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*These documents were submitted by Germany on 24 August 2026 and were added to the case file as Annex 9 to the preliminary objections of Germany (see CR 2026/30, p. 12).

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
Anl. 1PA	Dopp.	20 NIC

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; Dominici (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 [débiteur 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, ACIDI, 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

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BRILL | NIJHOFF

2023

Leiden/Boston

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 law³¹⁸.

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 doubt³¹⁹, 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 taken³²⁰. 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 law³²¹ 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

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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 Ruwebana, *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.

Annex 9

All correspondence exchanged between the Legal Directorate of the German Federal Foreign Office and the respective offices of Canada, the Netherlands, and the United Kingdom during the period relevant for the determination of the existence of a dispute between the Parties*

*These documents were submitted by Germany on 24 August 2026 and were added to the case file as Annex 9 to the preliminary objections of Germany (see CR 2026/30, p. 12).

Annex 9 - Email-Correspondence between the German Federal Foreign Office and the legal departments of the Foreign Ministries of Canada, the Netherlands and the United Kingdom relating to Nicaragua's allegations (2 February-1 March 2024)

Von: 500-RL Wasielewski, Lukas Georg (German Federal Foreign Office)

Gesendet: Friday, March 1, 2024 09:03

An: ' ' < >@minbuza.nl>; < >@fcdo.gov.uk>;
>@international.gc.ca; < >@fcdo.gov.uk>; >@minbuza.nl -
(Extern) < >@minbuza.nl>

Cc: < >@fcdo.gov.uk>; < >@fcdo.gov.uk>;
< >@fcdo.gov.uk>; < >@fcdo.gov.uk>; >
>@international.gc.ca; >@international.gc.ca; < >
>@auswaertiges-amt.de>; 5-D Uslar-Gleichen, Tania < >@auswaertiges-amt.de>;
>@international.gc.ca; >@international.gc.ca; < >
>@minbuza.nl>; >@international.gc.ca; >@international.gc.ca

Betreff: AW: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear colleagues,

Thank you, , for this very helpful table with the four notes received. Thursday, 7th March, 17:00 CET works for us as well. Attached please find the note which we sent to confirm receipt.

Best,

Lukas

Von: [REDACTED] <[REDACTED]@minbuza.nl>

Gesendet: Thursday, February 29, 2024 21:18

An: <@fcdo.gov.uk>; @international.gc.ca; 500-RL

Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]>

@fcdo.gov.uk>; @minbuza.nl - (Extern) <@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <

@fcdo.gov.uk>; <@fcdo.gov.uk>;

@international.gc.ca; @international.gc.ca;

<[REDACTED]@auswaertiges-amt.de>; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-

amt.de>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED] <

@minbuza.nl>; @international.gc.ca; @international.gc.ca

Betreff: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Hi _____,

Thanks, the comparison table is very helpful indeed! The 7th at 17h suits us well. Attached is the dipnote that we sent to acknowledge receipt.

Warm regards,

XXXXXXXXXXXX

From: [REDACTED] <[REDACTED]@fcdo.gov.uk>

Sent: Thursday, February 29, 2024 20:04

To: [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED]@international.gc.ca; [REDACTED]@auswaertiges-amt.de; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED]@auswaertiges-amt.de; [REDACTED]@auswaertiges-amt.de; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

OFFICIAL-SENSITIVE

Dear Colleagues,

I hope you are well.

May I suggest **Thursday 7 March at 11.00 (Canada); 16.00 (UK) and 17.00 (CET)** for our next meeting?

In addition, please see attached a helpful **comparison table of the NVs from Nicaragua to each of us**. You will note the primary differences are

[REDACTED]

Lastly, we are planning on simply acknowledging receipt of the NV today while still in the month of February. We will share this with you once issued. **I know NL has also confirmed receipt and indicated they will provide a more substantive response within a month.**

[REDACTED], Lukas, were you also planning on confirming receipt?

Many thanks and best regards.

[REDACTED]

[REDACTED] | Assistant Legal Adviser | Legal Directorate

Mob: [REDACTED] | Email: [REDACTED]@fcdo.gov.uk

From: [redacted] <[redacted]@minbuza.nl>

Sent: Tuesday, February 20, 2024 3:14 PM

To: [redacted]@international.gc.ca; [redacted]@auswaertiges-amt.de; [redacted]
<[redacted]@fcdo.gov.uk>; [redacted] <[redacted]@fcdo.gov.uk>; [redacted]
<[redacted]@minbuza.nl>

Cc: [redacted] <[redacted]@fcdo.gov.uk>; [redacted] <[redacted]@fcdo.gov.uk>; [redacted]
<[redacted]@fcdo.gov.uk>; [redacted] <[redacted]@fcdo.gov.uk>;
[redacted]@international.gc.ca; [redacted]@international.gc.ca; [redacted]@auswaertiges-
amt.de; [redacted]@auswaertiges-amt.de; [redacted]@international.gc.ca;
[redacted]@international.gc.ca; [redacted] <[redacted]@minbuza.nl>;
[redacted]@international.gc.ca; [redacted]@international.gc.ca

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear Colleagues,

For your consideration, please find attached a draft note verbale. Subject to approval from our Minister as to the general approach, we would consider sending this NV or a similar one to Nicaragua within a few weeks.

Talk to you soon!

