Legal Consequences for third States of Israel's potential breaches of the Genocide Convention in the light of the ICJ's Provisional Measures Orders in the *South Africa v Israel* case

Legal Opinion for the Arab Organisation for Human Rights in the UK

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SUMMARY

1. Introduction

1. This opinion explains the legal consequences for 'third States'—all States other than, in this context, Israel and South Africa—arising out of Israel's potential violations of the international law obligations concerning genocide, and, consequently, the commission of genocide crimes by individuals, in the light of the Provisional Measures Orders of the International Court of Justice ('ICJ') of 26 January 2024 ('the 26 January Order') and 28 March 2024 ('the 28 March Order') in the case brought by South Africa concerning violations by Israel of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') ('*South Africa v Israel*'). The focus is, in particular, on the legal position of States other than in circumstances where they are themselves directly legally responsible, on the basis of conspiracy and/or complicity, jointly with Israel in violating the international law obligations concerning genocide. The broader, more general legal matters addressed herein arise not on this basis, but because all States have rights and obligations consequent to Israel's violations, regardless of whether or not they are also jointly responsible, with Israel, for these violations. Likewise, the focus is only on the legal consequences for third States arising out of Israel's violations in particular; the consequences arising out of violations of international law by other States, including on the basis of joint responsibility with Israel, are not addressed.

2. Obligations

2. Article I of the Genocide Convention stipulates that:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II of the Genocide Convention, and customary international law, defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article III stipulates that

> The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

3. Effectively, the Genocide Convention, and customary international law, contain two distinct sets of obligations, hereinafter collectively the '**genocide obligations**,' borne by States:

(1) In the first place, an obligation not to commit the five genocide-related acts stipulated in Article III of the Genocide Convention, hereinafter the '**genocide prohibitions**':

> (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

(2) In the second place, an obligation to prevent breaches of the foregoing genocide prohibition obligations by any other actor, and to 'punish' such commission, i.e. to ensure that individuals suspected of committing these acts are subjected to a process of criminal justice (whether operated by themselves or other States/the ICC), hereinafter the '**genocide suppression duties**'. The latter, 'punish', obligation reflects the fact that individual criminal responsibility, in addition to State responsibility, for the five genocide-related acts stipulated in Article III also exists in international law, hereinafter the '**genocide individual crimes**'.

3. ICJ Provisional Measures Orders of 26 January and 28 March 2024

4. The effect of these two Orders is that the ICJ has determined, at the level of plausibility, that Israel's use of force in the Palestinian Gaza Strip constitutes the commission of genocide. This characterization of the use of force as genocide has been done either in a totalizing sense, or on the basis that there are genocidal aspects to the use of force. To end this commission of genocide, the force must end, either because it is of its nature genocidal, or because it is impossible to meaningfully disaggregate the genocidal and non-genocidal elements. In addition, more specifically, and to the same effect, the impediment to the provision of basic services and humanitarian assistance constituting a breach of the genocide prohibitions caused by the use of force is such that only an end to the use of force will end the breach.

5. The consequence of the foregoing is that it is the use of force *itself* that is illegal. In the same, totalizing manner that is arrived at from applying the *jus ad bellum*. It is unnecessary, then, to disaggregate this use of force, on the basis that some elements of it may be lawful, whereas other elements are illegal.

4. Consequences for third States

4.a. General position

6. Third States have a legal right and a duty to do, and a duty not to do, certain things, as a consequence of Israel violating the genocide obligations and, consequentially, individual genocide crimes being committed, and the presence of a real risk that these violations and crimes will continue and more will be perpetrated.

7. The effect of the ICJ's determination is that States must proceed on the basis of a working assumption that Israel is violating the genocide obligations, and there is a risk that these violations will continue, and other violations will arise, and that the rights and obligations

they have in consequence, which will be elaborated on below, are engaged. Within this, the assumption must be that the violations potentially include the commission and the risk of commission of genocide itself. And that Israel's use of force as a general matter must end in order, in part, for this commission, and risk of commission, to end. Put differently, they must act on the assumption that Israel's use of force is, in and of itself, a violation of the Genocide Convention.

8. In consequence, the obligations that third States bear are all concerned with the very use of force by Israel in the Palestinian Gaza Strip *itself*, rather than being concerned only with *how* the force is being used.

4.b. Non-recognition

9. Third States must not recognize as lawful Israel's violations of the genocide obligations, and the consequential crimes committed by individuals. Given the link between these violations and crimes and Israel's use of force in the Palestinian Gaza Strip, rendering this use of force illegal, States are obliged not recognize that Israel has a legal right to use this force. To do otherwise would be to incorrectly treat as lawful something which is illegal and, in consequence, to implicitly endorse illegality. This non-recognition obligation is a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.

10. States must not recognize the validity of Israel's presence in and exercise of control over the Palestinian Gaza Strip as a general matter, in and of itself. This includes not accepting, adopting or justifying, as totalizing explanations, Israel's explanations (e.g. self-defence) for this presence/exercise of control. Such acceptance/adoption/justification is tantamount to either denying, as the 'real' motivation, or as one of the motivations, a genocidal intent—genocide denial. This amounts to a fundamental repudiation of the prohibition of genocide, as a general matter, and as it applies in the present situation.

11. States should not permit their nationals to travel to Israel in order to serve in the Israeli armed forces in relation to the Palestinian Gaza Strip. Where they provide advice to their nationals on travel to foreign countries that indicates whether or not such travel is advisable/permitted, this must include clear warnings that travel to Israel for the purposes of service in the Israeli armed forces is not advisable/permitted, for the specific reason of the illegal activities such forces are engaged in and the potential individual criminal responsibility that therefore might arise as a result of this.

4.c. No aid or assistance

12. States violate their own genocide obligations if they provide aid or assistance to Israel in its violation of its genocide obligations, if this provision is given with the intent of facilitating the latter violations. The meaning and scope of this liability, which is commonly referred to as being concerned with 'complicity', is, as explained the outset, beyond the scope of the present opinion. There is, however, a separate, broader obligation concerning aid and assistance as a general matter, irrespective of any specific intent to facilitate illegality. A general principle of law is that a state is prohibited from providing

aid and assistance to another state if the first state is aware that the aid and assistance will be used in illegal activity. This is broader than liability commonly referred to as 'complicity' (although sometimes this term is also used to describe it) in that there is no requirement that the state necessarily *intends* the aid or assistance to be used in this way.

13. States are prohibited from providing any aid or assistance to Israel in its use of force in the Palestinian Gaza Strip, bearing in mind what has been said earlier about the illegal character of this use of force. Since the focus is on the use of force itself, not simply how it is being conducted, this means no financial, technical or material (e.g. arms) aid/assistance, *as a general matter*. Given the impossibility of meaningfully distinguishing between such aid/assistance that would end up supporting, one way or another, the use of force in the Palestinian Gaza Strip as distinct from other Israeli military activities, this effectively means that there can be no aid or assistance to Israel's military *at all*. States who wish to support Israel's lawful military activities—insofar as such activities are even presently being conducted —cannot do this until Israel ceases its illegal military activities.

4.d. Four duties to suppress Israel's violations of the genocide obligations, and the commission of individual genocide crimes

Introduction

14. A special requirement, borne by all States, flows from the genocide obligations of any given State and the related, consequential criminalization of the violation of such obligations on an individual level: all States are required to ensure that these obligations are not violated by that State and that, therefore, the consequential individual crimes are not perpetrated, and to ensure punishment if crimes occur. This general requirement is concretized in four specific duties borne by States to suppress Israel's violations of the genocide obligations, and the consequential commission of individual crimes, two of which being the genocide suppression duties outlined above. These are:

    (1) To prevent them from happening, and to co-operate to bring them to an end if they do happen (partially reflected in the genocide suppression duty to 'prevent').

    (2) Not to recognize the situation that gives rise to them (a specific duty replicating the aforementioned more general duty arising simply out of illegality itself).

    (3) Not to provide aid and assistance that will be used by Israel to facilitate them (regardless of whether or not the aiding/assisting States intend such use) (again, a specific duty replicating the aforementioned more general duty arising simply out of illegality itself).

    (4) To enable the 'punishment' of them in terms of individual criminal responsibility (reflected in the genocide suppression duty to 'punish').

Duty (1): To prevent violations of the genocide obligations and the consequent commission of individual crimes, and to cooperate to bring such violations and crimes to an end if they are perpetrated

15. The first suppression duty is that States are obliged to prevent Israel's violations of the genocide obligations, and the consequential commission of individual crimes, and to cooperate to bring to an end such violations, and crimes, if they occur.

16. As a matter of the genocide suppression duties, all States are obliged to prevent the violation of the genocide obligations by all other States, and the consequent commission of the individual genocide crimes.

17. On the obligation to cooperate to bring violations and consequential crimes to an end, no particular form of cooperation is prescribed by international law, given the multiplicity of possibilities that exist. Such possibilities include both institutionalized cooperation (for instance, through the United Nations) and non-institutionalized cooperation.

18. One means through which States could discharge the foregoing obligations would be to seek to give effect to the two Orders issued by the ICJ. Relatedly, States could utilize the various possibilities that exist for them to invoke Israel's breaches of its genocide obligations arising out of the *erga omnes* nature of these obligations, including intervening in the *South Africa v Israel* case to support South Africa. These possibilities are explained below.

19. States may also deploy a regime of sanctions aimed at curbing economic activity with Israel generally. These sanctions can also be deployed against government and military officials involved in supporting and or promoting violations of the genocide obligations. This may extend to freezing bank accounts and assets abroad, and travel restrictions.

