respect to these Genocide Convention claims existed. This follows clearly from the facts outlined above, as assessed in light of the Court’s jurisprudence.
57. As of 1 March 2024, Germany had not “positively opposed” Nicaragua’s genocide claims, and neither did Nicaragua and Germany hold “clearly opposite views concerning the question of the performance or non-performance of [Germany’s obligations under the Genocide Convention]”.⁶⁴
- (i) To recall, as of 1 March 2024, Germany and Nicaragua had never exchanged views on this issue. Nicaragua had not responded to Germany’s message, dated 14 February 2024, acknowledging receipt of Nicaragua’s note verbale. Germany, in turn, had yet to react to the substance of Nicaragua’s claims set out in the note verbale received on 13 February 2024.
 - (ii) Given the extreme complexity and sensitivity of the issues raised in that note, and the fact that parallel notes had been sent to three other States with which Germany understandably wished to consult, Germany’s silence during the period of just 15 days since the receipt of the note verbale on 13 February 2024 cannot reasonably be construed as a rejection of Nicaragua’s claims. This is all the more so as – unlike in other cases before the Court – prior to February 2024, there was no history of prior exchanges between Nicaragua and Germany about Nicaragua’s genocide claims. In the absence of any prior exchange, Germany simply could not have any “indication of [Nicaragua’s] opposition to its views on this matter”.⁶⁵

⁶³ Memorial, para. 484(1)–(3).

⁶⁴ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, I.C.J. Reports 1950, p. 74; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

⁶⁵ Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 507, para. 76.

Accordingly, when confronted, for the first time, with genocide claims relating to a conflict not directly involving Nicaragua or Germany, Germany had of necessity to consider its position with reasonable care before reacting to Nicaragua's claims, especially as Nicaragua's claims were advanced against at least four States and implicated the position of many more. By 1 March 2024, when Nicaragua instituted the present proceedings, Germany's consideration was on-going, and no dispute about questions of genocide had crystallised.

58. Contrary to Nicaragua's position, statements made by a representative of the German Federal Foreign Office at a press conference of 7 February 2024 did not crystallise a dispute about questions of genocide. At the time, to recall, Germany had not received Nicaragua's note verbale. All it had seen was a press release addressed to "the people of Nicaragua and the international community", referencing claims against four different countries. While the representative confirmed that Germany was "aware of a press release", she noted that "nothing else" (other than the press release) "is known".⁶⁶ As this was so, she continued, "we have no reason to comment further".⁶⁷ This shows that Germany did not consider itself ready at that point "to react" to Nicaragua's genocide claim, let alone positively to oppose claims allegedly put in a note verbale that it had yet to receive. As such, the response in the press conference can only correctly be seen as a reservation of Germany's position, rather than as a reaction to Nicaraguan claims which could have reflected Germany's positive opposition to those claims.
59. Nothing else follows from the statement by the representative of the Federal Foreign Office that "we reject the contents of the press release",⁶⁸ on which Nicaragua relies,⁶⁹ but which it takes out of context. This response to a question by a journalist merely affirmed what the representative had said at the outset of the relevant passage of the press conference: asked whether she could confirm that Germany had received Nicaragua's note verbale (as Nicaragua had claimed in its press release), the representative said that Germany "naturally reject[ed] the *relevant content* of the press release".⁷⁰ Read in its proper context, this statement referred to the *receipt* of a note

⁶⁶ Press conference statement (Nicaragua's Application, Annex 4), p. 1.

⁶⁷ Press conference statement (Nicaragua's Application, Annex 4), p. 2.

⁶⁸ Press conference statement (Nicaragua's Application, Annex 4), p. 2.

⁶⁹ Memorial, para. 24.

⁷⁰ Press conference statement (Nicaragua's Application, Annex 4), p. 1.

verbale – this was the “relevant content” of the press release that Germany “naturally rejected”, not having received the note. At no point during the short exchange at the press conference did the representative of the Federal Foreign Office in any way engage with any of the material claims contained in Nicaragua’s press release. The nature of the exchange is brought out clearly by the final question of the journalist, who once more asked for confirmation whether “The verbal note has not yet arrived?” – to which the representative responded that “I have now answered your question twice”, without any further comment.⁷¹ Seeking to construe the abovementioned exchange at the press conference as a substantive rejection of Nicaragua’s claims, Nicaragua ignores this context.

60. In conclusion, while Nicaragua advanced genocide claims in its note verbale and the accompanying press release, no dispute concerning these claims had crystallised by 1 March 2024 when Nicaragua instituted the present proceedings. As a result, the Court has no jurisdiction over the claims set out in paragraph 484(1)-(3) of the Memorial.

5. Nicaragua’s international humanitarian law claims

61. In its submissions numbered (4) and (5) in its Memorial, Nicaragua requests the Court “to adjudge and declare that Germany ... has breached and continues to breach its obligations under Article 1 of the Fourth Geneva Convention and intransgressible principles of humanitarian law by failing to ensure that the requirements of that Convention are complied with ... and ... by providing aid and assistance, including military equipment”.⁷² In its submission numbered (6), it advances a more generic claim, asserting that Germany has “breached and continues to breach its obligations under international humanitarian law ... by providing aid and assistance to Israel”.⁷³
62. For the reasons set out in sub-sections 2-4 above, Nicaragua is unable to establish that, on 1 March 2024, there existed a dispute with respect to any of these international humanitarian law claims.

⁷¹ Press conference statement (Nicaragua’s Application, Annex 4), p. 2.

⁷² Memorial, para. 484(4)–(5).

⁷³ Memorial, para. 484(6).

63. In its note verbale, Nicaragua did raise claims under “the 1949 Geneva Conventions, its [sic] Additional Protocols and customary international law”, and in particular under Common Article 1 of the 1949 Geneva Conventions (CA1).⁷⁴ By contrast, its press release of 1 February 2024 limited itself almost exclusively to claims under the Genocide Convention, mentioning other obligations only vaguely,⁷⁵ and highlighting “the recent announcements by these governments on the suspension of the funds to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)”.⁷⁶
64. Against this background, no dispute about Germany’s compliance with its obligations under international humanitarian law could have arisen by 1 March 2024. More specifically:
- (i) Given the lack of particularity of Nicaragua’s claims, including in the note verbale received on 13 February 2024, no positive opposition can be inferred from Germany’s silence during the brief two-week period preceding Nicaragua’s institution of proceedings.
 - (ii) As regards the press conference of 7 February 2024, on which Nicaragua relies,⁷⁷ it needs to be borne in mind that any statement made at the time could only be in response to Nicaragua’s press release, as Germany at the time had still to receive Nicaragua’s note verbale. Yet, as just noted, the press release made barely any mention of Nicaragua’s international humanitarian law claims. Even if the statements made by the representative of the Federal Foreign Office could somehow be treated as a ‘rejection’ of Nicaragua’s claims, this rejection could not have crystallised a dispute concerning Germany’s compliance with international humanitarian law.

⁷⁴ Note Verbale (Nicaragua’s Application, Annex 1), pp. 7–8.

⁷⁵ Press Release, 1 February (Nicaragua’s Application, Annex 3), in which Nicaragua communicates its “decision to hold [Germany and other states] responsible under international law for gross and systematic violations to the Convention on the Prevention and Punishment of the Crime of Genocide, international humanitarian law, including the law of occupation in the Occupied Palestinian Territories, in particular the Gaza Strip”.

⁷⁶ Press Release, 1 February (Nicaragua’s Application, Annex 3).

⁷⁷ Memorial, para. 24.

65. It follows that no dispute existed between Nicaragua and Germany with respect to Nicaragua’s international humanitarian claims set out in paragraph 484(4)-(6) of the Memorial.

66. The Court has regularly affirmed that “the existence of a dispute is the primary condition for the Court to exercise its judicial function”.⁷⁸ In line with this, each of the three jurisdictional titles invoked in the present proceedings – Article IX of the Genocide Convention, Article 22 CERD, and the two States’ optional clause declarations submitted under Article 36(2) of the Court’s Statute – required Nicaragua to establish the existence of a dispute on the date it filed its Application. As demonstrated in the preceding sub-sections, no such dispute existed with respect to any of Nicaragua’s claims, either because Nicaragua never raised its claims prior to the critical date of 1 March 2024, or because Germany never positively opposed Nicaragua’s claims. As a result, the Court has no jurisdiction to entertain any of these claims.

⁷⁸ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 270–271, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, para. 58.

Chapter 3

A Significant Number of Nicaragua's Claims Are Excluded from the Court's Jurisdiction under Article 22 CERD and the Optional Clause

A. Introduction

67. Even by reference to the alleged dispute put forward by Nicaragua, a significant number of its claims would fall outside the Court's jurisdiction. This is because these claims fail to meet the limitations on the Court's jurisdiction contained in Article 22 CERD and Germany's optional clause declaration.
68. In this respect:
- (i) Nicaragua's claims concerning alleged breaches of international legal rules prohibiting racial discrimination, segregation, and apartheid cannot be brought on the basis of Article 22 CERD as there has been no attempt for any such dispute to be "settled by negotiation or by the procedures expressly provided for in [the] Convention". Jurisdiction over these claims cannot be based on Germany's optional clause declaration either, as Article 22 CERD amounts to "another method of peaceful settlement chosen by all the Parties" in the sense of paragraph (i) of that declaration.
 - (ii) A significant number of Nicaragua's claims do not relate to "situations or facts subsequent" to 30 April 2008. These claims fall outside the temporal scope of Germany's optional clause declaration. As detailed below, this applies to Nicaragua's claims alleging breaches of obligations relating to international humanitarian law; the principle of self-determination; non-recognition and non-assistance in relation to unlawful situations; and racial discrimination, segregation, and apartheid.
69. In Sections B and C below, Germany develops these further jurisdictional objections.

B. Absence of Jurisdiction over Nicaragua’s Claims Relating to Racial Discrimination, Segregation and Apartheid

70. Nicaragua’s claims concerning alleged breaches of international legal rules against racial discrimination, segregation, and apartheid⁷⁹ fall outside the Court’s jurisdiction under Article 22 CERD and Germany’s optional clause declaration.

1. The preconditions for the seisin of the Court under Article 22 CERD are not met

71. Nicaragua asserts that “the jurisdiction of the Court is also based on Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination”.⁸⁰ This Article provides as follows:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

72. As is plain, Article 22 CERD conditions the right of State parties to refer a “dispute ... with respect to the interpretation or application of [CERD]” to the Court. The Court has clarified that prior to seising the Court, an applicant has to show that it has sought to reach an agreed settlement of its dispute with another State party *either* through the procedure before the CERD Committee governed by Articles 11 to 13 of the Convention *or* through negotiations.⁸¹ The Court has emphasised the importance of this prior attempt at an agreed settlement, noting that

“in their ordinary meaning, the terms of Article 22 of CERD, namely ‘[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly

⁷⁹ Memorial, para. 484(9).

⁸⁰ Memorial, para. 28.

⁸¹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 600, para. 113.

provided for in this Convention’, *establish preconditions to be fulfilled before the seisin of the Court*”.⁸²

73. In the present instance, Nicaragua has failed to meet these preconditions. It has not initiated the procedure before the CERD Committee. Equally clearly, Nicaragua has made no attempt to negotiate a settlement to its alleged dispute with Germany.
74. The Court has clarified the meaning of the precondition “which is not settled by negotiation”, contained in Article 22 CERD, in a number of decisions. Four points are significant.
- (i) *First*, the precondition of negotiation is separate from the requirement to demonstrate the existence of a dispute with respect to the interpretation or application of this Convention. In the words of the Court, “[n]egotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims”. And further, “the concept of ‘negotiations’ differs from the concept of ‘dispute’, and requires – at the very least – a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”⁸³
 - (ii) *Second*, the Court has further clarified that such genuine attempt must have been made *after* the emergence of a dispute.⁸⁴ And further: “manifestly, in the absence

⁸² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 128, para. 141 (emphasis added); see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 598, para. 106.

⁸³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 602, para. 116.

⁸⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 135, para. 168: “It stands to reason that it was only possible for the Parties to be negotiating the matters in dispute, namely, the Russian Federation’s compliance with its obligations relating to the elimination of racial discrimination, between 9 August 2008 and the date of the filing of the Application, on 12 August 2008, i.e., the period during which the Court found that a dispute capable of falling under CERD had arisen between the Parties.”

of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met.”⁸⁵

- (iii) *Third*, in ascertaining “whether negotiations, as distinct from mere protests or disputations, have taken place”, the Court has clarified that “negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question”.⁸⁶
- (iv) *Fourth*, in instances “where negotiations are attempted or have commenced”, but lead to no settlement, “the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked”.⁸⁷ In assessing whether this is the case, the Court has been careful to focus only on evidence “pertain[ing] to CERD-related matters”⁸⁸ (as opposed to other questions). In evaluating this evidence, the Court has e.g. considered the duration of negotiations, the frequency of meetings at which the matters in dispute were discussed, and the persistence of the parties’ views on the matter.⁸⁹ Moreover, it has taken into account whether in diplomatic notes, a party had “set

⁸⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 159.

⁸⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, paras 160–161.

⁸⁷ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 602, para. 117; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 128, para. 159 (with references to earlier case-law).

⁸⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 139, para. 180.

⁸⁹ To illustrate, the Court has e.g. considered the precondition of negotiation to have been met where “negotiations between the Parties lasted for approximately two years and included both diplomatic correspondence and face-to-face meetings”: see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 603, para. 120.

out its views concerning the alleged violations of the Convention” and whether the other party had “had a full opportunity to reply to ... allegations”.⁹⁰

75. Assessing Nicaragua's conduct against these yardsticks, it is plain that the precondition of negotiations has not been met in the present instance. As indicated above, Nicaragua has been unable to establish the existence of a dispute with regard to any of its claims, including those relating to racial discrimination, segregation, and apartheid.⁹¹ Still less is Nicaragua able to demonstrate that, prior to the seisin of the Court, it had made a genuine attempt to settle this alleged dispute through negotiations.
76. In fact, tellingly, Nicaragua does not even claim to have sought to settle its alleged dispute through negotiations with Germany. This is unsurprising because it has made no such effort at all. Specifically,
- (i) *At no point* did Nicaragua communicate its concerns pertaining to Germany's alleged non-compliance with CERD. These feature neither in its note verbale of 2 February 2024 nor in its press release of 1 February 2024.
 - (ii) *At no point* did Nicaragua engage Germany in any discussions relating to questions of racial discrimination following the receipt of the note verbale on 13 February 2024.
 - (iii) *At no point* was Germany given any opportunity to reply to any allegations concerning its alleged failure to comply with obligations regarding racial discrimination, segregation or apartheid.
 - (iv) *At no point* did negotiations about racial discrimination begin before Nicaragua's seisin of the Court on 1 March 2024.
77. These findings yield an inescapable conclusion: adopting the words of Court, “manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met”.⁹² Having failed to meet this precondition by 1

⁹⁰ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 603, para. 119.

⁹¹ *Supra*, paras 48–51.

⁹² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 159.

March 2024, Nicaragua cannot bring claims on the basis of Article 22 CERD. The Court lacks jurisdiction to entertain them.

2. Nicaragua’s racial discrimination claims cannot be brought on the basis of Germany’s optional clause declaration

78. Nicaragua’s claims relating to racial discrimination, segregation, and apartheid, to the extent they could have been covered by CERD, cannot be brought on the basis of Germany’s optional clause declaration as an alternative source of jurisdiction.
79. Germany recognises that, under the Court's jurisprudence, the scope of jurisdiction under matching optional clause declarations is to be assessed separately from that under compromissory clauses. As a result, it is not impossible that, in a given instance, “the scope of [the Court's] jurisdiction could be wider under the optional clause than under [a compromissory clause]”.⁹³ However, in the present instance, Germany’s optional clause declaration precludes such a possibility. This follows from paragraph (i) of the declaration, which is specifically designed to exclude litigation under the optional clause of disputes that could potentially be brought under provisions such as Article 22 CERD.⁹⁴
80. Under the terms of its paragraph (i), Germany’s declaration expressly excludes litigation on the basis of the optional clause over

“any dispute which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement or which is subject to another method of peaceful settlement chosen by all the Parties”.

81. This ‘special agreement reservation’ applies to Nicaragua’s alleged dispute with Germany over compliance with questions of racial discrimination, segregation and apartheid under CERD. Three points can be made:

⁹³ See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2007, p. 873, para. 137.

⁹⁴ The subsequent analysis focuses on the scope of para. (i) of Germany's optional clause declaration. As demonstrated below (paras 108–111), Nicaragua cannot raise racial discrimination claims on the basis of the optional clause for the further reason that these claims fall outside the temporal jurisdiction of the Court’s jurisdiction.

- (i) If the alleged dispute had indeed existed when Nicaragua instituted the present proceedings, it would have been “subject to another method of dispute settlement”, namely dispute settlement under Article 22 CERD. This is evident from Nicaragua’s attempts to rely on this clause.
 - (ii) For disputes related to the interpretation and application of rules relating to racial discrimination under CERD, Nicaragua and Germany “chose” to accept dispute settlement under Article 22 CERD when they became bound by CERD in 1969 and 1978 respectively.⁹⁵
 - (iii) Dispute settlement under the dedicated scheme of Article 22 CERD is “another method” in the sense of Germany’s reservation contained in paragraph (i). This is so because Article 22 CERD, as the Court has recognised, “establish[es] preconditions to be fulfilled before the seisin of the Court”,⁹⁶ which do not generally apply to claims based on the optional clause. The nuanced scheme of dispute settlement imposed by Article 22 CERD, making recourse to the Court dependent on the fulfillment of specific “preconditions”, reflects the conscious choice of all parties to CERD. As a result of this conscious choice, the “method” of peaceful dispute settlement offered under Article 22 CERD is materially different from peaceful dispute settlement under the optional clause.
82. In light of these considerations, Nicaragua’s alleged dispute with Germany relating to racial discrimination, segregation, and apartheid is precisely one to which Germany’s special agreement reservation was meant to apply. Nicaragua is precluded from relying on Germany’s optional clause to raise before the Court claims that, subject to the preconditions set out in the provision, it could have brought on the basis of Article 22 CERD.

⁹⁵ See details in *UNTS*, vol. 672, p. 384 (1969); and *UNTS*, vol. 1077, p. 305 (1978).

⁹⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 128, para. 141.

C. The Temporal Limitation of Germany's Optional Clause Declaration

83. A significant number of Nicaragua's claims fall to be dismissed for a further reason. They fall outside the scope of the Court's jurisdiction under the two parties' optional clause declarations.⁹⁷
84. In its Memorial, Nicaragua does not engage with the wording of Germany's optional clause declaration, merely asserting that "[t]he reservations set out in Germany's Article 36(2) declaration are not relevant to the present dispute".⁹⁸ This bold assertion does not withstand scrutiny. Rather, the temporal limitation contained in Germany's optional clause declaration excludes a significant number of Nicaragua's claims.
85. The first paragraph of Germany's declaration is critical. It provides as follows:
- "The Government of the Federal Republic of Germany declares that it recognises as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to the Secretary-General of the United Nations withdrawing the declaration and with effect as from the moment of such notification, *over all disputes arising after the present declaration, with regard to situations or facts subsequent to this date*".
86. As is clear from the highlighted passage at the end of the quotation, Germany has defined the temporal scope of the Court's jurisdiction under Article 36(2) of the Statute, "accept[ing] compulsory jurisdiction within specified limits".⁹⁹ It has done so by including a temporal limitation in the form of a "double-exclusion clause"¹⁰⁰ that excludes jurisdiction over (i) disputes arising before the date on which the declaration

⁹⁷ See Memorial, para. 26: "In the present case, the Court's jurisdiction is based on the declarations of acceptance of the Court's jurisdiction made by Germany and Nicaragua under Article 36 (2) of the Statute".

⁹⁸ See Memorial, para. 28.

⁹⁹ See PCIJ, *Phosphates in Morocco, (Italy v. France)*, Preliminary Objections, PCIJ, Series A/B, No 74, p. 24.

¹⁰⁰ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Judgment of 12 November 2024, separate opinion of Judge Iwasawa, para. 3 (at <https://www.icj-cij.org/sites/default/files/case-related/181/181-20241112-jud-01-03-en.pdf>).

was submitted (30 April 2008), as well as (ii) disputes arising after 30 April 2008 that relate to situations or facts before that date.

87. As demonstrated in the following, a significant number of Nicaragua's claims fall outside the scope of this temporal limitation as they relate to situations or facts that *predate* 30 April 2008.

1. The proper construction of Germany's temporal limitation clause

88. The Court and its predecessor have had ample opportunity to clarify the meaning of clauses limiting temporal jurisdiction to disputes relating to, or with regard to, "situations or facts subsequent to [a critical date]". The jurisprudence clarifies that, in the application of such a clause, it is necessary to identify the facts or situations that constitute the "real cause" or "source" of a dispute, and guidance has been given on how the "real cause" or "source" of a dispute is to be identified.
89. Beginning with the *Phosphates in Morocco* case, both the PCIJ and the ICJ have made clear that clauses of this type reflect a State's intention "only ... to submit to [the Court's] jurisdiction disputes *having actually arisen* from situations or facts subsequent to its acceptance".¹⁰¹ Both Courts have consistently taken the position that temporal limitation clauses like the one at hand also exclude disputes that relate to "subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real cause of the dispute".¹⁰² It is thus necessary to identify the facts or situations constituting the "real cause" or "source" of a dispute and to assess whether these facts or situations have occurred after or before the critical date set by the optional clause declaration.¹⁰³

¹⁰¹ See PCIJ, *Phosphates in Morocco, (Italy v. France), Preliminary Objections*, PCIJ, Series A/B, No 74, p. 24 (emphasis added).

¹⁰² See PCIJ, *Phosphates in Morocco, (Italy v. France), Preliminary Objections*, PCIJ, Series A/B, No 74, p. 24.

¹⁰³ The Court has made clear that this exercise is separate from the question at what point the dispute between the parties arose. To illustrate, in the *Certain Property* case, the Court "observe[d] that it is not contested that the present dispute was triggered by the decisions of the German courts ... [postdating the critical date for the purposes of jurisdiction]. This conclusion does not, however, dispose of the question the Court is called upon to decide, for under Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, the critical issue is not the date when the dispute arose, but the date of the facts or

90. As the Court explained in the *Right of Passage* and *Certain Property* cases:

“[t]he facts or situations to which regard must be had ... are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only ‘those which must be considered as being the source of the dispute’, those which are its ‘real cause’”.¹⁰⁴

91. As to identification of the “real cause” or “source” of a dispute, drawing on “the manner in which [an applicant’s] claims have been formulated” and the “statement of facts upon which the claim is based”,¹⁰⁵ the Court has been guided by three considerations in particular:

- (i) *First*, where an applicant has instituted proceedings against specific measures adopted by the respondent, it is necessary to assess whether these specific measures are merely the consequence of a legal position adopted previously. Hence Liechtenstein’s dispute with Germany may have been prompted by German court decisions during the 1990s, in which German courts refused to seize a previously Liechtenstein-owned painting confiscated after World War II. However, this dispute had its “real cause” or “source” in disagreements about the confiscation of German external assets after World War II and the treaty regime adopted to address such confiscation.¹⁰⁶ “[D]ecisions of the German courts in the *Pieter van Laer Painting* case”, in the words of the Court, “cannot be separated

situations in relation to which the dispute arose”: see *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 25, para. 48.

For the avoidance of doubt, while the *Certain Property* case concerned a treaty-based clause referring to subsequent “situations or facts”, i.e. Article 27(a) of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, the Court interpreted this clause in line with its prior jurisprudence on temporal limitations in optional clause declarations: see *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 24, para. 43, and further *Jurisdictional Immunities of the State (Germany v. Italy)*, *Counter-Claim, Order of 6 July 2010*, I.C.J. Reports 2010, pp. 318–321, paras 23–31).

¹⁰⁴ *Right of Passage over Indian Territory, Merits, Judgment*, I.C.J. Reports 1960, p. 35; later affirmed in *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 25, para. 44.

¹⁰⁵ See *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures, Order of 2 June 1999*, I.C.J. Reports 1999, p. 134, para. 27 (internal quotation marks omitted).

¹⁰⁶ *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, pp. 25–27, paras 47–52.

from the Settlement Convention and the Benes Decrees”,¹⁰⁷ just as, in the *Phosphates* litigation before the Permanent Court, French measures giving effect to the “monopolization of the Moroccan phosphates” could not be separated from the legislation establishing the monopoly regime.¹⁰⁸

- (ii) *Second*, where an applicant institutes proceedings against particular acts that form part of a series of measures, it is necessary to assess whether the particular acts can be separated from those previously adopted. Hence in the *Legality of Use of Force* cases, the Court, in assessing the Allied bombing of targets in Serbia, refused to treat “each individual air attack” as a “separate ... dispute”.¹⁰⁹ While the applicant had focused its claims on some of these “individual air attacks”, these particular acts implicated the same legal issues and could not give rise to a different legal assessment. As a result, claims directed against individual attacks did not give rise to “new disputes, distinct from the initial one, ... in respect of subsequent situations or facts”.¹¹⁰
- (iii) *Third*, in determining whether a particular measure had its “real cause” or “source” in prior facts or situations, the Court has inquired whether the respondent had taken measures that significantly departed from a previously held position or whether it had distanced itself from a prior common understanding. Hence in the *Right of Passage* case, India’s decision to “preven[t] Portugal from exercising [a] right of passage” between its Indian possessions, adopted in 1954 and “contrary to the practice hitherto followed”, gave rise to a new dispute that did not have its real cause or source in the earlier legal arrangements on which Portugal relied to establish its right of passage.¹¹¹ Conversely, as the Court made clear in the *Certain Property* and *Jurisdictional Immunities* cases, the mere deepening of a long-standing disagreement, caused by new measures adopted by the respondent, does not affect the “real cause” or “source” of a dispute, notably where the “legal

¹⁰⁷ *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 26, para. 51.

