

International Court of Justice (ICJ)

The Role of the International Court of Justice in Developing International/Global Law: a Survey of International Court of Justice Decisions, 2023–2024

Robert Kolb* and Aymeric Héche**

I Introduction

On the subject of a declaration of an intervention in relation to Israel's activities in occupied Palestinian territory, between 1 August 2023 and 31 July 2024, two judgments – one on the merits of and another on preliminary objections to such an intervention – were rendered; one advisory opinion was delivered; and nine orders were also issued on the same subject. Within this time period, the International Court of Justice (ICJ or the Court) held hearings for many contentious cases and for the 19 July 2024 advisory opinion (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*). Four orders relate to the ongoing conflict in the Gaza Strip.

Two developments should be noted concerning the instruments governing the functioning of the Court. First, the Rules of Court, the Resolution concerning the Internal Judicial Practice of the Court and the Practice Directions have been modified to render their provisions gender-inclusive.¹ These modifications entered into force on 24 October 2023. Second, Articles 81, 82 and 86 of the Rules of the Court have been amended.² The modifications relate to intervention and entered into force on 1 June 2024.³ The amendments to Articles 81 and 82 modified time limits for the filing of an application for permission to intervene under Article 62 of the Statute and for the declaration of intervention under Article 63 of the Statute. For instance, the time limits set in Article 81, Paragraph 1 and Article 82, Paragraph 1 now reads as follows: “[permission to intervene or declaration of intervention] shall be filed as soon as

* Professor at the University of Geneva, Geneva, Switzerland. The views expressed herein are those of the authors. This article was last updated in September 2024.

** PhD, Lecturer at the Haute-Ecole Arc, Neuchâtel, Switzerland.

1 International Court of Justice. *Press Release No. 2023/56*.

2 International Court of Justice. *Press Release No. 2024/18*.

3 *Ibid.*

possible, and *not later than the date fixed for the filing of the Counter-Memorial*" (emphasis added). The sentence "in exceptional circumstances, a declaration submitted at a later stage may however be admitted" was moved from Article 81, Paragraph 1 and Article 82, Paragraph 2 to the new Paragraph 4 of these Articles. The amendment also provides three new and modified paragraphs, with a detailed regime for each procedural stage (the time limit for applications for intervention in Paragraph 1 of both Articles; the time limit for intervention at the stage of further written pleadings and counterclaim in Paragraph 2; and the time limit for intervention at the stage of preliminary objections in Paragraph 3). The amendment to Article 86, Paragraph 2 is in relation to the possibility for intervening states, under Article 63 of the Statute, to submit observations during oral proceedings. The amended Paragraph 2 of Article 86 provides: "The intervening state may also submit its observations with respect to the subject matter of the intervention in the course of the oral proceedings, unless the Court decides otherwise." These new provisions evidence the growing importance of the intervention mechanism in the recent case law of the Court and the need for legal predictability regarding procedural matters. It may be argued that they were enacted to deter "mass intervention".⁴

On 25 October 2023, then President Donoghue addressed the Sixth Committee of the General Assembly in New York.⁵ The President delivered observations on the future of the Court. Regarding procedural matters, she thought it would be opportune to revise Article 34 of the Statute to let "regional integration organisations to appear as parties in contentious proceedings before the Court in respect of matters for which their member states had transferred competence to them".⁶ On the nomination and election of judges, she observed that "it could be desirable to eliminate the possibility of re-election, as a further demonstration of the independence and impartiality of members of the Court".⁷ As a result, the term of office should be extended to 12 years (instead of 9). The increasing workload of the Court and budgetary difficulties were stressed: "In 2011, the Court had issued two judgments and 11 orders,

4 Juliette McIntyre. "The ICJ Changes the Rules for Intervention." *EJIL:Talk!* 11 March 2024. Available at: <https://www.ejiltalk.org/the-icj-changes-the-rules-for-intervention/> and Ton Nu Thanh Binh. "Article 63 Intervention Before the International Court of Justice: New Developments and the Way Forward." *Opinio Juris*. 26 July 2024. Available at: <https://opiniojuris.org/2024/07/26/article-63-intervention-before-the-international-court-of-justice-new-developments-and-the-way-forward/>.

5 United Nations. *Summary Record of the 26th Meeting: Sixth Committee*. 25 October 2023. UN Doc. A/C.6/78/SR.26.

6 *Ibid.*, 5, para. 17.

7 *Ibid.*, 5, para. 20.

while [...] it had rendered four judgments and 28 orders [in 2022]. However, the resources available had not increased in parallel with the demands States had placed on the Court.”⁸

On 26 October 2023, then President Donoghue addressed the United Nations General Assembly in New York on the presentation of the Court’s annual report for the year 2022–2023. She noted the great diversity in the Court’s activity and underscored that “there are currently 20 cases pending before the Court, seven of which had been brought during the reporting year”.⁹ Indeed, the President noted that “the Court is experiencing one of the most dynamic periods in its history”.¹⁰ In closing, the President did not fail to raise the question of the budget and the importance of providing the Court with sufficient resources to enable it to fulfil its mandate.

On 17 July 2024, President Salam addressed the seventy-fifth session of the International Law Commission (ILC) in Geneva.¹¹ He provided an account of the cases submitted and the decisions rendered; he also informed ILC members that 24 cases are in the Court’s docket.

The Court of Justice’s seventy-sixth *Yearbook* for the period 1 August 2021–31 July 2022 was published in April 2024.¹² The Court’s *Annual Report* for the period 1 August 2022–31 July 2023 was released in August 2023.¹³ The eighth issue of the *Acts and Documents Concerning the Organisation of the Court* was published in June 2024. It includes the updated version of the Statute and Rules of Court, along with practice directions.¹⁴

8 *Ibid.*, 3, para. 11. Additionally, see 3, para. 10: “Contentious matters before the Court, with increasing frequency, entailed incidental proceedings such as requests for the indication of provisional measures, preliminary objections and counterclaims. Applications for permission to intervene or declarations of intervention could also consume the Court’s time and attention.”

9 International Court of Justice. *Press Release No. 2023/57*. Full text of the address available at: <https://www.icj-cij.org/statements-by-the-president> (UNGA, 78th Session, 20th Plenary Meeting, 26 October 2023) UN Doc. A/78/PV.20.

10 *Ibid.*

11 International Court of Justice. *Speech of H.E. Judge Nawaf Salam, President of the International Court of Justice, at the Seventy-Fifth Session of the International Law Commission*.

12 International Court of Justice. *Publications Catalogue*. Available at: <https://www.icj-cij.org/publications>.

13 International Court of Justice. *Annual Reports*. Available at: <https://www.icj-cij.org/annual-reports>.

14 International Court of Justice. *Acts and Documents (8/2)*. Available at: https://www.icj-cij.org/sites/default/files/2024-05/acts-and-documents-8_2.pdf.

II Composition of the Court

In July 2024, the Court was composed as follows:

1. President: Mr. Nawaf Salam (Lebanon);
2. Vice-President: Ms. Julia Sebutinde (Uganda);
3. Judges: Mr. Peter Tomka (Slovakia), Mr. Ronny Abraham (France), Mr. Abdulqawi Ahmed Yusuf (Somalia), Ms. Xue Hanqin (China), Mr. Dalveer Bhandari (India), Mr. Yuji Iwasawa (Japan), Mr. Georg Nolte (Germany), Ms. Hilary Charlesworth (Australia), Mr. Leonardo Nemer Caldeira Brant (Brazil), Mr. Juan Manuel Gómez Robledo (Mexico), Ms. Sarah Hull Cleveland (United States of America), Mr. Bogdan-Lucian Aurescu (Romania), and Mr. Dire Tladi (South Africa).¹⁵

Following the elections held in November 2023, five members were elected for a term of 9 years, which began in February 2024.¹⁶ The term of Judge Charlesworth was renewed. Judges Gómez Robledo, Cleveland, Aurescu and Tladi were elected as new members of the Court.¹⁷ Judge Donoghue (United States of America), Judge Bennouna (Morocco) and Judge Lipton Robinson (Jamaica) stepped down from office in February 2024. Judge Gevorgian (Russia) was not re-elected. The Court elected Judge Salam as President in February 2024 for a term of 3 years.¹⁸ The Court elected Judge Sebutinde as Vice-President in February 2024 for a term of 3 years.¹⁹ In accordance with Article 35, Paragraph 6 of the Rules of Court, following the election of Judge Dire Tladi, Mr Moseneke, a South African national, ceased to sit as Judge *ad hoc* in the Application of the Genocide Convention in the Gaza Strip case (*South Africa v. Israel*).

III Judgments of the Court

The Court managed to strike one case from the list (a dispute between Ukraine and Russia over the application of the Convention on the financing of terrorism and of the Convention on the elimination of racial discrimination). The Court decided preliminary objections in the dispute regarding allegations of

15 For additional details and the composition of the Chamber, see: International Court of Justice. *Press Release No. 2024/13*.

16 International Court of Justice. *Press Release No. 2024/9*.

17 International Court of Justice. *Press Release No. 2024/9*.

18 International Court of Justice. *Press Release No. 2024/11*.

19 International Court of Justice. *Press Release No. 2024/12*.

genocide (*Ukraine v. Russia*). The Court issued its advisory opinion regarding the *Legal Consequences arising from the Policies and Practices of Israel in the occupied Palestinian territory, including East Jerusalem*. The Court ruled on the indication or modification of preliminary measures nine times.

Four new applications were filed in relation to the following: application of the Convention on the prevention and punishment of the crime of Genocide in the Gaza Strip (*South Africa v. Israel*); alleged breaches of certain international obligations in respect of the occupied Palestinian territory (*Nicaragua v. Germany*); the raiding of the Mexican embassy in Quito by Ecuadorian police and military forces (*Mexico v. Ecuador*); and the sheltering of former Ecuadorian Vice-President Glas Espinel at the Embassy of Mexico in Quito (*Ecuador v. Mexico*). The Court received one request for advisory opinions in regard to interpretation of the Convention on the Freedom of Association and the Protection of the Right to Organise (“Right to Strike Under ILO Convention No. 187”).

On 28 August 2023, Canada added Paragraphs 2, lit. e) and f) to its previous declarations recognising the jurisdiction of the Court as compulsory (Article 36, Paragraph 2 Statute).²⁰ Letter e) excludes disputes that were not presented in writing at least 6 months before application to the Court.²¹ Letter f) excludes disputes that arise “out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area”. On 31 May 2024, Palestine deposited a declaration under the terms of Article 35, Paragraph 2 of the Statute in the Registry of the Court.²² Palestine “[...] declares that it accepts with immediate effect the competence of the International Court of Justice for the settlement of all disputes that may arise or that have already arisen covered by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) [...]”. On the same day, Palestine filed an application for permission to intervene and a declaration of intervention in the case concerning the Genocide Convention (*South Africa v. Israel*).²³ It has never been previously determined whether a state can intervene within the meaning of Articles 62 or 63 on the legal basis of such a declaration.

20 International Court of Justice. *Declarations under Article 36(2) of the Statute of the Court*. Available at: <https://www.icj-cij.org/declarations/ca>.

21 On temporal reservations to the Court’s jurisdiction under the optional clause, see: Robert Kolb. *Reservations to Optional Declarations Granting Jurisdiction to the International Court of Justice*. Leiden: Brill; 2024: 90.

22 International Court of Justice. *Press Release No. 2024/51*. Additionally, see: <https://www.icj-cij.org/states-not-parties>.

23 International Court of Justice. *Press Release No. 2024/52*.

A *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*

On 16 January 2017, Ukraine filed an application against Russia regarding alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The request stems from the 2014 events in eastern Ukraine and the Crimean Peninsula. The case's scope is limited to the ICSFT and CERD. Ukraine argued that ICSFT was violated by Russia as it failed to prevent the commission of offences of terrorism financing, especially regarding acts perpetrated by the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR). Ukraine argued that Russia violated the CERD by discriminating Crimean Tatars and ethnic Ukrainians in Crimea. The Court indicated provisional measures in its 19 April 2017 Order. In its 8 November 2019 Judgment, the Court found that it had jurisdiction to entertain Ukraine's claims based on Articles 24, Paragraph 1 of the ICSFT and on Article 22 of the CERD.

In its final submission, Ukraine requested the Court to adjudge and declare that Russia was responsible for violations of Articles 8, 9, 10, 12 and 18 of the ICSFT (failing to co-operate in the prevention of terrorism financing; failing to identify funds used for terrorism) and that, as a result, illegal armed groups in Ukraine were provided funds that enabled them to commit acts of terrorism, including the shooting down of Flight MH17. Ukraine requested the Court to adjudge and declare that Russia was responsible for violations of Articles 2, 4, 5, 6 and 7 of the CERD (racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea; sponsoring, promoting and inciting racial discrimination; failure to adopt measures against racial discrimination in the field of education). Ukraine requested the Court to adjudge and declare that Russia breached its obligations under the 2017 Order by imposing limitations on the Crimean Tatar, by failing to ensure Ukrainian language education and by aggravating the dispute. Ukraine requested that Russia should cease the above violations; take measures to prevent the commission of terrorism financing offences; and pay Ukraine financial compensation. The alleged CERD violations prompted Ukraine to request that Russia should cease the above violations; assure all residents of Crimea of protection against acts of racial discrimination; adopt measures against racial discrimination in the field of education; and pay Ukraine financial compensation. The alleged 2017 Order violations prompted Ukraine to request that Russia should provide full reparation for the harm caused for its actions and restore *Mejlis'* activities and all the

rights to their members. Russia asked the Court to reject all submissions made under the ICSFT and CERD.

The Court's 117-page judgment is structured as follows:

1. Alleged violation of ICSFT (Paragraphs 32–50);
2. Alleged violation of CERD (Paragraphs 151–374);
3. Alleged violation of the 2017 Order (Paragraphs 375–403).

The ICSFT section is threefold: (a) preliminary issues (Paragraphs 33–85); (b) alleged violation (Paragraphs 86–147); and (c) remedies (Paragraphs 148–150).

