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CR 2024/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Tuesday 9 April 2024, at 10 a.m., at the Peace Palace,

President Salam presiding,

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

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le mardi 9 avril 2024, à 10 heures, au Palais de la Paix,

sous la présidence de M. Salam, président,

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

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Abraham
		Yusuf
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Judge *ad hoc*	Al-Khasawneh
	Registrar	Gautier

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

M. Gautier, greffier

The Government of the Republic of Nicaragua is represented by:

HE Mr Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands and Permanent Representative of the Republic of Nicaragua to the international organizations based in the Kingdom of the Netherlands, member of the International Law Commission,

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Mr Alain Pellet, Emeritus Professor of the University Paris Nanterre, former Chairperson of the International Law Commission, member and former President of the Institut de droit international,

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

as Counsel and Advocates;

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Mr Ysam Soualhi, PhD candidate, Faculty of Law, University of Angers,

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Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

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Ms Kassandra Gómez Pineda, First Secretary, Permanent Representation of the Republic of Nicaragua to the Organisation for the Prohibition of Chemical Weapons,

Mr Pedro Hernández Balladarez, Financial Administrative Officer, Permanent Representation of the Republic of Nicaragua to the Organisation for the Prohibition of Chemical Weapons,

HE Mr Ammar Hijazi, Assistant Minister of Foreign Affairs and Expatriates for Multilateral Affairs of the State of Palestine,

HE Mr Omar Awadallah, Assistant Minister of Foreign Affairs and Expatriates for the United Nations and Specialized Agencies of the State of Palestine,

Mr Federico Argüello Noguera,

as Members of the Delegation.

The Government of the Federal Republic of Germany is represented by:

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M. Federico Argüello Noguera,

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Mr Paolo Palchetti, Professor at the University Paris 1 Panthéon-Sorbonne,

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M^me^ Andrea Waldau, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

M^me^ Clara Rother, ambassade de la République fédérale d'Allemagne au Royaume des Pays-Bas,

comme assistants.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets this morning to hear the single round of oral argument of the Federal Republic of Germany on the Request for the indication of provisional measures submitted by the Republic of Nicaragua in the case concerning *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua* v. *Germany)*.

I now give the floor to the Agent of Germany, Ms Tania von Uslar-Gleichen. You have the floor, Madam.

Ms VON USLAR-GLEICHEN:

OPENING STATEMENT

1. Members of the Court, it is an honour to address you today and to open the oral proceedings for the Federal Republic of Germany.

2. Monsieur le Président, Madame la Vice-Présidente, permettez-moi au début de vous féliciter chaleureusement pour votre élection.

3. Germany comes to these proceedings as a friend of the Court and a firm believer in the peaceful settlement of international disputes. Proceedings before this Court are rightly noted for their deep and serious engagement with the law and the facts.

4. Respect for, as well as the promotion of, international law are cornerstones of Germany's constitution and of its foreign policy. Germany has always been an advocate for the promotion and strengthening of international humanitarian law and humanitarian principles. This also guides our response to the conflict at stake here. Germany is doing its utmost to live up to its responsibility vis-à-vis both the Israeli and the Palestinian people.

5. Nicaragua, initiating proceedings against Germany before this Court, has taken a one-sided view of the conflict. It fails to properly appreciate both the facts and the law in this situation. Germany firmly rejects Nicaragua's accusations.

6. I need to emphasize one point at the beginning: Germany has learned from its past — a past that includes the responsibility for one of the most horrific crimes in human history, the Shoa. This explains one of the principles upon which our foreign policy with regard to all Middle East issues rests.

7. Our history is the reason why Israel's security has been at the core of German foreign policy. In her speech to the Knesset on 18 March 2008, Germany's then Chancellor Angela Merkel spoke about "Germany's special historical responsibility for Israel's security" as part of Germany's "raison d'État". Federal Chancellor Olaf Scholz reiterated this point in his speech to the German Bundestag on 12 October 2023: "Our own history, our responsibility deriving from the Holocaust, makes it our permanent duty to stand up for the existence and security of the State of Israel. This responsibility guides us."

8. Indeed, this responsibility must continue to guide us — because Israel's right to exist continues to be denied. In fact, it is denied in Nicaragua's Application, in the section devoted to Hamas' massacres of 7 October. According to Nicaragua, these attacks were directed at "settlements located in the occupied Palestinian territories of Sderot, Kfar Azza, Nir Oz, and Be'eri". Germany firmly rejects this notion. Hamas' terrorist attacks left 1,200 dead and thousands wounded, countless women, youth and children became victims of the most horrific sexual violence and 240 hostages were taken, many of them held until today. These attacks targeted communities located within the borders of Israel — not in Gaza, but in the State of Israel. Does Nicaragua really stand by its characterization that these are "occupied Palestinian territories", thus denying Israel's right to exist? Germany will not tolerate this. The international community founded the State of Israel as a safe haven for Jewish people. Its right to exist is internationally recognized.

9. Based on international law, Germany has, since 7 October, affirmed Israel's right to protect itself against these ongoing attacks. We are faced with the dilemma that Hamas terrorists use the civilian population as human shields and abuse civilian infrastructure to hide their terrorist activities. Foreign Minister Annalena Baerbock fully recognized this dilemma in the UN Security Council on 24 October 2023 when she pointed out that "Hamas is playing with human suffering" and "that the fight is against Hamas and not against civilians". Therefore, she has insisted that Israel, in defending itself, must do its utmost to protect civilian lives and respect the limits of self-defence and international humanitarian law at all times.

10. The other point I need to emphasize at the outset is: Germany has always been a strong supporter of the rights of the Palestinian people. This is — alongside Israel's security — the second principle that has guided Germany's response to the Middle East conflict in general — and to its

current escalation in particular. Germany remains committed to a two-State solution as the only path towards a lasting peace in the Middle East. Germany has provided significant support to Palestinians living in the occupied Palestinian territories for decades. To date, Germany has bilaterally supported the economic and social development of the occupied Palestinian territories and administrative capacity-building with a total of €1.5 billion.

11. Germany recognizes the right of Palestinians to self-determination, to be exercised in the territories that came under occupation in 1967. It has firmly condemned attempts to undermine the two-State solution, such as through the expansion of illegal settlements. There is no doubt where Germany stands. As Foreign Minister Baerbock stressed in her speech to the German Bundestag on 21 March 2024, our position is defined by international law.

12. Only a week after Hamas' massacre, on 13 October 2023, Foreign Minister Baerbock declared that "civilians need safe spaces where they can find protection and be provided with essential goods". On 29 February 2024, she called the suffering of Palestinians "indescribable" and life in Gaza "hell".

13. You will recognize these quotes also from Nicaragua's presentation. You will recognize others. This is not surprising. They are not proof, as claimed by Nicaragua, that Germany is failing to live up to its responsibilities. On the contrary, calling for the adherence to international law does not constitute the manifestation of its breach. To us these quotes prove that Germany is fulfilling its obligations to ensure respect for international humanitarian law — in a situation in which Israel is faced with ongoing attacks by Hamas terrorists who, long after 7 October, continued to fire rockets on Israeli towns and villages and who still hold more than 100 Israeli men, women and children hostage in Gaza. It is our duty to remind Israel that even when exercising its right to self-defence international humanitarian law applies.

14. The concern with the dramatic humanitarian situation in Gaza, reflected in the Court's Orders of 26 January and 28 March, also guides Germany: our conduct is directed at alleviating the dramatic situation in Gaza that the Court describes in its Orders.

15. We have been making humanitarian assistance available directly to the Palestinian people for months, and are working with international agencies towards this goal. Germany is the largest individual donor of humanitarian assistance, with €203.55 million in 2023 and €50.95 million in

2024 so far, implemented not only via UNRWA but also organizations like OCHA, the World Food Programme, the ICRC and the German Red Cross. Germany has increased its support threefold since October 2023, precisely to alleviate the catastrophic conditions that Palestinians are exposed to in Gaza. The legitimate Palestinian leadership in Ramallah has acknowledged Germany's contributions on more than one occasion.

16. During his recent visit to Israel on 17 March 2024, Chancellor Scholz expressed his grave concern about the humanitarian situation in Gaza. In six official visits to Israel and the occupied Palestinian territories since October 2023, Minister Baerbock — in constructive and close engagement with Israeli and Palestinian leaders — has tirelessly sought to build agreement towards concrete measures that will contribute to reduce the pain endured by individuals on both sides of the conflict. She visited the border crossings in Rafah and Kerem Shalom herself in order to examine how access for humanitarian assistance can be improved. Most other countries have not shown this intense level of engagement. Since October 2023, Germany has expanded its humanitarian assistance under the most difficult conditions.

17. Germany's policy is aligned with the demands expressed in UN Security Council resolution 2728, adopted on 25 March.

18. Like the UN Security Council, Germany is calling for "the immediate and unconditional release of all hostages", many of whom have German citizenship. It has done so since 7 October 2023.

19. Like the UN Security Council, Germany sees the need to expand the flow of humanitarian assistance and has left no stone unturned in helping to address the basic needs of Palestinians in Gaza.

20. Chancellor Scholz and Foreign Minister Baerbock have for months, in numerous bilateral talks, urged Israel to allow humanitarian aid into Gaza on a larger scale and to agree to a humanitarian ceasefire, which can only be sustainable if Hamas ceases its terrorist operations and releases the hostages.

21. Unlike Nicaragua, Germany is not blind to the fact that Hamas also has obligations under international humanitarian law, including towards the civilian population in Gaza. Not only does Hamas not comply with its obligations, but it also renounces any responsibility in the most cynical manner.

22. Mr President, Members of the Court, the bulk of Nicaragua's Application and Request assesses Israel's conduct and alleged violations of international law by Israel. But this is not a case brought against Israel. Nicaragua has initiated proceedings against Germany. Germany firmly rejects Nicaragua's accusations: they have no basis in fact or law. They are dependent on an assessment of conduct by Israel, not a party to these proceedings.