¹⁰⁸ PCIJ, *Phosphates in Morocco, (Italy v. France)*, *Preliminary Objections*, PCIJ, Series A/B, No 74, p. 24.

¹⁰⁹ See e.g. *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures, Order of 2 June 1999*, I.C.J. Reports 1999, p. 134, para. 29.

¹¹⁰ *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures, Order of 2 June 1999*, I.C.J. Reports 1999, pp. 134–135, para. 29.

¹¹¹ *Right of Passage over Indian Territory, Merits, Judgment*, I.C.J. Reports 1960, pp. 27 and 35.

assessment” requested of the Court, remains “inextricably linked to an appreciation” of earlier measures.¹¹²

2. Nicaragua’s claims having their real cause or source in facts or situations prior to 30 April 2008

92. Assessed in light of the Court’s jurisprudence, four of Nicaragua’s claims fall outside the temporal scope of Germany’s optional clause declaration, as they do not have their real cause or source in “facts or situations subsequent to [30 April 2008]”. These are:

- (i) Nicaragua’s claim that Germany “has breached and continues to breach its conventional and customary law obligations, including the obligation to facilitate and cooperate in bringing about the Palestinian people’s right to self-determination, by providing aid and particularly military equipment to Israel that is used to deny this right of self-determination and moreover helps to maintain and impose an apartheid regime” (the ‘self-determination claim’);¹¹³
- (ii) Nicaragua’s claim that Germany “has breached and continues to breach international law by failing in its obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and not render aid or assistance in maintaining the situation created by the continued illegal presence of Israel in the Occupied Palestinian Territory” (the ‘non-recognition and non-assistance claim’);¹¹⁴
- (iii) Nicaragua’s claim that Germany “has breached and continues to breach international law by providing unlawful assistance to Israel’s commission of racial discrimination, segregation and apartheid against the Palestinian people” (the ‘racial discrimination claim’),¹¹⁵ and

¹¹² See *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010*, I.C.J. Reports 2010, pp. 320–321, paras 28–29; *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 26, paras 51–52.

¹¹³ See Memorial, para. 484(7).

¹¹⁴ Memorial, para. 484(8).

¹¹⁵ Memorial, para. 484(9).

(iv) Nicaragua's claim that Germany has violated and continues to violate conventional and customary rules of international humanitarian law (including Article 1 of the Fourth Geneva Convention and intransgressible principles of humanitarian law) by failing to ensure that the requirements of the Fourth Convention are complied with and by providing aid and assistance to Israel (the 'international humanitarian law claim').¹¹⁶

93. In light of Nicaragua's presentation of its legal arguments in the Memorial, and the facts relied on to substantiate them, these claims do not have their real cause or source in facts or situations subsequent to 30 April 2008. While Germany's more recent conduct may have prompted Nicaragua to submit its claims to the Court, this more recent conduct cannot be separated from conduct predating 30 April 2008, and does not give rise to a new, separate dispute. It is inextricably linked to prior conduct by which, if Nicaragua is to be believed, Germany violated its international obligations relating to self-determination; non-recognition and non-assistance under Article 41 of the Articles on State Responsibility; racial discrimination, segregation, and apartheid; and international humanitarian law. Thus, even if the existence of the dispute as alleged by Nicaragua were to be taken at face value, these claims are excluded from the Court's jurisdiction, for the reasons set out in the subsequent sub-sections.

(a) Nicaragua's self-determination claim

94. In its submissions set out in paragraph 484(7) of its Memorial, Nicaragua accuses Germany of "ha[ving] breached and continu[ing] to breach" its duty "to facilitate and cooperate in bringing about the Palestinian people's right to self-determination". This submission builds on arguments developed in Chapter 4, section II of the Memorial (entitled "Germany's Violations in Respect of the Principle of Self-Determination of Peoples"), which in turn draw on Nicaragua's account of what it considers the relevant "factual background" to its claims.

95. As appears clearly from the relevant sections of Nicaragua's Memorial, any alleged dispute between Nicaragua and Germany about Germany's compliance with the principle of self-determination does not have its real cause or source in facts or situations

¹¹⁶ Memorial, para. 484(4)-(6).

subsequent to 30 April 2008. Rather, Nicaragua's self-determination claim is grounded in disagreements about the scope of Germany's obligations to respect the right of the Palestinian people to self-determination and to promote its realisation. This disagreement has its real cause or source in facts and situations predating 30 April 2008. In fact, Nicaragua repeatedly accuses Germany of having violated its obligations through conduct prior to that date. To the extent that it singles out Germany's more recent conduct, this conduct cannot be separated from Germany's prior actions or omissions.

96. Nicaragua considers the right to self-determination of the Palestinian people to have long been violated. Nicaragua describes this situation, variously, as "the continuous denial" of the right to self-determination and as "an illegal situation that spans decades",¹¹⁷ and asserts that throughout these "decades" third States (such as Germany) had to take positive action.¹¹⁸ Its case is that Germany has failed to take such action since well before 30 April 2008.

97. Nicaragua's overall position is summed up in the following statement:

"Germany has conducted a *long-term policy* of cooperating with and providing a wide range of assistance to Israel, up to the present day, with respect to acts undertaken in or in relation to the Occupied Palestinian Territory. *By reason of this conduct*, Germany has failed to respect the right of the Palestinian people to self-determination and to promote the realization thereof, and to cooperate to put an end to the ongoing denial of that right and to refrain from action that may entrench such denial. Germany's international responsibility is *thus* engaged."¹¹⁹

98. As is expressly alleged, the "dispute" relates to Germany's "long-term policy". It is through this "long-term policy", that Germany allegedly has failed to respect, and promote the realisation of, the right of self-determination of the Palestinian people. And it is through this conduct ("thus") that, according to Nicaragua, Germany's international responsibility is engaged. Nothing in Nicaragua's claims suggests that its alleged

¹¹⁷ Memorial, at paras 336 (heading), 344, 347.

¹¹⁸ See e.g. Memorial, paras 344, 339.

¹¹⁹ Memorial, para. 356 (emphasis added).

dispute with Germany has its real cause or source in facts or situations subsequent to 30 April 2008.

99. This reading is confirmed by an analysis of the specific forms of conduct by which, in Nicaragua's view, Germany has violated its obligations relating to self-determination. Nicaragua claims that "Germany has engaged in a variety of conduct that runs contrary to its obligations under international law".¹²⁰ The relevant actions and omissions span decades, without any distinction as to their date.
100. To illustrate by reference to central planks of Nicaragua's argument:
- (i) Military cooperation between Germany and Israel: Germany's military cooperation with Israel – described as "the backbone of Germany-Israel relations"¹²¹ – is key to Nicaragua's self-determination claim. This cooperation, which Nicaragua considers to be "manifestly at odds with Germany's international obligations", is said to include the "export of arms and other military and related equipment to Israel" and the "financing of Israel's military, training, exchange of information, and close collaboration between German and Israeli armament companies, which can only serve to maintain and strengthen Israel's military capacities in the context of the unlawful presence"¹²² – a presence, which, on Nicaragua's case, has been unlawful since 1967.¹²³ Nicaragua's self-determination claim accordingly is not focused on the period since 30 April 2008, but on Germany's "long-term policy". Hence Nicaragua relies on arms transfers in the period of 1957–1964; it cites data on the supply of German conventional weapons to Israel in the period 1999–2024; it offers a breakdown of figures for export licenses granted in the period 2003–2023, and it asserts that German supplies to Israel have been provided "for decades".¹²⁴ Nicaragua also accuses Germany of having modified the legal rules governing arms controls to Israel in the period prior to 2008, asserting that "[t]he Federal Security Council

¹²⁰ Memorial, para. 355.

¹²¹ Memorial, para. 357.

¹²² Memorial, para. 357.

¹²³ See Memorial, para. 91 ("In the June 1967 war, Israel unlawfully seized the Occupied Palestinian Territory thereby acquiring control over the whole of historic Palestine."); similarly at para. 96 ("an ongoing use of force in the form of its 58-year military occupation ... an ongoing aggression in violation of the United Nations Charter in the occupied territory").

¹²⁴ Memorial, paras 140–141, 143, 153, 160.

(Bundessicherheitsrat) modified the political guidelines for arms exports in 1982”.¹²⁵ All of this is alleged to support Nicaragua’s position that Germany has “enabled the military oppression of the Palestinian people in the Occupied Palestinian Territory”.¹²⁶

- (ii) Military training and information exchange: it is part of Nicaragua’s case that Germany violates its obligations in relation to self-determination by engaging in the training of Israeli soldiers and in regular exchanges of information through co-operation at the level of the two armies’ General Staff.¹²⁷ To sustain these claims, Nicaragua refers to the training of soldiers since 1984 and points to an “Agreement on mutual training between Israel and the Federal Republic of Germany”.¹²⁸ As is clear from the documents that Nicaragua relies upon, the Agreement was concluded on 17 March 2008 and the Army General Staff meetings began in 1997.¹²⁹
- (iii) Delivery of submarines: Nicaragua singles out Germany’s delivery of submarines to Israel, through which “Germany directly undermines the Palestinian right to self-determination”.¹³⁰ In support of its claim and relying on public news reports, Nicaragua states that Germany approved the sale to Israel of “five Dolphin-class submarines from [a] ... German manufacturer”.¹³¹ Nicaragua does not clarify that according to publicly available news reports, the first three Dolphin submarines mentioned were ordered and approved between 1990 and 1994, and delivered in 1999 and 2000, whereas a contract for further deliveries including the purchase of two additional submarines mentioned was agreed in 2005–2006.¹³²

¹²⁵ Memorial, para. 153.

¹²⁶ Memorial, para. 357 (footnote 690).

¹²⁷ Memorial, para. 357.

¹²⁸ Memorial, paras 150–151.

¹²⁹ Memorial, paras 150–151; and cf. the information contained in *BT-Drucksache* 18/2787 (2014), pp. 2 and 4 (Nicaragua’s Memorial, Annex 6).

¹³⁰ Memorial, para. 360.

¹³¹ Memorial, para. 142.

¹³² See the information on the website Naval Technology ‘SSK Dolphin Class Submarine’, <https://www.naval-technology.com/projects/dolphin/?cf-view> (assessed 19 September 2025).

- (iv) Alleged “shielding” of Israel in international fora: Nicaragua relies on Germany’s “opposition” to international efforts at condemning Israel.¹³³ Nicaragua accuses Germany of “shield[ing] Israel from any criticism, irrespective of the great number of reports and calls from international organisations, human rights bodies and Special Rapporteurs, or non-governmental organisations”, and treats the more recent scrutiny of Israel’s “military assault on the Gaza Strip” as but one example.¹³⁴ This in turn is part of Nicaragua’s broader claim that “Israel’s reliance on the diplomatic and military support of a selection of powerful third States has been a marked feature of its occupation of the Occupied Palestinian Territory since 1967”.¹³⁵
- (v) Germany’s decision to vote against, or to abstain on, General Assembly resolutions that affirmed the Palestinian people’s right to self-determination comes in for particular criticism.¹³⁶ Yet while Nicaragua refers to two resolutions adopted in 2012 and 2024, respectively, it chooses not to mention that Germany had equally abstained on, or voted against, resolutions adopted prior to 30 April 2008, including in the 1980s and 1990s.¹³⁷

101. Thus, the specific allegations on which Nicaragua’s self-determination claim rests do not have their real cause or source in facts or situations subsequent to 30 April 2008. As it explicitly states, Nicaragua considers Germany’s “long-term policy” of co-operation with Israel to violate the principle of self-determination. While recent events may have prompted Nicaragua to institute the present proceedings, Nicaragua does not suggest that Germany’s recent actions could be separated from its prior conduct, and there is no credible basis on which they *could* be separated. Nicaragua’s self-determination claim thus fails to respect the temporal limitation of Germany’s optional clause declaration: it is not a claim whose real cause or source relates to facts or situations subsequent to 30 April 2008. The Court has no jurisdiction to entertain it.

¹³³ Memorial, paras 357, 363–364.

¹³⁴ Memorial, para. 154.

¹³⁵ Memorial, para. 94.

¹³⁶ Memorial, para. 363.

¹³⁷ To illustrate, Germany voted against, or abstained on, resolutions that are explicitly cited in GA Res. 67/19 (2012): GA Res. 3210 (XXIX) (1974), GA Res. 3236 (XXIX) (1974), GA Res. 3237 (XXIX) (1974), GA Res. 43/177 (1988).

(b) Nicaragua’s non-recognition and non-assistance claims under Article 41 of the ILC Articles on State Responsibility

102. Nicaragua accuses Germany of “ha[ving] breached and continu[ing] to breach international law by failing in its obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and not render aid or assistance in maintaining the situation created by the continued illegal presence of Israel in the Occupied Palestinian Territory”.¹³⁸ Its central argument is that Germany has disregarded its Article 41 duties of non-recognition and non-assistance in relation to the entirety of the “ongoing violations of Palestinian rights in the Occupied Palestinian Territory”.¹³⁹
103. From the manner it presents its claim and the facts relied upon to support them, it is clear that Nicaragua’s alleged dispute with Germany does not have its real cause or source in facts or situations subsequent to 30 April 2008. Further, as with its self-determination claim, Nicaragua considers Germany to have breached its obligations since well before that date and relies heavily on conduct predating 30 April 2008.
104. According to Nicaragua, Israel in “June 1967..., Israel unlawfully seized the Occupied Palestinian Territory”;¹⁴⁰ its “ongoing aggression ... in violation of Article 2(4) of the Charter” since then is said to “trigge[r] third State obligations – including those of Germany – of non-recognition and refraining from aiding or assisting in the maintenance of its illegal presence in the Occupied Palestinian Territory”.¹⁴¹ As regards racial discrimination, Nicaragua asserts that “[s]ince its establishment in 1948, Israel has subjected the Palestinian people to a regime of settler colonial displacement, dispossession, and racial discrimination”: this is the basis for Nicaragua to contend that “providing support to Israel despite the risk that such support will be used in the maintenance of racial discrimination and apartheid constitutes a violation of the obligations set out in Article 41 of the ILC Articles on State Responsibility”.¹⁴² As regards self-determination, as indicated above, Nicaragua asserts that the rights of the

¹³⁸ Memorial, para. 484(8).

¹³⁹ Memorial, para. 77.

¹⁴⁰ Memorial, para. 91.

¹⁴¹ Memorial, para. 106.

¹⁴² Memorial, paras 373, 404, as well as at para. 390, where Nicaragua approvingly cites South Africa’s description of Israel maintaining a “75-year apartheid régime”.

Palestinian people have been violated for “decades”; this “systematic and continuous denial” is said to entail obligations of third States under “the customary rule reflected in Article 41 of the ILC Articles on State Responsibility”, and which by implication must be in place for “decades”.¹⁴³

105. Proceeding from this legal position, Nicaragua accuses Germany of having breached its obligations under Article 41 continuously, and since well before 30 April 2008. It specifically relies on the following:

- (i) The “very close and special relationship between Germany and Israel in all areas of life, diplomatic, economic, scientific, cultural, and military”: Nicaragua states expressly that the co-operation undertaken as part of “this” relationship (together with arms deliveries discussed below, but without any specification) “goes beyond an ‘undeniable influence’, to constitute active conduct of aiding and assisting Israel for decades in its illegal conduct”.¹⁴⁴ In support of its claims, Nicaragua refers to the sections of its Memorial in which it had traced the development of German-Israeli relations since the late 1950s.¹⁴⁵
- (ii) Specifically, Germany is said to have “undermin[ed] the right to self-determination of the Palestinian people” through aid and assistance provided to Israel in the form of “the delivery of arms and military equipment and through not preventing German companies from supporting and profiting from unlawful occupation, racial discrimination, segregation, and apartheid, and through its cooperation with Israel in other fields”.¹⁴⁶ As has been noted, Nicaragua’s claims regarding Germany military supplies to Israel rely on data going back to 1999, and reference specific weaponry (such as submarines) approved for delivery in the 1990s.¹⁴⁷
- (iii) The same applies to Nicaragua’s claim that “Germany’s close military cooperation with Israel ... violates its obligation not to render any aid or assistance that may contribute to maintaining the situation created by Israel’s illegal presence in the

¹⁴³ Memorial, para. 347.

¹⁴⁴ Memorial, paras 461–462.

¹⁴⁵ Memorial, para. 461.

¹⁴⁶ Memorial, para. 461.

¹⁴⁷ See *supra*, para. 100.

Occupied Palestinian Territory”: as Nicaragua makes clear, it considers Israel’s presence to have been illegal since 1967; by implication Germany stands accused of having violated its obligations for the entire duration of what Nicaragua qualifies as Israel’s “on-going use of force in the form of its 58-year military occupation” and “on-going aggression ... in violation of Article 2(4) of the Charter”.¹⁴⁸

106. As with its self-determination claim, Nicaragua makes no attempt to identify any facts or situations subsequent to 30 April 2008 that could constitute the real cause of its disagreement with Germany about Germany’s compliance with obligations flowing from Article 41 of the ILC Articles on State Responsibility. Considering the way it has put its claims, there is no basis on which Germany’s recent actions could be separated from its alleged prior conduct. To the extent that Nicaragua identifies breaches that have occurred after 30 April 2008, its claims are inextricably linked to disagreements about Germany’s prior compliance with obligations flowing from Article 41 of the ILC Articles on State Responsibility.
107. The upshot of this is that Nicaragua’s non-recognition and non-assistance claims do not have their real cause or source in any facts or situations subsequent to the critical date. They fall outside the temporal jurisdiction of the Court, as defined by Germany’s optional clause declaration.

(c) Nicaragua’s racial discrimination claim

108. In its submissions set out in paragraph 484(9) of its Memorial, Nicaragua accuses Germany of “ha[ving] breached and continu[ing] to breach international law by providing unlawful assistance to Israel’s commission of racial discrimination, segregation and apartheid against the Palestinian people”.¹⁴⁹ Its central argument is that Germany has failed to comply with its duty “to condemn Israel’s racial discrimination, segregation and apartheid against the Palestinian people ..., and to refrain from

¹⁴⁸ Memorial, paras 96 and 106.

¹⁴⁹ Memorial, para. 484(9).

supporting, sustaining or encouraging Israel’s regime of discrimination, segregation and apartheid”.¹⁵⁰

109. It is Nicaragua’s case that Germany has been required for decades to take action against Israel’s policies vis-à-vis the Palestinian people, which it variously describes as a regime of “racial discrimination ... [s]ince ... 1948”,¹⁵¹ or as a period of “twenty years” of “racial segregation and apartheid”.¹⁵² Based on this understanding, Nicaragua contends, without temporal limitation, that “Germany has violated the obligation to condemn Israel’s racial discrimination, segregation and apartheid in breach of Article 3 of ICERD”,¹⁵³ and has engaged in “conduct which bears the risk of contributing towards the establishment, maintenance, or further entrenchment of racial discrimination, segregation, and apartheid”¹⁵⁴ – a risk that, in Nicaragua’s assessment, has existed for decades, if not since 1948.
110. To sustain its racial discrimination claim, Nicaragua relies on the following:
- (i) As regards the duty not to support, sustain, and encourage racial discrimination, segregation, and apartheid, Nicaragua refers to Germany’s “support, including military support, to Israel, despite the risk that such support will be used to impose and continue to entrench racial segregation and apartheid, including through Israel’s unlawful presence in the Occupied Palestinian Territory”.¹⁵⁵ To substantiate its claim, Nicaragua refers back to those sections of its Memorial in which it had traced the evolution of Germany’s close relationship with Israel since the late 1950s and in which (as noted above) it had *inter alia* provided data detailing Germany’s licensing practice of the period of 2003–2023 as well as the volume of exports for 1999–2024.¹⁵⁶ (Nicaragua singles out the delivery of “naval vessels”, and refers back to its criticism of “Dolphin” submarine deliveries. As indicated above, these deliveries were based on contracts predating 30 April

¹⁵⁰ Memorial, para. 398.

¹⁵¹ Memorial, para. 373.

¹⁵² Memorial, para. 397.

¹⁵³ Memorial, para. 402.

¹⁵⁴ Memorial, para. 410.

¹⁵⁵ Memorial, para. 403.

¹⁵⁶ Memorial, para. 403 and footnote 738 (referring back to paras 138–308).

2008.¹⁵⁷) In Nicaragua’s view, “[t]his support” – in its entirety, without any differentiation – “is antithetical to the obligation to condemn racial segregation and apartheid and constitutes a direct violation of Article 3 of ICERD”.¹⁵⁸

- (ii) As regards the duty to condemn racial discrimination, segregation, and apartheid, Nicaragua’s case is that Germany had breached its obligations through “the delivery of arms and military equipment and through not preventing German companies from supporting and profiting from unlawful occupation, racial discrimination, segregation, and apartheid, and through its cooperation with Israel in other fields”.¹⁵⁹ According to Nicaragua, “this conduct” – again: in its entirety, without any differentiation – “contributes directly, both materially and politically, to the maintenance of racial discrimination, segregation, and apartheid over the Palestinian people, in violation of Germany’s international obligations”.¹⁶⁰

111. As these statements demonstrate, Nicaragua’s disagreement with Germany about Germany’s compliance with international obligations relating to racial discrimination, segregation, and apartheid, does not have its real cause or source in facts or situations subsequent to 30 April 2008. Nicaragua makes no attempt to identify any such subsequent fact or situation. Its sweeping claims and accusations fall outside the temporal scope of the Court’s jurisdiction under the optional clause.

(d) Nicaragua’s international humanitarian law claims

112. In its submissions set out in paragraph 484(4)-(6) of its Memorial, Nicaragua accuses Germany of “ha[ving] breached and continu[ing] to breach” conventional and customary rules of international humanitarian law (including Article 1 of the Fourth Geneva Convention and intransgressible principles of humanitarian law) by failing to ensure that the requirements of the Fourth Geneva Convention are complied with and by providing aid and assistance to Israel. These submissions build on arguments developed in Chapter 4, section I of the Memorial (entitled “Germany’s Breaches of

¹⁵⁷ Memorial, paras 413–414 (referring back to para. 142 setting out Nicaragua’s position on submarine deliveries. For the correct dates, see *supra*, para. 100.

¹⁵⁸ Memorial, para. 403.

¹⁵⁹ Memorial, para. 411.

¹⁶⁰ Memorial, para. 411.

International Humanitarian Law”), which in turn draw on Nicaragua’s account of what it considers the relevant “factual background”.

113. It is plain that Nicaragua’s international humanitarian law claims do not have their real cause or source in facts or situations subsequent to 30 April 2008. Rather, in Nicaragua’s case, the international humanitarian law claims originate in alleged conduct of Germany dating from well before 2008.
114. In essence, Nicaragua’s case is that Germany has been under a duty to take active measures to ensure Israel’s compliance with international humanitarian law for decades. This duty, Nicaragua asserts, was “triggered as soon as [Germany] knew or should have known of plausible violations of IHL [by Israel] and regardless of the ascertainment of intent on the part of Israel”,¹⁶¹ i.e. in Nicaragua’s view since at least 1967.¹⁶² Proceeding from this assessment, and to take but one example, Nicaragua considers Germany to have breached common Article 1 by allegedly “fail[ing] to call upon Israel to comply with the conclusions of the 2004 *Wall* Advisory Opinion of the Court”, e.g. in relation to the return of movable and immovable property.¹⁶³ It also refers to Germany’s alleged failure to condemn Israel during the General Assembly debates of July 2004, when the Assembly discussed the Court’s *Wall* opinion.¹⁶⁴
115. In developing its claims, Nicaragua underlines throughout the “loyal relationship”¹⁶⁵ that exists between Germany and Israel: this is said to give Germany a “particularly influential position”,¹⁶⁶ and to shape the scope of Germany’s duty to ensure respect.

¹⁶¹ Memorial, para. 314.

¹⁶² See Memorial, para. 314, where Nicaragua offers a “general description of some of [Israel’s] policies, practices, and actions ... in the Occupied Palestinian Territory since 1967”. Nicaragua specifically states that “all of [these policies, practices, and actions] engage ... international norms of jus cogens and erga omnes character and the independent legal obligations of third States – including Germany”, and adds that “[t]his includes the obligation to ensure respect for IHL”. See also at paras 373, 410, where Nicaragua states that “[s]ince its establishment in 1948, Israel has subjected the Palestinian people to a regime of settler colonial displacement, dispossession, and racial discrimination”, triggering the “IHL obligation to ensure respect”.

¹⁶³ Memorial, para. 322. In the passage, Nicaragua references the 2008–2009 debates in the Human Rights Council, but this is just presented as one occasion on which Germany, according to Nicaragua, failed to act upon its duty to “ensure respect”.

¹⁶⁴ Memorial, para. 322.

¹⁶⁵ Memorial, para. 321.

¹⁶⁶ Memorial, para. 321.

