

CR 2026/30

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2026

Public sitting

held on Monday 7 September 2026, at 10 a.m., at the Peace Palace,

President Iwasawa presiding,

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

VERBATIM RECORD

ANNÉE 2026

Audience publique

tenue le lundi 7 septembre 2026, à 10 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

*en l'affaire concernant des Manquements allégués à certaines obligations
internationales relativement au Territoire palestinien occupé
(Nicaragua c. Allemagne)*

COMPTE RENDU

Present: President Iwasawa
Vice-President Sebutinde
Judges Tomka
Abraham
Bhandari
Nolte
Charlesworth
Brant
Gómez Robledo
Cleveland
Aurescu
Tladi
Hmoud
Okowa
Judge *ad hoc* Al-Khasawneh
Registrar Villalpando

Présents : M. Iwasawa, président
M^{me} Sebutinde, vice-présidente
MM. Tomka
Abraham
Bhandari
Nolte
M^{me} Charlesworth
MM. Brant
Gómez Robledo
M^{me} Cleveland
MM. Aurescu
Tladi
Hmoud
M^{me} Okowa, juges
M. Al-Khasawneh, juge *ad hoc*

M. Villalpando, greffier

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as Agent and Counsel;

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Mr Daniel Müller, Founding Partner of FAR Avocats, member of the Paris Bar,

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M. Alexander Pyka, chef adjoint du département du droit international général, ministère des affaires étrangères de la République fédérale d'Allemagne,

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comme conseillers ;

M^{me} Sophie Horzela, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

comme assistante.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today and will meet in the coming days to hear the oral arguments of the Parties on the preliminary objections raised by the Respondent in the case concerning *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*. This morning, the Court will hear Germany's first round of oral argument.

For reasons duly made known to me, Judge Xue is unable to participate in these proceedings.

As a preliminary matter, I would like to take the opportunity to welcome the newly elected Registrar, Mr Santiago Villalpando, who, earlier this morning, made a solemn declaration before the Court in accordance with Article 24 of its Rules.

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Since the Court does not include upon the Bench a judge of Nicaraguan nationality, Nicaragua availed itself of the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr Al-Khasawneh, who was duly installed as judge *ad hoc* on 8 April 2024, during the phase of the present case that was devoted to the Request for the indication of provisional measures submitted by Nicaragua.

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I shall now recall the principal steps of the procedure in the present case.

On 1 March 2024, Nicaragua filed in the Registry of the Court an Application instituting proceedings against Germany for alleged violations by the latter of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, to which I shall refer as the "Genocide Convention", under the Geneva Conventions of 1949 and their Additional Protocols, as well as "intransgressible principles of international humanitarian law" and other conventional and customary norms of international law in relation to the Occupied Palestinian Territory, particularly the Gaza Strip. To found the jurisdiction of the Court, the Applicant invoked the declarations by which both States accept the compulsory jurisdiction of the Court (to which I shall refer as the

“optional clause declarations”) and the compromissory clause contained in Article IX of the Genocide Convention.

The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

By an Order dated 30 April 2024, the Court, having heard the Parties, found that “the circumstances, as they [then] present[ed] themselves to the Court, [were] not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures”.

By an Order dated 19 July 2024, the Court fixed 21 July 2025 and 21 July 2026 as the respective time-limits for the filing of the Memorial of Nicaragua and the Counter-Memorial of Germany.

The Memorial of Nicaragua was filed on 21 July 2025, within the time-limit fixed by the Court. In the Memorial, Nicaragua states that the Court’s jurisdiction in the present case is based on the Parties’ respective optional clause declarations and, for the claims concerning alleged violations of obligations stemming from the Genocide Convention, on the compromissory clause contained in Article IX of that Convention. Nicaragua adds that the jurisdiction of the Court is also based on Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (to which I shall refer as “CERD”).

On 21 October 2025, Germany raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application with respect to certain claims of Nicaragua. Consequently, by an Order of 22 October 2025, the Court noted that the proceedings on the merits were suspended by virtue of Article 79*bis*, paragraph 3, of the Rules of Court, and fixed 23 February 2026 as the time-limit within which Nicaragua could present a written statement of its observations and submissions on the preliminary objections raised by Germany. Nicaragua filed its written statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

After the closure of the written proceedings, Germany requested the inclusion of a new document in the case file in accordance with Article 56 of the Rules of Court and Practice Direction IX. Taking account of the views of the Parties, the Court authorized the Respondent to produce a copy of certain correspondence exchanged between the Legal Directorate of the German Federal Foreign Office and the respective offices of other States, together with a statement confirming that the document in question comprised the entirety of the relevant exchanges of which the Respondent was aware. 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.

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I would now like to welcome the representatives of Nicaragua and Germany who are in the Great Hall of Justice today. In particular, I note the presence of the Agent of Nicaragua and the Agent of Germany, each accompanied by members of their respective State's delegation.

In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the hearings will comprise a first and a second round of oral argument. The first round of oral argument will begin today, with the statement of Germany, and will close tomorrow, Tuesday 8 September 2026, following Nicaragua's first round of oral pleading. Each Party has been allocated a period of three hours for its first round. The second round of oral argument will begin on the afternoon of Wednesday 9 September 2026, with the statement of Germany, and close on the afternoon of Thursday 10 September 2026, with the statement of Nicaragua. Each Party will have a maximum of one and a half hours to present its reply.

In this first sitting, Germany may, if required, avail itself of a short extension beyond 1 p.m., in view of the time taken up by my introductory remarks.

I now give the floor to Ms Julia Monar, Agent of Germany. You have the floor, Madam.

Ms MONAR:

OPENING STATEMENT

I. Introduction

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur de me présenter devant vous aujourd'hui, en qualité d'agent de la République fédérale d'Allemagne. Je tiens à exprimer à cette occasion mes félicitations personnelles, et celles de mon gouvernement, au nouveau greffier de la Cour, M. Santiago Villalpando, pour son élection.

II. Exercising jurisdiction over Nicaragua's Application would undermine the principle of consensual jurisdiction

2. En tant qu'amie fidèle de la Cour, l'Allemagne soutient sans réserve le règlement pacifique des différends internationaux. Le profond respect de l'Allemagne pour l'organe judiciaire principal des Nations Unies ainsi que la confiance qu'elle lui accorde se manifestent non seulement à travers son soutien actif à la ratification étendue de traités contenant des clauses compromissoires, mais aussi à travers la déclaration d'acceptation de la juridiction obligatoire de la Cour faite en 2008.

3. Cependant, la présente affaire n'aurait pas dû être portée devant cette Cour. Comme l'Allemagne l'expliquera aujourd'hui, les conditions sur lesquelles s'appuie la juridiction de cette Cour ne sont pas réunies dans cette affaire. En effet, ce que le Nicaragua demande à la Cour contrevient aux principes fondamentaux sur lesquels repose l'exercice de la compétence de la Cour, en particulier le principe du consentement préalable à cette compétence. L'Allemagne soutient donc respectueusement que, si la Cour se déclarait compétente et acceptait d'exercer cette compétence sur les demandes du Nicaragua, cela établirait un précédent dangereux. Il y a trois raisons à cela, qui sous-tendent les exceptions préliminaires de l'Allemagne.

4. First, Germany respectfully submits that admitting Nicaragua's claims would empty the requirement of the existence of a "dispute" *at the time of the filing of an application*, of all meaning. The existence of a "dispute" is a central condition for the Court to exercise its mandate — which is the "peaceful settlement of *disputes*". The requirement of an existing "dispute" has been included in both Articles 36 and 38 of the ICJ Statute for a reason. That reason is that a State should not be "deprived of the opportunity to react before the institution of proceedings to the claim made against

its own conduct”¹. Here, however, Nicaragua’s conduct indicates that it was not interested in hearing Germany’s view on its allegations, but simply in bringing Germany before this Court. Were the Court to admit Nicaragua’s claims, no State that has accepted the Court’s jurisdiction could be certain that it would be given an opportunity to consider — let alone react to — another State’s allegations before facing them before this Court. This matters all the more in the current case. Mr President, Members of the Court, for the first time in the history of this Court, it is being asked to adjudicate a case that is *twice removed* from a classic bilateral dispute. Neither Nicaragua nor Germany is a party to the conflict that forms the real subject-matter of this case, the Israeli-Palestinian conflict. In such circumstances, it was critical that Germany be properly advised of the claims made against it and be given a fair opportunity to respond. It was not. It had no reason to expect claims from Nicaragua, it was caught cold and brought before this Court before any dispute could conceivably have been crystallized.

5. Second, Germany respectfully submits that admitting Nicaragua’s claims would distort the meaning of Germany’s *voluntarily* submitted declaration of 2008 by which it accepted the Court’s compulsory jurisdiction. It would distort its meaning, especially beyond its temporal limitation. Indeed, it appears that Germany’s conduct in the aftermath of the horrific terrorist attacks by Hamas on 7 October 2023 has prompted Nicaragua to use the opportunity to accuse Germany of violating international law with respect to alleged wrongful conduct that took place well before 30 April 2008. However, such claims are excluded by Germany’s optional-clause declaration. Like the optional-clause declarations of many other States, Germany’s declaration precludes litigation concerning facts and situations that predate the date of submission. As Germany’s counsel will explain in more detail, central claims put forward by Nicaragua have their real cause in facts or situations that predate 30 April 2008. In line with its established jurisprudence, the Court should reject these claims — any disregard of such clearly defined temporal limitations may undermine the confidence of States in accepting the compulsory jurisdiction of the Court.

6. Third, admitting Nicaragua’s claims would inevitably require the Court to determine the legality of the conduct of a third party, Israel, that has neither given its consent to — nor is in any

¹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 272, para. 40.*

way heard — in these proceedings. I have already made the point that neither Nicaragua nor Germany is directly engaged in the Israeli-Palestinian conflict. Instead, the case brought before this Court by Nicaragua involves an applicant asserting a right to act in pursuit of a public interest — and a respondent said to have violated ancillary and other obligations, the assessment of which necessarily requires evaluating the conduct of an absent State. Were the Court to declare Nicaragua’s claims admissible, the conduct of *any* State could at *any* time be brought before the Court and ruled on regardless of the absence of consent — provided that a third party has accepted the Court’s jurisdiction and that third party can be alleged to have engaged in some ancillary or similarly related wrongful conduct. We fear this would be an invitation to circumvent the principle of consent, the fundamental pillar of this Court’s jurisdiction.

III. Setting the record straight: Nicaragua’s factual statements are inapposite at this stage of the proceedings and paint a distorted picture

7. Mr President, Members of the Court, the three preliminary objections will be addressed in detail by Germany’s counsel. Before they do so, I would like to offer a few clarifications with respect to the factual allegations made by Nicaragua. A substantial part of Nicaragua’s written statement does not address Germany’s preliminary objections, but contains very serious allegations against Germany, portraying it as a State that “persistently refuses to meet the most fundamental obligations imposed by international law favouring other alleged ‘competing principles’ and hiding behind a purported ‘robust system’ of domestic law”².

8. Please allow me to make two preliminary points in this regard.

9. Firstly, these allegations have no place in this phase of the proceedings. They do not concern Germany’s preliminary objections. If anything, they concern the merits of this case. Germany notes that Nicaragua itself “is mindful of the limited scope of the present phase of the proceedings and does not intend to address issues that pertain to the merits of the case”³. Germany regrets that — despite Nicaragua’s professed awareness of the scope of these proceedings — it did not act accordingly.

² Written Statement of Nicaragua on the Preliminary Objections of Germany (WSN), para. 35.

³ WSN, para. 15.

10. Mr President, Members of the Court, this brings me to my second point. Germany cannot be expected to engage with these allegations at this stage of the proceedings. However, Germany feels compelled to point out that Nicaragua’s factual statements are not only inapposite at this stage of the proceedings but also create an inaccurate and distorted picture.

A. Germany’s robust and rigorous legal régime does not permit German authorities to disregard international law

11. Please allow me to first address what Nicaragua describes as Germany’s “*purported* ‘robust system’ of domestic law”, which, according to Nicaragua, allows German authorities to “favour . . . competing principles” over Germany’s obligations under international law when deciding on export licences⁴.

12. Mr President, Members of the Court, all German exports of military technology and equipment to Israel — as to any country — are subject to strict licensing requirements, which exceed international requirements⁵. Contrary to what Nicaragua claims, these licensing requirements do not leave *any* discretion to German authorities to disregard Germany’s obligations under international law⁶. Instead, the strictness of Germany’s legal framework was recently underlined by the German Federal Constitutional Court. The Court, Germany’s highest judicial organ, thoroughly examined Germany’s legal framework *in light of this Court’s Order of 30 April 2024*⁷. The Court clarified that the German legal régime on arms exports

“dictate[s] that, when assessing an application for licenses for armament exports, it must be examined whether the export of the military equipment . . . entails risks for compliance with international humanitarian law and international human rights. The license must be denied if such a risk is sufficiently high.”⁸

13. Licensing decisions follow a strict procedure based on a distinction between “war weapons” and “other military equipment”. According to the German War Weapons Control Act, a licence for the export of “war weapons” shall be denied, *inter alia*, if there is a reason to assume that such export would violate Germany’s international obligations or endanger their fulfilment. “Other

⁴ WSN, para. 35.

⁵ CR 2024/16, pp. 17–18, paras. 15–17(Tams).

⁶ See Article 6, paragraph 3 of the War Weapons Control Act; Sections 4 and 8 of the Foreign Trade and Payments Act.

⁷ Federal Constitutional Court (BVerfGE) — 2 BvR 1626/25 – (3 February 2026), paras. 10 and 14.

⁸ BVerfGE — 2 BvR 1626/25 – (3 February 2026), para. 96.

military equipment”, which for example refers to parts and components, requires a licence for export, which can only be granted on the basis of binding criteria. These notably include the condition that the granting of any such a licence must be in compliance with Germany’s international legal obligations, including those under international humanitarian law.

14. Accordingly, it is very clear that Germany’s domestic legal régime does not leave any leeway for Germany’s obligations under international law to be disregarded.

B. Germany’s licensing practice complies with international law

15. Indeed, *even Nicaragua* ultimately appears to accept the robust character of Germany’s domestic legal framework as such. Rather, Nicaragua argues that Germany allegedly does not *comply* with these domestic laws and accuses Germany of a lack of transparency with respect to its decisions on arms exports⁹.

16. Mr President, Members of the Court, Germany regularly publishes detailed reports on its arms exports, allowing for public scrutiny both by domestic and international actors, which is already in itself rather exceptional by international standards¹⁰. Germany also makes publicly accessible the responses by the Government to parliamentary questions relating to arms exports and, specifically, relating to arms exports to Israel. Indeed, Nicaragua cites several of these reports and responses in its written statement. But they simply do not substantiate Nicaragua’s accusation that Germany “persistently refuses its most fundamental obligations under international law”. On the contrary, they confirm that Germany takes concrete measures to ensure the compliance of its export licensing practice with international law.