Regarding preliminary issues, Russia tried to dismiss the claim on account of the “clean hands” doctrine. The Court rejected this doctrine on the ground that it was not relevant to the merits stage of the dispute (Paragraph 38).²⁴ The core preliminary issue related to the parties’ diverging interpretations of the ICSFT. According to the Court, “funds” (Articles 1 and 2 ICSFT) covers assets exchanged or used for their monetary value. However, “funds” are confined to resources possessing a financial or monetary character and does not include means used to commit acts of terrorism. As a result, it was concluded that “the alleged supply of weapons to various armed groups operating in Ukraine, and the alleged organisation of training for members of those groups, fall outside the material scope of the ICSFT” (Paragraph 53).

Next, the Court interpreted the scope of terrorism financing described in Article 2 of the ICSFT.²⁵ *Ratione personae*, this provision requires states to act to suppress and prevent terrorism financing by all persons, including state officials. *Ratione materiae*, terrorism financing is described in the chapeau of Article 2 of the ICSFT. The Court emphasised that the acts described in Article 2, paragraph 1 (a) and (b) are only “predicate acts” (constituent

24 See: Raelee Toh. “Did the ICJ Wash Its Hands of the Controversies Behind the Clean Hands Doctrine in its 2024 Judgment on the Application of the ICSFT and CERD.” *Opinio Juris*. 21 May 2024. Available at: <https://opiniojuris.org/2024/05/21/did-the-icj-wash-its-hands-out-of-the-controversies-behind-the-clean-hands-doctrine-in-its-2024-judgment-on-the-application-of-the-icsft-and-cerd-ukraine-v-russia-merits/>.

25 *International Convention for the Suppression of the Financing of Terrorism* (ICSFT), Art. 2(1): “1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.”

elements) of terrorism financing offences. These “predicate acts” are thus not self-standing offences (Paragraph 58). Regarding the *mens rea*, either the *intention* or *knowledge* that funds are used for terrorism financing must be present. The Court skilfully laid down a vague definition of knowledge: on one hand, knowledge is grounded in “objective factual circumstances”; on the other, “it may be relevant to look to the past acts of the group receiving the funds in order to establish whether a group is notorious for carrying out predicate acts [of terrorism financing]” (Paragraph 64). In doing so, the Court provided nuance to the overly rigid “actual awareness” standard with standards of “constructive” or “due diligence” knowledge. The parties further disagreed on the scope and interpretation of the predicate acts listed in Article 2, paragraph 1 (a) and (b). The Court limited its analysis to the need of the case – namely, Russia’s alleged violation of the obligation to co-operate in the prevention and suppression of terrorism financing. Under Article 2, paragraph 1 (b), “deliberate killings or serious bodily injury to civilians” was relevant insofar as they aimed “to intimidate a population or to compel a government or an international organisation to do or to abstain from doing any act”.

Finally, the Court turned to the proof of predicate acts (the shooting down of flight MH17; kidnappings and extrajudicial killings in eastern Ukraine; alleged Russian support to rocket attacks by DPR and LPR members). Following its definition of “funds”, the Court deemed that the ICSFT did not apply to predicate acts sustained solely by the supply of weapons (see Paragraph 53). The Court also raised the issue of knowledge: in the present circumstances, Russia’s violated the ICSFT only if it was aware that the funds were used to carry out predicate acts. The last preliminary issue naturally related to the question of proof. The Court considered that Ukraine’s claims required a “convincing” standard of proof. It should be observed that Ukraine’s claims relate to the obligation of co-operation against terrorism financing. Against this background, the Court noted that it was first necessary to ascertain the specific evidentiary threshold, because such a threshold may vary depending on the ICSFT provision and the nature of the obligation it imposes (Paragraph 84). It may even vary *within* a specific provision (see Paragraph 91). Accordingly, the Court sketched out the two-step examination that takes place in the remainder of the ICSFT segment of the decision: 1) definition of the relevant threshold and verification of whether the relevant obligation arose for Russia; and 2) if the obligation arose, an analysis of whether Russia violated the obligation. On this basis, the Court examined the alleged violations of Articles 8, 9, 10, 12 and 18 of the ICSFT.

Article 8 of the ICSFT refers to the obligation of state party to take measures for the identification, detection and freezing of funds. The Court found that “reasonable grounds to suspect that [...] funds are to be used for the purpose of terrorism financing” (Paragraph 92) should be evidenced for the relevant

threshold to freeze funds under Article 8 of the ICSFT to arise. The Court considered that the information available to Russia was not sufficient to raise reasonable grounds. Russia has, therefore, not violated its obligations under Article 8 ICSFT.

Article 9 of the ICSFT refers to the obligation to investigate persons suspected of terrorism financing. The threshold is low, since an “allegation” is sufficient (given that the purpose of an investigation is to get more information on the alleged offence). The Court then turned to Russia’s available information and considered that the *notes verbales* from Ukraine were sufficiently detailed to require an investigation. Although Russia did begin an investigation, the Court deemed it not on par with the ICSFT requirements. In this way, Russia violated its obligations under Article 9 of the ICSFT.

Article 10 of the ICSFT requires states to prosecute or extradite alleged offenders. The threshold is one of “reasonable grounds to suspect that an offence has been committed”. Given that the information provided by Ukraine to Russia did not evidence such grounds, the Court deemed that Russia did not violate this Article.

Article 12 ICSFT requires state parties to assist each other when investigating terrorism financing. The Court considered that three requests for assistance from Ukraine were not detailed enough and, significantly, that they did not sufficiently describe the alleged predicate acts committed and knowledge thereof. Russia, therefore, did not violate its obligations under Article 12.

Article 18 of the ICSFT obliges states to co-operate in the prevention of terrorism financing by taking measures such as adapting domestic legislation to counter terrorism financing within or outside their territories. The Court dismissed Ukraine’s claims because 1) the ICSFT relates to the prevention of terrorism financing of private persons (state terrorism is outside the ICSFT’s scope); 2) sufficient evidence of terrorism financing by private persons was not offered by Ukraine; 3) the supply of weapons and ammunition falls outside the ICSFT’s scope; and 4) Russia was not under any obligation to designate the LPR and DPR as terrorist organisations. Russia was found to have not violated its obligations under Article 18.

The Court then had to decide on remedies for the violation of Article 9 of the ICSFT: it was deemed that a finding of Russia’s violation and reinforcing respect of its obligation under Article 9 was enough. No financial or moral compensation was granted.

The CERD section of the judgment is threefold: a) preliminary issues (Paragraphs 152–200); b) alleged violation (Paragraphs 201–370); and c) remedies (Paragraphs 371–374).

Regarding preliminary issues, Russia tried to dismiss the claim on account of the “clean hands” doctrine. The Court rejected this doctrine (see Paragraphs 38

and 155). Next, the Court indicated how individual acts of discrimination and violation of the CERD were connected: a pattern of racial discrimination occurs if a significant number of individual acts of racial discrimination within the meaning of Article 1, Paragraph 1 of the CERD took place, and if these acts together constitute a pattern of racial discrimination (Paragraph 161). The Court then turned to the question of proof; the parties disagreed on the method to infer a pattern of racial discrimination. Regarding the applicable burden of proof, it varies depending on the type of facts having to be established. Regarding the “pattern” requirement, it must first be convincingly evidenced that acts of racial discrimination took place; only then will the Court consider whether these acts together amount to a pattern of racial discrimination. On the methods of proof, the Court recalled that different methods are available (statistical data; reports from official or independent bodies; witness statements) and that it enjoyed a wide margin of appreciation to assess the material’s probative value.

The next disagreement related to the meaning of “racial discrimination” enshrined in Article 1, paragraph 1 of the CERD.²⁶ This definition connects two elements: first, a distinction based on a prohibited ground (race, colour, descent or national or ethnic origin being some, with the list being exhaustive); and, second, that distinction must aim at “nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights”. Racial discrimination could result from directly discriminatory measures, as well as from indirect “facially neutral” measures connected to a prohibited ground. The Court recalled that Crimean Tartars and ethnic Ukrainians constitute protected groups under the CERD and turned to the eight alleged violations:

1. The first alleged violation: Disappearances, murders, abductions and torture. The initial task was to assess whether the alleged acts were instances of racial discrimination based on ethnic origin under Article 1 of the CERD. The Court dismissed Ukraine’s claim, given that physical violence was suffered not only by Crimean Tatars and on the grounds of political opposition to Russia, rather than ethnic origin.
2. The second alleged violation: Law enforcement measures, including searches, detentions and prosecutions. The Court noted that Russian law

26 *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), Art. 1. This reads as follows: “[t]he term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

in itself was not directly discriminatory. However, the Court reviewed if its application violated the CERD (indirect discrimination). The Court found that law enforcement measures disproportionately targeted Crimean Tatars. Notwithstanding, the Court was not convinced that the measures were based on ethnic origin (rather than a religious or political affiliation) and dismissed Ukraine's claim. The Court reached a similar conclusion regarding the *Mejlis*.

3. The third alleged violation: Ban on the *Mejlis*. The *Mejlis* form an elected body representing the Crimean Tatar population. The Court started by examining whether the ban amounts to racial discrimination pursuant to Article 1 of the CERD and aimed to nullify or impair the enjoyment of their rights. However, the ban was motivated by political opposition from the *Mejlis* to Russia, and thus not related to prohibited grounds under Article 1 of the CERD.
4. The fourth alleged violation: Measures relating to citizenship, especially the introduction of Russia's nationality and immigration law into Crimea. The Court found that there was no convincing evidence that the application of Russian citizenship régime in Crimea amounted to discrimination based on ethnic origin.
5. The fifth alleged violation: Measures relating to the suppression of cultural gatherings. The Court first observed that, in and of itself, the Russian legal framework did not violate the CERD. Regarding the application of the framework, the Court observed that measures disproportionately affected ethnic Ukrainians. However, the differentiation was not underpinned by one of CERD's Article 1 prohibited grounds, but by the restrictive approach of Russia towards public gathering. The Court dismissed Ukraine's claim.
6. The sixth alleged violation: Measures relating to media outlets. The Court considered that the legal framework for the regulation of media outlets did not – in and of itself – violate the CERD. Regarding the application of the framework, the Court was satisfied that the closures of media outlets were not based on considerations of ethnic origins.
7. The seventh alleged violation: Measures relating to cultural heritage and cultural institutions' destruction and failure to preserve significant cultural sites. The Court dismissed the claim because the evidence did not convincingly show that measures were underpinned by discrimination.
8. The eighth alleged violation: Measures relating to education and the promotion of Russian culture and language. The Court observed that education in a minority language implemented in such a way as to make it unreasonably difficult for members of an ethnic group to ensure that their

children do not suffer from unduly burdensome discontinuities could constitute discrimination under the CERD (Paragraph 357). Regarding access to education in the Ukrainian language, the Court could rely on statistical data to note a strong decline in the number of students receiving their school education in the Ukrainian language between 2014 and 2016. The Court held the view that Russia did not comply with its duty to protect the rights of ethnic Ukrainians from a disparate adverse effect based on their ethnic origin. The Court considered that this practice of violations amounted to a pattern of racial discrimination; this was also because its purpose was to lead to a structural change in the educational system. Russia violated its obligations under Article 2, paragraph 1 (a), and 5 (e) (v) of the CERD. The Court deemed that a finding of Russia's violations and a reinforcement of its need to respect its obligation under the Articles was enough. No financial or moral compensation was granted.

The last section of the judgment related to the alleged violations of the 2017 Order. The Court found that the ban on the *Mejlis* was not lifted, and Russia thus violated its obligation. It should be noted that this finding is completely independent from Paragraph 275, where the ban was deemed not contrary to the CERD. This seemingly contradictory conclusion (on first reading) is the consequence that obligations arising from provisional measures bind the parties, irrespective of the decisions on the merits. Regarding the availability of education in the Ukrainian language, the Court found that Russia did not violate the Order, since this education was still provided. Last, the Court found that Russia's recognition of the DPR and LPR and the launch of a war of aggression (labelled a "special military operation" in Paragraph 397) violated the Order because they aggravated the dispute. No remedies other than a declaration of a breach of the 2017 Order by Russia were provided.

In the operative part of the 31 January 2024 judgment, the Court found – by 13 votes to two – that failure from Russia to investigate facts regarding persons who allegedly committed an offence contemplated in Article 2 of the ICSFT constituted a violation of the obligation under Article 9, paragraph 1 of the ICSFT (those against included Judge Xue and Judge *ad hoc* Tuzmukhamedov). By ten votes to five, the Court rejected all other submissions made by Ukraine with respect to the ICSFT (those against included Judges Donoghue, Sebutinde, Bhandari, Charlesworth and Judge *ad hoc* Pocar). By 13 votes to two, the Court found that the implementation of Russia's educational system in Crimea after 2014 with regard to education in the Ukrainian language violated its obligations under Article 2, Paragraph 1(a) and Article 5 (e) (v) of the CERD (those against included Judge Xue and Judge *ad hoc* Tuzmukhamedov). It rejected – by ten votes to five – all other submissions made by Ukraine with respect to the CERD (those against included Judges Donoghue, Sebutinde, Bhandari, Charlesworth

and Judge *ad hoc* Pocar). By 11 votes to four, it found that Russia's limitations on the *Mejlis* violated its obligation under paragraph 106 (1) (a) of the ICJ Order indicating provisional measures of 19 April 2017 (those against included Judges Tomka, Xue, Brant and Judge *ad hoc* Tuzmukhamedov). By ten votes to five, it found that Russia violated its obligation under paragraph 106 (2) of the 2017 Order to refrain from any action which might aggravate or extend the dispute (those against included Judges Abraham, Bennouna, Yusuf, Xue and Judge *ad hoc* Tuzmukhamedov). By 11 votes to four, it rejected all other submissions made by Ukraine with respect to the 2017 Order (those against included Judges Sebutinde, Nolte, Charlesworth and Judge *ad hoc* Pocar). Judges Tomka, Abraham, Bennouna, Yusuf and Brant appended declarations to the judgment. Judges Donoghue, Bhandari, Iwasawa, Charlesworth and Judge *ad hoc* Pocar appended separate opinions to the judgment; Judge *ad hoc* Tuzmukhamedov appended a separate opinion, partly concurring and partly dissenting. Judge Sebutinde appended a dissenting opinion to the judgment.

