# The Monetary Gold Principle and States' Obligations Triggered by a Serious Risks of Atrocities Being Committed by Another State: The Cases of the Duty to Prevent Genocide and the Duty to Ensure Respect for IHL

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# The *Monetary Gold* Principle and States' Obligations Triggered by a Serious Risks of Atrocities Being Committed by Another State: The Cases of the Duty to Prevent Genocide and the Duty to Ensure Respect for IHL

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**Key Words**

Duty to prevent genocide – duty to ensure respect for international humanitarian law – Monetary Gold Principle – International Court of Justice

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Admettons que le « principe de l'*Or monétaire* » soit autre chose qu'une invention prétorienne conjoncturelle et, sinon superflue, du moins clairement sans pertinence en la présente espèce, et prenons-le sérieusement.[1]

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.[2]

Between the concept of decide, judicially, on third States rights or obligations and the fact that a legal interest of the third State may be affected or touched by the decision of the Court in the case as between the parties there is an abyss which should not be crossed if one desires to remain within the system of the ICJ Statute.[3]

As a matter of general principle, States act at their own peril.[4]

## 1. Introduction

### *1.1 Setting the Scene*

This article analyses whether it is possible to bring proceedings before the International Court of Justice (ICJ) against a state for the alleged violation of some obligations that are triggered by a serious risk that another state is committing or is about to commit some atrocities, without latter state participating in the proceedings. The article focuses on the situation in which a state is asked to respond to whether it has complied with obligations such as the duty to prevent genocide, the duty to prevent crimes against humanity, and the duty to ensure respect for international humanitarian law (IHL) in relation to the conduct of another state (here sometimes referred to as the 'third state'). One could wonder whether ascertaining that a state has undertaken measures to ensure that another state does not violate IHL or has prevented the other state from committing genocide or crimes against humanity may require that the latter state is a party to the proceedings under the so-called Monetary

[1] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, p. 39, para. 10 (Pellet).
[2] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, p. 29, para. 20 (Wordsworth).
[3] Torres Bernárdez, "Reply to Tentative Suggestions for a Draft Resolution (6 February 1998)", 68(1) *Yearbook of the Institute of International Law (YBIIL)* (1998) p. 196.
[4] Vaughan Lowe, 'Responsibility for the Conduct of Other States', 101 *Journal of International Law and Diplomacy* (2002) p. 10.

Gold Principle (MGP) or indispensable party principle.[5] The MGP is a procedural bar to the exercise of contentious jurisdiction by international courts, in particular the ICJ, according which, the ICJ should dismiss a case as inadmissible when, to settle the dispute submitted by the parties, the Court should first rule on the legal position of a state that is not a party to the proceedings.[6] So, when a state is brought before the ICJ with allegations of violations of the duty to prevent genocide, the duty to prevent crimes against humanity, and the duty to ensure respect for IHL, should the Court declare the case to be inadmissible under the MGP if the state allegedly about to commit or committing genocide, crimes against humanity, or IHL violations is not a party to the proceedings?

To the best knowledge of this author, the question of whether such cases are admissible under the MGP has never been discussed by the ICJ or any other international tribunal. However, in February 2024, Nicaragua applied to the ICJ alleging, *inter alia*, that Germany is violating its obligations to prevent genocide and to ensure respect for IHL in relation to the ongoing Israeli military operations in the Gaza Strip (*Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (hereinafter *Nicaragua v. Germany* case)).[7] One may wonder whether the fact that Israel is not a party to the case would prevent the Court from exercising its jurisdiction under the MGP – a point that has been discussed by both states in their pleadings at the provisional measures stage.[8] Given that the order on provisional measures adopted in April 2024 did non entertain the question[9] because the measures were rejected for lack of urgency and of risk of irreparable harm,[10] likely the issue will be discussed at the preliminary objections stage. However, this article analyses this topic from a broader perspective and does not offer specific commentary on this pending case.

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[5] The two expressions are employed here as synonyms even though this is contested by some commentators. See, e.g., Torres Bernárdez, "L'intervention dans la procédure de la Cour internationale de Justice", 256 *Recueil des Cours* (1995) p. 255.

[6] See below, section 2.

[7] E.g. *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures, 1 March 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf, paras. 3, 12, 15-17, 31, 49, 66, 67, 73, 88.

[8] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, pp. 38-40 (Pellet); *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, pp. 24-30 (Wordsworth).

[9] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, 30 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240430-ord-01-00-en.pdf (with no reference to the MGP).

[10] Ibid., Separate Opinion of Vice-President Sebutinde, para. 26; ibid., Separate Opinion of Judge Iwasawa, para. 15.

The contribution to knowledge of this article is twofold. First, it sheds light on a complex theoretical question pertaining to the settlement of international disputes before international courts and tribunals, particularly the ICJ. Second, it may assist international courts and tribunals, as well as litigating states, in specific pending or future proceedings. The results of this research enhance the perception that, contrary to what may have been thought in the past,[11] obligations pertaining to atrocities committed by other states are justiciable before competent international courts. Accordingly, it is necessary to shed light on the applicability of the MGP in relation to these obligations in general, even beyond its relevance to any specific case.

### *1.2 Scope and Structure*

To circumscribe the scope of this article, attention only focuses on legal obligations pertaining to state responsibility whether atrocities are committed or are at serious risk to be committed by another state. Although the breadth of the term atrocities is widely debated, this article focuses here on the duty to prevent genocide, the the duty to ensure respect for IHL, and the duty to prevent crimes against humanity, since genocide, crimes against humanity, and war crimes (that is, certain serious IHL violations) are usually considered the core content of atrocities.[12] However, the duty of a state to act in relation to crimes against humanity is not included in any international law treaty, but rather, some sectorial treaties on some crimes against humanity include provisions on prevention.[13] The International Law Commission (ILC)'s Draft Articles on Prevention and Punishment of Crimes Against Humanity (Draft Articles on CAH) include a duty to prevent crimes against humanity that might be relevant for the present research,[14] but, as explained below,[15] at the moment, the Draft Articles are worded in a way so as to limit significantly the possibility that such a duty could be applied in relation to actions committed by another state. Accordingly, the analysis here is centred mainly on to the applicability of the MGP to the duty to ensure respect for IHL and the duty to prevent genocide, the only clearly binding rules in the field. Nevertheless, the conclusions of this research might be relevant in relation to other rules of international law demanding that a state is not a mere

[11] Monica Hakimi, "State Bystander Responsibility", 21 *EJIL* (2010) p. 363.
[12] This is the approach of UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (2014).
[13] See e.g. Art. IV of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, and Art. 2(1) the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85.
[14] Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, *Y.B. ILC* (2019), vol. II, Part 2, Art. 4.
[15] See below, section 5.

bystander in relation to the conduct of another state if it is demonstrated that the relevant obligations have a similar nature.[16]

This article proceeds as follows. First, in wide brushstrokes, it describes the MGP as presented in international case law, with particular reference to its application in ICJ proceedings (section 2). Then, the article delineates the duties to ensure respect for IHL in its external dimension, analysing its nature in light of the theory of international obligations and the factors that trigger its applicability (section 3). A similar analysis is conducted in parallel in relation to the extraterritorial duty to prevent genocide (section 4). These obligations are examined in light of the usual categories employed by international case law to classify international obligations: on the one hand, primary versus secondary rules; on the other, obligations of conduct, obligations of result, and obligations of prevention. Section 5 briefly explains why the duty to prevent crimes against humanity, as currently codified by the ILC, does not have a significant external dimension and whether it is unlikely that any case where the MGP could be invoked would arise absent a binding instrument. The article contends that the MGP does not apply if a state is brought before the ICJ for having violated these duties in relation to the conduct of another state that is not a party to those proceedings because these duties are triggered by the awareness of the existence of a serious risk that the third state is violating or is about to violate international law: if a claim before the ICJ is drafted in relation to the existence of such an awareness, the Court would not have to assess whether the third state has violated IHL or has committed genocide (section 6). In doing so, the article affirms that this conclusion stands also in relation to the duty to prevent genocide, notwithstanding the 2007 decision in the case on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereinafter: *Bosnia v. Serbia* case), where the ICJ held that the occurrence of a genocide is a *condicio sine qua non* to consider that another state is responsible for the violation of the duty to prevent a genocide:[17] respectfully, this article criticises the soundness of this argument that would make the MGP applicable to the obligation to prevent genocide, arguing that it is not in line with the characterisation of the duty to prevent genocide as an obligation of conduct governed by due diligence and with the Court's decision in the *Corfu Channel* case[18] (section 7(c)).

[16] E.g. the duty not to expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture under Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) p. 43ff., para. 431 [hereinafter *Bosnia v. Serbia*].

[18] *Corfu Channel Case (UK v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949) p. 4ff.

### *1.3 Some Additional Caveats*

Further caveats are needed to accompany the reader through this analysis. First, this article is premised on a rather classical understanding on classifications of international obligations, and on the belief that the classifications of obligations under international law is a pivotal factor in assessing the conditions under which a state incurs international responsibility. Indeed, international lawyers have repeatedly affirmed that international law needs a theory of international obligations.[19] Clearly, the very premises of this research – let alone its conclusions – might be unpalatable for those readers who do not accept the classification of international obligations that is proposed here or who consider that the classification of international obligations is not a decisive factor because each obligation should be analysed on a case-by-case basis. This author considers that the application of a well-accepted theory of international obligations, including in the field of the classification of obligations, is a useful tool that might enhance the predictability of international law, dispelling serious risks of 'ad-hocism'.[20] Undoubtedly, reasonable observers may disagree.

Second, this article avoids exploring some solutions that, albeit interesting, appear to this author as dead-ends and out of line with *lex lata*. Just to mention few examples, there is a significant stream of scholarship advocating for abandoning the MGP and the fundamental nature of consent to ICJ jurisdiction.[21] At the present stage, respectfully, it looks unlikely that the Court would abandon the MGP, and thus this article accepts the MGP as part of the applicable law before the Court. Similarly, this article resists the temptation to mention the *jus cogens* nature of the relevant obligations – as well the fact that they may produce obligations *erga omnes (partes)* – as a reason not to apply the MGP: the Court has clarified that the alleged *jus cogens* nature of an obligation and its *erga omnes (partes)* character are totally irrelevant in relation to the establishment and exercise of the Court's jurisdiction[22] (a conclusion that resonates with the Court's distinction between procedural and

[19] Jean Combacau, "Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse" in *Le droit international: unité et diversité: melanges offerts à Paul Reuter* (1981) p. 204ff. On this topic, see, recently, Pierre d'Argent, "Les obligations internationals", 417 *Recueil des Cours* (2021) p. 17ff.; Cezary Mik, *Theory of Obligations in International Law* (2024).

[20] On the dangers of 'ad-hocism' in international law, albeit in a different context, see Andrea Bianchi, "Ad-hocism and the Rule of Law", 13 EJIL (2002) p. 263ff.

[21] See the different arguments by Elihu Lauterpacht, "Principles of Procedure in International Litigation", 345 *Recueil des Cours* (2009) pp. 465-479; Zachary Mollengarden and Noam Zamir, "The Monetary Gold Principle: Back to Basics', 115 *AJIL* (2021) p. 41ff.; Tom Sparks, "Reassessing State Consent to Jurisdiction: The Indispensable Third Party Principle before the ICJ", 91 *Nordic Journal of International Law* (2022) p. 216 ff.

[22] *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports (1995) p. 90, para. 29; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the*

substantive rules in subsequent cases).[23] In this field, it looks unlikely that *jus cogens* may work its 'magic',[24] dispelling the application of the MGP.

Third, as mentioned, this is not an article that aims at discussing the case launched by Nicaragua against Germany,[25] but rather, it only focuses on a theoretical problem: the relevance (if any) of the MGP when a state is alleged before the ICJ to have violated its duty to prevent another state from committing genocide or crimes against humanity or its duty to ensure respect for IHL in relation to the conduct of that state. Fourth, since the different components of this puzzle – the MGP, the duty to ensure respect for IHL, the duty to prevent genocide, the duty to prevent crimes against humanity, the classification of international obligations – have received significant attention by scholars, they are discussed only to the extent that is necessary to clarify how they interact to answer the question at hand. Finally, although the MGP has been applied before different international courts and tribunals,[26] it is taken into account here primarily in relation to the ICJ.

## 2. The *Monetary Gold* Principle in a Nutshell

As mentioned, the MGP is a procedural bar to the exercise of contentious jurisdiction by international courts that is routinely discussed in proceedings before the ICJ and other international courts and tribunals.[27] According to the MGP, the ICJ should not exercise its jurisdiction when, to

*Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, ICJ Reports (2006) p. 6ff., paras. 64 and 125.

[23] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) p. 99ff., para. 93.

[24] To borrow an expression by Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*", 19 EJIL (2008) p. 491 ff.