23. Therefore, a significant part of Germany's presentation today will be dedicated to "setting the record straight". It is our hope that these proceedings will contribute to a better understanding of the fact that Germany's action in this conflict has been firmly rooted in international law.

24. Where Germany has provided support to Israel, including in the form of exports of arms and other military equipment, the quantity and purposes of these supplies have been grossly distorted by Nicaragua, as Professor Tams will demonstrate. Germany only supplies arms on the basis of detailed scrutiny, a scrutiny that not only respects, but far exceeds the requirements of international law. Arms exports that take into account the security threats Israel is facing, in particular immediately after 7 October. At the same time, Germany's supply of arms and other military equipment to Israel is subject to a continuous evaluation of the situation on the ground.

25. Mr President, Members of the Court, like many other States, Germany has been tested by the conflict raging since 7 October. The entire international community is grappling with the political, moral and legal dilemma posed by the situation in Gaza. The principles I have mentioned — protection of Israeli security and support for the rights of Palestinians — have required Germany to make difficult choices. All those responsible for German foreign policy have worked tirelessly to strike the right balance. We are committed to translating into day-to-day practice what it means to respect international law in circumstances as challenging as these.

26. Nicaragua appears not to properly appreciate this. It projects the image of a Germany that wilfully enables, or even aids and abets, the alleged commissions of the gravest breaches of international law. Not once has Nicaragua sought information — or even an exchange of views — with the German Government. Indeed, it has rushed to bring this case to the Court on the basis of the flimsiest of evidence.

27. As counsel for Germany will develop, Nicaragua's Request for provisional measures plainly fails to meet the requirements of Article 41 of the Statute, as interpreted in the jurisprudence of this Court.

28. As Mr Sam Wordsworth, KC, will demonstrate, Nicaragua's case does not fall within the jurisdiction of this Court, not even prima facie. Germany has been brought before this Court in the absence of a dispute while, on the basis of its established case law, the Court cannot exercise jurisdiction in the absence of Israel, a truly indispensable party.

29. Professor Anne Peters will follow and demonstrate that Nicaragua's request is not linked to any plausible rights that are at issue in this case. Far from enabling alleged breaches of the most fundamental rules of international law, Germany has called consistently for strict compliance with international law. And Germany has always acted on this basis.

30. As Professor Paolo Palchetti will demonstrate, while the situation in Gaza is dramatic, there is no immediate risk of irreparable prejudice concerning the rights that Nicaragua asserts vis-à-vis Germany.

31. Above all, Nicaragua's Application and Request for provisional measures is based on factual premises that do not reflect reality. For that reason, Germany will begin the presentation by its counsel by setting the record straight; this will be done by Professor Christian Tams.

32. This concludes my opening statement. I please ask you, Mr President, to give the floor to Professor Tams.

The PRESIDENT: I thank the Agent of Germany for her statement. I now invite Mr Christian Tams to take the floor. You have the floor, Sir.

Mr TAMS:

FACTUAL BACKGROUND

I. Introduction

1. Mr President, Members of the Court, it is an honour to address you, and a privilege to do so on behalf of Germany. In my presentation, I will respond to Nicaragua's depiction of Germany as

wilfully disregarding rights of the Palestinian people and supporting or enabling breaches of international law.

2. Nicaragua's factual claims do not withstand scrutiny. They are based on speculation and at times misrepresentation. To set the record straight, Germany has provided you with a set of core documents in the judges' folder. I will refer you to these documents in relatively quick succession but I will provide key points on the slides.

II. Ongoing and substantial humanitarian assistance

3. I do so first to rebut Nicaragua's accusation that Germany had turned its back on the Palestinians. On this point, Nicaragua yesterday changed its pleading significantly. It now no longer seems to claim, as it had done in its Application, that Germany "halt[ed] its bilateral financial assistance to the Palestinians without further consideration early in the conflict"[1]. Instead, counsel yesterday acknowledged that "Germany is engaged in facilitating or improving humanitarian aid in Gaza and for its suffering people"[2], and we welcome this correction. However, Germany firmly rejects Nicaragua's characterization that this engagement is a "pathetic excuse"[3], as Nicaragua claims.

4. Mr President, documents contained in Annexes 2-5 of the judges' folder show how inaccurate this assertion is. Annex 2 brings together a list of statements by high-ranking German representatives, which reflect Germany's commitment to support Palestinians in Gaza from early on in the conflict. Let me take you to the first statement included in the list, made by Foreign Minister Baerbock on 19 October last year. You will see it on the slide, with its two key messages highlighted. One, the appointment of a senior German diplomat, Ms Deike Potzel, as Special Envoy for Middle East Humanitarian Issues. You heard nothing about Ms Potzel and her work in Nicaragua's pleading yesterday — nothing about five months of tireless humanitarian diplomacy, nothing about her public and behind-the-scenes engagement to increase the flow of humanitarian assistance under extremely challenging conditions.

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[1] Nicaragua's Application and Request for provisional measures, at para. 57.

[2] CR 2024/15, p. 32, para. 21 (Müller).

[3] *Ibid.*

5. Also on the slide: a pledge, made on 19 October last year, a pledge that Germany "is prepared to provide comprehensive [humanitarian] assistance": a pledge on which Germany acted on the same day by allocating an additional €50 million in humanitarian assistance for the people in Gaza.

6. Annex 3 gives us a fuller account of Germany's concrete contribution, and the central information is also on the slide. It contains figures from the UN Office for the Coordination of Humanitarian Affairs (OCHA), it lists support for the occupied territories by country. The chart for 2023 lists Germany as the largest international donor. And if you look at the chart for January to 31 March 2024, which is in Annex 4 and now also on the slide, you will see that Germany has remained the largest donor.

7. Mr President, Germany's total support for Palestine since early 2023 stands at €254.5 million in humanitarian assistance alone. Since 7 October 2023, rather than halting its support, Germany has more than tripled its humanitarian assistance to the Palestinians in the occupied territories. Annex 5 highlights the real impact of Germany's commitment. I would ask you to consider this as you reflect on Nicaragua's characterization that this is just a "pathetic excuse".

8. Mr President, Members of the Court, in addition to dismissing Germany's support, yesterday counsel for Nicaragua accused Germany of having "defunded" UNRWA[4]: a decision that Nicaragua presents as the cutting-off of aid at the most critical moment. This Nicaraguan claim is entirely without merit. Core information on about what really happened is in Annexes 6-9 of your folder. I will limit myself to three points.

9. First, Germany has not defunded UNRWA. On 27 January, it took a temporary decision not to approve further funds to UNRWA operations in Gaza. This decision was taken in response to grave allegations that UNRWA staff were implicated in the terror attacks of 7 October: allegations that left the UN Secretary-General "horrified" and that continue to be investigated. Germany has since resumed its funding for UNRWA operations in the West Bank, Jordan and elsewhere, committing a further €45 million. And already on 1 March, the very day Nicaragua instituted proceedings, Germany agreed, in consultation with other EU Member States, to release a €50 million

[4] Nicaragua's Application and Request for provisional measures, para. 16.

emergency assistance package from European Union funds. €12.5 million of these funds are provided by Germany.

10. But Nicaragua not only — and this is my second point — ignores this context. It ignores the fact that Germany's temporary decision of 27 January has had no direct effects on UNRWA operations. On 27 January, Germany was not due to release any funds for UNRWA for operations in Gaza that would have been withheld or withdrawn as a result of the decision. This was made very clear in the statement announcing the decision, which you see on the slide. It includes the phrase "there are . . . no new funding decisions pending. Humanitarian assistance will continue". Put differently, not a single euro of support has been halted or withdrawn. Quite to the contrary, Germany honours its pledges: funds provided before 27 January are still being used to support UNRWA work in Gaza.

11. Third, quite apart from UNRWA, Germany has stepped up its support for Gaza. The information contained in Annex 10 of the judges' folder makes this abundantly clear. Annex 10 lists relevant actions and decisions taken by Germany since 27 January. It is by no means exhaustive, but it shows what has really been happening. I will have to be very selective, but would urge you to look at Annex 10 when you consider Nicaragua's claims. When you look, you will see that immediately after 27 January 2024, the German Government made available support to other humanitarian donors, such as UNICEF, the ICRC and the World Food Programme: an additional support now amounting to nearly €40 million, in addition to funds provided to UNRWA and to contributions via the EU and the regular UN budget.

12. Annex 10 also highlights numerous examples of direct, operational support, aimed to alleviate the situation in Gaza. In-kind support such as supplying hundreds of tonnes of medical and sanitary equipment to the Palestinian Red Crescent in February. On-going work behind the scenes to ensure that help provided by agencies actually reaches Gaza under the most difficult conditions. And — as an emergency measure — air drops: an initiative by the Jordanian Government in which the German air force co-operates: 16 air drops so far have landed 83 tonnes of food directly into Gaza; and another one is scheduled for today. It is plainly wrong to suggest that Germany has in any way turned its back on Palestine. Germany works with countless partners, through various routes, leaving no stone unturned to alleviate the suffering.

III. Licensing of military exports

13. Mr President, Members of the Court, I turn to the second part of my presentation. Nicaragua accuses Germany of providing Israel with military aid and thereby facilitating breaches of international law. It says relatively little on how this equipment is supposedly used (and I will come back to this matter). Instead, counsel for Nicaragua repeatedly mentioned the total volume of licensed exports in 2023 — €326 million — and made references to items allegedly delivered, such as "artillery shell[s]" and "munitions"[5].

14. But the picture presented by Nicaragua is at best inaccurate; and at worst, it is a deliberate misrepresentation of the actual situation. Of course, Germany and Israel have close ties, including in defence co-operation. Germany's responsibility for Israel's security — emphasized by Germany's Agent just now in her opening statement — is an important factor in this respect. But this co-operation is based on a robust legal framework that assesses export licensing requests on a case-by-case basis, and that ensures compliance with national law and Germany's international obligations. And if we look at what has actually been licensed for export to Israel under this framework since October 2023, we see no artillery shells, no munitions. Nearly all exports involve what is known as "other military equipment", typically of a subordinate or defensive nature.