20. The aforementioned issue of States preventing their nationals from travelling to Israel to serve in the Israeli armed forces, addressed in connection with the obligation of non-recognition, is also relevant to the duty to prevent Israel's violations of the genocide obligations and the consequential commission of crimes by individuals, and to bring such violations and crimes to an end when they are perpetrated. States must, therefore, also prevent this travel, and include warnings on their travel advice, as outlined above, in order to prevent their nationals from contributing directly to these violations and themselves being liable for genocide crimes.

Duty (2): Obligation of non-recognition

21. The second suppression duty arising specifically out of the *erga omnes* and *jus cogens* nature of the genocide obligations and individual genocide crimes is that States are obliged not to recognize as lawful Israel's violations of these obligations and the consequential commission of individual crimes. However, this specific duty merely replicates the aforementioned more general duty arising simply out of illegality itself. The content of it is therefore addressed in the foregoing coverage of the general duty.

Duty (3): Obligation not to render aid or assistance

22. The third suppression duty arising specifically out of the *erga omnes* and *jus cogens* nature of the genocide obligations and individual genocide crimes is that States are obliged not to provide aid or assistance to Israel if this aid or assistance will be used by Israel in activities that violate these obligations, and, consequentially, constitute individual crimes, whether or not States intend the aid or assistance to be used in this away (and separate from the additional, more specific, matter, beyond the scope of this opinion, of responsibility that will arise if there is such intent). However, as with non-recognition, this specific duty merely replicates the aforementioned more general duty arising simply out of illegality itself. The content of the specific duty is therefore addressed in the foregoing coverage of the general duty.

Duty (4): Enable the exercise of criminal jurisdiction over individuals for individual genocide crimes

23. On the subject of genocide, the acts that are subject to State obligations also gives rise to individual criminal responsibility—what is referred to herein as individual genocide crimes. According to Article III of the Genocide Convention, these are:

> (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

24. Individuals can be prosecuted for such crimes before both the national criminal processes of any State (on the 'universal jurisdiction' basis) and the International Criminal Court.

25. As a general matter of customary international law, all States bear an obligation in international law to prosecute or to extradite individuals suspected of committing these genocide crimes in the Palestinian Gaza Strip. In a supplementary fashion, parties to the Genocide Convention are obliged to 'punish' these crimes, and parties to the Rome Statute of the International Criminal Court bear obligations under that treaty to enable prosecution either nationally or before the Court.

26. Enabling criminal prosecutions to happen, one way or another, is also a key means through which States can discharge their legal obligations to suppress the violations by Israel that give rise to individual criminal responsibility. Israel's violations of genocide obligations are actualized (predominantly) through the behaviour of human agents, and if those individuals are criminalized, the State violations they enable can be blocked. Moreover, the prospects of criminalization, including when investigations are commenced, can also have a deterrent effect on the human agents who act as Israel and thus determine its compliance with the genocide obligations.

27. In consequence, all third States must make every effort to enable investigations and prosecutions of the individual genocide crimes. Their own national jurisdictions may be hampered by immunity, which gives a special significance to the support they can and should give to the International Criminal Court. The situation in Palestine has already been referred to the ICC, but the effectiveness of that body is acutely precarious, both politically

and financially. Thus the position taken on ICC jurisdiction by third States has the potential to be transformative. States should see support for the ICC as a key means through which they discharge the suppression obligations set out above. Such support should be provided in two ways. In the first place, States who are parties to the Rome Statute could join the seven States that themselves joined the referral of the situation in Palestine originally made by the State of Palestine. This is to be contrasted with the forty-three States parties to the Rome Statute who have referred the situation in Ukraine to the Court. In the second place, third States, whether or not parties to the Rome Statute, could pledge financial support to the Office of the Prosecutor, explaining that the motivation for this is to support the Palestine investigation (even though the Office would use any funds provided across all its investigations).

4.e. Entitlement to invoke Israel's violations of the genocide obligations

4.e.i. Basis

28. States have the legal right to invoke the responsibility of Israel for breaching the genocide obligations. This right arises because the genocide obligations are (1) binding on those States who are parties to the Genocide Convention, a group established for the protection of a collective interest (an *erga omnes partes* obligation) and, also, in any case, (2) operative generally in customary international law, applicable to all States, and owed to the international community as a whole, i.e. obligations with *erga omnes* status.

4.e.ii. What States can do

4.e.ii.α. Call upon Israel—cessation, assurance of non-repetition, reparation

29. States are legally entitled to call upon Israel to perform the standard violation-consequence-related obligations applicable in international law: cessation, assurances of non-repetition, and reparation.

4.e.ii.β. Take measures to induce cessation and reparation

30. States are also entitled to take lawful measures against Israel to induce the aforementioned cessation and reparation. However, this entitlement is otiose given that, as indicated above, States are, separately, obliged to take such measures.

31. In addition, countermeasures—acts that are ordinarily wrongful, but where wrongfulness is precluded by the fact that they are taken in response to another State's wrongful act—against Israel on the same grounds may also be legally permissible.

4.e.ii.γ. Case(s) before the ICJ

32. The *South Africa v Israel* case is a third party case, brought by South Africa on the basis of an *erga omnes partes* right to see Israel comply with its obligations in the Genocide

Convention under Article IX. The existence of this right was affirmed *prima facie* by the ICJ in the 26 January Order. Other States can potentially participate in this case. There are two potential options here.

33. In the first place, under Article 62 of the ICJ statute,

> 1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request.

On 23 January 2024, Nicaragua submitted a request of this kind. At the time of writing, the Court had not decided upon it. Given that the granting of such a request is not automatic, it would be prudent to wait for the Court's decision on this application before considering whether and, if so, on what basis, an Article 62 intervention by other States might be viable and, if so, to what end such an intervention might be requested.

34. In the second place, under Article 63 of the ICJ statue, any of the other 151 States parties to the Genocide Convention have a right to intervene in the proceedings on the basis that the case involves the "construction"—i.e. a determination of the general meaning—of the Convention to which they are parties. If they intervene on this basis, then the "construction given by the judgment" will be binding on them. On 5 April 2024, Colombia made a declaration of intervention on this basis.

35. At the time of writing, it has been reported that Bangladesh, Belgium and Ireland have, separately, announced their intention to intervene in the case; these interventions have not yet been lodged at the Court.

36. States could join Colombia in intervening on the basis of Article 63 of the Statute, to put forward their view, as a general matter, on the meaning of the Genocide Convention. They could do this individually or collectively.

37. There are two key matters on which States could intervene in a way that supports the case made by South Africa.

38. In the first place, States could intervene to support the general jurisdictional basis for the case, in terms of the *erga omnes* nature of the obligations at issue and the consequential right a third state, in this case South Africa, has to bring a case.

39. In the second place, States could intervene to advance a particular legal meaning of the intent requirement in the definition of genocide, as some of them have already done in the *Gambia v Myanmar* case, to seek to persuade the Court to adopt a somewhat less strict approach. Indeed, those who have not intervened in that case should consider doing so there also, to make the same general point about the intent test. This would demonstrate that their position on is non-partisan. It would also potentially influence the Court at a key stage before the *South Africa v Israel* case gets to the issue, since the merits of *Gambia v Myanmar* will be addressed first, the Court potentially adopting a position then which it might go on to apply when it subsequently turns to the same issue in *South Africa v Israel.*

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1. Introduction

1. This opinion explains the legal consequences for 'third States'—all States other than, in this context, Israel and South Africa—arising out of Israel's potential violations of the international law obligations concerning genocide, and, consequently, the commission of genocide crimes by individuals, in the light of the Provisional Measures Orders of the International Court of Justice ('ICJ') of 26 January 2024 ('the 26 January Order')[1] and 28 March 2024 ('the 28 March Order')[2] in the case brought by South Africa concerning violations by Israel of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') ('*South Africa v Israel*').[3] The focus is, in particular, on the legal position of States other than in circumstances where they are themselves directly legally responsible, on the basis of conspiracy and/or complicity, jointly with Israel in violating the international law obligations concerning genocide.[4] The broader, more general legal matters addressed herein arise not on this basis, but because all States have rights and obligations consequent to Israel's violations, regardless of whether or not they are also jointly responsible, with Israel, for these violations. Likewise, the focus is only on the legal consequences for third States arising out of Israel's violations in particular; the consequences arising out of violations of international law by other States, including on the basis of joint responsibility with Israel, are not addressed.[5]

2. This opinion has been prepared in my private, individual capacity, and in my own name, only. It has not been written in any other capacity nor can and should the ideas herein be attributed to any other entity than myself.

3. It partly draws from, and should be read together with, an earlier legal opinion of 27 November 2023, which addresses the same question of the legal consequences for third States arising out of Israel's use of force in the Palestinian Gaza Strip on the basis of all areas of international law, including, but not limited to, the Genocide Convention (in that legal opinion, 'third States' refers to States other than Israel and the State of Palestine).[6] The present focus on the Genocide Convention is necessarily partial and so artificial. It does not capture the full range of violations of international law by Israel nor, therefore, the full scope of third State rights and obligations.

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[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), International Court of Justice, 26 January 2024, Request for the Indication of Provisional Measures, Order, obtainable here (hereinafter '26 January Order').

[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), International Court of Justice, 28 March 2024, Request for the Modification of the Order of 26 January 2024 Indicating of Provisional Measures, Order, 28 March 2024, obtainable here (hereinafter '28 March Order').

[3] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS, vol. 78, p. 277, text here, details of parties here (hereinafter 'Genocide Convention').