[25] For some commentaries, see Alexander Wentker and Robert Stendel, "Conspicuously Absent: The Indispensable Third Party Principle at the ICJ in *Nicaragua v. Germany*", *Verfassungsblog* (13 March 2024), available at https://verfassungsblog.de/conspicuously-absent/; Abhishek Trivedi, "Monetary Gold Principle and the Case of *Nicaragua v. Germany*", 23 *Chinese Journal of International Law* (2024) p. 387ff.

[26] See generally Beatrice I. Bonafé, "Indispensable Party", in *Max Planck Encyclopaedia of International Procedural Law Online (MPEIPL)*, paras. 15-30 (February 2018); Ori Pomson, "Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?", 10 *Journal of International Disputes Settlement (JIDS)* (2019) p. 88ff.; Brian McGarry and Nasim Zargarinejad, "All That Glitters Is Not Monetary Gold: Indispensable Parties and Public Interest Litigation before International Tribunals" in J. Bendel & Y. Suedi (eds), *Public Interest Litigation in International Law* (2024) p. 163.

[27] On this principle, see, e.g., Carlos Jiménez Piernas, "Efectos explícitos e implícitos de la doctrina del oro amonedado", in *I Pacis Artes: Obra Homenaje al Profesor Julio D. González Campos* (2005) p. 291ff.; Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. II (2006) pp. 539-547; Juan José Quintana, *Litigation at the International Court of Justice* (2015) pp.

settle the dispute submitted by the parties, it should first rule on the legal position of a third state that is not a party to the proceedings.[28] The MGP has received significant attention in the last two decades and, although some scholars doubt the compatibility of this rule with the increasingly multilateral character of international disputes and consider that it should be abandoned, it is still invoked by states and considered by the ICJ and other international tribunals as part of the existing legal framework.[29]

There are different views on the rationale underpining the MGP:[30] whereas some authors consider that it mainly protects the interests of states that are not parties to the proceedings,[31] others emphasise the fact that it protects the integrity of the judicial function.[32] In practice, the MGP serves both purposes, striking a balance between the interests of the parties to a dispute and the interests of third parties absent from the proceedings, while protecting the integrity of the exercise of a court's judicial function as well.[33] Its legal nature is also debated, with views varying from considering it a general principle or a rule of customary international law.[34] Some authors have also discussed the MGP in comparison with the power of the Court to decline to exercise its advisory function when there is a risk to circumvent the lack of state consent to the Court's jurisdiction.[35] In the system of the ICJ, the MGP is usually treated as an admissibility issue barring the exercise of jurisdiction rather than as an issue affecting the very existence of the jurisdiction.[36]

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911-924; Bonafé, *supra* note 26; Martins Paparinskis, "Revisiting the Indispensable Third Party Principle", 103 *Rivista di Diritto Internazionale (RDI)* (2020) p. 49ff.

[28] E.g., Bonafé, *supra* note 26, para. 3. See also Dapo Akande, "Introduction to the Symposium on Zachary Mollengarden & Noam Zamir 'The Monetary Gold Principle: Back to Basics'", 115 *AJIL Unbound* (2021) p. 140.

[29] C.F. Amerasinghe, *Jurisdiction of International Tribunals* (2003) p. 235; Rosenne, *supra* note 27, p. 546; Institut de Droit International, "Berlin session, Res. 24 August 1999", 68(2) *YBIIL* (1988) p. 377, paras. 19-21. For scholarly support to the MGP, see, e.g., Martins Paparinskis, "Long Live Monetary Gold *Terms and Conditions Apply", 115 *AJIL Unbound* (2021) p. 154ff.

[30] On the difficulties in identifying a rationale behind the MGP, see Pomson, *supra* note 26, pp. 109-117.

[31] E.g., Bonafé, *supra* note 26, para. 1; McGarry and Zargarinejad, *supra* note 26, p. 163.

[32] Emmanuelle Tourme-Jouannet, "L'impossible protection des droits du tiers par la Cour internationale de Justice dans les affaires de délimitation maritime" in D.-H. Anderson et als. (eds), *La mer et son droit: Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (2003) p. 321.

[33] Z. Crespi Reghizzi, *L'intervento 'come non parte' nel processo davanti alla Corte Internazionale di Giustizia* (2017), at 86-90.

[34] See e.g. the discussion in Pomson, *supra* note 26, pp. 117-124.

[35] See e.g. Sparks, *supra* note 21; McGarry and Zargarinejad, *supra* note 26, pp. 160-163.

[36] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* (Preliminary Objections), Judgment, 6 April 2023, para. 64; Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (2016) pp. 139-140. For a more nuanced approach, see Bonafé, *supra* note 26, paras. 36-44; Paparinskis, "Revisiting", *supra* note 27, pp. 71-76.

The MGP takes its name from the first case in which it was fully articulated, the 1954 *Case of the Monetary Gold Removed from Rome in 1943*.[37] In this decision, the ICJ refused to exercise its jurisdiction because the application 'centre[d] around a claim by Italy against Albania […] for the redress of an international wrong which, according to Italy, Albania has committed against her'.[38] The Court argued that to answer the principal question on whether 'Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her'.[39] Accordingly, since these questions 'relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy', Albania is an indispensable party and its consent is necessary for the exercise of the Court's jurisdiction.[40]

Subsequently, the principle was successfully invoked in the 1995 *East Timor (Portugal v. Australia)* case, in the following terms:

> the effects of the judgment requested by Portugal would amount to *a determination that Indonesia's entry into and continued presence in East Timor are unlawful* and that, as a consequence, it *does not have the treaty-making power* in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute *the very subject-matter* of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter [to the principle].[41]

In this case, the Court's approach to the applicability of the MGP is slightly different. While in the *Monetary Gold* case the principle barred the exercise of the ICJ's jurisdiction when the third state's legal position was the very subject-matter of the dispute, in the *East Timor* case, the exercise of jurisdiction is barred even if the question of the ascertainment of another state's jurisdiction is incidental. The two situations are considered as comparable by the Court because, in both cases, the ascertainment of the third state responsibility is a necessary step in order to assess the principal claim.[42]

These are the only two cases in which the ICJ has refrained from exercising its jurisdiction because of the MGP. In light of them, it is possible to argue that the MGP applies only if 'the legal

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[37] *Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and USA)*, Judgment, 15 June 1954, ICJ Reports (1954) p. 19ff.
[38] Ibid., para. 32.
[39] Ibid.
[40] Ibid.
[41] *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports (1995) p. 90ff., para. 34.
[42] Lucius Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *Recueil des Cours* (2001) p. 410.

interest of a state not a party to the proceedings should not only be affected by the decision, but should form the very subject-matter of the decision'.[43] This can happen incidentally if 'a third state's legal interests are engaged by a necessary incidental question of the case between the actual parties'.[44] Accordingly, the way in which claims by the applicant before the ICJ are structured is key in determining whether the MGP applies or not.[45]

The MGP presupposes a bilateral conception of international litigation that is increasingly challenged by the multilateral reality of most issues at the centre of disputes before the ICJ.[46] In cases where the responsibility of two or more states are at stake, the MGP does not apply as long as the assessment of the responsibility of the respondent is independent from the assessment of the responsibility of the third State.[47] This conclusion is supported by the very ICJ judicial decisions, where the ICJ has accepted considering claims brought against only one state as long as each claim for responsibility could be assessed separately.

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[43] Hanqin Xue, *Jurisdiction of the International Court of Justice* (2017) p. 98. See also Bola Ajibola, "The International Court of Justice and Absent Third States", 4 *African Yearbook of International Law* (1996) p. 95; Alexander Orakhelashvili, "The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: From *Monetary Gold* to *East Timor* and Beyond", 2 *JIDS* (2011) p. 382; John Merrills and Eric De Brabandere, *Merrills' International Dispute Settlement* (7th ed., 2022) p. 203.

[44] Tobias Thienel, "Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle", 54 *German Yearbook of International Law (GYIL)* (2014) p. 327. See also *Larsen v. Hawaiian Kingdom*, Procedural Order No. 3, 17 July 2020, para. 13.

[45] See Torres Bernárdez, *Reply*, *supra* note 3, p. 196; Crespi Reghizzi, *supra* note 33, p. 102; Pierre D'Argent, "The Monetary Gold Principle: A Matter of Submissions", 115 *AJIL Unbound* (2021) p. 150. Correctly, counsel for Germany before the ICJ focused on the emphasis given by the Nicaraguan application to actual violations by Israel to claim that the MGP is engaged (see *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, pp. 26-27, paras. 13-14 (Wordsworth)). See also *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, Separate Opinion of Vice-President Sebutinde, paras. 13-23.

[46] See, e.g., Malgosia Fitzmaurice, "The International Court of Justice and the Environment", 4 *Non-State Actors and International Law* (2004) pp. 196-197.

[47] Samantha Besson, "La pluralité d'Etats responsables: vers une solidarité internationale?", 11 *Swiss Review of International and European Law* (2007) p. 28; Karel Wellens, "Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections" in R. Wolfrum and C. Kojima (eds.), *Solidarity: A Structural Principle of International Law* (2010) pp. 25-26; Andre Nollkaemper, "Issues of Shared Responsibility before the International Court of Justice", in E. Rieter and H. de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2012) p. 212; Annemarieke Vermeer-Künzli, "Invocation of Responsibility" in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) p. 275; Andre Nollkaemper et als., 'Guiding Principles on Shared Responsibility in International Law', 31 *EJIL* (2020) p. 65.

For instance, in the *Corfu Channel* case, the ICJ ascertained that Albania has violated its 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[48] The case was triggered by the explosion of some mines in Albanian waters that damaged some British ships passing through the Corfu Channel. Although the mines were allegedly laid by Yugoslavia – a state that was not a party in the proceedings – the Court did not consider that Yugoslavia was an indispensable party, but rather, it authorised Albania to produce some documents. Although the Court 'did not refuse to receive these documents […] Yugoslavia's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court [found] it unnecessary to express an opinion upon their probative value.'[49] In other words, the Court did not consider Yugoslavia an indispensable party, but it was cautious in the evaluation of facts pertaining to Yugoslavia without its participation. According to a prominent observer, the difference between the MGP and the ICJ's stance in the *Corfu Channel* case rests in the fact that in the latter 'there were no direct allegations in the submissions that the international responsibility of Yugoslavia was in some way engaged, and that there was no claim against that country'.[50] For this reason, taking into account that Albania's responsibility could be assessed autonomously from any other state's responsibility, the MGP does not apply.[51]

Likewise, in the 1984 decision in the *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* case (hereinafter: *Nicaragua v. USA* case), the simple fact that a third state's interests may be affected by the decision did not make that state an indispensable party.[52] Rather, the Court considered that it was possible to separate the legal assessment of the US state responsibility from the assessment of responsibility upon Costa Rica and El Salvador: '[t]here is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties"

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[48] *Corfu Channel Case*, *supra* note 18.
[49] Ibid., p. 17. See also Chinkin, *supra* note 66, p. 199.
[50] Rosenne, *Intervention*, *supra* note 66, p. 173 (emphasis in the original). This is also the view expressed by Nicaragua in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, pp. 14-16 (Pellet).
[51] Olivier Corten and Pierre Klein, "The Limits of Complicity as a Ground for Responsibility" in K. Bannelier, Th. Christakis and S. Heathcote (eds.), *The ICJ and the Evolution of International Law* (2012) p. 324; Paparinskis, "Revisiting", *supra* note 27, pp. 81-82; Martins Paparinskis, "Procedural Aspects of Shared Responsibility in the International Court of Justice", 4 *JIDS* (2013) pp. 309-310; Anna Liguori, "Overlap Between Complicity and Positive Obligations: What Advantages in Resorting to Positive Obligations in Case of Partnered Operations?", 27 *Journal of Conflict & Security Law* (*JCSL*) (2022) p. 237 and p. 242.
[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, 27 June 1986, ICJ Reports (1986) p. 14ff., para. 88.

rule of the kind argued for by the United States,' according to which a mere legal interest of another state would have triggered the application of the MGP.[53]

Similarly, in the *Certain Phosphate Lands (Nauru v. Australia)* case, the ICJ considered that the MGP did not apply because Australia's international responsibility was severable from that of New Zealand and the UK, even though the allegedly wrongful act was committed through an 'Administrative Authority' created by the three governments jointly.[54] In the Court's view, 'a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru *might well have implications for the legal situation of the two other States concerned*, but 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.'[55] In other words, if it is possible to separate the assessment of state responsibility, the MGP does not apply even if ascertaining the responsibility of one state has significant legal implications on the perceptions of legality of the conduct by the other state. Subsequent cases have confirmed this conclusion.[56]

According to the ILC, an example of joint responsibility that cannot be separated and that makes the MGP applicable is, the rule codified by Article 16 of the 2001 ILC's Articles on State Responsibility (ARSIWA).[57] Under this provision, which is usually discussed by scholars under the notion of 'complicity',[58] '[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act

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[53] Ibid.