17. Allow me to draw your attention to three aspects in particular. First, the reports and responses confirm that Germany has not since 2024 authorized any export of “weapons of war” with a final destination in Israel that can be used in the Gaza conflict¹¹.

⁹ WSN, para. 16.

¹⁰ See, for example, the “National Reports Archive”, compiled and regularly updated by the Stockholm International Peace Research Institute (SIPRI) (available at <https://www.sipri.org/databases/national-reports>).

¹¹ Response of the Federal Government, German Bundestag, doc. 21/3774, 22 January 2026 (WSN, Annex 50), p. 2 (for the period from 22 September to 23 November 2025); p. 3 (for the period from 1 April to 30 July 2025); Response of the Federal Government, German Bundestag, doc 21/5906, 11 May 2026 (as contained in Nicaragua’s letter of 21 August 2026), p. 2 (for the period from 1 November 2025 to 31 March 2026).

18. Second, they confirm that Germany closely monitors the developing situation in Israel, Gaza and the region, taking into account the relevant political and military situation. Hence, Germany has in the past restricted its export licensing relating to other military equipment destined for Israel. Even Nicaragua acknowledges as much in its written statement¹².

19. Any such restrictions are preceded and accompanied by a third measure, namely the constant dialogue between German officials and their Israeli counterparts, in which German officials have repeatedly emphasized that granting licences for the export of arms to Israel depends on the compatibility of such action with international humanitarian law¹³ and on receiving assurances from Israel that military equipment will be used in accordance with international humanitarian law.

20. Germany's licensing practice is adapted as necessary. For example, since December 2024, only partial licences have been granted for certain large-volume applications. This enables the Government to take account of the changing situation on the ground, even at short notice, when deciding whether to grant licences for the remaining goods. At certain times, notably in the summer of 2025, Germany has even suspended the authorizing of *any* export licences for *any* military equipment that can be used in the Gaza Strip altogether¹⁴. As the German Government stated in August 2025, in reaction to a military push by Israel at the time, Germany would until further notice authorize *no* military equipment exports *that can be used in the Gaza Strip*¹⁵.

21. As a consequence, the figures for licences granted for the final export of arms to Israel fell significantly in the period from 8 August to 23 November 2025, during which the Federal Government restricted its arms exports to Israel. In fact, no arms export licences for final export to Israel were issued in the period from 8 August to 12 September¹⁶. For the rest of the period until 23 November, licences were only issued¹⁷ on the basis of the Federal Government's assessment that

¹² WSN, para. 31.

¹³ See e.g. Foreign Minister Waidephul (30 May 2025) available at https://www.timesofisrael.com/liveblog_entry/german-fm-future-arms-deliveries-to-israel-will-depend-on-gaza-humanitarian-situation/.

¹⁴ Response of the Federal Government to the parliamentary question, German Bundestag, doc. 21/1958, 2 October 2025, p. 4 (WSN, Annex 31); Government Press Conference on 17 November 2025, available at <https://www.bundesregierung.de/breg-de/suche/regierungspressekonferenz-vom-17-november-2025-2394212> (WSN, Annex 45).

¹⁵ Government Press Conference of 11 August 2025, Federal Government (WSN, Annex 23).

¹⁶ Written questions with answers received from the Federal Government in the week of 22 September 2025, German Bundestag, doc. 21/1831, p. 44.

¹⁷ Written questions with answers received from the Federal Government in the week of 7 April 2026, German Bundestag, doc. 21/5249 pp. 70-71.

none of the items can be used in the Gaza Strip. When the processing of licence applications for such arms exports was resumed in late 2025, this was directly linked to the reaching of a ceasefire agreement in Gaza on 10 October 2025¹⁸.

C. Judicial review by German courts of the licensing of arms exports is careful, comprehensive and it fully takes into account international law

22. Mr President, Members of the Court, Germany’s export licensing practice with respect to military equipment is not only subject to continuous evaluation by the competent executive organs, but also to comprehensive and careful judicial review by German courts. An equivalent to the “political question doctrine”, known to many other jurisdictions, does *not* exist within the German judicial system¹⁹. Accordingly, several domestic courts have been seised with the question of the legality of Germany’s arms export practices, including the Federal Constitutional Court.

23. Importantly, and contrary to what Nicaragua has been alleging, *all* of these courts *have* considered Germany’s obligations under international law as forming part of the relevant applicable law²⁰. A closer reading of the actual text of these decisions reveals that the courts examined the conduct in question in detail on the basis of a thorough consideration of international law — including this Court’s decisions — as applied to the concrete facts of the cases. However, they found that the facts of the respective cases simply did not support the claims made by the applicants²¹. Please allow me to draw your attention once more to the decision by the Federal Constitutional Court of Germany of 3 February 2026. This decision concerned a constitutional complaint submitted by a Palestinian complainant living in Gaza, who argued that the licences granted for the export of military equipment to Israel violated German constitutional and international law. The court rejected the complaint after a careful and comprehensive assessment of Germany’s licensing practice in light of its obligations under international law, noting that

“[t]he Federal Government is in constant dialogue with the Israeli Government, both bilaterally and as a member of the European Union. It works towards ensuring

¹⁸ Government Press Conference on 17 November 2025, available at <https://www.bundesregierung.de/breg-de/suche/regierungspressekonferenz-vom-17-november-2025-2394212> (WSN, Annex 45).

¹⁹ See e.g. BVerfGE — 2 BvR 1626/25 – (3 February 2026), paras. 79, 108-114.

²⁰ See e.g. BVerfGE — 2 BvR 1626/25 – (3 February 2026), para. 78.

²¹ See e.g. Administrative Court of Berlin, Judgment of 12 November 2025 – 4 K 45/24, paras. 31–35 (WSN, Annex 34); Administrative Court of Berlin, Judgment of 12 November 2025, 4 K 130/24, paras. 24–32 (WSN, Annex 35).

compliance with international humanitarian law and international human rights provisions and provides extensive humanitarian aid. The Federal Government has not only taken general protective measures, but has also adapted its practice of granting licenses to export weapons designed for warfare and military equipment intended to remain in Israel throughout the course of the continued Israeli military offensive in Gaza.”²²

24. Accordingly, Germany respectfully notes that there is no basis for alleging that Germany’s licensing practice is not thoroughly reviewed by German courts.

D. German authorities thoroughly analyse and examine criminal complaints relating to alleged crimes under Germany’s Code of Crimes against International Law

25. Mr President, Members of the Court, in its written statement, Nicaragua also claims that “no investigations have been initiated against Israeli armed forces for criminal offences falling under Germany’s Code of Crimes against International Law, the *Völkerstrafgesetzbuch*, committed in Gaza since 7 October 2023”²³.

26. This statement is misleading at best.

27. Since the beginning of the Israeli military operation in the Gaza Strip in late 2023, the Federal Prosecutor General has continuously observed the situation in the conflict zone and has analysed and examined cases in which there are indications of links to Germany. German authorities have received several criminal complaints against members of the Israel Defense Forces (IDF). All of these complaints are carefully examined by the German authorities.

28. Some of these complaints are still under consideration and it is thus not apposite to comment on them. As for the complaints that have not led to charges, these decisions have been communicated by letter to the persons who filed the criminal complaints. In these letters, the German authorities set out in detail the reasons why they decided not to open a formal investigation. Germany would like to draw your attention to the fact that Nicaragua itself refers to such a letter from the Federal Prosecutor. In this letter, he explains why certain preliminary examinations he had undertaken did not lead to the prosecution of the individuals in question²⁴. These reasons notably

²² BVerfGE — 2 BvR 1626/25 – (3 February 2026), para. 111.

²³ WSN, para. 32.

²⁴ See Memorial of Nicaragua (MN), para. 230, fn. 453 citing Letter for the Federal Prosecutor General, 26 March 2025 (Annex 59).

include the absence of evidence identifying either the accused individual or conduct that would meet the requirements of a crime falling within the scope of the *Völkerstrafgesetzbuch*.

29. Germany thus underlines that there is simply no basis for inferring from the absence of charges being brought against Israeli soldiers that the allegations in question have not been thoroughly analysed by the German authorities.

E. Germany is deeply committed to achieving lasting peace, justice and security for both Israelis and Palestinians

30. Mr President, Members of the Court, Germany hopes that these explanations have demonstrated that Nicaragua's claim that Germany prioritizes political principles over its obligations under international law is baseless. Nicaragua claims, in particular, that Germany would set aside its obligations in favour of a "competing" principle of its *Staatsräson*. However, on the contrary, Germany's *Staatsräson* is inextricably linked to its compliance with its obligations under international law.

31. It is true that Germany's unwavering support for the existence and security of the State of Israel constitutes the core of German-Israeli relations resulting from Germany's lasting historical responsibility. However, Germany's commitment to the existence and security of the State of Israel does not, in any way, imply a disregard for international law.

32. Germany fully recognizes the right of Palestinians to self-determination, to be exercised in the territory that came under occupation in 1967, and has expressed its support for a two-State solution as the only path towards a lasting peace in the Middle East on numerous occasions. It is for this reason that Germany has been providing significant support to Palestinians living in the Occupied Palestinian Territory for decades and contributes to the establishment of a future Palestinian State as part of a two-State solution. It should be noted that Germany is one of the largest donors to the Palestinian territories, with an active bilateral development co-operation portfolio of approximately US\$1 billion, and is currently the largest bilateral donor to UNRWA, with yearly contributions in support of the Agency exceeding US\$100 million.

33. Germany has repeatedly — and strongly — condemned attempts to undermine the two-State solution, such as through the expansion of illegal settlements and the violence perpetrated by radical Israeli settlers. In this regard, Germany has left no doubt, in its public statements, that it

fully respects and supports the conclusions this Court reached in its Advisory Opinion of 19 July 2024, and that Germany will act in line with the obligations under international law set out in it.

34. Germany has furthermore repeatedly emphasized the paramount importance of humanitarian access to Gaza by United Nations agencies. Within the General Assembly, Germany has voted in favour of the request addressed to this Court as well as the resolution welcoming this Court's Advisory Opinion of 12 December 2025.

35. At the same time, the humanitarian situation in Gaza remains extremely dire, as Germany continuously points out in both multilateral and bilateral fora. Since October 2023 alone, Germany has provided up to US\$480 million in humanitarian assistance, but it is fully aware that this is barely sufficient and stands ready to contribute in every way possible to conditions for lasting peace and security in accordance with its obligations under international law.

36. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, permettez-moi de conclure ces remarques factuelles en réitérant que l'Allemagne est profondément attachée à atteindre une paix durable ainsi que la justice et la sécurité pour les Israéliens comme pour les Palestiniens, conformément aux avis consultatifs donnés par la Cour en 2004, 2024 et 2025 — un objectif qui, du point de vue de l'Allemagne, est partagé par le Nicaragua. Toutefois, l'Allemagne doute sérieusement que l'affaire portée devant la Cour par le Nicaragua contribue de quelque manière que ce soit à nous rapprocher de cet objectif commun.

37. En conséquence, l'Allemagne demande respectueusement à la Cour de rejeter les demandes du Nicaragua.

IV. Order of presentations

38. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, après ces observations liminaires, je souhaite vous présenter en conclusion l'ordre des plaidoiries de l'Allemagne.

39. M. le professeur Antonios Tzanakopoulos présentera la première exception préliminaire, à savoir qu'il n'existait pas de différend entre le Nicaragua et l'Allemagne concernant les demandes présentées par le Nicaragua lorsque celui-ci a déposé sa requête.

40. M. le professeur Christian Tams démontrera, dans notre deuxième exception, que certains des principaux griefs formulés par le Nicaragua échappent à la compétence temporelle de la Cour en vertu de la clause facultative, alors que les griefs du Nicaragua relatifs à la discrimination raciale ne satisfont pas à la condition préalable à la saisine de la Cour énoncée à l'article 22 de la convention internationale sur l'élimination de toutes les formes de discrimination raciale.

41. Il sera suivi par M. Samuel Wordsworth, qui traitera la troisième exception préliminaire de l'Allemagne, à savoir le fait que, en application de la règle dite de la « partie indispensable », la Cour ne peut exercer sa juridiction eu égard aux demandes du Nicaragua en l'absence d'Israël.

42. Monsieur le président, honorables Membres de la Cour, je vous remercie de votre attention. Je vous prie, Monsieur le président, de bien vouloir accorder la parole au professeur Antonios Tzanakopoulos, qui présentera la première exception de l'Allemagne.

The PRESIDENT: I thank the Agent of Germany for her statement. I now invite Professor Antonios Tzanakopoulos to take the floor. You have the floor, Sir.

Mr TZANAKOPOULOS:

**THERE WAS NO DISPUTE BETWEEN NICARAGUA AND GERMANY
AT THE TIME OF THE FILING OF THE APPLICATION**

I. Introduction

1. Mr President, Members of the Court, it is a privilege to appear before you today, representing the Federal Republic of Germany. I will establish that no dispute existed between Nicaragua and Germany at the critical time of the filing of Nicaragua's Application with the Court, with respect to any of the claims that appear in Nicaragua's Memorial. As a result, what the Court has referred to as the primary condition for the exercise of its judicial function is not met²⁵.

2. This primary condition is all the more important where, as here, the respondent State is said to have committed a breach of an obligation owed *erga omnes*, yet is not itself involved in the underlying conflict around which this claim revolves. As the Agent has just noted, this is a situation that is not merely once but *twice* removed from the usual bilateral dispute-settlement framework.

²⁵ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55.

3. I will be making three points: First, I will explain that it is not sufficient, as Nicaragua suggests, to make some generic reference to international humanitarian law (IHL), or even to international law at large, in order to establish the existence of a dispute. The respondent State, Germany, must be able to identify that there is a given claim with respect to some specific legal subject-matter. This concerns what we have described for convenience, as you can see in our “overview” document in tab 3 of your judges’ folder, as Nicaragua’s self-determination claim²⁶, its non-recognition and non-assistance claim²⁷, its racial discrimination claim²⁸ and its non-prosecution claim²⁹.

4. Second, given that Nicaragua commenced these proceedings without allowing Germany an opportunity to respond, I will examine whether there could be, in this case, a “failure” to respond. This concerns Nicaragua’s genocide claims³⁰, its Common Article 1 claims³¹, as well as its general international humanitarian law claim³² — to the extent that the latter can be considered specific enough to be meaningful, and meaningfully different from its Common Article 1 claims. But the point I will be making is also fatal to Nicaragua’s other claims.

5. Third, I will take issue with Nicaragua’s argument in its written statement that we are somehow asking the Court to apply a “stricter” or “different” test for the determination of the existence of a dispute. This is not the case, and I will explain why.