A robust framework governing exports of military equipment

15. Mr President, permit me to begin with a comment about the German framework governing exports of military equipment, about which you have heard nothing from Nicaragua. This is a robust framework. All German exports of military technology and equipment to Israel are subject to strict licensing requirements. Among these German law distinguishes between two categories: "war weapons" (*Kriegswaffen*) and "other military equipment" (*sonstige Rüstungsgüter* in the original German). "War weapons" comprise, for example, combat aircraft or tanks — but also automatic weapons and certain corresponding ammunition and essential components. These war weapons require two licences before export under the War Weapons Control Act and under the Foreign Trade and Payments Act. The other category — "other military equipment" — is broad; it goes much beyond "weaponry" in the usual sense. It includes, for example, defence equipment against chemical

[5] See CR 2024/15, p. 53, para. 16 (Argüello Gómez); CR 2024/15, p. 27, para. 11 (Müller).

hazards, protective gear such as helmets or body protection plates, communication equipment, camouflage paint and components, parts and other equipment of a subordinate character. Outside standardized categories for routine deliveries, not only war weapons, but also all "other military equipment" under German law requires an individual licence for export. And such individual licence can only be granted following a case-by-case assessment of an individual application on the basis of binding criteria.

16. We have provided in Annexes 11-18 of the judges' folder relevant excerpts of the applicable German laws, but also of the 2008 EU Council Common Position defining common rules governing control of exports of military technology and equipment, and the Arms Trade Treaty. Professor Peters will take you to these.

17. At this stage, permit me to make a threshold point: for every licence that is granted, the German Government carefully assesses whether there is a clear risk that the particular item subject to licensing would be used in the commission of genocide, crimes against humanity or grave breaches of the Geneva Conventions of 1949. This requirement follows from binding rules of German and European law, which exceed international requirements. As Professor Peters and Palchetti will illustrate, this scrutiny is detailed, and it involves an inter-agency process with consideration by at least two ministries, the Federal Ministry for Economic Affairs and Climate Action and the Federal Foreign Office, and — depending on the content of the licence application — potentially also the Ministry of Defence, and the Federal Chancellery, the Federal Ministry for Economic Cooperation and Development, the Federal Ministry of Finance, the Federal Ministry of the Interior and Community and the Federal Ministry of Justice. As regards these "war weapons", licences must be issued at the ministerial level and accompanied by a corresponding additional licence issued by the Federal Office for Economic Affairs and Export Control.

Actual approvals since 7 October 2023

18. Mr President, what military equipment has Germany licensed? Military exports of course are a highly sensitive matter. Nonetheless, Germany has made a sincere effort to provide you with information that allows you to scrutinize Nicaragua's assertions. We have included core figures — provided by government departments involved in the licensing process — in Annex 19 of the judges'

folder. Let me highlight three points before commenting on particular accusations that Nicaragua made yesterday.

19. My first comment concerns the central categories of military equipment distinguished under German law, which I have mentioned already: "war weapons" (including ammunitions and essential components) on the one hand, and "other military equipment" on the other. This is an important distinction because the risks associated with the export of war weapons are naturally much higher, which is a central factor in deciding on licences. Nicaragua was very brief on this distinction. From the slide you see what Nicaragua omitted. Ninety-eight per cent of the licences granted since 7 October 2023 *did not* concern "war weapons", but "other military equipment". In four instances only has Germany eventually licensed the export of war weapons since October 2023. This is the first relevant point of context if we want to appreciate the *actual* licensing practice.

20. My second point, which also appears from document 19, and on which Nicaragua again was completely silent, concerns this: if we look at the statistics that Nicaragua presented to you, we see that over 25 per cent of the volume of exports were never destined for final use in Israel. Licences worth around €85 million concern military equipment that is to be processed in Israel and then re-imported to Germany, re-imported for use by the German armed forces. Yet this equipment features in the statistics that Nicaragua relies on to make its accusations.

21. My third point: the temporal context — another crucial factor — as the risks are being assessed not just with respect to particular military goods, but also at a particular point in time, in light of circumstances obtaining then. Nicaragua yesterday sought to make you think that there had been no evolution: Professor Pellet asserted that Germany "continue à autoriser la livraison à une large échelle d'armes"[6].

22. In response, let me ask you to look at the following slide. It shows how the total value of exports, for war weapons and for other military equipment, to Israel since October 2023 is spread out over the past months. The exact figures again are in Annex 19 of the judges' folder, but the basic point emerges clearly from the slide.

[6] CR 2024/15, p. 46, para. 25 (Pellet).

23. Almost 80 per cent of the volume of exports was approved before the end of October 2023, in what this Court has referred to as "the immediate context"[7] of Hamas' horrendous massacres. At that point and in this dramatic situation, Germany decided to prioritize pending licence requests.

24. Following October, the total volume of exports has dropped sharply, and you see the figures on the slide: to €24 million, €19 million, €8.5 million and so on. For now, permit me to mention two salient aspects.

25. The first is this: in February and March 2024, the total volume of exports for war weapons and other military equipment approved by Germany was at around half a million and around one million euros respectively. These licences were issued for lenses for daylight observation binoculars, bonding devices for hydrogen storage on submarines and infrared protection systems for defence against guided missiles.

26. The most recent licence — and this is my second particular point — was granted on 8 March 2024. It concerned a slip ring for the installation in a radar system; this is not an item that could plausibly be used to commit war crimes. A limited number of requests for exports remain under review for the time being. They are reviewed by German authorities in light of the developing situation and of the potential impact that the particular item might have.

27. Mr President, this brings me to the end of my overview of what exports have actually been licensed since October. Permit me to conclude by responding to three specific accusations that Nicaragua made yesterday. They concern particularly military items that, according to Nicaragua, Germany has delivered to Israel. But I begin by responding to points raised by counsel yesterday who noted that, quite apart from exports of military equipment, Germany had supplied military equipment directly to Israel, government to government, and specifically in that respect mentioned a request for tank ammunition.

28. Mr President, we have verified this with the German ministry yesterday. Based on the information I received, I can confirm that Israel approached the German Government in 2023 for tank ammunition. This application is being scrutinized. No licence has been approved. In fact — and

[7] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 13.

this goes to Nicaragua's broader insinuation yesterday — the only items directly supplied from the German Bundeswehr (armed forces) to Israel are sanitary material and helmets.

29. Nicaragua's second specific allegation made yesterday concerns war weapons allegedly licensed for export. Nicaragua yesterday repeated points made in the Application, namely that Germany had provided Israel "with all type of . . . military aid that would be used to commit grave crimes under international law, such as anti-tank weapons, ammunition for machine guns, . . . [and] propellant charges"[8]. I have already mentioned that since October 2023, four licences for war weapons have been granted. But Nicaragua completely misrepresents what they covered.

30. Two of these licences indeed concerned ammunition, as Nicaragua notes. Five hundred thousand pieces of ammunition were approved in November, a further 1,000 pieces approved in early 2024, both for industrial co-operation. What Nicaragua does not say is that the licence was for training ammunition. Training ammunition that is — as German experts involved in the licensing process confirmed — not suitable for combat operation.

31. The third licence concerns propellant charges, again as Nicaragua notes, also granted in connection with a co-operation project between German and Israeli industry. But again, Nicaragua omits the key bit of information. The propellant charges were for test purposes. Most of the propellant charges licensed for export are to be destroyed in Israel, the rest is to be re-delivered to Germany.

32. So, to reiterate: three of the four final export licences for war weapons concerned items that are unsuitable for use in combat operations. The fourth licence, which was in the immediate context of Hamas massacres, concerned the export of 3,000 portable anti-tank weapons.

33. Finally, to complete the picture: let me add in full transparency that for one further military item, one licence has been granted: this is a submarine which has received one licence, as I mentioned, but as a war weapon requires two licences for export.

34. Four war weapons licensed for export, three of them for test and training purposes. And one submarine not yet approved for export. That is the outcome of the actual licensing practice since October 2023. Nicaragua's references yesterday — referring to artillery shells or to munitions that would be used in Gaza — simply bear no relation to reality. Germany rejects them.

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[8] Nicaragua's Application and Request for provisional measures, para. 38; CR 2024/15, p. 14, para. 11 (Müller).

35. Mr President, my final point concerns the Heron drones — unmanned vehicles. They featured prominently in Nicaragua's Application as well as in its presentation yesterday. Germany stands accused of "having handed over two Heron drones" to Israel, and counsel for Nicaragua insisted on the point yesterday, noting that the "destruction caused by unmanned aerial vehicles like these drones . . . has been widely reported"[9]. Again, Nicaragua's assertions are false. The truth about the Heron drones can be found in the document in Annex 20 of the folder, and the essence is this.

36. The two Heron drones are Israeli drones. They are owned by Israel, not Germany. At no point have they left Israel. German soldiers were trained on them while in Israel under a lease agreement, which specified Israeli ownership and control. While German soldiers trained on these drones, the Heron drones were unarmed. After 7 October, German military personnel left Israel, as their security could not be guaranteed; and so their training on Israeli soil temporarily ended. This is the context. Nicaragua is again wrong on the basic facts.

37. Mr President, to sum up: 98 per cent of licences granted after 7 October do not concern war weapons, but other military equipment. Over 25 per cent of this military equipment is destined for eventual reimportation and use by the German armed forces. Eighty per cent of the volume that was approved for export was approved in October 2023. Applications for export licences are scrutinized by different ministries by reference to conditions that are more stringent than those under international law. As a matter of fact, only four war weapons have been licensed for export since October 2023, three of which concern test or practice equipment. Finally, as regards humanitarian assistance, Germany continues to provide humanitarian support, every single day, under extremely difficult conditions, constructively engaging with international partners. The minute we look closely, Nicaragua's accusations fall apart.