Warm regards,

[redacted]

From: [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>

Sent: Wednesday, February 14, 2024 17:13

To: [REDACTED]@auswaertiges-amt.de; [REDACTED] <[REDACTED]@minbuza.nl>;
[REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk; [REDACTED] <[REDACTED]@minbuza.nl>

Cc: [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk;
[REDACTED]@fcdo.gov.uk; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca;
[REDACTED]@auswaertiges-amt.de; [REDACTED]@auswaertiges-amt.de;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED]
<[REDACTED]@minbuza.nl>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Hello colleagues,

Mystery solved. Canada received the attached note today (it had been sent to an incorrect box in the first instance and was re-sent by Nicaragua). February 20 and 21 both suit us for a meeting.

Cheers,

[REDACTED]

From: 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>

Sent: February 14, 2024 3:26 AM

To: [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]
<[REDACTED]@international.gc.ca>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@minbuza.nl - (Extern) <[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]
<[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]
<[REDACTED]@international.gc.ca>; [REDACTED] <[REDACTED]@international.gc.ca>; [REDACTED]
<[REDACTED]@auswaertiges-amt.de>; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-
amt.de>; [REDACTED] <[REDACTED]@international.gc.ca>; [REDACTED]
<[REDACTED]@international.gc.ca>; [REDACTED] <[REDACTED]@minbuza.nl>

Subject: AW: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear colleagues,

Our mission in NY has managed to find the note addressed to us (attached) (sent to a wrong email-inbox). Its content is similar to what the Netherlands and the UK have received.

Best,

Lukas

Von: 500-RL Wasielewski, Lukas Georg

Gesendet: Dienstag, 13. Februar 2024 17:26

An: [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@international.gc.ca; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-
amt.de>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@minbuza.nl - (Extern)
<[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]
<[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED]
<[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]@auswaertiges-amt.de>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED]
<[REDACTED]@minbuza.nl>

Betreff: AW: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports
to Israel

Dear colleagues,

Wednesday 21st would work for us as well. We have not yet found a note addressed to us;
our NY mission is still looking into the matter.

Best,

Lukas

Von: [REDACTED] <[REDACTED]@minbuza.nl>

Gesendet: Tuesday, February 13, 2024 16:24

An: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@international.gc.ca; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@minbuza.nl - (Extern) <[REDACTED]@minbuza.nl>; 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]@auswaertiges-amt.de>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@minbuza.nl>

Betreff: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear [REDACTED], all,

We would be available on Wednesday the 21st for a call. Also, we will send an acknowledgment of receipt of the Note to Nicaragua today (nothing more).

Warm regards,

[REDACTED]

From: [REDACTED] <[REDACTED]@fcdo.gov.uk>

Sent: Tuesday, February 13, 2024 15:33

To: [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED]@international.gc.ca;
[REDACTED]@auswaertiges-amt.de; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <
[REDACTED]@minbuza.nl>; [REDACTED]@auswaertiges-amt.de

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]
<[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED]@auswaertiges-
amt.de; [REDACTED]@auswaertiges-amt.de; [REDACTED]@international.gc.ca;
[REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@minbuza.nl>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

OFFICIAL-SENSITIVE

Dear [REDACTED],

Very many thanks for sharing these. We can now also confirm receipt of a similar NV which was sent to the wrong mailbox at our NY Mission.

We are in process of considering next steps here in London, including response. In that regard, we are very grateful to you for sharing NL's LTT which we are looking at carefully; we hope to be able to share ours in due course too.

In the meantime, we would suggest organising another coordination meeting for mid-next week. If that suits everyone, I will revert with some proposed timings.

Best,

[REDACTED]

[REDACTED] | Assistant Legal Adviser | Legal Directorate

Mob: [REDACTED] | Email: [REDACTED]@fcdo.gov.uk

OFFICIAL-SENSITIVE

From: [REDACTED] <[REDACTED]@minbuza.nl>

Sent: Monday, February 12, 2024 9:22 PM

To: [REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@auswaertiges-amt.de; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <
[REDACTED]@minbuza.nl>; [REDACTED]@auswaertiges-amt.de

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; [REDACTED]@auswaertiges-
amt.de; [REDACTED]@auswaertiges-amt.de; [REDACTED]@international.gc.ca;
[REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@minbuza.nl>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear All,

We have been put on notice... It was received on Friday the 2nd at our Permanent Mission in NY, but was sent to the general inbox, and went unnoticed for over a week.

Warm regards,

[REDACTED]

From: [redacted] <[redacted]@minbuza.nl>

Sent: Thursday, February 8, 2024 09:13

To: [redacted]@international.gc.ca; [redacted]@fcdo.gov.uk; [redacted]@auswaertiges-amt.de; [redacted]@fcdo.gov.uk; [redacted] <[redacted]@minbuza.nl>; [redacted]@auswaertiges-amt.de

Cc: [redacted]@fcdo.gov.uk; [redacted]@fcdo.gov.uk; [redacted]@fcdo.gov.uk; [redacted]@fcdo.gov.uk; [redacted]@international.gc.ca; [redacted]@international.gc.ca; [redacted]@auswaertiges-amt.de; [redacted]@auswaertiges-amt.de; [redacted]@international.gc.ca; [redacted]@international.gc.ca; [redacted] <[redacted]@minbuza.nl>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear all,

As promised here are our LTT and background that we have provided to our COMs dept etc:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]
- [redacted]
- [redacted]

Passive Lines to Take:

- [redacted]
 - [redacted]
 - [redacted]
- [redacted]
 - [redacted]
 - [redacted]

Warm Regards,

[redacted]

