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

PROVISIONAL MEASURES, 9 April 2024

Professor Anne Peters - Lack of plausibility

Mr President, Members of the Court, it is an honour to appear before you today and to present Germany's position on plausibility.

A. THE STANDARD OF PLAUSIBILITY

This Court has already been seized in another case to deal with the heart-breaking consequences of the armed conflict in Gaza, initiated by the brutal attack of Hamas on Israel.

But this case is not between the two parties to that conflict.

It is the first case in the Court's history in which provisional measures are sought against a State that stands accused of **complicity in** and of lack of **vigilance and prevention** of acts of another State, that is not party to the proceedings.[1] Both types of legal obligations arise exclusively and necessarily in connection with, or in response to, the conduct of another state that is absent from these proceedings. Mr. Wordsworth has already demonstrated how this poses a serious admissibility problem.

This attempt to request provisional measures against one state by reference to the conduct of another, stretches the plausibility assessment to breaking point in an unprecedent manner. This Court will first have to find — on the basis of evidence[2] —that there are plausible facts that establish plausible violations on the part of Israel. Second, the Court will have to find that there are plausible facts that establish plausible violations on the part of Germany. Here, the Court will especially have to establish

[1] Unlike ICJ, *Application of the Genocide Convention, further requests for the indication of Provisional Measures* (Bosnia and Herzegovina v. Serbia and Montenegro), provisional measure of 13 Sept. 1993, para. 44-46 and para. 52.

[2] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Armenia v. Azerbaijan), Order of 7 Dec 2021, para. 60; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Order of 23 January 2020, para. 56; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Order of 26 Jan. 2024, paras 44, 45, and 54.

whether there are plausible objective and subjective links between the conduct of Germany and the conduct of the absent third state, Israel.

In this novel and special constellation, one would have expected Nicaragua to adduce concrete evidence and legal reasoning to substantiate its claims against Germany. However, Nicaragua has said surprisingly little on the law and, as regards the facts, it has almost exclusively relied on speculation and unjustified inferences.

B. No plausible complicity under Art. III lit. e) of the Genocide Convention and under customary law

Nicaragua claims that Germany is complicit in genocide and violations of international humanitarian law allegedly committed by Israel. In paragraph 15 of the Application, the Applicant mentions German "involvement in the facilitation" of "unlawful activities" (concerning the "laws of war"), and in paragraph 16, the Applicant alleges that "Germany is facilitating the commission of genocide" and calls this a "distinct base" of Germany's responsibility.

This must fail, because the most basic prerequisites for establishing aid and assistance, or – which is really the same thing – 'complicity', are lacking. These prerequisites are: a causal contribution of the accomplice to the wrongful act, and knowledge and intention to facilitate the wrongful act of the main perpetrator.[3] Nicaragua has not and can not provide any evidence to show these elements to be plausible.

1. Lack of a significant contribution and causality in law

The standard requirement for causality in law, as applied by international tribunals, is that there must be "proximity", "directness", or that the breach must not be too "remote".[4] Proximity is established where the consequence of an act is a "natural and normal consequence".[5] Such a link is especially needed to establish aid and assistance. Aid and assistance must have "contributed significantly" to the

[3] International Law Commission, Draft Articles on State Responsibility (Yearbook of the International Law Commission (2001) Vol. II, Part 2), commentary on Art. 16, para. 3; commentary on Art. 41, para. 11; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 43, para. 420.

[4] Mutatis mutandis International Law Commission, Draft Articles on State Responsibility (Yearbook of the International Law Commission (2001) Vol. II, Part 2), commentary on Art. 31, paras 9-10, with references to the case law.

[5] Mutatis mutandis *Provident Mutual Life Insurance Company and Others (United States) v. Germany (Life Insurance Claims*), 7 RIAA, 91, 113 (Arbitral Tribunal 1924).

alleged wrongful act.[6] This can only be determined objectively, by assessing the quality and quantity of the real contribution in the concrete case.

Nicaragua has not offered any evidence as to how any of the military equipment from Germany could have made a **significant** contribution to an alleged genocide or to breaches of international humanitarian law. Given Germany's stringent licensing standards that scrutinise precisely these risks, there is no indication that *German* equipment would have naturally or normally led to plausible violations of international law by Israel.