[54] *Certain Phosphate Lands (Nauru v. Australia)* (Preliminary Objections), Judgment, 26 June 1992, ICJ Reports (1992) p. 240ff., paras. 49-55.

[55] Ibid., para. 55.

[56] *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) p. 168ff., para. 204; *Application of the Interim Accord of 13 September 1995 (FYRM v. Greece)*, Judgment, 5 December 2011, ICJ Reports (2011) p. 644ff., para. 44; *Arbitral Award of 3 October 1899*, *supra* note 36, para. 107. See also *Oil Platforms (Iran v. USA)*, Judgment, Judgment, 6 November 2003, ICJ Reports (2023) p. 16ff., Separate Opinion of Judge Simma, paras. 79-82.

[57] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1 (Nov. 2001), repr. with commentaries, II-2 *Yearbook of the International Law Commission (Y.B. ILC)* (2008), Art. 16 [hereinafter: ARSIWA with Commentaries).

[58] On the relevant debate, see generally Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011); Olivier Corten, "La 'complicité' dans le droit de la responsabilité internationale: un concept inutile?", 57 *Annuaire Français de Droit International (AFDI)* (2011) p. 77; Miles Jackson, *Complicity in International Law* (2015); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016); Giuseppe Puma, *Complicità di Stati nell'illecito internazionale* (2018).

would be internationally wrongful if committed by that State.'[59] The provision clearly affirms that the state that provide the aid or assistance knows that a wrongful act is committed, thus requiring, in the case of proceedings, to solve preliminarily the issue whether the aided or assisted state has committed the wrongful act. According to the ILC's Commentary, the MGP applies to cases pertaining to Article 16 because 'it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, inter alia, on the wrongfulness of the conduct of the latter.'[60] Whether the ILC's concerns about the application of the MGP to responsibility under Article 16 are correct has not been tested by judicial practice yet. Quite curiously, the only case that bordered on this issue was decided by the International Tribunal for the Law of the Sea (ITLOS): in the *M/V Nostar (Panama v. Italy)* case, correctly, the Tribunal pointed out that in cases of providing assistance to or abetting a wrongful act, the MGP does not make inadmissible a claim against the state that is assisted (Italy, in those proceedings) only because the assisting state (Spain) is absent.[61] However, the question whether the claim could have been brought against Spain without Italy – the one foreseen by the ILC – has not been addressed yet.

All in all, the MGP is not a remedy to shield a state that has not consented to the ICJ jurisdiction from any indirect negative effect of a decision rendered in proceedings where that state is not present. As noted, 'the Court's doctrine can be summed up as follows: "protection against the fact of itself being the subject of a truly necessary prior decision, yes"; "protection against any (col)lateral effects of the Court's decision, no'.[62] Accordingly, '[i]t is a fair point to argue that if the Court accepts the responsibility alleged against the respondent, that strongly colours the de facto position of the other [state]. But this is fact, not law.'[63] Indeed, since the MGP is a bar to the exercise of jurisdiction by the ICJ, which is one of the main tasks demanded of the Court by its Statute, it has been considered as an exceptional occurrence, as a principle that should be interpreted narrowly.[64] States that feel they

[59] See ARSIWA with Commentary, *supra* note 57, Art. 16.
[60] Ibid., p. 67, para. 11. See, also, Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, A/CN.4/498 and Add.1-4 (1999), para. 176. See generally Aust, *Complicity and the Law*, *supra* note 58, pp. 305-311; Corten, *supra* note 58, p. 78; Puma, *supra* note 58, pp. 20-25; Chiara Venturini, "Complicità omissiva tra Stati per violazione di obblighi positivi", 106 *RDI* (2023) p. 967.
[61] *The M/V Norstar Case (Panama v. Italy)*, Preliminary Objections, Judgment, 4 November 2016, ITLOS Reports (2016) paras. 164-168. See the remarks by McGarry and Zargarinejad, *supra* note 26, pp. 148-149.
[62] Robert Kolb, *The International Court of Justice* (2013) pp. 570-571.
[63] Ibid., p. 572. See also ibid., p. 574.
[64] See *Oil Platforms (Iran v. USA)*, *supra* note 56, Separate Opinion of Judge Simma, para. 81. See also Bonafé, *supra* note 26, para. 45.

may be affected are free to institute separate proceedings, or to employ the procedure of intervention to participate in the proceedings.[65] The requirements for intervention under Article 62 of the ICJ Statute – that is, the existence of 'an interest of a legal nature which may be affected by the decision in the case'[66] – are 'less stringent' than those that make the MGP applicable.[67] If the absent state decides not to intervene, the rule on *res judicata* in Article 59 of the ICJ Statute, according to which '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case', protects the absent party from the negative effects of the decision.

Finally, it should be noted that one exception to the applicability of the MGP has been envisaged in some judicial decisions in relation to an assessment of responsibility that a tribunal can consider to be 'a given' even without the participation of the concerned state. Irrespective of the uncertainness on the definition of what is a 'given',[68] it should be noted that the existence of such 'givens' is confirmed by international judicial decisions. For instance, in the *Larsen v. Hawaiian Kingdom* case, an arbitral tribunal affirmed that the MGP does not apply if 'the legal finding against an absent third party could be taken as a 'given' (for example, by reason of an authoritative decision of the Security Council on the point)'.[69] As suggested in an individual opinion by an ICJ judge, if a circumstance is 'common knowledge' and there is 'no need for additional evidence', then the MGP does not apply.[70] In 2021, a Special Chamber of the ITLOS concluded that the illegality of the UK's control over the Chagos Islands, ascertained in the *Chagos* advisory opinion[71] by the ICJ, makes irrelevant the

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[65] Ibid.

[66] On this topic, see, e.g., Angelo Davì, *L'intervento davanti alla Corte Internazionale di Giustizia* (1984); Giovanni Cellamare, *Le forme di intervento nel processo dinanzi alla Corte internazionale di giustizia* (1991); Torres Bernárdez, *L'intervention*, *supra* note 5; Shabtai Rosenne, *Intervention in the International Court of Justice* (1993); Christine Chinkin, *Third Parties in International Law* (1993) pp. 147-217; Beatrice I. Bonafè, *La Protezione degli interessi di stati terzi davanti alla Corte Internazionale di Giustizia* (2014); Crespi Reghizzi, *supra* note 33.

[67] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Reports (1990) p. 92ff., para. 56. See also Alina Miron and Christine Chinkin, "Article 62" in A. Zimmermann et als. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed., 2019) pp. 1699-1670.

[68] Aust, *Complicity and the Law*, *supra* note 58, p. 309; Paparinskis, "Procedural Aspects", *supra* note 51, p. 312 and p. 316; Paparinskis, "Revisiting", *supra* note 27, p. 81.

[69] *Larsen v. Hawaiian Kingdom*, Award, 5 February 2001, para. 11.24 (emphasis added). See also *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, Dissenting Opinion of Judge ad-hoc Al-Khasawneh, para. 12 (with reference to an order on provisional measures adopted in another case as a prior determination that would render the MGP inapplicable). See also Crespi Reghizzi, *supra* note 33, pp. 106-107; Bonafé, *supra* note 26, para. 48.

[70] *Oil Platforms*, *supra* note 56, Separate Opinion of Judge Simma, para. 81.

[71] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion), 25 February 2019, ICJ Reports (2019) p. 95ff.

participation of the UK in proceedings on the delimitation of maritime boundaries between Mauritius and Maldives,[72] suggesting that the ICJ's advisory opinion should be treated as a 'given'.[73] Similarly, some commentators have argued that the ICJ's prima facie findings embodied in the orders on provisional measures in the *South Africa v. Israel* case[74] may be used as 'givens' in the *Nicaragua v. Germany* case,[75] even if they were the product of a prima facie assessment at the provisional measures stage. Following the ITLOS' case law, it should be possible to consider as 'givens' in the *Nicaragua v. Germany* case the conclusions on IHL violations reached by the ICJ in the 2004 and 2024 advisory opinions,[76] dispelling the possibility of invoking the MGP.[77] Indeed, in these two advisory opinions, and the *Chagos* advisory opinion as well, the Court described consequences for all states in the world in light of the serious violations of international law ascertained.[78]

In light of this analysis, the following sections discuss whether the duty to ensure respect for IHL, the duty to prevent genocide, and the duty to prevent crimes against humanity have an external dimension that requires an ascertainment of the legality of the conduct of a third state, directly or incidentally, or whether the responsibilities of the concerned states are severable. To explore these points, it is necessary to explore the nature and content of the relevant primary obligations.

## 3. The External Dimension of the Duty to Ensure Respect for IHL

### *3.1 The Content of the Duty Ensure Respect for IHL*

[72] ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment, ITLOS Reports (2021) p. 17ff., paras. 99, pp. 247-248.
[73] McGarry and Zargarinejad, *supra* note 26, pp. 149-150.
[74] *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; Order of 28 March 2024; Order of 24 May 2024.
[75] See the discussion in Trivedi, *supra* note 25, pp. 395-396; Dylan Jesse Andrian, 'Corroded Monetary Gold (Part II): A Nicaragua-Germany-Israel Boogaloo', *Opinio Juris*, 10 June 2024, https://opiniojuris.org/2024/06/10/corroded-monetary-gold-a-nicaragua-germany-israel-boogaloo/.
[76] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, ICJ Reports (2004) p. 136ff.; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion), 19 July 2024.
[77] Andrian, *supra* note 75 (with reference to the 2004 opinion only).
[78] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 76, paras. 158-159; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 71, paras. 180 and 182; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 76, paras. 278-279.

IHL differentiates between the 'duty to respect' IHL and the 'duty to ensure respect' for IHL. Article 1 Common to the Four 1949 Geneva Conventions ('Common Article 1') states that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'[79] Similarly, Article 1(1) of the 1977 First Additional Protocol affirms that '[t]he High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.'[80] The two components are usually understood as embodying two different obligations.[81]

The duty to respect applies to conduct that is attributable to a state party to the relevant instruments.[82] Since states are bound by IHL, all the individuals whose conduct is attributable to the state must comply with IHL. On the other hand, the duty to 'ensure respect' covers conduct that is not attributable to the state under the law of international responsibility.[83] According to the ITLOS, '[t]he expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a state liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the state'.[84] This duty applies to the negative and positive measures that the state must undertake

[79] Art. 1 common to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

[80] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 1(1), 8 June 1977, 1125 UNTS 3.

[81] Luigi Condorelli and Laurence Boisson De Chazournes, "Quelques remarques à propos de l'obligation des États de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances»" in Ch. Swinarski (ed), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (1984) pp. 22-24; Paolo Benvenuti, "Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligation of Third States to Ensure Respect for International Humanitarian Law" 1 *Yearbook of the International Institute of Humanitarian Law* (1989-90) p. 27ff.; Knut Dörmann and José Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations", 96 *International Review of the Red Cross (IRRC)* (2014) p. 707ff.; Robin Geiβ, "The Obligation to Respect and to Ensure Respect for the Conventions" in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (2015) p. 111ff.

[82] Marco Longobardo, "The Relevance of the Concept of Due Diligence for International Humanitarian Law", 37 *Wisconsin International Law Journal* (2019) pp. 56-57.

[83] Ibid., p. 57.

[84] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), 1 February 2011, ITLOS Reports (2011) p. 10ff., para. 112.

in relation to the conduct of individuals who are not members of its armed forces,[85] including members of armed groups without affiliation to the state.[86] This is commonly referred to as the internal dimension and, usually, it is accepted without controversy.