[4] On conspiracy and complicity, see Genocide Convention, Art. III (b) and (e) respectively, and *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Application instituting proceedings and request for the indication of provisional measures, 1 March 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf (hereinafter '*Nicaragua v Germany* provisional measures application').

[5] See *Nicaragua v Germany* provisional measures application.

[6] Ralph Wilde, *Legal Consequences for Third States of Israel's breaches of international law in the Palestinian Gaza Strip*, Legal Opinion for the Arab Organisation for Human Rights in the UK, 27 November 2023 (hereinafter 'Wilde 27 November 2023 Opinion').

2. Obligations

4. Article I of the Genocide Convention stipulates that:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II of the Genocide Convention, and customary international law, defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article III stipulates that

> The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

5. Effectively, the Genocide Convention, and customary international law, contain two distinct sets of obligations, hereinafter collectively the '**genocide obligations**,' borne by States:

(1) In the first place, an obligation not to commit the five genocide-related acts stipulated in Article III of the Genocide Convention, hereinafter the '**genocide prohibitions**':

> (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

(There is disagreement as to whether breaches/violations of these and other fundamental obligations by States (as opposed to individuals) are to be classified as 'crimes'; the present opinion adopts the neutral terminology of breaches/violations when it comes to these State obligations, without prejudice to that contested issue).

(2) In the second place, an obligation to prevent breaches of the foregoing genocide prohibition obligations by any other actor, and to 'punish' such commission, i.e. to ensure that individuals suspected of committing these acts are subjected to a process of criminal justice (whether operated by themselves or other States/the ICC), hereinafter the '**genocide suppression duties**'. The latter, 'punish', obligation reflects the fact that individual criminal responsibility, in addition to State responsibility, for the five genocide-related acts stipulated in Article III also exists in international law, hereinafter the '**genocide individual crimes**'.

In all cases 'genocide' is based on the definition in Article II of the Genocide Convention (binding on the basis of that treaty but also as a matter of custom—the treaty reflects the equivalent definition in custom). States parties to the Rome Statute for the International Criminal Court are bound by certain equivalent obligations to some of the genocide suppression obligations as a matter of that treaty.

6. As the ICJ affirmed in the Preliminary Objections phase of the *Bosnia and Herzegovina v Serbia and Montenegro* case, the genocide obligations are not limited to genocide within a State's own territory; they encompass genocide anywhere in the world.[7]

7. The genocide obligations and the genocide individual criminal sanctions are norms of *jus cogens*, peremptory norms, meaning they cannot be limited by other areas of international law. Serious violations of *jus cogens* norms give rise to special obligations on the part of third States, as will be addressed further below. A serious breach of a *jus cogens* norm of international law is defined in Article 41, paragraph 2, of the United Nations International Law Commission (ILC)'s Articles on State Responsibility as being "a gross or systematic failure by the responsible State to fulfil the obligation" concerned.[8] The commentary to the ILC's Articles on State Responsibility notes:

> To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims.[9]

Genocide is itself, of its very nature, 'systematic', by definition (cf. the intent component of the definition) something "carried out in an organized and deliberate way". Likewise, it is not that only certain violations of the prohibition of genocide are "of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule"—all violations have this character, given how genocide is defined. Thus all violations of the

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[7] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment of 11 July 1996, para 31 (page 616).

[8] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, U.N. Doc. A/56/10, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, (hereinafter 'ARSIWA'), Art. 41(2). See also International Law Commission, Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, adopted at its seventy-third session, A/77/10, 2022, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (hereinafter 'ILC *jus cogens* Draft Conclusions & Commentaries'), Conclusion 19, para. 3, and ARSIWA, Part Two, Ch. III, Art. 41 Commentary; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary.

[9] ARSIWA, Part Two, Ch. III, Art. 40 Commentary, para. 8. The passage continues:

> It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.

This is wrong when it comes to genocide, which can involve, but does not require, a large scale.

prohibition of genocide constitute 'serious' violations. If any violation of the prohibition of genocide itself has this character, then any violation of the obligation to prevent genocide, and/or the obligations stipulated in Article III paras (b)-(e), likewise have it, because of their link to the legal definition of genocide. These violations are, therefore, themselves necessarily 'serious' for this reason alone, regardless of any other factor specific to the type of obligation involved.

8. The genocide obligations and genocide individual crimes have *erga omnes* status in customary international law, meaning that all States have a legitimate interest in the following: a) that the obligations are complied with by all other States; b) that the crimes are not committed by any individuals, anywhere in the world; c) that, if crimes are committed, they are punished. This status also exists as a matter of the Genocide Convention—the obligations operate *erga omnes partes*—every one of the parties to the Convention has this legitimate interest in seeing them complied with by the other parties. As the ICJ stated in the *Gambia v Myanmar* case, parties to the Convention have a "common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity."[10]

9. This interest operates in two distinct ways given what is covered by the genocide obligations. On the one hand, it is reflected in the genocide suppression duties: States' obligations to 'prevent' and 'punish' genocide, and 'punish' the other genocide-related acts stipulated in Article III paras (b)-(e), by all other actors. On the other hand, more generally, all States have an interest in seeing the genocide suppression duties complied with by all other States.

10. As with *jus cogens*, the *erga omnes* and *erga omnes partes* character of the genocide obligations and genocide individual crimes give rise to particular consequences for third States, addressed below.

3. ICJ Provisional Measures Orders of 26 January and 28 March 2024

11. In the 26 January Order, the ICJ held that

> …the facts and circumstances…[reviewed by the Court in its Order] are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.[11]

12. This is a determination that there is a plausible case that Israel is, and risks in the future, violating the Genocide Convention. Given the Court's lack of express stipulated specificity as to the particular provisions of the Convention at issue, and its inclusion of the obligations in the Convention concerning the commission of genocide itself in its stipulated measures (covered below), this plausible violation potentially includes the

[10] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 17, para. 41.
[11] 26 January Order, para. 54. See also 28 March Order, para. 25.

commission of genocide itself, as both a present situation and a future risk, as well as the other genocide prohibitions and the genocide suppression duties. Although the case is only about State responsibility, given the link between the genocide prohibitions and the genocide individual crimes—they essentially make both the State and the individual responsible for the same acts—this determination is, in effect, a finding that there is a plausible case that individuals are committing the equivalent criminally-prohibited acts (even if the question of which individuals in particular are perpetrating them has not been determined).

13. The Court ordered Israel to do the following:

(1) … in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

> (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group;[12]

(2) … ensure with immediate effect that its military does not commit any acts described in point 1 above;[13]

(3) …take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;[14]

(4) …take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;[15]

(5) …take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;[16]

[…]

14. In the subsequent 28 March Order, the Court ordered that Israel should:

(a) take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians

[12] Id, pages 24-5.
[13] Id, page 25.
[14] Id, page 25.
[15] Id., page 25.
[16] Id., page 26.

throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary;

(b) ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.[17]

[…]

15. The Orders are legally binding on Israel, as independent sources of obligation in addition to the genocide obligations in the Genocide Convention and customary international law.[18] Israel is, therefore, obliged to comply with the stipulations of the Order in addition to its obligations in the Convention and custom.

16. The determination, as plausible, of Israel's violation of the Genocide Convention is in the context of Israel's use of force in the Palestinian Gaza Strip. If, therefore, Israel ceased its use of force there, this could potentially remove certain elements of the plausible violation of the Convention, with then certain other elements of the plausible violation requiring further actions beyond ending the use of force.

17. Indeed, as explained in my earlier legal opinion of 27 November 2023, Israel's use of force in the Palestinian Gaza Strip, which has been conducted since 1967 (alongside its use of force in the Palestinian West Bank, including East Jerusalem), is illegal in the law on the use of force.[19] For Israel to comply with this area of international law, it must immediately cease its use of force in the Palestinian Gaza Strip. Such compliance would have the potential consequential effect on partial compliance with the Genocide Convention as indicated above. (In Resolution 2728 of 25 March 2024 the UN Security Council demanded an immediate ceasefire for the month of Ramadan—a period that had ended at the time the present Opinion was issued—a requirement that was legally binding on Israel under UN Charter Article 25.[20])

18. However, the *South Africa v Israel* case, and the present Opinion, is artificially focused selectively only on the Genocide Convention. This raises the question of whether, as an exclusive matter of the Convention, Israel must cease its use of force in the Palestinian Gaza Strip. Clearly, a State can potentially use force, even do so in a manner that is illegal in the *jus ad bellum*, without also breaching the genocide obligations and committing genocide in particular.

19. That said, when it comes to the commission of genocide itself, if a determination is made that force is being used for this purpose, then the question is whether that force can be disaggregated, in terms of its purpose, with some elements being genocidal whereas others not being so. And, if so, whether it is possible for an end to genocide to be achieved without

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[17] 28 March Order, paras 45 and 51, sub-paragraph (2).
[18] As affirmed in the 26 January Order, para 83; 28 March Order, para 48.
[19] Wilde 27 November 2023 Opinion, Section 3.2. See also Ralph Wilde, Israel's War in Gaza is Not a Valid Act of Self-defence in International Law, *Opinio Juris* 9 November 2023.
[20] SC Res. 2728, 25 March 2024, UN Doc. S/RES/2728 (2024), para. 1.

an end to the use of force. There are two ways of approaching this. (These two approaches are be discussed again in the final section below, when addressing one of the subjects third States might wish to intervene in the *South Africa v Israel* case about).