Nicaragua is thus at pains to emphasise the long-standing links between the two States, as they have developed over decades. To illustrate:

- (i) Explaining why Germany is subject to particular scrutiny, Nicaragua is at pains to trace Germany's supply of military material to Israel back to the late 1950s, with data detailing the licensing practice of the period between 2003–2023 as well as the volume of exports for 1999–2024.¹⁶⁷
- (ii) Specifically, Nicaragua highlights Germany's involvement in the military training of Israeli soldiers, regular meetings between the two States' General Staff, and the delivery of submarines to Israel. As has been indicated, these specific forms of co-operation date back to well before 30 April 2008.¹⁶⁸ The training programme has been in place since 1984. Regular meetings at General Staff level began in 1997. German military companies have developed submarines for Israel on the basis of contracts dating back to 1989–1990 (approved in 1994), and which were extended in 2006.
- (iii) Close commercial ties: Nicaragua relies on the close commercial ties between Germany and Israel, noting that Germany has “[f]or many years ... been ... one of Israel's most important trade partners” and points to the existence of the German-Israel Chamber of Industry and Commerce (Deutsch-Israelische Industrie- und Handelskammer), which has been established as “part of the government supported network of German Chambers of Commerce Abroad (Deutsche Auslandshandelskammern)”.¹⁶⁹ As Nicaragua itself notes, the German-Israel Chamber of Industry and Commerce was established in 1967. By the same token, Germany's close commercial ties with Israel developed well before 30 April 2008.
- (iv) To advance its argument, Nicaragua highlights the existence of “intensive” scientific and cultural relations between Germany and Israel.¹⁷⁰ This is said to include German support for academic initiatives organised by the Minerva Stiftung, the work of the German-Israeli Society, and youth exchanges organised under the auspices of the Coordination Centre for German-Israeli Youth

¹⁶⁷ See Memorial, para. 356.

¹⁶⁸ See *supra*, para. 100.

¹⁶⁹ See Memorial, para. 130.

¹⁷⁰ Memorial, paras 133–134.

Exchange.¹⁷¹ As is clear from the Memorial, all of these ties predate 30 April 2008: the Minerva Stiftung “was created in 1964”, the German-Israeli Society was established “in 1966” while the Coordination Centre for German-Israeli Youth Exchange has been active “since 2001”.¹⁷²

- (v) Nicaragua relies on what it describes as “an essential political guideline of [Germany’s] policy – in particular its foreign policy”, i.e. the commitment to treat Israel’s security as part of the German “Staatsräson”,¹⁷³ which Nicaragua considers to be fundamentally at odds with international law. Nicaragua treats as important evidence various affirmations of the doctrine by German political leaders.¹⁷⁴ As is clear from Nicaragua’s Memorial, the “Staatsräson” doctrine predates 30 April 2008. Nicaragua traces it to an address given by Germany’s then-chancellor, Angela Merkel, on 25 September 2007,¹⁷⁵ which in turn makes clear the doctrine reflects long-standing principles of German foreign policy predating 25 September 2007.¹⁷⁶

116. These examples illustrate the sweeping nature of Nicaragua’s international humanitarian law claim. This claim, as presented by Nicaragua, does not have its real cause or source in facts or situations subsequent to 30 April 2008. As German conduct after that date cannot be separated from what came before, Nicaragua’s international humanitarian law claims fall outside the scope of the Court’s temporal jurisdiction, as defined by Germany’s optional clause declaration.

¹⁷¹ Memorial, paras 133–134.

¹⁷² Memorial, paras 133–134.

¹⁷³ Memorial, para. 136.

¹⁷⁴ See e.g. Nicaragua’s Application, paras 44, 46; as well as Annexes 8 and 10 thereto.

¹⁷⁵ See Memorial, para. 136 (citing United Nations, Official Records of the General Assembly, Sixty-second session, 5th plenary meeting, 25 September 2007, A/62/PV.5, p. 42).

¹⁷⁶ This is clear from the passage quoted by Nicaragua, in which Chancellor Merkel noted that “[e]ach and every German Chancellor before me has shouldered Germany’s special responsibility for the existence of Israel. I, too, pledge to live up to this responsibility that our history has bequeathed us”: see United Nations, Official Records of the General Assembly, Sixty-second session, 5th plenary meeting, 25 September 2007, A/62/PV.5, p. 42.

117. Nicaragua cannot ignore the wording of Germany's optional clause declaration. Like dozens of other States accepting the Court's jurisdiction under the optional clause, Germany has chosen "only ... to submit to [the Court's] jurisdiction disputes *having actually arisen* from situations or facts *subsequent to* its acceptance",¹⁷⁷ i.e. after 30 April 2008.
118. Assessed in light of the Court's consistent jurisprudence, and drawing on Nicaragua's presentations of its claims and the facts relied on to support them, central prongs of Nicaragua's alleged dispute with Germany do not have their real cause or source in facts or situations subsequent to 30 April 2008. For the reasons set out in the preceding sections, the Court lacks jurisdiction under the optional clause to sustain the claims set out in paragraph 484(4)-(9) of Nicaragua's Memorial.

¹⁷⁷ See PCIJ, *Phosphates in Morocco, (Italy v. France), Preliminary Objections*, PCIJ, Series A/B, No 74, p. 24 (emphasis added).

Chapter 4

Nicaragua's Claims Require the Court to Adjudicate upon the Lawfulness of Israel's Conduct in the Absence of Its Consent or Participation

A. Introduction: The *Monetary Gold* Principle

119. Even if the Court were to find that it had jurisdiction to entertain Nicaragua's claims, the great majority of these claims would be inadmissible. This is because all Nicaragua's major claims require the Court to adjudicate upon the lawfulness of Israel's conduct in the absence of its consent or participation.
120. In its well-known decision in *Monetary Gold Removed from Rome in 1943* (*Monetary Gold*), the Court held that it must abstain from adjudicating upon a claim where the legal interests of a third State form the "very subject matter" of that claim.¹⁷⁸ That decision, which the Court has since referred to as establishing the "*Monetary Gold* principle",¹⁷⁹ is an inevitable and necessary reflection of the fundamental need for consent in the system of adjudication in international law.¹⁸⁰
121. In *Monetary Gold*, the question was whether the Court could adjudicate on whether looted Albanian gold under the control of a Tripartite Commission (composed of France, the United Kingdom, and the USA) should be delivered to Italy or to the United Kingdom, both of which had unsatisfied claims for damages against Albania. The application raised two issues: (i) whether Italy had a valid claim to the gold; and (ii) as between Italy and the United Kingdom, whose claim had priority. The Court rejected as an "over-simplification"¹⁸¹ the United Kingdom's contention that Albania's consent was unnecessary because the only question was whether Albania's share should go to it or to Italy. To the contrary, the Court stated that the application "centre[d] around a

¹⁷⁸ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.

¹⁷⁹ See e.g. *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary Objection, Judgment, I.C.J. Reports 2023, p. 281, para. 63.

¹⁸⁰ See e.g. *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 101, para. 26.

¹⁸¹ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 31.

claim” by Italy to indemnification for an alleged wrong committed against it by Albania, and that claim could not be decided without Albania’s consent.¹⁸²

122. Albania’s decision not to intervene could not cure this defect. Since Albania’s legal interests would “form the very subject-matter of the decision”, the Statute did not authorise proceedings to continue in its absence.¹⁸³ It was also no answer that, pursuant to Article 59 of the Statute, the Court’s decision would not be binding on Albania. As the Court stated:

“Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.”¹⁸⁴

123. Since the question of priority as between Italy and the United Kingdom was dependent upon the Court accepting that Italy had a valid claim to the gold, the Court concluded that it could not adjudicate upon that question.¹⁸⁵
124. The same conclusion must be reached with respect to the great majority of the claims now brought by Nicaragua.¹⁸⁶ Its Application and its Memorial are replete with assertions that Israel is in breach of multiple and fundamental norms of international law, and the great majority of its claims against Germany are dependent on the Court making prior determinations as to these breaches by Israel.

¹⁸² *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.*

¹⁸³ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.*

¹⁸⁴ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954, p. 33.*

¹⁸⁵ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954, p. 33.*

¹⁸⁶ The conclusion would not apply with respect to Nicaragua’s claim at Memorial, para. 484(10), that Germany “has breached and continues to breach international law by refusing to prosecute, bring to trial and punish persons responsible for, or *accused of grave crimes under international law*, including war crimes and apartheid, whether or not such persons are German nationals” (emphasis added) insofar as the alleged breach is based on the objective fact of an accusation.

125. Nicaragua is of course well aware of the obstacle that the *Monetary Gold* principle presents to the admissibility of its claims. It seeks to address this issue up front in its Memorial,¹⁸⁷ running two basic lines of argument.
126. *First* (and this is a contention repeated many times in the Memorial), Nicaragua says that it “relies on determinations of facts and violations of a number of norms of international law ... *already established* by the Court in the *Palestine* Advisory Opinion and in the *Wall* Advisory Opinion”.¹⁸⁸
- (i) This attempt by Nicaragua to find a legal source for prior determinations of disputed facts and of breach by Israel demonstrates how essential such determinations are to Nicaragua’s case.
 - (ii) However, it is not open to Nicaragua to borrow and transform the Court’s opinions given in non-binding advisory proceedings into determinations that form a central part of a contentious case. That would be to ignore the fundamental requirement of consent and to undermine the essential distinctions – and the balance that exists – as between the Court’s advisory and contentious jurisdictions.
127. *Second*, Nicaragua seeks to distinguish and confine the *Monetary Gold* case, asserting that “[f]or the *Monetary Gold* principle to apply, there must exist concurring similar claims between one of the parties to the case before the Court and a third State” and that “the Court will not need to rule on Israel’s obligations”.¹⁸⁹ However:
- (i) There is no basis for any attempt to confine the *Monetary Gold* principle, which has been reaffirmed on various occasions by the Court,¹⁹⁰ or to redefine the principle by reference to a new criterion of “concurring similar claims”. Nicaragua is well aware of this, and hence is seeking impermissibly to transpose the Court’s views from its 2004 and 2024 Advisory Opinions.

¹⁸⁷ Memorial, paras 34–51.

¹⁸⁸ Memorial, para. 35, emphasis in the original.

¹⁸⁹ Memorial, paras 38–43, in particular para. 42.

¹⁹⁰ See most recently *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, *Preliminary Objection, Judgment*, *I.C.J. Reports 2023*, pp. 280–281, 286, 292, paras 60–64, 86, 107. There, the Court held that the relevant third party, the United Kingdom, had agreed that the dispute between Guyana and Venezuela could be settled by one of the means set out in Article 33 of the Charter of the United Nations, and that it would have no role in that procedure. Hence the *Monetary Gold* principle was not engaged.

- (ii) The great majority of Nicaragua's claims are indeed dependent on the Court making prior determinations of unlawful conduct by Israel.

128. These two points are now developed. In Section B, Germany first addresses the brief consideration of the law relevant to the *Monetary Gold* principle in Nicaragua's Memorial, before turning to the contention that the Court does not need to rule on the lawfulness of Israel's conduct in order to decide on the allegations of Germany's responsibility. In Section C, Germany addresses Nicaragua's attempt to bypass the *Monetary Gold* principle by invocation of the Court's past Advisory Opinions.

B. Application of the Monetary Gold Principle: The Lawfulness of Israel's Conduct Is the Very Subject-matter of Nicaragua's Claims

1. Nicaragua's misplaced attempt to confine the application of Monetary Gold

129. According to Nicaragua, the type of situation in which the *Monetary Gold* principle will apply "is quite exceptional and in no way comparable to that in the present case".¹⁹¹ It contends by reference to the *Monetary Gold* and *East Timor* cases that there is a requirement of "similar claims".¹⁹² Nicaragua's position thus appears to rely on and invoke an alleged similarity between competing claims of Italy and Albania to the monetary gold (with Albania not before the Court), and likewise competing claims of Portugal and Indonesia to the power to enter into treaties with respect to East Timor (with Indonesia not before the Court).
130. However, there is no such requirement of "similarity" as between potentially competing claims. As is well-established, what matters is whether the Court would have to rule upon the conduct of a third State as a prerequisite to a finding on the responsibility of the State before it, such that the vital issue to be settled concerns the international responsibility of a third State. Thus, in *East Timor*, the Court concluded that in order to adjudicate upon Portugal's claims, it would

"necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its

¹⁹¹ Memorial, para. 39.

¹⁹² Memorial, para. 42.

obligation to respect Portugal's status as administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.”¹⁹³

131. The Court held that it could not assess Australia's behaviour without first entering into the question of Indonesia's conduct, and hence it could not decide Portugal's claim. It could not be otherwise given the fundamental role played by consent.
132. On Nicaragua's case by contrast, wherever State A claims that State B has aided and assisted State C in an international wrong (as Nicaragua claims in the current case), it is presumed that the Court could decide on the central issue of the responsibility of State C regardless of the absence of State C's consent. According to Nicaragua, the allegedly required “similarity” of claims is not present and hence the *Monetary Gold* principle purportedly does not apply – seemingly because State B's responsibility is ancillary and in part dependent on different facts to the primary responsibility of State C. The argument is unclear and makes no sense. It is not supported by the Court's jurisprudence.¹⁹⁴
133. Nicaragua also relies on the *Nauru* case, seeking to persuade the Court that there is merely a risk of “implications for the legal situation” of Israel as a result of the determinations sought by Nicaragua.¹⁹⁵ This involves a mis-characterisation of the claims presented by Nicaragua alongside an attempt to bypass the established jurisprudence of the Court with respect to the Genocide Convention. Germany contends by reference to the *Bosnian Genocide* case and other relevant materials that the determinations of the wrongful conduct of Israel form a central and essential prerequisite to findings of wrongful conduct by Germany. If that is correct, then the

¹⁹³ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 104, para. 33 (emphasis added).

¹⁹⁴ At para. 42 of its Memorial, Nicaragua asserts: “For the *Monetary Gold* principle to apply, there must exist concurring similar claims between one of the parties to the case before the Court and a third State.” The supporting reference for this contention is to *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2020-2021, p. 44, para. 83 and p. 48, para. 99. Those paragraphs, and that case more generally, do not support Nicaragua's contention. As is well known, the Special Chamber of ITLOS found – very controversially – that the effect of the Court's *Chagos* advisory opinion and UNGA resolution 73/295 was that the UK had no relevant interests in the Chagos Archipelago and was therefore not an indispensable third party. Hence the *Monetary Gold* principle was not engaged.

¹⁹⁵ Memorial, para. 43, referring to *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 261–262, para. 55.

Monetary Gold principle will be engaged as this would plainly not be a mere “implications” case.

134. The difference between the two types of case was explained by the Court in the *East Timor* judgment and it is useful to set out the relevant passage in full:

“The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give *might affect* the legal interests of a State which is not a party to the case. Thus, in the case concerning *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), it stated, *inter alia*, as follows:

‘In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s Application . . . In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru’s claim . . . In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.’
(*I.C.J. Reports 1992*, pp. 261–262, para. 55.)

However, in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia’s entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia’s rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State’s consent. Such a judgment would run directly counter to the ‘well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise

jurisdiction over a State with its consent’ (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32).”¹⁹⁶

135. To adopt the wording of the Court, in the current case, the effects of the judgment requested by Nicaragua would amount to a determination that Israel’s conduct has been unlawful in multiple respects. Israel’s rights and obligations would thus constitute the very subject-matter of such a judgment which would be made in the absence of that State’s consent.
136. Of course, in order to avoid the application of the *Monetary Gold* principle, Nicaragua now seeks to put a distance between its claims against Germany and its claims against Israel. However, it is clear that just as in the *East Timor* case, each of the principal claims advanced against Germany would require the Court to pass judgment upon the lawfulness of Israel’s actions as a prerequisite to adjudication of the lawfulness of Germany’s actions.

2. The claims advanced by Nicaragua

137. Nicaragua’s Application alleges, in the clearest of terms, breaches by Israel of international law.
- (i) It contains numerous references to Israel as committing “great breaches of international law”,¹⁹⁷ “perpetrat[ing] genocidal acts and other atrocities”,¹⁹⁸ being “in breach of many of the most fundamental and sacred norms of international law”,¹⁹⁹ having acted in “complete disregard of international humanitarian law, human rights law and the Genocide Convention”,²⁰⁰ and having committed “serious breaches of universally accepted norms of international law”.²⁰¹

¹⁹⁶ *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 104, para. 34 (emphasis added).

¹⁹⁷ Application, para. 13.

¹⁹⁸ Application, para. 13.

¹⁹⁹ Application, para. 14.

²⁰⁰ Application, para. 38.

²⁰¹ Application, para. 8

- (ii) It refers to “violations of international humanitarian law, the Genocide Convention and peremptory norms of general international law by Israel”.²⁰² Any fair-minded observer could only interpret Nicaragua’s Application as putting squarely in issue the lawfulness of Israel’s conduct.
138. Moreover, Nicaragua’s Application expressly frames its claims against Germany as predicated upon Israel having committed such violations. The opening line of Nicaragua’s Application states:
- “This Application refers to *the serious breaches* of peremptory norms of international law ... taking place in the Occupied Palestinian Territory (OPT) and particularly the Gaza strip, and the *obligations derived therefrom* on the international community.”²⁰³
139. The Application explains that “Nicaragua requests the Court to adjudge and declare that Germany by its conduct *with respect to the serious violations of peremptory norms of international law taking place in the OPT*” has committed various breaches of international law.²⁰⁴ The formulation of each of Nicaragua’s claims in its Application demonstrates that determinations with respect to the unlawful nature of Israel’s conduct are a prerequisite for the finding of breach by Germany:
- (i) Breach of the Genocide Convention: the claims of breach by Germany are formulated by reference to the alleged “ongoing genocide” by Israel against the Palestinian people.²⁰⁵
 - (ii) Breach of Common Article 1 (CA1) of the Fourth Geneva Convention: the claim is formulated by reference to an alleged failure to ensure that the requirements of the Fourth Geneva Convention and various other sources of conventional and customary international law are complied with by Israel, i.e. alleged breach by Germany of CA1 through “providing aid, including military assistance, that *would be used in the commission of* genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or

²⁰² Application, para. 78.

²⁰³ Application, para. 2 (emphasis added).

²⁰⁴ Application, para. 3 (emphasis added).

²⁰⁵ Application, para. 67(1)–(2).

civilians protected as such, or other war crimes, in violation of its duties under 1949 Geneva Conventions and customary international law ...”.²⁰⁶

- (iii) Aid and assistance: the claim is based on a closely related allegation of “providing aid and assistance to Israel”.²⁰⁷ By reference to this claim and the claim for breach of CA1, Nicaragua seeks to hold Germany responsible with respect to a very broad range of alleged war crimes and violations of IHL by Israel.
- (iv) Self-determination: the claim for breach is pleaded by reference to aid allegedly provided “to Israel that is used to deny [the Palestinian people’s] right of self-determination and ... to maintain and impose an apartheid regime”. The unlawfulness of Israel’s conduct is also the premise of this claim.²⁰⁸

140. There is some attempt to blur the lines in Nicaragua’s Memorial, although it could not be and is not open to Nicaragua to seek to avoid the *Monetary Gold* principle through artful pleading. In any event, it remains clear that allegations of wrongful conduct on the part of Israel are central prerequisites to Nicaragua’s claims against Germany.

141. Thus, in the Introduction to its Memorial, Nicaragua refers for example to “the heinous acts perpetrated in the Occupied Palestinian Territory” and “the genocide being perpetrated by Israel that is still ongoing”.²⁰⁹ Where it seeks to present its case as concerned with the alleged unlawful conduct of Germany alone, Nicaragua nonetheless still alleges (making the comparison to the *South Africa v. Israel* case) that

“many of the gross violations committed by Israel of its obligations under the *Genocide Convention* (and its corresponding obligations under customary law) are elements establishing the crime of genocide but are also independently violations of international humanitarian law, the right to self-determination and the prohibition of racial discrimination, segregation and apartheid and the inadmissibility of the acquisition of territory by force; in this respect some facts are common to both cases; however, the scope of the present case is wider than the one

²⁰⁶ Application, para. 67(3) (emphasis added).

²⁰⁷ Application, para. 67(4).

²⁰⁸ It is not serious for Nicaragua to suggest, having sought to impugn Israel’s conduct in such stark terms, that Article 59 of the Court’s Statute would adequately protect Israel’s interests in this case. Cf. CR 2024/15, p. 39, para. 9 (Pellet).

²⁰⁹ Memorial, paras 50–51.

brought before the Court by South Africa in its substance and different concerning the Defendant and its responsibilities”.²¹⁰

142. In other words, as in *South Africa v. Israel*, the Court is being asked to accept that Israel has breached the Genocide Convention; but it is also being asked to accept that there are different and further breaches by Israel, including of International Humanitarian Law (IHL) and the right to self-determination.
143. That these alleged “gross violations committed by Israel” are indeed central to Nicaragua’s case is then all the more obvious from Chapter 3 of the Memorial, headed “The Factual Background”. This contains a lengthy section (Section I.C) on “Israeli Policies and Practices in the Occupied Palestinian Territory since 1967”, including sub-sections on Israeli settlements, annexation of the OPT (by Israel), violation of self-determination (by Israel), racial segregation and apartheid (by Israel), genocide (by Israel).²¹¹ Even where, in its Chapter 3, Nicaragua purports to focus on the conduct of Germany, critical parts of the argument concern how weaponry has been used by Israel in Gaza in alleged breach of the multiple norms invoked by Nicaragua. Thus, in the lengthy sub-section “Data and Evidence Confirm that the Military Equipment Delivered by Germany is not of a Subordinate or Defensive Nature Only and is Used in the Gaza Strip”,²¹² Nicaragua makes a series of allegations as to how and when certain weapons have been used by Israel – by reference to multiple photo and video exhibits, press reports and some UN materials.²¹³
144. So far as concerns the claims for breach that then follow in the Memorial, despite the attempts to obfuscate matters, these largely mirror (but significantly expand) the claims in Nicaragua’s Application, as follows:
- (i) Breach of the Genocide Convention: these concern an alleged failure to prevent genocide, aid to Israel, and complicity. The claims are again cast by reference to the alleged “ongoing genocide” by Israel against the Palestinian people.²¹⁴

²¹⁰ Memorial, para. 12(a) (emphasis added).

²¹¹ Memorial, paras 391–123.

²¹² Memorial, paras 212–243.

²¹³ See in particular Memorial, paras 224–242 and fns 438–487.

²¹⁴ Memorial, para. 484(1)–(3).

- (ii) Breach of CA1 and related customary international law: these are formulated by reference to an alleged failure to ensure that the requirements of the Fourth Geneva Convention are complied with by Israel and alleged breach of CA1 through “providing aid and assistance [to Israel], including military equipment, in violation of its duties under the 1949 Geneva Conventions, customary international law, the Court’s Advisory Opinions of 2004 and 2024, as well as the obligation upon Germany related to the transfer of arms to parties to an armed conflict as recalled in the Order of the Court of 30 April 2024”.²¹⁵
- (iii) Unlawful aid and assistance, including with respect to “Israel’s commission of racial discrimination, segregation and apartheid against the Palestinian people”.²¹⁶
- (iv) Self-determination: in particular through Germany allegedly “providing aid and particularly military equipment to Israel that is used to deny this right of self-determination [of the Palestinian people] and moreover helps to maintain and impose an apartheid regime.”²¹⁷
- (v) Breach by Germany through allegedly failing in “in its obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and not render aid or assistance in maintaining the situation created by the continued illegal presence of Israel in the Occupied Palestinian Territory”.²¹⁸

145. The unlawfulness of Israel’s conduct is plainly the premise of all these claims, and a lengthy Annex 1 entitled “Non exhaustive list of statements on International Humanitarian Law and Genocide” is submitted by Nicaragua in support of that alleged unlawfulness. As explained further in the next sub-section, just as in the *Monetary Gold* and *East Timor* cases, when it comes to the norms of international law that Nicaragua invokes, the determination of the responsibility of Israel is indeed a prerequisite for the determination of the responsibility of Germany.

²¹⁵ Memorial, para. 484(4)–(5).

²¹⁶ Memorial, para. 484(6) and (9).

²¹⁷ Memorial, para. 484(7).

²¹⁸ Memorial, para. 484(8).

3. The wrongfulness of Israel's conduct is a prerequisite to any finding of breach by Germany

146. As a matter of the applicable international law that it seeks to rely on, Nicaragua could not succeed in any of its principal claims without the Court adjudicating upon the lawfulness of Israel's conduct.

(a) Nicaragua's Genocide claims

The alleged breach of the obligation to prevent

147. In the *Bosnian Genocide* case, the Court gave some important clarifications on the nature of the obligation to prevent genocide under Article 1 of the Genocide Convention. It confirmed that this is an obligation of conduct and not of result, and explained that it required the exercise of due diligence.²¹⁹ The Court addressed the circumstances in which a State would breach the obligation and, of particular importance, it confirmed that State responsibility for an alleged breach of the obligation to prevent is dependent on the existence of a genocide:

“[A] State can be held responsible for breaching the obligation to prevent genocide *only if genocide was actually committed*. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins *that the breach of an obligation of prevention occurs*. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

‘... 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.’

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence

²¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, para. 430.

of the act. In fact, 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. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. *However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.*"²²⁰

148. Consequently, the Court held that it would only consider Serbia's conduct in connection with the massacres at Srebrenica "because these are the only acts in respect of which the Court had concluded in this case that genocide was committed."²²¹
149. The same analysis has been adopted in the Court's subsequent jurisprudence.²²²
150. It follows that Germany can only be held responsible for breaching the obligation to prevent genocide if a genocide has actually been (or is being) committed. Nicaragua is asking the Court to make a positive finding that Germany "has *breached* and continues to *breach*" the obligation of prevention by "failing to prevent the ongoing genocide".²²³ The question is thus not whether the obligation of prevention may have been triggered (an issue on which the Court also focused in the *Bosnian Genocide* case), but whether the obligation has been violated. That requires the Court to rule on whether Israel is committing genocide. Thus, the Court would "necessarily have to rule upon the lawfulness of [Israel's] conduct as a prerequisite" to the determination of this claim.²²⁴

²²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, pp. 221–222, para. 431 (emphasis added).