More contentious is whether the duty to ensure respect embodies an external dimension, that is, whether it imposes obligations upon states in relation to the conduct of other states. The prevailing view is that such an external dimension exists. The ICJ, in 2004, stated that 'every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.[87] In 2024, this conclusion was confirmed by the Court in the order on provisional measures in the *Nicaragua v. Germany* case and in the advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.[88] This has been the longstanding position of the International Committee of the Red Cross (ICRC) as expressed in the 2005 ICRC Customary IHL Study,[89] the 1958 ICRC Commentary to the Four Geneva Conventions,[90] and the 2016 Updated ICRC Commentary to the First Geneva Convention.[91]

States have expressed support for the external dimension of the duty to ensure respect for IHL in a number of multilateral fora. The external dimension has been routinely reiterated by the UN General Assembly.[92] States have supported the existence of such an external dimension on the occasion of

[85] Marco Sassòli, "State Responsibility for Violations of International Humanitarian Law", 84 *IRRC* (2002) p. 412; Robert Kolb, "Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'article 1 commun des Conventions de Genève de 1949", 46 *Revue Belge de Droit International* (2013) p. 517ff.; Timo Koivurova and Krittika Singh, 'Due Diligence', in *MPEPIL* (2022), para. 22.
[86] Dieter Fleck, "International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law", 11 *JCSL* (2006) pp. 187-188; International Law Association, Study Group on Due Diligence in International Law, First Report (7 March 2014) pp. 13-14.
[87] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 76, para. 158.
[88] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, para. 23; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion), 19 July 2024, para. 279.
[89] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, vol. I: Rules* (2005), Rule 144.
[90] Jean Pictet (ed.), *Commentary: I Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) p. 25.
[91] See e.g. Jean-Marie Henckaerts, "Article 1: Respect and Ensure Respect", in ICRC (ed.), *Updated Commentary on the First Geneva Convention* (2016) para. 153.
[92] E.g. GA Res. 43/21 (3 November 1988), para. 5; GA Res. ES-10/14 (02 August 2004), para. 7.

multilateral conferences such as the 1968 International Conference on Human Rights in Teheran[93] and the 2001 Conference of High Contracting Parties to the Fourth Geneva Convention.[94] Individual states such as Oman, Switzerland and Sweden have manifested their support to this view.[95] Nicaragua and Germany agreed on the existence of such an external dimension in the pending case before the ICJ.[96] Most scholars agree on the existence of such an external dimension.[97] On the other hand, the practice of some other states such as the US and Canada has been staunchly against the existence of this external dimension,[98] which is accordingly criticised by some scholars as not in line with current practice.[99]

### *3.2 Classifying Obligations Pursuant to the Duty to Ensure Respect*

The duty to ensure respect for IHL is a primary rule, that is, it is an international obligation binding states rather than an international obligation that arises as a consequence of a wrongful act (secondary rules).[100] In this field, the divide between primary rules and secondary rules is often thin,

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[93] Human Rights in Armed Conflicts, Res. XXIII adopted by the International Conference on Human Rights, 12 May 1968, preamble, para. 9.

[94] Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration, 5 December 2001, para. 4.

[95] See the practice collected in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Online* (2005), Rule 144, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule144.

[96] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, p. 15, para. 15 (Pellet); *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, pp. 26-27, paras. 37-38 (Peters).

[97] E.g., Condorelli & Boisson De Chazournes, *supra* note 81, pp. 26-29; Nicolas Levrat, "Les conséquences de l'engagement pris par les Hautes Parties contractantes de 'faire respecter' les Conventions humanitaires" in F. Kalshoven (ed), *Implementation of International Humanitarian Law* (1989) p. 263ff.; Dörmann and Serralvo, *supra* note 81; Geiβ, *supra* note 81, pp. 120-132; Andrea Breslin, "A Reflection on the Legal Obligation for Third States to Ensure Respect for IHL", 22 *JCSL* (2017) p. 5ff.; Silja Vöneky, "Implementation and Enforcement of International Humanitarian Law" in D. Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, 2021) p. 694; Marten Zwanenburg, "The 'External Element' of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation', 97 *International Law Studies (ILS)* (2021) p. 621ff.

[98] For more detail, see Henckaerts and Doswald-Beck, *supra* note 89.

[99] E.g., Carlo Focarelli, "Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?", 21 *EJIL* (2010) p. 125ff.; Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to 'Ensure Respect'", 96 *ILS* (2020) p. 674ff.

[100] Eric David, "Primary and Secondary Rules" in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010) p. 27ff.; Giorgio Gaja, "Primary and Secondary Rules in the International Law on State Responsibility", 97 *RDI* (2014) p. 981ff.

but this conceptual distinction must be kept in mind. To this end, as a primary rule, the duty to ensure respect should not be confused with 'aid or assistance in the commission of an internationally wrongful act', which is governed by Article 16 of the ARSIWA and it is part of the law on state responsibility.[101]

According to the prevailing view, the duty to ensure respect for IHL imposes both negative and positive obligations.[102] This conclusion is supported by Rule 144 of the ICRC Customary IHL Study, according to which 'States may not encourage violations of [IHL] by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of [IHL].'[103] In relation to negative obligations, the 2016 Updated ICRC Commentary affirms that states 'have certain negative obligations, which means they must abstain from certain conduct. In particular, they may neither encourage, nor aid or assist in violations of the Conventions'.[104] In relation to positive obligations, the 2016 Updated ICRC Commentary affirms that states 'have positive obligations under common Article 1, which means they must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party'.[105]

Negative obligations are obligations of result. As emphasised by significant literature,[106] in international law there is a clear distinction between 'obligations of means or conduct' and 'obligations of result'. This distinction was introduced by ILC's special rapporteur Roberto Ago, who considered that '[t]here is a breach by a state of an international obligation requiring it to adopt a particular course of conduct when the conduct of that state is not in conformity with that required of it by that obligation,' and that '[t]here is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does

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[101] On the distinction between this obligation and aid and assistance under Article 16 of ARSIWA see Puma, *supra* note 58, pp. 305-306.
[102] Geiβ, *supra* note 81, p. 118. Positive obligations are considered more controversial because of the opposition to the external dimension to the duty to ensure respect. See Marko Milanovic, "Intelligence Sharing in Multinational Military Operations and Complicity under International Law", 97 *ILS* (2021) pp. 1324-1325.
[103] Henckaerts and Doswald-Beck, *supra* note 85, Rule 144.
[104] Henckaerts, *supra* note 91, para. 158.
[105] Ibid., para. 164.
[106] Combacau, *supra* note 19; Antonio Marchesi, *Obblighi di condotta e obblighi di risultato* (2003); Constantin Economidés, "Content of the Obligation: Obligations of Means and Obligations of Result" in Crawford, Pellet and Olleson (eds.), *supra* note 100, p. 371 ff.; Rüdiger Wolfrum, "Obligation of Result versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations" in M.H. Arsanjani et als. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010) p. 363ff.; d'Argent, 'Les obligations', *supra* note 19, pp. 150-195.

not achieve the result required of it by that obligation.'[107] Ago envisaged a third cathegory – obligations of prevention – that is discussed below.[108] However, the ILC did not share Ago's view, and the distinction was not incorporated in the final ARSIWA. The dichotomy survived and thrived in international case law, but the distinction is constructed today in a way opposite to that purported by Ago.[109] In contemporary international law, an 'obligation of result is an obligation to "succeed"'.[110]

In the case of negative obligations, a state complies with them only as soon as it demonstrates that the event that was prohibited did not occur. Accordingly, a state violates negative obligations under the duty to ensure respect for IHL as soon as it does not refrain from encouraging, aiding, or assisting the third state the violates IHL or about which there is a serious risk of violating IHL. So the negative result to be achieved is not that the third state in fact respects IHL: rather, a state complies with this obligation if it reaches the result of abstaining from encouraging, aiding, or assisting the third state.

Positive obligations may be obligations of conduct or obligation of result, depending on the way in which they are structured. For instance, obligations of domestic criminalisation are obligations of result.[111] 'Obligations of conduct or of means' refer to those obligations requiring states to 'to employ all means reasonably available to them, so as to prevent [an event] so far as possible', as affirmed by the ICJ in relation to the duty to prevent genocide.[112] In relation to these obligations, a state must 'deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.[113] The notion of due diligence is employed to measure state compliance with obligations of conduct.[114]

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[107] *See* Draft Arts 20 and 21 and the accompanying commentary in Roberto Ago, "Sixth Report on State Responsibility", 2 *YBILC* (1977) 3, pp. 8-43.
[108] See below, section 6.3.
[109] See Pierre-Marie Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *EJIL* (1999) 371; Gattini, 'Breach of International Obligations" in Nollkaemper and Plakokefalos (eds), *supra* note 47, pp. 35-36.
[110] Riccardo Pisillo Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States", 35 *GYIL* (1992) p. 48.
[111] *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012), p. 422, para. 75. Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (2021) pp. 67-68.
[112] *Bosnia v. Serbia*, *supra* note 17, para. 430. This duty is analysed separately below, section 4.
[113] ITLOS, *Responsibilities and Obligations*, *supra* note 84, para. 110.
[114] *Bosnia v. Serbia*, *supra* note 17, para. 430; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) p. 14ff., paras. 101, 187, 197, 204, 205, 209, 223, 265; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015, ICJ Reports (2015) p. 665ff., paras. 104, 153, 168, 228. See, also,

Due diligence refers to the diligence that is due under a certain obligation of conduct in order to assess whether the state has violated it or not.[115]

The positive obligations embodied in the duty to ensure respect for IHL are obligations of conduct governed by due diligence. According to the ICRC, to comply with this duty, states 'must exert their influence, to the degree possible, to stop violations of [IHL]'.[116] Similarly, the 2016 Updated ICRC Commentary states that this duty 'constitutes a general duty of due diligence to prevent and repress breaches of the Conventions […]. This is an obligation of means'.[117] State practice confirms this conclusion: a statement of the French Ministry of Foreign Affairs before a French court in 2011 considered this duty to embody due diligence obligations.[118] More recently, in 2024, the Appeals Court of the Hague concluded that Common Article 1 contains more than an incentive to the contracting parties: it is a binding obligation for the parties to the treaty and states must take positive steps to induce other states to act in accordance with IHL.[119] The Appeals Court affirmed that this is a best efforts obligation according to which a state is obliged to do what is reasonably within its power in the given circumstances.[120] These references to 'exertion of influence', 'positive steps', 'best efforts', and 'reasonable measures' clearly indicate that the duty to ensure respect for IHL is a due diligence obligation.[121]

The means that states must employ vary depending on 'specific circumstances, including the gravity of the breach, the means reasonably available to the state, and the degree of influence it

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African Commission on Human and Peoples' Rights, 245/02, *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (15 May 2006), available at www.achpr.org/communications/decision/245.02/.

[115] See generally Riccardo Pisillo Mazzeschi, *Due diligence e responsabilità internazionale degli Stati* (1989); José Fernando Lozano Contreras, *La noción de debida diligencia en derecho internacional público* (2007); Samantha Besson, "La due diligence en droit international', 409 *Recueil des Cours* (2020) p. 154ff; Heike Krieger, Anne Peters and Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (2020); Alice Ollino, *Due Diligence Obligations in International Law* (2022); Penelope Ridings, "Due Diligence in International Law" in Report of the International Law Commission, Seventy-fifth session (29 April–31 May and 1 July–2 August 2024) A/79/10 (2024) p. 146ff.

[116] Henckaerts and Doswald-Beck, *supra* note 85, Rule 144.

[117] Henckaerts, *supra* note 91, para. 150. See also ibid., para. 165.

[118] *TA Paris, AFPS c. État français* (28 October 2011), no. 1004813, cited in Hélène De Pooter, "L'affaire du Tramway de Jérusalem davant les tribunaux français", 60 *AFDI* (2014) p. 65, note 118.

[119] Appeals Court of the Hague, *Stichting Oxfam Novib et al. v. de Staat der Nederlanden (Ministerie van Buitenlandse Zaken)* (12 February 2024), para. 3.12, https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:191 (author's translation).

[120] Ibid.

[121] E.g., Levrat, *supra* note 81, pp. 276-275; Sassòli, "State Responsibility", *supra* note 85, p. 412; Dörmann and Serralvo, *supra* note, pp. 723-725; Gabriella Venturini, "Les obligations de diligence dans le droit international humanitaire" in S. Cassella (ed.), *Le standard de due diligence et la responsabilité internationale* (2018) p. 135; Geiβ, *supra* note, p. 118; Longobardo, "The Relevance", *supra* note, p. 62: Koivurova and Singh, *supra* note, para. 22.

exercises over those responsible for the breach'.[122] As recently noted by the United Arab Emirates, '[t]hese obligations may translate into different actions from one State to another'.[123] The 2016 Updated ICRC Commentary discusses some measures that can be adopted both by states individually and by states collectively.[124] Since the duty to ensure respect pertains to primary sources and in international law a state cannot invoke compliance with an obligation to justify the violation of another rule, the measures undertaken by states to comply with the duty to ensure respect cannot result in the violation of international law.[125]

### *3.3 The Conditions Under Which the Duty to Ensure Respect for IHL Arises*

In relation to negative obligations under the duty to ensure respect for IHL, there is a certain consensus that they apply in situations not covered by aid and assistance under Article 16 of the ARSIWA.[126] In 1986, the ICJ considered that the USA violated negative obligations under the duty to ensure respect by encouraging the violation of IHL through the dissemination to the *contras* of a manual with instructions incompatible with IHL.[127] In these circumstances, the Court noted that '[w]hen considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, *it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable*'.[128] The Court has employed the notion of 'aware[ness] of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law'.[129] Notwithstanding some disagreement,[130] this test looks correct and it is likely the test that will be used

[122] Henckaerts, *supra* note 91, para. 165.
[123] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Public sitting, 21 February 2024, https://www.icj-cij.org/sites/default/files/case-related/186/186-20240221-ora-01-0-bi.pdf, p. 47, para. 52.
[124] Henckaerts, *supra* note 91, paras. 180-183.
[125] Ibid., paras. 174-179. See also Giorgio Gaja, "The Protection of General Interests in the International Community', 364 *Recueil des Cours* (2012) p. 125.
[126] See the discussion in Helmut Philipp Aust, "Complicity in Violations of International Humanitarian Law" in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (2015) p. 458; Geiβ, *supra* note, pp. 131-132; D'Argent, 'Les obligations', *supra* note 19, pp. 169-170.
[127] *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 52, paras. 254-256.
[128] Ibid., para. 256 (emphases added)
[129] Ibid.
[130] See the discussion in Milanovic, "Intelligence", *supra* note, p. 1328.

in future cases by the ICJ,[131] as demonstrated by some individual opinions of ICJ judges in the 2024 order on provisional measures in the *Nicaragua v. Germany* case.[132]

In 2008, the EU, without explicit reference to the duty to ensure respect, has adopted the criteria of a clear risk in relation to export of weapons. Member states must 'deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law'.[133]

Similarly, domestic courts have relied on the awareness of a serious risk as the condition to trigger the application for the duty to ensure respect. For instance, in 2019, a UK Court of Appeals ordered the British government to stop exporting weapons to Saudi Arabia because the *clear* risk of violations of IHL had not be assessed properly.[134] Likewise, in relation to the provision of spare parts for F-35 jet fighters to Israel, the Appeals Court of the Hague, without making any distinction between negative and positive obligations, affirmed in January 2024 that the duty to ensure respect for IHL arises when a state is aware that another state is committing serious violations of IHL[135] or when there is a *clear risk* that this might be the case.[136] The existence of the awareness of such a serious risk is a factual circumstance than can be assessed objectively. In other words, it is the circumstance that triggers the application of the duty to ensure respect for IHL.