20. The first approach is based on the position in the most recent jurisprudence of the ICJ, in the *Croatia v Serbia and Montenegro* case, on the intent component of the definition of genocide. That position is that the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" in Article II of the Convention must be "the only inference that could reasonably be drawn from the acts in question."[21] As indicated, the Court potentially included genocide itself, as being committed and/or being at risk of commission, in its determination of a plausible violation of the Genocide Convention by Israel in the 26 January Order. If this potential inclusion was done on the basis of applying the aforementioned jurisprudential approach to the intent component of the genocide definition, it follows that the Court has (on the basis of a standard of plausibility) essentialized Israel's use of force in the Palestinian Gaza Strip, as being "only" linked to the commission of genocide. It follows, then, that in this context, Israel's obligation not to commit genocide is, in effect, an obligation to end its use of force entirely.

21. Under the second approach, a relatively looser approach to the intent component of the genocide definition would operate, allowing for potential alternative motivations for a use of force to be concurrently operative. However, whereas this would mean that a use of force is being determined to have a 'mixed' motivational character, when it comes to how to bring things in line with the obligation not to commit genocide, necessarily all the use of force would have to end, since it is all tainted by genocidal intent, even if that intent cohabits with other intentions.

22. It follows, then, that the Court's plausible finding that Israel is potentially committing genocide and/or risks the commission of genocide under the Genocide Convention through its use of force in the Palestinian Gaza Strip requires, as a means of partially ending this plausible violation of the prohibition of genocide in the Convention, the end of the use of force itself, quite apart from whether or not that use of force is or is not lawful in *jus ad bellum* terms. The Court's Orders in the light of this plausible finding, calling, in points (1) and (2) of the Order of 26 January, and point (b) of the Order of 28 March, upon Israel to comply with the core prohibition of genocide in the Convention, is, therefore, in effect, a call for the end of the use of force in the Palestinian Gaza Strip. That the Court did not stipulate this in terms does not mean it is not the necessary legal consequence of the Court's express stipulations.

23. Alternatively, and to the same effect, it can be concluded that there is no way of ensuring the provision of "basic services and humanitarian assistance" ordered in point 4 of the Order of 28 February and point (a) of the Order of 26 March without an end to the use of force by Israel. In her Declaration appended to the Order of 26 March, Judge Charlesworth, referencing the UN documents that the Court had partly relied on as the basis for its order in this regard, stated that:

[21] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports (2015) 3, § 148.

> These documents illustrate how the provision of humanitarian aid in the Gaza Strip is undermined by the military campaign. The documents make clear that the only way to prevent further destruction of the Palestinian population in the Gaza Strip is to bring military operations to an end. They all call for ceasefires, whether temporary or permanent.[22]

Judge Charlesworth goes on to observe that whereas the Court cannot order a ceasefire, something that by definition applies to all belligerents, if it only has jurisdiction over one belligerent, Israel, it can indicate measures to that party.[23] In consequence, she finds that

> the measures indicated by the Court today only partly respond to the situation that the Court describes and to the continuing threat to the right of the Palestinian group to exist. While the measure in subparagraph (2) (a) identifies appropriate actions for Israel to take, the measure in subparagraph (2) (b) is elliptical. Instead of employing the convoluted terms of operative subparagraph (2) (b), in my view the Court should have made it explicit that Israel is required to suspend its military operations in the Gaza Strip, precisely because this is the only way to ensure that basic services and humanitarian assistance reach the Palestinian population.[24] [Note that the references to subparagraphs (2) (a) and (b) correspond to points (a) and (b) of the 28 March Order quoted above].

Impliedly, that which should have been explicitly stated was implicitly required by what the Court did explicitly call for, enabling the provision of "basic services and humanitarian assistance". Thus, again, Israel is required to cease its use of force to enable compliance with the genocide prohibitions (as indicated, the Order does not indicate which genocide obligation(s) its stipulations relate to but presumably this one is concerned with one or more of the genocide prohibitions rather than the genocide suppression duties).

24. To conclude: the effect of the two Orders is that the ICJ has determined, at the level of plausibility, that Israel's use of force in the Palestinian Gaza Strip constitutes the commission of genocide. This characterization of the use of force as genocide has been done either in a totalizing sense, or on the basis that there are genocidal aspects to the use of force. To end this commission of genocide, the force must end, either because it is of its nature genocidal, or because it is impossible to meaningfully disaggregate the genocidal and non-genocidal elements. In addition, more specifically, and to the same effect, the impediment to the provision of basic services and humanitarian assistance constituting a breach of the genocide prohibitions caused by the use of force is such that only an end to the use of force will end the breach.

25. The consequence of the foregoing is that it is the use of force *itself* that is illegal. In the same, totalizing manner that is arrived at from applying the *jus ad bellum*. It is unnecessary, then, to disaggregate this use of force, on the basis that some elements of it may be lawful, whereas other elements are illegal.

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[22] 28 March Order, Declaration of Judge Charlesworth, obtainable from https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-05-en.pdf, para. 5.
[23] Id, para. 6. See also para. 8.
[24] Id, para. 7.

4. Consequences for third States

4.a. General position

26. As partly indicated above in the reference to genocide suppression obligations, and explained in full in what follows, third States have a legal right and a duty to do, and a duty not to do, certain things, as a consequence of Israel violating the genocide obligations and, consequentially, individual genocide crimes being committed, and the presence of a real risk that these violations and crimes will continue and more will be perpetrated.

27. These State violations and individual crimes occur if the necessary legal tests are met on the facts. Whether this is or is not the case may end up being determined by international courts and tribunals, such as the ICJ in the case of Israel's responsibility, and the International Criminal Court (ICC) in the case of the criminal responsibility of individuals. But if this happens, such determinations do not themselves bring the violations/crimes into being. The violations/crimes are already taking place—they are merely being confirmed as such by the court or tribunal.

28. The rights and obligations of third States, then, do not arise only if and when an authoritative judicial determination is made of a violation/crime. They arise the moment the violation/crime occurs and, also, when there is a real risk that the violation/crime will occur. As the ICJ stated in the *Bosnia and Herzegovina v Serbia and Montenegro* case, the

> obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit.[25]

29. States cannot take the position, therefore, that until there is an authoritative determination as to a violation/crime, the aforementioned rights to do certain things, and obligations not to do certain things, are not engaged. When it comes to the obligations, if these States do not comply with them at the time the associated violations/crimes take place, and/or when there is a real risk that they will take place, the States will themselves violate international law.

30. States must therefore make their own determinations as to whether or not Israel is violating the genocide prohibitions and/or there is a risk of such violations, and, relatedly, whether individual genocide crimes are being committed and/or there is a risk such crimes will be committed, in real time, in order to be able, if necessary, to adjust their own behaviour in order to remain in compliance with their own obligations.

31. After 26 January 2024, these individual determinations have to take into account the determination made by the ICJ that there is a plausible case that the Genocide Convention

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[25] 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 (hereinafter '*Bosnia and Herzegovina v Serbia and Montenegro* 2007 Judgment'), para 431.

is being violated by Israel. The ICJ is the pre-eminent international judicial body, as the judicial Organ of the United Nations. Its determination was made after considering submissions made by both South Africa, arguing in favour of the determination made, and Israel, the State whose obligations are at issue, arguing against it.

32. The effect of the ICJ's determination is that States must proceed on the basis of a working assumption that Israel is violating the genocide obligations, and there is a risk that these violations will continue, and other violations will arise, and that the rights and obligations they have in consequence, which will be elaborated on below, are engaged. Within this, as indicated above, the assumption must be that the violations potentially include the commission and the risk of commission of genocide itself. And that, for the reasons indicated above, Israel's use of force as a general matter must end in order, in part, for this commission, and risk of commission, to end. Put differently, they must act on the assumption that Israel's use of force is, in and of itself, a violation of the Genocide Convention.

33. In consequence, the obligations that third States bear are all concerned with the very use of force by Israel in the Palestinian Gaza Strip *itself*, rather than being concerned only with *how* the force is being used.

4.b. Non-recognition

34. Third States must not recognize as lawful Israel's violations of the genocide obligations, and the consequential crimes committed by individuals. Given the aforementioned link between these violations and crimes and Israel's use of force in the Palestinian Gaza Strip, rendering this use of force illegal, States are obliged not recognize that Israel has a legal right to use this force. To do otherwise would be to incorrectly treat as lawful something which is illegal and, in consequence, to implicitly endorse illegality. As Judge Higgins indicated in paragraph 38 of her Separate Opinion to the 2004 Advisory Opinion of ICJ on the legal consequences of Israel's construction of the Wall in the occupied Palestinian West Bank, "[t]hat an illegal situation is not to be recognized…by third parties is self-evident". This non-recognition obligation is a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.

35. (A further, supplementary non-recognition obligation also exists in international law for the particular reason that the rules whose breach by Israel has been determined to be plausible are, as indicated above, of a fundamental nature. This has the effect of reinforcing, and concretizing as a specific obligation, the operation of the more general principle in the particular context of the breaches covered. It is addressed separately below.)

36. States must not recognize the validity of Israel's presence in and exercise of control over the Palestinian Gaza Strip as a general matter, in and of itself. This includes not accepting, adopting or justifying, as totalizing explanations, Israel's explanations (e.g. self-defence) for this presence/exercise of control. Such acceptance/adoption/justification is tantamount to either denying, as the 'real' motivation, or as one of the motivations, a genocidal intent—genocide denial. This amounts to a fundamental repudiation of the prohibition of genocide, as a general matter, and as it applies in the present situation.