²²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 222, para. 432.

²²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 128, para. 441.

²²³ Application, para. 67(1); Memorial, para. 484(1) (emphasis added).

²²⁴ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 104, para. 33.

151. Nicaragua all but ignores this fundamental point in its Memorial. It devotes many pages to supposed failures by Germany with respect to identifying, accepting and acting upon obligations of prevention under Article I of the Genocide Convention.²²⁵ It is only in two short sentences at the end of its section on breach that Nicaragua comes to the Court's consistent finding that, under Article I, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed.²²⁶ In this short passage, it does (and can do) no more than invite the Court to go back on its consistent interpretation, as follows:

“The Court has an important contribution to make in affirming that a failure to exercise due diligence in recognizing that there is a serious risk of genocide and to take appropriate lawful measures to diminish or eliminate that risk constitutes a violation of the Genocide Convention, and of the customary international law duty to prevent genocide, regardless of whether or not the crime of genocide actually occurs. In other words, this obligation exists independently of whether a third State actually commits genocide.”²²⁷

152. It is as if the careful reasoning of the *Bosnian Genocide* case, as upheld in the *Croatian Genocide* case, simply did not exist.

153. It is as if it could be enough for Nicaragua just to assert that “[e]vidence of genocidal intent [on the part of Israel] is plain for all to see”,²²⁸ with the Court neither expected nor required to test the strength of such serious allegations.

154. The correct and well-established position is that, in order for Nicaragua to make good its Article I claim against Germany, Nicaragua would have to present the evidence of alleged genocidal acts and intent of Israel, and the Court would have to weigh and make determinations on this evidence – all in the absence of Israel. The Court cannot do this.

The alleged breaches with respect to provision of aid and complicity

²²⁵ Memorial, paras 437–451.

²²⁶ Memorial, para. 453.

²²⁷ Memorial, para. 453.

²²⁸ Memorial, para. 450.

155. Nicaragua also makes two closely related (if not indistinguishable) claims under the Genocide Convention concerning provision of aid and complicity.
156. *First*, Nicaragua alleges that Germany has breached its obligation under Article I by providing aid including military equipment to Israel “that would be used in the commission of genocide, by Israel”²²⁹ or, as stated in the Memorial, “that could be used in the commission of genocide, by Israel”.²³⁰ The change in wording from “would” to “could” is notable and may have been made with a view to somehow bypassing the *Monetary Gold* principle. The change is not however explained by Nicaragua (and, as further identified below, it would not assist it in avoiding the implications of the Court’s jurisprudence).
157. *Second*, Nicaragua alleges breach by Germany of Article III(e) of the Genocide Convention “by being complicit in genocide by providing aid, including military equipment to Israel that has been used in the commission of genocide by Israel”.²³¹
158. It is not clear why these two claims are presented as separate, in particular in light of the Court’s jurisprudence. As the Court explained in the *Bosnian Genocide* case, there is no distinction of substance between aiding or assistance as reflected in Article 16 of the ILC’s Articles on State Responsibility and complicity under Article III(e) of the Genocide Convention.²³² As it further explained:

“In other words, to ascertain whether the Respondent is responsible for ‘complicity in genocide’ within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished ‘aid or assistance’ in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.”²³³

²²⁹ Application, para. 67(2).

²³⁰ Memorial, para. 484(2).

²³¹ Memorial, para. 484(3).

²³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 217, para. 420.

²³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 217, para. 420.

159. Nicaragua alleges that “Germany has delivered military equipment, ammunition, technology, spare parts and components *to facilitate Israel’s military campaign* in the Occupied Palestinian Territory, especially Gaza ... despite being *aware of the violations being committed by Israel* from the moment of their first occurrence shortly after 7 October 2024, ...”.²³⁴ Nicaragua’s claim with respect to complicity thus appears expressly predicated on the existence of alleged violations of Israel, i.e. on such violations being established to the satisfaction of the Court.
160. In any event, as the Court explained in the *Bosnian Genocide* case, “there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, *enabled or facilitated the commission of the acts*”.²³⁵ Complicity in genocide is dependent on the commission of genocide by some third party. In the absence of a finding of genocide, the question of complicity does not arise.²³⁶ Nicaragua’s claims thus again require to establish to the Court’s satisfaction the commission of genocide – in the absence of the third State allegedly responsible for that genocide.
161. Insofar as Nicaragua seeks to present its claim on provision of aid claim as subject to some different rule, it is similarly well-established that aid or assistance by State A of wrongful conduct by State B can only be unlawful if the conduct of State B is indeed wrongful. Pursuant to the rule of customary international law reflected in Article 16 of the ILC’s Articles on State Responsibility:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

²³⁴ Memorial, para. 458 (emphasis added).

²³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 222, para. 432 (emphasis added).

²³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment. I.C.J. Reports 2015 (I), p. 128, para. 441.

(b) the act would be internationally wrongful if committed by that State.”

162. As further identified in the ILC Commentary: “A State is not responsible for aid or assistance under article 16 unless ... the internationally wrongful conduct is actually committed by the aided or assisted State.”²³⁷ Thus a claim of unlawful aid or assistance with respect to the acts of Israel is predicated on it being established that Israel has committed or is committing internationally wrongful acts. As the Commentary acknowledges, the *Monetary Gold* principle may render such a claim inadmissible since “it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act.”²³⁸ The Commentary notes that the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case, which is correct because a third State could in theory give its consent to the Court’s adjudication. However, that is not the case here, and the *Monetary Gold* principle is again squarely engaged.
163. Further, for there to be a wrongful act under Article 16, it must be established that the acts of aid or assistance actually caused or contributed to the wrongful act,²³⁹ and in a way that was material.²⁴⁰ This important part of the Article 16 test could not be met without first identifying the relevant wrongful act (by Israel).

Conclusion on the Genocide claims

164. While Nicaragua has sought to portray its genocide claims as aimed at alleged breaches of Germany’s obligations arising out of Germany’s conduct,²⁴¹ that provides no answer to the *Monetary Gold* principle: the determination of the claims concerning Germany’s conduct require the Court to adjudicate upon an alleged genocide by Israel, and Israel’s

²³⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, para. 5.

²³⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, para. 11.

²³⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, para. 1.

²⁴⁰ James Crawford, *State Responsibility: The General Part* (2013), p. 403 (Annex 5).

²⁴¹ Memorial, paras 437–451. See also CR 2024/15, p. 42, para. 18 (Pellet).

rights and obligations would thus constitute the very subject-matter of the judgment sought by Nicaragua. It follows that the Court must decline to hear those claims in the absence of Israel.²⁴²

(b) Nicaragua’s international humanitarian law claims

165. Nicaragua alleges breach by Germany of Article 1 of the Fourth Geneva Convention and “intransgressible principles of international humanitarian law” by failing to “ensure that the requirements of that Convention are complied with” and by providing aid, including military equipment to Israel “that would be used in the commission” of various war crimes and grave breaches.²⁴³ It also alleges breach by Germany of its obligations under international humanitarian law by “not only by failing to ensure that these rules of elementary consideration of humanity are respected by Israel, but also by providing aid and assistance to Israel”.²⁴⁴
166. It follows that this group of claims are concerned with breach of the obligation to “ensure respect” and unlawful aid and assistance.

The obligation to “ensure respect”

167. The obligation to “ensure respect” under CA1 has been characterised as entailing a positive and a negative obligation, i.e. a positive obligation to exert influence on parties to an armed conflict to observe international humanitarian law²⁴⁵ and a negative obligation not to encourage or aid violations of IHL by another State in an armed

²⁴² It is noted that Nicaragua has not sought to suggest that the *Monetary Gold* principle could be addressed by subordination of the Genocide claims to the outcome of the *South Africa v. Israel* case.

²⁴³ Application, para. 67(3); Memorial, para. 484(4)–(5).

²⁴⁴ Application, para. 67(4); Memorial, para. 484(6).

²⁴⁵ See e.g. ICRC, Customary IHL Database (at <https://ihl-databases.icrc.org/en/customary-ihl/v1>), Rule 144; ICRC, Updated Commentary to Geneva Convention I, Article I, 2019, paras 120, 155, 169 (at https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=#5_B); ICRC, Updated Commentary to Geneva Convention II, Article I, 2017, paras 142, 177, 191 (at <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-1/commentary/2017?activeTab=1949GCs-APs-and-commentaries>); ICRC, Updated Commentary to Geneva Convention III, Article I, 2020, paras 153, 188, 202 (at <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020?activeTab=1949GCs-APs-and-commentaries>).

conflict.²⁴⁶ Nicaragua argues in favour of this characterisation of CA1,²⁴⁷ and claims that Germany has breached both positive and negative obligations (although active encouragement by Germany, as opposed to aid and assistance, is not alleged²⁴⁸).

168. Assuming for present purposes that this is both a useful and a correct characterisation,²⁴⁹ the central obligation remains to “ensure respect”. In a manner analogous to the Genocide claims considered above, the determination of whether Germany has breached the obligation to “ensure respect” would, as a prerequisite, require the Court to pass judgment on whether Israel has failed to “respect” the Fourth Geneva Convention (and, more broadly, other provisions of treaty and customary law invoked by Nicaragua²⁵⁰).
169. The principle articulated in the *Bosnian Genocide* case – that the obligation to prevent genocide is triggered by knowledge of the existence of a serious risk of genocide, but that *breach* of the obligation only occurs when a genocide is actually committed – applies equally in the current context.
170. In the *Bosnian Genocide* case, the Court was applying the standard approach reflected in the ILC’s Articles on State Responsibility, Article 14(3):

“The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

²⁴⁶ See ICRC, Updated Commentary to Geneva Convention I, Article I, 2019, para. 158 (at https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=#5_B). and ICRC, Updated Commentary to Geneva Convention III, Article I, 2020, para. 191 (at <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020?activeTab=1949GCs-APs-and-commentaries>), so far as concerns ‘encouragement’, by reference to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 114, para. 220.

²⁴⁷ Memorial, paras 314–315.

²⁴⁸ At para. 314 of the Memorial, Nicaragua does place reliance on *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 114 and 130, paras 220 and 256, in the context of its consideration of negative obligations and when these arise. In that case, the Court was concerned with CA1 and the prohibition of encouragement. Germany notes that the Court in that case did not consider CA1 in depth and did not benefit from any argument from the (non-appearing) respondent State. It also notes that the case could not be analogous in terms of the *Monetary Gold* principle as the Court was concerned with the conduct of a non-State actor, not a third State whose consent would be needed for adjudication by the Court.

²⁴⁹ The question of whether there is material common ground between the Parties in this respect, as Nicaragua contends, would be a matter for a merits phase. Cf. Memorial, paras 316–317.

²⁵⁰ Application, para. 67(3); Memorial, para. 484(4).

171. Consistent with this, and as recognised by a number of jurists, the Court’s approach in *Bosnian Genocide* applies to obligations of prevention more generally.²⁵¹
172. The duty to “ensure respect” is an equivalent obligation. As a matter of ordinary meaning, a duty to “ensure respect” entails an obligation “to ensure compliance”.²⁵² This is how the duty is understood by Nicaragua, which in terms refers to CA1 as requiring Germany “to ensure that the requirements of [the Fourth Geneva] Convention are complied with”.²⁵³ An obligation to ensure respect (compliance) and an obligation to prevent non-compliance are simply two sides of the same coin. The logic behind Article 14(3) of the ILC’s Articles on State Responsibility applies equally. Just as it is not legally coherent to find a failure to prevent a breach unless that breach has occurred, it is not legally coherent to find a failure to ensure compliance unless the relevant non-compliance has been established. To use the language of Article 14(3), the obligation to “ensure respect” in CA1 is directed towards preventing a “given event occurring”, namely breaches of the Geneva Conventions. Further:
- (i) The obligation to “ensure respect” in CA1 is “similar”²⁵⁴ to the obligation to prevent genocide. Both are obligations of conduct which require the exercise of due diligence (the ICRC has referred in the ICRC Commentary to the “similar due diligence obligation” that is derived from Article I of the Genocide Convention, as is noted and relied upon by Nicaragua).²⁵⁵ Due diligence is a standard of conduct which is not to be conflated with the question of whether and when a

²⁵¹ Pierre d’Argent, ‘Les obligations internationales’, *Recueil des cours*, vol 417, p. 199, para. 300 (Annex 6); James Crawford, *State Responsibility. The General Part* (CUP 2013) pp. 230–231 (Annex 5); Samantha Besson, *Due Diligence in International Law* (Brill Nijhoff 2023) p. 105 (Annex 7); Christian J. Tams et al, *The Genocide Convention. Article-by-Article Commentary*, 2nd edn., Beck/Hart 2024, pp. 51–52, para. 34 (Annex 8). Cf. the position where there is an obligation of co-operation with respect to prevention: *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment of 31 January 2024, at para. 138.

²⁵² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 200, para. 159.

²⁵³ Application, para. 67(3); Memorial, para. 484(4).

²⁵⁴ See the updated *ICRC Commentary to Geneva Convention I*, para.166 (at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=>).

²⁵⁵ Memorial, para. 315, referring to the updated ICRC Commentary to Geneva Convention I ((at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=>)), para. 166.

breach of the primary obligation occurs.²⁵⁶ Just as with the obligation to prevent genocide, a lack of due diligence is a necessary but not sufficient condition for a finding of breach of the obligation to ensure respect.

- (ii) Even assuming that the obligation to take positive steps to “ensure respect” under Article 1 is triggered by a “foreseeable risk” of violations of IHL,²⁵⁷ that does not take the obligation outside Article 14(3) of the ILC’s Articles on State Responsibility. The point in time at which a State’s duty to act arises is not necessarily coincident with the point in time at which a State breaches that duty. In the context of the obligation to prevent genocide, which is triggered by awareness of a “serious risk”, it has been established by this Court that a failure to act despite awareness of such a risk does not constitute a breach unless and until a genocide has actually occurred.²⁵⁸ It would therefore be no answer to the application of the *Monetary Gold* principle to say that Germany’s obligation under Article 1 is triggered by a ‘foreseeable risk’ which risk could be assessed independently of any actual breach by Israel of IHL.
- (iii) It would moreover be a surprising result if State A could be found to have breached its obligation to “ensure” State B’s “respect” for IHL in circumstances where State B’s conduct did not breach IHL. State practice does not support such an expansive approach to CA1. Indeed, there is a dearth of practice in which States have asserted breaches of Article 1 on the basis of inaction in the face of a “foreseeable risk” of another State’s breach of IHL in circumstances where that risk of breach did not materialise.
- (iv) There is no indication in the drafting history that CA1 was intended to create an obligation which could be breached in the absence of any actually established violation of IHL by a third State. As explained in the Pictet Commentary (on

²⁵⁶ Pierre d’Argent, ‘Les obligations internationales’, *Recueil des cours*, vol 417, p. 197, para. 298 (Annex 6); James Crawford, *State Responsibility. The General Part* (CUP 2013) pp. 231–232 (Annex 5); Samantha Besson, *Due Diligence in International Law* (Brill Nijhoff 2023) p. 105 (Annex 7).

²⁵⁷ See para. 164 of the updated *ICRC Commentary to Geneva Convention I* (at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=>); Memorial para. 314, referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, pp. 114, 130, paras 220 and 256.

²⁵⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, pp. 221–222, para. 431.

which Nicaragua relies), the meaning of the provision was that: “[i]n the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention.”²⁵⁹

173. The point appears all the more clear with respect to the so-called negative obligation under CA1, prohibiting aid and assistance.²⁶⁰ As already noted under sub-section (a) above, any finding that State A had violated international law by providing aid and assistance to State B depends on the determination that State B’s conduct is indeed wrongful. Only this reading is in line with the ILC’s widely accepted formulation of the rule against aid and assistance in Article 16 of the Articles on State Responsibility, which applies to Nicaragua’s assertions.

Unlawful aid and assistance of Israel by Germany

174. As a separate but closely related head of claim, Nicaragua contends that Germany is wrongfully providing aid and assistance to Israel.²⁶¹ The same point as made at sub-section (a) above apply once more: the claim is ultimately predicated upon Israel having breached international law. The claims fall within Article 16 of the ILC’s Articles on State Responsibility concerning aid or assistance of another State in the commission of an “internationally wrongful act”. The Commentary to Article 16 confirms that responsibility for aiding or assisting requires that the wrongful conduct must have been “actually committed by the aided or assisted state”.²⁶²

Conclusion with respect to Nicaragua's international humanitarian law claims

²⁵⁹ See Jean Pictet (ed.), *Commentary on the Fourth Geneva Convention of 12 August 1949* (1958) (at <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-1/commentary/1958?activeTab=1949GCs-APs-and-commentaries>), p. 16 (emphasis added). Nicaragua relies on the Pictet Commentary at Memorial, para. 313.

²⁶⁰ Memorial, para. 484(5).

²⁶¹ Application, para. 67(4), Memorial, para. 484(6).

²⁶² Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, para. 5.

175. As with the Genocide claims, the determination of Nicaragua's CA1 and related claims require the Court to adjudicate upon alleged breaches of international humanitarian law by Israel, and Israel's rights and obligations would thus constitute the very subject-matter of the judgment sought by Nicaragua. Again, the *Monetary Gold* principle applies and the Court must decline to hear those claims in the absence of Israel.

(c) Nicaragua's self-determination and non-recognition claims, and the claim of unlawful assistance to Israel's racial discrimination, segregation and apartheid

The self-determination and non-recognition claims

176. Nicaragua contends that Germany has breached its conventional and customary law obligations by providing aid and particularly military equipment to Israel that is used to deny the right of self-determination of the Palestinian people.²⁶³ The claim is plainly predicated upon a prior finding on whether Israel is denying the Palestinian people their right of self-determination.
177. The *East Timor* case is directly on point. Portugal contended that Australia had failed to observe the obligation to respect the rights of the people of East Timor to self-determination. In a well-known passage, the Court held:

“... Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (...); it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the

²⁶³ Memorial, para. 484(7).

rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.”²⁶⁴

178. The same is true in this case.
179. As to Nicaragua’s claim concerning an alleged breach of obligations of non-recognition²⁶⁵ and its reliance on Article 41(2) of the ILC’s Articles on State Responsibility,²⁶⁶ the same basic points apply. Pursuant to Article 41(2): “No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.” As follows from this wording, any finding of breach must be predicated on the established existence of the prior “serious breach”. Further, the Commentary states that Article 41 is to be read in conjunction with Article 16 (as would be expected)²⁶⁷ and it must again be the case that, as with Article 16 (see sub-section (a) above), the underlying wrongful conduct must have been “actually committed by the aided or assisted state”.²⁶⁸
180. The only question could be whether, with respect to the self-determination and recognition claims, Nicaragua can bypass the *Monetary Gold* principle by invocation of the Court’s past Advisory Opinions (it cannot). This is considered in Section C below.

Racial discrimination, segregation and apartheid

181. Nicaragua contends that “there is ample and considerable evidence from the past twenty years that Israel’s treatment of the Palestinian people is racially discriminatory and constitutes both racial segregation and apartheid”.²⁶⁹ On this basis, it alleges that

²⁶⁴ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; see also p. 104, para. 33.

²⁶⁵ Memorial, para. 484(8).

²⁶⁶ Memorial, para. 347.

²⁶⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 41, para. 11.

²⁶⁸ *Ibid.*, Commentary to article 16, para. 5.

²⁶⁹ Memorial, para. 397.

Germany “has breached and continues to breach international law by providing unlawful assistance to Israel’s commission of racial discrimination, segregation and apartheid against the Palestinian people”.²⁷⁰

182. The same points apply as with respect to all Nicaragua’s aiding and assistance claims.

C. Nicaragua’s Attempt to Bypass the Monetary Gold Principle

183. Nicaragua’s case raises a very important issue of principle in its contention that the *Monetary Gold* principle is not engaged because the Court has already made the required determinations concerning Israel’s conduct in the *Wall* and *Policies and Practices of Israel in the Occupied Palestinian Territory* advisory opinions. There are three interrelated reasons as to why Nicaragua’s contention fails.

- (i) *First*, the nature and function of the Court’s advisory opinion jurisdiction is very different to the nature and function of its contentious jurisdiction. The consent of directly impugned States is essential to the latter, and that requirement of consent cannot be bypassed by reference to views expressed by the Court whilst exercising its advisory jurisdiction. If it were otherwise, the requirement of consent would be rendered nugatory.
- (ii) *Second*, as a result of its very different nature and function, where the Court is exercising its advisory jurisdiction, it does not make determinations of fact suitable for transposition into contentious proceedings. On a basic procedural level, it does not receive or hear detailed submissions on disputed facts from disputing parties, it does not hear evidence being tested by cross-examination. More generally, the Court in an advisory opinion is only considering and assessing facts to the limited extent necessary to answer the specific request before it.
- (iii) *Third*, it follows that the consideration of facts in any advisory opinion will be carefully tailored to the specific task then before the Court. As the Court took care to explain in the *Policies and Practices of Israel* advisory opinion:

²⁷⁰ Memorial, para. 484(9).

“the Court considers that, in its request, the General Assembly has not sought from the Court a detailed factual determination of Israel’s policies and practices. The object of the questions posed by the General Assembly to the Court is the legal characterization by the Court of Israel’s policies and practices. Therefore, in order to give an advisory opinion in this case, it is not necessary for the Court to make findings of fact with regard to specific incidents allegedly in violation of international law. The Court need only establish the main features of Israel’s policies and practices and, on that basis, assess the conformity of these policies and practices with international law.”²⁷¹

A contentious case that turns on specific determinations of breach by Israel of multiple norms does require detailed factual determinations and entails more than legal characterisation. Moreover, the current contentious case is, as identified by the first lines of Nicaragua’s Application, concerned with “the serious breaches of peremptory norms of international law ... taking place in the Occupied Palestinian Territory (OPT) *and particularly the Gaza strip*, and the obligations derived therefrom on the international community”.²⁷² The legality of Israel’s actions in the Gaza strip is not considered in the *Policies and Practices of Israel* advisory opinion (nor of course in the *Wall* case). It follows that, at best, the two advisory opinions could only be of significance to those parts of Nicaragua’s case not concerning events in Gaza post-October 2023.

184. These points are developed in greater detail below.

1. The well-established differences in the Court’s contentious and advisory jurisdiction

185. In the specific context of disputes between Israel and Palestine, the Court has emphasised the difference between the nature and function of its contentious and advisory jurisdictions. Thus, as the Court explained in the *Wall* case by reference to its longstanding jurisprudence, it is because of this difference that the Court has jurisdiction

²⁷¹ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024 (at <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>), para. 77.

²⁷² Application, para. 2 (emphasis added).

to give an advisory opinion regardless of the question of consent and regardless of the existence of radically divergent positions as between Israel and Palestine:

“The Court observes that the lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

‘The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.’”²⁷³

186. As the Court identifies in clear terms, consent has no bearing on the Court’s jurisdiction to give an advisory opinion.²⁷⁴ The position in contentious cases such as the present case is of course quite different, and here the *Monetary Gold* principle exists to protect “the well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent”.²⁷⁵ As this reflects, consent is the essential basis for the exercise of the Court’s jurisdiction in contentious cases. It would be both contradictory and destabilising if the fundamental requirement of consent in contentious cases could be bypassed by reference to past advisory proceedings in which consent was an irrelevance precisely because such

²⁷³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, pp. 157–158, para. 47, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 7.

²⁷⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, pp. 157–158, para. 47.

²⁷⁵ *East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995, p. 104, para. 34, quoting *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment*, I.C.J. Reports 1954, p. 32.

proceedings were only of an advisory character and therefore were of a different nature and served a different function. The result would be that findings made in an advisory opinion could no longer be characterised as “only of an advisory character” and of “no binding force”.

187. Moreover, the central defect that the *Monetary Gold* principle protects against – the absence of consent to exercise of the Court’s jurisdiction in contentious proceedings – would remain: Israel has not consented to the determination of its rights and obligations by the Court.

2. The absence of determinations of fact suitable for transposition into contentious proceedings

188. The Court may of course make findings of fact in order to give an advisory opinion. As stated in the *Policies and Practices of Israel* advisory opinion:

“In its Opinion concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (*First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72), and in its Opinion on *Western Sahara*, the Court made it clear that what is decisive in these circumstances is whether the Court has before it sufficient information “to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46). The discretion of the Court is exercised in order to protect the integrity of its judicial function and it is for the Court to assess, in each case, the nature and extent of the information required for it to perform its judicial function.”²⁷⁶

189. The Court thus reaches judicial conclusions, but this remains within the specific confines of what is necessary to give the opinion. It is not concerned with having before it “the nature and extent of the information required for it to perform” any different judicial function, i.e. the making of determinations of fact necessary for a judgment in

²⁷⁶ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024 (at <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>), para. 46.

a contentious case that is binding. Thus although it may, as in the case of the 2024 advisory opinion, have before it information from a large number of states and a voluminous dossier from the United Nations, as a general matter it does not need to – and does not – receive or hear detailed submissions on disputed facts or, for example, hear evidence being tested by cross-examination.