From: [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>

Sent: Monday, February 5, 2024 6:13 PM

To: [REDACTED]@fcdo.gov.uk <[REDACTED]@fcdo.gov.uk>, [REDACTED]
<[REDACTED]@minbuza.nl>, [REDACTED]@auswaertiges-amt.de <[REDACTED]@auswaertiges-amt.de>, [REDACTED]@fcdo.gov.uk <[REDACTED]@fcdo.gov.uk>, [REDACTED]
<[REDACTED]@minbuza.nl>, [REDACTED]@auswaertiges-amt.de <[REDACTED]@auswaertiges-amt.de>

CC: [REDACTED]@fcdo.gov.uk <[REDACTED]@fcdo.gov.uk>, [REDACTED]@fcdo.gov.uk <[REDACTED]@fcdo.gov.uk>, [REDACTED]@fcdo.gov.uk <[REDACTED]@fcdo.gov.uk>, [REDACTED]@fcdo.gov.uk <[REDACTED]@fcdo.gov.uk>, [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>, [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>, [REDACTED]@auswaertiges-amt.de <[REDACTED]@auswaertiges-amt.de>, [REDACTED]@auswaertiges-amt.de <[REDACTED]@auswaertiges-amt.de>, [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>, [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Hi [REDACTED]

Canada can attend as well. Just confirming who is available.

[REDACTED]

From: [REDACTED] <[REDACTED]@fcdo.gov.uk>

Sent: Monday, February 5, 2024 10:11 AM

To: [REDACTED] <[REDACTED]@minbuza.nl>; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@minbuza.nl>; 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]@international.gc.ca>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@international.gc.ca>; [REDACTED] <[REDACTED]@international.gc.ca>; 500-2 Koch, Nikolaus <[REDACTED]@auswaertiges-amt.de>; 5-VZ Tesch, Konstantin <[REDACTED]@auswaertiges-amt.de>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

OFFICIAL-SENSITIVE

Dear Both,

Thank you for reverting. We too think it would be useful to have an initial exchange even without NVs, in order to get ahead of the curve.

Best regards

[REDACTED]

OFFICIAL-SENSITIVE

From: [REDACTED] <[REDACTED]@minbuza.nl>

Sent: Monday, February 5, 2024 14:58

To: 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@minbuza.nl>; 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>; [REDACTED]@international.gc.ca

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; 500-2 Koch, Nikolaus <[REDACTED]@auswaertiges-amt.de>; 5-VZ Tesch, Konstantin <[REDACTED]@auswaertiges-amt.de>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

OFFICIAL-SENSITIVE

Dear All,

That time would suit us. From our perspective, it would be helpful to have a first exchange of views, even without having received a formal notification.

Warm regards,

[REDACTED]

OFFICIAL-SENSITIVE

From: 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>

Sent: Monday, February 5, 2024 15:41

To: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED] <[REDACTED]@minbuza.nl>; 500-RL Wasielewski, Lukas Georg <
[REDACTED]@auswaertiges-amt.de>; [REDACTED]@international.gc.ca; [REDACTED] <
[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; 500-2 Koch, Nikolaus <
[REDACTED]@auswaertiges-amt.de>; 5-VZ Tesch, Konstantin <[REDACTED]@auswaertiges-
amt.de>

Subject: AW: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear [REDACTED], dear all,

very happy to coordinate. Time is fine with us.

So far we are still unaware of any NV having been received.

Are you planning to hold the meeting even if no NV has been received by either of us by then?

Best
Tania

Von: [REDACTED] <[REDACTED]@fcdo.gov.uk>

Gesendet: Monday, February 5, 2024 15:36

An: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@minbuza.nl - (Extern) <[REDACTED]@minbuza.nl>; 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>; [REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; 500-2 Koch, Nikolaus <[REDACTED]@auswaertiges-amt.de>

Betreff: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

OFFICIAL-SENSITIVE

Dear Colleagues,

Further to [REDACTED]'s email below, we would like to suggest convening at **16:00 (UK); 17:00 (CET); and 11:00 (Canada) on Wednesday 7 February** to discuss this matter and think about how best to coordinate. Please can you kindly let us know whether this timing works for you? Additionally, it would also be very useful to know **if anybody has yet received a Note Verbale?** Very many thanks.

Best regards

[REDACTED]

[REDACTED] | Assistant Legal Adviser | Legal Directorate

Foreign, Commonwealth & Development Office | King Charles Street | London SW1A 2AH

Mob: [REDACTED] | Email: [REDACTED]@fcdo.gov.uk | Web: www.gov.uk/fco

OFFICIAL-SENSITIVE

From: [REDACTED] <[REDACTED]@fcdo.gov.uk>

Sent: Saturday, February 3, 2024 15:27

To: [REDACTED] <[REDACTED]@minbuza.nl>; 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>; [REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@international.gc.ca>; [REDACTED]@international.gc.ca; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; 500-2 Koch, Nikolaus <[REDACTED]@auswaertiges-amt.de>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Many thanks [REDACTED], Lukas. Fully agree on coordinating LTT. [REDACTED] and [REDACTED] are on call over the weekend in case it's necessary to coordinate today/tomorrow. Otherwise, if colleagues agree, it might be good to have a short Teams meeting early next week to touch base.