The decision must be interpreted in accordance with the type of case it belongs to: seizing the Court through a compromissory clause to judge a situation much larger than the scope of the Convention invoked. This type of case is also known as “shoehorning” (trying to fit as many issues as possible in a tight spot). However – and as a result – the Court must limit itself to the law stemming from the Conventions, and general public international law is largely discarded. By enforcing a restrictive approach to “shoehorning” cases, the Court makes it clear that states resorting to this tactic cannot count on its generosity. This is why the Court may seem formalistic on multiple levels in this case. Regarding the status of the territory, the Court stayed silent; it is true that Ukraine did not request the Court to rule on occupation (or annexation). It is, however, difficult to apply and interpret such Conventions in limbo, and it is worth recalling that – under international humanitarian law – the occupying Power must uphold the law of the occupied state (Article 64 of the Fourth Geneva Convention; Article 43 of the Hague Regulations; and Paragraph 106 of the same year's advisory opinion *Occupied Palestinian territory*).

This restrictive approach also manifested in the threshold required for evidence. The Court's sole finding of a CERD violation is underpinned by statistical data.²⁷ The Court applied a very high standard of proof, since any discrimination that could *also* be attributed to a reason unrelated to Article 1

²⁷ The significance accorded to official reports and statistical data suggest that states' pleadings may challenge the way the reports were made, which statistical data were collected, what facts were left in the shadows and so on if they want to prevent the Court to rely too much on this kind of evidence.

of the CERD would lead to rejection of the Convention.²⁸ In this respect, the Court did not take into account the ethnic situation in Crimea and mass flight to Ukraine's mainland,²⁹ nor did it wonder *why* ethnic Ukrainians and Crimean Tatars were more prone to politically oppose Russia. The applicant must bring convincing evidence to the Court; otherwise, the Court follows the maxim that the regularity of states' acts is presumed (*omnia rite praesumuntur esse acta*).

Regarding CERD violations, this convention has a limited field of application. Not all violations of human rights can be channelled through it, but only those related to racial discrimination and, more precisely, to the prohibited grounds of Article 1 of the CERD. The Court's findings reflect the fact that the current regime in Russia is certainly imbued with the imperial idea, but not with a racial ideal.

Finally, it must be underscored that the Court had never been so reluctant to award remedies. Although it observed multiple violation of important obligations (such as aggravating and extending the dispute), the Court considered that a mere declaration of illegality was sufficient.

B *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*

On 26 February 2022, Ukraine filed an application against Russia concerning a dispute on the interpretation, application and fulfilment of the Genocide Convention. The case is set against the background of the aggression against Ukraine, which started in 2014 and expanded in 2022. Ukraine's application posits that "Russia's false and offensive allegations of genocide [are] a pretext for its unlawful military aggression against Ukraine" (Paragraph 34). The Court indicated provisional measures on its 16 March 2022 Order. Thirty-two states were authorised to intervene in the procedure under Article 63 of the Statute. At the end of the oral proceedings, Russia requested the Court to declare that it lacked jurisdiction and/or that the claim was inadmissible. Ukraine requested the Court to dismiss Russia's objections; declare that it has jurisdiction to entertain the claims and that these are admissible; and proceed to hear the

28 Gabriela García Escobar. "ICJ's Judgment in *Ukraine v. Russia* Regarding CERD's Scope of Racial Discrimination: ICJ's Approach to CERD Committee's Views." *EJIL:Talk!* 29 February 2024. Available at: <https://www.ejiltalk.org/icjs-judgment-in-ukraine-v-russia-regarding-cerds-scope-of-racial-discrimination-icjs-approach-to-cerd-committees-views/>.

29 Iryna Marchuk. "Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in *Ukraine v. Russia* (CERD and ICSFT)." *EJIL:Talk!* 22 February 2024. Available at: <https://www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/>.

claims on their merits. Ukraine invoked Article IX of the Genocide Convention as a basis of the Court's jurisdiction.

The first preliminary objection related to the existence and subject of the dispute. Ukraine contended that Russia made false allegations on the commission of genocide in the Luhansk and Donetsk oblasts. Russia argued that there was no dispute – *inter alia* – because Ukraine never alleged that Russia acted inconsistently with the Genocide Convention and because Russia was not aware and could not be aware of Ukraine's statements on the issue. The Court recalled its past and recent case law on the existence of a dispute, which boils down to evidence of an opposition of views between the parties. When applied to this particular case, the criteria made clear that the parties disagreed on whether genocide had been (or was being) committed by Ukraine in the Eastern part of its territory. Russia's first preliminary objection was rejected.

Regarding the subject matter of the dispute, the Court addressed preliminary objections in two different sections. First came objections related to Ukraine asking the Court to declare that it had not perpetrated genocide (Paragraphs 58–118; third, fourth, fifth and sixth preliminary objections). These were followed by objections related to Ukraine's request to declare that Russia acted unlawfully with respect to the Genocide Convention (Paragraphs 119–150; third and second preliminary objections).

Four preliminary objections were examined in the first aspect of the dispute: the introduction of new claims by Ukraine (third objection); the lack of practical effect of the judgment (fourth objection); the inadmissibility of a "reverse compliance request" (fifth objection); and abuse of process (sixth objection). In its third objection, Russia argued that Ukraine changed its request. In the application, the Court was asked to find that there were no acts of genocide under Article III of the Convention, whereas the memorandum sought a confirmation that there was no evidence as to the responsibility of genocidal acts from Ukraine. The Court recalled its case law: additional and amended claims are admissible if they do not modify the subject matter of the dispute. Hence, such claims must be connected to the application (by implication, or they are relevant to the application). The Court found that Ukraine's amended formulation clarified the claim and, therefore, did not modify the dispute. Russia's third objection was rejected. In its fourth objection, Russia contended that the declaratory judgment sought by Ukraine would be devoid of any practical effect. The Court noted that its case law allowed it to make a declaratory judgment establishing the parties' respective rights and obligations. Accordingly, the Court found that such a judgment would clarify whether Ukraine acted in accordance with the Genocide Convention; Russia's objection was rejected. In its fifth objection, Russia contended that a "reverse compliance request" was

inadmissible, because such requests are rare and confined to the World Trade Organisation (WTO); Article IX of the Genocide Convention does not contemplate such requests; the Court never accepted such requests; such requests are incompatible with the judicial function of the Court; and the request contradicts judicial propriety and equality of parties, since it may pre-empt Russia's invocation of Ukraine's responsibility under the Convention. Ukraine and the intervening states argued *inter alia* that Article IX of the Genocide Convention does not preclude the Court to admit "reverse compliance request" ("a request for a declaration that the applicant did not breach its obligations under the Convention"; see Paragraph 93).³⁰ The Court carefully dwelled on the objection (Paragraphs 81–109). The Court considered that WTO practices were not at all relevant (neither positively nor negatively) because they were underpinned by specific provisions of the 1994 Marrakesh Agreement. Regarding whether Article IX Genocide Convention precluded a declaration of compliance, the Court relied on its case law³¹ and considered that interpretation of the provision did not rule out a "reverse compliance request". Next, the Court considered that its own case law did not support nor rebut reverse compliance requests. Regarding the compatibility of such requests with judicial function, the Court recalled that establishing facts and applying the law to facts were an integral part of its function. Regarding the judicial propriety and the equality of the parties, the Court contended that the content of the judgment on its merits was unknown, and that it was beyond the Court's role to speculate about an eventual application from Russia. In the light of the above, Russia's objection was rejected, and the Court recognised Ukraine's legal interest in a declaration that would clarify the rights and obligations of the Parties.³² In its sixth objection, Russia contended that Ukraine's application was an abuse of process. An abuse of process is only exceptionally satisfied; clear evidence must be provided. The Court considered that neither the timing of the

30 Other formulas on Paragraph 93: "a request for a declaration of conformity", "a declaration of compliance", "a non-violation declaration", "non-violation complaints" or requests for "negative declarations".

31 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, paras. 168–169 (additional term "fulfilment" in Article IX).

32 The Court was mindful of its own role in the maintenance of peace (Paragraph 108). It can be argued that the Court is an integral part of the UN's system and of the Genocide Convention. Therefore, it must contribute to the prevention of genocide and entertain claims on "reverse compliance request".

application, nor the “mass intervention” of third states, constituted an abuse. Russia’s objection was rejected.

The second aspect of the dispute related to the compatibility of Russia’s actions with the Genocide Convention (Paragraphs 119–150). In its memorandum, Ukraine requested the Court to declare that Russia’s use of force against Ukraine and its recognition of the DPR and LPR had violated the Genocide Convention. This prompted two preliminary objections from Russia: the introduction of new claims (third objection) and the jurisdiction *ratione materiae* of the Court under the Genocide Convention (second objection). In its third objection, Russia argued that submissions made in Paragraph 178 (c) and (d) of Ukraine’s memorandum were new and thus inadmissible, because they changed the nature of the dispute submitted in the application. Submission (c) states: the Court is requested to “adjudge and declare that the Russian Federation’s use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention”. Submission (d) states: the Court is requested to “adjudge and declare that the Russian Federation’s recognition of the independence of the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’ on 21 February 2022 violates Articles I and IV of the Genocide Convention”. The Court relied on the criteria on amended and additional claims set out in a previous segment of the judgment (Paragraphs 68–71). It was observed that a different wording was used in the memorandum and in the application. Notwithstanding, the application already challenged the legality of Russia’s conduct with respect to the Genocide Convention. The Court rejected Russia’s objection and concluded that Ukraine’s memorandum clarified and made more specific claims already relevant to its application. In its second objection, Russia contended that submissions (c) and (d) fall outside the scope of the Genocide Convention. Ukraine was claiming that Russia violated Articles I and IV by acting “for the stated purpose of bringing a genocide to an end and punishing the perpetrators” (Paragraph 133), and that Russia had thus invoked the Convention in bad faith. The Court recalled that an alleged violation of the treaty is not sufficient to trigger jurisdiction; it must also be ascertained that the violations fall within the provisions of the treaty. The Court held the view that the acts alleged by Ukraine – even if fully established at the merit stage – would not constitute a violation of Articles I and IV. Even if allegations of genocide committed by Ukraine were made in bad faith, and measures were taken by Russia under this pretext, this would not violate Articles I and IV. Russia’s conduct would not constitute an abuse of the Convention. Invoking the Convention – even abusively – does not constitute a violation of obligations of prevention and punishment under Articles I and IV.

The Court held the view that, even if the recognition of the DPR and LPR and the “special military operation” were performed by Russia to undermine the Convention, “it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of states and the use of force” (Paragraph 146). Accordingly, submissions (c) and (d) of Ukraine’s memorandum fall outside the scope of the Convention. Russia’s second objection was upheld.

In summary, all objections were rejected, except for the segment of the second objection relating to submissions (c) and (d). In the operative part of the 2 February 2024 judgment, the Court rejected – by 15 votes to one – the first preliminary objection of the Russian Federation (those against included Judge Gevorgian). By 12 votes to four, it upheld the second preliminary objection relating to submissions (c) and (d) in Paragraph 178 of the memorandum of Ukraine (those against included Judges Donoghue, Sebutinde, Robinson and Charlesworth). By 15 votes to one, it rejected the third preliminary objection relating to submission (b) in paragraph 178 of the memorandum of Ukraine (those against included Judge Gevorgian). It rejected – by 14 votes to two – the third preliminary objection relating to submission (c) and (d) in paragraph 178 of the memorandum of Ukraine (those against included Judges Donoghue and Gevorgian). It rejected – by 13 votes to three – the fourth preliminary objection (those against included Judges Gevorgian and Bennouna). By 13 votes to three, it rejected the fifth preliminary objection (those against included Judges Gevorgian, Abraham and Bennouna). By 15 votes to one, it rejected the sixth preliminary objection (those against included Judge Gevorgian). The Court found – by 15 votes to one – that it has jurisdiction to entertain submission (b) in paragraph 178 of the memorandum of Ukraine on the basis of Article IX of the Genocide Convention (those against included Judge Gevorgian). By 13 votes to three, it found that submission (b) in paragraph 178 of the memorandum of Ukraine is admissible (those against included Judges Gevorgian, Abraham and Bennouna). Judges Tomka, Bennouna and Brant appended declarations to the judgment. Judges Donoghue, Iwasawa, Charlesworth and Judge *ad hoc* Daudet appended separate opinions to the judgment. Judge Abraham appended a partially dissenting opinion to the judgment; Judge Gevorgian appended a dissenting opinion to the judgment; and Judges Sebutinde and Robinson appended a joint dissenting opinion to the judgment.

The judgment raised multiple legal questions. The Court accepted “reverse compliance request” for the first time. This may be described as a category of declaratory judgment, where the applicant asks the Court to declare that it did not breach international law (a declaratory and negative decision). In this

situation, as in regular applications, the Court can be seized only if a dispute already exists (Ukraine and Russia disagreed on whether a genocide was committed). These types of judgments have a practical effect: in the present case, Ukraine has a legal interest in a finding that no genocide was committed.

The Court also analysed the condition and limit to new submissions; the Court only allows these submissions that are already implicit to the claim or derive directly from it (Paragraph 69). Otherwise, there will be an undue transformation of the object of the dispute as set out in the initial request. These findings are in accordance with the principle of good administration of justice.

As in the *Ukraine v. Russia* discussed earlier (see *supra*, at the very end of the section III.A), the case involved a “shoehorning” component: Ukraine tried to get the Court to rule on Russia’s aggression and on the recognition of DRP and LPR. The trick failed; the Court stuck to the *ratione materiae* competence granted by the Genocide Convention. The relevant compromissory clause (Article IX of the Genocide Convention) confer only a narrow field of jurisdiction: it offers recourse only for disputes concerning the interpretation or application of the Convention, and therefore only for the substantive field of that Convention. General international law and other conventions and treaties are not within the Court’s jurisdiction.