Some support to this conclusion can be found in the Arms Trade Treaty.[137] Its Article 6(3) prohibits the transfer of weapons if a state 'has knowledge at the time of authorization that the arms or items would be used in the commission of' international crimes. However, its Article 7 dictates that in situations in which a transfer is not prohibited, a state shall 'assess the potential' that, if transferred, the arms "could be used" to commit or facilitate serious violations of IHL. If, after making this assessment and adopting any available mitigating measures, the state determines there is an "overriding risk" of such consequences occurring, the export of weapons cannot be authorised.[138]

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[131] Levrat, *supra* note, pp. 264-266; Zeray Yihdego, *The Arms Trade and International Law* (2007), p. 232.
[132] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, Dissenting Opinion of Judge ad-hoc Al-Khasawneh, para. 13 (with reference to the plausibility of the occurrence of IHL violations).
[133] Council, Common Position 2008/944/CFSP (Dec. 8, 2008), OJ L 335, Art 2(3)(c).
[134] *R (Campaign Against the Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, para. 144.
[135] Appeals Court of the Hague, *supra* note, para. 3.12 (author's translation).
[136] Ibid., paras. 5.16-5.18
[137] Arms Trade Treaty, 2 April 2013, 3013 UNTS 52373.
[138] See the discussion in Milanovic, "Intelligence", *supra* note, p. 1329; Marco Roscini and Riccardo Labianco, "The Intersections between the Arms Trade Treaty and the International Law of Foreign

Although one should refrain from automatically considering the standard of the Arms Trade Treaty to be applicable to the duty to ensure respect, it should be noted that the evolution of IHL, which takes into account the aim of preventing the commission of IHL violations, suggests that the notion of overriding risk could be relevant for the duty to ensure respect as well.[139]

Considering the position of the ICJ, of the Court of Appeals of the Hague, and the rules embodied in the Arms Trade Treaty, it is possible to conclude that the awareness of the existence of risk (usually qualified as serious) is enough to trigger the application of the duty to ensure respect. Support for this position can be found in the views of those who consider that the knowledge of *past* violations is a sufficient trigger for the duty to ensure respect.[140] This view was also adopted by a fact-finding mission dispatched by the UN Human Rights Council,[141] the UK Court of Appeal,[142] and the EU.[143] It looks like the reference to past violation is employed here as evidence of a serious risk of further violations.

A slightly different view is adopted by the 2016 Updated ICRC Commentary, which makes a distinction between the requirements for aid and assistance under Article 16 of the ARSIWA – established under the law of international responsibility – and the standard imposed by the duty to ensure respect.[144] According to the ILC's Commentary, 'States are responsible for *knowingly* aiding or assisting another State in the commission of an internationally wrongful act' but '[t]he subjective element of '*intent'* is unnecessary'.[145] To this end, the 2016 Updated ICRC Commentary confirms that the threshold of negative obligations under the duty to ensure respect is lower than that provided by aid and assistance under Article 16 of the ARSIWA, but it still requires the knowledge of ongoing

Intervention in Situations of Internal Unrest", 52 *Israel Yearbook on Human Rights* (2022) pp. 385-388.

[139] Milanovic, "Intelligence", *supra* note, pp. 1330-1331.

[140] Sassòli, "State Responsibility", *supra* note 85, p. 413; Marco Sassòli, *International Humanitarian Law* (2019) p. 529.

[141] HRC, Detailed Findings of the Group of Eminent International and Regional Experts on Yemen, 29 September 2020, para. 413.

[142] *R (Campaign Against the Arms Trade) v Secretary of State for International Trade*, *supra* note 134, paras. 139-145.

[143] Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment* (16 September 2019) p. 52.

[144] Henckaerts, *supra* note 91, para. 159.

[145] Ibid. (emphasis added). However, the ICRC Commentary considers knowledge of past patterns as the relevant test. See ibid., para. 162.

violations. 'Knowledge' is also mentioned, always in the realm of arms transfer, in some Dutch practice.[146]

However, a knowledge-based test pertaining to the violation might be too strict. The duty to ensure respect aims at advancing the protection offered by IHL. In this, its object and purpose, which are relevant for interpretive ends,[147] are humanitarian in character. Accordingly, from the elements available, the view based on the ICJ's precedent and other aforementioned elements of state practice that awareness of a serious risk is the relevant test is more persuasive that relying on the knowledge of actual violations.

In relation to positive obligations to ensure respect for IHL, it should be noted that positive obligations governed by due diligence are triggered by the state's awareness of the existence of a risk rather than by the knowledge of a violation or by the intent to aid the commission of a violation.[148] To the best knowledge of this author, no case law has addressed this issue in relation to the duty to ensure respect for IHL, but rather, most elaboration is offered in relation to the duty to prevent genocide. According to the ICJ, the duty to prevent genocide materialises when a state is aware of the existence of a serious risk that a genocide is about to be committed.[149] This conclusion is analysed below in full details. [150]

Suffice it to say that both the 2016 Updated ICRC Commentary[151] and scholars[152] consider that the test described by the ICJ for the duty to prevent genocide is applicable to positive obligations under the duty to ensure respect for IHL. It has been claimed that the fact that it is not necessary that a wrongful act occurs to trigger the application of the duty to ensure respect is the key difference between this obligation and aid and assistance under Article 16 of ARSIWA, which requires the commission of a wrongful act.[153] The reason why the commission of a wrongful act is not necessary

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[146] Netherlands, "Government Response to Parliamentary Questions concerning the use of Dutch intelligence in a drone attack with innocent civilian victims (18 January 2016)", in correspondents' reports attached to 19 *Yearbook of International Humanitarian Law* (2016) 1, available at https://www.asser.nl/media/3717/netherlands-yihl-19-2016.pdf.

[147] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(1).

[148] Corten, *supra* note 58, p. 77; Besson, "La due diligence", *supra* note 115, p. 303; Helmut Philipp Aust and Prisca Feihle, "Due Diligence in the History of the Codification of the Law of State Responsibility" in Krieger, Peters and Kreuzer (eds), *supra* note 115, p. 57.

[149] *Bosnia v Serbia*, *supra* note 17, para. 431 (emphasis added).

[150] See below, section 4.3.

[151] Henckaerts, *supra* note 91, para. 166.

[152] Geiß, *supra* note 81, pp. 126-127; Breslin, *supra* note 81, p. 23; Oona A. Hathaway et als., "Common Article 1 and the U.S. Duty to Ensure Respect for the Geneva Conventions in Yemen", *Just Security* (26 April 2018), https://www.justsecurity.org/55415/common-article-1-u-s-duty-ensure-respect-geneva-conventions-yemen/.

[153] Puma, *supra* note 58, pp. 305-306.

to trigger the applicability of the positive obligation to ensure respect for IHL is because its application is triggered by the existence of a serious risk alone, in line with what international law requires for the duty to prevent genocide as explained below.

## 4. The Extraterritorial Duty to Prevent Genocide

### *4.1 The Content of the Duty*

This section analyses the extraterritorial duty to prevent genocide. Article 1 of the UN Genocide Convention affirms that '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'[154]

The duty to prevent genocide has been discussed by the ICJ in the 2007 decision in the *Bosnia v. Serbia* case.[155] The Court argued that the Convention embodies three different and autonomous duties: the duty not to commit genocide, the duty to prevent genocide, and the duty to punish genocide.[156] In that case, the Court found that a genocide had occurred outside the territory of Serbia,[157] that the genocide was not attributable to Serbia under the rules of state responsibility,[158] but that Serbia had nonetheless violated international law inasmuch as it had not attempted to prevent that genocide from occurring outside its territory.[159]

The *Bosnia v. Serbia* precedent attracted significant scholarly attention because it clarified that the duty to prevent genocide is an autonomous obligation that compels states to act in relation to facts that occur both within and outside their territory.[160] Scholarly works have discussed which measures can be undertaken to implement this duty,[161] with particular emphasis on whether it can be invoked

[154] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS. 277.
[155] *Bosnia v. Serbia*, *supra* note 17.
[156] Ibid., paras. 167, 179, 425-427.
[157] Ibid., para. 297.
[158] Ibid., paras. 413-415.
[159] Ibid., para. 438.
[160] Ibid., para. 183.
[161] William A. Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes", 2 *Genocide Studies and Prevention* (2007) p. 101ff.; Orna Ben-Naftali, "The Obligation to Prevent and Punish Genocide" in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (2009) p. 27ff.; Serena Forlati, "The Legal Obligation to Prevent Genocide: *Bosnia v. Serbia* and Beyond", 31 *Polish Yearbook of International Law* (2011) p. 200; Etienne Ruvebana, *Prevention of Genocide under International Law* (2014); Christian J. Tams, "Article I" in Ch.J. Tams, L. Berster and B. Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014) pp. 45-54.

to justify the use of armed force outside the legal framework of the UN Charter.[162] The effects of this obligation upon international organisations and states voting in international organisations, with specific reference to the UNSC, has been discussed as well.[163]

Although the *Bosnia v. Serbia* case mentioned the duty in relation to the actions of an armed group, judicial practice has discussed this duty in relation to the actions of other states too.[164] For instance, in 2022, Ukraine has claimed that Russia has abused its duty to prevent genocide by launching an unlawful invasion of Ukraine with the pretext of protecting the Russian minorities in Ukraine from an alleged genocide prepared by the Ukrainian government.[165] Similarly, as mentioned, Nicaragua has filed a case against Germany before the ICJ in early 2024 for allegations pertaining to the violation of the duty to prevent genocide in relation to its support for Israeli actions in the Gaza Strip.[166] Some domestic cases have also discussed states' duty to prevent genocide in relation to the conduct of other states.[167]

### *4.2 Classifying Obligations Pursuant to the Duty to Prevent Genocide*

[162] Marco Longobardo, "Genocide, Obligations *Erga Omnes* and Responsibility to Protect", 19 *International Journal of Human Rights* (2015) p. 1199ff.; Edoardo Greppi, "La prevenzione del genocidio fra intervento umanitario e responsabilità di proteggere" in L. Zagato and L. Candiotto (eds), *Il genocidio: declinazioni e risposte di inizio secolo* (2018) p. 139ff.; Willaim A. Schabas, 'Preventing Genocide and the Ukraine/Russia Case', *EJIL:Talk!* (10 March 2022), https://www.ejiltalk.org/preventing-genocide-and-the-ukraine-russia-case/.

[163] See e.g. John Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations among the P5* (2018); Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (2020).

[164] This possibility was anticipated in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order on Further Requests for the Indication of Provisional Measures, 13 September 1993, ICJ Reports (1993) p. 325ff., Separate opinion of Judge ad hoc Lauterpacht, para. 105.

[165] *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 27 February 2022, https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-APP-01-00-EN.pdf. The main argument of the case was dismissed at the preliminary objection stage, with the case proceeding to the merits only in part. See *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, (Ukraine v. Russian Federation)* (Preliminary Objections), Judgment, 2 February 2024, https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf.

[166] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9.

[167] See, e.g., The Netherlands, *Supreme Court, State of the Netherlands v. Mothers of Srebrenica Association and Others* (19 July 2019), in 195 *ILR* (2021) p. 239; US, District Court, Northern District of California, *Defense for Children International-Palestine et als v. Joseph R. Biden et al*, Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction, Case No. 23-cv-05829-JSW (31 January 2024).