Best regards

[REDACTED]

[REDACTED] | Legal Director | Foreign, Commonwealth & Development Office | King Charles Street, London SW1A 2AH | Tel: [REDACTED] | Mob: [REDACTED]

From: [REDACTED] <[REDACTED]@minbuza.nl>

Sent: Saturday, February 3, 2024 12:58

To: 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>;
[REDACTED]@international.gc.ca; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@minbuza.nl>

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; 500-2 Koch, Nikolaus <[REDACTED]@auswaertiges-amt.de>

Subject: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear colleagues,

- We are preparing LTT to respond to any questions (from the press). [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]

I hope you can still enjoy your weekend,

[REDACTED]

From: 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>

Sent: Saturday, February 3, 2024 13:30

To: [REDACTED]@international.gc.ca; [REDACTED]@fcdo.gov.uk; [REDACTED] <[REDACTED]@minbuza.nl>

Cc: [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk; [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca; 5-D Uslar-Gleichen, Tania <[REDACTED]@auswaertiges-amt.de>; 500-2 Koch, Nikolaus <[REDACTED]@auswaertiges-amt.de>

Subject: AW: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Dear colleagues,

Thank you, [REDACTED], for reaching out on this issue. Neither our embassy in Managua nor in The Hague have received any official communication from the government of Nicaragua, nor has the embassy of Nicaragua in Berlin contacted the Foreign Office. All we have at this point in time is this press release dated February 1st.

I do agree that we should coordinate closely on this. From my understanding, Nicaragua want to intervene in the case ZAF v. ISR on the basis of Art. 62 ICJ Statute – I am very curious about the Court's reaction to this and how it will use its discretion, which under Art. 62 (intervention by leave of the Court) is greater than under Art. 63 (intervention as of right).

Best,

Lukas

Von: [REDACTED]@international.gc.ca <[REDACTED]@international.gc.ca>

Gesendet: Freitag, 2. Februar 2024 19:50

An: [REDACTED]@fcdo.gov.uk; [REDACTED]@minbuza.nl; 500-RL Wasielewski, Lukas Georg <[REDACTED]@auswaertiges-amt.de>

Cc: [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk; [REDACTED]@fcdo.gov.uk;
[REDACTED]@fcdo.gov.uk; [REDACTED]@minbuza.nl - (Extern) <[REDACTED]@minbuza.nl>;
[REDACTED]@international.gc.ca; [REDACTED]@international.gc.ca

Betreff: RE: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

Hello [REDACTED], The initial report came from my colleague, [REDACTED], at our Embassy in The Hague. We have not received the Note Verbale at this point.

[REDACTED]

From: [REDACTED] <[REDACTED]@fcdo.gov.uk>

Sent: Friday, February 2, 2024 1:23 PM

To: [REDACTED] <[REDACTED]@international.gc.ca>; [REDACTED] <[REDACTED]@minbuza.nl>; [REDACTED]@auswaertiges-amt.de

Cc: [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED] <[REDACTED]@fcdo.gov.uk>; [REDACTED]@minbuza.nl; [REDACTED] <[REDACTED]@international.gc.ca>

Subject: FW: Reports of Nicaraguan genocide claim against UK/GER/NL/CAN re arms exports to Israel

OFFICIAL

Colleagues

Our Embassy in the Hague (from I think [REDACTED] one of your colleagues) have received the link below to the Nicaraguan press release (also in English). Information is a bit sketchy at this point but it would be good to know whether any of you - or your Embassies – have received similar information or indeed a Note Verbale ?

Best regards

[REDACTED]

[REDACTED] | Legal Director | Foreign, Commonwealth & Development Office | King Charles Street, London SW1A 2AH | Tel: [REDACTED] | Mob: [REDACTED]

<https://www.el19digital.com/articulos/ver/titulo:148879-gobierno-de-nicaragua-impedir-y-detener-el-genocidio-en-palestina>

PRESS RELEASE

PREVENT AND STOP THE GENOCIDE IN PALESTINE

The Government of Reconciliation and National Unity informs the people of Nicaragua and the international community 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, including the law of occupation in the Occupied Palestinian Territories, in particular the Gaza Strip.

In this vein, in a note verbal sent to these governments, Nicaragua recalled that the facts and circumstances of the Israeli actions in and against the Palestinians led the International Court of Justice to conclude on 26 January 2024 “that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III”.

Although the Order on Provisional Measures of the Court is not a judgment on the merits, nevertheless on the evidence publicly available, the Court found it plausible that the Genocide convention has been and is being violated by Israel. If genocide is plausibly occurring in the Gaza Strip in the judgment of the highest world Court,

it cannot be otherwise in the judgment of the international community that is also dramatically aware of the same facts that led the Court to that conclusion.

The obligation to prevent genocide arises and begins when there is a risk of it occurring; in fact, when it is plausible that it is occurring or might occur. This plausibility is now beyond doubt and dispute.

In that sense, Nicaragua has urged the governments of the United Kingdom, Germany, the Netherlands and Canada to immediately halt the supply of arms, ammunitions, technology and/or components to Israel as it is plausible they might have been used to facilitate or commit violations of the Genocide Convention, including but not limited to acts of genocide, attempted genocide, complicity in genocide and conspiracy to commit genocide.

Unfortunately, the provision of military weapons and other assistance capable of being used in the genocide taking place has not stopped or diminished since the genocidal attacks of Israel on the Gaza Strip began in October 2023, and in some cases has indeed increased. Nicaragua has reminded these governments that “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”.

Furthermore, Nicaragua has warned that 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) further exposes that in the present scenario, the Governments of the United Kingdom, Germany, the Netherlands and Canada continue to disregard their obligations, and to actively facilitate violations of the rules of international law by Israel to the severe and immediate prejudice of the Palestinian people, particularly Gazans, and the international community as a whole. In particular, Nicaragua has underscored that this act contributes to the collective punishment of the Palestinians and to the apparent objective of forcing the Palestinian population to leave the Occupied Palestinian Territories, particularly Gaza, and preventing the exercise of their right to self-determination.