Regarding “mass intervention”, it seems to have no or very modest influence in the present case: the Court only briefly referred to the position of intervening states in the Judgment.³³ Finally, the case sparked scholarly debate on whether some of the provisional measures decided in the 22 February 2022 Order automatically lapsed because of the judgment.³⁴

33 William Schabas. “The Damp Squib of Third Party Intervention in *Ukraine v. Russia*.” *EJIL:Talk!* 5 February 2024. Available at: <https://www.ejiltalk.org/the-damp-squib-of-third-party-intervention-in-ukraine-v-russia/> and Kyra Wigard, Ori Pomson and Juliette McIntyre. “Keeping Score: An Empirical Analysis of the Interventions in *Ukraine v. Russia*.” *Journal of International Dispute Settlement*. 2023;14: 305–327.

34 Matei Alexianu. “Ukraine’s ICJ Provisional Measures: A Narrow Path to Remedies.” *EJIL:Talk!* 20 February 2024. Available at: <https://www.ejiltalk.org/ukraines-icj-provisional-measures-a-narrow-path-to-remedies/>; Dai Tamada. “Still Valid: Provisional Measures in *Ukraine v. Russia* (*Allegations of Genocide*).” *EJIL:Talk!* 15 March 2024. Available at: <https://www.ejiltalk.org/still-valid-provisional-measures-in-ukraine-v-russia-allegations-of-genocide/>; Yue Cao. “The Preliminary Objections Judgment of *Genocide* (*Ukraine v. Russia*): Implications on ‘Packaging and Shoehorning.’” *Opinio Juris*. 17 May 2024. Available at: <https://opiniojuris.org/2024/05/17/the-preliminary-objections-judgment-of-genocide-ukraine-v-russia-implications-on-packaging-and-shoehorning/>.

IV Orders

A *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Request for Provisional Measures (Canada and The Netherlands v. Syria)*

On 8 June 2023, Canada and the Netherlands (hereafter “the applicants”) filed an application against Syria concerning alleged violations of the Convention against Torture (CAT or the Convention). The applicants asked – *inter alia* – that Syria immediately cease and prevent all acts that amount to or contribute to torture; immediately release persons unlawfully detained; allow access to all places of detention; do not destroy or render inaccessible evidence related to the application; and provide a report to the Court of measures taken to give effect to its Order. Syria did not participate in the oral proceedings, but it sent a 10 October 2023 letter to the Registry disclosing its position on the applicants’ requests.

The Court first had to ascertain its *prima facie* jurisdiction. The applicants sought to found the Court’s jurisdiction on Article 36, Paragraph 1 of the Statute and on Article 30, Paragraph 1 of the CAT. The applicants and Syria are parties to the CAT; none of them made a reservation to Article 30. The invocation of Article 30 of the CAT is underpinned by the existence of a dispute and by facts covered *ratione materiae* by the CAT. The applicants contended that they made their position known in multilateral fora at the UN. They also directly sent written communications and requested negotiations with Syria pursuant to Article 30 of the CAT. Syria rejected these requests. The Court underscored that diplomatic exchanges indicated that parties differ as to whether certain acts or omissions allegedly committed. Furthermore, the applicants alleged acts committed by Syria that can fall within the CAT’s provisions.

The Court then had to dwell on the procedural preconditions set out in Article 30 of the CAT: parties must attempt to settle any dispute “through negotiation”. Secondly, any such dispute, if it cannot be settled through negotiation, “shall, at the request of one of [the parties], be submitted to arbitration”. Parties can seize the Court only if they are still “unable to agree on the organisation of the arbitration” after 6 months. The Court observed that negotiations require a genuine attempt to engage in discussions, with a view to resolving the dispute. It then emphasised that the applicants exchanged numerous communications and held meetings, but the respective positions did not evolve. Accordingly, the condition of negotiation is met. The condition of 6 months elapsing since an offer for arbitration is also met; applicants waited more than 6 months to

seize the Court. Procedural preconditions were met; the Court thus had *prima facie* jurisdiction pursuant to Article 30 of the CAT.

The Court considered that the applicants had standing, despite the fact that Syria alleged that they were not direct victims of the acts of torture. The Court recalled that all parties to the CAT have an interest to ensure that acts of torture are prevented: CAT obligations are of an *erga omnes partes* character.

In Paragraphs 52–63, the Court turned to the rights that were allegedly breached and the link between such rights and the measures requested. The applicants referred to the rights to secure compliance of Syria with its obligations under Articles 2, 7, 10, 11, 12, 13, 15 and 16 of the CAT. The Court noted that the provisions of the CAT are intended to protect individuals. As states parties, the applicants thus enjoyed a plausible right to compliance with those *erga omnes partes* character obligations by Syria under the CAT. The Court also concluded that, since the requested measures are aimed at preserving the rights asserted in the CAT, a link exists between the rights claimed by the applicants and some of the provisional measures.

In Paragraphs 64–75, the Court analysed the risk of irreparable prejudice and the condition of urgency. Relying on various reports, the applicants alleged that Syria committed acts of torture on a mass scale since at least 2011, and that ongoing or future violations constituted irreparable harm with respect to each victim. In its 10 October 2023 letter, Syria contended that the applicants did not present specific evidence of acts of torture, which did not demonstrate a lack of urgency. The Court considered that individuals subjected to torture are at serious risk of irreparable prejudice. Regarding evidence, the Court relied on various reports and documents to reach the conclusion that “there is a real and imminent risk of irreparable prejudice to the rights invoked by the Applicant states before the Court gives its final decision” (Paragraph 75).

In the light of the above, the Court concluded that all conditions for the indications of provisional measures were met; it referenced its power to indicate other measures than those requested by the applicants. On 16 November 2023, the Court indicated by 13 votes to two that, in accordance with the CAT, Syria shall take all measures to prevent acts of torture and ensure that its officials do not commit such acts (those against included Judges Gevorgian, Xue). By 13 votes to two, it indicated that Syria shall take measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of the CAT (those against included Judges Gevorgian, Xue). Judge Xue appended a declaration to the Order; Judge Gevorgian appended a dissenting opinion to the Order.

B *Application of the International Convention on the Elimination of All Forms of Racial Discrimination: Request for Provisional Measures (Armenia v. Azerbaijan)*

Armenia filed this fifth request for provisional measures in reaction to the events of 19 September 2023. Armenia asked – *inter alia* – for the following measures: Azerbaijan shall refrain from breaching the CERD; refrain from any actions having the effect of displacing ethnic Armenians from Nagorno–Karabakh; withdraw all military personnel from this territory; facilitate the work of the Red Cross; and submit a report to the Court of measures taken to give effect to this Order. Azerbaijan requested the Court to reject all provisional measures. The Court agreed to examine the situation, as the circumstances underlying Armenia’s request differed from the ones that led to the provisional measures of 22 February 2023. The examination itself was twofold, comprising an assessment of 1) the rights for which protection is sought and the link between such rights and the measures requested and 2) evidence of a risk of irreparable prejudice and urgency.

Armenia asserted that the large-scale military assault conducted on 19 September 2023 resulted “in hundreds of ethnic Armenians being killed; more than 100,000 being forcibly displaced and continuing to fear for their lives” (Paragraph 33). Furthermore, it contended that Azerbaijan’s measures during and after 19 September 2023 constitutes “ethnic cleansing”. Armenia seeks the preservation of Articles 2, 3, 5, 6 and 7 of the CERD. Azerbaijan stated that it has the responsibility to ensure protection in its territory; in this respect, Azerbaijan referred to the undertakings on the protection of alleged rights made by its agent at the 12 October 2023 hearing. The Court recalled the obligations imposed by Articles 1, 2 and 5 of the CERD (protection from racial discrimination, right to security; protection from bodily harm; freedom of movement). Having found that the events of 19 September 2023 made it plausible that at least some of the rights of the CERD have been violated, the Court assessed the connection with the requested provisional measures. The Court considered that indication of the provisional measures was linked to the CERD and, specifically, to the displacement of the remaining Armenians from Nagorno–Karabakh, to the right of those persons displaced to a safe return to their homes and to allow those who wish to leave Nagorno–Karabakh to do so.

Conditions for provisional measures include irreparable prejudice caused to rights that are the subject of judicial proceedings or the alleged disregard of such rights that may entail irreparable consequences (Paragraph 46). The Court noted the long-standing exposure to vulnerability and social precariousness of Nagorno–Karabakh residents; it observed that UN reports estimated that more than 100,000 people were displaced. Regarding Armenians still

residing in Nagorno–Karabakh, the Court recalled that irreparable prejudice could also be caused to the right to equality before the law in the enjoyment of the right to freedom of movement when the persons concerned are exposed to privation and hardship. In the light of the above, the Court reached the conclusion that disregard for the CERD obligations could cause irreparable prejudice to those rights, and urgency is existent. This conclusion was also underpinned by the formal undertakings of Azerbaijan’s agent, made at the 12 October 2023 hearings (undertakings relating to security, safety, medical treatment, protection of property and access of the Red Cross were made). The Court recalled that these undertakings are to be considered unilateral declarations; they are binding and create legal obligations for Azerbaijan. Although these undertakings reduce the risk of irreparable prejudice, they do not remove it entirely, and the indications of provisional measures by the Court is still warranted. The conditions for the indications of additional provisional measures were accordingly met.

The Court indicated measures partly different from those requested – in particular, measures regarding the supply of food and electricity, as well as measures regarding access for the Red Cross, were not granted. On 17 November 2023, the Court indicated – by 13 votes to two – that, in accordance with the CERD Convention, Azerbaijan shall (i) ensure that persons who left Nagorno–Karabakh after 19 September 2023 and wish to return are able to do so; (ii) that persons who remained in Nagorno–Karabakh after 19 September 2023 and wish to depart are able to do so; and (iii) that persons who remained in Nagorno–Karabakh after 19 September 2023 or returned to Nagorno–Karabakh and wish to stay are free from the use of force or intimidation that may cause them to flee (those against included Judge Yusuf and Judge *ad hoc* Koroma). By 13 votes to two, the Court indicated that, in accordance with the CERD Convention, Azerbaijan shall protect and preserve registration, identity and private property documents and records that concern the persons identified under the previous provisional measure (those against included Judge Yusuf and Judge *ad hoc* Koroma). By 13 votes to two, it indicated that Azerbaijan shall submit a report to the Court on the implementation of the provisional measures and of the undertakings made by the agent of Azerbaijan within 8 weeks from the date of this Order (those against included Judge Yusuf and Judge *ad hoc* Koroma). Judge Yusuf and Judge *ad hoc* Koroma appended dissenting opinions to the Order.

C *Arbitral Award of 3 October 1899: Request for Provisional Measures (Guyana v. Venezuela)*

On 29 March 2018, Guyana filed an application against Venezuela regarding a dispute concerning “the legal validity and binding effect of the Award

regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899". The Court delivered a first judgment on jurisdiction and admissibility on 18 November 2020, and a second on preliminary objections on 6 April 2023. On 20 October 2023, Venezuela's Electoral Council published five questions to be put before the Venezuelan people in a consultative referendum on 3 December 2023. The questions related, *inter alia*, to the validity of the 1899 award and of the resulting boundary line, and to the creation of a "Guyana Essequiba state" under Venezuelan's sovereignty (Paragraph 15). In response, Guyana filed a request for provisional measures on 30 October 2023. Guyana asked the Court to indicate – *inter alia* – that Venezuela should not hold the consultative referendum and that Venezuela should not include any question encroaching upon the legal issues to be determined by the Court in its judgment on the merits of the planned referendum. Venezuela asked the Court to reject the request for provisional measures.

The Court first examined whether the provisional measures requested related to the preservation of rights plausibly belonging to Guyana (Paragraphs 19–26). The Court reached the conclusion that, under its 2020 judgment and the 1899 award, Guyana's sovereignty over the territory in question is plausible. Measures requested by Guyana aim to ensure that Venezuela does not take any actions that are intended to prepare or allow for the exercise of sovereignty; a link thus exists between the right plausibly claimed by Guyana and the requested measures. The Court then dwelled on the risk of irreparable prejudice and urgency (Paragraphs 27–37). Under Article 41 of the Statute, such a risk must be real and imminent and irreparable prejudice to the rights claimed should be evidenced. Guyana argued that provisional measures were needed to prevent Venezuela from annexing the Essequibo and to stop the referendum. After reviewing statements made by the President of Venezuela and its Minister of Defence, the Court concluded that the circumstances "present a serious risk of Venezuela acquiring and exercising control and administration of the territory" (Paragraph 37). The Court underscored that Venezuela's readiness to act towards the disputed territory could happen at any point after the referendum, thus demonstrating that there is urgency in taking provisional measures. The Court availed itself of the faculty to indicate measures different from those requested: given the present circumstances, the Court emphasised the need to maintain the *status quo* and not to aggravate the dispute.

On 1 December 2023, the Court unanimously indicated that Venezuela shall refrain from taking any action that modify the currently prevailing situation in the territory in dispute; it unanimously indicated that both parties shall refrain from any action that might aggravate or extend the dispute. Judge Sebutinde appended a declaration to the Order; Judge Robinson and Judge *ad hoc* Couvreur appended separate opinions to the Order.

D *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip: Request for Provisional Measures (South Africa v. Israel)*

On 29 December 2023, South Africa filed an application against Israel concerning alleged violations in the Gaza Strip of the Genocide Convention. South Africa asked – *inter alia* – that Israel immediately suspend its military operations; take all measures to prevent genocide; desist from the commission of any and all acts within the scope of Article 11 of the Genocide Convention; prevent the forced displacement of Palestinians; ensure that its military does not commit acts or incitement of genocide; and take measures to prevent the destruction of evidence related to the commission of genocide. Israel requested the Court to reject the measures and to strike the case from the list.

The Court started by addressing *prima facie* jurisdiction under Article IX of the Genocide Convention. Both states are parties to the Convention, and neither entered reservation to Article IX. A dispute must be evidenced, as well as a link with the obligations under the Genocide Convention. The Court observed that South Africa and Israel's public statements and direct communications sufficiently evidenced that they held clearly opposite views as to whether acts or omissions amounted to violations under the Genocide Convention. The existence of a dispute was thus established. The Court then analysed the links between the alleged facts and the Convention. In its view, at least some of the acts allegedly committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention. It follows that the Court has jurisdiction to entertain the case. Given the *erga omnes partes* nature of the obligations enshrined in the Genocide Convention, South Africa has standing to submit the dispute to the Court.