6. Finally, and as a coda, I will briefly highlight how Nicaragua’s arguments regarding conduct subsequent to the filing of the Application cannot absolve it from the requirement of establishing the existence of a dispute. Even taken at face value, these arguments are of no help to Nicaragua’s case.

²⁶ MN, para. 484 (7).

²⁷ MN, para. 484 (8).

²⁸ MN, para. 484 (9).

²⁹ MN, para. 484 (10).

³⁰ MN, para. 484 (1)-(3).

³¹ MN, para. 484 (4)-(5).

³² MN, para. 484 (6).

II. No dispute concerning Nicaragua's submissions (7)-(10)

7. Mr President, Members of the Court, I turn to the first of these issues. As a starting-point, Nicaragua and Germany are more or less at one when it comes to identifying the criteria established in the Court's jurisprudence for determining the existence of a dispute.

8. A dispute, a disagreement over facts or law³³, must exist between the parties at the critical time of the filing of the application³⁴. This is a primary condition for the Court to exercise its judicial function³⁵. Such a disagreement requires an objectively determinable exchange between the parties³⁶ which evinces "positive opposition" in their views: the claim of one must be positively opposed by the other³⁷.

9. For positive opposition to be established, a State must not be deprived of the opportunity to react before the institution of proceedings to a *claim* made against its conduct³⁸. The term "claim" here is important: the relevant exchanges between the States must refer to the subject-matter of a rule, or of the obligation under a rule, "with sufficient clarity to enable the State against which a *claim* is made to identify that there is, or may be, a dispute with regard to that subject-matter"³⁹.

10. The reading of this last requirement is the first point where Germany diverges from Nicaragua. Leaving aside the fact that there were no material exchanges between Nicaragua and Germany at all in this case, a matter to which I shall return, Nicaragua relies on only two documents in order to assert the existence of a dispute between itself and Germany: the Note Verbale of

³³ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J. Series A No. 2, p. 11.; cf. WSN, para. 46.

³⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 85, para. 30; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 271, para. 39.; cf. WSN, para. 52.

³⁵ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55.; cf. WSN, para. 45.

³⁶ See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), pp. 270-271, paras. 36-37; cf. WSN, para. 49.

³⁷ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; cf. WSN, para. 46.

³⁸ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 272, para. 40.

³⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 85, para. 30 (emphasis added).

2 February 2024 and the press release of 1 February 2024⁴⁰. Notably, the latter document was not even addressed to Germany and the claims that it contains are different to those in the Note Verbale. This reliance on only two documents, one of which is a press release, is, in itself, something that sets this case apart from other cases where the Court has found a dispute to exist between the two parties. In *Allegations of Genocide*, the Court referred not only to relevant statements by the highest authorities of the Russian Federation, including at the United Nations, but also to Ukrainian denunciations of Russian allegations going back almost a decade to 2014, in order to establish the existence of a dispute⁴¹. In *The Gambia v. Myanmar*, the Court relied on the history of exchanges at the United Nations between the two States over a period of more than a year — exchanges that were themselves based on reports issued by the relevant fact-finding mission⁴². Nothing of the sort has happened in this case: the two documents are the only allegations that Nicaragua can refer to — and they are both far removed from constituting “exchanges”.

11. In any event, in neither of these documents did Nicaragua mention — not once — its claims regarding self-determination, non-recognition and non-assistance, racial discrimination and non-prosecution⁴³. You can find the two documents in tabs 5 and 6 of the judges’ folder, and you can also see relevant parts on the screen now — there is no reference to any of these claims.

12. The non-prosecution claim, to take an example, is nowhere to be found in either the Note Verbale or the press release on which Nicaragua relies to establish the existence of a dispute. The word “prosecution” is not even mentioned anywhere in these two documents. That alone should be enough to demonstrate that there could be no dispute as to Germany’s “refusal to prosecute . . . persons responsible for . . . grave crimes under international law”⁴⁴. What is more, the claim in the Application, and eventually in the Memorial, is extremely broad in its formulation and does not even

⁴⁰ WSN, para. 63 citing the Note Verbale from the Ministry of Foreign Affairs of Nicaragua to the German Federal Office dated 2 February 2024 (hereinafter the “Note Verbale”), Application of Nicaragua (AN), Annex 1, and the press release of the Government of Nicaragua dated 1 February 2024, AN, Annex 3 (hereinafter the “press release”).

⁴¹ See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Preliminary Objections, Judgment, I.C.J. Reports 2024 (II), pp. 394-395, paras. 47-49.

⁴² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 506, para. 73.

⁴³ MN, para. 484 (7), (8), (9) and (10) respectively. See Preliminary Objections of Germany (POG), paras. 48 *et seq.*

⁴⁴ MN, para. 484 (10).

attempt to specify which persons Germany is alleged to have failed to prosecute, and for which specific crimes — by contrast, say, to *Belgium v. Senegal*, where the claim referred to a specific individual and over specific crimes⁴⁵. In fact, even in that case, the Court refused to accept that a dispute existed over the prosecution or extradition with respect to certain crimes because Belgium, while mentioning them, did not state or imply that Senegal “had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite” the specific individual⁴⁶. Of note, also, is the fact that Nicaragua does not attempt to develop its non-prosecution claim even after the critical date, in its Memorial or written statement, where it limits itself to brief references in two, and then one, paragraphs, respectively⁴⁷. Similar considerations apply also to the other claims discussed under this heading.

13. In response to Germany’s position that none of these terms or claims are mentioned in Nicaragua’s Note Verbale or press release, Nicaragua spends ten paragraphs in its written statement to highlight the importance of various rules of international law allegedly being violated by Israel in the Occupied Palestinian Territory, including the prohibition of acquisition of territory by force, international humanitarian law (at large) and international human rights law (again at large)⁴⁸. But these references cannot help Nicaragua’s case. The simple fact remains that, at no point before instituting proceedings, did Nicaragua raise with Germany any concern relating to questions of non-recognition and non-assistance, racial discrimination or non-prosecution. Its generic references to international law plainly do not meet the test formulated by the Court. In all the cases already mentioned, i.e. *Allegations of Genocide, The Gambia v. Myanmar*, *Georgia v. Russia* and *Belgium v. Senegal*, the Court emphasized that the exchanges between the parties referred to specific rules, in

⁴⁵ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 443, para. 50.

⁴⁶ *Ibid.*, p. 444, para. 54.

⁴⁷ MN, paras. 230, 271; WSN, para. 32.

⁴⁸ See e.g. WSN, paras. 77, 83-85.

particular genocide⁴⁹, ethnic cleansing⁵⁰ and the obligation to extradite or prosecute specific persons accused of torture⁵¹. Nicaragua's references, by contrast, do not refer to the subject-matter of a rule or the obligation under a rule, "with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter"⁵².

14. It was thus not enough for Nicaragua to refer in vague terms to "international humanitarian law", coupled with a reference to "customary international law". How could a respondent State understand from such wording that it was to be brought to the Court to answer claims concerning racial discrimination, or non-recognition and non-assistance, or a failure to prosecute?

15. Much the same applies, Mr President, to Nicaragua's self-determination claim⁵³. Neither in the Note Verbale nor in the press release is there any actual claim that Germany's conduct which is before the Court today is in breach of the principle of self-determination. Rather, the reference to self-determination in both documents, as Nicaragua itself admits, is made with respect to the funding of UNRWA⁵⁴. But Nicaragua then goes on to claim in its written statement that, perhaps, other acts by Germany may be in breach of that same principle⁵⁵. With respect, that is beside the point. The communication referred to the funding of UNRWA, a matter that was much discussed at that time. It should have specified, at least in general terms, which *further* conduct Nicaragua considered to be in breach of what rule. Otherwise, it remains open to the claimant State to continuously reframe a dispute that has supposedly been established. Not to mention that the recipient State is not able to respond to the allegation, if it is not clear to it which conduct is allegedly in breach of what rule.

⁴⁹ See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Preliminary Objections, Judgment, I.C.J. Reports 2024 (II), pp. 394-395, paras. 47-49; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), pp. 505-506, paras. 72-73.

⁵⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 120, para. 113, having previously reviewed various more generic claims and rejected them as having established the existence of a dispute.

⁵¹ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 443-445, paras. 50-54.

⁵² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 85, para. 30.

⁵³ NM, para. 484 (7).

⁵⁴ WSN, para. 82.

⁵⁵ *Ibid.*

16. All this I mention as additional points to Germany's main point with respect to the self-determination claim: no such claim exists in the Note Verbale or the Press Release. The reference to self-determination in both documents is made in passing and as part of the purported factual background. Indeed, Nicaragua uses the reference to self-determination and the funding of UNRWA to then conclude that "these *facts* reveal that Germany is engaged in a gross and systematic failure to fulfill its obligations under the 1948 Genocide Convention"⁵⁶. Nicaragua itself refers to them as facts that establish, in its view, the purported violation of the Genocide Convention.

17. In sum, none of the claims as to self-determination, non-recognition and non-assistance, racial discrimination and non-prosecution in Nicaragua's Memorial was raised in any discernible form in the Note Verbale or the Press Release. Some of them appeared in rudimentary form in its Application, while others appeared for the first time in its Memorial. These issues were not raised at all, let alone raised "with sufficient clarity"⁵⁷, before Nicaragua rushed to the Court. Germany was therefore deprived of any opportunity to react to any such claims. Thus, there could not exist a dispute between the Parties regarding these late claims at the critical time of filing of the Application.

III. No dispute concerning Nicaragua's submissions (1)-(6)

18. Mr President, Members of the Court, I turn now to the genocide, Common Article 1 and to the general international humanitarian law claims raised in Nicaragua's submissions (1)-(6)⁵⁸. As set out in Germany's preliminary objections, there was likewise no dispute with respect to any of these claims on 1 March 2024. This is so because no dispute regarding these claims had crystallized. Nicaragua did raise issues under the Genocide Convention and under the Geneva Conventions of 1949, specifically Common Article 1, in its Note Verbale of 2 February 2024. However, Germany never had the opportunity to respond to those claims because no time was allowed for Germany to do so.

19. To recall, the Court has stated that it may infer from a respondent's silence that the latter rejects the future applicant's claims, and therefore that there is positive opposition and thus a

⁵⁶ The Note Verbale, p. 7 (emphasis added) (AN, Annex 1).

⁵⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30.

⁵⁸ MN, para. 484 (1)-(3), (4)-(5), and (6), respectively. See POG, paras. 55 *et seq.* and 61 *et seq.*, respectively.

dispute.⁵⁹ But for the Court to so infer, the “respondent [must have] *failed* to reply to the applicant’s claims”⁶⁰ in “circumstances where a response is called for”⁶¹. Nicaragua says in its written statement that “[f]ailure to respond to a claim in circumstances where a response is called for *confirms* the existence of a dispute”⁶², citing *Georgia v. Russia* and *Cameroon v. Nigeria* — neither of which actually uses the term “confirms”⁶³. A failure to respond when a response is called for does not *confirm* the existence of a dispute. It is *required* to establish the existence of a dispute in the absence of explicit exchanges. But whether an alleged failure does in fact establish the existence of a dispute depends, as can only be the case, on the circumstances.

20. Thus, the Court has made clear that, whether a respondent may be considered as having *failed* to reply “depends on the particular circumstances of each case”⁶⁴. And the relevant circumstances include, per the Court’s jurisprudence, the period of time during which a respondent maintained its silence after being presented with the claim⁶⁵, the clarity and specificity of the claims as formulated⁶⁶ and the history of prior diplomatic exchanges between the parties bearing on the same subject-matter⁶⁷.

21. I have dealt with the clarity of certain claims already. I add here that the more unspecified or unclear the allegations are, the longer the State to which these are addressed may need to consider them, in order to try and understand what they may be about. The genocide claims, the Common

⁵⁹ See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 84, para. 30; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 505, para. 71.

⁶⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 505, para. 71 (emphasis added).

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

⁶² WSN, para. 50 (emphasis added).

⁶³ See *ibid.*, fn. 149.

⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 507, para. 75.

⁶⁵ *Ibid.*, para. 76.

⁶⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 85, para. 30 read together with *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), pp. 274-275, para. 47.

⁶⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 444-445, para. 54; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 507, para. 76.

Article 1 claims, and the general IHL claim are not specified, but put in the most generic manner — and this needs to be borne in mind. But that aside, neither the period of time during which Germany “maintained its silence after being presented with the claim”, nor “the history of prior diplomatic exchanges between the parties bearing on the same subject-matter” suffice to crystallize a dispute in this case.

22. Nicaragua puts heavy emphasis on the Court’s finding in *The Gambia v. Myanmar* that one month of silence between the receipt of a Note Verbale and the filing of an application is enough to establish positive opposition, given also “the seriousness of the allegations”⁶⁸. It also seeks to argue that even a shorter time, only hours, may occasionally suffice, relying on the *Allegations of Genocide* case⁶⁹. Nicaragua however does not mention that the Court, in finding that a dispute existed in that latter case, set out clear evidence of explicit positive opposition of views between Russia and Ukraine, some going back even to 2014⁷⁰. It was only against this background that the Court found that “[i]n the specific circumstances of the case” Ukraine could seise it without any further delay⁷¹.

23. As to the period of one month considered sufficient by the Court in *The Gambia v. Myanmar*, again, the Court did not make this finding in a vacuum. As it does with the *Allegations of Genocide* case, Nicaragua conveniently forgets several paragraphs of the Court’s Judgment in *The Gambia v. Myanmar* case. In paragraphs 65 and following, the Court describes in great detail how the two States had come to blows over the matter that eventually came before the Court in the United Nations General Assembly and, indeed, on the back of detailed fact-finding mission reports over more than one year⁷².

24. Most importantly, the Court highlighted how the Note Verbale sent by The Gambia did not signify the first time that relevant allegations were made known to Myanmar⁷³. In fact, it indicated that the two parties had already expressed opposing views on the matter even before the Note Verbale

⁶⁸ WSN, para. 89.

⁶⁹ See WSN, para. 53.

⁷⁰ See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening), Preliminary Objections, Judgment, I.C.J. Reports 2024 (II)*, pp. 394-395, paras. 47-49.

⁷¹ *Ibid.*, p. 395, para. 50.

⁷² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 502-504, paras. 65-69.

⁷³ *Ibid.*, p. 507, para. 76.

was sent⁷⁴. The circumstances, thus, are quite different than those in our case. Nicaragua can point to no instance where it had made relevant claims against Germany at any time before the Note Verbale or the Press Release (that was actually not addressed to Germany at all).

25. I will not dwell on the untenable assertion that Germany should have considered that there might exist disputes between itself and Nicaragua as to potentially all provisions of the four Geneva Conventions of 1949, all provisions of Additional Protocol I of 1977, all of IHL that has passed into customary international law — or even all of customary international law at large — and should have then responded to all these claims *within one month*. Plainly, even if discrete claims could somehow be identified, one month is not enough time for a State to formulate a position and revert on claims that potentially span the totality of IHL, or even international law at large, including the law of State responsibility⁷⁵.