Consequently, Nicaragua has given written notice to these governments that it will adopt all measures it considers appropriate in accordance with international law, including recourse to the International Court of Justice, to guarantee respect for these fundamental international texts and customary international law.

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, 1 February 2024

Government of Reconciliation and National Unity
Republic of Nicaragua

ENDS

 | **Legal Counsellor & Head of International Law Team**

British Embassy The Hague | Lange Voorhout 10, 2514 ED | The Hague | Netherlands



Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Note No. 038/2024

Note Verbale

The Permanent Mission of the Federal Republic of Germany to the United Nations presents its compliments to the Permanent Mission of Nicaragua to the United Nations.

The Permanent Mission of the Federal Republic of Germany to the United Nations wishes to confirm receipt of the latter's Verbal Note No. MINIC-MIS-071-02-2024 dated 1 February 2024.

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

New York, February 14, 2024



Permanent Mission of Nicaragua
to the United Nations
New York

per mail

**RE: POSSIBLE PROCEEDINGS BY NICARAGUA AGAINST
THE UNITED KINGDOM AT THE INTERNATIONAL COURT OF JUSTICE**

**Comparison between Nicaragua’s Notes to
the UK, Germany, Canada and the Netherlands**

Key:

- material differences

	United Kingdom	Germany	Canada	Netherlands
1.	The Ministry of Foreign Affairs of the Republic of Nicaragua presents its compliments to the Foreign, Commonwealth and Development Office of the United Kingdom and refers to the ongoing military actions carried out by Israel for almost four	The Ministry of Foreign Affairs of the Republic of Nicaragua presents its compliments to the German Federal Foreign Office and refers to the ongoing military actions carried out by Israel for almost four months in the Gaza Strip since the events of 7 October 2023.	The Ministry of Foreign Affairs of the Republic of Nicaragua presents its compliments to the Ministry of Foreign Affairs of Canada (Global Affairs Canada) and refers to the ongoing military actions carried out by Israel for almost four months in	The Ministry of Foreign Affairs of the Republic of Nicaragua presents its compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and refers to the ongoing military actions carried out by Israel for almost four months in

	months in the Gaza Strip since the events of 7 October 2023.		the Gaza Strip since the events of 7 October 2023.	the Gaza Strip since the events of 7 October 2023.
2.	The United Kingdom and the whole international community is well aware of the same facts that the International Court of Justice pointed out and described in its Order on Provisional Measures of 26 January 2024, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa vs Israel). The Court noted that the military operation being conducted by Israel “has resulted, inter alia, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale”. The Court also highlighted that many Palestinians in the Gaza Strip “have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating”.	Germany and the whole international community is well aware of the same facts that the International Court of Justice pointed out and described in its Order on Provisional Measures of 26 January 2024, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa vs Israel). The Court noted that the military operation being conducted by Israel “has resulted, inter alia, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale”. The Court also highlighted that many Palestinians in the Gaza Strip “have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating”.	Canada and the whole international community is well aware of the same facts that the International Court of Justice pointed out and described in its Order on Provisional Measures of 26 January 2024, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa vs Israel). The Court noted that the military operation being conducted by Israel “has resulted, inter alia, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale”. The Court also highlighted that many Palestinians in the Gaza Strip “have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating”.	The Netherlands and the whole international community is well aware of the same facts that the International Court of Justice pointed out and described in its Order on Provisional Measures of 26 January 2024, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa vs Israel). The Court noted that the military operation being conducted by Israel “has resulted, inter alia, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale”. The Court also highlighted that many Palestinians in the Gaza Strip “have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating”.
3.	Likewise, the United Kingdom and the entire international community is also well aware, as the Court itself also pointed out in its Order, of the statements made by the Office for the Coordination of Humanitarian Affairs (OCHA), the World Health Organization (WHO), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the Secretary General of the United Nations and 37 Special Rapporteurs, Independent Experts	Likewise, Germany and the entire international community is also well aware, as the Court itself also pointed out in its Order, of the statements made by the Office for the Coordination of Humanitarian Affairs (OCHA), the World Health Organization (WHO), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the Secretary General of the United Nations and 37 Special Rapporteurs, Independent Experts	Likewise, Canada and the entire international community is also well aware, as the Court itself also pointed out in its Order, of the statements made by the Office for the Coordination of Humanitarian Affairs (OCHA), the World Health Organization (WHO), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the Secretary General of the United Nations and 37 Special Rapporteurs, Independent Experts	Likewise, Dutch government and the entire international community is also well aware, as the Court itself also pointed out in its Order, of the statements made by the Office for the Coordination of Humanitarian Affairs (OCHA), the World Health Organization (WHO), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the Secretary General of the United Nations and 37 Special Rapporteurs, Independent Experts