37. States should not permit their nationals to travel to Israel in order to serve in the Israeli armed forces in relation to the Palestinian Gaza Strip. Where they provide advice to their nationals on travel to foreign countries that indicates whether or not such travel is advisable/permitted, this must include clear warnings that travel to Israel for the purposes of service in the Israeli armed forces is not advisable/permitted, for the specific reason of the illegal activities such forces are engaged in and the potential individual criminal responsibility that therefore might arise as a result of this.

38. The general obligation not to recognize the validity of Israel's use of force in the Palestinian Gaza Strip is reflected in determinations made by the ICJ and the UN Security Council concerning South Africa's illegal presence in Namibia. This presence was illegal on one of the other bases on which Israel's presence in the Palestinian Gaza Strip is illegal, which are not the subject of the present opinion—as a violation of self-determination.[26] The determinations of it are transferrable by analogy to the present focus on Israel's illegal basis in terms of a violation of the Genocide Convention.

39. In a 1971 Advisory Opinion the ICJ held that that the consequence of the illegal nature of the presence was an obligation on the part of all States "to recognize the illegality and invalidity of South Africa's continued presence" in Namibia (para. 119). In Resolution 301 of 1971, the Security Council stated (para 6(1)) that

> States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia.

In an earlier resolution, 276 of 1970, the Council called upon all States (in para. 2)

> [p]articularly those which have economic and other interests in Namibia to refrain from any dealings with the Government of South Africa which are inconsistent with…

…the Council's determination that (in para. 5)

> …the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia…are illegal and invalid.

In its 1971 Advisory Opinion, the ICJ held that

> Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to…make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia (para. 123).

The Security Council called upon States maintaining diplomatic or consular relations with South Africa to take the following concrete steps:

[26] See Wilde 27 November 2023 Opinion, Section 2, and Ralph Wilde, *Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza 'legal' or 'illegal' in international law?*, Legal Opinion, 29 November 2022 (hereinafter 'Wilde 29 November 2022 Opinion').

> issue a formal declaration to the Government of South Africa to the effect that they do not recognize any authority of South Africa with regard to Namibia and that they consider South Africa's continued presence in Namibia illegal…[and] terminate existing diplomatic and consular representation as far as they extend to Namibia, and to withdraw any diplomatic or consular mission or representative residing in the Territory (Resolution 283 of 1970, para. 2).

And it called upon all States

> …to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration (Resolution 301 of 1971, para 6).

4.c. No aid or assistance

4.c.i. General principle

40. States violate their own genocide obligations if they provide aid or assistance to Israel in its violation of its genocide obligations, if this provision is given with the intent of facilitating the latter violations.[27] The meaning and scope of this liability, which is commonly referred to as being concerned with 'complicity', is, as explained the outset, beyond the scope of the present opinion.[28] There is, however, a separate, broader obligation concerning aid and assistance as a general matter, irrespective of any specific intent to facilitate illegality. A general principle of law is that a state is prohibited from providing aid and assistance to another state if the first state is aware that the aid and assistance will be used in illegal activity. This is broader than liability commonly referred to as 'complicity' (although sometimes this term is also used to describe it) in that there is no requirement that the state necessarily *intends* the aid or assistance to be used in this way. Such a principle was indicated by Judge Higgins in her observation, made in conjunction with the earlier observation concerning non-recognition in her Separate Opinion to the ICJ's Advisory Opinion on the Wall (para. 38), "[t]hat an illegal situation is not to be…assisted by third parties is self-evident". As with non-recognition, this is a general principle of law in the sense that it is inherent in the concept of law and the rule of law itself.

41. (As with the obligation of non-recognition, a further, supplementary obligation not to provide aid or assistance to another state if this will be used for illegal activity by that other state (regardless of whether the aiding/assisting state intends it to be used in this way) also exists in international law for the particular reason that the rules whose breach by Israel has been determined to be plausible are, as indicated above, of a fundamental nature. This has the effect of reinforcing, and concretizing as a specific obligation, the operation of the more general principle in the particular context of the breaches covered. It is addressed separately below.)

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[27] See ARSIWA, Art. 16, and commentary thereto.
[28] Cf. Genocide Convention, Art. III (b) and (e).

42. States are prohibited from providing any aid or assistance to Israel in its use of force in the Palestinian Gaza Strip, bearing in mind what has been said earlier about the illegal character of this use of force. Since the focus is on the use of force itself, not simply how it is being conducted, this means no financial, technical or material (e.g. arms) aid/assistance, *as a general matter*. Given the impossibility of meaningfully distinguishing between such aid/assistance that would end up supporting, one way or another, the use of force in the Palestinian Gaza Strip as distinct from other Israeli military activities (quite apart from the separate issue, beyond the scope of the present opinion, that such activities may also be unlawful – certainly, the operation of the military occupation of the Palestinian West Bank, including East Jerusalem, falls into this category, [29] as referenced further below), this effectively means that there can be no aid or assistance to Israel's military *at all*. States who wish to support Israel's lawful military activities—insofar as such activities are even presently being conducted (a matter that is beyond the scope of the present opinion)—cannot do this until Israel ceases its illegal military activities.

4.c.ii. As invoked in other contexts

43. The invocation of this principle in other contexts is transferrable to Israel's illegal use of force in the Palestinian Gaza Strip. In the context of South Africa's illegal presence in Namibia, the ICJ found in its Advisory Opinion (para. 119) that member States of the United Nations are "under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia". In the context of territories under Portuguese colonial control in 1965, the Security Council requested in Resolution 218 (para. 6) that:

> …all States…refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration; and to take all the necessary measures to prevent the sale and supply of arms and military equipment to the Portuguese Government for this purpose, including the sale and shipment of equipment and materials for the manufacture and maintenance of arms and ammunition to be used in the Territories under Portuguese administration.

4.c.iii. As invoked in the context of Israel's illegal occupation of the Palestinian Gaza Strip and the West Bank as a general matter

44. The principle has already been invoked in relation to Israel's presence in the Palestinian Gaza Strip, of which, as indicated above, the current use of force is a continued manifestation, as part of a more general determination concerning Israel's illegal presence there and in the Palestinian West Bank, including East Jerusalem. In Resolution 3414 of 1975 (para. 3), the UN General Assembly

[29] On the illegality of the occupation of the Palestinian West Bank, including East Jerusalem, see Wilde 29 November 2022 Opinion.

> Request[ed] all States to desist from supplying Israel with any military or economic aid as long as it continues to occupy Arab territories and deny the inalienable national rights of the Palestinian people.

In Resolution 36/27 of 1981 (para. 3), the General Assembly "[r]eiterates its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States". In Resolution 36/226A, of 1981 (para. 13), the Assembly called on all States "to put an end to the flow to Israel of any military, economic, and financial resources that would encourage it to pursue its aggressive policies against the Arab countries and the Palestinian people". The Assembly also (in para. 12) considered that

> …the agreements on strategic co-operation between the United States of America and Israel signed on 30 November 1981…encourage Israel to pursue its aggressive and expansionist policies and practices in the Palestinian and other Arab territories occupied since 1967, including Jerusalem, would have adverse effects on efforts for the establishment of a comprehensive, just and lasting peace in the Middle East and would threaten the security of the region.

In Resolution 38/180A of 1983, the General Assembly (para. 9) deplored "any political, economic, financial, military and technological support to Israel that encourages Israel to commit acts of aggression and to consolidate and perpetuate its occupation and annexation of occupied Arab territories", and (para. 13) called "once more" upon all Member States:

> (a) To refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them;
>
> (b) To refrain from acquiring any weapons or military equipment from Israel;
>
> (c) To suspend economic, financial and technological assistance to and co-operation with Israel;
>
> (d) To sever diplomatic trade and cultural relations with Israel.

The General Assembly further declared, in Part E of the same Resolution, "the international responsibility of any party or parties that supply Israel with arms or economic aid that augments its war potential" (para 1), and condemned "all steps which may result in augmenting the capability of Israel and contributing to its policy of aggression against countries in the region" (para. 2). In particular, it demanded that all States, and particularly the United States of America, "refrain from taking any step that would support Israel's war capabilities and consequently its aggressive acts" (para. 3), and called upon States to "review… any agreement, whether military, economic or otherwise, concluded with Israel" (para. 4).

4.d. Four duties to suppress Israel's violations of the genocide obligations, and the commission of individual genocide crimes

4.d.i. Introduction

45. A special requirement, borne by all States, flows from the genocide obligations of any given State and the related, consequential criminalization of the violation of such obligations on an individual level: all States are required to ensure that these obligations are not violated by that State and that, therefore, the consequential individual crimes are not perpetrated, and to ensure punishment if crimes occur. This general requirement is concretized in four specific duties borne by States to suppress Israel's violations of the genocide obligations, and the consequential commission of individual crimes, two of which being the genocide suppression duties outlined above. These are:

    (1) To prevent them from happening, and to co-operate to bring them to an end if they do happen (partially reflected in the genocide suppression duty to 'prevent').

    (2) Not to recognize the situation that gives rise to them (a specific duty replicating the aforementioned more general duty arising simply out of illegality itself).

    (3) Not to provide aid and assistance that will be used by Israel to facilitate them (regardless of whether or not the aiding/assisting States intend such use) (again, a specific duty replicating the aforementioned more general duty arising simply out of illegality itself).

    (4) To enable the 'punishment' of them in terms of individual criminal responsibility (reflected in the genocide suppression duty to 'punish').

    (As indicated, States are already required to follow (2) and (3) as a matter of legal principle concerning illegality as a general matter, addressed above. Here, they are subject to the same requirement as a matter of a specific set of legal obligations tied to violations of the genocide obligations and consequential commission of individual genocide crimes in particular (and other fundamental rules, beyond the scope of the present opinion, covered in my earlier opinion of 27 November 2023), arising out of the *erga omnes* and *jus cogens* character of these norms.)