26. The additional point here is that Germany did not even have that one month to consider and respond to the allegations in the Note Verbale, even taken in their narrowest possible form. This is because Germany did not actually receive the Note Verbale until 13 February 2024. Nicaragua says that both of the email addresses used for the communication of the Note Verbale were the official ones registered with the United Nations Protocol and Liaison Service⁷⁶. That is beside the point, however. Germany notes that, registered as the email addresses may be, these are not the channels customarily used — at least exclusively — for important diplomatic communications, including by Nicaragua itself⁷⁷.

27. Nicaragua repeatedly stresses how important and urgent its communication was, asserting, as it did, grave violations of international law⁷⁸. But if a State wishes to rely on the prompt receipt and consideration of an important communication, it does not limit itself to sending it from a Yahoo email address to a generic “info” address. I suggest that a seasoned diplomat such as the Permanent

⁷⁴ See *ibid.*, p. 506, para. 73:

“The Court considers that the statements made by the Parties before the United Nations General Assembly in 2018 and 2019 indicate the opposition of their views on the question whether the treatment of the Rohingya group was consistent with Myanmar’s obligations under the Genocide Convention.”

⁷⁵ Given that Nicaragua also makes a non-recognition and non-assistance claim under the law of State responsibility.

⁷⁶ WSN, para. 90.

⁷⁷ See WSN, para. 43, referencing Annex 4.

⁷⁸ See e.g. WSN, para. 62.

Representative of Nicaragua to the United Nations would naturally have been expected in such circumstances to send this — at least in parallel — to Germany’s Embassy in Managua or to the Federal Foreign Office in Berlin and, of course, not just to rely on electronic communications.

28. Nicaragua also notes in its written statement that both Canada and the Netherlands replied to its Note Verbale to confirm receipt, and that neither of them considered the channel of communication employed by Nicaragua as inappropriate⁷⁹. But both of these States, as well as the United Kingdom, *did* indeed consider the channel of communication as at least bizarre, if not flat out inappropriate. All four States, as you can see in the email exchanges here, had been actively looking for the Note Verbale, and holding co-ordination meetings, ever since being informed of the Press Release on 2 February 2024 — you can see further in the email chain in tab 8 of your judges’ folder. The first to discover the Note Verbale was the Netherlands, on 12 February. It is the email on the top left. It notes that it was received on 2 February “*but* was sent to the general inbox [of the United Nations Permanent Mission], and went unnoticed for over a week”⁸⁰. On 13 February, the United Kingdom — immediately below, on the left side — writes that “[w]e can now . . . confirm receipt of a similar NV *which was sent to the wrong mailbox* at our NY Mission”⁸¹. You can see the replies of Germany in the central column. The first reply by Germany is on the same date, and Germany notes that “[w]e have not yet found a note addressed to us; our NY mission is still looking into the matter”⁸², and immediately below, you can see that on the next day Germany reports that “[o]ur mission in NY has managed to find the note addressed to us (attached) (*sent to a wrong email-inbox*)”⁸³. Canada then, on the top right, reverts on 14 February to note: “*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)*”⁸⁴.

⁷⁹ WSN, para. 90 at fn. 225.

⁸⁰ Germany’s judges’ folders on Monday 7 September, tab. 8: “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) (hereinafter “Annex 9”) (emphasis added).

⁸¹ *Ibid.* (emphasis added).

⁸² *Ibid.*

⁸³ *Ibid.* (emphasis added).

⁸⁴ *Ibid.* (emphasis added).

29. So, it was not just Germany that was wrong-footed by Nicaragua's unusual communication channels in such an important matter.

30. Nicaragua continues to argue that Germany rejected, or rather "unequivocally" rejected⁸⁵, Nicaragua's claims. But it offers nothing new with respect to that argument. It just reprises a position that the German Government offered this rejection during a regular press conference on 7 February 2024. Germany has already fully set out the proper reading of the Government spokesperson's answers on that date. A date, to recall, at which Germany had not yet received the Note Verbale.

31. The German Federal Foreign Office spokesperson was asked in particular, as you can see in the excerpts, (a) to confirm receipt of the Note Verbale; and (b) to indicate how Germany intends to react to the steps being taken by Nicaragua⁸⁶. The spokesperson replied that the Federal Foreign Office was "aware of a press release", but noted that "nothing else" (other than the Press Release) "is known"⁸⁷. "Accordingly", she continued, "we have no reason to comment further"⁸⁸. This is a clear reservation of Germany's position with respect to the Note Verbale and the reaction to the steps taken by Nicaragua. While the spokesperson did also note that "we naturally reject the *relevant* content of the press release"⁸⁹, this referred to the *receipt* of the Note Verbale, which was suggested in the Press Release and with respect to which the journalist had enquired.

32. This was an instance of a spokesperson giving an *ad hoc* response to an unexpected question, not any form of official legal assessment of, or response to, the claims. At no point during the short exchange at the press conference did the representative of the Federal Foreign Office engage in any way with any of the material claims contained in Nicaragua's Press Release. The journalist was pressing on the receipt of the Note Verbale (you can see the question there): "The verbal note has not yet arrived?", the journalist asks again⁹⁰. To this the Federal Foreign Office spokesperson

⁸⁵ WSN, paras. 62, 97 and 113.

⁸⁶ Statements by the German Federal Foreign Office at the Governmental Press Conference, 7 February 2024 (relevant extracts in AN Annex 4, p. 1).

⁸⁷ *Ibid.*, p. 2.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, p. 1 (emphasis added).

⁹⁰ *Ibid.*, p. 2.

responds that “I have now answered your question twice”⁹¹, without offering any further comment. To seek to portray this as an “unequivocal rejection” of the Nicaraguan claims stretches credulity.

33. Beyond the question of how one is to interpret the spokesperson’s response to a journalist, however, I should also stress that statements made at a press conference cannot be regarded as “statements or documents exchanged between the parties” or “exchanges made in multilateral settings”⁹², which this Court takes into account for the determination of the existence of a dispute. The evidentiary value of this exchange for determining the existence of a dispute is thus questionable. This is all the more so since neither the “actual” nor the “intended addressee”⁹³ of these statements was in fact Nicaragua. The addressee was the journalist seeking to find out whether Germany had received Nicaragua’s Note Verbale. It would be the first time that the Court would infer positive opposition from a reply to a journalist, and this would broaden the term “positive opposition”.

34. Far more importantly, however, Germany never “failed” to respond to Nicaragua’s allegations. Quite the opposite: as we have stated repeatedly, and as you have seen, Germany was actively considering its position in co-ordination with the other three States that turned out to have received similar Notes Verbales. Nicaragua questions whether this is in fact true and, with that, it also questions Germany’s good faith. Nicaragua states:

“There is no evidence on the record showing that Germany was ‘actively considering its position’ by 13 or 14 February 2024, or that Germany was ‘seeking co-ordination with the three states — The Netherlands, the United Kingdom, and Canada’ — that had received notes verbales from Nicaragua”.⁹⁴

35. But there is evidence for this, Mr President, Members of the Court. In the email chain that you can find in tab 8 of the judges’ folder, and on screen now, you can see that negotiations were taking place between the four States regarding the organization of numerous co-ordination meetings — along with discussions on locating the Note Verbale⁹⁵. Once the Notes Verbales have been located and studied by all four States, the United Kingdom suggests 7 March 2024 for the “next”

⁹¹ *Ibid.*

⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 502, para. 64.

⁹³ *Ibid.*

⁹⁴ WSN, para. 97 (footnotes omitted).

⁹⁵ Annex 9.

co-ordination meeting⁹⁶. This is the email on the top right. Germany, immediately below, confirms its availability on the morning of 1 March 2024⁹⁷, a few hours before it finds out that Nicaragua had filed an Application with the Court on that very day.

36. In these circumstances, it is simply not serious to suggest that Germany “failed” in any way to respond to Nicaragua’s claims. Claims that had never been raised in any form before February 2024; claims that were different in the Press Release and in the Note Verbale; claims that were ill-defined to begin with and would require a very detailed consideration in order to begin to formulate a proper response. Germany was actively looking for the Note Verbale; co-ordinating with the other States named in the Press Release as recipients of equivalent Notes Verbales; and considering its position together with these States already on 13 February 2024. Just over two weeks after it had received the Note Verbale, and while co-ordination and discussion between the four States was taking place, Nicaragua rushed to the Court — but only against Germany. *Nicaragua did not even afford Germany enough time to “fail”*.

37. The impression left is that Nicaragua was just trying to tick boxes — as easily and as quickly as possible — in order to bring the matter to the Court. But in its hurry, it failed to establish that a dispute had emerged between itself and Germany regarding its submissions (1)-(6).

IV. The Court’s usual test must be strictly applied in situations “twice removed” from the bilateral setting of dispute settlement

38. Mr President, Members of the Court, Nicaragua argues in its written statement that Germany is trying to suggest that you should somehow apply a stricter test than you have thus far for establishing the existence of a dispute⁹⁸. This is a misrepresentation of Germany’s position. Both in the written and in the oral proceedings, Germany has stuck to the well-established criteria that the Court considers for the existence of a dispute. This is even — perhaps unconsciously — admitted by Nicaragua in paragraph 56 of its written statement. There, it quotes Germany’s written submissions,

⁹⁶ *Ibid.*

⁹⁷ *Ibid* (emphasis added).

⁹⁸ WSN, para. 45.

including the passage where Germany argues that “the Court’s *usual* test for the determination of the existence of a dispute be stringently applied”⁹⁹.

39. The reference is to the “usual” test; not a different test¹⁰⁰, not a stricter test. Germany calls upon the Court to be strict in the application of the requirements of the usual test, precisely because the case before it is unique. Nicaragua may claim that there is “nothing special” about this case¹⁰¹ but there is. The special thing about it is not that it has been brought by a State “other than the injured State” on the basis of *erga omnes* or *erga omnes partes* obligations. Such cases are usually only “once removed” from the usual bilateral setting of dispute settlement between an allegedly injured and an allegedly responsible State.

40. The unique thing about it is that in no other case that has been brought before this Court could the respondent have been *any one of a number of States*, rather than only a specific State. This is confirmed by the fact that originally, Nicaragua implicated no less than four States in its assertions and it would have undoubtedly implicated more, if it had considered that there was a plausible jurisdictional basis for doing so. The case, then, is “twice removed” from the usual bilateral setting. In such a case, an application may be lodged by *any* State against virtually *any other* State. And that may well be unproblematic, as long as one State, the one State that takes it upon itself to lodge the application, at least makes sure to establish the existence of a dispute between itself and one of its many potential targets. The Court should therefore be strict in applying the requirements — the usual requirements, mind — for establishing the existence of a dispute in these circumstances. Otherwise, the claim remains floating in the ether as a potential claim of all against all, until the moment when an unprepared respondent suddenly receives an unheralded application.

41. Nicaragua fails to establish the existence of a dispute between itself and Germany at the critical time of the filing of the Application, even based on the test that Nicaragua itself puts forward. And it is quite aware of that. This is evident in Nicaragua’s attempt, in Section D of Chapter 2 of its written statement, to rely on conduct subsequent to the critical date to shore up a failing case. But

⁹⁹ WSN, para. 56 (emphasis added).

¹⁰⁰ See WSN, para. 57.

¹⁰¹ WSN, para. 9.

none of this can help Nicaragua establish a dispute that did not exist at the critical time, on 1 March 2024¹⁰².

V. Conclusion

42. Mr President, Members of the Court, Nicaragua fails to pass the bar that it sets for itself, even if it sets it lower than the Court has done in its jurisprudence. The truth is that it sent a Note Verbale to Germany almost *pro forma*, in the vaguest possible terms (as it turns out from the case that it eventually submitted), and without waiting for any response. The almost unimaginable complexity of an open-ended set of claims that could be subsumed under its general formulations should have been examined and responded to within a couple of weeks, Nicaragua argues — even when no such issues had been raised with Germany in the past, even when all sorts of claims could be made by all States against all other States in the context of the situation in the Occupied Palestinian Territory.

43. The correct position is that no dispute existed between Nicaragua and Germany at the time of Nicaragua's seisin of the Court with respect to any of the Nicaraguan claims as they appear in its submissions (1)-(10) in the Memorial. Mr President, Members of the Court, thank you for your kind attention. May I now ask, Mr President, that you give the floor to Professor Christian Tams, who will speak to Germany's second preliminary objection? Unless, of course, the Court considers this to be an appropriate moment for a short coffee break. Thank you.

The PRESIDENT: I thank Professor Tzanakopoulos. Before I give the floor to the next speaker, the Court will observe, indeed, a break of 10 minutes. The sitting is adjourned.

The Court adjourned from 11:30 a.m. to 11:45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I will now give the floor to Professor Christian Tams. You have the floor, Sir.

¹⁰² See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *Jurisdiction and Admissibility*, I.C.J. Reports 2016 (I), p. 272, para. 40:

“Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute . . . However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings” (emphasis added, references omitted).

Mr TAMS:

**THE MAJORITY OF NICARAGUA'S CLAIMS ARE EXCLUDED FROM THE COURT'S JURISDICTION
UNDER THE OPTIONAL CLAUSE DECLARATION AND ARTICLE 22 CERD**

I. Introduction

1. Mr President, Members of the Court, it is an honour to address you on behalf of Germany.

2. I will be developing Germany's argument that, even if there was a dispute as alleged by Nicaragua, a majority of Nicaragua's claims would fall outside the Court's jurisdiction. I will first deal with limits to the Court's jurisdiction under the two States' respective optional clause declarations. Following that, I will move on to discuss particular problems with respect to Nicaragua's racial discrimination claim and Article 22 of the CERD. In the overview document, which we have submitted as tab 3, these matters are referred to as preliminary objection *2a* and *2b*, respectively.

**II. Nicaragua's claims set out in submissions (4)-(9) fall outside the Court's temporal
jurisdiction under the optional clause**

3. Mr President, Germany recognized the Court's jurisdiction under the optional clause on 30 April 2008. As many other States, Germany took great care to specify what disputes would be covered by its declaration. You have the full text of the relevant declaration at tab 9 of the judges' folder. Its first paragraph you see on the slide.

4. I draw your attention to the highlighted passage at the end, which determines the temporal scope of the Court's jurisdiction. As you read, the Court's jurisdiction is limited to "disputes arising after the present declaration [i.e. 30 April 2008], with regard to situations or facts subsequent to this date".

5. This temporal limitation is highly relevant in this instance. Central claims put forward by Nicaragua do not relate to "situations or facts subsequent to" 30 April 2008. Specifically, this is true for Nicaragua's claims set out in submissions (4) to (9). That is, its claims relating to Common

Article 1 and general international law¹⁰³, to self-determination¹⁰⁴, to non-recognition and non-assistance¹⁰⁵, and to racial discrimination¹⁰⁶.