	and members of Working Groups of the Human Rights Council, including the United Nations Committee on the Elimination of Racial Discrimination, all of them warning of the humanitarian disaster unfolding in Gaza, the use of hate speech against Palestinians and the risk of genocide, along with breaches of international humanitarian law.	and members of Working Groups of the Human Rights Council, including the United Nations Committee on the Elimination of Racial Discrimination, all of them warning of the humanitarian disaster unfolding in Gaza, the use of hate speech against Palestinians and the risk of genocide, along with breaches of international humanitarian law.	and members of Working Groups of the Human Rights Council, including the United Nations Committee on the Elimination of Racial Discrimination, all of them warning of the humanitarian disaster unfolding in Gaza, the use of hate speech against Palestinians and the risk of genocide, along with breaches of international humanitarian law.	and members of Working Groups of the Human Rights Council, including the United Nations Committee on the Elimination of Racial Discrimination, all of them warning of the humanitarian disaster unfolding in Gaza, the use of hate speech against Palestinians and the risk of genocide, along with breaches of international humanitarian law.
4.	The facts and circumstances of the Israeli actions in and against the Palestinians led the Court to conclude “that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III”.	The facts and circumstances of the Israeli actions in and against the Palestinians led the Court to conclude “that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III”.	The facts and circumstances of the Israeli actions in and against the Palestinians led the Court to conclude “that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III”.	The facts and circumstances of the Israeli actions in and against the Palestinians led the Court to conclude “that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III”.
5.	The Order of the Court for Provisional Measures is not a judgment on the merits, but on the evidence publicly available the Court found it plausible that the Genocide Convention has been and is being violated by Israel. If genocide is plausibly occurring in the Gaza Strip in the judgment of the highest world Court, it cannot be otherwise in the judgment of the international community that is also aware of the same facts that led the Court to that conclusion.	The Order of the Court for Provisional Measures is not a judgment on the merits, but on the evidence publicly available the Court found it plausible that the Genocide Convention has been and is being violated by Israel. If genocide is plausibly occurring in the Gaza Strip in the judgment of the highest world Court, it cannot be otherwise in the judgment of the international community that is also aware of the same facts that led the Court to that conclusion.	The Order of the Court for Provisional Measures is not a judgment on the merits, but on the evidence publicly available the Court found it plausible that the Genocide Convention has been and is being violated by Israel. If genocide is plausibly occurring in the Gaza Strip in the judgment of the highest world Court, it cannot be otherwise in the judgment of the international community that is also aware of the same facts that led the Court to that conclusion.	The Order of the Court for Provisional Measures is not a judgment on the merits, but on the evidence publicly available the Court found it plausible that the Genocide Convention has been and is being violated by Israel. If genocide is plausibly occurring in the Gaza Strip in the judgment of the highest world Court, it cannot be otherwise in the judgment of the international community that is also aware of the same facts that led the Court to that conclusion.
6.	As the Court has recalled, “all the States parties to the Convention have	As the Court has recalled, “all the States parties to the Convention have	As the Court has recalled, “all the States parties to the Convention have	As the Court has recalled, “all the States parties to the Convention have

	a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations” of the said instrument. The obligation to prevent genocide arises and begins when there is a risk of it occurring; in fact, when it is plausible that it is occurring or might occur. This plausibility in now beyond doubt and dispute.	a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations” of the said instrument. The obligation to prevent genocide arises and begins when there is a risk of it occurring; in fact, when it is plausible that it is occurring or might occur. This plausibility in now beyond doubt and dispute.	a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations” of the said instrument. The obligation to prevent genocide arises and begins when there is a risk of it occurring; in fact, when it is plausible that it is occurring or might occur. This plausibility in now beyond doubt and dispute.	a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations” of the said instrument. The obligation to prevent genocide arises and begins when there is a risk of it occurring; in fact, when it is plausible that it is occurring or might occur. This plausibility in now beyond doubt and dispute.
7.	The Government of the United Kingdom cannot deny that is perfectly aware that “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”. Since the risk of genocide is established, in Nicaragua’s view, that window of time has long closed and the government of the United Kingdom should comply with its obligations under the Genocide Convention.	The German Government cannot deny that is perfectly aware that “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”. Since the risk of genocide is established, in Nicaragua’s view, that window of time has long closed and the government of Germany should comply with its obligations under the Genocide Convention.	The Canadian Government cannot deny that is perfectly aware that “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”. Since the risk of genocide is established, in Nicaragua’s view, that window of time has long closed and the government of Canada should comply with its obligations under the Genocide Convention.	The Dutch Government cannot deny that is perfectly aware that “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”. Since the risk of genocide is established, in Nicaragua’s view, that window of time has long closed and the government of the Netherlands should comply with its obligations under the Genocide Convention.
8.	In that sense, Nicaragua urges the government of the United Kingdom to immediately halt the supply of arms, ammunitions, technology or components to Israel as it is plausible they are being used to facilitate or commit violations of the Genocide Convention, including but not limited to acts of genocide, attempted genocide, complicity in	In that sense, Nicaragua urges the government of Germany to immediately halt the supply of arms, ammunitions, technology or components to Israel as it is plausible they are being used to facilitate or commit violations of the Genocide Convention, including but not limited to acts of genocide, attempted genocide, complicity in	In that sense, Nicaragua urges the government of the Canada to immediately halt the supply of arms, ammunitions, technology or components to Israel as it is plausible they are being used to facilitate or commit violations of the Genocide Convention, including but not limited to acts of genocide, attempted genocide, complicity in	In that sense, Nicaragua urges the government of the Netherlands to immediately halt the supply of arms, ammunitions, technology or components to Israel as it is plausible they are being used to facilitate or commit violations of the Genocide Convention, including but not limited to acts of genocide, attempted genocide, complicity in