The duty to prevent genocide embodies both positive and negative obligations. However, most practice and scholarly attention has focused on the positive obligations following the *Bosnia v. Serbia* decision,[168] which exclusively discussed positive obligations.

In clarifying that obligations under the duty to prevent genocide are different than complicity to commit genocide,[169] the ICJ obliterated the negative component of the duty to prevent genocide. According to the Court, 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed.'[170] While making a distinction between complicity under state responsibility and the primary rule on genocide prevention may be correct,[171] the conflagration between 'aiding and abetting' genocide with any possible negative duty of abstention under genocide prevention is less sound. The negative obligation under the duty not to commit genocide does not exhaust the possibility of providing support for genocide below the threshold of aiding and abetting, as otherwise implied by the Court.[172] However, the Court's position may be explained on the basis of the fact that the Genocide Convention bans more conduct than the mere commission of genocide: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are equally prohibited by Article III, which is mentioned by the Court to cut short any discussion about negative obligations under the duty to prevent genocide.[173]

As a matter of positive obligations, the ICJ has described the duty to prevent genocide as an obligation of conduct governed by due diligence. In the Court's words,

> the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.[174]

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[168] *Bosnia v. Serbia*, *supra* note 17.
[169] Ibid., para. 432.
[170] Ibid.
[171] A different question, beyond the purview of this article, is whether aid and assistance under Art. 16 of ARSIWA can be committed by omission, as discussed by Aust, *Complicity and the Law*, *supra* note, pp. 225-230; Lanovoy, *supra* note, pp. 184-186; Puma, *supra* note, pp. 74-84; Venturini, *supra* note 60.
[172] *Bosnia v. Serbia*, *supra* note 17, para. 432.
[173] Ibid.
[174] Ibid., para. 430.

This dictum is based on the aforementioned distinction between 'obligations of means or conduct' and 'obligations of result'.[175]

The ICJ observed that the measures that a state must undertake to prevent genocide vary depending on several factors. The Court noted that one should assess the state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that state and the main actors in the events'.[176]

The Court went on mentioning due diligence as the relevant notion to be employed to measure state compliance with this obligations of conduct. In the Court's words, '[i]n this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance.'[177] As noted by the ICJ, it 'irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide'.[178] Indeed, a 'State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.'[179]

A similar approach was adopted by the Court in the 2024 order on provisional measures in the *Nicaragua v. Germany* case. The Court recalled that the duty to prevent genocide 'requires States parties […] to employ all means reasonably available to them to prevent genocide so far as possible'.[180]

### *4.3 The Conditions Under Which the Duty to Prevent Genocide Arises*

According to the ICJ, the duty to prevent genocide materialises when a state is aware of the existence of a serious risk that a genocide is about to be committed. In the Court's words, 'a State's obligation to prevent, and the corresponding duty to act, *arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk* that genocide will be

[175] See above, section 3.2.
[176] *Bosnia v. Serbia*, *supra* note 17, para. 430.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, para. 23.

committed'.[181] In the 2024 order on provisional measures in the *Nicaragua v. Germany* case, the Court confirmed that the duty to prevent genocide arises when states parties 'are aware, or […] should normally have been aware, of the serious risk that acts of genocide would have been committed'.[182] This test has been endorsed by state practice.[183]

The Court's words mean that two elements are required: an objective requirement that there is a serious risk that acts of genocide will be committed, and a subjective requirement that the state is or should be aware of the serious risk.[184] No certain knowledge that a genocide is occurring or underway is required.[185] Scholarship mentions direct diplomatic warnings, public information, media coverage, reports of governmental and non-governmental organisations, especially during widely-covered escalating conflicts, as elements to be taken into account.[186]

The ICJ went on to clarify that 'a State may be found to have violated its obligation to prevent *even though it had no certainty*, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis *it is enough that the State was aware*, or should normally have been aware, of the *serious* danger that acts of genocide would be committed'.[187] This conclusion is in line with the fact that the obligation to prevent genocide is an obligation of conduct governed by due diligence. It suggests that to measure whether the duty to prevent has been violated, the attention should focus only on the conduct of the state that was aware of a serious risk of genocide being committed or about to be committed.

## 5. The Limited External Dimension of the Duty to Prevent Crimes Against Humanity in the ILC's Codification

[181] *Bosnia v Serbia*, *supra* note 17, para. 431 (emphasis added).
[182] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, para. 23.
[183] See *Allegations of Genocide under Convention on Prevention and Punishment of Crimes of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, 7 September 2022, https://www.icj-cij.org/sites/default/files/case-related/182/182-20220907-WRI-01-00-EN.pdf, para. 22; *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, p. 47, para. 28 (Pellet).
[184] Tams, "Article I", *supra* note 161, p. 49.
[185] Ibid.
[186] Ibid.
[187] *Bosnia v. Serbia*, *supra* note 17, para. 432 (emphasis added).

This section briefly explores the duty to prevent crimes against humanity as codified by the ILC in its 2019 Draft Articles on CAH. It is argued that the external dimension of the obligations codified by the current Draft Articles licensed by the ILC is very limited and unlikely to trigger state responsibility for lack of prevention in relation to the conduct of another state.

Article 4 of the Draft Articles on CAH is entitled 'obligation of prevention' and embodies a general obligation of prevention according to which '[e]ach State undertakes to prevent crimes against humanity, in conformity with international law'. The ways in which this obligation should be operationalised is twofold. Under Article 4(1), prevention of crimes against humanity should occur through 'effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction'. This provision, more than embodying a genuine obligation of prevention, provides for an obligation of domestic criminalisation with a preventive function.[188] This obligation is limited to actions to be undertaken in the territory within state jurisdiction. The explicit mention of the territory within state jurisdiction was included in the Draft Articles to limit the scope of the obligation at hand: the ILC's Special Rapporteur explicitly preferred to avoid concluding that a state would have been considered responsible for lack of prevention in relation to crimes against humanity occurring outside its own territory: '[b]y referring to acts occurring "in any territory under its jurisdiction", the language is broader than a reference solely to conduct occurring in the State's "territory", but narrower than language that could suggest an obligation upon the State to develop legislative, administrative, judicial or other measures to prevent any conduct worldwide. ... the language … avoids suggesting a more open-ended and therefore perhaps less clear obligation with respect to the adoption of specific measures.'[189] Accordingly, the preparatory works of the Draft Articles exclude an external dimension of Article 4(1).[190]

Actually, the reference to territory under state jurisdiction pursuant to Article 4(1) could be neutralised through interpretation. One could argue that the duty is broader in scope so as to cover other states' actions occurring outside the state territory so long as the *preventive measures* are adopted within the state territory. In other words, if there is a serious risk of crimes against humanity

[188] On this distinction, see generally Marco Longobardo, "The Italian Legislature and International and EU Obligations of Domestic Criminalisation", 21 *International Criminal Law Review* (2021) pp. 631-632.
[189] First report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur, 17 February 2015, A/CN.4/680, para. 11.
[190] Ezéchiel Amani Cirimwami and Stefaan Smis, "Le régime des obligations positives de prévenir et de poursuivre à défaut d'extrader ou de remise prévues dans le texte des projets d'articles sur les crimes contre l'humanité provisoirement adoptés par la Commission du droit international", 30 *Revue québécoise de droit international* (2017) p. 15; William A. Schabas, "Prevention of Crimes Against Humanity", 16 *JICJ* (2018) p. 721.

in State A, State B might be considered to be bound to prevent those crimes against humanity as long as the preventive measures are enacted from within the territory of State B. The problem with this interpretation is that in the normal course of action a state undertakes actions in relation to other states from its own territory. The words of the Special Rapporteur make it clear that not only the preventive actions but also the facts triggering the duty must occur within the same state's territory.

On the other hand, Article 4(2) includes an obligation with an external dimension.[191] Under this provision, prevention must occur through 'cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations'. This is an obligation with an external scope in the sense that it is not limited to crimes against humanity occurring within the territory of the state. However, the Commentary of the Draft Articles explains that the duty to prevent through cooperation pertains to concerted actions with other states and, in particular, through the UN.[192] Obligations of cooperation are traditionally seen as obligations of diligent conduct,[193] as confirmed by the case law by ITLOS.[194] However, the content of diligence that is required looks quite low in comparison to other due diligence obligations such as the duty to ensure respect for IHL and the duty to prevent genocide. Certainly, the obligation at hand is not an obligation of prevention under the theory of international obligations.[195]

As these pages are being written, states are negotiating a convention on crimes against humanity based on the ILC's Draft Articles. States are free to include a duty to prevent crimes against humanity with an external dimension that is broader than that codified by Article 4(2) of the Draft Articles. This would be a welcome amendment that would align the rules on crimes against humanity to those on genocide and war crimes. However, at the moment, the ILC's Draft Articles only provide the duty to prevent crimes against humanity with an external dimension limited to the obligation of cooperation. Being that the ILC's Draft Articles are not formally binding, and in the absence of any case law under corresponding customary law on state responsibility for lack of cooperation in preventing crimes against humanity from being committed by another state, the analysis in this article proceeds with a focus on the duty to prevent genocide and ensure respect for IHL in light of the MGP.

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[191] Schabas, *supra* note 190, p. 717.
[192] Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, *supra* note, 61, paras. 13-14.
[193] Ollino, *supra* note, p. 126; D'Argent, *supra* note 19, p. 171.
[194] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, ITLOS Reports (2015), para. 210; *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, paras. 307-309.
[195] D'Argent, *supra* note 19, p. 171.

## 6. The Independent Nature of the Violation and the Irrelevance of the Monetary Gold Principle

### *6.1 General Observations*

After having analysed the MGP, the duty to ensure respect for IHL, the duty to prevent genocide, and the duty to prevent crimes against humanity, it is time to see how the three interact. As argued above, the MGP does not bar the exercise of the ICJ's jurisdiction when it is possible to assess the alleged responsibility of the respondent state and that of the third state separately.[196] Depending on how specific claims before the ICJ are framed, this may be the case of allegations pertaining to violations of the duty to ensure respect for IHL and the duty to prevent genocide – the only ones with well-established external dimensions – in relation to the conduct of another state.

To reach this conclusion, this article explored the character of the duty to ensure respect and the duty to prevent genocide: they are primary obligations that are different from aid and assistance as codified in Article 16 of ARSIWA. Both in their positive and negative aspects, they broaden the areas of prohibited support for a state that is at a serious risk of violating IHL or committing genocide. Both in the case of the duty to ensure respect for IHL and the duty to prevent genocide, there is a separation between the wrongful act of the state that does not act diligently and that of the third state,[197] if any. The situation is different from aid and assistance as codified by the ILC, for which the MGP may be relevant because the rule under Article 16 of ARSIWA – at least in the codification provided by the ILC – depends on the ascertainment of the responsibility of the state that is principally responsible for the wrongful act.[198] In fact, since compliance with the duty to ensure respect and the duty to prevent genocide should be assessed autonomously, the MGP might not apply. To dispel the application of the MGP, an applicant should avoid framing its claims as pertaining to the knowledge of the commission of a genocide or IHL violations by a third state. Rather, the claims should be

[196] See *supra* section 2.

[197] Besson, "La pluralité", *supra* note 47, p. 22; Aust, *Complicity and the Law*, *supra* note 58, p. 403; Lanovoy, *supra* note 58, p. 303; Sophie Duroy, *The Regulation of Intelligence Activities under International Law* (2023), pp. 109-110 and p. 112. See also *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, pp. 39-44, paras. 11, 18, 21 (Pellet).

[198] See Sarah Heathcote, "State Omissions and Due Diligence" in Bannelier, Christakis and Heathcote (eds.), *supra* note 51, p. 305; Aust, *Complicity and the Law*, *supra* note 58, pp. 305-311; Corten, *supra* note 58, p. 78; Rachel López, "The Duty to Refrain: A Theory of State Accomplice Liability for Grave Crimes", 97 *Nebraska Law Review* (2018) p. 160.

constructed as relative to the awareness by the respondent that a serious risk of such a violation may exist.

### *6.2 Negative and Positive Obligations*

In the case of negative obligations, a state complies with them only as soon as it demonstrates that the event that was prohibited did not occur. Accordingly, a state violates negative obligations under the duty to ensure respect for IHL if it does not refrain from encouraging, aiding or assisting a state that violates IHL or about which there is a serious risk of violating IHL.[199] The violation of the duty to ensure respect is independent from the conduct of the third state.