38. This, Mr President, Members of the Court, concludes my presentation on the factual background to the present dispute. I am grateful for your kind attention. I would ask you now, Mr President, to invite Mr Sam Wordsworth to the podium to continue Germany's presentations.

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

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[9] CR 2024/15, p. 27, para. 9 (Müller).

Mr WORDSWORTH:

THE ABSENCE OF PRIMA FACIE JURISDICTION/A PRIMA FACIE BASIS FOR ANY EXERCISE OF JURISDICTION BY THE COURT

A. Introduction

1. Mr President, Members of the Court, it is a privilege to appear before you and to have been asked by Germany to set out its position that no order on provisional measures can be made given the absence of prima facie jurisdiction and/or a prima facie basis for any exercise of jurisdiction.

2. Germany makes two points.

3. First, it is plain from the Application, and was no less plain yesterday, that alleged violations of international law by Israel constitute the essential bedrock of Nicaragua's Application and Request. The honourable Agent's first speech yesterday was replete with assertions that "[s]erious breaches of international humanitarian law and other peremptory norms of international law, including genocide, are taking place in Palestine", alongside references to "the genocide committed by Israel"[10]. The case on genocide against Germany is entirely dependent upon this, that is, upon a prior finding of breach by Israel. The same applies to Nicaragua's case on international humanitarian law. The Agent summarized this claim as follows: "The violations of international humanitarian law by Israel create obligations for Germany."[11] I will return to the details in a moment, but the basic point is that Nicaragua seeks determinations on the conduct of Israel, an absent party, which determinations are a prerequisite to any finding of responsibility on the part of Germany. Yet, Nicaragua must establish that, at least prima facie, the Court is able to exercise jurisdiction[12], and it cannot do so given the manifest absence of an indispensable third party, namely Israel[13].

4. Second, it was said by the Agent yesterday that "Nicaragua has not had the opportunity to be informed of the position of Germany"[14]. Yet, the reason for this is Nicaragua's decision to lodge

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[10] CR 2024/15, pp. 12, 15, paras. 3, 13 (Argüello Gómez). See also pp. 13, 17, 19-20, paras. 8, 20-21, 27-30.

[11] CR 2024/15, p. 15, para. 13 (Argüello Gómez).

[12] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, paras. 39-42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, *Provisional Measures, Order of 26 January 2024*, paras. 33-34.

[13] See also *The Statute of the International Court of Justice, A Commentary*, Zimmermann and Tams (eds.), pp. 1150-1151, referring to Kaikobad, *Australian YIL* (1996), p. 132 *et seq*.

[14] CR 2024/15, p. 20, para. 31 (Argüello Gómez).

its Application without allowing Germany an opportunity to engage and to inform Nicaragua of the basic factual inaccuracies that Professor Tams has just spelled out. Instead, just 17 days after Germany received Nicaragua's Note Verbale, the current proceedings were commenced without prior warning, relying for the supposed existence of a dispute on a few words by a governmental representative in a general press conference where Germany was seeking to withhold its position — because it had then only seen a short press statement from Nicaragua, concerning the alleged conduct of four States, one of which was Germany. Nicaragua sought to skate over this issue yesterday[15], but it cannot show, even prima facie, the existence of the dispute required to establish the Court's jurisdiction.

B. Determinations on the conduct of Israel are a prerequisite to the determinations sought against Germany

5. Turning to the details, I start with the central need in this case for determinations by the Court concerning the conduct of Israel, an absent party. Nicaragua showed itself yesterday to be very sensitive about this, with Professor Pellet seeking to neutralize this key point — first by saying that, at the provisional measures phase, the Court is only concerned with the prima facie existence of jurisdiction, not the ability to exercise it, and then by suggesting that the *Monetary Gold* line of jurisprudence made no sense[16]. Neither contention is remotely serious.

6. First, at the provisional measures phase, the Court will of course examine both the existence of prima facie jurisdiction and the issue of whether, prima facie, it is able to exercise jurisdiction. No authority was cited to suggest the contrary, and indeed any different approach would be entirely counter-intuitive. The long-standing purpose of provisional measures is "to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent"[17]. It makes no difference at all whether the reason for there being no ability to adjudicate on relevant rights is due to absence of jurisdiction, or absence of the ability to exercise jurisdiction. Moreover, Nicaragua's contention is flatly inconsistent with the Court's

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[15] CR 2024/15, pp. 12-13, paras. 7-8 (Argüello Gómez).

[16] CR 2024/15, pp. 37-39, paras. 7-9 (Pellet).

[17] *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 93.

established jurisprudence[18]. In *The Gambia* v. *Myanmar* case, for example, as you can see on your screens, the Court was not content simply to establish its jurisdiction prima facie, as it did at paragraph 7 of the Order, but it then went on to consider a disputed issue of admissibility, in that case one of standing.

7. Second, the *Monetary Gold*-type situation is not wholly exceptional as was suggested yesterday[19], and the approach of the Court there or in *East Timor*[20], for example, does no more than reflect the basic rule on the essential need for consent. This is to be found in many other contexts including, for example, maritime delimitation, where the Court has held, as one would expect, that it "will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined"[21].

8. It is obviously wrong to say that there is no need for such an approach given Article 59 of the Statute and the possibility of intervention, and the current Request offers an apt example in this respect. Suppose the Court were to make an order in the terms sought by Nicaragua, on the basis of the allegedly plausible rights under the Genocide and Geneva Conventions, which presuppose that Israel is in breach of these treaties or at least that there is a serious risk of such breach. Such a finding would be treated around the world as a generally applicable and objective assessment of actual or likely wrongful conduct by Israel. Yet Israel would have no standing to challenge the order. If Israel wished to see the order amended or lifted, it would have to intervene as a party under Article 62 of the Statute, but it could only do so with the consent of both parties given the absence of a jurisdictional link so far as concerns Nicaragua's claims of breach of international humanitarian law.

9. Thus not only does the claim put forward by Nicaragua seek determinations on the lawfulness of Israel's conduct that will directly impact Israel, it leaves Israel without any avenue to challenge those determinations save for submission to the Court's jurisdiction[22], with a critical key

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[18] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, paras. 39-42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, *Provisional Measures, Order of 26 January 2024*, paras. 33-34.

[19] CR 2024/15, pp. 38-39, para. 9 (Pellet).

[20] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90.

[21] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 756, para. 312.

[22] Cf. *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 54.

to even being able to challenge any order held by Nicaragua, given the need for its consent to intervention. Thus, Nicaragua seeks radically to undermine the most fundamental principles concerning consent to jurisdiction.

10. I turn to the further points made by Professor Pellet.

11. The first was simply to repeat the contention that the issue of the exercise of jurisdiction does not arise at the provisional measures phase as he said there will be no determination on the merits[23]. I say no more on that, other than to recall that issues going to jurisdiction are assessed prima facie by reference to whether the Court will be able to make a judgment specifically on the merits, not by looking at the provisional measures phase in isolation[24]. It could not be otherwise.

12. As a second point, it was argued that the current case is one where the legal interests of a third State might be affected, but no more, and hence the principle in *Monetary Gold* is not engaged. It was said that no demand was made impacting the rights of a third State, and that the reference point had to be Nicaragua's Application, from which it is said to be clear that: "the issue is not whether *Israel* has breached its international obligations but indeed whether *Germany* has breached its own"[25].

13. While the fundamental rules on consent could not in any event be bypassed by attempts at artful pleading, it is useful to focus on Nicaragua's Application. This shows that the essential keystone in the construct of the current claim is the unlawful nature in which Israel is said to be pursuing its current military operations in Gaza. This is plain, for example, from paragraphs 8-9 of the Application, where it is asserted that "actions by the Israeli Government constituted serious breaches of universally accepted peremptory norms of international law" and that "serious violations of international humanitarian law were evident from the start".

14. The responsibility of Germany is alleged, but in complete reliance on asserted wrongful acts of Israel. This can be seen, for example, from paragraph 38 of the Application, now on your screen (emphasis added):

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[23] CR 2024/15, pp. 39-40, para. 10, second indent (Pellet).

[24] See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 179, para. 24.

[25] CR 2024/15, p. 40, para. 11 (Pellet) (with informal translation).

> "The German Government has engaged in political, military and financial support to Israel *despite its awareness that the military operation launched in the OPT, particularly Gaza, was being conducted in complete disregard of international humanitarian law, human rights law and the Genocide Convention* . . . Germany has not acted *to bring to an end the wrongful acts of Israel perpetrated against the Palestinians, and has instead supported Israel by providing it with all type of aid, including military aid that would be used to commit grave crimes under international law*".

15. Turning then to the specific declarations sought from the Court, at paragraph 67 of the Application, Nicaragua first alleges that Germany has breached Article I of the Genocide Convention through a failure to prevent genocide.

(a) But, in order to determine that there has been such a breach, the Court must first determine that Israel has committed genocide.

(b) This can be seen, for example, from the *Bosnian Genocide* case, and please note that this is a paragraph that Nicaragua put up on the screen yesterday, but omitting the passages underlined on the screen, despite their obvious importance. In particular: "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed"[26].

(c) The passage read out by Nicaragua is in italics. The Court there emphasizes that it is not saying that there is no obligation of prevention until the perpetration of genocide commences. But the Court is clear on the need for a prior finding on genocide before any *breach* of the obligation to prevent can be determined. And this is reiterated in the second underlined paragraph:

> "if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, *since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent*".

(d) The same basic point follows from the *Croatia* v. *Serbia* case. The Court found that no genocide had taken place, and hence there could not be "any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide"[27].

16. Turning back to the Application, Nicaragua then alleges that Germany has aided and assisted Israel in the commission of genocide and breaches of obligations under international

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[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 431.

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

humanitarian law, at paragraphs 67 (3) and (4), and these allegations again cannot be determined without a prior determination that the conduct of Israel is unlawful.

(a) Article 16 of the ILC Articles on State Responsibility, which the Court has considered to be reflective of customary international law, is concerned with aid or assistance "in the commission of an internationally wrongful act"[28].