3. The limited nature of the findings reached in the two advisory opinions relied on by Nicaragua

190. As already noted, the Court emphasised in its 2024 advisory opinion that it was not making “a detailed factual determination of Israel’s policies and practices”, and it found that “it is not necessary for the Court to make findings of fact with regard to specific incidents allegedly in violation of international law. The Court need only establish the main features of Israel’s policies and practices and, on that basis, assess the conformity of these policies and practices with international law.”²⁷⁷
191. But even as to these “main features”, the Court’s findings were critically limited so far as concerns the current case: the Court considered that “the policies and practices contemplated by the request of the General Assembly do not include conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023”.²⁷⁸ Yet Nicaragua expressly identifies that conduct as a focus of the current case,²⁷⁹ as is very obvious so far as concerns the genocide claim and the more recent allegations within the CA1 and related claims.²⁸⁰ To similar effect, the *Wall* opinion is focused on a matter – the legality of / legal consequences with respect to the Wall – which is at most of tangential reference to the current claim.
192. The Court will moreover recall that, in the *East Timor* case, Portugal sought to defeat application of the Monetary Gold principle by relying on certain resolutions of the UN General Assembly and in particular the Security Council. These were said to establish

²⁷⁷ *Ibid.*, para. 77.

²⁷⁸ *Ibid.*, para. 81.

²⁷⁹ Application, para. 2. Emphasis added.

²⁸⁰ Cf. e.g. the focus on Gaza in Chapter 3 of the Memorial in particular at pp. 72–130 in the section headed “Germany’s delivery of arms and of military equipment used in the Gaza strip and elsewhere in the Palestinian Occupied Territory”.

the unlawful nature of the acts of Indonesia and hence the Court had the benefit of a series of “givens” such that it was not required to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the territory.²⁸¹

193. The Court did not decide the issues of principle concerning whether the resolutions were binding in nature and whether the *Monetary Gold* principle could be defeated in this way, but instead focused very closely on the wording of the resolutions relied on, finding that they did not go so far as Portugal claimed. To similar effect, to the extent that the two advisory opinions could play any role in terms of displacing the need for determinations of fact and law in the current case with respect to Nicaragua’s allegations of wrongful conduct by Israel (which role Germany does not accept), it would be essential to examine with great care the findings made and their relevance to the current claim. This is all the more so given that the current claim, unlike either advisory opinion, is “particularly” concerned with the events in Gaza from October 2023.

194. Notwithstanding Nicaragua’s attempts to blur the lines, Israel is and remains an essential and inevitable target of Nicaragua’s claims. As set out in the preceding sections, all of Nicaragua’s major claims would require the Court to adjudicate upon the lawfulness of Israel’s conduct in the absence of its consent or participation. In line with its well-developed jurisprudence, the Court, even if it were to find that it possesses jurisdiction, the claims set out in paragraph 484(1)-(9) of Nicaragua’s Memorial would be inadmissible.

²⁸¹ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, pp. 103–104, paras 30–33.

Chapter 5

Submissions

195. In light of the foregoing considerations, Germany requests the Court to uphold its preliminary objections, and to adjudge and declare:

- (a) that it has no jurisdiction to entertain any of Nicaragua's claims;
- (b) further or in the alternative, that it has no jurisdiction over Nicaragua's claims set out in para. 484(4)-(9) of the Memorial; and
- (c) that Nicaragua's claims set out in para. 484(1)-(9) of the Memorial are inadmissible.

Respectfully submitted,



Tania von Uslar-Gleichen

Agent of the Government of Germany

Certification

I hereby certify that the annexes filed with these Preliminary Objections are true copies of the documents referred to and that the translations provided are accurate.

Berlin, 21 October 2025



Tania von Uslar-Gleichen

Agent of the Government of Germany

List of Annexes

- Annex 1 Government of Nicaragua, ‘Nicaragua and Palestine’, Press Release, 10 April 2025 (<https://tortillaconsal.com/bitacora/node/6396>)
- Annex 2 Government of Nicaragua, ‘Nicaragua with Palestine Always!’, Press Release, 4 April 2025 (<https://www.tortillaconsal.com/bitacora/node/6363>)
- Annex 3 Cover email forwarding Nicaragua’s Note Verbale, 1 February 2024
- Annex 4 Note Verbale from the Embassy of Nicaragua in Berlin to the German Federal Foreign Office, 1 February 2024
- Annex 5 James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) (extracts)
- Annex 6 Pierre d’Argent, ‘Les obligations internationales’, *Recueil des cours de l’Académie de La Haye*, vol. 417 (2021) (extracts)
- Annex 7 Samantha Besson, *Due Diligence in International Law* (Brill Nijhoff 2023) (extracts)
- Annex 8 Christian J. Tams et al., *The Genocide Convention. Article-by-Article Commentary* (2nd edn., Beck/Hart 2024) (extracts)

Annex 1

Government of Nicaragua, 'Nicaragua and Palestine'
Press Release, 10 April 2025



Tortilla con Sal

Un enfoque diferente - Nicaragua - A different focus

Nicaragua and Palestine

Enviado por tortilla el Jue, 10/04/2025 - 11:34

Gobierno de Reconciliación y Unidad Nacional Unida Nicaragua Triunfa



PRESS RELEASE

NICARAGUA AND PALESTINE

The Government of Reconciliation and National Unity informs the People of Nicaragua and the International Community that on April 1st 2025, Nicaragua had decided to discontinue the proceedings filed before the International Court of Justice relating to the very serious violations of the Rights of the Palestinian People and State. This decision was due to the high financial cost involved for a developing country with the economic

restrictions that Nicaragua suffers, to be able to continue with these judicial procedures.

However, over the last week there has been an upsurge in violations against the Palestinian People and even against international humanitarian services, leaving totally evident the violation of all norms of international law by Israel and especially the total complicity of some Western countries, which have decided to continue their political, economic and military support to those responsible for these crimes.

In view of the above, making a great effort, Nicaragua has decided to notify the International Court of Justice that it wishes to continue with its judicial procedures over the violations of the Rights of the Palestinian People.

This decision has also been reached taking into account offers of help and collaboration which have been received so as to be able to continue with these procedures before the International Court.

The Government of Reconciliation and National Unity reaffirms its steadfast commitment to the rule of law at the International level and to the peaceful settlement of disputes between States.

Managua, April 10th 2025
Government of Reconciliation and National
Unity
Republic of Nicaragua

Annex 2

Government of Nicaragua, 'Nicaragua with Palestine Always!'
Press Release, 4 April 2025



Tortilla con Sal

Un enfoque diferente - Nicaragua - A different focus

Nicaragua With Palestine Always !

Enviado por tortilla el Vie, 04/04/2025 - 18:45

Gobierno de Reconciliación y Unidad Nacional Unida Nicaragua Triunfa



PRESS RELEASE

NICARAGUA WITH PALESTINE ALWAYS !

The Government of Reconciliation and National Unity informs the People of Nicaragua and the International Community of its decision to discontinue the proceedings filed before the International Court of Justice related to the extremely serious violations of the Rights of the Palestinian People and State.

This decision is due to the high financial cost for a developing country, and given the economic restrictions Nicaragua faces, in order to continue these judicial proceedings. Nevertheless, Nicaragua clarifies that it will continue to support the Palestinian People and State in all other areas within its reach and will not cease to fulfill its international obligations in defense of the Brotherly Palestinian People.

Nicaragua also reminds the States with greater resources that international judicial channels remain open to demand respect for Palestinian rights.

Likewise, Nicaragua wishes to thank all the collaborators who extended their assistance in these proceedings before the International Court.

The Government of Reconciliation and National Unity reaffirms its firm commitment to the rule of law at the international level and the peaceful settlement of disputes between States.

Managua, April 4, 2025
Government of Reconciliation and National
Unity
Republic of Nicaragua

Annex 3

Cover email forwarding Nicaragua's Note Verbale, 1 February 2024

Cover email. 1 February 2024 (**emphasis** added)

From: Nicaragua Mission <nicaraguaunny@yahoo.com>
To: info@new-york-un.diplo.de <info@new-york-un.diplo.de>
Cc: Embajador JH <nicaraguaun@yahoo.com>; Eleane Pichardo Urbina <epichardo16@yahoo.com>; Alina J. Arguello <alina.arguello@gmail.com>
Sent: Thursday, February 1, 2024 at 07:17:38 PM EST
Subject: MINIC-MIS-071-02-2024 Permanent Mission of Germany to the United Nations

Dear Colleagues, Please kindly acknowledge receipt of this email and its attachments.

The Permanent Mission of Nicaragua to the United Nations presents its compliments to the Permanent Mission of Germany to the United Nations, and has the honour to attach herewith Note MRE/VM-AMM/0023/02/2024, from the Ministry of Foreign Affairs of the Republic of Nicaragua, addressed to the German Federal Foreign Office.

The Permanent Mission of Nicaragua to the United Nations kindly requests the Permanent Mission of Germany to the United Nations to convey this Note to its destination.

The Permanent Mission of Nicaragua to the United Nations avails itself of this opportunity to renew to the Permanent Mission of Germany to the United Nations, the assurances of its highest consideration.

***Permanent Mission of Nicaragua
to the United Nations***

Annex 4

Note Verbale from the Embassy of Nicaragua in Berlin to the
German Federal Foreign Office, 1 February 2024



EMBAJADA DE NICARAGUA
REPÚBLICA FEDERAL DE ALEMANIA

Auswärtiges Amt		703
Eing. 06. FEB. 2024		701
Tg.Nr. 318.1338		AM
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Auswärtiges Amt 4	DE:
06. Feb. 2024	Anl.: ✓
AZ:	

info@embanic.de

ENA 07/01/24

Verbalnote

Die Botschaft der Republik Nicaragua begrüßt hochachtungsvoll das Auswärtige Amt – Ref. 703 – und erlaubt sich die Rückgabe der Protokollausweis von:

Frau Tatiana Daniela García Silva, Botschafterin, Protokollausweis Nr. AP0236868, auf Grund ihrer Ausreise und der Schließung der nicaraguanischen Botschaft in der Bundesrepublik Deutschland.

Der Schlüssel zum Briefkasten Nr. 119 des Auswärtigen Amtes ist leider während des Umzugs verloren gegangen, so dass wir ihn nicht mehr zustellen können. Falls es gefunden wird, werden wir es Ihnen so schnell wie möglich zusenden.

Die Botschaft der Republik Nicaragua benutzt diesen Anlaß das Auswärtige Amt – Referat 703 - erneut seiner ausgezeichneten Hochachtung und Wertschätzung zu versichern.

Berlin, den 01. Februar 2024



An das
Auswärtige Amt
- Referat 703 -
BERLIN

Translation of Note Verbale from the Embassy of the Republic of Nicaragua in Berlin to the German Federal Foreign Office of 1 February 2024

[Stamp reads:

Federal Foreign Office

Received: 6 February 2024

Diary number: 3181338

Attachment: 1PA; Copy: -]

Note Verbale

The Embassy of the Republic of Nicaragua presents its compliments to the Federal Foreign Office — Division 703 — and takes the liberty of returning the protocol pass of:

Ms. Tatiana Daniela Garcia Silva, Ambassador, protocol pass no. AP0236868, due to her departure and the closure of the Nicaraguan Embassy in the Federal Republic of Germany.

Unfortunately, the key to letterbox no. 119 at the Ministry of Foreign Affairs was lost during the move, so we are no longer able to deliver it. If it is found, we will send it to you as soon as possible.

The Embassy of the Republic of Nicaragua avails itself of this opportunity to renew to the Federal Foreign Office - Division 703 - the assurances of its highest consideration.

Berlin, February 1st 2024

To the
Federal Foreign Office
- Division 703 -
B E R L I N

Annex 5

James Crawford, *State Responsibility: The General Part*
(Cambridge University Press 2013) (extracts)

State Responsibility

The General Part

James Crawford



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And louder sing
For every tatter in its mortal dress.

W. B. Yeats, 'Sailing to Byzantium'.

latter prompted Mexico to request an interpretation of the *Avena* judgment under Article 60 of the ICJ Statute⁵⁰ on the basis that a dispute had arisen between the parties as to the meaning and scope of the relevant part of the *dispositif*, namely the meaning of the obligation of result contained in paragraph 153(9) of the *Avena* judgment. The United States resisted the application, on the basis that there was in reality no disagreement between the parties – both agreed that paragraph 153(9) of *Avena* imposed an obligation of result on the United States. What they did *not* agree on, the argument ran, was whether the obligation had been breached, a determination outside the jurisdiction of the Court in the context of the interpretation of a prior judgment.

Despite making a determination at the provisional measures stage that a dispute existed between the parties,⁵¹ the Court in *Avena Interpretation* ultimately accepted the US argument and held that an interpretation could not be given. It did, however, give an indication – albeit tangential – as to the content of the obligation of result imposed on the United States by the original *Avena* judgment. It said:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute.⁵²

7.4.2 *Due diligence and obligations of prevention*

The Draft Articles continued the analysis of different kinds of obligations by making special provision for obligations of prevention. Draft Article 23 provided as follows:

Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there

⁵⁰ Further: Zimmerman and Thienel, in Zimmerman, Tomuschat and Oellers-Frahm (2006) 1275.

⁵¹ *Avena Interpretation*, Provisional Measures, ICJ Rep. 2008 p. 331, 326.

⁵² *Ibid.*

is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

The commentary dealt with obligations of prevention in the following way:

The characteristic feature ... is precisely the notion of an event, i.e., an act of man or of nature which, as such, involves no action by the State ... [I]f the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation ... [T]he non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved.⁵³

The commentary went on to assert that in the cases of obligations of prevention, the mere failure to prevent is not a sufficient condition for responsibility, although it is a necessary one: 'The State can obviously be required only to act in such a way that the possibility of the event is obstructed, that is, to frustrate the occurrence of the event as far as lies within its power.'⁵⁴

Thus obligations of prevention are not warranties or guarantees that an event will not occur; rather, they are inherently obligations to take all reasonable or necessary measures to ensure that the event does not occur. Although it has been said that an obligation of prevention 'is essentially regarded as a duty of due diligence',⁵⁵ when it comes to assessing breach, obligations of prevention may be distinguished from obligations of due diligence in the ordinary sense. A true obligation of prevention is not breached unless the apprehended event occurs,⁵⁶ whereas an obligation of due diligence would be breached by a failure to exercise due diligence, even if the apprehended result did not (or not yet) occur.⁵⁷ Thus obligations of due diligence are relative, not absolute.⁵⁸ Despite the close relationship between obligations of prevention

⁵³ Draft Articles Commentary, Art. 23, §34. ⁵⁴ *Ibid.*, Art. 23, §6.

⁵⁵ Rao, Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (prevention of transboundary damage from hazardous activities), ILC Ybk 1999/I, 116.

⁵⁶ ARSIWA, Art. 14(3) provides that the breach of an international obligation requiring a state to prevent a given event 'occurs *when the event occurs* ...' (emphasis added).

⁵⁷ See Draft Articles Commentary, Art. 23, §4 n. 6. On due diligence see further e.g. McCaffrey, Fourth Report on the Law of the Non-navigational Uses of International Watercourses, ILC Ybk 1988/II(1), 237–42; Pisillo-Mazzeschi, (1992) 35 GYIL 9; Rao, Second Report, ILC Ybk 1999/I.

⁵⁸ Economides (2010), 376.

and those of due diligence (which also usually apply in the context of prevention),⁵⁹ the latter were omitted from Draft Article 23.

On one view Draft Article 23 was devoted to a particular obligation of result, ‘namely the obligation for a state to prevent, by the means of its own choice, the occurrence of a given event’.⁶⁰ On a traditional categorization, however, the provision could also be construed as concerning an obligation of means, and thus once again the traditional conduct/result distinction was not clearly rendered in the Draft Articles.⁶¹ It is tempting to analyse obligations of prevention as ‘negative’ obligations of result. For such obligations, the result in question is not the occurrence of something but its non-occurrence. On the other hand, whether this is so depends on the interpretation of the particular primary rule. As an example of an obligation of prevention, the Draft Articles Commentary cites Article 22(2) of the Vienna Convention on Diplomatic Relations (VCDR), which provides:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.⁶²

According to the commentary, this is an obligation ‘whose breach similarly takes place only if that result [i.e. intrusion, damage or disturbance] can be seen not to have been ensured’.⁶³

Although there are ‘pure’ obligations of prevention in the sense explained in the Draft Articles Commentary, it is clear that VCDR Article 22(2)

⁵⁹ In particular, obligations of due diligence are ‘the standard basis for the protection of the environment from harm’: Commentary to the ILC’s Articles on Prevention of Transboundary Harm from Hazardous Activities, Art. 3, ILC Ybk 2001/II(2), 138; they are also particularly relevant in connection with protection of foreign nationals and their property, and protection of diplomatic and consular agents. For examples of due diligence obligations see e.g. Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, UN Doc. A/51/229 (not yet in force), Arts. 7(1), 21(2), 22; Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, Art. 22(2); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 12 April 2011, CETS 210, Art. 5(2). In the human rights context see also the UN Declaration on Elimination of Violence against Women, GA Res. 48/104, 20 December 1993, Art. 4(c).

⁶⁰ Economides (2010), 376. See also Hafner and Buffard, in Crawford, Pellet and Olleson (2010) 521, 522.

⁶¹ Economides (2010), 376.

⁶² VCDR, 18 April 1961, 500 UNTS 95. See Draft Articles Commentary, Art. 23, §§4, 12 n. 19.

⁶³ *Ibid.*, §12. According to the commentary, diplomatic protests made at an earlier time are concerned with securing performance of the obligation and do not raise issues of responsibility: *ibid.*

is not such an obligation. It is an obligation of conduct. No doubt it does not involve a warranty or guarantee against intrusion, but it is a continuing obligation on the host state to take all appropriate steps to protect the mission, which becomes more demanding if for any reason the mission is invaded or disturbed. In the *Tehran Hostages* case, the International Court referred to these and other provisions of the VCDR as imposing on the receiving state ‘the most categorical obligations . . . to take appropriate steps to ensure the protection of’ the US missions and their personnel.⁶⁴ It went on to hold that, through its inaction in the face of various threats from the militants,

the Iranian Government failed altogether to take any ‘appropriate steps’ to protect the premises, staff and archives of the United States mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion . . . [I]n the opinion of the Court . . . the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means . . . This inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations to the United States under the provisions of article 22, paragraph 2 . . .⁶⁵

Moreover, the interpretation of VCDR Article 22(2) favoured in the Draft Articles Commentary is undesirable in principle; states should not be able to neglect that ‘special duty’ on the basis that intrusion, damage or disturbance has not yet occurred and may never occur.

A better example of an obligation of prevention, also mentioned in the commentary to Draft Article 23,⁶⁶ is the principle enunciated in the *Trail Smelter* arbitration, that a state should use its best efforts to prevent cross-border damage by pollution to a neighbouring state. The commentary goes on to assert that, ‘[e]ven in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act’.⁶⁷ This is true if the situation which has to be prevented is not defined in terms of the occurrence of damage, but it *may* be so defined. States can assume

⁶⁴ *Tehran Hostages*, ICJ Rep. 1980 p. 3, 30.

⁶⁵ *Ibid.*, 31–2. The Court concluded that the Iranian conduct ‘clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises’ (*ibid.*, 35–6). See also Rosenne (1985), 50, 67. This point was also made by Germany in its comments on Draft Articles, Art. 20: UN Doc. A/CN.4/488, 67.

⁶⁶ Draft Articles Commentary, Art. 23, §11. For the decision see (1938 and 1941) 3 RIAA 1905.

⁶⁷ Draft Articles Commentary, Art. 23, §5.

obligations to prevent damage to particular persons or to the territory of other states, and it may be that on the proper interpretation of the particular obligation it is the occurrence of the damage which triggers responsibility, rather than the failure to take steps to prevent it. If responsibility is engaged by the failure to act in and of itself, regardless of the outcome, then the obligation is better categorized as an obligation of due diligence. But not all obligations directed towards preventing an event from occurring are of this kind, and it was not intended to be the function of the ARSIWA to force all such obligations into a single form.

On the whole, Draft Article 23 and its commentary were problematic for their confusing treatment of obligations of prevention. The reaction from governments was lukewarm at best; the United Kingdom felt that the provision was uncontroversial but unnecessary, whereas France and others observed that once again the provision related more to primary obligations than secondary rules and had no place in the Articles.⁶⁸ In the end the ILC decided to delete Draft Article 23, and the final adopted text of the ARSIWA only mentions obligations of prevention in the context of the temporal elements of breach.⁶⁹

In the *Bosnian Genocide* case, the International Court had to consider the specific obligation of prevention in Article I of the Genocide Convention.⁷⁰ The Court was careful to observe that the duty to prevent varies from one instrument to another, depending on the primary rules, and that it was not establishing a general jurisprudence applicable to all obligations of prevention.⁷¹ Nonetheless, its comments on prevention are of interest for present purposes. First, the Court described the obligation to prevent genocide as an obligation of conduct:

[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.

⁶⁸ See Crawford, Second Report, 27.

⁶⁹ ARSIWA, Art. 14(3); see further ARSIWA Commentary, Art. 14, §14. Further: [Chapter 8](#).

⁷⁰ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

⁷¹ *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 220–1.

In this area the notion of ‘due diligence’, which calls for an assessment *in concreto*, is of critical importance.⁷²

The Court’s formulation of the obligation to prevent genocide as an obligation of conduct reinforces the decision to delete Draft Article 23 from ARSIWA, and is preferable to the view that obligations of prevention are obligations of result.⁷³ Further, the Court’s position is consistent with the traditional conception of obligations of conduct as best efforts measures,⁷⁴ as well as with the position on obligations of prevention taken by the ILC in the context of its work on international liability for injurious consequences arising out of acts not prohibited by international law.⁷⁵

The decision is also noteworthy for its conclusion that a state can only be held responsible for breaching the obligation to prevent genocide if genocide was actually committed, which distinguishes it from an obligation of due diligence:

It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs ... [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. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.⁷⁶

Thus, although the Court acknowledged that due diligence is an important factor in discharging the obligation of prevention, the latter cannot be categorized as an obligation of due diligence *per se*, because

⁷² *Ibid.*, 221.

⁷³ See also Economides (2010), 378. Cf. Hafner and Buffard (2010), 521–2.

⁷⁴ The Court later described the obligations of prevention in the Genocide Convention as ‘positive obligations, to do their best to ensure that such acts do not occur’; *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 223.

⁷⁵ Rao, Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (prevention of transboundary damage from hazardous activities), ILC Ybk 1999/I, 116.

⁷⁶ *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 221–2.

12 Ancillary and secondary responsibility

12.1 Responsibility of states for the conduct of other states and international organizations

12.1.1 *The scope of ancillary or secondary responsibility*

In accordance with the general principle stated in ARSIWA Article 2, state responsibility arises when conduct attributable to a state breaches an international obligation of that state. But there may be cases where conduct of one state, not acting as an organ or agent of another state, is nonetheless chargeable to the latter state, even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One of the ARSIWA seeks to define the exceptional cases where this is so.

Three situations are covered in Chapter IV. ARSIWA Article 16 deals with what in national law would be termed ‘complicity’, that is, where one state provides aid or assistance to another state, thereby facilitating the commission of a wrongful act by the latter. ARSIWA Article 17 deals with cases where one state is responsible for the internationally wrongful act of another state because it has assumed powers of direction or control over the latter, for example by treaty or as a result of belligerent occupation of the latter’s territory. ARSIWA Article 18 deals with the extreme case where one state deliberately coerces another into committing an act which is or (but for the coercion) would be an internationally wrongful act on the part of the coerced state.

In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting state, and is (or but for the

coercion, would be¹) a breach of that state's international obligations. The 'implication' of the second state in that breach arises from the special circumstance of its willing assistance in, its direction or control over, or its coercion of the conduct of the acting state. But there are also important differences between the three cases. Under ARSIWA Article 16, the primary wrongdoer is the acting state and the assisting state has a supporting role. By contrast, in the case of coercion under ARSIWA Article 18, the coercing state is the *fons et origo* of the conduct, and the coerced state is its instrument. As formulated, ARSIWA Article 17 deals with cases where direction or control has actually been exercised by the dominant state, with the subordinate state merely following orders.

With the approval of the Draft Articles of the Responsibility of International Organizations (DARIO)² by the ILC, an additional layer of complexity has been added: DARIO Part V deals with analogous situations in which a state's ancillary or secondary responsibility is generated by virtue of the acts of an international organization.³ DARIO Article 58 is the equivalent to ARSIWA Article 16, and considers situations of complicity as between a state and international organization. DARIO Article 59 is the analogue of ARSIWA Article 17, and deals with situations in which a state directs or controls an international organization. Finally, DARIO Article 60, like ARSIWA Article 18, addresses the coercion of an international organization by a state.

The DARIO, however, deal with two additional situations which, strictly speaking, do not generate ancillary or secondary responsibility for states, but which it is nonetheless convenient to address in this chapter. DARIO Article 61 preserves state responsibility in cases where a state seeks to circumvent its international obligations through the use of an international organization as a buffer or cat's paw. DARIO Article 62 deals with the individual responsibility of state members of an international organization more generally, and describes two situations in which members may be held so responsible notwithstanding the separate legal personality of the organization.

¹ This qualification is necessary because, if a state really has been coerced, the wrongfulness of its act may be precluded by *force majeure*. Further: [Chapter 9](#).

² ILC Report 2011, UN Doc. A/66/10, Ch. V. For an overview of the DARIO see Pronto, (2011) 36 S. Af. YIL 94.

³ This gap was deliberately left in the ARSIWA, Art. 57 stating that the articles were 'without prejudice to any question of the responsibility . . . of any State for the conduct of an international organization'.