A. The proper construction of Germany’s “double exclusion” clause

6. Mr President, the Court is very familiar with limitations to the temporal scope of its jurisdiction, which feature in the declarations of many States. The formula used by Germany has been referred to as a “double exclusion clause”¹⁰⁷: a double exclusion that precludes the litigation of (i) disputes that arose before a critical date, that is, in our case, 30 April 2008, and (ii) of later disputes that relate to situations or facts predating the critical date. It is the second prong of this “double exclusion” that is relevant here.

7. The Court’s jurisprudence provides guidance on the proper interpretation of double-exclusion clauses. The Parties’ written pleadings reflect this, and they provide some common ground.

8. I make three points:

- i. Nicaragua and Germany both draw on the *Phosphates in Morocco* case, in which the Permanent Court (of International Justice (PCIJ)) clarified the rationale of such relevant temporal limitations. By including such a clause, the PCIJ clarified, a State — France in the *Phosphates* case, and the same applies to Germany here — makes clear its intention “only . . . to submit to [the Court’s] jurisdiction disputes having actually arisen from situations or facts” that took place after the critical date¹⁰⁸.
- ii. Both Parties accept that, when applying this limitation, “the critical issue”, as this Court put it in the *Certain Property* Judgment, “is . . . the date of the facts or situations in relation to which the dispute arose”¹⁰⁹.

¹⁰³ See MN, para. 484 (4)-(6).

¹⁰⁴ See MN, para. 484 (7).

¹⁰⁵ See MN, para. 484 (8).

¹⁰⁶ See MN, para. 484 (9).

¹⁰⁷ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Preliminary Objections, Judgment, I.C.J. Reports 2024 (III)*, separate opinion of Judge Iwasawa, para. 3.

¹⁰⁸ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

¹⁰⁹ *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 25, para. 48.

iii. In addressing this “critical issue”, the Court and its predecessor have focused on the “real cause” or the “source” of a dispute. As this Court put it in the *Right of Passage* case, “[t]he facts or situations to which regard must be had . . . are [only] ‘those [only those] which must be considered as being the source of the dispute’, those which are its ‘real cause’”¹¹⁰. As Nicaragua notes, this focus on the “real cause” or the “source” implies that a dispute can be entertained if earlier facts and situations are merely the backdrop, or part of the broader context — but not the real cause — of the dispute¹¹¹. Conversely, as noted in the *Phosphates* case, where claims focused on “subsequent factors . . . [that] either presume the existence or are merely the confirmation or development of earlier situations or facts”, the double-exclusion clause applies and the matter falls outside the Court’s jurisdiction¹¹². All this, I believe, is common ground.

9. Where the Parties diverge is in the characterization of the matter Nicaragua has put before you, and to this I will now turn to assess whether Nicaragua’s claims, in this instance, relate to situations or facts that predate the critical date, i.e. 30 April 2008.

10. My focus in this is, naturally, on the claims put forward by Nicaragua in the Memorial or, in the words of the Court, on “the subject of the dispute . . . presented by the [claimant]”¹¹³. Seeking to identify the “source” or the “real cause” of the dispute presented by Nicaragua, I will consider the very questions that the Court has considered in its jurisprudence:

- What is “[t]he situation which [the claimant] denounces as unlawful”¹¹⁴?
- What is the “situation” that [the claimant] has “referred . . . to the Court”, and for which it seeks to “secure a remedy”¹¹⁵?
- Finally, in the language of the *Jurisdictional Immunities* case, what are “the facts . . . advance[d] by [the claimant] as showing the failure of [the respondent] to comply with its obligations”¹¹⁶?

¹¹⁰ *Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960*, p. 35.

¹¹¹ See WSN, para. 155.

¹¹² See *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

¹¹³ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 25; see also *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 319, para. 26 (“the dispute that [a claimant] intends to submit to the Court”).

¹¹⁴ See *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 25.

¹¹⁵ *Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960*, p. 27.

¹¹⁶ See *ibid.*, p. 35.

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

11. Mr President, Germany has set out its position on these matters in some detail in Chapter 4 of the written preliminary objections. To reiterate the essential point: the claims Nicaragua puts forward in its submissions (4) to (9) relate to facts and situations that predate 30 April 2008 and, therefore, cannot be brought on the basis of the optional clause declaration. I will deal with these claims in turn, and I begin with Nicaragua's self-determination claim.

(a) *Nicaragua's self-determination claim (submission (7))*

12. In line with the Court's approach, I begin by asking: "What is the dispute that [Nicaragua] intends to submit to the Court?" On the slide, you see how Nicaragua puts the matter, in paragraph 356 of its Memorial, under the heading "Germany's breaches of its obligations"¹¹⁷. You see that Nicaragua begins by referring to its earlier account which had "described how Germany has conducted a *long-term policy* of cooperating with and providing a wide range of assistance to Israel, up to the present day".

13. Now, this is not a mere opening phrase; it is the beginning of a specific claim. Nicaragua accuses Germany of violating the right of self-determination "[b]y reason of this conduct". It is through "this conduct", i.e. the "long-term policy", that Germany is said to have violated international law and "thus" incurred responsibility. This is the dispute that Nicaragua intends to bring before the Court.

14. And this is how Nicaragua — in the very section detailing Germany's alleged breaches of international law — describes the "situation" which it "denounces as unlawful"¹¹⁸: it seeks to redress the "long-standing violation of the right to self-determination of the Palestinian people"¹¹⁹ — a situation, which it describes as a "continuous denial" and "an illegal situation that spans decades"¹²⁰. It is "in this context", Nicaragua insists, that "Germany has an obligation to respect the right of the

¹¹⁷ *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 319, para. 26.

¹¹⁸ See *Phosphates in Morocco, Preliminary Objections, P.C.I.J., Series A/B, No. 74*, p. 25.

¹¹⁹ MN, para. 370.

¹²⁰ MN, para. 347.

Palestinian people to self-determination”¹²¹ — which obligation, Nicaragua asserts, Germany has breached through its “long-term policy”.

15. So how does Nicaragua seek to substantiate these claims? What “facts” — in the language of the Court — does it “advance[] . . . as showing [Germany’s] failure to comply with its obligations”¹²²? Nicaragua refers to a “variety of acts and omissions”¹²³. Certain of these acts and omissions date from after 30 April 2008. But clearly, many do not. Permit me to take you to three examples — more are referred to in Germany’s written pleadings¹²⁴.

16. First, arms exports — Nicaragua puts forward a sweeping claim that “[b]y providing Israel with significant military aid and advanced weapons systems . . . , knowing that these could be used in the Occupied Palestinian Territory, Germany directly undermines the Palestinian right to self-determination”¹²⁵. A sweeping claim because nothing in the Memorial suggests that, according to Nicaragua, Germany’s conduct became unlawful after 30 April 2008. Rather, to make good on its claim, Nicaragua points to arms exports that date back to 1999, it lists export licences since 2003¹²⁶, and all of this, if Nicaragua is to be believed, is unlawful as it “enables the military oppression of the Palestinian people in the Occupied Palestinian Territory”¹²⁷.

17. Second, the same sweeping approach characterizes Nicaragua’s arguments on specific arms deliveries. Submarines are central to Nicaragua’s case: it refers to the delivery of “five Dolphin class submarines”. These are in Nicaragua’s words “particularly significant”¹²⁸. Their delivery says Nicaragua “directly undermine[d]” Germany’s obligations under international law¹²⁹. But the evidence suggests and indicates that this claim concerns facts from well before 2008: the first three of the five Dolphin submarines mentioned were ordered and approved between 1990 and 1994. They were delivered in 1999 and 2000. A contract for further deliveries, including the purchase of two

¹²¹ MN, para. 371.

¹²² *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment, I.C.J. Reports 1960, p. 35.

¹²³ MN, para. 357.

¹²⁴ See POG, paras. 97-101.

¹²⁵ MN, para. 360.

¹²⁶ See MN, paras 140-141, 143, 153, 160.

¹²⁷ MN, para. 357.

¹²⁸ MN, para. 142.

¹²⁹ MN, para. 360.

additional submarines mentioned, was agreed in 2005-2006. And all of this, of course, is well before the critical date of 30 April 2008¹³⁰.

18. To take a third example — military training and information exchange: according to Nicaragua, through training and information exchange, Germany has “enable[d] the military oppression of the Palestinian people”¹³¹. Again, Nicaragua’s claim is sweeping and so are the facts that it relies on to support it. You see them on the slide¹³².

19. Training, as Nicaragua itself notes, began in 1984. It was formalized, as Nicaragua asserts, in an Agreement on Mutual training from 2008 — and the evidence Nicaragua puts forward makes clear that this was an agreement concluded in March 2008, before the critical date. And the same is true for exchanges of staff referred to towards the end of the passage: Nicaragua’s evidence leaves no doubt — Germany and Israel have been holding army general staff meetings on an annual basis since 1997. This is what Nicaragua’s evidence tells us.

20. And Mr President, all these statements come directly from Nicaragua’s Memorial. Contrary to what Nicaragua asserts, Germany does not “unduly rewrite[] the dispute submitted by Nicaragua to the Court”¹³³. We are engaging with Nicaragua’s claims set out in the Memorial, in the very sections that accuse Germany of breaching international law. And the Memorial leaves no doubt: the dispute Nicaragua intends to bring before the Court relates to Germany’s “long-term policy” vis-à-vis Israel, in place since well before 2008. It is this long-term policy that — adapting the words of the Court — Nicaragua “denounces as unlawful”¹³⁴. And in order to establish Germany’s alleged “failure to comply with its obligations”, Nicaragua “advances” “facts” — manifold facts — from before 30 April 2008¹³⁵.

¹³⁰ See POG, para. 100 (iii).

¹³¹ MN, para. 359.

¹³² MN, paras. 150-151.

¹³³ Cf. WSN, para. 165.

¹³⁴ See *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 25.

¹³⁵ See *Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960*, p. 35.

21. And all of this, Mr President, leads to one inescapable conclusion: the dispute that Nicaragua intends to bring before the Court is not one that “ha[s] actually arisen from situations or facts subsequent to”¹³⁶ 30 April 2008. Its “real cause”, its “source”, predates that critical date.

22. Mr President, Members of the Court, in its written observations, Nicaragua offers two arguments to suggest that the Court could nonetheless entertain the dispute.

23. The first, I can deal with briefly. This is Nicaragua’s assertion that its dispute is really related to Germany’s “actions arising after 30 April 2008” — and everything else, as Nicaragua says, is just part of the “historical background”, or the broader, “overall context”¹³⁷. But this is plainly incorrect. Nicaragua specifically accuses Germany of having breached international law through conduct predating 30 April 2008. And to give just one example, consider the “five Dolphin class submarines”¹³⁸ that Nicaragua referred to, approved well before 2008: These are not “background”, this is not “context”, this is a central plank of Nicaragua’s case.

24. Mr President, Nicaragua also says that Germany’s conduct after 30 April 2008 is separable from what came beforehand, and that it can be assessed “independently of any previous similar conduct by Germany”¹³⁹.

25. But this does not help Nicaragua either. In fact, in referring to the supposed separability of conduct occurring over decades, Nicaragua ignores the wording of Germany’s declaration and the Court’s guidance on how the “real cause” of a dispute is to be identified. Now, Nicaragua is not the first applicant to come to the Court encouraging the Court to focus on later facts and situations which, if looked at in isolation, would fall within the Court’s temporal jurisdiction, and this is not the first case in which the Court has had to assess “acts of the same nature” that took place before and after a critical date. And we suggest that the Court’s jurisprudence on the “real cause” of disputes is precisely meant to address this.

26. The *Certain Property* case illustrates the Court’s approach very well. As the Court will recall, Liechtenstein in that case had challenged judicial decisions of the 1990s in which German

¹³⁶ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

¹³⁷ WSN, paras. 168, 170 and 172.

¹³⁸ MN, para. 142.

¹³⁹ See WSN, para. 180.

courts had refused to seize, for the benefit of the prior Liechtenstein owner, a painting confiscated after World War II. Liechtenstein asked the Court to focus on these later court decisions, which, if seen in isolation, would have fallen within the Court's temporal jurisdiction. Germany, in the *Certain Property* case by contrast, noted that the later decisions had their basis in Germany's long-standing policy regarding post-World War II confiscations: there was, as Germany noted in *Certain Property*, "no change of position", and the court decisions that had prompted Liechtenstein to bring the case "did not depart from prior German case law on the subject"¹⁴⁰.

27. The Court's response to this debate is instructive, and you see the relevant passage on the slide¹⁴¹. The Court, of course, recognized that German court decisions of the 1990s had been rendered after the critical date. But that was not the relevant test. Rather, the Court asked whether, in light of the dispute submitted by Liechtenstein and the facts it had relied on, these later court decisions "departed from [Germany's] previous position" or whether, in the alternative, "for the first time" they addressed "a new situation" after the critical date. And on both aspects, the answer was "no": Germany's conduct, the Court found in *Certain Property*, was consistent: it began at a time when the Court possessed no jurisdiction and it stretched into the period after the critical date. There was no departure. And even though German courts had never addressed claims relating to Liechtenstein's property prior to the critical date, for German courts to do so in the 1990s did not give rise to a "new situation": the dispute Liechtenstein had brought before the Court concerned questions that had been addressed before. It had its "source" — its "real cause" — in facts and situations that predated the critical date.

28. Mr President, the implications of the Court's approach in *Certain Property* for our case are clear. Like Liechtenstein, Nicaragua needs to show that the German conduct it attacks, adapting the words of the Court, either "departed from a previous . . . position", or "for the first time" addressed "a new situation". But even on Nicaragua's case, that test is not met. In fact, Nicaragua's claim is directed against Germany's "long-term policy" — against a "previous . . . position" that Germany has *maintained* and that, as Nicaragua expressly asserts, is said to have been in violation

¹⁴⁰ See *Certain Property (Liechtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 21, para. 35.

¹⁴¹ See *ibid.*, p. 25, para. 49.

of international law before the critical date. Applying the test set out in the *Certain Property* case, it is clear that to the extent that Nicaragua refers to Germany's "actions . . . after 30 April 2008"¹⁴², these are, in the words used by the Court, "merely the confirmation or development of earlier situations or facts"¹⁴³. And so, on the basis of the Court's jurisprudence, the self-determination claim that Nicaragua submitted and to which I have taken you to falls outside the Court's jurisdiction under the optional clause.

(b) *Nicaragua's claims relating to racial discrimination, IHL and non-recognition and non-assistance (submissions (4)-(6), (8), (9))*

29. Mr President I turn to Nicaragua's other claims, and I will be much briefer; much briefer because Nicaragua's submissions follow the pattern of its self-determination claim: Nicaragua seeks to bring before the Court a dispute that it defines in very broad terms. It makes clear that, through its claims, it intends to redress a situation that began well before 2008. And to sustain its claims, it advances facts from before 2008 to assert that Germany had violated its obligations.