(b) There must be "an internationally wrongful act". The Commentary further clarifies that this must be a "completed act"[29], and that of course is only confirmed by the subsequent conclusion of the Court on complicity in the *Croatia* v. *Serbia* case that you have just seen. Moreover, the ILC Commentary expressly notes:

> "The International Court has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, it would have to rule, as a prerequisite, on the lawfulness of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle. That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed [*and please note there the use of the past tense*] an internationally wrongful act."

(c) The Commentary does suggest that the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case[30], and indeed there may in a given case already be the requisite prior finding or indeed the consent from the third State, but in the current case, *Monetary Gold* does indeed apply, and I will return to the case and its application shortly.

17. As to the declarations sought at paragraphs 67 (3) and 67 (4) of the Application, for breach of common Article 1 and related customary international law due to a "failure to ensure" compliance, a breach of the obligation to "ensure respect . . . in all circumstances" is necessarily predicated on there having been a lack of the required "respect" by the other State.

(a) The reasoning of the Court in the *Bosnian Genocide* case applies equally in the current context. There, as you have seen, the Court explained how the State's obligation to prevent, and the corresponding duty to act, arises when the State learns of the existence of a serious risk of genocide, which is exactly the same as how Nicaragua portrays the operation of common

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[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, p. 217, para. 420.

[29] Commentary to Art. 16, para. 3.

[30] Commentary to Art. 16, para. 11.

Article 1. But, as the Court also explained, a genocide "must occur for there to be a violation of the obligation to prevent"[31].

(b) Precisely the same applies here, and it makes no difference at all if common Article 1 is envisioned as a rule of due diligence, as that is just how the obligation to prevent under the Genocide Convention is interpreted. The basic question remains: how can it be said that there was a failure to "*ensure* respect" of a third State if the failure on the part of that third State to "*respect*" is not established in the first place? I would add that this is how the Court envisaged the operation of this obligation in its 1986 Judgment in *Nicaragua* v. *United States of America*[32], and that is also the intuitive result. It is entirely usual for one State to support another in the context of an armed conflict, this is not an activity that the international community rigidly seeks to deter. It is only if the conduct of the conflict turns out to have been in breach of international humanitarian law that the acts of the State offering support would be expected to be ruled upon.

18. The same basic points apply to paragraph 67 (5) of the Application, which is predicated on Israel denying Palestine's right to self-determination and maintaining and imposing an apartheid régime.

19. As to the Court's jurisprudence, the current case is substantially the same as *Monetary Gold*. There the Court explained: "The Court is not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom. It is requested to determine first certain legal questions upon the solution of which depends the delivery of the gold."[33]

20. Well, just so here. The Court is not merely called upon to pronounce on the State responsibility of Germany. It is required first to make determinations as to the State responsibility of Israel. And Nicaragua cannot avoid this by saying that the Court can find breach by Germany on the basis of a serious risk of a breach by Israel. On the correct analysis, such determinations would not be sufficient to establish breach by Germany as follows from the analogy to the *Bosnian Genocide*

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[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, p. 222, para. 431.

[32] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 114, para. 220, referring to "violations". See also ICRC, Rules of Customary International Humanitarian Law, Article 144.

[33] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, *Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 31.

case; but anyway, as a matter of principle it makes no difference whether the required determination is an actual breach or of serious risk of breach. There is still an essential prior determination of the conduct of an absent third State on which the responsibility of the respondent State wholly depends.

21. The consequent reasoning of the Court in *Monetary Gold* concerning the absence of jurisdiction regarding the underlying issue of breach by Albania thus applies in the current context:

> "In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested. [*Or just so here, substituting Israel for Albania and Nicaragua for Italy*] To go into the merits of such questions would be to decide a dispute between Italy and Albania.
>
> The Court cannot decide such a dispute without the consent of Albania."[34]

22. And this is not a case like *Nauru*, where the determinations with respect to Australia's conduct merely might have had "implications" for the legal situation of the United Kingdom and New Zealand, and the Court was in a position to hold that "no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia"[35].

23. By contrast, the current case is precisely analogous to *East Timor*, where Portugal's claim as to the unlawfulness of Australia's conduct in entering into the 1989 Treaty with Indonesia could "not be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty"[36]. Again, the current case is on all force.

C. The absence of a dispute

24. I turn to the existence of a dispute, which is a basic prerequisite to consent to jurisdiction under both Article IX of the Genocide Convention and Article 36 (2) of the Court's Statute.

25. The dispute that is relied on must exist, objectively, at the time the Court is seised[37]. Equally well established is the need for a "claim of one party that is positively opposed by the other",

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

[35] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55. Cf. also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 660, para. 43.

[36] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 28.

[37] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

and that the two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations"[38].

26. As to the basic facts in this case, Nicaragua relies on its press release of 1 February 2024 and a Note Verbale attaching a letter of 2 February[39], as well as the excerpts from a wide-ranging German governmental press conference of 7 February[40]. So, Nicaragua says claim plus opposition, hence a dispute. But:

(a) As the Court has explained, the question of whether there is a dispute or not is one of substance, not of form. It is not a box-ticking exercise, as can be seen from the Court's very detailed consideration in past cases as to whether there was indeed the required dispute with respect to the asserted source of jurisdiction[41].

(b) In considering substance, the context is of critical importance. The current Parties are at two points of remove from the classic bilateral dispute situation: Nicaragua appears in this case only on the basis of alleged *erga omnes* obligations owed by Germany, which is not of course a participant in the ongoing conflict in Gaza. And this is not a case where the parties had already locked horns before the United Nations or in some other fora[42].

27. In the current situation, for there to be a dispute as a matter of substance, there would have to be some form of meaningful engagement with a claim, pursuant to which Germany communicated its position either to Nicaragua or in such a way that it could objectively be understood as crystallizing a dispute.

28. It was said yesterday that: "The legal dispute was described in Nicaragua's letter of 2 February 2024"[43]. But this Note Verbale was sent to the public information email address of Germany's Permanent Mission to the United Nations in New York, not any address that is used for official diplomatic communications. It was not picked up until 13 February, and it should be noted

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[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 19.

[39] Application, Annexes 1 and 3.

[40] Application, Annex 4.

[41] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 85-120, paras. 31-113.

[42] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 502-507, paras. 65-75.

[43] CR 2024/15, p. 50, para. 7 (Argüello Gómez).

that equivalent Notes Verbales were also sent to the public information email addresses for Canada, the Netherlands and the United Kingdom, and we understand that these were likewise only picked up on 13 February, following a further email sent by Nicaragua to the Netherlands. This approach of Nicaragua is, to say the least, unusual, and indeed, in the past, Nicaragua has always sent Notes Verbales to the appropriate email addresses of the Ambassador and assistants at the German Embassy in Managua, often copying in other German missions, again on the appropriate email addresses.

29. It follows that, when at a general press conference of 7 February, a representative of the German Federal Foreign Office was asked questions about having received a Note Verbale and how Germany intended to respond, Germany was simply not in a position to say anything material. The excerpt of the press release is at judges' folder, tab 21, and in due course I ask you to read this carefully. You will see that the journalist asking the questions correctly understood Germany as not having received any Note Verbale, and you will also see that Germany did not consider itself ready to make any public statement of its position. This was not, and could not have been, a response crystallizing a dispute on the basis of a claim in a Note Verbale that had not been seen.

30. Once it had in fact received the Note Verbale, Germany was actively considering its response and seeking co-ordination with the three States that had received similar emails when, without warning, Nicaragua commenced the current proceedings on 1 March.

31. There was no opportunity to engage, and it is to be emphasized that this is not a case like *The Gambia* v. *Myanmar*, where the Court could infer the existence of a dispute following a failure to respond one month following the delivery of a Note Verbale, but in circumstances where there had already been a number of prior communications both outside and within the UN General Assembly that showed the mutual opposition of views[44]. Nicaragua sought to suggest, but was wholly unable to point to, anything remotely equivalent, and notably seeks to invoke the German Note Verbale of 11 March sent to the Court after it was seised, and that of course is wholly irrelevant[45].

32. Of course, the Court is only concerned with a prima facie showing. But the fact that this case is at the provisional measures phase cuts both ways. It is not just that extraordinary relief is

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[44] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 502-507, paras. 65-75.

[45] CR 2024/15, pp. 50-51, para. 8 (Argüello Gómez).

sought given that jurisdiction and the ability to exercise jurisdiction have not yet been established. Also, relief is sought on the basis that Germany, a peaceful democratic nation, a long-time avowed supporter of international law and the international legal order, is breaching the Genocide Convention and conventional and customary international law. The determinations sought could scarcely be more serious, and the relief sought also has, and is plainly intended to have, direct and indirect impacts on third States not before the Court.

33. It is precisely in circumstances such as this that jurisdiction prima facie demands a real showing of positive opposition and clearly opposed views, not a precipitate rush to court in the hope that a box might be considered at best half-ticked.

34. Mr President, Members of the Court, I thank you for your attention and ask you to call Professor Peters to the floor.

The PRESIDENT: I thank Mr Wordsworth for his statement. I now invite Ms Anne Peters to take the floor. You have the floor, Madam.

Ms PETERS:

LACK OF PLAUSIBILITY

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

A. The standard of plausibility

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

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

4. Here, this is the first case in the Court's history in which provisional measures are sought against a State that stands accused of *complicity in* and lack of *vigilance and prevention* of acts of another State that is not party to these proceedings[46]. Both types of legal obligations arise exclusively and necessarily in connection with, or in response to, the conduct of another State that is absent from

[46] Unlike *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, paras. 44-46 and para. 52.

these proceedings. Mr Wordsworth has already demonstrated how this poses a serious admissibility problem.

5. This attempt to request provisional measures against one State by reference to the conduct of another State stretches the plausibility assessment to breaking point in an unprecedented manner. This Court will first have to find — on the basis of evidence[47] — that there are plausible facts that establish plausible violations on the part of Israel. Second, the Court will have to find that there are plausible facts that establish plausible violations on the part of Germany. Here, the Court will especially have to establish whether there are plausible objective and subjective links between the conduct of Germany and the conduct of the absent third State, Israel.