The Court then turned to the two core conditions of provisional measures – namely, 1) the rights for which protection is sought and the link between such rights and the measures requested (Paragraphs 35–59) and 2) evidence of a risk of irreparable prejudice and urgency (Paragraphs 60–74). Regarding the first condition, the Court recalled the obligations laid out in Articles I, II and III of the Genocide Convention (the obligation to prevent and punish; definition of Genocide; prohibited acts). The Court stated that Palestinians in the Gaza Strip do constitute a protected group within the meaning of Article II. Based on various UN agencies and World Health Organization reports, the Court noted the large numbers of deaths, injuries and forced displacement caused by the military operations. The Court concurrently took note of declarations and statements made by Israel's officials regarding the civilian population of the Gaza Strip (Paragraphs 51–52). The facts and circumstances mentioned above are sufficient for the Court to conclude that the risk of breach of at least some of the rights for which South Africa was seeking protection are plausible, and

particularly the protection under Article III. Therefore, the Court also considered that a link exists between the rights highlighted by South Africa and some of the provisional measures requested (protection of the Palestinians in Gaza from acts of genocide and from other prohibited acts under Article III).

Regarding the risk of irreparable prejudice and urgency, the Court started by recalling the overarching goals of the Genocide Convention – namely, its “humanitarian and civilising purposes” (Paragraph 65). Accordingly, the Court stated that prejudice to the right to be protected from acts of genocide can cause irreparable harm. The Court noted the extreme vulnerability of the Gaza Strip population; the risk of further deterioration of living conditions; and the risk of collapse of humanitarian assistance. In the light of the above, the Court considered that there is urgency and a real and imminent risk that irreparable prejudice will be caused to the rights protected by the Genocide Convention.

The conditions for the indications of provisional measures were accordingly met. The Court indicated measures partly different from those requested – for instance, measures on fact-finding missions were not granted. The Court emphasised that all parties to the conflict must abide by international humanitarian law and called for the immediate release of the hostages abducted during the attack of 7 October 2023 (Paragraph 85). On 26 January 2024, the Court indicated – by 15 votes to two – that, in accordance with the Genocide Convention, Israel shall take measures to prevent acts encompassed by Article II, especially the killing of members of a group; bodily or psychological harm; conditions of life aiming at destroying a group; and the prevention of births (those against included Judge Sebutinde and Judge *ad hoc* Barak). By 15 votes to two, it indicated that Israel shall ensure its military does not commit acts described in the previous measure (those against included Judge Sebutinde and Judge *ad hoc* Barak). By 16 votes to one, the Court indicated that Israel shall take measures to prevent and punish the direct committing of and public incitement to commit genocide (those against included Judge Sebutinde). By 16 votes to one, it indicated that Israel shall take measures to provide urgently needed basic services and humanitarian assistance to Palestinians in the Gaza Strip (those against included Judge Sebutinde). By 15 votes to two, it indicated that Israel shall prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Articles II and III of the Genocide Convention (those against included Judge Sebutinde and Judge *ad hoc* Barak). By 15 votes to two, the Court indicated that Israel shall submit a report on measures taken within 1 month from the date of this Order (those against included Judge Sebutinde and Judge *ad hoc* Barak). Judges Xue, Bhandari and Nolte appended declarations to the Order; Judge *ad hoc* Barak appended a separate opinion; and Judge Sebutinde appended a dissenting opinion.

Much has been written on this Order; the “plausibility test” in particular sparked scholarly interest.³⁵ It should be emphasised that the test relates to the plausibility of rights at risk of breaching under the Genocide Convention. The test’s goal is to verify whether the Genocide Convention is sufficiently relevant to identify provisional measures: “the ICJ does not examine the strength of the claim made and its chances of success. [...] it merely considers whether there is a *plausible link* between the *claimed rights* and the relevant treaty”.³⁶ At the provisional measures stage, the Court is not concerned with whether substantive rights exist or are well-founded.³⁷ Be that as it may, the plausibility test is open to various interpretations;³⁸ provisional measures issued in disputes related to *erga omnes* obligations may raise different legal issues than in the usual bilateral setting.

E *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip: Request for the Modification of Provisional Measures (South Africa v. Israel)*

On 29 December 2023, South Africa filed an application against Israel concerning alleged violations of the Genocide Convention in the Gaza Strip; the Court indicated provisional measures in a 26 January 2024 Order. Given the

35 Marko Milanovic. “ICJ Indicates Provisional Measures in *South Africa v. Israel*.” *EJIL:Talk!* 26 January 2024. Available at: <https://www.ejiltalk.org/icj-indicates-provisional-measures-in-south-africa-v-israel/>; Milena Sterio. “The ICJ’s Provisional Measures Order in the *South Africa v. Israel* Case: Unsurprising; Politically and Legally Significant.” *Opinio Juris*. 26 January 2024. Available at: <https://opiniojuris.org/2024/01/27/the-icjs-provisional-measures-order-in-the-south-africa-v-israel-case-unsurprising-politically-and-legally-significant/>; Roy Schondorf. “Implausible Confusion: The Meaning of ‘Plausibility’ in the ICJ’s Provisional Measures.” *EJIL:Talk!* 6 May 2024. Available at: <https://www.ejiltalk.org/implausible-confusion-the-meaning-of-plausibility-in-the-icjs-provisional-measures/>; and Marko Milanovic. “A Thought Experiment on Plausibility and ICJ Provisional Measures.” *EJIL:Talk!* 7 May 2024. Available at: <https://www.ejiltalk.org/a-thought-experiment-on-plausibility-and-icj-provisional-measures/>. Additionally, see: Mona Rishmawi. “The Plausibility Test in the Recent Provisional Measures Orders of the International Court of Justice.” *EJIL:Talk!* 18 December 2023. Available at: <https://www.ejiltalk.org/the-plausibility-test-in-the-recent-provisional-measures-orders-of-the-international-court-of-justice/>.

36 Roy Schondorf. “Implausible Confusion: The Meaning of ‘Plausibility’ in the ICJ’s Provisional Measures.” *EJIL:Talk!* 6 May 2024. Available at: <https://www.ejiltalk.org/implausible-confusion-the-meaning-of-plausibility-in-the-icjs-provisional-measures/>. Emphasis in the original.

37 Robert Kolb. *The International Court of Justice*. Oxford: Oxford University Press; 2013: 626.

38 Marko Milanovic. “A Thought Experiment on Plausibility and ICJ Provisional Measures.” *EJIL:Talk!* 7 May 2024. Available at: <https://www.ejiltalk.org/a-thought-experiment-on-plausibility-and-icj-provisional-measures/>.

developing circumstances in the Gaza Strip, South Africa requested the Court on 6 March 2024 to “indicate further provisional measures and/or to modify its provisional measures indicated on 26 January 2024” (Paragraphs 6–9). South Africa requested – *inter alia* – all parties to the conflict to halt fighting, and that hostages and detainees be released. It also requested that all parties to the Genocide Convention take measures to comply with their obligations under the Convention, and that Israel provide urgently needed basic services and humanitarian assistance to address famine and poor living conditions faced by Palestinians in Gaza and submit a report of the measures to the Court. Israel asked the Court not to indicate further provisional measures.

The Court considered South Africa’s request as a modification of provisional measures under Article 76, Paragraph 1 of the Rules; accordingly, the Court had to determine whether a change of situation justified a modification of the 26 January 2024 Order. Taking into account the deteriorating circumstances in the Gaza Strip, UN and associated agencies’ reports on the situation in Gaza and the escalation of malnutrition, the Court considered that a change of situation had occurred. In order to modify the provisional measures, the Court had to verify the conditions set in Article 41 of the Statute. Regarding “*prima facie* jurisdiction” and “the rights whose protection is sought and the link between such rights and the measures requested”, the Court saw no reasons to revisit the conclusions reached in the previous Order (Paragraphs 24–25). The Court, rather, focused on the evidence of a risk of irreparable prejudice and urgency: it observed the deteriorating living conditions, food insecurity and increasing risks of epidemics in the Gaza Strip. The Court took note of UN representatives’ statements that only a halt of the conflict could provide relief to Gaza Strip. In the light of the above, the Court found that the situation entailed a further risk of irreparable prejudice to certain rights and that there is urgency (Paragraph 40).

The conditions for the modifications of provisional measures were accordingly met. The Court indicated measures partly different from those requested. For instance, measures aimed at third states were not granted. The Court also stated that it was “deeply troubling that many of the hostages remained in captivity” and reiterated its call for their immediate release (Paragraph 50). On 28 March 2024, the Court reaffirmed – by 14 votes to two – the provisional measures of 26 January 2024 (those against included Judge Sebutinde and Judge *ad hoc* Barak). The Court unanimously indicated that, in accordance with the Genocide Convention, Israel shall take measures to ensure in full co-operation with the UN for unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance to Palestinians throughout Gaza, including by increasing land crossing points and maintaining them as

necessary. By 15 votes to one, the Court indicated that Israel shall ensure its military does not commit acts in violation of any of the rights of the Palestinians in Gaza, considered a protected group under the Genocide Convention (those against included Judge *ad hoc* Barak). The Court also decided, by 15 votes to one, that Israel shall submit a report on measures taken within 1 month from the date of this Order (those against included Judge *ad hoc* Barak). Judges Salam, Yusuf and Charlesworth appended declarations to the Order; Judges Xue, Brant, Gómez Robledo and Tladi appended a joint declaration; and Judge Nolte and Judge *ad hoc* Barak appended separate opinions.

F *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory: Request for Provisional Measures (Nicaragua v. Germany)*

On 1 March 2024, Nicaragua filed an application against Germany concerning alleged breaches of certain international obligations in respect of the occupied Palestinian territory. The application contained provisional measures requesting the Court to ask Germany to immediately suspend its military aid to Israel; do its utmost to ensure that weapons already delivered were not used to commit genocide; and resume its support and funding to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The Court examined whether the circumstances warranted the indication of provisional measures. In this respect, the Court noted the strict German legal framework regarding the export and licensing of war weapons and observed that “only four licences for ‘war weapons’ have been granted” since 7 October 2023 (Paragraph 18). Regarding UNRWA’s funding, the Court underscored that contributions are voluntary in nature. Against this background, the Court reached the conclusion that no provisional measures were required.

On 30 April 2024, the Court found – by 15 votes to one – that the circumstances did not require the indication of provisional measures (those against included Judge *ad hoc* Al-Khasawneh). Judges Cleveland and Tladi appended declarations to the Order; Judges Sebutinde and Iwasawa appended separate opinions; and Judge *ad hoc* Al-Khasawneh appended a dissenting opinion.

G *Embassy of Mexico in Quito: Request for Provisional Measures (Mexico v. Ecuador)*

On 11 April 2024, Mexico filed an application against Ecuador regarding legal questions concerning the settlement of international disputes and the inviolability of a diplomatic mission. The application contained provisional measures requesting Ecuador to respect the inviolability of the premises of the Embassy of Mexico and the private residences of Mexico’s diplomatic agents; allow

Mexico to clear its diplomatic premises and the private residences of its diplomatic agents; refrain from any act or conduct likely to aggravate or widen the dispute; and not to prejudice the rights of Mexico in respect of any decision which the Court may render on the merits. The application stems from the stay of the former Vice-President of Ecuador inside the Mexican embassy in Quito. He has been convicted by Ecuador and was subjected to ongoing criminal proceedings when he entered the Mexican embassy on 17 November 2023. Mexico refused to allow Ecuador to execute the arrest warrant; Mexico also decided to grant political asylum to the former Vice-President. On 5 April 2024, Ecuadorian security forces entered the embassy without authorisation and forcibly removed the former Vice-President from the premises. The next day, Mexico decided to immediately terminate diplomatic and consular relations with Ecuador.

Mexico sought provisional measures because it feared that the vacant diplomatic premises and the documents therein were vulnerable to potential damages, confiscation or inspection by Ecuador. Ecuador argued that the events of 5 April 2024 were exceptional, and assurances to Mexico had already been provided. The Court focused on the urgency condition (Article 41 of the Statute). The Court considered that the 9 April 2024 *note verbale* addressed to Mexico, the 19 April 2024 letter addressed to the Court and the declaration of the agent of Ecuador during the 1 May 2024 public hearings provided adequate assurances in response to the concerns expressed by Mexico. These documents are binding unilateral declarations and constitute “commitments to provide full protection and security to the premises, property and archives of the diplomatic mission of Mexico in Quito, as well as to allow the clearing of such mission and of the private residences of Mexican diplomatic agents” (Paragraph 32). The Court thus concluded that there was no urgency, nor real and imminent risk of irreparable prejudice to the rights claimed by Mexico (Paragraph 34).

On 23 May 2024, the Court unanimously found that the circumstances did not require the indication of provisional measures. Judges Bhandari, Nolte, Gómez Robledo, Cleveland and Aurescu appended declarations to the Order.

H *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip: Request for the Modification and Indication of Provisional Measures (South Africa v. Israel)*

On 29 December 2023, South Africa filed an application against Israel concerning alleged violations of the Genocide Convention in the Gaza Strip; the Court indicated provisional measures on 26 January 2024 and modified them on 28 March 2024. Given the developing circumstances in the Rafah Governorate, South Africa submitted a request on 10 May 2024 for the modification and

indication of provisional measures. South Africa requested Israel – *inter alia* – to withdraw from and cease the offensive in Gaza and in Rafah; take measures to ensure access to Gaza by the UN and other officials engaged in the provision of humanitarian aid and assistance, as well as to enact fact-finding missions; and submit open reports to the Court of the measures taken to give effect to these provisional measures. Israel asked the Court not to indicate further provisional measures.

The Court considered South Africa's request as a modification of provisional measures under Article 76, Paragraph 1 of the Rules. Accordingly, the Court had to determine whether a change of situation justified a modification of the 28 March 2024 provisional measures. Considering the worsening circumstances in the Gaza Strip since the last order, the disastrous humanitarian situation, the intensification of bombardment and the displacement of more than 800,000 people from Rafah as of 18 May 2024, the Court concluded that a change of situation had occurred. In order to modify the provisional measures, the Court then had to verify the conditions under Article 41 of the Statute. As already stated in the 28 March 2024 Order, the Court saw no reason to revisit the conclusions reached in the 26 January 2024 Order regarding "*prima facie* jurisdiction" and "the rights whose protection is sought and the link between such rights and the measures requested" (Paragraphs 31–32).