4.d.ii. Multiple bases for these rules

46. The derivation of these suppression duties is multifaceted. In the first place, they are derived from the genocide suppression obligations. In the second place, they arise as a consequence of the genocide obligations operating *erga omnes* more generally, i.e. beyond the *erga omnes partes* character of the genocide suppression obligations as a matter of the Genocide Convention. In the third place, they arise as a consequence of the genocide obligations having *jus cogens* status.

4.d.ii.α. Basis 1: Genocide suppression obligations

47. As indicated, the genocide suppression duties to 'prevent and punish' are partly the basis for, respectively, duties (1) and (4).

4.d.ii.β. Basis 2: Erga omnes

48. In the case of violations of the right of self-determination and core/basic protective norms of international humanitarian law (which Israel is also violating in the Palestinian Gaza Strip – see my earlier legal opinion of 27 November 2023), the ICJ indicated in the *Wall* Advisory Opinion, that States bear the foregoing suppression duties (1)-(3), given that the rules violated have the following two characteristics: first, they operate *erga omnes*, and second, linked to this status, primary obligations to promote the realization of these obligations by all States exist in international law (in the case of self-determination, in the Friendly Relations and Co-operation Resolution of the General Assembly; in the case of the core/basic protective rules of IHL, in common Article 1 to the four Geneva Conventions).[30] The Court was not concerned with the genocide obligations and the genocide individual crimes in the *Wall* Advisory Opinion case, but the logic of its position in relation to these other areas of law is transferrable to the genocide-related norms, bearing in mind that these norms share the same two characteristics, as reflected in the obligation to 'prevent' under Article I of the Genocide Convention.

49. It follows, then, following the ICJ's approach in the *Wall* Advisory Opinion, that Israel's violations of the genocide obligations, and the related commission of individual genocide crimes, engage suppression obligations (1)-(3). This amounts to a fleshing out, through three particular, specific duties, the general requirement to ensure the realization of Israel's implementation of these areas of international law as previously identified.

4.d.ii.γ. Basis 3: For 'serious' violations, of rules that have jus cogens *status*

50. As indicated above, the genocide obligations are *jus cogens* rules of international law, and any violation of them is, of its nature, 'serious'. As matter of the international law of State responsibility as articulated in the International Law Commission's Articles on State Responsibility and its draft conclusions on *jus cogens* obligations, 'serious breaches' of *jus cogens* obligations, in the words of the Commentary on the State Responsibility Articles, "attract additional consequences, not only for the responsible State but [also] for all other States".[31] These additional consequences are the four suppression-related duties being addressed presently, which all States bear in the case of a serious breach of a peremptory norm of general international law by any State. This position as it relates to

[30] The Court emphasises these two elements of each of the two areas of international law (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (hereinafter '*Wall* Advisory Opinion (2004)')), p. 199, para. 156 for self-determination; pp. 199-200, paras. 157-158 for IHL), follows this with "Given the character and…importance of the rights and obligations involved", and affirms the three obligations in relation to these two areas of international law (Ibid., p. 200, para. 159).
[31] ARSIWA, Part Two, Ch. III Commentary, para. 7. On this area of State responsibility, see ARSIWA, Arts. 40-41; ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19. See also ARSIWA, Part Two, Ch. III Commentary.

duties (1)-(3) is reflected in the following stipulation by the UN Human Rights Council in resolution 49/28 of 11 April 2022 (preamble, para 7):

> Calls upon all States to ensure their obligations of non-recognition, non-aid or assistance with regard to the serious breaches of peremptory norms of international law by Israel…and also calls upon them to cooperate further to bring, through lawful means, an end to these serious breaches and a reversal of Israel's illegal policies and practices.

4.d.ii.δ. Consolidating the suppression duties

51. Consolidating these three different bases for the suppression duties leads to a unitary position that four such duties exist, as outlined above. The following explanation of the content of each is based on a consolidation of the treatment of it across the relevant bases.

4.d.iii. Duty (1): To prevent violations of the genocide obligations and the consequent commission of individual crimes, and to cooperate to bring such violations and crimes to an end if they are perpetrated

52. The first suppression duty is that States are obliged to prevent Israel's violations of the genocide obligations, and the consequential commission of individual crimes, and to cooperate to bring to an end such violations, and crimes, if they occur.

53. As a matter of the genocide suppression duties, all States are obliged to prevent the violation of the genocide obligations by all other States, and the consequent commission of the individual genocide crimes.

54. In the *Wall* Advisory Opinion, the ICJ stated that:

> It is…for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[32]

As indicated, the logic of this applies equally to the violation of the genocide obligations (not addressed in the *Wall* Advisory Opinion).

55. In addition, the *jus cogens* nature of the genocide obligations, and the inherently 'serious' nature of violations of it, mean that, as a matter of the law of State responsibility, States bear the duty to cooperate with one another—"a joint and coordinated effort by all States"—to bring violations to an end.[33]

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[32] *Wall* Advisory Opinion (2004), p. 200, para. 159.

[33] ARSIWA, Art. 41(1); Quotation from ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 3. See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 1; On this duty existing in customary international law, see ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, Commentary, para. 2.

56. In the *Bosnia and Herzegovina v Serbia and Montenegro* case, the ICJ elaborated on the scope of the duty to prevent thus:

> the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[34]

57. On the obligation to cooperate to bring violations and consequential crimes to an end, no particular form of cooperation is prescribed by international law, given the multiplicity of possibilities that exist. Such possibilities include both institutionalized cooperation (for instance, through the United Nations) and non-institutionalized cooperation.[35]

58. On the United Nations, in the 2019 *Chagos* Advisory Opinion the ICJ held, in the context of self-determination and its status as an *erga omnes* right, that "while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations

[34] *Bosnia and Herzegovina v Serbia and Montenegro* 2007 Judgment, para. 430.
[35] ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 2. and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19 Commentary, para. 10.

to put those modalities into effect" (para 180) and also "that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius" (para. 182).

59. One means through which States could discharge the foregoing obligations would be to seek to give effect to the two Orders issued by the ICJ. Relatedly, States could utilize the various possibilities that exist for them to invoke Israel's breaches of its genocide obligations arising out of the *erga omnes* nature of these obligations, including intervening in the *South Africa v Israel* case to support South Africa. These possibilities are explained below.

60. States may also deploy a regime of sanctions aimed at curbing economic activity with Israel generally. These sanctions can also be deployed against government and military officials involved in supporting and or promoting violations of the genocide obligations. This may extend to freezing bank accounts and assets abroad, and travel restrictions.

61. The aforementioned issue of States preventing their nationals from travelling to Israel to serve in the Israeli armed forces, addressed in connection with the obligation of non-recognition, is also relevant to the duty to prevent Israel's violations of the genocide obligations and the consequential commission of crimes by individuals, and to bring such violations and crimes to an end when they are perpetrated. States must, therefore, also prevent this travel, and include warnings on their travel advice, as outlined above, in order to prevent their nationals from contributing directly to these violations and themselves being liable for genocide crimes.

4.d.iv. Duty (2): Obligation of non-recognition

62. The second suppression duty arising specifically out of the *erga omnes* and *jus cogens* nature of the genocide obligations and individual genocide crimes is that States are obliged not to recognize as lawful Israel's violations of these obligations and the consequential commission of individual crimes.

63. In the *Wall* Advisory Opinion, the ICJ, in the context of violations of the law of self-determination and international humanitarian law, having observed the *erga omnes* and *jus cogens* character of these areas of law, stated that "…all States are under an obligation not to recognize the illegal situation" (para. 159). As indicated, the logic of this applies equally to the violation of genocide obligations and consequential commission of individual genocide crimes (not addressed in the *Wall* Advisory Opinion).

64. In addition, the *jus cogens* nature of the genocide obligations and individual genocide crimes, and the inherently 'serious' nature of violations of these obligations and the consequential commission of individual crimes, mean that, as a matter of the law of State responsibility, States are obliged, in the words of the International Law Commission's Articles on State Responsibility, not to "recognize as lawful" the "situation created by" these violations/crimes.[36] This is reflected in the dictum of the International Criminal

[36] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 2. See also ARSIWA, Part Two, Ch. III, Art. 41 Commentary, *passim*. On the status of this obligation in customary international law, see ARSIWA, Part Two, Ch. III, Art. 41 Commentary, paras 6 and 12 and sources cited therein and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 13, para. 13 and sources cited therein.

Court in *The Prosecutor v. Bosco Ntaganda* that "as a general principle of law, there is a duty not to recognize situations created by certain serious breaches of international law".[37] According to the commentary to the Articles on State Responsibility,

> The obligation applies to "situations" created by these breaches…It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.[38]

65. However, as indicated earlier, as Judge Higgins observed in her separate opinion in the *Wall* Advisory Opinion, "[t]hat an illegal situation is not to be recognized…is self-evident", and so actually this specific duty, arising out of the *erga omnes* and *jus cogens* nature of the genocide obligations, merely replicates the more general duty arising simply out of illegality itself. The content of the specific duty is therefore addressed in the foregoing coverage of the general duty.

4.d.v. Duty (3): Obligation not to render aid or assistance

66. The third suppression duty arising specifically out of the *erga omnes* and *jus cogens* nature of the genocide obligations and individual genocide crimes is that States are obliged not to provide aid or assistance to Israel if this aid or assistance will be used by Israel in activities that violate these obligations, and, consequentially, constitute individual crimes, whether or not States intend the aid or assistance to be used in this away (and separate from the additional, more specific, matter, beyond the scope of this opinion, of responsibility that will arise if there is such intent).