In the case at hand, the act of the state that breaches the duty is the lack of abstention. This is an inchoate duty, that is, a duty whose violation is independent from the fact that the third state has in fact violated IHL.[200] Since these negative duties are triggered by the existence of a serious risk, awareness of the risk is the crucial point that determines the violation, rather than the fact that the risk results in a violation of IHL by the third state. In other words, the duty to ensure respect *anticipates* the intervention of international law to the moment in which the awareness of a serious risk materialises, rather than to the time in which a violation in fact occurs. Considering that the serious risk only exposes the state to future legal challenges[201] runs against the objective of anticipating the protection of the fundamental rules protected by IHL. For this reason, whether a state has violated IHL should be considered irrelevant for the assessment of compliance with the duty to ensure respect by the state bound by the duty to ensure respect. As noted, in these cases, 'conduct of third states would be relevant not for the purpose of establishment of wrongfulness of third states but only as one consideration in establishing the degree of compliance with the original primary rule'.[202]

In relation to the application of the MGP, 'the very subject-matter' of the case before the ICJ would be whether the state has abstained from encouraging, aiding, or assisting another state that is violating or is at serious risk of violating IHL. The emphasis would be on whether the state is aware of this factual situation. There would be no need to adjudicate whether the third state violated IHL, but it would be enough to demonstrate that the first state was aware of a serious risk. In other words, if the accidental ascertainment of whether the third state has violated IHL is not necessary to assess compliance with the state's duty to ensure respect, then the MGP does not bar the exercise of a court's

[199] Milanovic, "Intelligence", *supra* note 102, p. 1325.
[200] Contra, ibid., pp. 1334-1338 (who frames the analysis through the lenses of complicity).
[201] Ibid., p. 1338.
[202] Paparinskis, "Procedural Aspects", *supra* note 51, p. 309.

jurisdiction. Accordingly, under the narrow construction of the MGP provided by the ICJ, the fact that the third state is a party is not a legal requirement to ascertain whether there is a serious risk of a violation. Rather, this looks like one of the cases in which an interested state might offer its view through intervention. There is a difference between assessing the responsibility of one state for the violation of IHL (the third state that would be an indispensable party) and burdening the applicant state with the task of demonstrating that the respondent state was aware of the existence of a serious risk (without entering the debate on whether a violation in fact occurred).

In relation to positive obligations, and with the exception of obligations of prevention that are discussed separately below,[203] the situation is similar. Obligations of conduct pertain to the conduct of that state that should act with due diligence. Since obligations of conduct focus on the best efforts of the state which has to exercise due diligence, scholars agree that they are inchoate obligations whose violations can be assessed irrespective on whether the event occurs.[204] As noted in relation to environmental obligations of conduct,[205] the possibility that an obligation of due diligence is violated without the occurrence of any harm is supported by the Commentary to Article 31 of the ARSIWA, according to which '[i]n some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs'.[206] This conclusion is confirmed by the ICJ, which affirmed that when Iran 'failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion', '[t]his inaction of the Iranian Government *by itself* constituted clear and serious violation of Iran's obligations to the United States' under diplomatic and consular law.[207] Indeed, every time that the ICJ has discussed environmental obligations of conduct, the Court has refrained from considering that their violation occurs only if another actor has caused a certain event.[208]

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[203] See below, section 6.3.

[204] Pasquale De Sena, 'Questioni in tema di responsabilità internazionale per attività spaziali'*, 73 RDI* (1990) p. 301; Dupuy, *supra* note 109, pp. 381-383; Robert Kolb, *Advanced Introduction to International Humanitarian Law* (2014) p. 168; Marco Longobardo, "Training and Education of Armed Forces in the Age of High-Tech Hostilities" in E. Carpanelli and N. Lazzerini (eds.), *Use and Misuse of New Technologies* (2019) pp. 80-81 and p. 87; Jutta Brunée, "Procedure and Substance in International Environmental Law"*,* 405 *Recueil des Cours* (2020) p. 157; Ollino, *supra* note 115, p. 201.

[205] Brunée, *supra* note 204, pp. 155–158.

[206] ARSIWA with Commentary, *supra* note 57, p. 92, para. 6.

[207] *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980) p. 3ff., paras. 63 and 67 (emphasis added).

[208] See Maurizio Arcari, "The Breach of the Obligation to Prevent Environmental Harm and the Law of State Responsibility" in M. Arcari, I. Papanicolopulu and L. Pineschi (eds.), *Trends and Challenges in International Law* (2022) pp. 191-203 (discussing *Pulp Mills on the River Uruguay*,

International case law and the practice of international organisations support the idea that since, the assessment of the violation of both negative and positive obligations is independent from the assessment of the unlawful conduct by another state, the participation of the third state is not required under the MGP. As recalled above, in the *Corfu Channel* case, the ICJ ascertained that Albania has violated its 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[209] This obligation has been subsequently considered an obligation of conduct governed by due diligence by the Court.[210] The Court did not consider that the absence of Yugoslavia made the case inadmissible, but rather, it considered that the responsibility of Yugoslavia could have been separated from that of the UK to the extent that the conduct of Yugoslavia could have been taken into account in its factual dimension without any final assessment of state responsibility. [211] For this reason, taking into account that Albania's responsibility had to be assessed autonomously from any other state's responsibility, the MGP did not apply.[212]

The ILC expressed support for this conclusion. In the Commentary to the ARSIWA, the ILC discussed the *Corfu Channel* case by noting that 'a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances *was original and not derived from the wrongfulness of the conduct of any other State*.'[213] If this is correct, as this author believes, the participation of the third state is not necessary because its conduct would not be the subject-matter – not even incidentally – of the proceedings.

In other words, if responsibility under the duty to prevent genocide and the duty to ensure respect for IHL is autonomous and severable from actual violations of the Genocide Convention and of IHL by the third state, then the existence of a serious risk can be seen as a factual consideration to be demonstrated before the ICJ, rather than an incidental finding on the third state's responsibility. For instance, in the *Bosnia v. Serbia* case, in relation to the positive obligation under the duty to prevent genocide, the Court seemed to suggest that the awareness of a serious risk of genocide by Serbia is a factual element to be proved, rather than the legal assessment of responsibility. In that case, the

*supra* note 114, and *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, *supra* note 114).

[209] *Corfu Channel Case*, *supra* note 18.

[210] *Pulp Mills on the River Uruguay*, *supra* note 114, at para. 101.

[211] *Corfu Channel Case*, *supra* note 18, p. 17.

[212] See above, section 2.

[213] ARSIWA with Commentary, *supra* note 57, p. 64, para. 4 (emphasis added).

serious risk of genocide was reconstructed on the basis of 'the information, voicing serious concern, in their possession', and the Court concluded that 'given all international concern about what looked likely to happen at Srebrenica' and the communications between Milošević and Mladić, 'it must have been clear that there was a serious risk of genocide in Srebrenica'.[214] True, this conclusion was provided during some proceedings in which Serbia was able to offer its views and where there was no other state whose interests could have been protected by the MGP. However, the awareness of the serious risk is treated as a matter of fact rather than as a legal conclusion.

Accordingly, in relation to the MGP, one might argue that the awareness of the existence of a serious risk of the commission of genocide or of IHL violations are not incidental findings on whether another state has committed genocide or violated IHL. Rather, they look like factual circumstances that pertain to what the state that did not act to prevent genocide or to ensure respect knew at the moment in which the serious risk materialised. To reconstruct whether that state was aware of a serious risk of genocide or IHL violation, the Court might rely on factual allegations discussed during the proceedings, following the usual rules on burden of proof and evidence before the ICJ.[215] The Court could also rely on the authorities considered to be 'givens' in order to dispel the application of the MGP, such as, according to the case law mentioned afore, decisions of the UNSC and past decisions of the ICJ.[216] However, in relation to the duty to prevent genocide and to ensure respect for IHL, these sources are not invoked to dispel the application of the MGP – which is irrelevant when the awareness of a serious risk rather than a conclusive ascertainment of state responsibility is required. Thus, these number of authorities that can be invoked to determine that the state was aware of the serious risks is broader. In any case, no state could seriously claim that it was unaware of the existence of serious risk of genocide or IHL violations if the ICJ has ascertained them in an advisory opinion that spells out consequences for all states in the world.[217]

It is not by chance that fact-finding missions, which are not courts and struggle to engage in dialogue with all the interested parties,[218] consider themselves to be entitled to ascertain violations of IHL in order to make states aware of their duty to ensure respect. For instance, a fact-find mission recently created by the OSCE affirmed that '[t]he impartial, independent and reliable establishment

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[214] *Bosnia v. Serbia*, *supra* note 17, para. 438.
[215] See generally James Gerard Devaney, *Fact-Finding before the International Court of Justice* (2016).
[216] See above, section 2.
[217] In this case, probably the MGP would not apply even if complicity under Art. 16 of ARSIWA was at stake since the advisory opinions can be considered as 'givens'. See above, section 2.
[218] See generally Larissa van den Herik, "An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law", 13 *Chinese Journal of International Law* (2014) p. 507ff.

of facts by a neutral, legitimate body greatly contributes to ensuring better respect of IHL […]. Such fact-finding also provides third States with reliable information on the situation, allowing them to make appropriate decisions in light of their aforementioned obligations to ensure respect of IHL'.[219] Another fact-finding mission observed that '[w]ith the number of public reports establishing serious violations of international humanitarian law, no State can claim not to be aware of such violations being perpetrated in Yemen'.[220] As noted, 'if it may not always be obvious whether (the risk of ) breaches of [IHL] are(/is) sufficiently serious, no such problems arise in the present context inasmuch as the periodic reports of the Commission of Inquiry clearly demonstrate a pattern of systematic disregard for' IHL.[221] Since these fact-finding missions are not international courts, their findings cannot be considered as 'givens' on state responsibility, but rather, they provide awareness of serious risks of the commission of atrocities.

Even if the state that is at a serious risk of committing genocide or of violating IHL does not participate in the proceedings, the assessment of the risk would not make the legal position of that state the very subject-matter of the case. If that state is willing to contribute to the assessment of the facts, it could always decide to intervene to protect its interests, as noted in the *Nicaragua v. USA* decision mentioned above. If the state does not want to intervene, the limited scope of *res judicata* under Article 59 of the ICJ Statute would protect its interests. Additionally, to avoid the risk that these kinds of cases are used to circumvent the lack of consent or the lack of participation of the third State, the ICJ could spell out in its decision that the findings on the awareness of such a serious risk do not amount to the assessment of the responsibility of the third (absent) state.[222]

In other words, if the claims are structured on the awareness of a serious risk of genocide rather than on the actual commission of genocide by another state, it is possible to conclude that the MGP does not apply because the assessment of the responsibility of the respondent state is independent from any ascertainment of the responsibility by the third state. This is the consequence of constructing

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[219] Report of the OSCE Moscow Mechanism's mission of experts entitled "Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022", 12 April 2022, https://www.osce.org/odihr/515868, p. 89.

[220] HRC, Detailed Findings, *supra* note 141, para. 413.

[221] Tom Ruys, "Of Arms, Funding and 'Non- lethal Assistance'—Issues Surrounding Third-State Intervention in the Syrian Civil War", 13 *Chinese Journal of International Law* (2014) p. 29.

[222] See the concerns voiced by Germany in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, pp. 25-26, paras. 8-9 (Wordsworth).

the duty to prevent genocide and the duty to ensure respect for IHL as independent primary obligations triggered by the awareness of a serious risk.

### *6.3 A Different Conclusion in Relation to Obligations of Prevention?*

A possible obstacle to the conclusion that the MGP would not apply if the allegations focus on the awareness of a serious risk of genocide can be found in a dictum of the ICJ in relation to when the obligation to prevent genocide is violated. This obstacle cannot be transplanted to other obligations of conduct such as the duty to ensure respect for IHL because they are not obligations of prevention under Article 14(3) of ARSIWA and because the ICJ mentioned that its dictum on this topic is not general in scope, but rather, it applies only to the duty to prevent genocide.[223] However, there are good reasons not to consider this obstacle insurmountable even in relation to the duty to prevent genocide.

As noted, the ICJ considered the duty to prevent genocide to be an obligation of conduct.[224] In the Court's words, it is 'irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide'.[225] However, the ICJ contradicted this logical conclusion by affirming that to conclude that the duty to prevent is violated it is necessary to demonstrate that genocide in fact occurred:

> a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. […] 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.[226]

This conclusion relies on Article 14(3) of the ARSIWA, which states that '[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with

[223] *Bosnia v. Serbia*, *supra* note 17, para. 429.
[224] Ibid., para. 430.
[225] Ibid.
[226] Ibid., para. 431.

that obligation.'[227] This dictum does not apply to the duty to ensure respect for IHL, which, despite its preventive function, is not drafted as an obligation of prevention.