The Court focused on the evidence of a risk of irreparable prejudice and urgency: it recalled the massive displacement of the population and the immense risks associated with a military operation in Rafah, and observed that measures taken by Israel were not deemed sufficient to alleviate the risk. In the light of the above, the Court found that the situation entailed urgency and a further risk of irreparable prejudice to the plausible rights.

The conditions for the modifications of provisional measures were accordingly met. The Court indicated measures that were partly different from those requested – in particular, submission by Israel of an "open report" within 1 week as from the date of the Order was not granted. The Court stated again that it was deeply troubling that many hostages remained in captivity and reiterated a call for their immediate release (Paragraph 56). On 24 May 2024, the Court reaffirmed – by 13 votes to two – immediate and effective implementation of provisional measures indicated in its 26 January 2024 and 28 March 2024 Orders (those against included Judge Sebutinde and Judge *ad hoc* Barak). It indicated, by 13 votes to two, that, in accordance with the Genocide Convention, Israel shall halt its offensive and any other action in Rafah that may impact living conditions in such a way to bring about physical destruction to Palestinians (those against included Judge Sebutinde and Judge *ad hoc* Barak). By 13 votes to two, it indicated that Israel shall maintain the Rafah crossing for unhindered provision of urgent basic services and humanitarian assistance (those

against included Judge Sebutinde and Judge *ad hoc* Barak). By 13 votes to two, the Court indicated that Israel shall take measures to ensure access to the Gaza Strip by any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the UN (those against included Judge Sebutinde; and Judge *ad hoc* Barak). The Court decided – by 13 votes to two – that Israel shall submit a report on measures taken within one month as from the date of this Order (those against included Judge Sebutinde and Judge *ad hoc* Barak). Judges Nolte, Aurescu and Tladi appended declarations to the Order; Judge Sebutinde and Judge *ad hoc* Barak appended dissenting opinions.

I *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: Admissibility of the Declarations of Intervention (Gambia v. Myanmar)*

On 11 November 2019, Gambia filed an application against Myanmar concerning alleged violations of the Genocide Convention. The Court indicated provisional measures in a 23 January 2020 Order. In its 22 July 2022 judgment, the Court found that it had jurisdiction under Article IX of the Genocide Convention, and that Gambia's application was admissible. On 15 November 2023, Maldives filed a declaration of intervention pursuant to Article 63 of the Statute; a joint declaration of intervention was filed on the same day by Canada, Denmark, France, Germany, the Netherlands and the United Kingdom. Myanmar objected to the admissibility of the two declarations of intervention.

The Court recalled that, in the present case, the object of declaration of intervention under Article 63 Statute is limited to the construction of the Genocide Convention. The Court then examined the conformity of the declarations with the requirements of Article 82 of the Rules. Under Paragraph 1, declarations must be filed in a timely manner and signed by the appointed agent. The only issue related to Maldives' declaration. It was initially defective due to the signature requirement, but the Minister of Foreign Affairs of the Maldives later confirmed that the signature was that of the appointed agent. Both declarations of intervention fulfilled the requirements of Article 82, Paragraph 1 of the Rules. Under Paragraph 2, the declaration must have specific sections, especially one relating to the construction of the provision of the convention. Myanmar argued that the declarations were too general in this respect. The Court was satisfied that the declarations meet the requirements, since it is sufficient for intervening states to indicate which provisions are in question and to state the construction for which they contend. Intervening states are not required to address the interpretive points disputed by the parties.

In the last section of the Order, the Court examined whether the declarations went beyond the scope of intervention set out in Article 63 of the Statute.

Myanmar argued that declarations were not confined to the construction of the provisions of the Genocide Convention, since they related to matters such as evidence, facts and application of the law. Hence, Myanmar contended that the whole declarations of intervention must be found inadmissible. On their part, Gambia and the intervening states argued that declarations were in line with the Statute; that the standard of proof and types of evidence were relevant to shed light on the construction of the provisions; that intervening states could raise points of interpretation other than the ones disputed by the parties; and that they could rely on general international law significant for the case outside the Genocide Convention (through interpretation pursuant to Article 31, Paragraph 3 of the Vienna Convention on the Law of Treaties [VCLT]). The Court upheld the view that the intervention targets the construction of Articles I, II, IV, V and VI of the Genocide Convention, all of which are in question at the merits stage of the dispute. The Court considered that interventions are not limited to interpretation points disputed by the parties, and that rules and principles of international law outside the Genocide Convention were relevant if they met the requirements of interpretation rules set out in Article 31, Paragraph 3 of the VCLT. Regarding the segment of intervention addressing matters alien to the construction of provisions, such as facts and the evidentiary value of documents, the Court declared that it will “not consider such issues and expects the interveners to refrain from addressing them any further” (Paragraph 45).

On 3 July 2024, the Court unanimously decided that the declaration of intervention submitted by the Maldives is admissible, insofar as it concerns the construction of provisions of the Genocide Convention. It also unanimously decided that the declaration of intervention submitted jointly by Canada, Denmark, France, Germany, the Netherlands and the United Kingdom is admissible insofar as it concerns the construction of provisions of the Genocide Convention.

V Advisory Opinion

A *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*

On 30 December 2022 the General Assembly (GA) adopted resolution 77/247, requesting the Court to render an advisory opinion on two questions:

1. What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from

its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

2. How do the policies and practices of Israel referred to above affect the legal status of the occupation, and what are the legal consequences that arise for all states and the United Nations from this status?

The general context, including main GA and SC Resolutions and important historical development, is summarised in Paragraphs 51–71. When the Court is requested to give an advisory opinion, it must first verify whether it has jurisdiction and then if – in the exercise of its discretionary power – there is any reason why it should decline to answer. On jurisdiction, the Court was satisfied that both questions were of legal character pursuant to Article 65, Paragraph 1 of the Statute. Regarding “discretion”, six reasons for the Court to decline to answer were put forward, all of which were rejected. These six reasons included:

1. The request relates to a dispute, and Israel has not consented to the jurisdiction of the Court. The Court recalled that a case relating to legal issues upon which divergent views are held by states does not automatically convert it into a bilateral dispute. Furthermore, the Palestinian question goes well beyond the two states and “is a matter of particular interest” to the UN (Paragraph 35).
2. The opinion would not assist the GA; given that the request originated from the GA, the Court discarded the argument.
3. The opinion may undermine the Israeli–Palestinian negotiation process. Whether the opinion would impact the (stalled) negotiation process is a matter of conjecture and speculation foreign to the work of the Court.
4. An opinion would be detrimental to the work of the SC. Given that certain aspects of the Palestinian question are dealt in parallel by the GA and the SC, the Court saw no compelling reason not to give an opinion.
5. The Court does not have sufficient information to give an opinion. The Court considered the information provided by more than 50 states, international organisations, Israel and the UN sufficient to decide on the legal questions.
6. The questions are formulated in a biased manner. The Court recalled that it has the power to interpret and reformulate the two questions.

The Court could then turn to the scope and meaning of the two questions of the GA. In this segment, the Court explains how the advisory opinion is structured. The two questions were rearranged into material, territorial and temporal

scopes (the Court interpreted and reframed the questions). Regarding the material scope, the Court identified three main items:

1. Prolonged occupation, settlement and annexation (then addressed in Sections v.A., B. and C. of the opinion);
2. Discriminatory legislation and measures (Section v.D.); and
3. Self-determination (Section v.E.).

Because the questions of GA Res 77/247 assumed that Israel was violating international law (“ongoing violation”), the Court recalled that it was up to itself to determine the lawfulness of Israel’s policies and practices. Regarding the evidence of a violation, the Court declared that it would primarily rely on reports and documents from the UN and other official and independent bodies, given that the task at hand was not a detailed determination into a specific incident, but a global legal assessment of Israel’s policies and practices. Regarding the territorial scope, the Court recalled that the occupied Palestinian territory forms a single unit, encompassing the West Bank, the Gaza Strip and East Jerusalem (or the “Holy City of Jerusalem”). Regarding the temporal scope, the Court is requested to examine the situation since 1967. Policies and practices adopted by Israel in response to the events of 7 October 2023 are not encompassed by the opinion, because such policies were not “ongoing” or “continuing” at the time the GA requested the opinion. In Paragraphs 82–83, the Court announced that, if Israel’s policies were to be scrutinised according to the scheme just outlined and considered a violation of international law, the Court would further analyse how they impacted the legal status of the occupation (see Sections VI of the opinion) and if legal consequences arose for Israel, other states and the UN (Sections VII of the opinion).

The Court could now turn to the applicable law. The applicability of certain rules – especially on occupation – depends on the status of the territory. The Court confirmed its 2004 *Wall* advisory opinion, wherein the West Bank and East Jerusalem were considered occupied territories. However, the *Wall* opinion was silent regarding the Gaza Strip. This territory was occupied from 1967 onwards but, in 2004–2005, Israel withdrew its army and removed settlements. The Court thus had to analyse whether the Gaza Strip was still an occupied territory. Reports of a commission of inquiry underscored that Israel maintained control over airspace and territorial waters; supply of water and electricity; customs duties; the construction industry; the Palestinian population registry; and crossings allowing access to and from Gaza. Relying on Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereafter “Hague Regulations”), the Court affirmed that the decisive criterion is not physical military presence in the territory (“boots on the ground”), but whether

“authority has been established and can be exercised [...] Where an occupying Power, having previously established its authority in the occupied territory, later withdraws its physical presence in part or in whole, it may still bear obligations under the law of occupation to the extent that it remains capable of exercising, and continues to exercise, elements of its authority in place of the local government” (Paragraph 92). The Court thus considered that Israel is capable of exercising – and still exercises – certain key elements of authority over the Gaza Strip: “Israel’s withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation. Israel’s obligations have remained commensurate with the degree of its effective control over the Gaza Strip” (Paragraph 94). The Court then highlighted which rules and principles were relevant to answer the questions, starting with the prohibition of the acquisition of territory by use of force and self-determination in international humanitarian law (especially the Fourth Geneva Convention – hereafter GCIV – and Hague Regulations). The Court emphasised that international human rights could also apply to occupied territories, and it observed that Israel was bound by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) with respect to occupied territories. Regarding the CERD, the Court affirmed that it applies in the occupied territories. Finally, the Court considered the Oslo I and Oslo II Accords as relevant insofar as they do not deprive the protected population of the benefits of the GCIV.

Section v relates to the first question asked by the GA and is the heart of the advisory opinion. The Court assesses the conformity of Israel’s policies and practices in the occupied Palestinian territory. Five issues are tackled:

1. Prolonged occupation (Paragraphs 104–110);
2. Settlement policy (Paragraphs 111–156);
3. Annexation of the occupied Palestinian territory (Paragraphs 157–179);
4. Discriminatory legislation and measures (Paragraphs 180–229); and
5. Self-determination (Paragraphs 230–243).

Regarding occupation, the Court recalled key principles: the occupying power assumes a set of powers and duties with respect to the occupied territory; it has the status of an administrator and usufructuary of the occupied territory; and it must administer the territory for the benefit of the local population. Occupation is assumed to be a temporary situation; it cannot create a title of sovereignty. The Court emphasised that the temporal limit of the occupying powers’ duties set in Article 6, Paragraph III of the GCIV is “not aimed at releasing states from their obligations under this Convention in situations of prolonged occupation [...] in circumstances in which the local authorities in the occupied territory have not resumed exercising governmental functions

a year after the close of the military operations, the obligations of the occupying Power under the Fourth Geneva Convention remain in force, notwithstanding Article 6, Paragraph 3” (Paragraph 107). The Court also emphasised that Article 6 of the GCIV does not grant additional powers to the occupying power in the case of prolonged occupation. In short, the Court considered that “[t]he fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law” (Paragraph 109). According to the Court, there is thus no *lex specialis* in the instance of prolonged occupation (see, however, the definition of annexation later in the opinion in Paragraphs 158 ff).

Regarding the settlement policy (colonization), the Court recalled that Israel implemented this policy throughout its occupation of the occupied Palestinian territory and that multiple UN organs and bodies examined the question of Israeli settlements. The Court then addressed six points: (1) transfer of the civilian population; (2) confiscation or requisition of land; (3) exploitation of natural resources; (4) extension of Israeli law; (5) forced displacement; and (6) violence against Palestinians.

In regard to the transfer of the civilian population, under Article 49 of the GCIV, “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”. The Court noted that there was extensive evidence of Israel providing incentives for the relocation of individuals into the West Bank. Israel regularly legalised outposts established in the West Bank contrary to Israeli legislation, thus encouraging the transfer of civilian populations. The Court thus considered that the transfer of settlers to the West Bank and East Jerusalem was contrary to Article 49 of the GCIV.

In regard to the confiscation or requisition of land, Israel’s settlement policy in the West Bank and East Jerusalem goes hand-in-hand with the confiscation or requisitioning of land, including private property. Under Article 46 of the Hague Regulations, private property must be respected and cannot be confiscated. Article 52 of the Hague Regulations allows requisition, but only for the needs of the army of occupation. Article 55 of the Hague Regulations provides that public real estate must be administered by the occupying power for the benefit of the occupied population. The confiscated property benefited the settlers; the Court hence concluded that Israel’s land policies violated Articles 46, 52 and 55 of the Hague Regulations.

In regard to the exploitation of natural resources, the Court recalled that, under Article 55 of the Hague Regulations, the occupying power can only act as an administrator and usufructuary of natural resources, and it shall supply water to the occupied population. Under Principle 23 of the Rio Declaration on Environment and Development of 1992, the occupying power must avoid

environmental harm and must use the natural resources of the occupied territory in a sustainable fashion. The Court noted evidence of exploitation by Israel of water and minerals for its own benefits and to the detriment of the Palestinian population; that authority over water resources in some occupied territories was transferred to Israel's national water company; that the supply of water to Israelis settlers was prioritised; that Palestinian in the West Bank must buy water from Israel at a high price; that Israel's settlements and industrial zones led to the pollution of water; and that most of the raw material extracted in "Area C"³⁹ of the occupied territories is transferred to Israel. The Court considered that Israel's exploitation of natural resources in the occupied Palestinian territory is inconsistent with its international obligations, especially its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources.