12.1.2 *The standards of direction and control and coercion*

Leaving aside for now the notion of aid and assistance as provided for in ARSIWA Article 16, the concept that would later underpin ARSIWA Articles 17 and 18 (as well as DARIO Articles 59 and 60) was known in Ago's shorthand as 'indirect responsibility'.⁴ Since the beginning of the twentieth century, however, the notion demonstrated a marked theoretical inconsistency, switching between the so-called 'representation theory' on the one hand, and the 'control theory' on the other, with the latter eventually emerging as the principal conceptual basis for the relevant provisions.⁵

The representation theory of indirect responsibility was spelled out by Anzilotti⁶ in 1902. In brief, it posited that a state which was responsible for the international representation of another state in foreign affairs could, as a consequence, be held internationally responsible for the delicts of the representee. His justification for the position was as follows:

When a country has accepted the supremacy of another State, but without being completely absorbed into it, it retains its international personality and continues to be a separate subject of international law in its relations with other States; the rules of international law prohibiting any act injurious to another State then apply to it as to any other person under international law: it is therefore capable of engaging in an activity contrary to the duties imposed on it by international law, but, as it cannot enter into relations with the injured or offended State, the latter must address itself to the State which represents it, and the duty to redress the damaged caused rests with that State.⁷

Anzilotti's position attracted support for some time.⁸ It was incorporated into the 1929 Harvard Research Draft on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners,⁹ which provided in Article 3 as follows:

A State is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions ... For the purpose of this article, a dominion, a colony, a dependency, a protectorate or a community under

⁴ ILC Ybk 1979/II(2), 4. ⁵ *Ibid.*, 4–26.

⁶ See e.g. Anzilotti, (1902); Anzilotti (1906); Anzilotti, *Corso di diritto internazionale* (3rd edn, 1928), 473.

⁷ Anzilotti (1906), 301.

⁸ See e.g. Borchard (1916), 201–2; Fauchille, 1 *Traité de droit international public* (8th edn, 1922), 523; Verdross, (1929) 30 *Hague Recueil* 271, 465. It was also reflected in the views of the Institut de droit international: (1927) 33 *Ann. de l'Inst.* 488.

⁹ (1929) 23 *AJIL Spec. Supp.* 133. Further: Crawford and Grant (2007).

mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

The position also influenced the jurisprudence of the Permanent Court of International Justice, which in *Mavrommatis Palestine Concessions* remarked:

The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it.¹⁰

Despite early support for Anzilotti's position, it came under critical scrutiny in the 1930s when it was pointed out that the mere fact of representation did not prevent injured parties from addressing claims to the state so represented. Ago was subsequently to note:

The mere existence of the international representation relationship between [State] A and [State] B has no consequences for third States except that their relations with the represented State are conducted through the representing State: there is nothing to prevent the represented State from making such reparation through the representing State.¹¹

The replacement for the representative theory was the control theory, which held that responsibility can only be attributed indirectly where one state acts so as to compromise the decision-making capacity of another state.¹² Although present in the commentaries of the late nineteenth century,¹³ it was developed further in the twentieth, with Eagleton remarking:

[I]f one State controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting State for the subordinating State is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left, to the respondent State.¹⁴

As Ago pointed out,¹⁵ Eagleton's development of control theory presented a far more credible basis for responsibility than the simple formal

¹⁰ *Mavrommatis Palestine Concessions*, (1924) PCIJ Ser. A No. 2, 23.

¹¹ ILC Ybk 1979/II(1), 7. Earlier: Ago, *La responsabilità indiretta nel diritto internazionale* (1934), 30ff. On the failed attempt to refocus the representative theory by Verdross, see ILC Ybk 1979/II(2), 7–9.

¹² ILC Ybk 1979/II(2), 13. ¹³ See e.g. de Martens, 1 *Traité de droit international* (1883), 379.

¹⁴ Eagleton (1928), 43. ¹⁵ ILC Ybk 1979/II(2), 13.

question of representation. This was to be Ago's central contribution to the question: to classify the various forms of relationship that might compromise a state's freedom to decide to such an extent that responsibility could be imputed to another. These would eventually evolve into the recognized standards of direction and control and outright coercion.

12.2 Aid or assistance in the commission of a breach¹⁶

ARSIWA Article 16 provides as follows:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Literally interpreted, ARSIWA Article 16 posits a rather extensive principle of responsibility of one state for the acts of another. It treats as wrongful any aid or assistance rendered for the commission of an internationally wrongful act carried out by the second state – in other words, it seeks to regulate *complicity* and is often referred to by this rubric,¹⁷ although the term itself does not appear in order to prevent the drawing of parallels with municipal criminal law.¹⁸ Unlike its predecessor, Draft Article 27, Article 16 stipulates a 'mental element' which must be fulfilled if international responsibility is to accrue: the state must render the aid or assistance with knowledge of the circumstances of the internationally wrongful act. Significantly, it is distinct from the concept of joint responsibility as developed in ARSIWA Article 47, and represents an autonomous internationally wrongful act on its own.¹⁹

¹⁶ Generally: Brownlie (1983), 189–92; Quigley (1986); Noyes and Smith (1988); Graefrath (1996); Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (1990); Lowe, (2001) 101 KGZ 1; Dominicé (2010); Aust (2011).

¹⁷ E.g. Aust (2011). See also the remarks of Graefrath (1996), 371: the term complicity so far has been used in international relations in the political field. It has a pejorative connotation and denounces an act as illegal because it is part of another illegal act or in support of a crime. It always designates a form of participation and derives the moral condemnation from the illegality of the principal act.

¹⁸ Graefrath (1996), 370–1.

¹⁹ *Ibid.*, 371–2. Further: ILC Ybk 1978/II(2), 104; ARSIWA Commentary, Art. 16, §1.

12.2.1 ILC development and customary status

ARSIWA Article 16 had a difficult birth, and multiple iterations of the provision were presented to the ILC over its twenty-five-year gestation.²⁰ Its most concrete iteration prior to the final version was Draft Article 27, which provided on first reading:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute a breach of an international obligation.

This wording proved controversial, and many states registered their disapproval. Perhaps the most strident was Switzerland, which stated that Draft Article 27 ‘had no basis in positive law’ and should be deleted.²¹ Other states – notably Germany²² and the United States²³ – queried whether international law was capable of giving effect to the concept of ‘aid and assistance’ and further asserted that even if it was, more precision was required of the term ‘rendered for the commission’ and for the necessary element of intent. Others were more favourable to the principle: the United Kingdom, for example, supported the basic notion of Draft Article 27 but called for a clearer distinction between cases in which complicity was independently wrongful and those in which it was not.²⁴

On second reading it was agreed that the Draft Article should be retained but that further precision was required.²⁵ Wording close to that of ARSIWA Article 16 was proposed²⁶ and eventually approved by the Commission with only minor additional modification.²⁷ The most significant addition was that of paragraph (b), which was included to ensure that states would only be found complicit where they themselves were bound by the obligation violated by the party to which aid or assistance was rendered.

²⁰ See: Crawford, Second Report, 47–51. Further: Aust (2011), 100–3.

²¹ ILC Ybk 1998/II(1), 128. Earlier, Switzerland had queried the status of the provision as a primary rule and asserted that it was too broad: ILC Ybk 1981/II(1), 77.

²² ILC Ybk 1998/II(2), 128. ²³ *Ibid.*, 129.

²⁴ On the basis that if wrongfulness was independent of any additional act by the state immediately responsible, Draft Art. 27 was redundant: *ibid.*, 128–9. Japan also called for a clearer definition of the principle in general: ILC Ybk 1999/II(2), 107.

²⁵ Crawford, Second Report, 51.

²⁶ *Ibid.*, 56. The principal difference between the 1999 iteration of Draft Art. 27 and ARSIWA, Art. 16 was that the former included situations in which one state ‘directs or controls’ another state. This was later removed and placed into ARSIWA, Art. 17.

²⁷ Aust (2011), 102–3.

Although at the time ARSIWA Article 16 was seen by some as falling within the ‘progressive development’ part of the ILC’s mandate,²⁸ the International Court considered in *Bosnian Genocide* that the provision had attained the status of customary international law.²⁹ Although there had previously existed *sui generis* injunctions against the rendering of aid or assistance, such as the Friendly Relations Declaration³⁰ and the Definition of Aggression³¹ as promoted by the UN General Assembly, and Article 2(5) of the UN Charter, Article 16 provided a framework by which complicity could be prohibited generally, and it has been treated as such in subsequent state practice.³²

12.2.2 *Defining ‘aid or assistance’*

12.2.2.1 The terms of ARSIWA Article 16

The first question to be answered in any application of ARSIWA Article 16 is whether the state in question has rendered ‘aid or assistance’ to another state in the commission of an internationally wrongful act. Put another way, the question is one of how the assistance rendered relates to the wrongful act.

²⁸ See e.g. the comments of Special Rapporteur Ago when introducing the first version of Draft Art. 27 in his Seventh Report: ILC Ybk 1978/II(1), 59: ‘In any event, we believe we can at least support our position on this point by evoking the intention of progressive development by which, it seems, the international community must necessarily be guided in the matter.’ This had altered by the final adoption of the ARSIWA: ARSIWA Commentary, Art. 16, §7: ‘State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance.’ Also Quigley (1986), 81–107; Padelletti (1990), 94.

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007 p. 43, 217. This conclusion had already been reached much earlier with respect to Draft Art. 27 by Judge Schwebel in a dissenting opinion: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep. 1986 p. 14, 558 (Judge Schwebel, diss.). Mr Schwebel had previously chaired the drafting committee which gave the Draft Article its final form on the first reading: ILC Ybk 1978/I, 269.

³⁰ GA Res. 2625(XXV), 24 October 1970, Principle 1, §9: ‘Every State has the duty to refrain from organizing, assisting or participating in acts of civil strife or terrorist acts in other States or acquiescing in organized activities within its territory directed towards the commission of such acts.’

³¹ GA Res. 3314(XXIX), 14 December 1974, Annex, Art. 3(f), defining as aggression ‘[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State’.

³² On the development of ARSIWA, Art. 16 as a customary rule, see generally Aust (2011), Ch. 4.

Neither the provision itself nor the ILC's commentary thereto provides a substantial definition of the concept, though there was some discussion of the matter within the ILC.³³ Ushakov during the Commission's 1978 session described the problem of a definition as follows:

[P]articipation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.³⁴

No limitation is placed on the precise *form* of the aid or assistance in question – all that is required is a causative contribution to the illegal act.³⁵ In the Commentary to Draft Articles adopted on first reading, the ILC provided that 'the aid or assistance must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act'.³⁶ Reservations were raised³⁷ during the second reading over this definition due to the concern that the qualifier 'materially' could cause confusion with the notion of 'material breach' in Article 60 of the Vienna Convention on the Law of Treaties (VCLT).³⁸ What was clear, however, was that the assistance rendered did not need to have been *indispensable* to the commission of the wrongful act. To impose such a requirement would invite speculation as to other contingencies and would be difficult to apply.³⁹ That said, suitably involved 'assistance' may result in a finding of joint responsibility under ARSIWA Article 47, a point emphasized by Brownlie in the context of aggression:

[T]he supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to 'aid or assistance' in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles equipment and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility.⁴⁰

Beyond this point, however, confusion emerges. It was established on adoption of the ARSIWA that 'the aid or assistance must be given with a

³³ Aust (2011), 195–7.

³⁴ ILC Ybk 1978/I, 239. Also *ibid.*, 229 (Reuter); *ibid.*, 233 (Riphagen). Further: ILC Ybk 1999/I, 79 (Simma).

³⁵ Lowe (2001), 5–6. ³⁶ ILC Ybk 1978/II(2), 99ff. ³⁷ Crawford, Second Report, 50.

³⁸ 22 May 1960, 1155 UNTS 331.

³⁹ Crawford, Second Report, 50. Also Quigley (1986), 121–2. ⁴⁰ Brownlie (1983), 191.

view to facilitating the commission of the act *and must actually do so*'.⁴¹ Thus the ILC Commentary states that assistance must be 'clearly linked' to the wrongful act, and make a 'significant' contribution to it.⁴² But the commentary seems internally inconsistent, providing later that 'the assistance may have only been an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered'.⁴³ This discrepancy may be resolved by reference to the position taken by the ILC in relation to the Draft Articles on the Responsibility of International Organizations (DARIO). In its commentary to DARIO Article 14, the equivalent to ARSIWA Article 16, the Commission expressly links the two provisions before drawing attention to the need for 'significant' assistance in relation to the latter⁴⁴ – the required standard would therefore appear to be one of substantial involvement on the part of the complicit state.

In an analysis of the concepts of 'assistance' as manifested in *sui generis* regimes,⁴⁵ Aust concludes that state practice tends to indicate that 'the majority of States are eager to limit the concept of assistance to cases in which active participation is given'.⁴⁶ Thus mere incitement will not be considered a violation of ARSIWA Article 16,⁴⁷ although, as Ago noted in his Seventh Report, it may infringe other rules of international law.⁴⁸

12.2.2.2 Omissions as 'aid or assistance'

Omissions may also be excluded as a form of aid or assistance.⁴⁹ In *Bosnian Genocide* the Court remarked:

[C]omplicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide, while a violation of the obligation to prevent results from the mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely a reflection of the notion that the ban on genocide and the other acts listed in Article III [of the Genocide Convention], including complicity, places States under a negative obligation, the obligation not to

⁴¹ ARSIWA Commentary, Art. 16, §5 (emphasis added). ⁴² *Ibid.* ⁴³ *Ibid.*, §10.

⁴⁴ ILC Report 2011, 104.

⁴⁵ E.g. the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and Their Destruction, 18 September 1997, 2056 UNTS 211; Convention on Cluster Munitions, 30 May 2008, CCM/77; Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161.

⁴⁶ Aust (2011), 209. ⁴⁷ Dominicé (2010), 285. ⁴⁸ ILC Ybk 1978/II(1), 54–5.

⁴⁹ This displaces the general presumption contained in ARSIWA, Art. 2, which provides that state responsibility may be incurred through an omission.

commit the prohibited acts, while the duty to prevent places States under a positive obligation, to do their best to ensure that such acts do not occur.⁵⁰

Aust attempts to cast doubt on the absolute character of this pronouncement by reference to *Corfu Channel*.⁵¹ There, the United Kingdom alleged that the Albanian state was responsible for the explosion of several contact mines in the Corfu Channel in 1946. As a result of the incident, HMS *Volage* was severely damaged and HMS *Saumarez* crippled beyond repair. Forty-four servicemen were killed and forty-two injured.⁵² A question which remained unresolved when the matter was brought before the Court was exactly who laid the mines. Albania, which lacked a navy, clearly could not have done so.⁵³ The United Kingdom alleged that Albania was nonetheless complicit in the damage caused on the basis that the state knew of the minefield but failed to inform the UK flotilla.⁵⁴ The Court found that the failure to warn was an internationally wrongful act, and found Albania responsible accordingly,⁵⁵ a determination that Aust recasts as ‘the quintessential aid or assistance to the State which laid the mines’.⁵⁶ He dismisses the fact that the Court predicated its findings on the basis of Albania’s primary responsibility⁵⁷ rather than some form of accessory liability as evidence of judicial economy: ‘a separate responsibility for complicity would not then be needed as the complicit State was already obliged to warn third States on the basis of an independent primary obligation’.⁵⁸ But if such an interpretation were

⁵⁰ *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 222–3.

⁵¹ Aust (2011), 225–30, citing *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949 p. 4.

⁵² Further: Jones, (1949) 26 BYIL 447; Maher, (2005) 9 AJLH 47.

⁵³ It is widely assumed that Yugoslavia – an absent and unnamed third party – laid the mines in the context of its conflict with Greece: Chinkin (1993), 319.

⁵⁴ ICJ Pleadings 1949-I p. 19, 48:

The responsibility of Albania rests, firstly, upon a direct complicity in the existence of the minefield which is created by her knowledge of it, whether or not she laid it or connived in its actual laying. Secondly, it rests upon a failure – which was, in the submission of the Government of the United Kingdom, a wilful failure to discharge an imperative international duty to notify the existence of this dangerous minefield. Thirdly, it rests upon the failure of the Albanian authorities to warn His Majesty’s ships of their danger when they were seen to be approaching it.

⁵⁵ ICJ Rep. 1949 p. 4, 22–3. ⁵⁶ Aust (2011), 227. Also Orakhelashvili (2010), 658.

⁵⁷ ICJ Rep. 1949 p. 4, 22:

[Albania’s obligations arise from] certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

⁵⁸ Aust (2011), 227.

ever plausible, it must be reviewed in the light of the strong dictum of the Court in *Bosnian Genocide*: seen through this lens, *Corfu Channel* is reflective of an exercise in joint responsibility under ARSIWA Article 47, and the ILC Commentary treats it in this way.⁵⁹

12.2.2.3 ‘Aid or assistance’: general principles?

What abstract principles may therefore be drawn from the terms ‘aids or assists’ as they occur in ARSIWA Article 16? First, the complicit state must make some contribution to the wrongful act, though it need not be essential. Second, the contribution must be in the form of a positive act: neither active incitement nor a mere omission will suffice to ground responsibility. Third, despite some inconsistency within the ARSIWA Commentary, comparison with the DARIO Commentary reveals that the assistance rendered must be ‘significant’. Fourth, if sufficiently significant, then the contributing state’s role may transcend that of mere complicity, and the state may become jointly responsible for the act under ARSIWA Article 47.

Beyond this, little more can be said with certainty. It is perhaps better to say on this point, as Aust does, that aid or assistance ‘is a normative and case-specific concept, meaning that its content will always have to be determined in the specific situation’.⁶⁰ Certainly, this is the view that has been taken with regard to DARIO Article 14 (and by extension DARIO Article 58). Special Rapporteur Gaja remarked in his Seventh Report:

One difficulty in defining more precisely aid or assistance in the commission of an internationally wrongful act is that, for the purpose of assessing whether aid or assistance occurs, much depends on the content of the obligation breached and on the circumstances. Thus, it seems preferable not to modify the wording that was used in [ARSIWA Article 16].⁶¹

12.2.3 The ‘subjective’ element of complicity

Given the potential breadth of the phrase ‘aid and assistance’, the essential element in defining complicity lies in the question of intent.⁶² Read with the commentary, ARSIWA Article 16 lists two limitations that together amount to a ‘subjective’ or ‘mental’ element. Although this proved controversial within the ILC,⁶³ state aversion to the notion of

⁵⁹ ARSIWA Commentary, Art. 47, §8. Further: [Chapter 11](#). ⁶⁰ Aust (2011), 230.

⁶¹ UN Doc. A/CN.4/610, §75. ⁶² Graefrath (1996), 374–6.

⁶³ Aust (2011), 232–5. See e.g. Njenga, arguing that ‘too narrow a definition [of intent] would nullify the scope of the article ... [n]o State would admit that it was helping

strict liability in relation to complicity⁶⁴ compelled the inclusion of subjective considerations in the wording of ARSIWA Article 16, a point recognized early by Ago:

The very ‘idea’ of complicity in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving supplies intends to use them. Without this condition, there can be no question of complicity.⁶⁵

The first limitation occurs in the words of ARSIWA Article 16(a), which requires that the complicit state commit the relevant aid or assistance ‘with knowledge of the circumstances of the internationally wrongful act’. The converse of this is stated expressly in the terms of the commentary itself: ‘[i]f the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.’⁶⁶ Despite the attempts of some states to widen the scope of the mental element to include not only actual but constructive knowledge⁶⁷ (i.e. the complicit state *should* have known that it was assisting in the commission of an internationally wrongful act), the wording of the provision is confined to knowledge actually in the possession of the complicit state.

The second limitation is not contained within the wording of ARSIWA Article 16, but revealed in the commentary, which states:

[A]id or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid and assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to

another State to commit a wrongful act’: ILC Ybk 1978/I, 236. Cf. Schwebel, noting that ‘Hitler’s plan of aggression had been published in explicit detail’: *ibid.*, 237. Others found the inclusion to be redundant, arguing that ‘aid and assistance’ already presumed the existence of knowledge: ILC Ybk 1999/I, 70 (Brownlie).

⁶⁴ Crawford, Second Report, 49–50. ⁶⁵ ILC Ybk 1978/II(1), 58.

⁶⁶ ARSIWA Commentary, Art. 16, §4.

⁶⁷ See e.g. the statement of the Netherlands: ILC Ybk 2001/II(1), 52. See also, earlier, the statements of Ustor in the ILC, proposing that (ILC Ybk 1975/I, 48):

separate provision be made for the important case of oblivious complicity by a State which consented to the use of its territory for the commission of unlawful acts against a third State. There was similar complicity when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory.

facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.⁶⁸

Leaving aside the purely factual question of whether the assistance so rendered facilitated the commission of the wrongful act, this second element is sufficient to eclipse entirely the requirement of knowledge, as an overt intention to assist presupposes knowledge of assistance. It has arguably been accepted into the customary ambit of complicity by the International Court, which remarked in *Bosnian Genocide*:

[T]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent . . . of the principal perpetrator.⁶⁹

The Court went on to state that it considered there to be little doubt that the crimes perpetrated at Srebrenica were committed as a result of equipment and resources provided as part of a general policy of ‘aid and assistance’ by the Federal Republic of Yugoslavia (FRY) towards the Republika Srpska, but concluded that complicity could not be made out, as it could not be proved that the FRY supplied aid to the perpetrators of the genocide ‘in full awareness that the aid supplied would be used to commit genocide’.⁷⁰

The passages in the *Bosnian Genocide* judgment in which ARSIWA Article 16 was applied by analogy reveal several aspects of the requirements of knowledge and intent. In the first place, ‘[t]he standard required by [Article 16] – as applied by the [Court] – is one of specific knowledge of the alleged accomplice, crucially of an internationally wrongful act with a high degree of particularity’.⁷¹ In the second, the use of the term ‘at the least’ by the Court in *Bosnian Genocide* indicates that, as a general rule, something more than mere knowledge is required, namely the need for actual intent that aid and assistance be given to the illegal act.⁷²

Some commentators have expressed concerns that the subjective element to ARSIWA Article 16 as so formulated narrows unduly the scope of complicity, possibly to the point of rendering the concept ‘unworkable’.⁷³ Quigley identifies two principal difficulties.⁷⁴ First, it is difficult

⁶⁸ ARSIWA Commentary, Art. 16, §5. ⁶⁹ ICJ Rep. 2007 p. 43, 218 (emphasis added).

⁷⁰ *Ibid.*, 218–19. ⁷¹ Dominicé (2010), 286. ⁷² Aust (2011), 236.

⁷³ Graefrath (1996), 375. Further: Quigley (1986), 109–17; Orakhelashvili (2010), 650–1. See also Aust (2011), 235–7.

⁷⁴ Quigley (1986), 111.

to determine the mind of a state – if a complicit state is aware of what it is doing, it may attempt to conceal the provision of aid, possibly through the dissemination of conflicting statements by multiple organs. Second, the complicit state may not in fact desire the illegal result, and instead be animated by some other motive – in such a case, it is argued, even if the assisting state knew of the use to which the aid was put but did not intend the outcome, it could not be held complicit. Graefrath gives the following example:

According to that definition e.g. a State supplying arms to Turkey under the condition that they not be used to suppress the Kurds cannot be held guilty of complicity if afterwards the weapons were used for exactly that purpose. Even supplying arms knowing that Turkey may use them against the Kurds would not be sufficient to prove the intent required for complicity.⁷⁵

By way of counter-argument, the requirement of outright intent in order to establish complicity is justified by the character of interstate relations and the great diversity of situations which may arise, particularly in the context of military bases, airspace or the use of territory generally.⁷⁶ Additionally, as the first reading commentary may be taken as indicating, if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed.⁷⁷ It is thus wrong to suggest that the complicit state must be in common cause with the principal in order for ARSIWA Article 16 to apply.⁷⁸

But, more fundamentally, complaints about the need for intent in complicity are misplaced. The provision for complicity in the ARSIWA was (at least initially) a measure of progressive development on the part of the ILC. To complain about the manner in which the ILC has limited complicity is to ignore the fact that ARSIWA Article 16 is still a substantial advance of the concept in international law⁷⁹ – though it could be fairly argued that the requirement of actual intent should have been inserted into the text of the provision, rather than elaborated in the commentary. Second, and more substantially, the limitation exists for a reason. If it is true that ARSIWA Article 16 is intended to develop the law, then it must do so in a manner acceptable generally to governments. It was sensible not to advance a relatively novel principle potentially detrimental to state sovereignty in its broadest possible form.⁸⁰

⁷⁵ Graefrath (1996), 373. ⁷⁶ Crawford, Second Report, 50. Also Dominicé (2010), 286.

⁷⁷ ILC Ybk 1978/II(2), 99–105; Lowe (2001), 8–9. ⁷⁸ Lowe (2001), 6–9. ⁷⁹ *Ibid.*, 12.

⁸⁰ Aust (2011), 238: ‘Such an interpretation would be detached from international practice and would give rise to expectations on the establishment of responsibility for complicity which are not warranted.’

12.2.4 Complicity and the *pacta tertiis* rule

ARSIWA Article 16(b) requires that ‘the act would be internationally wrongful if committed by [the aiding or assisting] State’. Thus, if complicity is to be found, the aiding or assisting state must be bound by the rule that the main actor is violating. The commentary⁸¹ links this requirement to the *pacta tertiis* principle.⁸² It is of central importance to the provision, but emerged only during the second reading. Draft Article 27 on first reading provided that complicity would give rise to responsibility ‘even if, taken alone, such aid or assistance would not constitute the breach of an international obligation’. This, it was felt, was a bridge too far, as it would have enabled an aiding and assisting state to be held independently liable for the breach of a bilateral treaty to which it was not itself a party.⁸³ In addition, it ran the risk of straying beyond the mandate that the ILC had set itself with regard to the codification of state responsibility and creating a new primary rule,⁸⁴ by establishing new obligations incumbent on states in the first instance.