30. And this is true first, for Nicaragua's *racial discrimination* claim — its ninth submission. It is a sweeping claim; Nicaragua accuses Germany of not having "condemn[ed] Israel's racial discrimination, segregation and apartheid against the Palestinian people" and of "supporting [and] sustaining . . . Israel's regime of discrimination"¹⁴⁴. This is not a dispute that relates to developments since 2008. Nicaragua describes it as a situation of "racial [discrimination] and apartheid", to which it says the Palestinian people has been exposed for at least "twenty years"¹⁴⁵. As with self-determination, the "situation which [Nicaragua] denounces as unlawful"¹⁴⁶ predates the critical date.

31. And as with self-determination, Nicaragua accuses Germany of having violated its obligations through conduct from well before 2008. To illustrate, and you see the quotes on the slide, it refers to Volkswagen's involvement in the supply of vehicles to Israel by MAN, a German company — this, says Nicaragua, is "[a] telling example" of Germany's alleged breaches: MAN

¹⁴² See WSN, para. 172.

¹⁴³ See *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

¹⁴⁴ MN, para. 398.

¹⁴⁵ MN, para. 397. At para. 373, Nicaragua suggests that Israel had maintained a régime of "racial discrimination" "[s]ince . . . 1948".

¹⁴⁶ See *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 25.

trucks, Nicaragua asserts, are “used for . . . maintaining the occupation regime through force”, and MAN busses and chassis are also supplied, says Nicaragua, to Israel’s public transport group Egged¹⁴⁷. But the timing for these claims is revealing: Volkswagen acquired shares in MAN in 2006. MAN has delivered trucks and chassis to Israel since the 1960s. These are not “new facts” in the sense of the Court’s jurisprudence. They date from well before 2008.

32. The same is true of another plank of Nicaragua’s racial discrimination claim, that is the delivery — and you see the quote — of “[n]aval vessels . . . constructed and delivered by German companies” (clear references to the Dolphin class submarines): Nicaragua describes these — and you see the quote on the slide — as an “essential” element for the maintenance of racial discrimination, and it says that Germany’s conduct was “fundamentally and incontrovertibly incompatible with [its] obligations”¹⁴⁸. But, Mr President, as discussed already, the deliveries of five Dolphin class submarines referred to by Nicaragua were based on contracts from before 30 April 2008. As with respect to self-determination, this is not background or context. These are the very facts that Nicaragua advances to establish Germany’s responsibility — and they clearly predate the critical date.

33. Mr President, the same applies to Nicaragua’s submissions (4) to (6) which relate to *Common Article 1 and general international law*: here Nicaragua’s case is that Germany has been under a duty to take active measures to ensure Israel’s compliance with international humanitarian law for decades. This duty, Nicaragua asserts, was “triggered as soon as [Germany] knew or should have known of plausible violations of IHL”¹⁴⁹ by Israel. According to Nicaragua, Germany has been under such a duty to ensure respect for IHL since at least 1967.

34. As regards the facts, Nicaragua accuses Germany of having been what it says “a devoted friend of Israel”¹⁵⁰ and of not speaking up against Israel — another sweeping accusation directed against Germany’s long-term policy. Nicaragua identifies points in time at which, in its view,

¹⁴⁷ MN, paras. 418 and 420.

¹⁴⁸ MN, para. 413.

¹⁴⁹ MN, para. 314.

¹⁵⁰ MN, para. 321.

Germany was expected to criticize Israel — including, and you see the quote on the slide, in General Assembly debates about the *Wall* Advisory Opinion in July 2004¹⁵¹.

35. Nicaragua also accuses Germany of permitting German companies to engage in commercial activity in the Occupied Palestinian Territory and to sustain its claim, it points, amongst others, to the conduct of Heidelberg Materials. Specifically, its concern is that Heidelberg Materials has been operating “through its Israeli subsidiary Hanson Israel since 2007”¹⁵².

36. And this is again not background or context. Just as with respect to Volkswagen or MAN, or the submarines: the specific claims that Nicaragua advances show that its dispute with Germany is not one that “ha[s] actually arisen from situations or facts subsequent to”¹⁵³ the critical date of 30 April 2008. The parallel with the *Certain Property* case is plain.

37. Mr President, permit me finally to take you to Nicaragua’s claim of *non-recognition and non-assistance*. We see the same pattern: Nicaragua seeks to redress a situation that it characterizes as one of decade-long unlawfulness. Germany’s obligations arise in the face of what Nicaragua calls an “ongoing use of force in the form of [Israel’s] 58-year military occupation”¹⁵⁴. For 58 years, Nicaragua asserts, the — what it calls — “ongoing aggression” has “engag[ed] . . . legal obligations of third States — including Germany” — of non-recognition and non-assistance¹⁵⁵. The same pattern.

38. And the same pattern, too, as far as Nicaragua’s assertions of breach are concerned. You see it on the slide. Nicaragua leaves no doubt: Germany is expressly accused of “active conduct of aiding and assisting Israel *for decades* in its illegal conduct”¹⁵⁶. And again: what is at issue is Germany’s long-term policy, acts of the same nature occurring over decades that, in Nicaragua’s argument, amount to unlawful support of Israel, as Nicaragua says, “in all areas of life, diplomatic, economic, scientific, cultural, and military”¹⁵⁷.

¹⁵¹ MN, para. 322.

¹⁵² MN, paras. 328 and 277.

¹⁵³ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

¹⁵⁴ MN, para. 96.

¹⁵⁵ MN, para. 98.

¹⁵⁶ MN, para. 462.

¹⁵⁷ MN, para. 461.

39. Mr President, Members of the Court, we have provided further details about Nicaragua's claims — other than self-determination — in paragraphs 102-117 of Germany's Preliminary Objections. But the illustrations I have taken you to illustrate the pattern. Whether we look at the specific allegations of breach, or at Nicaragua's claim that Germany for decades had to take "proactive steps"¹⁵⁸ to redress breaches of IHL and to condemn racial discrimination, the picture is the same.

40. From the way Nicaragua has presented its claims, it is clear that it perceives the situation as one of decade-long illegality, since well before 2008. Nicaragua's claim is that Germany has maintained its long-term policy vis-à-vis Israel, not that it "departed from a previous . . . position"¹⁵⁹, to use the words of the *Certain Property* Judgment. From the specific facts that it relies on to substantiate its claims, its submissions (4) to (9), it is clear that these submissions do not have their source, or their real cause, in facts subsequent to 30 April 2008. They fall outside the Court's temporal jurisdiction under the optional clause.

III. The Court lacks jurisdiction over Nicaraguas' racial discrimination claim (submission (9))

41. Mr President, Members of the Court, I move on to what we have referred to, in the document at tab 3 of the folder, as Germany's preliminary objection "2b": this is a targeted objection which is directed against the ninth of Nicaragua's submissions; its racial discrimination claim.

42. Now, to establish the Court's jurisdiction over this claim, Nicaragua had initially invoked Article 22 of the Racial Discrimination Convention, CERD. In response to Germany's preliminary objections, Nicaragua later suggested that its racial discrimination claim could, in any event, be brought under the optional clause. But both arguments fail.

A. The conditions for the seisin of the Court under Article 22 CERD are not met

43. I begin with Article 22 of the CERD, whose text you see on the slide.

44. Now, the Court is familiar, very familiar, with this compromissory clause. In recent decisions, it has clarified the meaning of the key passage of Article 22, that is the phrase that disputes

¹⁵⁸ MN, para. 315 (citing the 2016 *ICRC Commentary on the First Geneva Convention*), p. 277.

¹⁵⁹ See *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 25, para. 49.

can only be submitted to the Court, as you see in the highlighted passage, if they are “*not settled by negotiation or by the procedures expressly provided for in this Convention*”. And this phrase, as you noted in the *Georgia v. Russia* case, “establish[es] preconditions to be fulfilled before the seisin of the Court”¹⁶⁰: prior to initiating proceedings, a claimant must have sought an amicable settlement, either via the CERD specific procedure provided for in Articles 11-13 (which Nicaragua never pursued) or through negotiations.

45. The Court’s jurisprudence also provides clear guidance on how the precondition of prior negotiation is to be construed. Claimants must have made, in the words of the Court as shown on the slide, “a genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute [about racial discrimination]”¹⁶¹. Such negotiations, you have noted, are “distinct” and they require more than — “mere protests or disputations”. And you have made clear that the claimant needs to show that there “has been a failure of negotiations, or [that] negotiations have become futile or deadlocked”¹⁶².

46. And all this is well established. Now, it is plain that Nicaragua has made *no* attempt to settle the alleged dispute over racial discrimination through negotiations. As Professor Tzanakopoulos has shown, at no point before initiating proceedings did Nicaragua raise concerns about questions of racial discrimination with Germany, neither in its Note Verbale sent to a generic email account, nor in its Press Release. And at no point did Nicaragua bring up concerns about racial discrimination after Germany had eventually received the Note Verbale on 13 February 2024.

47. Now, Nicaragua of course is aware of this; it accepts that it made no attempt to negotiate¹⁶³. It says the circumstances did not allow for it as the situation in Gaza, in February 2024, was dire. But Mr President, it is plainly implausible that the situation on the ground precluded Nicaragua from

¹⁶⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141 (emphasis added);

¹⁶¹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 602, para. 116.

¹⁶² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 159 (with references to earlier case law).

¹⁶³ WSN paras. 143-145.

making, in the words of the Court, “a genuine attempt . . . to engage in discussions”¹⁶⁴ with Germany. Nicaragua could have followed up with a Note Verbale, it could have initiated discussions. Nicaragua made a choice — it chose to ignore the precondition set out in Article 22 of the CERD.

48. And the upshot of this, Mr President, is clear, and I can put it in the words used by the Court in the case between Georgia and Russia: “Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met.”¹⁶⁵ Nicaragua’s racial discrimination claim cannot be brought on the basis of Article 22 of the CERD.

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

49. Mr President, Members of the Court, Nicaragua now seeks to bring its racial discrimination claim on the basis of the two States’ respective optional clause declarations¹⁶⁶. But this attempt to circumvent the requirements of Article 22 of the CERD cannot succeed, for two reasons. The first I have mentioned already: Nicaragua’s racial discrimination claim falls outside the Court’s temporal jurisdiction under Germany’s optional clause.

50. But there is a second reason, and it is derived from paragraph (i) of Germany’s optional clause declaration, which you see on the slide. And you see that Germany excludes from the jurisdiction of the Court “any dispute which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement or which is subject to another method of peaceful settlement chosen by all the Parties”.

51. Now, this passage contains a “special agreement reservation”, a common feature of optional clause declarations submitted under Article 36, paragraph 2, of the Court Statute. The rationale of this reservation is not in doubt: like many other States, Germany seeks to ensure that special régimes of dispute resolution, with their tailor-made preconditions and requirements, are not circumvented. Put simply, State claimants cannot ignore these preconditions and bring materially the same claim under the optional clause.

¹⁶⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157.

¹⁶⁵ *Ibid.*, p. 128, para. 159.

¹⁶⁶ WSN, paras. 122-129.

52. Yet, this is precisely what Nicaragua seeks to do. Adapting the terms of the German declaration, Nicaragua's racial discrimination claim, developed on the basis of Article 3 of the CERD¹⁶⁷, is "subject to another method of dispute settlement", that is dispute settlement under Article 22 of the CERD — a method of dispute settlement that Nicaragua expressly invokes in the present case. In the words used by Germany in the special agreement reservation, Germany and Nicaragua have "chosen" to accept dispute settlement under Article 22 CERD when they became bound by the Convention in 1969 and 1978 respectively. And dispute settlement under Article 22 of the CERD is, in the words used in the reservation, "another method" of dispute settlement because it envisages various forms of amicable dispute resolution and makes recourse to them a precondition before this Court can be seised.

53. Now, in its written statement, Nicaragua suggests that giving effect to Germany's special agreement reservation would result in what it calls an "endless loop", because Article 22 leaves room for the "disputants" to agree on "another mode of settlement"¹⁶⁸ as well.

54. But this, Mr President, is a smokescreen. Germany's position does not lead into loops, let alone endless ones. We are not concerned here with the interpretation of Article 22 of the CERD: the clause, on its express terms, presupposes the existence of a dispute about racial discrimination, which the "disputants" could then, in the course of subsequent negotiations, agree to submit to an alternative mode of settlement. But none of this is remotely relevant here, if only because Nicaragua never raised questions of racial discrimination before initiating proceedings. Germany simply asks the Court to give effect to a perfectly meaningful reservation — a reservation that is intended to streamline the Court's jurisdiction under different titles of jurisdiction and that ensures that the parties' insistence on prior negotiations — an eminently sensible precondition consciously included in Article 22 of the CERD — cannot simply be circumvented.

55. Mr President, Members of the Court, this concludes my presentation on the temporal scope of the Court's jurisdiction under the Parties' respective optional clause declarations, and on the problems facing Nicaragua's claim related to racial discrimination. I thank you for your kind

¹⁶⁷ See MN, para. 403 (accusing Germany of a "direct violation of Article 3 of ICERD").

¹⁶⁸ WSN, para. 136.

attention, and I will ask you now, Mr President, to call upon Mr Samuel Wordsworth to continue Germany's first round presentation.

The PRESIDENT: I thank Professor Tams for his statement. I now invite Mr Samuel Wordsworth to take the floor. You have the floor, Sir.

Mr WORDSWORTH:

NICARAGUA'S CLAIMS REQUIRE THE COURT TO ADJUDICATE UPON THE LAWFULNESS OF ISRAEL'S CONDUCT IN THE ABSENCE OF ITS CONSENT OR PARTICIPATION

I. Introduction

1. Mr President, Members of the Court, it is a privilege to appear before you and to have been asked by Germany to develop its position that the Court should not exercise jurisdiction because Nicaragua's claims require the Court to adjudicate upon the lawfulness of Israel's conduct despite the absence of its consent or participation.

2. There are three key issues:

- (a) The first concerns the precise contours of the Monetary Gold principle. Here there is some agreement because Nicaragua has to accept that the Court has consistently found that it will not exercise its jurisdiction where the legal interests of an absent and non-consenting State "would not only be affected by a decision, but would form the very subject-matter of the decision"¹⁶⁹ or, to use the Court's formulation of the test from the *East Timor* case, where "the Court would necessarily have to rule upon the lawfulness of [the absent State's] conduct as a prerequisite for deciding on [the claimant State's] contention that [the respondent State] violated its obligation"¹⁷⁰.
- (b) The second issue, and this is probably the key point of difference between the Parties, is whether the Monetary Gold principle is engaged in the current case; that is, whether the Court would necessarily have to rule upon the lawfulness of Israel's conduct as a prerequisite for deciding on

¹⁶⁹ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.