In regard to the extension of Israeli law, under Article 43 of the Hague Regulations and 64 of the GCIV, the occupying power must keep the law of the occupied territory in force, save for certain exceptions, such as the security of the occupying power. The Court observed that Israel applied its military and domestic law in the West Bank and East Jerusalem. Palestinians are subjected to Israel's military law and courts, whereas settlers are subjected to criminal law. Regarding East Jerusalem, the Court observed that Israel regards it as its own national territory: Israel's domestic law is fully applied. The Court interpreted Articles X, XIII, and XVII of the Oslo II Accord as not going beyond the law of occupation previously outlined: "Israel may not rely on the Oslo Accords to exercise its jurisdiction in the occupied Palestinian territory in a manner that is at variance with its obligations under the law of occupation" (Paragraph 140). The Court considered that Israel exercised its regulatory authority in a manner inconsistent with Article 43 of the Hague Regulations and Article 64 of the GCIV.

In regard to forced displacement, the Court observed that large-scale confiscations of land induced the departure of the local population. In addition, planning policies resulted in eviction, demolition of property and displacement of hundreds of people from the occupied Palestinian territory every year. Under Article 49, Paragraph 1 of the GCIV, "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". The provision prohibits all forcible transfers of protected persons, including transfers within

39 Pursuant to the Oslo II Accord, "Area C" covers more than 60 percent of the West Bank and is exclusively administered by Israel.

the occupied territory. The transfer is also “forcible” when no physical force is used (Paragraph 145). The Court considered that little choice is often left to the Palestinians of Area C but to quit their residence. The frequent confiscation and demolition of property are not temporary and do not constitute permissible evacuations. The Court considered that Israel’s policies and practices are contrary to Article 49 of the CGIV.

In regard to violence against Palestinians, the Court noted that the settlement policy led to violence by settlers and security forces against Palestinians. Articles 46 of the Hague Regulations, 27 of the GCIV and 6 and 7 of the ICCP are relevant for the right to life and protection against violence. The Court noted that, according to multiple reports, Palestinians were subjected to extensive violence, and Israeli authorities failed to respond to such violence (failure to prevent and punish; lack of access to justice and effective remedies). Israeli security forces sometimes supported attacks launched by settlers. Several times, security forces used unnecessary or disproportionate force against Palestinians’ demonstrations. Palestinian women and girls were subjected to gender-based violence by Israeli security forces and settlers (physical, psychological and verbal abuse; sexual harassment; use of force). The Court considered that violence against the life or bodily integrity of Palestinians and the systematic failure to prevent or punish these acts of violence, as well as Israel’s excessive use of force, was a violation of Articles 46 of the Hague Regulations, 27 of the GCIV and 6 and 7 of the ICCP.

After review of these six points, the Court reaffirmed that Israeli settlements and its regime are in violation of international law. In the segment regarding the annexation of the occupied Palestinian territory, the Court distinguished “annexation” and occupation under the CGIV. The former was characterised as “forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power. Annexation [...] presupposes *the intent of the occupying Power to exercise permanent control over the occupied territory* [emphasis added]” (Paragraph 158), whereas the latter was characterised as being temporary in character. The Court then examined whether Israel’s policies amounted to annexation: numerous of Israel’s policies and practices implemented in the West Bank and East Jerusalem are such as to bring them under the occupying Power’s permanent control (maintenance and expansion of settlements; construction of infrastructure; exploitation of natural resources; proclamation of Jerusalem as Israel’s capital; displacement of the local population; application of Israeli domestic law in East Jerusalem and its application in the West Bank). The practices and policies created irreversible effects on the ground and thus amounted to annexation of a large share of the occupied Palestinian territory. The Court discussed

the lawfulness of these policies: it recalled that annexation of an occupied territory by an occupying power is unlawful under Article 2, Paragraph 4 Charter and the first principle of UNGA Resolution 2625 (XXV) of 24 October 1970. This principle was recalled numerous times in GA and SC resolutions regarding the Palestinian situation. The Court found that Israel's policies and practices amounted to annexation of a large share of the occupied Palestinian territory. The Court considered that seeking to acquire sovereignty over an occupied territory – as is done through Israel's policies and practices in East Jerusalem and the West Bank – is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force.

Regarding discriminatory legislation and measures, the Court recalled that it was up to itself to determine whether the policies and practices discussed above and adopted in the occupied territory amounted to discriminatory legislation or to discriminatory measures of a systemic character. To answer, the Court first had to define the prohibition of discrimination with reference to numerous conventions that give effect to this principle (Articles 1 of the Charter; 2 of the Universal Declaration of Human Rights; 27 of the GCIV; 2 and 26 of the ICCPR; 2 of the ICESCR; and of the 1 CERD). The common core of these provisions “is the concept of differential treatment between persons belonging to different groups” (Paragraph 190). The task of the Court is thus to assess whether Israel's legislation and measures differentiate Palestinians and other groups on grounds such as race, religion or ethnicity. However, “not all differentiation of treatment constitutes discrimination” (Paragraph 191), so the Court must also determine whether a differential treatment is justified. Three points were addressed by the Court: the residence permit policy; restrictions on movement; and demolition of property.

In regard to the residence permit policy in East Jerusalem, the Court outlined that “residence in East Jerusalem is unrestricted for Israeli citizens and for non-Israeli Jews [...] all other residents of East Jerusalem, including Palestinians that are not Israeli citizens, are regarded as foreign nationals residing in the territory of Israel, and their right to reside in East Jerusalem is subject to holding a valid residence permit” (Paragraph 193). In addition, Palestinians of the West Bank are, in principle, prohibited from obtaining a residence permit in East Jerusalem. The Court considered that the residence permit policy resulted in an unjustified differential treatment. The Court considered that the residence permit policy amounted to a prohibited discrimination under Articles 2, 23 and 26 of the ICCPR, and Articles 2 and 10 of the ICESCR.

In regard to restrictions on movement, the Court noted that, while Area C (in the West Bank) is accessible to settlers, Palestinians require a special permit.

A road network in Area C exists, which passes near some Palestinian villages. However, much of its access is impeded, restricted, made dependent on an individual travel permit or prohibited. Moreover, “[a] significant restriction of movement for Palestinians is the wall that has been under construction in the West Bank since 2002” (Paragraph 201). Movement between the Gaza Strip, the West Bank and East Jerusalem are likewise strictly restricted, and access to places of worship in East Jerusalem is impeded. The Court considered that Israel’s practices differentiate Palestinians with reference to their freedom of movement. To the extent that Israel’s security concerns pertain to the security of the settlers, the Court considered that it cannot be invoked as a ground for discriminatory measures, given that the presence of settlers in the occupied Palestinian territory is contrary to international law (*nemo auditur propriam turpitudinem allegans*). The Court held Israel’s policies as prohibited discrimination under Articles 2 and 26 of the ICCPR, Article 2 of the ICESCR and Article 2 of the CERD.

In regard to demolition of property in the West Bank and in East Jerusalem, demolition takes two forms, which will be examined in turn: a) demolition of property as a punitive sanction for a criminal offence (“punitive demolition”); and b) demolition of property because of a lack of building permit. Punitive demolitions target the current and prior homes of individuals (or their family) who have been convicted of offences of a terrorist nature. The Court noted that several thousand punitive demolitions were ordered, but they never affected Israeli civilians. The treatment is thus differential under Article 17 of the ICCPR (the right to be protected from arbitrary or unlawful interference with privacy, family and home). The Court held that the treatment is no more justified under Article 55 of the GCIV and 23(g) of the Hague Regulations: punitive demolition does not seem necessary for military operations. Furthermore, Article 33 of the GCIV prohibits collective punishment, which is undermined by the fact that the homes destroyed are also used by individuals who have not committed any offences. The Court considered that punitive demolitions are contrary to international humanitarian law and do not serve a legitimate public aim. These demolitions amount to prohibited discrimination under Articles 2 and 26 of the ICCPR, Article 2 of the ICESCR and Article 2 of the CERD. In regard to demolitions because of a lack of building permit, the Court outlined that only a small share of land is allocated to Palestinian construction in Area C and East Jerusalem. In addition, the approval rate of Palestinian permits is low: around 90 percent are denied, whereas the approval rate for Israeli permits reaches 60–70 percent. Against this background, Palestinians tend to build structures without a permit. The UNHCR reported that, in Area C and East Jerusalem, several thousand buildings, including more than 1,600 providing humanitarian

aid and more than 600 providing water, sanitation and hygiene, were demolished. By contrast, settlers lacking building permits were far less affected by demolitions. The Court considered that Israel's issuance of building permits and its practice of demolition due to absence of a permit constitutes differential treatment under Article 17 of the ICCPR. No reasonable and objective criteria nor a legitimate public aim underpins this practice. The Court considered Israel's issuance of building permits and its practice of demolition due to absence of a permit amounted to discrimination under Articles 2 and 26 of the ICCPR, Article 2 of the ICESCR and Article 2 of the CERD.

Having reviewed the residence permit policy, restrictions on movement and demolition of property, the Court concluded that a broad array of Israeli legislation and measures amount to differential treatment of Palestinians. The Court held that comprehensive restrictions imposed on Palestinians constituted systemic discrimination and are violations of Articles 2 and 26 of the ICCPR, Article 2 of the ICESCR and Article 2 of the CERD. The Court finally assessed whether Israel's policies and practices amounted to racial segregation or apartheid under Article 3 of the CERD. The Court observed the result of Israel's policies: first and foremost, a near-complete physical and juridical separation between Palestinian communities and the settlers. The Court considered that "Israel's legislation and measures constitute a breach of Article 3 of CERD" (Paragraph 229).⁴⁰

Regarding self-determination, the Court recalled that this right is affirmed numerous times (Article 1 of the Charter; UNGA Resolution 2625 (XXV) of 24 October 1970; UNGA Resolution 1514 (XV) of 14 December 1960; Article 1 of the ICESCR and ICCPR) and is well-established in its case law. Given the broad scope of application of this right, the Court must determine if Israel's policies and practices impede its exercise. The Court deemed that four elements of the right were especially relevant in the present situation:

1. The right to self-determination entails the right to territorial integrity; Israel hence must not impede the Palestinian people from exercising it, including the right to an independent and sovereign state in the occupied

⁴⁰ The Court did not decide whether it was racial segregation, apartheid, or both. See: David Keane. "Racial Segregation and Apartheid in the ICJ Palestine Advisory Opinion." *EJIL:Talk!* 31 July 2024. Available at: <https://www.ejiltalk.org/racial-segregation-and-apartheid-in-the-icj-palestine-advisory-opinion/>; Jinan Bastaki. "Whose Reasonable Inference? The ICJ's Advisory Opinion and the Threshold for Apartheid's *mens rea*." *EJIL:Talk!* 22 August 2024. Available at: <https://www.ejiltalk.org/whose-reasonable-inference-the-icjs-advisory-opinion-and-the-threshold-for-apartheids-mens-rea/>; and David Keane. "A Missed Opportunity: The Decision in *Palestine v. Israel*." *EJIL:Talk!* 5 September 2024. Available at: <https://www.ejiltalk.org/a-missed-opportunity-the-decision-in-palestine-v-israel/>.

Palestinian territory. The Court observed that Israel's annexation violates the integrity of the occupied Palestinian territory.

2. The right to self-determination entails protection against dispersion of the population and undermining the integrity of a people. The Court found that the wall; Israel's settlement policy; annexation; and discriminatory legislation and measures contribute to the departure of Palestinians and undermine the integrity of the Palestinian people.
3. The right of permanent sovereignty over natural resources is violated by depriving the Palestinian people of natural resources. By monopolising natural resources, Israel impeded the exercise of the right to self-determination.
4. The right to freely determine political status and to pursue economic, social and cultural development is impaired by the dependence of the occupied Palestinian territory on Israel for the provision of basic goods and services.

To conclude this segment of the opinion, the Court held that Israel's violated the right of the Palestinian people to self-determination and that its prolonged policies and practices undermined the exercise of the right in the future. In Section VI of the opinion, the Court could then analyse how Israel's policies and practices affected the legal status of the occupation and thereby the legality of the continued presence of Israel in the occupied Palestinian territory. Regarding the relevant law, the Court found that the question must be approached according to the right to self-determination and to *ius ad bellum* (use of force), because this last body of rules "determine[s] the legality of the continued presence of the occupying Power in the occupied territory" (Paragraph 251). *Ius in bello* (IHL) was not deemed relevant, because it always applies to the occupying power, "regardless of the legality or illegality of its presence" (Paragraph 251). The Court then scrutinised two items: a) the way in which Israeli policies and practices affect the legal status of the occupation and b) the legality of the continued presence of Israel. Regarding the first item, the Court observed that policies and practices changed the physical character, legal status, demographic composition and territorial integrity of the occupied Palestinian territory. These changes make clear that Israel intends to maintain its presence permanently. The Court recalled that occupation cannot serve as the source of title to territory. Israel asserted its sovereignty over and annexed certain parts of the territory, thus violating the prohibition. This led the Court to consider that "this violation has a direct impact on the legality of Israel's continued presence, as an occupying Power, in the occupied Palestinian territory" (Paragraph 254). On self-determination, the Court observed that Israel's policies and practices impeded the right to self-determination; this violation

affects the legality of Israel's presence in the occupied Palestinian territory. The Court held "that occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty denying them their right to self-determination" (Paragraph 257). Regarding the second item, the Court considered that Israel abused its position as an occupying power, frustrated the right to self-determination and violated the prohibition of the acquisition of territory by force. As a result, Israel's continued presence in the occupied Palestinian territory is illegal (Paragraphs 261–264).