Although generally welcomed by the ILC,⁸⁵ some members considered paragraph (b) to be an overly broad restriction. Economides was most vocal in this respect, noting that the provision

considerably reduced, without good reason, the scope of application of [Draft Article 27]. It did not exclude bilateral obligations alone. It also excluded multi-lateral obligations by which the aiding or assisting State was not bound. The condition was not necessary, since it was most unlikely that a State would knowingly and deliberately help another State to breach its bilateral or multilateral treaty obligations.⁸⁶

Such criticisms overstate the effects of ARSIWA Article 16(b). Within its ambit are peremptory norms, obligations *erga omnes* and the entire corpus of customary international law.⁸⁷ While issues do arise with

⁸¹ ARSIWA Commentary, Art. 16, §6.

⁸² See VCLT, Arts. 34 (‘A treaty does not create either obligations or rights for a third State without its consent’) and 35 (‘An obligation arises for a third State from a provision of a treaty if the parties intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing’). Further: David, in Corten and Klein (2011) 887.

⁸³ Crawford, Second Report, 50–1; Dominicé (2010), 286.

⁸⁴ ILC Ybk 1999/I, 68 (Crawford).

⁸⁵ See e.g. ILC Ybk 1999/I, 70 (Simma); *ibid.*, 70 (Brownlie); *ibid.*, 71 (Rosenstock); *ibid.*, 74 (Hafner).

⁸⁶ *ibid.*, 68. Also Lowe (2001), 7; Orakhelashvili, in Crawford, Pellet and Olleson (2010) 347, 351–3.

⁸⁷ ILC Ybk 1999/I, 69 (Crawford); *ibid.*, 70 (Simma).

respect to multilateral agreements, the *pacta tertiis* rule provides ample justification for the restriction.

Take the case of a bilateral treaty between state A and state B under which the two states agree not to export certain materials or technology to, or not to trade with, state C. In the language of municipal trade practices law, this is a secondary boycott. State C, as target, is of course not bound by the agreement, pursuant to VCLT Article 34. Why, then, should it be held responsible if, knowing of the treaty, it assists state A in breaching it? Without the inclusion of paragraph (b), ARSIWA Article 16 could become a vehicle by which the effects of well-publicized bilateral obligations are given universal extension. This position is surely different from a situation in which the assisting state is bound by the relevant primary rule, for example where a state bound by the Treaty on the Non-Proliferation of Nuclear Weapons aids another state in obtaining weapons in violation of the treaty.

It has been suggested that Article 16(b) would allow an otherwise complicit state to escape responsibility by arguing that it is bound by a *different* rule from the one breached by the assisted state. Thus Aust suggests:

Although the aiding and assisting State would not technically be barred from granting such support, it is reasonably clear that through its conduct it will harm a third State (or ... an individual protected by the given human rights treaty). Moreover, the State would have to rely on the purely formal argument that, although it is contributing to a violation of a rule to which it is bound, it could avoid responsibility due to the rule in question being laid down in differing sources.⁸⁸

But this misreads Article 16(b), which merely requires that the conduct in question would have been internationally wrongful if committed by the assisting state and says nothing about the identity of norms or sources.

12.2.5 *Complicity and international organizations*

This analysis of ARSIWA Article 16 also applies, *mutatis mutandis*,⁸⁹ to the case of DARIO Article 58.⁹⁰ The provision reads as follows:

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

⁸⁸ Aust (2011), 264–5.

⁸⁹ Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), 64.

⁹⁰ Ryngaert and Buchanan (2011), 142–3.

- (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and
 - (b) the act would be internationally wrongful if committed by that State.
2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

DARIO Article 58(1) mirrors exactly the wording of ARSIWA Article 16, and thus includes the same requirements of knowledge and the *pacta tertiis* qualification, a link drawn expressly in the ILC Commentary.⁹¹ But paragraph 2 contains no analogue in ARSIWA Article 16. It represents an effort on the part of the ILC to ensure that responsibility does not follow automatically where a state is directed to do something by an international organization,⁹² at least in ancillary cases. But as the commentary to the provision makes clear, the fact that *ancillary* responsibility is not generated where a state follows the directive of an international organization does not necessarily exclude *all* forms of state responsibility:

The fact that a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article, but under the articles on the responsibility of States for internationally wrongful acts.⁹³

There is minimal state practice supporting DARIO Article 58 as a rule of customary international law. But it seems likely that such a rule should exist as a matter of principle. If, as was noted in *Bosnian Genocide*,⁹⁴ ancillary responsibility as between states may be considered a customary norm, there is no reason why the same logic should not apply as between a state and any other actor on the international plane. This point is made

⁹¹ DARIO Commentary, Art. 58, §1. ⁹² *Ibid.*, §4.

⁹³ *Ibid.*, §5. The ‘rules of the organization’ referred to in DARIO, Art. 58(2) are defined in DARIO, Art. 2(b) as ‘in particular, the constituent instruments, decisions, resolutions, and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization’.

⁹⁴ ICJ Rep. 2007 p. 43, 217.

expressly in the commentary, which notes: '[t]he present article uses the same wording as [ARSIWA Article 16] because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State'.⁹⁵

The ILC has been criticized as taking an unduly narrow view of 'aid or assistance' in the context of DARIO Article 58. In particular, commentators complain that states will not be held accountable for their votes for or against the individual policies of the entity, which may impact on vulnerable populations, particularly where the organization in question is a large financial institution such as the World Bank or the International Monetary Fund.⁹⁶ Aside from fact that a broader definition of aid or assistance in the present context would risk a wave of abstentions within the voting patterns of international organizations (and an accompanying crisis of legitimacy), these objections, as with criticisms of ARSIWA Article 16, miss the point. DARIO Article 58, at least at this stage, is representative of the 'progressive development' aspect of the ILC's mandate. If it is to become accepted as a codification of custom, it must be presented in such a way as to be palatable to governments generally. Attempting to hold states liable for individual votes – and thereby undermining the *raison d'être* of separate legal personality – is not the way to go about this.

12.3 Direction and control over another state or international organization

12.3.1 The scope and relevance of ARSIWA Article 17

ARSIWA Article 17 provides as follows:

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) that act would be internationally wrongful if committed by that State.

⁹⁵ DARIO Commentary, Art. 58, §3. The same may be said of responsibility for aid and assistance as between two international organizations: see DARIO, Art. 14.

⁹⁶ Clark, (2002) HHRJ 205, 213; d'Aspremont, (2007) 4 IOLR 91, 98; Ryngaert and Buchanan (2011), 143.

Annex 6

Pierre d'Argent, 'Les obligations internationales', *Recueil des cours de l'Académie de La Haye*, vol. 417 (2021) (extracts)

LES OBLIGATIONS INTERNATIONALES

par

PIERRE D'ARGENT

nettement l'impuissance dans laquelle se trouverait le Nicaragua, *qui dispose de moyens bien plus faibles* pour maîtriser ce trafic si celui-ci emprunte son territoire et que les autorités essaient de l'arrêter. » ⁵²⁴

Dans l'affaire des *Usines de pâtes à papier*, la Cour reconnut également que

« l'Etat est tenu de mettre en œuvre *tous les moyens à sa disposition* pour éviter que les activités qui se déroulent sur son territoire, ou sur tout espace relevant de sa juridiction, ne causent un préjudice sensible à l'environnement d'un autre Etat » ⁵²⁵.

De même, dans l'affaire *Philippines c. Chine*, le Tribunal a considéré que la Chine était responsable, dans la mesure où elle avait des moyens à sa disposition :

« In any event, there can be no question that the officers aboard the Chinese Government vessels in question were fully aware of the actions being taken by Chinese fishermen and *were able to halt them had they chosen to do so* » ⁵²⁶.

292. Dans son rapport sur la protection de l'atmosphère, M. Shinya Murase reconnaît également que

« la diligence requise s'analyse en l'obligation faite à tout Etat sous le contrôle duquel sont menées telles ou telles activités d'apporter toute son activité à sa mission de prévention, *dans les limites de ses moyens*, de sorte que, même s'il venait à se produire des effets nocifs significatifs, on ne pourrait lui reprocher automatiquement d'avoir failli à l'obligation de diligence » ⁵²⁷.

293. En revanche, dans l'avis consultatif portant sur les *Responsabilités et obligations des Etats dans le cadre d'activités menées dans la Zone*, le Tribunal a répondu par la négative à la question de savoir si un traitement différencié devait être appliqué entre les Etats en

524. *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, arrêt, 27 juin 1986, Recueil 1986, p. 85, paragraphe 157, italiques ajoutés.

525. *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, 20 avril 2010, Recueil 2010, p. 67, paragraphe 101.

526. *In the matter of the South China Sea arbitration (Philippines c. Chine)*, affaire CPA n° 2013-19, 12 juillet 2016, p. 296, paragraphe 755, italiques ajoutés.

527. S. Murase, « Troisième rapport sur la protection de l'atmosphère », 2016, A/CN.4/692, p. 9.

développement et les Etats développés. Le Tribunal considéra en effet qu'en l'absence de clause prévoyant une différenciation expresse à cet effet, il fallait assurer une application uniforme des règles en matière de protection des fonds marins et ce afin d'

«éviter que des entreprises commerciales ayant leur siège dans des Etats développés créent des sociétés dans des Etats en développement, obtenant ainsi leur nationalité et leur patronage, dans le but de bénéficier d'une réglementation et de contrôles moins stricts. La multiplication d'Etats qui patronnent «de complaisance» compromettrait l'application uniforme des normes les plus élevées de protection du milieu marin, la sécurité du développement des activités menées dans la zone et la protection du patrimoine commun de l'humanité»⁵²⁸.

Si l'on comprend les inquiétudes du Tribunal – la reconnaissance de la différenciation risquant de se faire au détriment de la protection de l'environnement –, il n'en demeure pas moins que le critère des moyens à la disposition de l'Etat joue immanquablement un rôle dans l'appréciation *in concreto* de la *due diligence*, sachant toutefois que la différenciation en résultant restera toujours dans les limites de standards minimaux permettant la protection de l'environnement⁵²⁹.

6. Les spécificités des obligations de prévention en tant qu'obligations de comportement

294. Les obligations de prévention forment au sein des obligations de comportement une sous-catégorie particulière dont les ressemblances, mais aussi les différences, d'avec les obligations de comportement habituelles méritent d'être brièvement rapportées.

295. Tout d'abord, une obligation de prévention est une obligation de comportement en ce qu'elle impose à son débiteur d'agir avec *due diligence*. En ce sens, les développements précédents relatifs à la *due diligence* sont *mutatis mutandis* applicables aux obligations de prévention, sachant que leur «contenu ... varie d'un instrument à l'autre, selon le libellé des dispositions pertinentes et en fonction de

528. TIDM, *Responsabilités et obligations des Etats dans le cadre d'activités menées dans la Zone*, avis consultatif, 1^{er} février 2011, n° 17, *Recueil*, p. 54, paragraphe 159.

529. *Supra* n° 265 ss.

la nature même des actes qu'il s'agit de prévenir»⁵³⁰ de même qu'en fonction des moyens et capacités dont dispose l'Etat sur lequel pèse l'obligation de prévention, ainsi, plus généralement, des circonstances et des limites de ce que «permet la légalité internationale»⁵³¹.

296. L'obligation de prévention se distingue toutefois des obligations de comportement usuelles en ce que le but poursuivi par l'obligation est d'éviter qu'un événement préjudiciable ne se produise, plutôt que de favoriser la réalisation dans le monde réel d'une situation nouvelle. En ce sens – mais en ce sens seulement –, J. Crawford a qualifié les obligations de prévention d'«obligations de résultat «négatives»⁵³² : l'obligation tend à la non-réalisation d'un événement considéré comme le résultat indésirable (et illégal) d'un possible (mais évitable) processus factuel. Par ailleurs, comme toute obligation de comportement, l'obligation de prévention n'est pas une obligation de réussir : ne devant pas «garantir que l'événement ne se produira pas»⁵³³, son débiteur pourra s'en être dûment acquitté alors même que l'événement devant être prévenu se sera produit. Au sujet de l'obligation de prévenir le génocide, la Cour internationale de Justice a souligné que, étant une obligation de comportement et non de résultat, la «responsabilité d'un Etat ne saurait être engagée pour la seule raison que le résultat recherché n'a pas été atteint»⁵³⁴.

297. L'obligation de prévention est encore une obligation de comportement en ce que l'événement devant être prévenu ne dépend pas exclusivement du comportement du débiteur de l'obligation, mais également d'autres facteurs aléatoires⁵³⁵, en particulier le comportement de tiers. En réalité, tant en matière de droit de l'environnement, de droits de l'homme, de droit des investissements ou d'autres secteurs du droit international tels que le droit diplomatique ou le droit international humanitaire, les obligations de prévention permettent de rechercher

530. *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, 26 février 2007, *Recueil 2007*, p. 220, paragraphe 429.

531. *Ibid.*, p. 221-222, paragraphes 430-431.

532. J. Crawford, «Deuxième rapport sur la responsabilité internationale des Etats», *ACDI*, 1999, vol. II, partie 1, paragraphe 85.

533. *Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite et commentaires relatif*, *ACDI*, 2001, vol. II, partie 2, p. 153.

534. *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, 26 février 2007, *Recueil 2007*, p. 221, paragraphe 430.

535. R. Pisillo Mazzeschi, «Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme», *Recueil des cours*, tome 333 (2008), p. 390.

une responsabilité étatique alors même que le comportement des particuliers qui engendre l'événement préjudiciable à éviter n'est pas attribuable à l'Etat. En effet, les obligations de prévention à charge des Etats consistent à «prévenir la commission par d'autres personnes ou entités qu'eux-mêmes des actes contraires à certaines normes du droit international»⁵³⁶. Toutefois, la réalisation de cet événement du fait des particuliers n'en demeure pas moins révélatrice d'un possible manquement étatique à une obligation positive de prévention. Comme l'ont montré Triepel⁵³⁷ et Anzilotti⁵³⁸, et ainsi que la jurisprudence le conçoit depuis lors⁵³⁹, l'Etat n'est pas, en ce cas, responsable pour le fait des particuliers, mais bien du fait de sa propre passivité dès lors qu'une obligation positive de prévention lui imposait d'empêcher, dans toute la mesure du possible, la survenance du dommage réalisé par le comportement d'individus qui ne lui est pas attribuable⁵⁴⁰.

298. Il est encore un point fondamental sur lequel l'obligation de prévention se distingue de l'obligation de comportement usuelle, c'est-à-dire celle qui ne tend pas à prévenir la réalisation d'un événement. Comme on l'a rappelé ci-dessus, la violation d'une telle obligation de comportement est réalisée dès que survient l'omission consistant à ne pas adopter les mesures requises au titre de la *due diligence* la gouvernant, et non par la non-réalisation du but qu'elle poursuit⁵⁴¹. A l'inverse, l'obligation de prévention est une sous-catégorie d'obligation de comportement pour laquelle cette non-réalisation – c'est-à-dire la survenance de l'événement à prévenir – constitue une condition *sine qua non* du caractère illicite de l'omission. Cette exigence est exprimée dans les termes suivants par l'article 14, paragraphe 3, des articles sur la responsabilité des Etats pour fait internationalement illicite :

536. *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, 26 février 2007, *Recueil 2007*, p. 220, paragraphe 429.

537. H. Triepel, *Völkerrecht und Landesrecht*, Leipzig, Mohr (Siebeck), 1899, p. 333-334, trad. par R. Ago, «Quatrième rapport sur la responsabilité des Etats», *ACDI*, 1969, vol. II, p. 108.

538. D. Anzilotti, «La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers», *Rev. gén. dr. internat.*, 1906, p. 5-29.

539. Voir notamment *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, 26 février 2007, *Recueil 2007*, p. 221, paragraphe 430.

540. Dans le même sens, S. Besson, «La *due diligence* en droit international», *Recueil des cours*, tome 409 (2020), p. 239 ss.

541. Voir *supra*, n° 219 ss et n° 242 ss, et aussi P.-M. Dupuy, «Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility», *EJIL*, 1999, p. 379.

«La violation d'une obligation internationale requérant de l'Etat qu'il prévienne un événement donné a lieu au moment où l'événement survient et s'étend sur toute la période durant laquelle l'événement continue et reste non conforme à cette obligation.»⁵⁴²

Dès lors, l'obligation de prévention paraît moins exigeante qu'une obligation de comportement ordinaire puisque, s'agissant de cette dernière, le débiteur ne peut s'exonérer de sa responsabilité en soutenant que le résultat recherché par l'obligation a été atteint, alors que cette exonération, pour le motif que l'événement à prévenir n'est pas survenu, est possible en cas d'obligation de prévention. Cette différence, qui institue une condition supplémentaire pour qu'une obligation de prévention soit violée, a été critiquée par la doctrine⁵⁴³. Il faut cependant bien s'entendre sur cette exigence temporelle qui fait de la violation d'une obligation de prévention un délit d'événement plutôt que de pure conduite, ainsi qu'Ago le notait déjà en 1939⁵⁴⁴.

299. La subordination du caractère illicite de l'omission à la survenance de l'événement à prévenir – lequel doit donc être objectivable – concerne uniquement la constitution de la violation et non le moment auquel l'obligation de prévenir est déclenchée. En effet, comme la Cour l'a souligné dans l'affaire *Bosnie c. Serbie* en se référant à l'article 14, paragraphe 3, considéré comme «une règle générale du droit de la responsabilité internationale des Etats», «[c]'est seulement au moment où l'acte prohibé [devant être prévenu] a commencé à être commis que la violation d'une obligation de prévention est *constituée*»⁵⁴⁵. Ainsi, «la responsabilité d'un Etat pour violation de l'obligation de prévenir le génocide n'est susceptible d'être retenue que si un génocide a effectivement été commis». Cela étant, le fait que la constitution de l'omission comme fait internationalement illicite soit subordonnée à la réalisation de l'événement devant être évité «ne signifie évidemment pas que l'obligation de prévenir le génocide ne prend naissance qu'au moment où le génocide commence à être perpétré, ce qui serait absurde, puisqu'une telle obligation a précisément pour objet d'empêcher ou de tenter d'empêcher, la survenance d'un tel acte»⁵⁴⁶. L'obligation

542. Article 14, paragraphe 3, ARIE.

543. P.-M. Dupuy, «Reviewing the Difficulties of Codification...», *op. cit.*, p. 379.

544. R. Ago, «Le délit international», *Recueil des cours*, tome 68 (1939), p. 500.

545. *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, 26 février 2007, *Recueil* 2007, p. 221, paragraphe 430. Nous soulignons.

546. *Ibid.*, p. 222, paragraphe 431.

de prévenir est donc déclenchée bien en amont de la survenance de l'événement devant être évité : le devoir d'agir qui est le « corollaire » de l'obligation de prévention « pren[d] naissance, pour un Etat, au moment où celui-ci a connaissance, ou devrait normalement avoir connaissance, de l'existence d'un risque sérieux de la [survenance de l'événement à prévenir] »⁵⁴⁷.

300. Empreints de bon sens et de logique, les propos de la Cour relatifs à l'obligation de prévenir le génocide sont applicables à toute autre obligation de prévention. Il en résulte que, même si l'obligation de prévenir est déclenchée, la responsabilité pour manquement à la *due diligence* qu'elle requiert ne peut être établie si n'est pas survenu « l'événement en l'absence duquel la violation de l'obligation de prévention n'est pas constituée »⁵⁴⁸. Cela ne signifie évidemment pas que la responsabilité de l'Etat considéré comme étant en défaut d'agir conformément à l'exigence de prévention ne pourrait être *invoquée* par un autre Etat, selon la nature extrinsèque de l'obligation, avant même que l'événement à prévenir n'ait eu lieu. En particulier, si une base de compétence juridictionnelle paraît exister, cet autre Etat pourrait assurément solliciter, de la Cour internationale de Justice ou d'un autre juge international, des mesures conservatoires, le risque imminent de préjudice irréparable pouvant résider dans la future survenance possible de l'événement à prévenir.

301. Si la violation de l'obligation de prévention n'est constituée qu'à partir de la survenance de l'événement qui aurait dû être prévenu, elle « s'étend sur toute la période durant laquelle l'événement continue et reste non conforme à cette obligation »⁵⁴⁹. Selon le rapport de la CDI, l'affaire du *Trail Smelter* (Fonderie du Trail)⁵⁵⁰ – bien connue en droit de l'environnement pour avoir affirmé le devoir de prévention de la pollution transfrontière entre Etats voisins – exemplifierait le caractère continu de la violation de l'obligation de prévention durant toute la durée de la survenance de l'événement à prévenir car aussi longtemps que persistait la pollution, l'obligation était violée. Le Commentaire ajoute que la violation de l'obligation de prévenir est « progressivement aggravée »⁵⁵¹ si son débiteur ne fait rien pour mettre fin à l'événement

547. *Ibid.*

548. *Ibid.*

549. Article 14, paragraphe 3, ARIE.

550. *Affaire de la fonderie de Trail (Trail Smelter) (Etats-Unis/Canada)*, 1938 et 1941, Nations Unies, *RSA*, vol. III, p. 1905.

551. *Rapport de la Commission du droit international sur les travaux de sa cinquante-troisième session*, *ACDI*, 2001, vol. II, partie 2, p. 65.

qu'il aurait dû empêcher de survenir et qui persiste. Toutefois, le Commentaire reconnaît également que toutes les violations des obligations de prévenir ne sont pas nécessairement continues en ce que certaines obligations de prévention sont seulement attachées à éviter la survenance, plutôt qu'également la continuation, d'un événement particulier. Dans ce cas, l'omission illicite est instantanée. En revanche, elle est continue si l'obligation de prévenir continue d'être due aussi longtemps que l'événement perdure. Dans ce cas, la cessation de la violation continue de l'obligation de prévenir implique de mettre fin à l'événement – soit de parvenir à un résultat, là où l'exécution de l'obligation violée exigeait seulement un comportement conforme à la diligence requise sans nécessairement parvenir à éviter la survenance de l'événement.

302. Une dernière question doit encore être évoquée afin d'avoir une compréhension complète des obligations de prévention. Elle se pose après qu'un manquement à la *due diligence* est avéré et que l'événement à prévenir s'est produit, c'est-à-dire lorsque la violation de l'obligation de prévenir est constituée. Cette question est celle de savoir si l'auteur du manquement peut échapper à sa responsabilité en démontrant que, même s'il s'était acquitté de son obligation avec diligence et qu'il avait fait ses meilleurs efforts, l'événement à prévenir se serait néanmoins produit.

303. Dans l'affaire *Bosnie c. Serbie*, la Cour a clairement répondu à cette question par la négative :

« Peu importe, en revanche, que l'Etat dont la responsabilité est recherchée allègue, voire qu'il démontre, que s'il avait mis en œuvre les moyens dont il pouvait raisonnablement disposer, ceux-ci n'auraient pas suffi à empêcher la commission du génocide. Une telle circonstance, d'ailleurs généralement difficile à prouver, est sans pertinence au regard de la violation de l'obligation de comportement dont il s'agit. Il en va d'autant plus ainsi qu'on ne saurait exclure que les efforts conjugués de plusieurs Etats, dont chacun se serait conformé à son obligation de prévention, auraient pu atteindre le résultat – empêcher la commission d'un génocide – que les efforts d'un seul d'entre eux n'auraient pas suffi à obtenir. »⁵⁵²

552. *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, 26 février 2007, CIJ Recueil 2007, p. 221, paragraphe 430.

Cet extrait est important à plus d'un titre.

304. D'une part, le caractère comportemental de l'obligation de prévenir y est rappelé : la raison pour laquelle il est indifférent de déterminer si sa bonne exécution était impuissante à empêcher la survenance de l'événement tient fondamentalement au fait qu'elle n'est pas une obligation de réussir. Ce qui compte, c'est le comportement conforme à la *due diligence*, c'est-à-dire le déploiement des meilleurs efforts du débiteur. Puisqu'il n'est pas tenu d'assurer que l'événement à prévenir ne survienne, il ne peut échapper à sa responsabilité en soutenant que ses efforts auraient de toute façon été infructueux. En d'autres termes, l'obligation de prévenir exige que l'on agisse, quand bien même agir paraîtrait vain, car on ne peut jamais vraiment le déterminer – ni avant que ne survienne l'événement à prévenir tandis que l'obligation est déclenchée, ni après sa survenance.

305. D'autre part, la dernière phrase de l'extrait reproduit ci-dessus rappelle la dimension collective des obligations contenues dans la Convention sur le génocide ; elle reconnaît qu'il est des circonstances dans lesquelles les meilleurs efforts d'une seule partie à la Convention pourraient d'emblée s'avérer insuffisants. Combinée avec la considération qui la précède, cette réalité ne permet pas pour autant à une partie à la Convention de se prévaloir de la passivité des autres pour estimer être libérée de son devoir d'agir.

306. Enfin, en statuant de la sorte, la Cour paraît également avoir rejeté l'idée suivant laquelle il devrait être démontré que le manquement à la *due diligence* a été la cause de la survenance de l'événement à prévenir pour que la responsabilité pour violation de l'obligation de prévention puisse être établie. La subordination de cette violation à « un certain rapport de causalité »⁵⁵³ entre le manquement et la réalisation de l'événement qui aurait dû être prévenu a été suggérée par Ago⁵⁵⁴, mais elle n'a pas été retenue par la CDI⁵⁵⁵. En revanche, l'établissement

553. R. Ago, «Septième rapport sur la responsabilité des Etats», *ACDI*, 1978, vol. I, partie I, p. 33.

554. *Ibid.*, p. 30 :

«pour pouvoir constater la violation d'une obligation de cette catégorie, le concours de deux conditions est requis : l'événement à prévenir doit s'être produit, rendu possible par un défaut de vigilance de la part d'organes étatiques. On ne peut évidemment pas alléguer une violation par l'Etat de son obligation de prévenir un événement donné tant que celui-ci ne s'est en fait pas produit, et il en va de même si l'événement redouté s'est produit, mais sans que cela puisse être imputable à un défaut de prévoyance de la part de certains organes de l'Etat».