2. The subjective element: knowledge and intention to facilitate

In addition, Nicaragua has not provided any evidence for the presence of the necessary subjective elements, which are knowledge and intent.[7]

In the *Bosnian Genocide* case, you insisted "that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide **cannot be treated as complicity** in genocide **unless <u>at the least</u>** that organ or person **acted knowingly**, that is to say, in particular, **was aware of the specific intent (dolus specialis) of the principal perpetrator.** If that condition is not fulfilled, that is sufficient to **exclude** categorization of the conduct as complicity."[8]

The position is the same in customary law generally: aid and assistance must be given with knowledge of the circumstances, and **with the intention to facilitate** the occurrence of the wrongful conduct.[9]

Nicaragua has not provided evidence on any plausible intent on the part of Germany to facilitate internationally wrongful acts.

Germany – on the contrary – has demonstrated to this Court that its intention has always been to assure full respect of international law, be it the Genocide Convention, international humanitarian

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[6] International Law Commission, Draft Articles on State Responsibility (Yearbook of the International Law Commission (2001) Vol. II, Part 2), commentary on Art. 16, para. 5; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 43, para. 432.

[7] cf ICJ, *Application of CERD and the Convention for the Suppression of the Financing of Terrorism* (Ukraine v. Russia), Provisional Measures Order of 19 April 2017, para. 75; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Azerbaijan v. Armenia), Provisional Measures Order of 7 Dec. 2021, para. 53.

[8] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 43, para. 421.

[9] ILC commentary on Art. 16 para 5; James Crawford, *State Responsibility* (Cambridge UP 2013), 406-408.

law, or other customary international law. Germany has engaged with Israel on numerous occasions to urge compliance with international law.

As explained by Professor Tams, Germany has a robust legal framework and procedures in place with regard to arms exports. These procedures have been and will continue to be applied. With regard to humanitarian aid, Germany has – contrary to the allegations by Nicaragua – increased its efforts significantly. Given these facts, any allegation of intention to facilitate the perpetration of allegedly wrongful acts by Israel is entirely unfounded.

3. No plausible aid and assistance in maintaining a situation created by a serious breach of peremptory norms

Because the elements of aid and assistance are absent, all claims that Germany has aided and assisted in maintaining a situation resulting from alleged serious breaches of ius cogens by Israel (as Art. 41(2) ARSIWA puts it) are equally baseless.

C. No plausible breaches of Art. I of the Genocide Convention and common Art. 1 of the Geneva Conventions

I now turn to Germany's obligations under Art. I of the Genocide Convention and common Art. 1 of the Geneva Conventions.

Although – generally speaking – obligations to prevent genocide and to ensure respect with international humanitarian law are indeed Germany's own obligations, the emergence, scope, exact content, and any possible breach of such obligations inevitably depend on, and vary by reference to the degree and kind of the risk of wrongful acts by another State, in this case Israel.

1. Art. I of the Genocide Convention

Allow me to start with the obligation to prevent genocide, an obligation of conduct that is incumbent upon **all** States. Germany is of course fully aware of the diverging views over the legal categorization of the Israeli conduct of its defence against the ongoing attack by Hamas. The Court has been seized to judge upon this question in another case, not this one.

In the current context, it should be noted that Germany has continuously engaged politically with Israel in a dialogue that has not shied away from critical questions. In the strongest terms, German leaders have warned Israel of the grave dangers that a ground offensive in Rafah would pose. For months, in countless meetings, German leaders and diplomats have worked towards the opening of more border crossings. As you have heard Professor Tams state earlier, to prevent famine, Germany is engaged in emergency deliveries, dropping food from the air. These concrete measures are at the

heart of Germany policy. So, Germany has in any event continuously used all reasonable means at its disposal to both exert its influence on the Israeli partners in order to improve the situation and to itself furnish humanitarian aid. It continues to do so every day. Germany has thus in any event duly fulfilled any conceivable obligation to prevent the occurrence of genocide by these concrete measures. We cannot see how any duty to prevent could demand more of us.

2. Common Art. 1 of the Geneva Conventions

Leaving aside the fact that Nicaragua, as a non-party to the conflict in Gaza, has no standing to enforce Germany's obligations under common Art. 1 with regard to a third State like Israel, a violation of common Art. 1 of the Geneva Conventions by Germany is likewise not plausible.