¹⁷⁰ See e.g. *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 104, para. 33.

Nicaragua's claims of breach by Germany, such that the legal interests of Israel "would form the very subject-matter of the decision".

(c) And the third issue, which is of wide systemic importance, is whether the Monetary Gold principle can be bypassed to the extent of the factual determinations and legal characterizations made by the Court in the exercise of its advisory jurisdiction, in particular in its 2024 Opinion on the *Policies and Practices of Israel in the Occupied Palestinian Territory*. On Nicaragua's argument, an advisory opinion can be used as a stepping stone to a judgment in a contentious proceeding even though the "very subject-matter" of that judgment is the State responsibility of a non-consenting party. In Germany's view, that would be radically inconsistent with Article 36 of the Court's Statute and also many decades of the Court's jurisprudence in both contentious and advisory cases.

II. The contours of the Monetary Gold principle

3. I turn to the contours of the Monetary Gold principle, and there are five short points to make. It is useful to start with the Court's 2023 Judgment in the *Guyana v. Venezuela* case.

4. As you can see, the Court is recalling, at paragraph 60, its past consideration of "whether a State that is not party to the proceedings before it should be deemed to be an indispensable third party without the consent of which the Court cannot adjudicate", with the relevant principle then being set out by reference to the *Monetary Gold* and *East Timor* cases. Thus, quoting *East Timor*, the Court recalls, at paragraph 62, its conclusion that it could not exercise its jurisdiction "because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent".

5. Moving on, the Court then explained at paragraph 63 that "an objection that a third State is an indispensable party without the consent of which the Court cannot adjudicate" goes to the exercise rather than the existence of jurisdiction; with further clarification then following, that this is how the "Monetary Gold principle" operates. That term, the "principle", being expressly defined.

6. So, the five short points.

7. First, in its written statement, Nicaragua contends that the Court has rejected the existence of a rule on indispensable third parties¹⁷¹. That is obviously incorrect. Nicaragua refers to the 1984 Judgment in *Military and Paramilitary Activities* but, there, the Court was specifically rejecting the existence of “the ‘indispensable parties’ rule of the kind argued for by the United States”, which was extremely broad and purported to rely on the self-defence rights of neighbouring States. By contrast, the Court in that case expressly referenced *Monetary Gold*, finding that this probably represented the limits of its power not to exercise jurisdiction¹⁷².

8. In a related attempt to call into doubt the existence of the Monetary Gold principle, Nicaragua characterizes this as a “so-called” or “alleged” principle¹⁷³. Yet the established existence and legal effect of the Monetary Gold principle could not be more clear, and as you have just seen, the Court has even taken the trouble to define the principle by reference to its past jurisprudence¹⁷⁴.

9. Second, and following from this, the legal test for when the principle applies is very well-established. The question asked in *Monetary Gold* was whether the legal interests of Albania in the contested gold formed “the very subject matter of the decision”¹⁷⁵. The answer was “yes” because, as the Court explained in the *Nauru* case, “the determination of Albania’s responsibility was a prerequisite for a decision to be taken on Italy’s claim”¹⁷⁶. So, borrowing the formula from *East Timor* that the Court has set out in *Guyana v. Venezuela*, the question now for the Court is whether, “in order to decide the claims of [Nicaragua], it would have to rule, as a prerequisite, on the lawfulness of [Israel’s] conduct in the absence of that State’s consent”.

10. My third point is that this is actually a reasonably straightforward test to apply. It does not require — as Nicaragua suggests — recourse to this distinction that the Court made in the completely different context of the *Barcelona Traction* case between “a right infringed” and “a mere interest

¹⁷¹ WSN, para. 204.

¹⁷² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 430-431, paras. 86-88.

¹⁷³ WSN, paras. 189, 192; see also para. 187.

¹⁷⁴ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary Objection, Judgment, I.C.J. Reports 2023 (I), p. 281, paras. 62-64.

¹⁷⁵ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.

¹⁷⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 261, para. 55).

affected”¹⁷⁷. There, of course, the Court was concerned with the distinction between the rights of a shareholder and the “mere interest” of the shareholders with respect to acts infringing only the rights of the company. Of course, that distinction is a complete irrelevance when it comes to *Monetary Gold*.

11. Here, the relevant distinction is between — (i) a claim where the legal interests of the third State form the very subject-matter of the decision — that is, the claim requires the Court “to rule, as a prerequisite, on the lawfulness of” an absent State’s conduct, and (ii) a claim which merely allows for inferences or implications as to the legal position of third States.

(a) That second possibility was illustrated by *Nauru*, where the Court held that it was not sufficient that its finding of breach by Australia of the 1947 Trusteeship Agreement might have “implications for the legal situation of” the two other States parties that made up the relevant Administering Authority: New Zealand and the United Kingdom. As the Court explained, the question was whether a finding of the responsibility of those two States was, as a matter of logic, a necessary step to finding responsibility on the part of Australia. The answer was “no”. The issue of Australia’s breach of the Trusteeship Agreement was a freestanding question, and there was nothing under that Agreement that debarred the Court from considering a claim of breach by Australia in isolation¹⁷⁸.

(b) So, in the current case, the key question is whether, in order to establish that Germany has breached an obligation incumbent on it — for example, by failing to prevent or being complicit in genocide — whether the Court would first have to decide that Israel has committed an act of genocide. I’ll return to this very shortly; but the answer is “yes”: the Court would have to decide that issue.

12. My fourth initial point: there is no basis for adding, as Nicaragua seeks to add, a further requirement that the legal interests of the third State be identical or similar to those of the respondent State. According to Nicaragua, the *Monetary Gold* case turned on there being a competing claim to the same gold. And similarly, it says that, in *East Timor*, the key point concerned which of two

¹⁷⁷ WSN, para. 201, referring to *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 36, para. 46.

¹⁷⁸ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 258, para. 48 and p. 262, para. 55.

competing States could enter into a given treaty, Portugal or the absent Indonesia¹⁷⁹. Yet there is no suggestion of this further requirement in any of the cases, and there is no reason for a consent-based principle such as Monetary Gold suddenly becoming inapplicable in a case involving for example obligations of prevention or differing forms of ancillary liability.

13. Indeed, in its Commentary to Article 16 of the 2001 Articles on State Responsibility, the ILC expressly recognized that the Monetary Gold principle “may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act”¹⁸⁰. The Commentary notes that the Monetary Gold principle is not all-embracing and may not be a barrier to judicial proceedings in every case, which must be correct because a third State may have consented to the Court’s adjudication¹⁸¹. However, there is no consent from the third State in the current case.

14. Fifth and finally on the contours of the Monetary Gold principle, Nicaragua says that the application of the principle is “quite exceptional”¹⁸², but that is pure assertion and does not form part of the relevant test. The principle is either engaged by a claim or it is not. Nicaragua says that there are various cases where the Court has found that the principle is not engaged¹⁸³, but that is not remotely surprising. Cases such as *Nauru* simply demonstrate how the Monetary Gold principle is not engaged where the Court does *not* have to rule, as a prerequisite, on the lawfulness of the absent State’s conduct. The same applies to the other cases that Nicaragua refers to in this context:

(a) Indeed, in *Military and Paramilitary Activities*, as the Judgment records, it was Nicaragua’s express position that its Application did “not put in issue the right of a third State to receive military . . . assistance from the United States”¹⁸⁴, the respondent State in that case, of course.

¹⁷⁹ WSN, paras. 242-243, referring to *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 101, para. 27, and also MN, para. 42. Cf. POG, paras. 129-132.

¹⁸⁰ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission (YILC)* (2001), Vol. II, Part Two, Commentary to Article 16, at para. 11.

¹⁸¹ See e.g. *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary Objection, Judgment, I.C.J. Reports 2023 (I), p. 292, at para. 107.

¹⁸² WSN, para. 192.

¹⁸³ WSN, paras. 193-197.

¹⁸⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 430, para. 86.

By contrast, here, the central pillar of Nicaragua's claim is its challenge to the right of Israel to receive military assistance from Germany, the respondent State now before you.

(b) As to *DRC v. Uganda*, as the Court explained, it did not have to decide on any alleged responsibility of Rwanda as a necessary stepping stone to finding responsibility on the part of Uganda¹⁸⁵.

(c) And the same was true in the *Interim Accord* case. The Court was able to assess the alleged wrongful conduct of Greece independently of NATO's decision on the candidacy of what is now North Macedonia. As the Court explained, the applicant was challenging Greece's conduct in the period prior to the taking of any NATO decision, and not the decision itself¹⁸⁶. And hence the conduct of the third State, or of NATO, was not pulled into question.

III. The application of the Monetary Gold principle

15. I turn then to the application of the Monetary Gold principle to the current case.

(i) *The Genocide Convention claims (Nicaragua's submissions (1) to (3))*

16. I start with Nicaragua's submissions (1) to (3) alleging breach of the Genocide Convention, and it is to be emphasized up front that these three claims are not formulated so as to depend upon, or relate in any way, to the outcome of the genocide claims in *South Africa v. Israel*.

17. At submission (1) of its Memorial, Nicaragua seeks a declaration from the Court that Germany "has breached and continues to breach its obligations under the Genocide Convention in particular the obligations provided in Article I by, with full knowledge of the situation, failing to prevent *the ongoing genocide* against the Palestinian people in particular Palestinians in the Gaza Strip"¹⁸⁷.

18. At submissions (2) and (3), it then brings closely related claims of breach of Article 1 through Germany's provision of military aid to Israel and of Article III (e) concerning Germany's alleged complicity in "the commission of genocide by Israel"¹⁸⁸.

¹⁸⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 238, para. 204.

¹⁸⁶ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011 (II), pp. 660-661, paras. 42-43.

¹⁸⁷ MN, para. 484 (1).

¹⁸⁸ MN, para. 484 (2)-(3).

19. As to the first of these three submissions, the Court’s jurisprudence on Articles I and III could not be more clear. As the Court explained in the *Bosnian Genocide* case:

“[A] State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) [— which of course would include complicity —] begins that the breach of an obligation of prevention occurs. [There is then a reference to Article 14 (3) of the ILC Articles on State Responsibility.]

.....

[The Court then explains:] This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act.

.....

[But, as it emphasizes in conclusion to this paragraph,] 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.”¹⁸⁹

20. And that is the Court’s carefully reasoned conclusion by reference to the nature of the obligation of prevention and Article 14 (3) of the ILC Articles on State Responsibility, subsequently confirmed by the Court in the *Croatian Genocide* case¹⁹⁰. A finding of failure to prevent genocide is dependent on the existence of a prior finding that a genocide has indeed taken place. There is no such finding in the current case and, in order for Germany to be found responsible for any failure to prevent or for complicity in genocide, the Court would have first to find that there has been a genocide¹⁹¹. Thus, for the purposes of Monetary Gold, the Court would indeed have to find the commission of a genocide by Israel as a prior and necessary step to finding a breach by Germany.

21. Nicaragua has no serious answer to this. It says three things.

22. First, Nicaragua says that there is a question as to whether the obligation to prevent genocide has been triggered, referring to the knowledge of serious risk threshold from *Bosnian*

¹⁸⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 221-222, para. 431.

¹⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 128, para. 441.

¹⁹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 221-222, para. 431, and p. 217, para. 420 with respect to complicity. See POG, paras. 155-163.

*Genocide*¹⁹². But that is to seek to sidestep the actual nature of the claim that Nicaragua has brought, which is for *breach* of the Article 1 obligation of prevention, not a preliminary declaration as to whether the obligation is engaged or not.

23. Second, Nicaragua invites the Court to make “an important contribution” by establishing that Article 1 can be breached where there is a failure to exercise due diligence and to take appropriate measures, regardless of whether or not the crime of genocide actually occurs¹⁹³. But that, of course, is just a thinly disguised invitation for the Court to depart from its existing jurisprudence in *Bosnian Genocide* and of course the *Croatian Genocide* case¹⁹⁴.

24. Third, this time relying on *Bosnian Genocide*, Nicaragua argues that the Court could just decide that certain individuals and groups have committed a genocide in Gaza, and that there is no need to find State responsibility on the part of Israel. It says that “the Court only needs to note that these crimes occurred” while “the commission of genocidal acts is well-documented”¹⁹⁵. But that, of course, still requires the Court to make findings of genocide, as in the *Bosnian Genocide* case, and there, of course, there was no third State involved, so the current issue did not arise: the genocide alleged was conducted by an entity — the Bosnian-Serb army — whose acts could not be attributed to Serbia or any other State. Here, by contrast, Nicaragua alleges breach by Germany with respect, specifically, to “the commission of genocide by Israel”, as follows from multiple references in Nicaragua’s Application and Memorial, and the express terms of Nicaragua’s submissions¹⁹⁶ that you have just seen up on the screen. And it is by supplying military equipment to Israel (and not to any other actor) that Nicaragua alleges that Germany is breaching its obligation of prevention¹⁹⁷. Likewise, the evidence that Nicaragua deploys purports to show the commission of a genocide by Israel, not by any other party.

25. The reality is that Nicaragua’s case requires the Court to find as a necessary first step that there has been a genocide in Gaza, and no such finding could be made in isolation from the question

¹⁹² WSN, para. 212, referring to MN, paras. 120-123 and 437-448.

¹⁹³ WSN, para. 215, referring to MN, paras. 452-453.

¹⁹⁴ POG, paras. 151-154.

¹⁹⁵ WSN, paras. 216-217, and see also paras. 218-221 to similar effect.

¹⁹⁶ See e.g. AN, paras. 67 (2) and (3); MN, paras. 484 (2) and (3). See also e.g. AN, paras. 48 and 57; MN, paras. 12 (a), 48, 50-51, 98, etc.

¹⁹⁷ See e.g. AN, paras. 18, 49, 57; MN, paras. 147, 196, 262, 270-271, 416, 457.

of who has committed the alleged genocide, including who has the requisite genocidal intent, as to which the only alleged perpetrator is Israel.

26. As a separate point, it may also be that Nicaragua is seeking to rely on some supposed distinction between a determination that there has been commission of a genocide by Israel and a determination of Israel's State responsibility. If so, that could make no sense. As Article 1 of the ILC Articles on State Responsibility recognizes: "Every internationally wrongful act of a State entails the international responsibility of that State." There is no relevant distinction in the current context and, consistent with this, the Court has found without distinction that the Monetary Gold principle applies where it has to rule, as a prerequisite, on the *lawfulness* of an absent State's conduct or on the *responsibility* of the absent State¹⁹⁸. So this all goes nowhere.