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

B. No plausible complicity under Article III *(e)*, of the Genocide Convention and under customary law

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

8. This must fail, because the most basic prerequisites for establishing aid and assistance, or — what is really the same thing — "complicity", are lacking. These prerequisites are: a causal contribution of the accomplice to the wrongful act, and knowledge and intention to facilitate the

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

wrongful act of the main perpetrator[48]. Nicaragua has not and cannot provide any evidence to show these elements to be plausible.

1. Lack of a significant contribution and causality in law

9. The standard requirement for causality in law, as applied by international tribunals, is that there must be "proximity", "directness" or that the breach must not be too "remote"[49]. Proximity is established where the consequence of an act is a "natural and normal consequence"[50]. Such a link is especially needed to establish aid and assistance. Aid and assistance must have "contributed significantly" to the alleged wrongful act[51]. This can only be determined objectively, by assessing the quality and the quantity of the real contribution in the concrete case.

10. Nicaragua has offered no evidence as to how any of the military equipment from Germany could have made a *significant* contribution to an alleged genocide or to breaches of international humanitarian law. Given Germany's stringent licensing standards that scrutinize precisely these risks, there is no indication that *German* equipment would have naturally or normally led to plausible violations of international law by Israel.

2. The subjective element: knowledge and intention to facilitate

11. In addition, Nicaragua has not provided any evidence for the presence of the necessary subjective elements, which are knowledge and intent[52].

12. In the *Bosnian Genocide* case, you insisted

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[48] International Law Commission, Draft Articles on State Responsibility (*Yearbook of the International Law Commission* (2001), Vol. II, Part 2), commentary on Art. 16, para. 3; Commentary on Art. 41, para. 11; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 217, para. 420.

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

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

[51] International Law Commission, Draft Articles on State Responsibility (*Yearbook of the International Law Commission* (2001), Vol. II, Part 2), Commentary on Art. 16, para. 5; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 222, para. 432.

[52] Cf. *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, para. 75; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, para. 53.

> "that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide *cannot be treated as complicity* in genocide *unless at the least* that organ or person *acted knowingly*, that is to say, in particular, *was aware of the specific intent* (dolus specialis) *of the principal perpetrator.* If that condition is not fulfilled, that is sufficient to *exclude* [the] categorization [of the conduct] as complicity."[53]

13. The position is the same in customary law generally: aid and assistance must be given with knowledge of the circumstances, and *with the intention to facilitate* the occurrence of the wrongful act[54].

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

15. Germany — on the contrary — has demonstrated to this Court that its intention has always been to assure full respect of international law, be it the Genocide Convention, international humanitarian law, or other customary law. Germany has engaged with Israel on numerous occasions to urge compliance.

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

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

17. Because the elements of aid and assistance are absent, all claims that Germany has aided and assisted in maintaining a situation resulting from alleged serious breaches of *ius cogens* by Israel (as Article 41 (2) of the Articles on State Responsibility put it) are equally baseless.

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

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

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[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 218, para. 421 (emphasis added).

[54] ILC Commentary on Art. 16, para. 5; James Crawford, *State Responsibility* (2013), Cambridge University Press, pp. 406-408.

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

1. Article I of the Genocide Convention

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

21. In the current context, it should be noted that Germany has continuously engaged politically with Israel in a dialogue that has not shied away from critical questions. In the strongest terms, German leaders have warned Israel of the grave dangers that a ground offensive in Rafah would pose. For months, in countless meetings, German leaders and diplomats have worked towards the opening of more border crossings. And you have heard Professor Tams state earlier, to prevent famine, Germany is engaged in emergency deliveries, dropping food from the air. These concrete measures are at the heart of Germany policy. So, Germany has continuously used all reasonable means at its disposal to both exert its influence on the Israeli partners in order to improve the situation and to itself furnish humanitarian aid. It continues to do so every day. Germany has thus in any event duly fulfilled any conceivable obligation to prevent the occurrence of genocide by these concrete measures. We cannot see how any duty to prevent could demand more of Germany.

2. Common Article 1 of the Geneva Conventions

22. I turn to common Article 1 of the Geneva Conventions. Leaving aside the fact that Nicaragua, as a non-party to the conflict in Gaza, has no standing to enforce Germany's obligations under common Article 1 with regard to a third State like Israel, a violation of common Article 1 of the Geneva Conventions by Germany is not plausible. First, in the Nicaragua case of 1986, this Court identified one specific external obligation incumbent upon non-parties to an armed conflict: the

obligation not to encourage violations of international humanitarian law by another State that finds itself in armed conflict[55].

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

24. Second, the obligation to ensure respect generates so-called positive obligations to exert one's influence on parties to an armed conflict to observe international humanitarian law[56]. Germany has always fulfilled, and continues to fulfil, this obligation. It is persistently urging Israel to apply restraint, to allow for humanitarian access by opening check-points and the like. Ongoing in-depth bilateral exchanges between various ministries on several levels focus on the processes that Israel has in place to ensure respect for international humanitarian law. Yesterday, we heard Nicaragua acknowledge these endeavours.

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

26. As I said, common Article 1 and parallel customary law prohibits States from encouraging violations of international humanitarian law. However, this provision does not generate a negative obligation to refrain completely from military support to a State involved in an armed conflict. Common Article 1 does not and cannot block all transfer of aid to a State that might exercise its right to self-defence. Such a blanket prohibition would be nonsensical because it would be incompatible with every State's right to support countries acting in self-defence.

27. While the scope of common Article 1 is contested and requires further discussion, even taken at its broadest plausible interpretation, the obligation to ensure respect embodied in common Article 1 can do no more than suggest that all States must conduct a proper risk assessment for decisions regarding exports of military equipment and arms[57].

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[55] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 220.

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

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

3. Germany fulfils its obligation to ensure respect under common Article 1 in its export control practice

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

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

30. The German Constitution itself, the highest law of the country, monitored by a robust constitutional court, prohibits export of weapons without a licence by the federal government[58].

31. Following these provisions, Germany applies the War Weapons Control Act[59], its Foreign Trade and Payments Act[60], the EU Common Position[61] and the Arms Trade Treaty[62] as binding law.

32. Mr Tams already explained that at least four ministries are involved here, as you also see on the slide.

33. The German Federal Government's "Political Principles on the Export of Weapons and other Military Goods" of 2019[63] explicitly seeks to "design a restrictive weapons export policy"[64], "within the framework of Germany's international obligations"[65].

34. These principles are "general administrative rules" in the sense of the German Constitution[66]. With these, the Government binds itself and limits its discretion. The principles refer to the EU Common Position.

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

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

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

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

[62] The Arms Trade Treaty of 2 April 2013, United Nations, *Treaty Series*, Vol. 3013, p. 269.

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

[64] *Ibid.*, Preamble, indent 1.

[65] *Ibid.*, Preamble, indent 2.

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

35. Further, the export of weapons and military equipment is, to the extent feasible, subject to parliamentary control[67]. The Federal Government informs Parliament about licensing decisions that have gone through the Federal Security Council and about the kind, number of goods, recipient country and involved German enterprises. Such reports also cover the total volume of the transactions, unless in individual instances constitutionally protected interests prohibit such disclosure. This information is not classified, it is not secret[68].

36. Allow me to single out only two of the relevant benchmarks, all other rules can be found in the judges' folder: under the EU Common Position, Germany, "having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law", applies the rule that it "shall . . . deny any export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law"[69]. Where the German authorities identify such a clear risk, they must deny the export licences. But please note, the assessment of course is by reference to the relevant equipment supplied. If it is a batch of helmets or training ammunition, of course the assessment may be no risk at all.

37. In the narrower scope of application of the Arms Trade Treaty, German authorities

> "shall not authorize any transfer of conventional arms . . . if [they have] knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches . . . attacks directed against civilian objects . . . or other war crimes"[70].

38. If an export is not prohibited under this provision, German authorities assess the potential that the item could be used to commit or facilitate a serious violation of international humanitarian law[71]. If they find an "overriding risk" of such a negative consequence, they may not authorize the export[72]. But again, flak jackets might not pose such a risk.

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

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

[69] Art. 2 (2) *(c)* of the EU Common Position.

[70] Art. 6 (3) ATT.

[71] Art. 7 (1) *(i)* ATT.

[72] Art. 7 (3) ATT.

39. Our four-tiered legal and political control régime of exports of arms and military goods is robust. It is democratic, as transparent as possible given the sensitivity of the material involved, and it is subject to parliamentary and, to some extent, judicial oversight[73].

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

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

D. Conclusion

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

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

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

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

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

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

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

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

The PRESIDENT: I thank Ms Peters for her statement. J'appelle maintenant à la barre M. Paolo Palchetti. Vous avez la parole, Monsieur.

M. PALCHETTI :

ABSENCE D'UN RISQUE RÉEL ET IMMINENT DE PRÉJUDICE IRRÉPARABLE

I. Il n'y a aucun risque imminent de préjudice découlant du comportement de l'Allemagne

1. Monsieur le président, Mesdames et Messieurs les juges, c'est pour moi un honneur de me présenter devant vous au nom de la République fédérale d'Allemagne.

2. La Cour indique des mesures conservatoires s'il existe « un risque réel et imminent qu'un préjudice irréparable soit causé aux droits revendiqués »[74].

3. Le Nicaragua n'a pas démontré que le comportement de l'Allemagne faisait courir un tel risque aux droits en litige. Ses avocats n'ont rien dit sur ce point, qui est pourtant crucial. Ils ont surtout insisté sur la situation tragique qui existe actuellement à Gaza[75] et sur les deux ordonnances que vous avez rendues en janvier et mars 2024 dans l'affaire opposant l'Afrique du Sud et Israël[76].