First, in the *Nicaragua* case of 1986, this Court identified one specific external obligation incumbent upon non-parties to an armed conflict: the obligation **not to encourage** violations of international humanitarian law by another state that finds itself in armed conflict.[10]

It is inconceivable that Germany would encourage Israel to violate international humanitarian law, and indeed, not even Nicaragua alleges this.

Second, the obligation to ensure respect generates so-called positive obligations to exert one's influence on parties to an armed conflict to observe international humanitarian law.[11] Germany has always fulfilled and continues to fulfil this obligation. It is persistently urging Israel to apply restraint, to allow for humanitarian access by opening check-points, and the like. Ongoing in-depth bilateral exchanges between various Ministries and on several levels focus on the processes that Israel has in place to ensure respect for international humanitarian law. Yesterday, we heard Nicaragua acknowledge these endeavours.

Third, there is the issue of the export of arms and other military equipment.

As stated, common Article 1 and parallel customary law prohibits States from encouraging violations of international humanitarian law. However, this provision does not generate a negative obligation to refrain from military support to a state involved in an armed conflict. Common Article 1 does not and cannot block all transfer of aid to a State that could be engaging in self-defense in accordance with

[10] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. USA*), judgment of 27 June 1986, ICJ Reports 1986, 14, para. 220.

[11] ICRC database customary law Rule 144: "States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law."

Art. 51 of the UN Charter. Such a blanket prohibition would be nonsensical, because it would be incompatible with every State's right to support countries acting in self-defence.

While the scope of common Article 1 is contested and requires further discussion, even taken at its broadest plausible interpretation, the obligation to ensure respect embodied in common Article 1 can do no more than suggest that all states must conduct a proper risk assessment for decisions regarding exports of military equipment.[12]

3. Germany fulfills its obligation to ensure respect under common Art 1 in its export control practice

Assuming that common article 1 has implications for the transfer of arms and military equipment, Nicaragua has failed to offer any evidence that plausibly show that Germany did not act with due diligence in its export law and practice.

The German legal framework on the manufacturing, marketing, and export of weapons ("*Kriegswaffen*") and other military equipment ("*Rüstungsgüter*") is four-layered and strict.

The German constitution itself, the highest law of the country, monitored by a robust constitutional court, prohibits export of weapons without a licence by the federal government.[13]

Following this prohibition, Germany applies the War Weapons Control Act (*KriegswaffenkontrollGesetz)* of 1961/2022,[14] its Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) of 2013, last amended in 2024,[15] the EU Common Position 2008,[16] and the Arms Trade Treaty of 2013[17] as binding law.

Four ministries are involved here, as you see on the slide.

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[12] International Committee of the Red Cross, Commentary of 2016, common Art. 1, para 165 (https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=undefined); ICRC, 'Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria – a Practical Guide' (2nd edn 2016), p 13; cf. ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, paras 112-120.

[13] Art. 26 (2) of the German Basic Law.

[14] War Weapons Control Act, as amended by the Announcement of 22 November 1990 [Federal Law Gazette I, p. 2506]) as amended by Article 3 of the law of 11 October 2002, Federal Law Gazette I, p. 3970.

[15] Foreign Trade and Payments Act of 6 June 2013 (BGBl. I S. 1482), last amended by statute of 27th February 2024 (BGBl. 2024 I Nr. 71).

[16] EU Council Common Position 2008/944/CFSP of 8 December 2008, OJ 2008 L 335/99 (as amended by Council Decision (CFSP) 2019/1560), OJ 2019 L 239/16; Art. 25 lit. b) ii TEU in conjunction with Art. 29 sentence 1 TEU and Art. 288(4) TFEU.

[17] The Arms Trade Treaty of 2 April 2013, United Nations Treaty Series, vol. 3013, p. 269.

The German Federal Government's "Political Principles on the Export of Weapons and other Military Goods" of 2019[18] explicitly seek to "design a restrictive weapons export policy",[19] "within the framework of Germany's international legal obligations".[20]

These Principles are "general administrative rules" in the sense of the German Constitution.[21] With these, the Government binds itself and limits its discretion. The Principles refer to the EU Common Position.