	genocide and conspiracy to commit genocide.	genocide and conspiracy to commit genocide.	genocide and conspiracy to commit genocide.	genocide and conspiracy to commit genocide.
9.	It has been widely reported in the media that since 2015, the United Kingdom “has licensed at least £474 million worth of military exports to Israel, including components for combat aircrafts, missiles, tanks, technology, small arms and ammunition”. The UK Defence Journal estimates around 15 percent of the F-35 stealth bomber aircraft currently being use against the population in Gaza is British-made. The provision of military weapons and other assistance capable of being used in the genocide taking place has not stopped or diminished since the genocidal attacks of Israel on the Gaza Strip began in October 2023.	It has been widely reported in the media that “German defence export approvals to Israel so far this year [2023] have risen nearly tenfold from last year, with Berlin treating permit requests as a priority” since 7 October 2023; and that “the German government has approved the export of close to 303 million euros’ (\$323 million) worth of defence equipment to Israel. By comparison, 32 million euros’ worth of defence exports were approved in all of 2022”. It was also reported that “the majority of individual export permits - 185 out of 218 - were granted after the Oct. 7 attack on Israel”. It now appears to be indisputable that Germany is knowingly providing military components and other assistance capable of being used in the genocide taking place in Gaza.	It has been widely reported in the media that since 2022 “there were 315 active permits for military sales to Israel, with no sign that the [Canadian] government cancelled or suspended any of those permits that might still have been in use when Israel began its latest bombing campaign on Gaza”. Furthermore, a more recent report warned, “that some Canadian-made components, including those found in F-35 fighter jets, are first shipped to the United States and then ultimately supplied to the Israeli military”. As Canada well knows, the F- 35 stealth bomber aircraft is currently being use against the population in Gaza.	It has been widely reported in the media that “the Netherlands is home to one of three F-35 European regional warehouses” and that “Woensdrecht Air Base has served as a distribution center for spare parts”. The Netherlands is “a key contributor to the production and sustainment of the F-35 Lightning II advanced fighter”. It is also public knowledge that the Israeli Air Force placed an order for parts immediately after the events of 7 October 2023; and that the F-35 stealth bomber aircraft is currently being use against the population in Gaza as the Dutch government well knows. Despite all the above mentioned, the Netherlands refused to halt the provision of military components and other assistance capable of being used in the genocide taking place, and has not stopped or diminished the said exports since the genocidal attacks of Israel on the Gaza Strip began in October 2023.
10.	Furthermore, the recent announcement on the suspension by the United Kingdom of its funding to the UNRWA, on which the population of Gaza is critically dependent, further demonstrates that in the present scenario the Government of the United Kingdom continues to	Furthermore, the recent announcement on the suspension by Germany of its funding to the UNRWA, on which the population of Gaza is critically dependent, further demonstrates that in the present scenario the Government of Germany continues to disregard its	Furthermore, the recent announcement on the suspension by Canada of its funding to the UNRWA, on which the population of Gaza is critically dependent, further demonstrates that in the present scenario the Government of Canada continues to disregard its obligations	Furthermore, the recent announcement on the suspension by the Netherlands of its funding to the UNRWA, on which the population of Gaza is critically dependent, further demonstrates that in the present scenario the Dutch government continues to disregard its obligations

	disregard its obligations and to actively facilitate violations of the rules of international law by Israel to the severe and immediate prejudice of the Palestinian people, particularly Gazans, and the international community as a whole. In particular, this act contributes to the collective punishment of the Palestinians and to the apparent objective of forcing the Palestinian population to leave the Occupied Palestinian Territories, particularly Gaza, and preventing the exercise of their right to self-determination.	obligations and to actively facilitate violations of the rules of international law by Israel to the severe and immediate prejudice of the Palestinian people, particularly Gazans, and the international community as a whole. In particular, this act contributes to the collective punishment of the Palestinians and to the apparent objective of forcing the Palestinian population to leave the Occupied Palestinian Territories, particularly Gaza, and preventing the exercise of their right to self-determination.	and to actively facilitate violations of the rules of international law by Israel to the severe and immediate prejudice of the Palestinian people, particularly Gazans, and the international community as a whole. In particular, this act contributes to the collective punishment of the Palestinians and to the apparent objective of forcing the Palestinian population to leave the Occupied Palestinian Territories, particularly Gaza, and preventing the exercise of their right to self-determination.	and to actively facilitate violations of the rules of international law by Israel to the severe and immediate prejudice of the Palestinian people, particularly Gazans, and the international community as a whole. In particular, this act contributes to the collective punishment of the Palestinians and to the apparent objective of forcing the Palestinian population to leave the Occupied Palestinian Territories, particularly Gaza, and preventing the exercise of their right to self-determination.
11.	Nicaragua is of the opinion that these facts reveal that the United Kingdom is engaged in a gross and systematic failure to fulfill its obligations under the 1948 Genocide Convention. Therefore, it is the right and the duty of Nicaragua, as a State Party to the Genocide Convention to seek the United Kingdom's compliance with its obligations under the Convention as recognized by the Court when it concerns erga omnes partes obligations. Consequently, Nicaragua will adopt all measures it considers appropriate in accordance with international law, to guarantee respect for this fundamental international text, including recourse to the International Court of Justice.	Nicaragua is of the opinion that these facts reveal that Germany is engaged in a gross and systematic failure to fulfill its obligations under the 1948 Genocide Convention. Therefore, it is the right and the duty of Nicaragua, as a State Party to the Genocide Convention to seek Germany's compliance with its obligations under the Convention as recognized by the Court when it concerns erga omnes partes obligations. Consequently, Nicaragua will adopt all measures it considers appropriate in accordance with international law, to guarantee respect for this fundamental international text, including recourse to the International Court of Justice.	Nicaragua is of the opinion that these facts reveal that Canada is engaged in a gross and systematic failure to fulfill its obligations under the 1948 Genocide Convention. Therefore, it is the right and the duty of Nicaragua, as a State Party to the Genocide Convention to seek Canada's compliance with its obligations under the Convention as recognized by the Court when it concerns erga omnes partes obligations. Consequently, Nicaragua will adopt all measures it considers appropriate in accordance with international law, to guarantee respect for this fundamental international text, including recourse to the International Court of Justice.	Nicaragua is of the opinion that these facts reveal that the Netherlands is engaged in a gross and systematic failure to fulfill its obligations under the 1948 Genocide Convention. Therefore, it is the right and the duty of Nicaragua, as a State Party to the Genocide Convention to seek the Netherlands's compliance with its obligations under the Convention as recognized by the Court when it concerns erga omnes partes obligations. Consequently, Nicaragua will adopt all measures it considers appropriate in accordance with international law, to guarantee respect for this fundamental international text, including recourse to the International Court of Justice.
12.	Moreover, Nicaragua also considers that the United Kingdom has disregarded and continues to disregard its obligations under	Moreover, Nicaragua also considers that Germany has disregarded and continues to disregard its obligations under international humanitarian	Moreover, Nicaragua also considers that Canada has disregarded and continues to disregard its obligations under international humanitarian	Moreover, Nicaragua also considers that the Netherlands has disregarded and continues to disregard its obligations under international