555. J. Crawford, «Deuxième rapport sur la responsabilité internationale des Etats», *ACDI*, 1999, vol. II, partie I, p. 30, paragraphe 85 et *Rapport de la Commission du droit*

du lien de causalité entre l'omission contraire à la *due diligence* et les dommages survenus à la suite de l'événement qui aurait dû être prévenu suppose de démontrer «avec un degré suffisant de certitude» que cet événement «aurait effectivement été empêché si le [débitéur de l'obligation de prévention] avait adopté un comportement conforme à ses obligations juridiques»⁵⁵⁶. Il y a là une difficulté commune aux obligations positives qui a déjà été commentée⁵⁵⁷.

international sur les travaux de sa cinquante et unième session, ACDI, vol. II, 1999, p. 65, paragraphe 183.

556. *Application de la Convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, 26 février 2007, Recueil 2007, p. 234, paragraphe 462.*

557. *Supra* n° 201 ss.

Annex 7

Samantha Besson, *Due Diligence in International Law*
(Brill Nijhoff 2023) (extracts)

ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE
THE HAGUE ACADEMY OF INTERNATIONAL LAW

Due Diligence in International Law

Samantha Besson

translated by
Sévrine Knuchel

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increase in risk³⁰³, as well as the duty-bearer's knowledge of that causal nexus³⁰⁴. This point will be further developed in the examination of the reasonable content and the variability parameters of due diligence, as well as in the analysis of causation in the context of responsibility for the breach of a due diligence obligation.

The second condition is the duty-bearer's ability to take measures. This condition seeks to verify that the potential duty-bearer is able to be diligent and may therefore be required to be such.

This criterion is also the second condition for the application of due diligence obligations in international human rights law, notably in the regime of the ECHR³⁰⁵, where it is referred to as "reasonable ability" (or reasonable capacity). The same criterion appears in other international legal regimes, such as international diplomatic law³⁰⁶.

Because these two conditions relate to what can be reasonably expected from or owed by the potential duty-bearer of due diligence, they will be further examined in the next section (E) devoted to due diligence's content, notably in relation to the standard of the reasonable State or IO in international law. Moreover, these two conditions become variability parameters since due diligence's content may vary depending on the degree of actual or constructive knowledge and on the degree of ability of the duty-bearer. We will therefore also return to the issue in the section (F) devoted to due diligence's variability.

E. The content of due diligence

An obligation of (x with) due diligence framed in the negative is an obligation not to carelessly harm the rights and interests protected by international law. The content of the due diligence standard strongly depends therefore on the content of the obligation upon which it is grafted. The due diligence standard merely qualifies that content by requiring the duty-bearer to exercise reasonable care in performing its conduct in compliance with its obligation.

303. See e.g. ECtHR, Case of *Luginbuhl v. Switzerland*, No. 42756/02, Judgment of 17 January 2006.

304. On the "real prospect of altering the outcome or mitigating the harm" test, see e.g. ECtHR, Case of *O'Keeffe v. Ireland*, *op. cit. supra* note 301, para. 149.

305. See e.g. ECtHR, Case of *Osman v. The United Kingdom*, *op. cit. supra* note 301, para. 116; ECtHR, Case of *Opuz v. Turkey*, *op. cit. supra* note 205, para. 129; ECtHR, Case of *O'Keeffe v. Ireland*, *op. cit. supra* note 301, paras. 144-149; ECtHR, Case of *Talpis v. Italy*, *op. cit. supra* note 205, paras. 98-99 and 129.

306. See e.g. ICJ, The case of the *United States Diplomatic and Consular Staff in Tehran*, *op. cit. supra* note 8, para. 68.

In order to better discern the specific content of the due diligence standard, it is necessary to distinguish between (1) the types of specific obligations upon which the due diligence standard is grafted (*obligation of due diligence*); (2) the measures of care or the absence of nuisance by negligence qualifying the content of this specific obligation (*obligation of due diligence*); and (3) the reasonable character of the measures required to comply with that obligation (*obligation of due diligence*).

1. *Obligations of x with due diligence*

As previously highlighted, due diligence is a standard of conduct that is attached to and qualifies an obligation of (x with) due diligence, which is why it is often simply referred to as a due diligence obligation.

Most of these specific obligations are obligations of conduct. It is also possible, however, to subject the behavioural component of an obligation of result to the due diligence standard³⁰⁷. In any case, international tribunals primarily identify due diligence obligations with obligations of conduct, often by contrasting them with obligations of result³⁰⁸.

These obligations of diligent conduct can be obligations of prevention³⁰⁹, protection or reparation³¹⁰. Depending on their content, they can be substantive (disarming private military groups, for example) or procedural (initiating an environmental impact assessment, for example). This distinction between substantive and procedural

307. The obligation to issue a judgment in international human rights law may be considered as an obligation of result, which includes a conduct component qualified by the due diligence standard. In this case, however, diligence is owed with regard to the actions of the duty-bearer of the obligation, and not with regard to the actions of a third party, as previously envisioned.

308. See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit. supra* note 8, paras. 99-100; ICJ, *The case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide* *op. cit. supra* note 22, para. 430; ICJ, *The case of Pulp Mills on the River Uruguay*, *op. cit. supra* note 3, para. 186; ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, *op. cit. supra* note 41, paras. 109-110; ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *op. cit. supra* note 148, paras. 125 and 129. See also P. d'Argent and A. de Vauleroy, *op. cit. supra* note 33, pp. 256-259. Contra: R. Pisillo Mazzeschi, 1992, *op. cit. supra* note 5; R. Pisillo Mazzeschi, 2018, *op. cit. supra* note 23 (on the terms).

309. See e.g. Convention on the Law of the Non-Navigational Uses of International Watercourses, *op. cit. supra* note 9, Arts. 7 (1), 21 (2) and 22; Istanbul Convention, *op. cit. supra* note 9, Art. 5 (2); Arms Trade Treaty, *op. cit. supra* note 9, Art. 6 (3).

310. See e.g. Convention on the Law of the Sea, *op. cit. supra* note 9, Arts. 63 and 192. On the diversity of specific due diligence obligations, see also R. Pisillo Mazzeschi, 2018, *op. cit. supra* note 23, p. 329; J. Crawford, *op. cit. supra* note 24, p. 230.

obligations of due diligence was introduced by case law, notably in international environmental law, and has proven less than clear or even useful in practice³¹¹. We will return to this issue several times in the remainder of this course.

Most of the time, obligations of (x with) due diligence are positive obligations and require an active conduct (enacting criminal law, signalling the presence of a bomb, conducting an environmental impact assessment, by way of examples). They can also be negative obligations, such as obligations to refrain from harming (not providing military assistance to an armed group, for example)³¹². In that respect, it is important to emphasise that, in the same way that the normative quality of due diligence is not inferior merely because it is a standard, so too is its normative quality not inferior merely because the specific obligation which it qualifies is deemed either positive or negative. However, while an obligation can be positive or negative, the due diligence standard itself is always positive and is breached by omission (negligence)³¹³.

Distinguishing between these different types of due diligence obligations is crucial: while certain obligations of conduct cannot be conceived of without an integrated standard of due diligence (obligations of prevention, for instance), this standard can also be integrated into obligations that are not preventive³¹⁴. This was one of the critiques raised by James Crawford and other jurists from the civil law tradition³¹⁵ against Roberto Ago's draft Article 23 ARSIWA³¹⁶. Today, due diligence's complete identification with preventive, precautionary or cooperative obligations in the jurisprudence on international environmental law is particularly problematic in that respect³¹⁷. As

311. See J. Brunnée, 2020, *op. cit. supra* note 14.

312. See e.g. Convention on the Law of the Sea, *op. cit. supra* note 9, Art. 192; PCA, *South China Sea Arbitration*, *op. cit. supra* note 8, para. 941. See also P. d'Argent and A. de Vacleroy, *op. cit. supra* note 33, p. 267; A. Seibert-Fohr, *op. cit. supra* note 261.

313. See also S. Shiffrin, 2017, *op. cit. supra* note 6, writing that: "Negligence may involve a failure to take due care, where due care requires an omission or an action, and the failure may itself involve an omission or an action."

314. See also J. Crawford, *op. cit. supra* note 24, pp. 226-232; P. d'Argent and A. de Vacleroy, *op. cit. supra* note 33, p. 259.

315. See P.-M. Dupuy, 1992, *op. cit. supra* note 75; J. Combacau, *op. cit. supra* note 75; P. Reuter, *op. cit. supra* note 75.

316. See J. Crawford, *op. cit. supra* note 24, pp. 226-232.

317. See e.g. ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, *op. cit. supra* note 41, para. 117, referring, in the same paragraph, to the "obligation" and the "standard" of due diligence. See also Separate opinion of Judge Dugard, in ICJ, *The case of Certain Activities carried out by Nicaragua in the Border Area*, *op. cit. supra* note 3, para. 7,

discussed earlier, it is guided by considerations pertaining to the sources and regime of due diligence: the ICJ recognised the customary nature of these specific obligations by deriving them from the due diligence standard, which the Court deemed, for that purpose, to be a customary obligation of general international law ³¹⁸.

Distinguishing the types of due diligence obligations is particularly important when it comes to differentiating between a breach of due diligence (i.e. when due diligence is integrated into other types of obligations) and a breach of an obligation of diligent prevention, particularly with regard to the role of the occurrence of harm for that breach. While the generality of this characteristic is not beyond doubt ³¹⁹, most preventive obligations can only be considered breached once the harm which they sought to prevent has occurred. This would apply even if the harm's occurrence does not necessarily mean that the obligation has been breached (contrary to what would be the case with an obligation of result) provided, of course, all reasonable preventive measures have been taken ³²⁰. We will re-examine this issue in the presentation of different aspects of due diligence in international responsibility law in the next chapter.

Distinguishing between types of due diligence obligations is also illuminating when addressing the nettlesome (and regrettable) distinction now made in international environmental law ³²¹ and

who, in the same sentence, refers to due diligence as an "obligation" and a "standard" of conduct.

318. See e.g. ICJ, *The case of Pulp Mills on the River Uruguay*, *op. cit. supra* note 3, paras. 101 and 204; ICJ, *The case of Certain Activities carried out by Nicaragua in the Border Area*, *op. cit. supra* note 3, para. 104. By way of a reminder, the argument in ICJ, *The case of Pulp Mills on the River Uruguay*, *op. cit. supra* note 3, undergoes three shifts: (i) the standard of due diligence becomes a full-fledged obligation; (ii) it is then qualified as a customary obligation; and (iii) the principle or obligation of prevention is derived from that customary obligation, rather than the other way round.

319. It is precisely this doubt that compels the ICJ to specify that it is not developing a "general jurisprudence" applicable to all the obligations of prevention in international law: see ICJ, *The case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *op. cit. supra* note 22, para. 429.

320. See ICJ, *The case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *op. cit. supra* note 22, paras. 221-222 and 430-431. In this regard, one must distinguish between the obligation of prevention under Arts. I and V of the Convention on the Prevention and Punishment of the Crime of Genocide, *op. cit. supra* note 279, and the obligation under VCDR, *op. cit. supra* note 9, Art. 22 (2). See also on this issue, J. Crawford, *op. cit. supra* note 24, pp. 226-232; P. d'Argent and A. de Vaucleroy, *op. cit. supra* note 33.

321. See in particular ICJ, *The case of Pulp Mills on the River Uruguay*, *op. cit. supra* note 3; ICJ, *The case of Certain Activities carried out by Nicaragua in the Border Area*, *op. cit. supra* note 3; Separate opinions of Judges Dugard, paras. 6 *et seq.* and Donoghue, paras. 9 *et seq.*, in the latter case.

international human rights law³²² between procedural and substantive obligations of prevention³²³.

The role given to the harm's occurrence in the breach of obligations of diligent prevention in international environmental law has indeed led to the identification of due diligence obligations which could be breached even without the occurrence of such a harm. Such obligations were named, for want of a better alternative, procedural preventive obligations (an obligation to assess the risk related to a building's construction, for example) as opposed to substantive preventive obligations (a prohibition on constructing a building that poses a certain risk, in that example)³²⁴. This distinction is criticised on the ground that it makes little sense, but also because it rests upon an erroneous generalisation of the condition of the occurrence of the harm for the breach of all obligations of diligent prevention³²⁵. This problem is further discussed below, as well as in Chapter IV on due diligence in international environmental law.

2. *Due diligence measures or the absence of nuisance by negligence*

The due diligence standard and by extension the obligations upon which it is grafted require the adoption of (measures of) "diligence", "vigilance" or "care"³²⁶ with regard to the rights or interests that these obligations protect.

322. See H. Raspail, *op. cit. supra* note 15.

323. See the masterful discussion on this issue in J. Brunnée, 2020, *op. cit. supra* note 14; J. Brunnée, "International Environmental Law and Community Interests: Procedural Aspects", in E. Benvenisti and G. Nolte (eds.), *Community Obligations in International Law*, Oxford, Oxford University Press, 2018, pp. 151-175. See also Y. Kerbrat, "Obligations procédurales et obligations de fond en droit international des dommages transfrontières", in I. Prezas (ed.), *Substance et procédure en droit international public: dialectique et influences croisées*, Paris, Pedone, 2016, pp. 7-18.

324. See e.g. ICJ, The case of *Certain Activities carried out by Nicaragua in the Border Area*, *op. cit. supra* note 3, para. 104. See also ICJ, The case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *op. cit. supra* note 22, paras. 221-222 and 430-431.

325. For a critique, see J. Brunnée, 2020, *op. cit. supra* note 14, for whom the obligations of diligent prevention in international environmental law may be breached without the occurrence of the harm to be prevented. She therefore considers that the separate identification of procedural obligations of prevention is not only impossible, but superfluous. See also S. Maljean-Dubois, *op. cit. supra* note 14.

326. On these different terms and their interchangeability in practice, see ICJ, The case of *Pulp Mills on the River Uruguay*, *op. cit. supra* note 3, para. 101; ICJ, The case of *Armed Activities on the Territory of the Congo*, 2005, *op. cit. supra* note 3, paras. 246-248; PCA, *Indus Waters Kishenganga Arbitration*, *op. cit. supra* note 8, para. 450.

Annex 8

Christian J. Tams et al., *The Genocide Convention. Article-by-Article Commentary*
(2nd edn., Beck/Hart 2024) (extracts)

The Genocide Convention

Article-by-Article Commentary

by

Christian J. Tams,
Lars Berster and
Björn Schiffbauer

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- 29 *Fourth*, the Convention provides more **detail on the scope of the duty to punish perpetrators in national jurisdictions**. Article VI qualifies the scope of this duty significantly by introducing a territorial nexus: ‘persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State *in the territory of which the act was committed*’. On the face of it, this seems to suggest that no duty exists to punish genocide committed outside a party’s own territory.⁷⁷ As is explored in the commentary to the resulting gap in the Convention’s system of protection can however be closed by a proper construction of Article IV, pursuant to which *génocidaires* ‘shall be punished’ without reservation.⁷⁸
- 30 *Fifth*, while Articles IV and VI are crucial, a number of **other provisions are also relevant to assessing the scope of the duty to punish**. Article V requires national implementation legislation ‘to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III’. According to Article VII para. 1, genocide must not be qualified as a political offence for the purposes of extradition treaties. Finally, on the institutional plane, Article VIII envisages enforcement action by the United Nations, which, amongst other things, may facilitate the punishment of *génocidaires*.
- 31 **b) The duty to prevent genocide. aa) General considerations.** Unlike for the duty to punish, **the content of the duty to prevent genocide is not specified in any detail in the subsequent provisions of the Convention**.⁷⁹ In fact, Article VIII (envisaging UN action ‘for the suppression and prevention of ... genocide’), ‘is the only Article in the Convention ... which deals with the prevention of that crime’.⁸⁰ Of course, punishing *génocidaires* as required by Articles IV and VI may have a preventative effect on future perpetrators⁸¹ and as some of the duties to punish relate to conduct preceding the actual commission of genocide (such as conspiracy or incitement to commit genocide⁸²), the link between prevention and punishment could indeed be said to be ‘nuanced’.⁸³ Yet prevention cannot be reduced to the potential, indirect effects of punishing, and to interpret the duty to prevent genocide as an aspect of a duty to punish would run counter to the wording of Article I, which treats them as ‘two distinct duties’.⁸⁴ The duty to prevent genocide therefore has a separate existence; it is (as the ICJ put it) ‘not absorbed by the obligation to punish’.⁸⁵
- 32 **The duty to prevent is not exhausted by Article VIII** either. As is explored in the commentary to that provision, Article VIII in the main has an enabling and clarificatory function; it leaves a wide margin of discretion to UN organs that are to identify the

⁷⁷ As noted elsewhere, Article VI does not preclude the exercise of national jurisdiction over genocide committed abroad; however it does not require it: see → Art. VI mns 45–52.

⁷⁸ → Art. IV mns 28–32.

⁷⁹ See para. 426 of the ICJ’s judgment in the *Bosnian Genocide case*: ‘the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a *principle* in Article I, only in Article VIII’.

⁸⁰ *Ruhashyankiko Report*, para. 304. As noted above, this has prompted (unjustified) doubts about the legal nature of the duty to prevent (→ mns 20–2).

⁸¹ This in fact is one of the assumptions of (international) criminal law, clearly brought out e.g. by the fifth preambular recital of the Rome Statute: ‘*Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*’.

⁸² → Art. III mns 23–35.

⁸³ Ben-Naftali in Gaeta, *Genocide Convention*, p. 29.

⁸⁴ *Sep. Op. Lauterpacht, Bosnian Genocide case*, ICJ Reports 1993, 325, 443. See also Ruvebana, *Prevention of Genocide*, 90–3.

⁸⁵ *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 427. In para. 425, the Court speaks of ‘two distinct yet connected obligations’.

‘appropriate’ means of preventing genocide.⁸⁶ If the duty to prevent had no meaning beyond Article VIII, it would (as has been noted) be ‘normatively empty’.⁸⁷ It would in fact not be a duty of treaty parties at all, as Article VIII is addressed to the (competent organs of the) United Nations, not to states. For that reason alone, attempts to limit Article I’s duty to prevent to UN action in the sense of Article VIII seem far-fetched.⁸⁸ Adapting the ICJ’s phrase, one could say that the duty to prevent imposed by Article I is ‘not absorbed by [UN action under Article VIII]’.⁸⁹

As the subsequent provisions of the Genocide Convention say so little on the duty to prevent genocide, its scope must be ascertained through **an interpretation of Article I in the light of general rules of interpretation**. Unlike with respect to the duty to punish (which is specified – and circumscribed – in other provisions⁹⁰), Article I itself is of decisive relevance: there simply exist no ‘implementing provisions’ on which the interpretation could draw; a *renvoi* is not possible. In light of this, the International Court was correct to emphasise, in the *Bosnian Genocide case*, that ‘in particular [the] undertaking to prevent’ supports the view that ‘Article I ... creates obligations distinct from those which appear in the subsequent Articles’.⁹¹ But Article I itself remains fairly vague; it mentions the duty to prevent without saying anything else about it.⁹² Because this is so, the precise scope of the duty to prevent is difficult to assess, which in turn has prompted domestic courts to deny its direct effect in proceedings brought by victims.⁹³ The subsequent considerations recognise the generality of the text whilst seeking to identify its main structural features.⁹⁴

bb) Activating the duty to prevent. The duty to prevent genocide does not exist in the abstract. It requires active conduct aimed at precluding the occurrence of a certain result, namely acts of genocide (plus, perhaps, other acts referred to in Article III).⁹⁵ **While it is a permanent obligation requiring vigilance, the duty to prevent is ‘activated’ by threats of genocide:** without such a threat, it does not have any mean-

⁸⁶ Article VIII envisages ‘action under the Charter’ by ‘the competent organs of the United Nations ... as they consider appropriate for the prevention ... of genocide’. The terms ‘as they consider appropriate’ bring out the largely discretionary character of the provision; however, UN organs are at least under a duty to engage with allegations of genocide. For details see → Art. VIII mns 14–7.

⁸⁷ See Ben-Naftali in Gaeta, Genocide Convention, p. 33.

⁸⁸ For the most ambitious attempt see Judge *ad hoc* Kreča’s dissent in the *Bosnian Genocide case*, ICJ Reports 2007, paras 538–51.

⁸⁹ See *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 427; and further Gattini *EJIL* 18 (2007), 699–700.

⁹⁰ → mns 24–30.

⁹¹ *Bosnian Genocide case*, ICJ Reports 2007, 43, para. 162.

⁹² See Schabas, Genocide in Int’l Law (1st ed.), p. 72: ‘while the final 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’. See further Sicilianos in Ascensio *et al.*, Droit international penal, p. 119.

⁹³ See e.g. Hoge Raad, Mothers of Srebrenica case, ECLI:NL:HR:2019:1284, para. 3.7.3 (‘Although Article I of the Genocide Convention does provide that the Contracting Parties undertake to prevent genocide, it does not determine the manner in which they will do so. The obligation of effort to prevent genocide defined in Article I of the Genocide Convention is formulated in general terms and does not entail unconditional and sufficiently precisely described obligations that can be applied directly as objective law in a dispute between an individual and the State.’) See already the preceding judgment in the same case, rendered by the Hague Court of Appeal, at paras 34.1.–34.6.; for critical comment see Boon *AJIL* 114 (2020), 485–6.

⁹⁴ For attempts to ‘distil’ minimum requirements flowing from the duty to prevent see notably Schiffbauer *GenocideSP* 12 (2018), 83; Mayroz *Journal of Genocide Research* 14(2012), 79.

⁹⁵ Problems relating to conspiracy, attempt, incitement and complicity are addressed *infra* mn. 42. See also → Art. III mns 23 et seqq.

ingful content.⁹⁶ What is more, like other forms of responsibility by omission, responsibility for failing to prevent a certain result will only arise if the proscribed result (such as acts of genocide, plus possibly other acts referred to in Article III) eventually takes place: 'a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed'.⁹⁷ This fits easily with the traditional perspective, within the law of state responsibility, on duties of prevention, which is reflected in Article 14 para. 3 of the ILC's Articles on State Responsibility: '[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs'.⁹⁸ In the light of these considerations, the scope of Article I's duty to prevent depends on two questions in particular: what forms of conduct need to be prevented? And which level of 'threat' is required for the duty to apply? In answering these questions, it seems convenient to distinguish geographical, temporal and substantive aspects of Article I.

- 35 (1) *The geographical dimension.* The first problem concerns the place where acts of genocide threaten to take place. **Does Article I oblige state parties to prevent acts of genocide anywhere in the world?** Does the duty to prevent only apply to acts of genocide 'at home'? Or does it mirror approaches under human rights treaties, which regularly can apply extraterritorially where states exercise a certain level of control and influence? Article I does not settle this question; it is silent on the issue. Yet this silence can lead to diverging interpretations. According to the International Court of Justice, it is to be read as a decision against territorial limitation: hence the Court's succinct observation that 'the obligation each State ... has to prevent ... the crime of genocide is not territorially limited by the Convention'.⁹⁹ But this is not the only possible reading: it would also be plausible to say that, in the absence of an express provision mandating its extraterritorial (let alone global) reach, the ordinary meaning would be to construe the duty to prevent as a territorial obligation – at least if one accepts that obligations under international law apply 'primarily territorial[ly]'.¹⁰⁰
- 36 The normative context of Article I is not conclusive either. Supporters of a 'global' interpretation, rejecting any territorial limitation, can point to Article VI, which does introduce a territorial limit.¹⁰¹ This suggests that indeed, **territorial limitations are not alien to the Convention** and that silence can be read as 'absence of a territorial limitation'. On the other hand, it is worth noting that Article VIII, envisaging UN action for, amongst other things, the prevention of genocide (irrespective of where it threatens to

⁹⁶ Gattini *EJIL* 18 (2007), 704, makes the point forcefully: 'If it is true that the duty to prevent a genocide is not temporally limited, and that the states are under a general obligation to do all in their power, through legislative measures or others, to prevent the commission of such acts, it is also true that it is only through some temporally determinable elements, e.g., the presence of a real and serious danger of genocide, that the duty to prevent can be concretized.' Forlati *PolyJIL* 31 (2011), 197, speaks of 'conditions under which the obligation [to prevent genocide] applies'.

⁹⁷ ICJ Reports 2007, 43, para. 431.

⁹⁸ See YbILC 2001, vol. II/2, 59. Gattini (*EJIL* 18 (2007), 701–2) discusses alternative constructions, but accepts that Article 14 para. 3 was 'formulated in unmistakable terms' and presented a 'well-trodden path'. See further Langobardo, *Diritto umani e diritto internazionale*, 237; Ruvebana and Brus *NILR* 62 (2015), 25.

⁹⁹ *Bosnian Genocide case* (preliminary objections), ICJ Reports 1996, 595, para. 31. In 1996, and notwithstanding the territorial nexus apparently provided by Article VI, the Court had said the same about the duty to punish. At the merits stage of the *Bosnian Genocide case*, it distinguished between the duty to prevent (not territorially limited) and the duty to punish (territorially limited), see ICJ Reports 2007, 43, paras 183–4.

¹⁰⁰ As was held by the European Court of Human Rights in the *Banković case*, para. 59. The acceptance of such a 'presumption' has been criticised: see e.g. Milanovic *HRLR* 8 (2008), 411.

¹⁰¹ → mn. 28.