4. Monsieur le président, une chose doit être claire d'emblée : aucune de ces ordonnances ne peut être utilisée pour démontrer l'existence d'un risque imminent imputable à l'Allemagne.

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[74] *Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël), mesures conservatoires, ordonnance du 26 janvier 2024*, par. 61. Voir aussi *Sentence arbitrale du 3 octobre 1899 (Guyana c. Venezuela), mesures conservatoires, ordonnance du 1er décembre 2023*, par. 28 ; *Application de la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (Canada et Pays-Bas c. République arabe syrienne), mesures conservatoires, ordonnance du 16 novembre 2023*, par. 65 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan), mesures conservatoires, ordonnance du 17 novembre 2023*, par. 48 ; *Allégations de génocide au titre de la convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 16 mars 2022, C.I.J. Recueil 2022 (I)*, p. 226, par. 66.

[75] CR 2024/15, p. 57 (Argüello Gómez).

[76] *Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël), mesures conservatoires, ordonnance du 26 janvier 2024* ; *Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël), demande tendant à la modification de l'ordonnance en indication de mesures conservatoires du 26 janvier 2024, ordonnance du 28 mars 2024* ; CR 2024/15, p. 24 (Müller).

5. Dans vos ordonnances, vous avez certes reconnu que la situation à Gaza est telle qu'il existe un risque réel et imminent pour les droits des Palestiniens. Mais le risque dont il est question dans vos ordonnances est celui qui découle du comportement d'Israël. Votre conclusion repose uniquement sur la prise en considération du comportement d'Israël.

6. Or, ce dont il est question dans la présente affaire, c'est le comportement de l'Allemagne. C'est à partir de son comportement que l'existence d'un risque imminent doit être établi.

7. Ce que disent clairement vos ordonnances, c'est que la situation humanitaire qui règne dans la bande de Gaza est « catastrophique »[77]. L'Allemagne en a bien conscience. Ses hauts responsables politiques ont déclaré à maintes reprises leur bouleversement face aux souffrances de la population civile de Gaza. En tant que membre de la communauté internationale, l'Allemagne s'est fermement employée à faire en sorte que ces souffrances cessent. Elle a insisté sur la nécessité que le droit international soit respecté et elle a pris des mesures concrètes visant à répondre aux préoccupations internationales.

8. Ces mesures ne montrent pas seulement que les contestations portées par le Nicaragua dans sa requête sont dénuées de tout fondement juridique. Elles montrent aussi — et c'est le point que j'entends développer ce matin — l'absence d'un risque imminent de préjudice imputable à l'Allemagne.

9. Dans le temps qu'il reste à ma disposition, je m'occuperai tout d'abord des mesures en matière d'assistance militaire. Je passerai ensuite à l'aide humanitaire.

II. Absence d'un risque imminent de préjudice par rapport à l'assistance militaire

10. Le Nicaragua invite la Cour à indiquer une mesure — c'est la mesure n° 1 — enjoignant à l'Allemagne de « immediately suspend its aid to Israel, in particular its military assistance »[78].

11. Dans sa demande en indication de mesures conservatoires, le Nicaragua justifiait cette mesure en faisant exclusivement référence à la situation dans la bande de Gaza[79]. Hier, le Nicaragua

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[77] *Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël), demande tendant à la modification de l'ordonnance en indication de mesures conservatoires du 26 janvier 2024, ordonnance du 28 mars 2024*, par. 30.

[78] CR 2024/15, par. 39, p. 58 (Argüello Gómez).

[79] Requête introductive d'instance et demande en indication de mesures conservatoires, par. 101.

a modifié sa position : il ne s'agit plus seulement de la bande de Gaza mais du génocide plausible et d'autres violations graves « occurring in the Gaza Strip, as well as in other parts of Palestine »[80]. Le Nicaragua n'a pas expliqué les raisons de ce changement. Il n'a pas précisé s'il existait des faits nouveaux nécessitant l'examen de la situation dans les territoires palestiniens en dehors de Gaza, et n'a pas non plus fourni d'informations détaillées à ce sujet. Sa stratégie consiste à lancer des accusations sans préciser les faits ni fournir de preuves.

12. C'est cette même approche qui sous-tend la mesure n° 2. Elle vise à imposer à l'Allemagne une obligation de vigilance par rapport aux armes déjà livrées à Israël. Or, le Nicaragua n'indique pas comment l'Allemagne pourrait concrètement exercer cette vigilance.

13. L'agent du Nicaragua a précisé hier que cette mesure « requires Germany to use whatever legal or contractual powers, and whatever influence it has over Israel »[81]. Monsieur le président, s'il est question d'exercer une influence sur Israël, le Nicaragua peut être rassuré. Comme il le sait bien, les plus hautes autorités de l'État allemand ont demandé à plusieurs reprises à Israël d'accepter une pause humanitaire et d'assurer le respect du droit international humanitaire. Une mesure de la Cour en ce sens n'est ni nécessaire ni urgente.

14. En réalité, pour que la Cour indique les mesures n^{os} 1 et 2, il aurait fallu que le Nicaragua fournisse des preuves crédibles démontrant qu'il existe un risque imminent que l'Allemagne, intentionnellement, en connaissance de cause ou sans faire preuve de la diligence requise, aide militairement Israël à commettre des violations graves du droit international.

15. Le Nicaragua n'a pas fourni ces preuves. En fait, il ne le peut tout simplement pas, et ce pour une raison essentielle.

16. Le droit allemand et la pratique administrative allemande subordonnent la concession des licences d'exportation d'armements et d'autres équipements militaires à des conditions très strictes. Ces conditions vont bien au-delà de ce qui est demandé par le droit international.

17. Je n'ai pas l'intention de répéter ce qui a été déjà dit sur ce point par les professeurs Tams et Peters. Je me bornerai à observer qu'il est difficile de comprendre comment le Nicaragua peut

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[80] CR 2024/15, par. 39, p. 58 (Argüello Gómez).

[81] *Ibid.*, par. 26, p. 56.

affirmer que sa demande actuelle est urgente, alors que le droit allemand impose depuis longtemps des conditions très strictes visant à prévenir tout risque, y compris celui évoqué par l'État demandeur.

18. Cela est d'autant plus vrai que le respect de ces conditions strictes est surveillé tout au long de la procédure d'instruction des demandes de licence. Permettez-moi d'en exposer deux traits essentiels, qui montreront le contrôle extrêmement minutieux qui est exercé sur chacune d'entre elles.

19. Le premier aspect concerne le nombre d'autorités qui participent à la procédure. Comme l'ont fait remarquer les professeurs Tams et Peters, l'autorisation d'exporter des armes de guerre nécessite l'intervention de plusieurs ministères. Au sein de chaque ministère, des experts préparent un projet d'avis sur l'attribution ou non de la licence. Cette évaluation est finalisée par des hauts fonctionnaires ministériels. Bref, une licence ne sera approuvée que si le Gouvernement allemand dans son ensemble — c'est-à-dire tous les ministères concernés — convient que les conditions d'exportation sont remplies.

20. Le deuxième aspect concerne l'objet du contrôle. Celui-ci porte, tout d'abord, sur la nature du matériel militaire en question, et en particulier sur le risque d'utilisation abusive qu'il présente. Il y a ici un point sur lequel je voudrais insister : de nombreux articles militaires relevant de la catégorie « autres équipements militaires », et dont l'exportation est soumise à autorisation en vertu de la législation allemande, ne présentent aucun risque d'utilisation abusive. C'est d'ailleurs également le cas de certains articles classés comme armes de guerre.

21. Naturellement, la situation du pays de destination est elle aussi examinée de près. Chaque demande de licence est soumise au service des exportations étrangères du ministère fédéral des affaires étrangères, qui s'appuie systématiquement sur l'expertise de spécialistes du pays en question avant de délivrer son avis.

22. Monsieur le président, je devrais, à ce stade, vous exposer comment ce régime et cette procédure ont été mis en œuvre par rapport à l'exportation d'armes et d'autres équipements militaires vers Israël. Il ne m'est toutefois pas nécessaire de m'attarder sur ce point. Le professeur Tams vous a déjà montré le nombre et le contenu des licences accordées dans ce contexte.

23. Le cadre qu'il vous a montré est suffisamment précis. Le droit allemand impose de tenir compte de l'évolution de la situation sur le terrain. C'est la ligne de conduite que les autorités allemandes ont tenue par rapport à la situation à Gaza.

24. Pour vous convaincre qu'il existe un risque imminent de préjudice, le Nicaragua cherche à concentrer votre attention sur le nombre des licences qui ont été accordées par l'Allemagne dans les semaines suivant immédiatement le 7 octobre 2023. Il prétend que les exportations d'armes vers Israël ont continué d'augmenter dans les mois suivants. Le professeur Pellet l'a dit explicitement : « les ventes d'armes n'ont pas cessé, elles se sont amplifiées très considérablement »[82].

25. Cette affirmation déforme la réalité. Le professeur Tams vous a exposé les données réelles. Vous avez déjà vu ce graphique. Si je vous le présente à nouveau, c'est parce qu'il illustre très clairement que les allégations du Nicaragua sont dépourvues de fondement. Ce qui s'est passé est le contraire de ce que le Nicaragua vous a dit hier.

26. Je n'ai pas besoin de m'attarder sur les raisons qui ont conduit l'Allemagne, en octobre 2023, à réaffirmer son engagement pour la sécurité d'Israël. La question qui doit nous intéresser ici, c'est d'établir s'il existe un risque imminent qui peut justifier l'indication de mesures conservatoires.

27. Or, on ne peut pas sérieusement prétendre se fonder sur la situation existant en octobre 2023 pour prouver l'existence d'un tel risque — qui plus est en faisant abstraction du comportement allemand depuis octobre. Ce risque ne peut être établi que sur la base de la situation qui existe aujourd'hui — avril 2024.

28. Je le redis : la situation actuelle est claire. Le droit allemand impose des conditions strictes aux exportations d'armements. Ce droit a été appliqué, et continuera d'être appliqué de manière rigoureuse par les autorités allemandes, y compris s'agissant d'Israël.