In its last segment, the advisory opinion established the legal consequences of Israel's policies and practices and of its continued presence.⁴¹ The Court addressed the legal consequences for Israel, but also for other states and for the UN. Regarding Israel, the Court affirmed that its continued presence in the occupied territory is illegal and constitutes a wrongful act of a continuing character entailing its international responsibility. Accordingly, Israel must bring it to an end as rapidly as possible. Israel must also bring an end to all unlawful policies and practices discussed in the present advisory opinion. In addition, Israel must provide full reparation (restitution, compensation and/or satisfaction) for the damage caused by its internationally wrongful acts to all natural and legal persons. Restitution encompasses land, immovable property, seized assets, archives and documents taken from Palestinians and Palestinian institutions since 1967. Regarding other states, the Court observed that some violations include obligations *erga omnes* (or obligations in which all states have a legal interest in their protection). With regards to the right to self-determination, it is up to the GA and SC to indicate how Israel's presence in the occupied Palestinian territory must end and how self-determination will fully realize. States must co-operate to implement those indications. With regards to the prohibition of the acquisition of territory by force, the Court held that member states are obligated "not to recognise any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem" (save for strictly circumscribed exceptions discussed in Paragraph 278). Furthermore, all states must not recognise the situation arising from the unlawful presence of Israel in the occupied Palestinian territory as legal. States must also not aid or assist the situation created by Israel's illegal presence in the occupied

41 See: International Law Commission. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. A/56/10 (2001); Arts. 40–41 and *Yearbook of the International Law Commission*. 11(2) (2001): 31, 126–127.

Palestinian territory.⁴² Regarding the legal consequences for the UN, the Court affirmed that the obligation not to recognise also applies to the UN. Finally, the modalities to end Israel's presence in the occupied Palestinian territory are left to the GA and SC.

On 19 July 2024, the Court unanimously found that it has jurisdiction to give the advisory opinion; it was decided – by 14 votes to one – to comply with the request for an advisory opinion (those against included Judge Sebutinde). The Court was of the opinion, by 11 votes to four, that Israel's continued presence in the occupied Palestinian territory is unlawful (those against included Judges Sebutinde, Tomka, Abraham and Aurescu). It concluded that, by 11 votes to four, that Israel must end its unlawful presence in the occupied Palestinian territory as rapidly as possible (those against included Judges Sebutinde, Tomka, Abraham and Aurescu). By 14 votes to one, it was decided that Israel must immediately cease all settlement activities, and evacuate settlers from the occupied Palestinian territory (those against included Judge Sebutinde). By 14 votes to one, the Court decided that Israel must repair the damage caused to all the natural or legal persons in the occupied Palestinian territory (those against included Judge Sebutinde). By 12 votes to three, it ruled that all states must not recognise the situation arising from the unlawful presence of Israel in the occupied Palestinian territory and not to render aid or assistance in maintaining the situation created (those against included Judges Sebutinde, Abraham and Aurescu). By 12 votes to three, it ruled that international organisations, including the UN, must not recognise the situation arising from the unlawful presence of Israel in the occupied Palestinian territory (those against included Judges Sebutinde, Abraham, Aurescu). It was also decided – by 12 votes to three – that the UN, and especially the GA and the SC, should consider the modalities and action required to end the unlawful presence of Israel in the occupied Palestinian territory as rapidly as possible (those against included Judges Sebutinde, Abraham and Aurescu). Judges Salam, Tomka, Xue, Charlesworth, Brant and Tladi appended declarations to the advisory opinion; Judges Nolte and Cleveland appended a joint declaration. Judges Yusuf, Iwasawa, Nolte, Gómez Robledo and Cleveland appended separate opinions; Judges Tomka, Abraham, and Aurescu append a joint opinion. Judge Sebutinde appended a dissenting opinion.

42 Regarding consequences for treaties with Israel, see, for instance: David Keane. "A Missed Opportunity: The Decision in *Palestine v. Israel*." *EJIL:Talk!* 5 September 2024. Available at: <https://www.ejiltalk.org/a-missed-opportunity-the-decision-in-palestine-v-israel/>. *Mutatis mutandis* is also relevant for Western Sahara, Morocco and the European Union.

The opinion is long and dense, but – paradoxically – this is not always the case when it comes to legal analysis. It is not uncharacteristic for the Court to occasionally be hasty in making (valuable) legal observation without explaining the precise basis for it. This commentary tackles only some of the opinion’s many legal steps.⁴³

According to some scholars, there is a difference between a traditional wartime occupation within the context of Article 42 of the Hague Regulations and a revisited wartime occupation within the context of the GCIV, which has now been retroactively applied to the interpretation of the Hague Regulations. Parts of the law of occupation can be applied in a *fragmented* way – exactly like the Court argued in Paragraphs 91–94 – depending on the control exercised by the occupying power over certain activities, even without a military presence maintained on-site. This solution is perfectly in line with the GCIV, the general humanitarian purpose of which – protecting civilians is the heart of IHL – is better served by a functional interpretation than by an all-or-nothing logic based on military presence alone. The Court thus correctly affirmed that this latter type of occupation (as defined within the GCIV) is not dependent on the “boots on the ground” threshold contained under Article 42 of the Hague Regulations. If the territory has been occupied and the authority is withdrawn, the capacity to gain back control over the territory is sufficient to be considered an occupying power. The withdrawal from a territory does not release the occupying power of its obligations, which remain commensurate with the degree of effective control over the occupied territory (Paragraphs 91–94). “Commensurate” is another way to label the “fragmented” or “sectorial” application of some of the law of an occupier’s obligations to the occupied territory.

The Court also “interpreted” (or erased) the time limit of the occupying power’s obligations under Article 6, Paragraph III of the GCIV (Paragraph 107):

43 For other comments, see: Marko Milanovic. “ICJ Delivers Advisory Opinion on the Legality of Israel’s Occupation of Palestinian Territories.” *EJIL:Talk!* 20 July 2024. Available at: <https://www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories/>; Marko Milanovic. “The Occupation of Gaza in the ICJ Palestine Advisory Opinion.” *EJIL:Talk!* 23 July 2024. Available at: <https://www.ejiltalk.org/the-occupation-of-gaza-in-the-icj-palestine-advisory-opinion/>; Ingrid Bunk and Monica Hakimi. “The Prohibition of Annexations and ICJ’s Advisory Opinion on the Occupied Palestinian Territory.” *EJIL:Talk!* 22 July 2024. Available at: <https://www.ejiltalk.org/the-prohibition-of-annexations-and-icjs-advisory-opinion-on-the-occupied-palestinian-territory/>; Yussef Al Tamimi. “Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement.” *EJIL:Talk!* 30 July 2024. Available at: <https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement/>; and David Keane. “Racial Segregation and Apartheid in the ICJ Palestine Advisory Opinion.” *EJIL:Talk!* 31 July 2024. Available at: <https://www.ejiltalk.org/racial-segregation-and-apartheid-in-the-icj-palestine-advisory-opinion/>.

it affirmed that this provision cannot be applied where an occupation lasts for more than a year after the general end of military operations. The Court has thus given a clear-cut answer: Article 6 Paragraph 111 is no longer good law and no longer applies. This marks a return to the traditional rule of general international law contained in the Hague Regulations and First Additional Protocol. The Court seems to think that the very clear letter of Article 6 can be defeated by two teleological recitals – namely, a reason set out in the *travaux préparatoires* and a reason linked to the humanitarian protection purpose of the GCIV, which is better suited to the full application of occupation law even 1 year after the general end of military operations. Even if the Court’s reasoning does not shine in terms of clarity, the result must be commended: the unfortunate Article 6, which shows how hard cases make bad law, has been excised from modern occupation law.

The ICJ distinguished “lawful” occupation from “unlawful” annexation. Annexation is a forcible acquisition of the occupied territory: the occupying Power intends to exercise permanent control over the territory (Paragraph 158). This definition shall be read with the segment affirming that the rules of occupation do not change in the case of prolonged occupation. There is thus no departure from the Hague Regulations, nor from the Fourth Geneva Convention (Paragraph 109). The Court, rather, assessed whether the continued presence of Israel turned into *de iure* or *de facto* annexation. By doing so, the Court avoided the pitfall of scholarly debate on prolonged occupation and chose to reaffirm a key principle of the law of occupation: “occupation is conceived of as a *temporary state of affairs* [emphasis added], during which the exercise by the occupying Power of authority over foreign territory is tolerated for the benefit of the local population” (Paragraph 106). The ICJ’s approach to prolonged occupation/annexation can be relevant for – *inter alia* – Ukraine (especially Crimea), Northern Cyprus, Nagorno–Karabakh and Western Sahara.

The Court seized the opportunity to reaffirm, strengthen and develop the right to self-determination. It may offer lessons for Western Sahara.⁴⁴ The ICJ gave a list of concrete rights (or duties) stemming from the right to self-determination, showing that this right is a general principle of international law – in other words, a general normative idea with various concretisations received through international practice or case law. The ICJ did not go beyond its competence regarding the way to implement self-determination; it recalled that implementation was the AG and SC’s responsibilities. The door is thus left

44 On *Western Sahara* at the UN: Stephen Allen and Jamie Trinidad. *The Western Sahara Question and International Law: Recognition Doctrine and Self-Determination*. Abingdon: Routledge; 2024. Available at: <https://doi.org/10.4324/9781032658827>.

open to diplomatic and policy arrangements as *leges speciales* that do not necessarily fully implement pre-existing international law.

The Court also clearly reiterated the separation of *jus ad bellum* and *jus in bello*, adding international human rights law to the latter. It opportunely points out that the *jus ad bellum* concerns the lawfulness of the use of force or control of a territory, whereas the *jus in bello* and international human rights law apply independently of such lawfulness. Therefore, to determine the lawfulness of Israel's presence in the occupied territory, the Court turns to *jus ad bellum*.

The opinion is also rich for the law on international responsibility.⁴⁵ However, the reasoning of the Court regarding the commencement of Israel's wrongful acts is not fully or convincingly argued. The Court affirms that violations are continuous in character, but does not explain why and how they started in 1967; nor does the Court analyse the changes brought about by the various stages of the occupation. Rather, it considered that any occupation/annexation since 1967 was unlawful and entails reparations by Israel (Paragraphs 259–272).⁴⁶ Perhaps the Court considered the facts from the perspective of Article 15 of the Articles on responsibility of states for internationally wrongful acts (breaches consisting of a composite act)?⁴⁷ Under this provision, an act that was not intrinsically wrongful when it was committed may retroactively become so on the ground of its connection with a larger unlawful scheme. Therefore, the 1967 acts may not have been unlawful *per se* at the time of commission, but turned out to be when linked with later policies and practices.

Lastly, it must be said that questions of the Hebrew state's security are dealt with rather superficially in the opinion. See, for instance, Paragraph 37 of the joint opinion of Judges Tomka, Abraham, and Aurescu: "Without diminishing Israel's responsibility in the current deadlock in any way, or denying the

45 *Articles on Responsibility of States for Internationally Wrongful Acts*. United Nations International Law Commission. 2001, Arts. 40–41. These Articles on the responsibility of states for internationally wrongful acts are ubiquitous in Paragraphs 273–281. The customary nature of Article 41 and its limits is debated.

46 Judges disagreed on the need to analyse the lawfulness of the 1967 occupation. Compare Paragraphs 33–34 of the joint opinion of Judges Tomka, Abraham, and Aurescu with Paragraph 17 of the declaration of Judge Charlesworth. According to the joint declaration of Judges Nolte and Cleveland (Paragraph 4), the Court was simply not requested to rule on the lawfulness of the 1967 occupation.

47 "1. The breach of an international obligation by a state through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."

illegality of several aspects of its policy in the occupied Palestinian territory and of its refusal to respect the rights of the Palestinian people and of the Palestinians, we believe it is simply fair to also acknowledge that this state faces serious security threats, and that the persistence of these threats could justify maintaining a certain degree of control on the occupied territory, until sufficient security guarantees, which are currently lacking, are provided.” By inserting a few sentences on this issue, the Court could have avoided the easy critique of not being sufficiently well-balanced between the two main actors, Israel and Palestine.

VI Conclusion

The case law shows a growing and converging trend to resort to the Court for *actio popularis* (32 states intervening in *Ukraine v. Russia*) and *erga omnes partes* obligations (*Netherlands and Canada v. Syria*; *South Africa v. Israel*; *Nicaragua v. Germany*). This, in turn, can lead to a new reading of the rules⁴⁸ and the shining of a spotlight on rules that have seldom been used, especially regarding intervention. This trend is set against the background of an increasing number of cases being brought to the Court. Procedural questions are increasingly examined and significant, because they can act as a filter. The Court thus bears the burden to interpret and set a limit to procedural questions, such as intervention.

It is possible to sketch some of the ways the Court can respond to this pressure. It can, for instance, modify the procedural provisions enshrined in the Rules of the Court (the Statute being a treaty; it cannot be modified by the Court). The Court amended Articles 81, 82 and 86 of the Rules regarding intervention (see the Introduction). Judicial practice is also a way to deal with intervention: in *Ukraine v. Russia*, the influence of the 32 intervening states was not sensible; it can thus deter future mass intervention. The Court sometimes purposely gives vague answers to keep things in a state of flux, allowing bifurcation in decisions that follow. For instance, judges do not necessarily share the same understanding of the plausibility test in the *South Africa v. Israel* order.⁴⁹ The Court sometimes resorts to another technique: crafting “cost-effective”

48 How is the “plausibility test” supposed to apply when the applicant state is not the direct victim? Does the test slightly change in this situation?

49 Roy Schondorf. “Implausible Confusion: The Meaning of ‘Plausibility’ in the ICJ’s Provisional Measures.” *EJIL:Talk!* 6 May 2024. Available at: <https://www.ejiltalk.org/implausible-confusion-the-meaning-of-plausibility-in-the-icjs-provisional-measures/>.

solutions (going beyond judicial economy). Although it is not related to a procedural matter, the definition and use of annexation in the occupied Palestinian territory advisory opinion is a good instance of streamlining legal reasoning. The definition of annexation empowered the Court to link together multiple legal issues (legality of Israel's presence; start of the wrongful acts with occupation in 1967; obligation to leave the territory as rapidly as possible) and to avoid a debate on the rules on prolonged occupation. It must be noted that the Court's decisions and advisory opinions are very seldom the result of an initial unitary and linear chain of legal reasoning. They are more like a loop, in which consequences and results feed back into the legal reasoning, until judges agree upon an efficient legal structure. They thus bear all the hallmarks of a collective search for a proper legal expression of complex legal matters.