Further, the export of weapons and military equipment is, to the extent feasible, subject parliamentary control.[22] The Federal Government informs Parliament about licensing decisions that have gone through the Federal Security Council and about the kind, number of goods, recipient country, and involved German enterprises. Such reports also cover the total volume of transactions, unless in individual instances constitutionally protected interests prohibit such disclosure. This information is not classified or secret.[23]

Allow me to single out only two of the relevant benchmarks, all other rules can be found in the Judges' folder: Under the EU Common Position, Germany, "having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law" (Art. 2 sec. 2 lit. c), applies the rule that it "shall (….) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of **serious violations** of international humanitarian law."[24] Where the German authorities identify such a clear risk, they must deny export licences. But please note, the assessment of course is by reference to the relevant equipment being supplied. If it is a batch of helmets or training ammunition, of course the assessment may be – no risk at all.

In the narrower scope of application of the Arms Trade Treaty, German authorities "**shall not authorize** any transfer of conventional arms (…) if [they have] **knowledge** at the time of authorization that the arms or items would be used in the commission of **genocide**, **crimes against**

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[18] Politische Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern of 26 June 2019. https://www.bmwk.de/Redaktion/DE/Downloads/P-R/politische-grundsaetze-fuer-den-export-von-kriegswaffen-und-sonstigen-ruestungsguetern.pdf.

[19] Politische Grundsätze, Preamble indent 1.

[20] Preamble indent 2.

[21] Art. 86 of the German Constitution (Basic Law *[Grundgesetz]*).

[22] German Federal Court, BVerfGE 137, 185, judgment of 21 October 2014, - 2 BvE 5/11 -, Leitsatz 1.

[23] § 8 Geschäftsordnung Bundessicherheitsrat (Rules of the Federal Security Council), Bundestag-Drucksache 18/5773 of 13 August 2015.

[24] Art. 2(2) lit. c) of the EU Common Position.

humanity, **grave breaches** of the Geneva Conventions of 1949, **attacks directed** against civilian objects or civilians protected as such, or **other war crimes** as defined by international agreements to which it is a Party."[25]

If export is not prohibited under this provision, German authorities assess the potential that the item could be used to commit or facilitate a serious violation of international humanitarian law.[26] If they find an "**overriding risk"** of such a negative consequence, they may not authorise the export.[27] But again, flak jackets might not pose such a risk.

Our four-tiered legal and political control regime of exports of arms and military goods is robust. It is democratic, as transparent as possible given the sensitivity of the material involved, and subject to parliamentary and judicial oversight.[28].

Nicaragua has provided no evidence whatsoever that the German licensing policy is not appropriate for conducting the risk prognoses required by international law. By contrast, the German legal framework provides for constant re-assessment in the light of highly dynamic situations on the ground.

The domestic procedures in place amply satisfy the obligation to ensure respect under common Article 1 of the Geneva Conventions so that any breach is implausible.

D. Conclusion

To conclude, the Court must apply a reasonable standard of plausibility that does justice to the special features of this case:

The case is brought to this Court by a state not party to a conflict against another state that is equally not a party to that conflict.

It requires the application of a stretched plausibility test that operates on two levels. Nicaragua has not provided any evidence for the elements of causality, full knowledge, and intention to facilitate. Germany's conduct is far removed from whatever putative breaches of international law by Israel. All this leads to complicity being out of the question.

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[25] Art. 6(3) ATT.

[26] Art. 7(1) lit. i) ATT.

[27] Art. 7 (3) ATT.

[28] German Federal Court, BVerfGE 137, 185, judgment of 21 October 2014, - 2 BvE 5/11 -; e.g. Administrative Court (*Verwaltungsgericht*) Berlin (4. Kammer), judgment of 2 Nov. 2020 – VG 4 K 385.19.

Germany has fulfilled any potential duty to take proactive steps to prevent any misconduct, including alleged genocide, with its tireless efforts to improve the situation for the people in Gaza.

Finally, Germany is employing stringent criteria with respect to a very limited supply of war weaponry. It thus satisfies the due diligence standards under Art. I of the Genocide Convention. and all the more so its obligation to ensure respect under the broad umbrella clause of common Article 1 of the Geneva Conventions.

Mr President, Member of the Court,

The situation in Gaza is unbearable. Too many lives have been destroyed, too many life plans shattered. We all want this to end. But this type of strategic litigation between proxies will not bring us closer to our shared goal.

Mr President,

This concludes my presentation. May I now request the Court to call on Professor Paolo Palchetti, who will continue with Germany's presentation. Thank you for your attention.