29. Dans sa jurisprudence, la Cour a déjà tenu compte de garanties de droit interne pour exclure l'existence d'un risque imminent de préjudice[83]. Dans la présente affaire, la Cour peut faire confiance aussi bien au droit allemand qu'à la pratique continue des autorités qui sont chargées de l'appliquer : les conditions très sévères qu'ils imposent suffisent pour prévenir le risque de préjudice aux droits en cause en cette affaire.

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[82] CR 2024/15, par. 18, p. 42 (Pellet).

[83] *Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003*, p. 109-110, par. 33-35.

III. Absence d'un risque imminent de préjudice par rapport à l'aide humanitaire

30. J'en viens à l'aide humanitaire. La mesure conservatoire n° 3 sollicitée par le Nicaragua prévoit que « Germany must resume its support and financing of UNRWA in respect of its operations in Gaza »[84]. L'Allemagne — c'est l'argument du Nicaragua —, en suspendant le financement de l'UNRWA, ferait courir un risque imminent de préjudice au droit des Palestiniens de Gaza.

31. L'accusation portée par le Nicaragua est totalement infondée et de mauvaise foi. L'Allemagne n'a violé aucune obligation et n'a pas non plus créé, par son comportement, un risque imminent de préjudice irréparable. Je vais vous le démontrer en trois temps.

32. Premièrement, vous avez entendu parler ce matin de la variété des efforts fournis par l'Allemagne en matière d'assistance humanitaire : comme l'a montré le professeur Tams, cette aide n'a jamais été interrompue, elle se poursuit activement encore aujourd'hui, et l'Allemagne n'a jamais manifesté l'intention de l'interrompre. Cette circonstance est, en soi, suffisante pour se convaincre de l'absence d'un risque imminent imputable à l'Allemagne.

33. Le Nicaragua évite de prendre en considération ces initiatives. Il se concentre uniquement sur la suspension des versements à l'UNRWA. Il est évident, pourtant, que le financement de l'UNRWA n'est pas la seule forme possible d'aide humanitaire. Un État ne peut pas être tenu pour responsable d'un risque immédiat de préjudice s'il fournit une assistance humanitaire à la population par d'autres moyens.

34. Ma deuxième observation est que le Nicaragua part d'un présupposé erroné. Ce n'est pas faute de financement que l'aide humanitaire n'arrive pas à la population palestinienne. Le vrai problème, ce sont les restrictions à l'entrée et à la distribution de l'aide humanitaire. Comme vous l'avez reconnu, « il est urgent d'augmenter la capacité et le nombre de points de passage terrestres permettant d'entrer dans Gaza »[85].

35. Dans ces circonstances, il est inutile d'insister sur la suspension du financement de l'UNRWA. Il est clair également que si les restrictions à l'entrée et à la distribution de l'aide humanitaire font courir un risque imminent aux droits des Palestiniens à Gaza, ce risque n'est pas

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[84] CR 2024/15, par. 39, p. 59 (Argüello Gómez).

[85] *Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël), demande tendant à la modification de l'ordonnance en indication de mesures conservatoires du 26 janvier 2024, ordonnance du 28 mars 2024*, par. 35.

imputable à l'Allemagne, qui n'a évidemment aucun contrôle sur le territoire et a insisté à plusieurs reprises auprès d'Israël, y compris au plus haut niveau, pour que l'entrée de l'aide humanitaire soit facilitée.

36. Ma dernière observation concerne la position de l'Allemagne à l'égard de l'UNRWA. Même si l'on acceptait de se concentrer uniquement sur la décision d'en suspendre le financement, cela ne suffirait pas à conclure qu'il existe un risque imminent de préjudice.

37. Premièrement, la décision de suspendre provisoirement le financement de l'UNRWA n'a eu aucun effet immédiat sur son activité. En effet, selon le plan de financement préétabli, aucun nouveau versement ne devait être effectué par l'Allemagne dans les semaines qui ont suivi le 27 janvier 2024.

38. Deuxièmement, tout en étant consciente de la nécessité de clarifier les graves allégations formulées à l'encontre de quelques membres du personnel de l'UNRWA, l'Allemagne a continué à reconnaître le rôle important de l'agence à Gaza. En témoigne le soutien allemand apporté aux initiatives visant à financer le travail de l'organisation, y compris le soutien au versement, le 1er mars 2024, de 50 millions d'euros par l'Union européenne, dont l'Allemagne est le premier contributeur financier.

39. Troisièmement, malgré les difficultés que la suspension du financement a pu créer pour l'organisation, il n'y a aucun risque immédiat qu'elle cesse ses activités à Gaza. Le commissaire général de l'UNRWA, Philippe Lazzarini, a reconnu, fin mars, que l'organisation dispose de fonds pour fonctionner jusqu'à la fin du mois de mai[86]. De plus, certains États ont décidé de reprendre leur financement. L'Allemagne a elle-même annoncé depuis lors un financement de 45 millions d'euros destiné au travail régional de l'UNRWA en Jordanie, au Liban, en Syrie et en Cisjordanie[87].

IV. Conclusion

40. J'en viens à mes conclusions. Pour que la Cour indique des mesures conservatoires, il doit y avoir un risque réel et imminent de préjudice irréparable, et ce risque doit être apprécié par rapport

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[86] Voir *Reuters*, "UN Palestinian refugee agency says it has funds to operate until end-May", 26 March 2024, accessible à l'adresse suivante : https://www.reuters.com/world/middle-east/un-palestinian-refugee-agency-says-it-has-funds-run-operations-until-end-may-2024-03-26/.

[87] Voir https://www.auswaertiges-amt.de/de/newsroom/unrwa/2650306 (25 mars 2024).

au comportement de l'Allemagne. Sans cela, rien ne justifie de telles mesures ni en matière d'assistance militaire ni en matière d'aide humanitaire. Par conséquent, la Cour doit refuser d'indiquer les mesures demandées par le Nicaragua.

41. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre attention et je vous prie, Monsieur le président, de bien vouloir donner la parole à l'agent de l'Allemagne, M[me] Tania von Uslar-Gleichen.

Le PRÉSIDENT : Je remercie M. Palchetti pour son exposé. I now give the floor back to the Agent of Germany, Ms Tania von Uslar-Gleichen. You have the floor, Madam.

Ms VON USLAR-GLEICHEN:

CONCLUDING STATEMENT

1. Thank you. Mr President, Members of the Court, in concluding this morning's presentation, permit me to reiterate Germany's grave concern for the situation of the Palestinians in Gaza — a concern it shares with Nicaragua, and with this Court. To alleviate the suffering of the Palestinians — alongside ensuring the release of the hostages and security for Israel — are central goals of Germany in the current crisis. Our presentations this morning have highlighted what this currently involves: continuous and close engagement with Israeli and Palestinian leaders in order to increase humanitarian access to Gaza and provide essential humanitarian aid, in order to ensure the adherence to international law and in order to promote a sustainable political solution for peace and security in the region.

2. Mr President, Germany attaches great importance to the sound and consistent administration of justice by this Court. Such administration requires a careful analysis of the evidence and a serious scrutiny of legal claims, and respect of the fundamental principles of international law. This is especially so when a case is rushed to this Court against a State that is accused of being in an accessory role in alleged violations.

3. As Germany's counsel have set out, Nicaragua's request has no basis in law or fact. There are no legal reasons to justify the requested provisional measures. Germany has neither violated the Genocide Convention nor international humanitarian law, neither directly nor indirectly. Our

actions — where we support Israel and where we assist Palestine — fulfil our legal obligations and will continue to do so, mindful of changing conditions on the ground. We have done our utmost to see to it that in the Gaza conflict, to which we ourselves are not a party, the rights and obligations of all sides are brought to bear and are being respected. It is the privilege and the burden of politics to try to best possibly balance the legitimate interests of both the Israeli and the Palestinian peoples within the framework of international law.

4. We stand by Israel's right to security and to self-defence while insisting upon its limits being scrupulously respected. We have done our utmost to use our political leverage to ensure respect for international humanitarian law. We continue to do our utmost to respect our own responsibilities deriving from international humanitarian law and the Genocide Convention. We have done our utmost, and more than many, to provide humanitarian assistance to the Palestinian people in Gaza and we continue to work for a political solution, too, by the way of a negotiated two-State solution.

5. Mr President, Members of the Court, this Great Hall of Justice is not the place for slogans, but for a thorough administration of international justice. With the utmost respect to the Court, Germany is confident that the Court, guided by these considerations and applying the standards developed in its jurisprudence, will dismiss Nicaragua's request for provisional measures.

6. Against this background, I now proceed to read Germany's final submissions:

"The Federal Republic of Germany asks the Court

1) to reject the request for the indication of provisional measures submitted by the Republic of Nicaragua; and

2) to remove from the General List the case introduced by the Republic of Nicaragua on 1 March 2024."

7. This concludes Germany's oral presentation. On behalf of our delegation, I am grateful for your kind attention. I would also like to express my gratitude to the Office of the Registrar and to the interpreters for their work during these proceedings. Thank you.

LE PRÉSIDENT : Je remercie l'agente de l'Allemagne, dont l'exposé conclut la procédure orale consacrée à la demande en indication de mesures conservatoires présentée par le Nicaragua en l'affaire concernant des *Manquements allégués à certaines obligations internationales relativement*

au Territoire palestinien occupé (Nicaragua c. Allemagne). Je tiens à remercier les agents, conseils et avocats du demandeur et de la défenderesse pour leurs interventions.

Conformément à la pratique habituelle, je prierai les agents de bien vouloir rester à la disposition de la Cour pour tout renseignement complémentaire dont celle-ci pourrait avoir besoin. La Cour rendra son ordonnance sur la demande en indication de mesures conservatoires dès que possible. Les Parties seront avisées en temps utile de la date à laquelle elle en donnera lecture en audience publique.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 12 h 5.

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