The view of the ICJ on the applicability of Article 14(3) of the ARSIWA is an important element of international jurisprudence that should not be underestimated. In fact, it could be decisive in considering the MGP to be applicable to obligations of prevention. If to assess whether State A has failed to prevent genocide in relation to State B's conduct we need to demonstrate that State B has in fact committed genocide, then the ascertainment of State B's responsibility will be the very subject-matter of the dispute or, at least, should be assessed incidentally.[228] At this point, the consent to jurisdiction of State B would be necessary.[229]

This might be the final word on the matter at hand, especially in light of the ICJ's tendency to confirm its past case law.[230] However, as argued in previous works,[231] the very conclusion that the occurrence of a genocide is needed to assess the violation of the duty to prevent is far from sound. Indeed, Article 14(3) of the ARSIWA is the product of the works of the ILC at a time when obligations of prevention were considered differently from the way in which they are employed in contemporary case law.[232] Article 14(3) originated in the work of Special Rapporteur Roberto Ago, who considered that there were three different kinds of obligations: obligations of result, obligations of means, and obligations of prevention.[233] In his view, obligations of prevention were obligations of negative result (obligations not to make something happen),[234] rather than obligations of conduct governed by due diligence.[235] At the time, this conclusion was justified by Ago as a consequence of

[227] ARSIWA with Commentary, *supra* note 57, Art. 14(3).
[228] Christian J. Tams, "Article IX" in Tams, Berster and Schiffbauer (eds.), *supra* note 161, p. 306.
[229] See also *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, Separate Opinion of Vice-President Sebutinde, para. 15.
[230] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, ICJ Reports (2015), p. 3, para. 125.
[231] Marco Longobardo, "Is the Duty to Prevent Genocide an Obligation of Result or an Obligation of Conduct according to the ICJ?", *EJIL:Talk!*, 16 May 2019, www.ejiltalk.org/symposium-on-the-genocide-conventionis-the-duty-to-prevent-genocide-an-obligation-of-result-or-an-obligation-of-conduct-according-to-the-icj/; Marco Longobardo, "L'obbligo di prevenzione del genocidio e la distinzione fra obblighi di condotta e obblighi di risultato", 13 *Diritti umani e diritto internazionale* (2019) p. 237ff.
[232] A 'relic' according to Giovanni Distefano, *Fundamentals of Public International Law* (2019) p. 697.
[233] See generally Dupuy, *supra* note 109; Gattini, *supra* note 109.
[234] Roberto Ago, "Seventh Report on State Responsibility", 2 *YBILC* (1978) pp. 32-37.
[235] Aust and Feihle, *supra* note 148, p. 54.

the lack of any case law ascertaining the violation of a duty to prevent in the absence of the occurrence of the event.[236]

The finalised ARSIWA do not offer any example of state practice and *opinio juris* in support of the customary status of this rule.[237] This omission is a peculiar happenstance and an unpersuasive conclusion: from the lack of case law on violations of obligations of prevention in the absence of the event, Ago and the ILC concluded, without elaboration, the existence of uniform state practice and *opinio juris* in the sense that a violation could only occur when the event is not prevented. The doubtful solidity of this view – which would have required more support in actual state practice and *opinio juris* – is confirmed by the fact that, to the best knowledge of this author, the rule in Article 14(3) has not been applied by international case law outside the *Bosnia v. Serbia* case. Indeed, almost no practice corresponding to this rule can be found in the reports on compilations of decisions of international courts, tribunals, and other bodies prepared by the Secretary-General upon requests by the UNGA[238] – the only exception being a reference to it by the Inter-American Court of Human Rights to justify that states may incur in responsibility for omissions rather than in relation to the time in which the breach occurs.[239] Although counsel for Germany during the proceedings in the *Nicaragua v. Germany* case argued that the ICJ in 2015 confirmed explicitly that the occurrence of genocide is a prerequisite to ascertain responsibility under the duty to prevent,[240] in fact the relevant passage of that decision did not refer to Article 14(3).[241] This omission might be telling in light of the abundance of references to ARSIWA in most decisions of the ICJ.

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[236] Ago, 'Seventh Report', *supra* note 234, p. 34, para. 11.
[237] ARSIWA with Commentary, *supra* note 57, p. 62, para. 14.
[238] See A/62/62, paras. 75-82; A/65/76, paras. 19-21; A/68/72, paras. 78-82; A/71/80, paras. 87-89; A/74/83, 23; A/77/74, 18. The reference in A/62/62/Add.1, para. 4 pertains to the case of *Bosnia v. Serbia*, *supra* note 17. See also Arcari, *supra* note 208, pp. 191-203. It is unfortunate that Nicaragua has not contested this point in its pleadings on provisional measures in the pending case filed against Germany (see *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 8 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf, p. 45, para. 23 (Pellet)).
[239] Inter-American Court of Human Rights, *Castillo González et al. v. Venezuela*, Judgment, Merits, 27 November 2012, para. 111, footnote 53 (also cited in A/68/72, para. 81).
[240] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, p. 29, para. 15 (Wordsworth)
[241] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 230, para. 441. Note the addition of the word 'hence' in the recollection of this point by the counsel in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Public sitting, 9 April 2024, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-ora-01-00-bi.pdf, p. 29, para. 15 (Wordsworth).

The rule in Article 14(3) was firmly rooted in Ago's consideration that obligations of prevention are obligations of (negative) result rather than of conduct. However, if the duty to prevent genocide is an obligation of conduct governed by due diligence – as affirmed by the ICJ – then the occurrence of the event (genocide) should be totally irrelevant for the breach of the obligation. As such, when the ICJ applied Article 14(3) to an obligation of conduct such as the duty to prevent genocide, its reasoning was criticised as a 'contradiction',[242] the product of 'some conceptual difficulties',[243] and 'inconsistency',[244] and 'an unreasonable conclusion'[245] that 'is truly disconcerting'[246] by most scholars. It was noted that the controversial correspondence to customary international law of Article 14(3), 'could perhaps partly explain why the ICJ, in its subsequent case law concerning the prevention of environmental damage, abstained from any reference to this provision'.[247] Those who consider that the Court was correct in invoking Article 14(3) of ARSIWA had to conclude that the duty to prevent genocide is not an obligation of conduct governed by due diligence[248] and/or that there are different types of obligations of prevention, some belonging to the obligations of conduct and some to the realm of the obligations of result.[249]

Moreover, that the duty to prevent genocide is only violated when a genocide occurs runs contrary the object and purpose of the Genocide Convention itself in relation to prevention. Even though it is possible to envisage two separate temporal moments, one (t1) when the duty arises, and one (t2), when state responsibility is engaged, such a distinction would weaken the preventive function of the obligation. Indeed, a state may decide to take the chance not to act when it is a serious risk of genocide and its obligation arises (t1), hoping that the state that poses a serious risk to commit genocide in fact does not commit the genocide (t2) either by its own choice or for another reason that intervenes. Clearly, separating t1 from t2, that is, differentiating between the time the duty to prevent genocide arises and the time state responsibility occurs is out of line with the preventive function, since it enhances the risk that genocide is not prevented. Accordingly, as noted by an individual opinion appended to the 2024 order on provisional measures in the *Nicaragua v. Germany* case, when

[242] Marko Milanović, "State Responsibility for Genocide: A Follow-Up", 18 *EJIL* (2007) p. 687.
[243] Andrea Gattini, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment", 18 *EJIL* (2007) p. 702.
[244] Ben-Naftali, *supra* note 161, p. 41.
[245] Forlati, *supra* note 161, p. 200.
[246] Heathcote, *supra* note 198, p. 312.
[247] Arcari, *supra* note 208, p. 190.
[248] James Crawford, *State Responsibility: The General Part* (2013) pp. 331-332. See also D'Argent, "Les obligations", *supra* note 19, p. 198.
[249] Rüdiger Wolfrum, "General International Law (Principles, Rules, and Standards)" in *MPEPIL* (December 2020), para. 90.

the existence of a serious risk of genocide is manifest, 'it would be absurd for [a State] to have to await the total completion of genocide before its responsibility could be engaged'.[250]

In light of these conceptual difficulties in reconciling obligations of conduct governed by due diligence with the necessity of genocide actually occurring to assess lack of prevention, and taking into account the need to interpret the duty to prevent genocide in light of its preventing object and purpose, an increasing number of commentators argue that the precedent set by the Court should be set aside and that the occurrence of genocide is not necessary to ascertain the violation of the duty to prevent genocide.[251] There is no international case law on responsibility for violations of obligations of prevention without the occurrence of the event simply because, without the event, states have no interest in adjudicating those violations.[252]

Indeed, in December 2024, few days before the submission of this article, the Democratic Republic of the Congo forcefully challenged the applicability of Article 14(3) of ARSIWA to the duty to prevent genocide, arguing that a violation can occur even if a genocide does not materialise.[253] The Democratic Republic of the Congo offered three arguments to support its claim: first, since the Genocide Convention prohibits the incitation to genocide irrespective of whether a genocide occurs, it would be illogical to link the violation of other provisions of the Convention to the materialisation of a genocide;[254] second, the Democratic Republic of the Congo, along the lines discussed here, considered that requiring the materialisation of a genocide as a prerequisite for the violation of the duty of prevention is in conflict with the due diligence nature of the duty to prevent genocide;[255] third,

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[250] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, *supra* note 9, Dissenting Opinion of Judge ad-hoc Al-Khasawneh, para. 13.

[251] Mark Gibney, "Genocide and State Responsibility", 7 *Human Rights Law Review* (2007) pp. 768-769; Montserrat Abad Castelos, *¿Es posible combatir el terrorismo yihadista a través de la justicia?* (2019) p. 104; Sébastien Touzé, 'La notion de prévention en droit international des droits de l'homme' in E. Decaux & S. Touzé (eds), *La prevention des violations des droits de l'homme* (2015) p. 24; Monnheimer, *supra* note 111, p. 106; Ollino, *supra* note 115, pp. 208-213; Arcari, *supra* note 208, p. 205; Federica D'Alessandra and Shannon Raj Singh, "Operationalizing Obligations to Prevent Mass Atrocities: Proposing Atrocity Impact Assessments as Due Diligence Best Practice", 14 *Journal of Human Rights Practice* (2022) p. 773; Mohammad H. Zakerhossein, 'An Appeal to Address the Failure in Preventing Genocide in Gaza through the International Court of Justice', *Opinio Juris*, 10 November 2023, https://opiniojuris.org/2023/11/10/an-appeal-to-address-the-failure-in-preventing-genocide-in-gaza-through-the-international-court-of-justice/.

[252] Dupuy, *supra* note 109, p. 381.

[253] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening)*, Declaration of intervention of the Democratic Republic of the Congo, 11 December 2024, https://www.icj-cij.org/sites/default/files/case-related/178/178-20241211-int-01-00-fr.pdf, pp. 44-48.

[254] Ibid., para. 110.

[255] Ibid., para. 111.

again in line with what argued here, the Democratic Republic of the Congo affirmed that the requirement of the occurrence of a genocide to trigger state responsibility for lack of prevention runs against the object and purpose of the Genocide Convention.[256]

Accordingly, it is submitted here that, since the duty to prevent genocide is an obligation of conduct governed by due diligence, there is no need to ascertain that a genocide occurred in order to assess whether the duty to prevent is violated.

## 7. Conclusions

This article clarified that, if the ICJ has jurisdiction to hear an allegation about the violation of the duty to ensure respect for IHL, the duty to prevent genocide, or the duty to prevent crimes against humanity in their external dimensions, the respondent state should not be able to claim successfully that the lack of participation in the proceedings by the third state is a bar to the exercise of the Court's jurisdiction. Indeed, both negative and positive obligations under the duty to ensure respect for IHL and under the duty to prevent genocide should be assessed independently from the conduct of the third state. Less clear is the analysis in relation to the duty to prevent crimes against humanity since it is not incorporated in a binding instrument, it has limited external dimension in the ILC's Draft Articles, and it has generated no case law so far under corresponding rules of customary international law.

If the claims before the ICJ are constructed about the awareness of a serious risk of genocide or of IHL violations, then the Court would not have to ascertain whether the third state has in fact committed genocide or IHL violations. The Court should only assess, following the usual rules on evidence, whether the respondent was aware of the serious risk. This assessment requires evaluations of facts: if the third state wants to contribute to the establishment of these factual circumstances, it can decide to intervene. Otherwise, the rules on *res judicata* will protect that third state from negative effects deriving from the ICJ decision. The situation is less clear-cut in relation to the duty to prevent genocide since the ICJ has affirmed that this duty is violated only if genocide in fact occurs. It is respectfully submitted here that this conclusion does not stand up to scrutiny and, as such, should not trigger the application of the MGP in relation to the accidental ascertainment on whether the third state has committed genocide.

The analysis contributed to knowledge by clarifying how the MGP applies in relation to cases involving this kinds of obligations pertaining to atrocities. Additionally, this conclusion is important

[256] Ibid., para. 112.

to understand theoretical questions on how international law rules on cooperation work in the field of genocide prevention and IHL and how they interact with the consensual nature of peaceful settlement of international disputes.