67. In the *Wall* Advisory Opinion, the ICJ, in the context of violations of the law of self-determination and international humanitarian law, having observed the *erga omnes* and *jus cogens* character of these areas of law, stated that "all States…are under an obligation not to render aid or assistance in maintaining the [illegal] situation" (para. 159). As indicated, the logic of this applies equally to the violation of genocide obligations and consequent commission of individual genocide crimes (not addressed in the *Wall* Advisory Opinion).

68. In addition, the *jus cogens* nature of the genocide obligations and individual genocide crimes, and the inherently 'serious' nature of violations of these obligations and consequent commission of individual crimes, mean that, as a matter of the law of State responsibility, States are obliged to refrain from rendering aid or assistance to Israel in maintaining the situation that constitutes these violations/crimes.[39]

69. However, again, as indicated earlier, as Judge Higgins observed in her separate opinion in the *Wall* Advisory Opinion, "[t]hat an illegal situation is not to be…assisted is self-evident", and so actually, as with non-recognition, this specific duty, arising out of the *erga*

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[37] *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, of January 2017, Trial Chamber VI, International Criminal Court, para. 53.

[38] ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 5.

[39] ARSIWA, Art. 41(2). See also ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 19, para. 2; ARSIWA, Part Two, Ch. III, Art. 41 Commentary. On the status of this obligation in customary international law, see ARSIWA, Part Two, Ch. III, Art. 41 Commentary, para. 12, and ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 13, para. 13 and sources cited therein.

omnes and *jus cogens* nature of the genocide obligations, merely replicates the more general duty arising simply out of illegality itself. The content of the specific duty is therefore addressed in the foregoing coverage of the general duty.

4.d.vi. Duty (4): Enable the exercise of criminal jurisdiction over individuals for individual genocide crimes

70. As indicated above, on the subject of genocide, the acts that are subject to State obligations also gives rise to individual criminal responsibility—what is referred to herein as individual genocide crimes. According to Article III of the Genocide Convention, these are:

> (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

71. Individuals can be prosecuted for such crimes before both the national criminal processes of any State (on the 'universal jurisdiction' basis) and the International Criminal Court.

72. As a general matter of customary international law, all States bear an obligation in international law to prosecute or to extradite individuals suspected of committing these genocide crimes in the Palestinian Gaza Strip. In a supplementary fashion, parties to the Genocide Convention are obliged to 'punish' these crimes, and parties to the Rome Statute of the International Criminal Court bear obligations under that treaty to enable prosecution either nationally or before the Court.

73. Enabling criminal prosecutions to happen, one way or another, is also a key means through which States can discharge their legal obligations, as outlined above, to suppress the violations by Israel that give rise to individual criminal responsibility. Israel's violations of genocide obligations are actualized (predominantly) through the behaviour of human agents, and if those individuals are criminalized, the State violations they enable can be blocked. Moreover, the prospects of criminalization, including when investigations are commenced, can also have a deterrent effect on the human agents who act as Israel and thus determine its compliance with the genocide obligations.

74. In consequence, all third States must make every effort to enable investigations and prosecutions of the individual genocide crimes. Their own national jurisdictions may be hampered by immunity, which gives a special significance to the support they can and should give to the International Criminal Court. The situation in Palestine has already been referred to the ICC,[40] but the effectiveness of that body is acutely precarious, both politically and financially. Thus the position taken on ICC jurisdiction by third States has the potential to be transformative. Given the exceptional significance of ICC jurisdiction in the light of immunity impediments to national jurisdiction, the role the Court can potentially play in criminal enforcement, thereby furthering the cause of suppressing Israel's violations of international law in the way outlined herein, is fundamental. In consequence, States should see support for the ICC as a key means through which they discharge the suppression obligations set out above. Such support should be provided in

[40] https://www.icc-cpi.int/palestine

two ways. In the first place, States who are parties to the Rome Statute could join the seven States that themselves joined the referral of the situation in Palestine originally made by the State of Palestine.[41] This is to be contrasted with the forty-three States parties to the Rome Statute who have referred the situation in Ukraine to the Court.[42] In the second place, third States, whether or not parties to the Rome Statute, could pledge financial support to the Office of the Prosecutor, explaining that the motivation for this is to support the Palestine investigation (even though the Office would use any funds provided across all its investigations). It is reported that such extra support has been pledged by Belgium, Spain and Ireland,[43] just as it has been reported that some States have pledged support on the basis of an equivalent motivation as far as the Ukraine investigation is concerned.[44] There are important, ongoing concerns about the ability and willingness of the Office of the Prosecutor at the ICC to address the situation in Palestine effectively, given the immense pressure it and the Court are under on that situation by those, such as the USA, who are opposed to the Court addressing it. Other States need to counter this through political and financial support if there is any hope that the Office of the Prosecutor and the ICC are able to withstand that pressure and deliver justice to the Palestinian people, a good in and of itself, and also a potentially vital means of enabling greater compliance with the genocide (and other core) obligations by Israel, an objective which, as the present opinion has indicated, States bear a legal obligation to secure.

4.e. Entitlement to invoke Israel's violations of the genocide obligations

4.e.i. Basis

4.e.i.α. Introduction

75. States have the legal right to invoke the responsibility of Israel for breaching the genocide obligations. This right arises because the genocide obligations are (1) binding on those States who are parties to the Genocide Convention, a group established for the protection of a collective interest (an *erga omnes partes* obligation)[45] and, also, in any case, (2) operative generally in customary international law, applicable to all States, and owed to the international community as a whole, i.e. obligations with *erga omnes* status.[46]

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[41] https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine; https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral_Chile__Mexico.pdf

[42] https://www.icc-cpi.int/situations/ukraine

[43] https://www.belganewsagency.eu/federal-government-provides-funding-to-investigate-war-crimes-in-israel-and-palestine; https://www.palestinechronicle.com/spain-to-voluntarily-contribute-to-iccs-war-crimes-investigation-in-gaza/; https://www.thejournal.ie/social-democrats-expel-israeli-ambassador-6222461-Nov2023/; https://www.oireachtas.ie/en/debates/question/2023-11-30/146/.

[44] https://www.voanews.com/a/millions-in-extra-funding-pledged-for-icc-work-in-ukraine/7014220.html

[45] ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 6.

[46] ARSIWA, Art. 48(b); ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 8.

4.e.i.β. (1) Erga omnes partes

76. Obligations *erga omnes partes* apply to a particular group of States and exist for the purpose of protecting a collective interest.[47] Usually, such obligations exist in a treaty, although they can also exist in customary international law.[48] Such obligations "are owed by any State party to all the other States"[49] such that when any given State breaches them, all other States within the group can invoke the breach even if they were not directly injured or they do not have some other special interest in it (e.g. it concerned harm to their nationals).[50]

77. Whether a treaty contains *erga omnes partes* obligations depends on its text. Interpreting the Treaty of Versailles in *S.S. Wimbledon*, the League of Nations Permanent Court of International Court of Justice identified a common legal interest in "the intention of the authors … to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind".[51] In the *Belgium v. Senegal* case, the ICJ identified the *erga omnes partes* nature of obligations under the Convention Against Torture in the treaty's preambular call "to make more effective the struggle against torture…throughout the world".[52] Consequently, "the obligations in question are owed by any State party to all the other States Parties to the Convention"[53] and States have "a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, the authors do not enjoy impunity".[54]

78. The genocide obligations in the Genocide Convention are of this type. In the *Reservations to the Convention Against Genocide* Advisory Opinion, the ICJ emphasised that States had a common interest in each other's compliance with the Convention, because its "object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality".[55] In the preliminary objections phase of the current *Gambia v. Myanmar* case before the ICJ, the Court affirmed "right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention".[56] It then invoked this dictum and proceeded on the basis of it in the 26 January Order.[57]

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[47] ARSIWA, Art. 48.
[48] ARSIWA, Part Three, Ch. I, Art. 48 Commentary, para. 6.
[49] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (hereinafter 'Belgium v Senegal Judgment (2012)'), p. 422 at p. 439, para. 68.
[50] *Belgium v. Senegal* Judgment (2012), p. 450, para. 69; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Preliminary Objections, I.C.J. Reports 2022 (hereinafter '*Gambia v. Myanmar* Preliminary Objections (2022)'), p. 36, para. 109.
[51] *Case of the S.S. "Wimbledon"*, Judgment of 17 August 1923, P.C.I.J., Series A, No. 1, 1923 (hereinafter '*S.S. "Wimbledon"* Judgment (1923)'), p. 23.
[52] *Belgium v. Senegal* Judgment (2012), para. 68.
[53] Ibid.
[54] Ibid.
[55] Reservations to the Genocide Convention Advisory Opinion (1951), p. 12.
[56] *Gambia v. Myanmar* Preliminary Objections (2022), para. 113.
[57] 26 January Order, para 33.

4.e.i.γ. (2) Erga omnes obligations (and by association, jus cogens obligations)

79. All States can also invoke Israel's breach of the genocide obligations in customary international law because they operate *erga omnes* as a matter of this area of law.[58] *Erga omnes* obligations in customary international law are owed by Israel, along with all other States, to the international community as a whole and, therefore, as the ICJ held in the *Barcelona Traction* case, "by their very nature … are the concern of all States" and "[a]ll States can be held to have a legal interest in their protection...".[59] The ILC Draft conclusions on *jus cogens* norms, the Commentary of which observing that norms with *jus cogens* status also have *erga omnes* status, holds that "any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*)".[60]

4.e.ii. What States can do

4.e.ii.α. Call upon Israel—cessation, assurance of non-repetition, reparation

80. States are legally entitled to call upon Israel to perform the standard violation-consequence-related obligations applicable in international law: cessation, assurances of non-repetition, and reparation.