	international humanitarian law, including but not limited to the 1949 Geneva Conventions, its Additional Protocols and customary international law. Common Article I of the 1949 Geneva Conventions explicitly mandates the High Contracting Parties to “respect and to ensure respect for the present Convention in all circumstances”, which includes the obligation to actively take steps to endeavor that other Contracting Parties respect the rules.	law, including but not limited to the 1949 Geneva Conventions, its Additional Protocols and customary international law. Common Article I of the 1949 Geneva Conventions explicitly mandates the High Contracting Parties to “respect and to ensure respect for the present Convention in all circumstances”, which includes the obligation to actively take steps to endeavor that other Contracting Parties respect the rules.	law, including but not limited to the 1949 Geneva Conventions, its Additional Protocols and customary international law. Common Article I of the 1949 Geneva Conventions explicitly mandates the High Contracting Parties to “respect and to ensure respect for the present Convention in all circumstances”, which includes the obligation to actively take steps to endeavor that other Contracting Parties respect the rules.	humanitarian law, including but not limited to the 1949 Geneva Conventions, its Additional Protocols and customary international law. Common Article I of the 1949 Geneva Conventions explicitly mandates the High Contracting Parties to “respect and to ensure respect for the present Convention in all circumstances”, which includes the obligation to actively take steps to endeavor that other Contracting Parties respect the rules.
13.	In this vein, Nicaragua is giving notice in writing of its claims concerning violations by the United Kingdom of its obligations under the Geneva Conventions of 1949, in particular the Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and the Additional Protocol of 1977, and generally of international humanitarian law and customary international law, including the law of occupation, in the context of its failure to prevent and facilitation of breaches of international law by Israel in its operations against Palestinians in the Occupied Palestinian Territories, particularly Gaza. This is also notice of Nicaragua’s “intention to submit the dispute or claim to the Court failing an amicable settlement” in accordance with the United Kingdom’s declaration recognizing the	In this vein, Nicaragua is giving notice in writing of its claims concerning violations by Germany of its obligations under the Geneva Conventions of 1949, in particular the Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and the Additional Protocol of 1977, and generally of international humanitarian law and customary international law, including the law of occupation, in the context of its failure to prevent and facilitation of breaches of international law by Israel in its operations against Palestinians in the Occupied Palestinian Territories, particularly Gaza.	In this vein, Nicaragua is giving notice in writing of its claims concerning violations by Canada of its obligations under the Geneva Conventions of 1949, in particular the Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and the Additional Protocol of 1977, and generally of international humanitarian law and customary international law, including the law of occupation, in the context of its failure to prevent and facilitation of breaches of international law by Israel in its operations against Palestinians in the Occupied Palestinian Territories, particularly Gaza. This is also notice of Nicaragua’s “intention to submit the dispute or claim to the Court failing an amicable settlement” in accordance with Canada’s declaration recognizing the	In this vein, Nicaragua is giving notice in writing of its claims concerning violations by the Netherlands of its obligations under the Geneva Conventions of 1949, in particular the Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and the Additional Protocol of 1977, and generally of international humanitarian law and customary international law, including the law of occupation, in the context of its failure to prevent and facilitation of breaches of international law by Israel in its operations against Palestinians in the Occupied Palestinian Territories, particularly Gaza.

	jurisdiction of the Court as compulsory filed on 22 February 2017.		jurisdiction of the Court as compulsory filed on 28 August 2023.	
14.	The Ministry of Foreign Affairs of Nicaragua avails itself of this opportunity to renew to the Foreign, Commonwealth and Development Office of the United Kingdom the assurances of its highest consideration.	The Ministry of Foreign Affairs of Nicaragua avails itself of this opportunity to renew to the German Federal Foreign Office the assurances of its highest consideration.	The Ministry of Foreign Affairs of Nicaragua avails itself of this opportunity to renew to the Ministry of Foreign Affairs of Canada (Global Affairs Canada) the assurances of its highest consideration.	The Ministry of Foreign Affairs of Nicaragua avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Kingdom of the Netherlands the assurances of its highest consideration.