27. Nicaragua similarly has no answer when it comes to its claims of aiding genocide and complicity, its submissions numbers (2) and (3). The customary law obligation not to aid or assist is, of course, reflected in Article 16 of the ILC Articles on State Responsibility, as to which it is well established that there cannot be a breach "unless . . . the internationally wrongful act is actually committed by the aided or assisted State"¹⁹⁹. The same requirement applies for a claim of complicity contrary to Article III of the Genocide Convention, as was explained by the Court in the *Bosnian Genocide* case²⁰⁰.

28. It follows that, so far as concerns each of the three genocide claims in the current case, the Monetary Gold principle applies: the determination of each claim requires the Court to adjudicate upon the alleged genocide by Israel, and Israel's rights and obligations would thus constitute the very subject-matter of the judgment sought by Nicaragua.

(ii) *The Common Article 1 and general IHL claims (Nicaragua's submissions (4) to (6))*

29. I turn to Nicaragua's submissions (4) to (6) alleging Germany's breach of an obligation to "ensure respect" by Israel of Israel's obligations under the Fourth Geneva Convention and customary

¹⁹⁸ Compare *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, *Preliminary Objection, Judgment*, *I.C.J. Reports 2023 (I)*, p. 281, para. 62 with *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 261, para. 55.

¹⁹⁹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC* (2001), Vol. II, Part Two, Commentary to Article 16, para. 5.

²⁰⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *ICJ Reports 2007 (I)*, p. 217, para. 420 and pp. 221-222, para. 431.

international humanitarian law, as well as related breaches of aiding and assisting Israel's breaches of the Convention and international humanitarian law. This claim is brought by reference to Article 1 of the Fourth Convention, as well as an analogous obligation said to exist as a matter of customary law²⁰¹.

30. The nature and content of Common Article 1 of the 1949 Conventions is, as the Court will be well aware, a controversial matter. However, for the purposes of the current case on inadmissibility, Germany has been willing to assume that Nicaragua is correct in its characterization that Article 1 entails (i) a positive obligation to exert influence on parties to an armed conflict to observe international humanitarian law and (ii) a negative obligation not to encourage or aid violations of IHL by another State such as Israel that is engaged in an armed conflict²⁰².

31. Germany's point is that the Article 1 obligation to "ensure respect" — that is, an obligation to ensure another State's compliance — is, so far as is now relevant, equivalent to an obligation to prevent that State's non-compliance. They are two sides of the same coin. Hence, the Court's approach in the *Bosnian Genocide* case, derived from Article 14 (3) of the ILC Articles on State Responsibility, applies equally here²⁰³. The same basic question arises — how can it be said that State A has failed to ensure compliance by State B unless, as a matter of fact, there was non-compliance? If there was compliance, how can it be said that there was a failure to ensure compliance?

32. To a significant extent, this is common ground. In Nicaragua's written statement, it is said in terms that "Nicaragua does not dispute that the obligation to ensure respect may be partly analyzed as an obligation of prevention"²⁰⁴. However, Nicaragua also contends that "the obligation to ensure respect also includes a negative dimension which is more far-reaching than an obligation to prevent". Quoting from the 2020 ICRC Commentary, it contends that this "additional dimension implies that the High Contracting Parties 'must abstain from certain conduct. In particular, they may neither

²⁰¹ MN, para. 484 (4)-(6).

²⁰² POG, paras. 167-168, referring to MN, paras. 314-315.

²⁰³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), pp. 221-222, para. 431.*

²⁰⁴ WSN, para. 226.

encourage, nor aid or assist in violation of the Conventions.””²⁰⁵ Germany makes three points in response.

33. First, for good reason, Nicaragua has not pleaded out a case that Germany has encouraged Israel to breach the Fourth Convention or customary rules of IHL. There is no analogy to the *Nicaragua v. United States of America* case, where the Court found that the USA was responsible for encouraging a breach of Common Article 3 through the publication of a CIA manual of psychological operations that the Court found encouraged the commission of acts contrary to international law²⁰⁶. The facts here are completely different and that case does not assist²⁰⁷.

34. Second, the essential reference point for any obligation not to aid or assist, including if that obligation forms part of Common Article 1, is Article 16 of the ILC Articles on State Responsibility. And as already noted, there cannot be a breach of aiding or assistance under Article 16 “unless . . . the internationally wrongful act is actually committed by the aided or assisted State”²⁰⁸. The Monetary Gold principle is squarely engaged where, as here, the consent of the allegedly aided or assisted State is lacking.

35. Third, in an apparent riposte to this, Nicaragua refers to a passage from the 2025 ICRC Commentary to the Fourth Convention, which seeks to distinguish aiding and assisting under Article 1 from the rule under Article 16 of the ILC Articles on State Responsibility on the basis that the former is concerned with primary liability, as opposed to derivative responsibility for complicity²⁰⁹. That interpretation is not supported by any widespread State practice and appears inconsistent with Article 31 (3) (c) of the Vienna Convention. But in any event:

(a) As the Court can see — and this is eight lines down in the paragraph before you — the specific point of distinction put forward by the ICRC is that, under Article 1, and in contrast to Article 16, there is no requirement that the aiding State have *intended* to facilitate the occurrence of the

²⁰⁵ WSN, para. 226, referring to Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Commentary of 2020, para. 191.

²⁰⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 66-69, paras. 118-122, pp. 114-15, para. 220, and p. 130, para. 256.

²⁰⁷ Cf. WSN, para. 229.

²⁰⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC* (2001), Vol. II, Part Two, Commentary to article 16, para. 5.

²⁰⁹ WSN, para. 233, referring to Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Commentary of 2025, para. 226.

wrongful act. The ICRC Commentary is not saying that it would be possible for an international court or tribunal to find a failure to “ensure respect” in the abstract, *without identifying* whether there was indeed an actual failure to “respect” in the first place. It would be surprising if it were otherwise.

- (b) The characterization of Common Article 1 as a primary obligation of due diligence (and not as a prohibition of complicity) could not somehow change the logical and legal requirement, in this context, of finding the third State’s breach of international law in order to determine whether the respondent State had violated a due diligence obligation to ensure that there would be no breach.

36. Nicaragua appears to argue that the *Tehran Hostages* case may suggest otherwise, and it relies on the Court’s conclusion there that Iran had failed to take appropriate steps to protect the United States mission²¹⁰. It is not understood how this helps Nicaragua. In *Tehran Hostages*, there was no question of ensuring the compliance by an absent third State of its obligations, there was no question as to whether the militants had indeed wrongfully entered the United States Embassy, and hence there was no difficulty in establishing that Iran had breached its obligation “to take all appropriate steps to protect the premises of the mission against any intrusion or damage”²¹¹.

37. In its conclusion on Common Article 1 and general IHL, Nicaragua alleges that Germany is invoking *Monetary Gold* “to escape its responsibility for not preventing gross violations of obligations deriving from international humanitarian law”²¹². That is regrettable, but it also demonstrates Germany’s point. Nicaragua not only recognizes here that Common Article 1 is for relevant purposes analogous to an obligation to prevent, it also makes an assertion as to gross violations of obligations under IHL, that is, gross violations by Israel. And the Court cannot decide on whether or not that is a valid assertion in the absence of the party portrayed as responsible for the gross violations.

²¹⁰ WSN, para. 235, referring to *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, pp. 31-32, paras. 63 and 67.

²¹¹ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 31, paras. 62-63, applying Article 22 (2) of the Vienna Convention on Diplomatic Relations.

²¹² WSN, para. 236.

(iii) Self-determination, non-recognition and racial discrimination claims (submissions (7) to (9))

38. Finally, Nicaragua contends in its submission (7) that Germany has breached its conventional and customary law obligations by providing aid and particularly military equipment to Israel that is used to deny the right of self-determination of the Palestinian people, and it alleges a similar breach at submission (9) with respect to alleged unlawful assistance to what is described as “Israel’s commission of racial discrimination, segregation and apartheid”. It appears obvious that all this is predicated on a prior determination of the relevant wrongful conduct by Israel, just as breach by Indonesia of the right to self-determination was a necessary prior step in the *East Timor* case, but not a permissible step in the absence of the non-consenting party (Indonesia). The same point applies to submission (8), that is Nicaragua’s allegation of breach by Germany of an obligation of non-recognition under Article 41 (2) of the ILC’s Articles on State Responsibility. A finding of any breach by Germany is dependent on the existence of a prior and “serious breach” by Israel²¹³.

IV. Nicaragua’s reliance on the Court’s advisory opinions concerning Israel

39. This leads to the third of the issues on application of the Monetary Gold principle, which is Nicaragua’s attempt to bypass the principle through reliance on determinations that the Court has made in its advisory jurisdiction. On Nicaragua’s case, even though the “very subject-matter” of a contentious case is the State responsibility of a non-consenting party, the Court can still make findings concerning that absent State by reference to determinations made in past advisory opinions.

40. Nicaragua refers to all three of the Court’s Advisory Opinions concerning Israel, but with a particular focus on your 2024 Opinion concerning *Policies and Practices of Israel in the Occupied Palestinian Territory*. However, as the Court expressed very clearly in that case, the 2024 Opinion is not concerned with the conduct of Israel in Gaza following 7 October 2023. It follows that, at best, findings made in the exercise of the Court’s advisory opinion jurisdiction could offer only a very partial answer to the application of Monetary Gold in the present case.

41. But there are, in any event, two interrelated reasons why such findings provide no answer at all, and Germany emphasizes the very real systemic importance of maintaining a clear boundary between the exercise of the Court’s contentious and advisory jurisdictions.

²¹³ See POG, paras. 177-182; cf. WSN, paras. 241-243.

42. First, as to the exercise of its contentious jurisdiction, consent is — of course — essential. The Monetary Gold principle is merely one reflection of that. It is precisely because there is no requirement of consent in the context of an advisory opinion that the Court has far greater freedom, including where it makes findings on matters that could also be seen as highly contentious aspects of a bilateral dispute, such as in the *Wall* or *Chagos* cases, to take two well-known examples. But it is very problematic if findings that are made because the opinion is “only of an advisory character”²¹⁴ can then be deployed to defeat the absence of otherwise necessary consent in a contentious proceeding. The opinion is then no longer “only of an advisory character” but is instead a source of findings that both enable and acquire binding effect in a contentious case. That would be both contradictory and destabilizing²¹⁵.

43. Second, and consistent with its past practice, in the Opinion of 2024 concerning the *Occupied Palestinian Territory*, the Court indicated that, as to disputed facts, its concern was only that it had sufficient information for the specific purposes of giving the requested opinion²¹⁶. As the Court explained:

“In these advisory proceedings, the Court considers that, in its request, the General Assembly has not sought from the Court a detailed factual determination of Israel’s policies and practices. The object of the questions posed by the General Assembly to the Court is the legal characterization by the Court of Israel’s policies and practices. Therefore, in order to give an advisory opinion in this case, it is not necessary for the Court to make findings of fact with regard to specific incidents allegedly in violation of international law. The Court need only establish the main features of Israel’s policies and practices and, on that basis, assess the conformity of these policies and practices with international law.”²¹⁷

44. So, the Court was only looking at the broad picture. It was expressly not looking at specific incidents as to which it could be said, for example, that the use made by Israel of a given weapon, allegedly licensed by Germany, was in breach of some specific provision of the fourth Geneva Convention.

²¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 157-158, para. 47, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

²¹⁵ See POG, paras. 185-186.

²¹⁶ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024 (III)*, p. 778, paras. 46-47.

²¹⁷ *Ibid.*, p. 785, para. 77.

45. Further, in contrast to a contentious case with all parties present, the Court did not hear a full account of the facts from the State alleged to be in breach of international law and did not have the benefit of hearing the evidence before it being tested, including through cross-examination. None of that need be an issue where the Court exercises its advisory jurisdiction; but it becomes very problematic if findings in that specific context are going to be applied in contentious proceedings with respect to an absent party whose alleged wrongdoing is the “very subject-matter” of the contentious case. Consistent with that, in its 2025 *UNRWA Opinion*, the Court emphasized that it was “not to be understood as prejudging matters of fact or law that will be determined in the [*South Africa v. Israel*] case or other contentious cases”, recalling that “the parties to pending contentious proceedings will have the opportunity to present evidence and arguments on questions of fact and law, on the basis of which the Court will decide in those proceedings”²¹⁸. By contrast, on Nicaragua’s approach, there would be no such opportunity for Israel to respond, in this case, to allegations of genocide and serious breaches of other fundamental norms, and yet somehow that is thought not to matter.

46. Nicaragua relies on the controversial decision of a Special Chamber of ITLOS in the *Mauritius v. Maldives* case for the proposition that

“judicial determinations [of the International Court of Justice] made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the ‘principal judicial organ’ of the United Nations with competence in matters of international law”²¹⁹.

But it is very important to recognize that, in its advisory and contentious cases, the Court is exercising different competences for different purposes and, as is entirely appropriate, different processes are followed. That would appear undeniable.

47. Nicaragua also seeks to make something of Germany’s vote in the United Nations General Assembly endorsing the 2024 Advisory Opinion and calling upon all States to comply, and likewise of a statement by Germany’s representative that Germany would act in line with the obligations of

²¹⁸ *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory, Advisory Opinion of 22 October 2025*, paras. 30-31.

²¹⁹ WSN, paras. 264-265, referring to *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment, ITLOS Reports 2020-2021*, p. 77, para. 203.

international law set out in the Opinion²²⁰. It also refers to statements that Germany has made on the illegality of settlement construction in the Occupied Palestinian Territory²²¹.

48. Yet the Monetary Gold principle is concerned with the consent of the absent third State; Germany's position and views with respect to that absent third State cannot somehow fill that gap. It is not for Germany to seek to anticipate, oppose or adopt whatever position Israel might take in respect of the allegations of Israeli wrongdoing that Nicaragua makes. Germany merely emphasizes the existence of those allegations of Israeli wrongdoing and considers that the Court would have to rule on these, as a prerequisite, in order to decide Nicaragua's claims against Germany.

49. Finally, I note that Nicaragua also wishes to rely on findings, in particular on imminent risk and plausibility of rights, that were made in the context of the *South Africa v. Israel* provisional measures proceedings, as if these could be sufficient to ground its claims²²². But the current claims, which aim to establish unlawful conduct on the part of Germany and Israel, could in no way be based on findings that merely go to the existence of a risk or of plausible rights. The Court's findings in the *South Africa v. Israel* case served a different purpose in a different case and could not be used to circumvent the need for the consent of the absent State in the current case.

50. Mr President, Members of the Court, that concludes my presentation and indeed Germany's opening submissions, and we thank you very much for your attention.

The PRESIDENT: I thank Mr Wordsworth, whose statement brings to an end today's sitting. Oral argument on the preliminary objections raised by Germany will resume at 10 a.m. tomorrow, Tuesday 8 September 2026, for Nicaragua's first round of oral argument. The sitting is closed.

The Court rose at 1.15 p.m.

²²⁰ WSN, paras. 251-252.

²²¹ WSN, paras. 251-252.

²²² WSN, paras. 209, 214, 246-247.