4.e.ii.β. Take measures to induce cessation and reparation

81. States are also entitled to take lawful measures against Israel to induce the aforementioned cessation and reparation.[61] However, this entitlement is otiose given that, as indicated above, States are, separately, obliged to take such measures.

82. In addition, countermeasures—acts that are ordinarily wrongful, but where wrongfulness is precluded by the fact that they are taken in response to another State's wrongful act—against Israel on the same grounds may also be legally permissible. The Commentary to the Articles on State Responsibility noted in 2001 that State practice on countermeasures by non-injured States "is limited and embryonic," mentioning the use of trade embargoes, asset freezes, travel bans, boycotts, and other unilateral and multilateral sanctions.[62] The conclusion then was that

> the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 [concerning *erga omnes* obligations] to take countermeasures in the collective interest.[63]

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[58] ARSIWA, Art. 48(b).
[59] *Barcelona Traction* Judgment (1970), p. 32, para. 33.
[60] ILC *jus cogens* Draft Conclusions & Commentaries, Conclusion 17, para. 2.
[61] ARSIWA, Art. 54.
[62] ARSIWA, Part Three, Ch. II, Art. 54 Commentary paras. 3 and 4 (quotation from para 3).
[63] ARSIWA, Part Three, Ch. II, Art. 54 Commentary paras 6.

83. Notably, the Commentary did not hold that such countermeasures would be unlawful—the position was left open. In the over-two-decade-period since the Commentary was completed, a right to take such measures may have crystallized.[64]

4.e.ii.γ. Case(s) before the ICJ

84. The *South Africa v Israel* case is a third party case, brought by South Africa on the basis of an *erga omnes partes* right to see Israel comply with its obligations in the Genocide Convention under Article IX. According to that article:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III [concerning conspiracy, incitement, attempt and complicity], shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

85. The existence of this right was affirmed *prima facie* by the ICJ in the 26 January Order.[65] Other examples of standing established on the basis of obligations *erga omnes partes* are the League of Nations Permanent Court of International Justice in the aforementioned *S.S. Wimbledon* case, allowing Italy and Japan to bring a claim against Germany for refusing to grant access to the Kiel Canal, despite not being individually injured;[66] and the ICJ permitting Gambia to bring a claim against Myanmar under the Genocide Convention despite being uninjured by Myanmar's actions in the aforementioned *Gambia v Myanmar* case.[67]

86. As South Africa has already brought a case against Israel, other States can potentially participate in this. There are two potential options here.

87. In the first place, under Article 62 of the ICJ statute,

> 1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request.[68]

On 23 January 2024, Nicaragua submitted a request of this kind.[69] At the time of writing, the Court had not decided upon it. Given that the granting of such a request is not automatic, it would be prudent to wait for the Court's decision on this application before considering whether and, if so, on what basis, an Article 62 intervention by other States might be viable and, if so, to what end such an intervention might be requested.

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[64] Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', (2016) 29 QIL 3.
[65] 26 January Order, paras 33-4.
[66] *S.S. "Wimbledon"* Judgment (1923), pp. 20-23
[67] *Gambia v. Myanmar* Preliminary Objections (2022), p. 37, para. 113,
[68] ICJ Statute (Annex of the UN Charter), https://www.icj-cij.org/statute) (hereinafter 'ICJ Statute'), Art. 62.
[69] Application for Permission to Intervene by the Government of the Republic of Nicaragua, 23 January 2024, https://www.icj-cij.org/sites/default/files/case-related/192/192-20240123-int-01-00-en.pdf

88. In the second place, under Article 63 of the ICJ statue, any of the other 151 States parties to the Genocide Convention have a right to intervene in the proceedings on the basis that the case involves the "construction"—i.e. a determination of the general meaning—of the Convention to which they are parties.[70] If they intervene on this basis, then the "construction given by the judgment" will be binding on them.[71] On 5 April 2024, Colombia made a declaration of intervention on this basis.[72]

89. At the time of writing, it has been reported that Bangladesh, Belgium and Ireland have, separately, announced their intention to intervene in the case; these interventions have not yet been lodged at the Court.[73]

90. States could join Colombia in intervening on the basis of Article 63 of the Statute, to put forward their view, as a general matter, on the meaning of the Genocide Convention. They could do this individually or collectively.

91. There are two key matters on which States could intervene in a way that supports the case made by South Africa.

92. In the first place, States could intervene to support the general jurisdictional basis for the case, in terms of the *erga omnes* nature of the obligations at issue and the consequential right a third state, in this case South Africa, has to bring a case. Although the jurisprudential Rubicon on third States being able to bring such cases has been crossed through the *Gambia v Myanmar* case, it would still be valuable to have additional support for this general proposition, to bolster the likelihood that the Court will follow precedent (which, as indicated, it did *prima facie* in the 26 January Order) in the face of a challenge to this by Israel.

93. In the second place, States could intervene to advance a particular legal meaning of the intent requirement in the definition of genocide, as some of them have already done in the *Gambia v Myanmar* case.

94. As indicated above, the fundamental legal issue when it comes to Israel's commission of genocide is whether or not Israel's military action in the Palestinian Gaza Strip is being conducted with genocidal intent. Israel, and some of its State supporters, insist that the intent is not this, but self-defence. The issue here is not whether Israel has a legal right of self-defence in international law that would justify its military action in Gaza (as indicated above, and explained in my earlier opinion of 27 November 2023, as it happens, it does not). Nor is the issue whether self-defence justifies genocide (it does not, as Israel itself accepts). Rather, the issue is whether self-defence is Israel's *objective* in the war. Is the *intent* genocidal, as the State of Palestine, other States generally, and South Africa in

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[70] ICJ Statute, Art. 63.
[71] Id.
[72] Republic of Colombia, Declaration of Intervention, 5 April 2024, https://www.icj-cij.org/sites/default/files/case-related/192/192-20240405-int-01-00-en.pdf
[73] https://mofa.gov.bd/site/press_release/2bd6b2da-c04d-48b7-a7c8-b32cf13a97fc; https://www.middleeastmonitor.com/20240311-belgium-to-intervene-in-south-africas-genocide-case-against-israel-at-top-un-court/; https://www.gov.ie/en/press-release/4e9a7-statement-by-the-tanaiste-on-the-south-africa-vs-israel-case-at-the-international-court-of-justice/.

particular, in this case, say? Or is it not, for example because it is something else, such as self-defence?

95. As indicated above, the most recent decision of the ICJ on this matter of intent, in the *Croatia v Serbia and Montenegro* case, held that the test is whether genocidal intent is "is the only inference that could reasonably be drawn from the acts in question."[74] 'Only reasonable inference' is a high bar. Given this, the success of the *South Africa v Israel* case, when it comes to the main issue of whether or not Israel's actions in the Palestinian Gaza Strip constitute genocide, will depend to a considerable extent on how the test as defined in the earlier case is interpreted, and also whether the Court might be persuaded, in this case, to adopt a different, somewhat looser definition of the test compared to that earlier case. (As indicated above, it is not clear from the 26 January Order in this case how exactly the Court applied the test to make the determinations there.)

96. In the *Gambia v Myanmar* case currently before the Court, also, as indicated, concerning the Genocide Convention, the same issue with the test for intent is presenting itself, and, in consequence, efforts are already being made to persuade the Court to adopt a somewhat looser approach. Moreover, these efforts involve States intervening in the same way that could be done by States in the present case. In November 2023 Canada, Denmark, France, Germany, the Netherlands and the United Kingdom jointly intervened, arguing that:

> [I]t is crucial for the Court to adopt a balanced approach that recognizes the special gravity of the crime of genocide, without rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings of genocide near-impossible.[75]

They made various suggestions about the meaning and scope of the 'only reasonable inference' dictum in *Croatia v Serbia and Montenegro* that essentially broadened what is covered by the test for intent.

97. States could make an intervention along similar lines in the present case, to support a particular approach to the intent test and so increase significantly the likelihood of a finding of genocide in this case.

98. Indeed, States should also consider intervening in the *Gambia v Myanmar* case to make the same general point about the intent test. This would demonstrate that their position on is non-partisan, which would in turn enhance the likelihood that the Court adopt this position, given that such adoption would effectively be for all purposes, not just the particular case before it. It would also potentially influence the Court at a key stage before the *South Africa v Israel* case gets to the issue, since the merits of *Gambia v Myanmar* will be addressed first, the Court potentially adopting a position then which it might go on to apply when it subsequently turns to the same issue in *South Africa v Israel.* If the Court continues with its prior approach to 'only reasonable inference' when it has to decide

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[74] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports (2015) 3, § 148. Also ibid., §§ 417, 510.

[75] https://www.icj-cij.org/index.php/node/203299 and https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf, para. 52.

things in *Gambia v Myanmar*, it will be harder to challenge this approach when it turns to the same matter in *South Africa v Israel.*

99. If States decide to intervene, on whatever legal issue, they might consider including as an appendix submissions from relevant UN Human Rights Mandate Holders and Palestinian and international civil society human rights organizations. There is no jurisdictional basis on which such actors can make submissions in the case in their own right. Such submissions could potentially strengthen further the legal arguments being made in the case, given the unique credibility, legitimacy, expertise, and information that such bodies have.