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LEGAL OPINION

Request for a Legal Opinion on the Regime of Innocent Passage and the Due Diligence Obligations of Flag States under the International Law of the Sea

I. INTRODUCTION

1. This expert legal opinion aims to elucidate the rights and obligations of States regarding activities conducted by vessels flying their flag or operating within their waters, particularly in cases involving serious violations of human rights or breaches of peremptory norms of international law. To this end, the opinion addresses the following questions concerning the regime of innocent passage and the due diligence obligations of flag States under the international law of the sea:

Question 1 – Innocent passage regime

- a. Under the UN Convention on the Law of the Sea (UNCLOS or the Convention)¹ or other applicable rules of international law, do coastal States have the right or the obligation to interrupt or suspend the passage of foreign ships through their territorial sea:
 - i. In response to non-compliance with international human rights obligations binding upon those States, including obligations arising under the UN Arms Trade Treaty and other relevant treaties?
 - ii. To avoid providing aid or assistance to another State in maintaining a situation that constitutes a breach of peremptory norms of international law?
- b. If such a right or duty exists:
 - i. Under what circumstances and conditions may or should it be exercised?

¹ Convention on the Law of the Sea, opened for signature on 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

- ii. What enforcement measures can a coastal State lawfully implement against foreign ships engaged in non-innocent passage?
- iii. Does it reflect customary international law?

Question 2 – Due diligence obligations of flag States

- a. Does UNCLOS require flag States to effectively exercise control and jurisdiction over vessels flying their flag, including when those vessels operate within the waters of another State?
 - b. If such a general duty exists:
 - i. Does it include a due diligence obligation for flag States to monitor the compliance of vessels flying their flag with the State's binding human rights obligations, including those arising under the UN Arms Trade Treaty and other relevant treaties, and to take appropriate action in cases of non-compliance?
 - ii. Does it reflect customary international law?
2. The international law of the sea is the body of rules of public international law governing the use and management of maritime spaces and resources, both in peacetime and, to the extent consistent with the law of armed conflict, during wartime.²
 3. The sources of international law, as outlined in Article 38(1) of the Statute of the International Court of Justice (ICJ),³ including international conventions and customs, apply to the law of the sea, as they do in other areas of international law. These sources may also underpin the establishment of peremptory norms of general international law (*ius cogens*), as defined by Article 53 of the Vienna Convention on the Law of Treaties (VCLT).⁴

² *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9 April 1949, ICJ, 22.

³ ICJ Statute, Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

⁴ VCLT, Article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Emphasis added.

4. The cornerstone of the international law of the sea is the UNCLOS, adopted in 1982 and in force since 16 November 1994. The Convention draws on the foundational work of the International Law Commission (ILC)⁵ for the 1958 Geneva Conventions on the Law of the Sea,⁶ as well as on subsequent multilateral developments, negotiations, relevant State practice, and decisions by competent international bodies, including international courts and tribunals.
5. As of January 2025, UNCLOS has been ratified or acceded to by 170 parties, including one international organization (the European Union) and a non-UN member State with Permanent Observer status (the State of Palestine).
6. Due to the widespread ratification of UNCLOS, the enduring nature of many of its provisions—confirmed by the Convention’s history and the jurisprudence of international courts and tribunals—and the prohibition of reservations and exceptions within its framework,⁷ numerous UNCLOS provisions are widely recognized as reflective of customary international law, even by States that have not ratified the Convention.
7. The provisions of UNCLOS pertinent to the analysis in this legal opinion are primarily found in Part II (Territorial Sea and Contiguous Zone), Section 3 (Innocent Passage in the Territorial Sea), Part VII (High Seas), Section 1 (General Provisions), and Part XVI (General Provisions) of the Convention. These rules should be considered in the context of the preparatory work of UNCLOS, academic literature, and relevant international case law, including decisions of the International Tribunal for the Law of the Sea (ITLOS), which contribute to their interpretation.
8. Finally, other international legal instruments, including the UN Arms Trade Treaty (ATT)⁸ the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),⁹ and the International Convention on the Suppression and Punishment of the

⁵ International Law Commission, *Articles concerning the Law of the Sea with commentaries*, Yearbook of the International Law Commission, 1956, Volume II.

⁶ Convention on the Territorial Sea and the Contiguous Zone, came into force on September 10, 1964, Convention on the High Seas, came into force on September 30, 1962, Convention on Fishing and Conservation of the Living Resources of the High Seas, came into force on March 20, 1966, Convention on the Continental Shelf, came into force on June 10, 1964.

⁷ UNCLOS, Article 309.

⁸ Arms Trade Treaty, opened for signature on 3 June 2013, UNTS No 52373 (entered into force 24 December 2014).

⁹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, UNTS 2000 (entered into force 12 January 1951).

Crime of Apartheid (Apartheid Convention)¹⁰ are integral to the analysis presented in this legal opinion.

9. This legal opinion was commissioned by the Palestinian Boycott, Divestment and Sanctions (BDS) National Committee (hereinafter “the claimant”) to the Associazione di Consulenza in Diritto del Mare (ASCOMARE), and was prepared in a personal capacity by the following experts, listed alphabetically: Ademuni Odeke,¹¹ Alice Ollino,¹² Andrea Caligiuri,¹³ Andrea Pappalardo,¹⁴ Daud Hassan,¹⁵ Irini Papanicolopulu,¹⁶ Pierandrea Leucci¹⁷ and Tullio Scovazzi.¹⁸ Research support was provided by Pierre Clément Mingozi,¹⁹ Andrea Valentina Salamino²⁰ and Matteo Bedendi.²¹

II. LEGAL ANALYSIS

QUESTION 1, SUB-QUESTION (a)

10. The first issue addressed pertains to the regime governing the innocent passage of vessels through a coastal State’s territorial sea, which encompasses several sub-questions, as outlined in point 1 of this legal opinion.

¹⁰ International convention on the suppression and punishment of the crime of apartheid, adopted by the General Assembly of the United Nations on 30 November 1973, UNTS 1563 (entered into force 18 July 1976).

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- 11.** Initially, the inquiry seeks to determine whether coastal States, under UNCLOS or other international law rules, have a right or an obligation to interrupt or suspend the passage of a foreign vessel through their territorial sea:
- i. In response to non-compliance with international human rights obligations binding upon those States, including obligations arising under the UN Arms Trade Treaty and other relevant treaties?*
 - ii. To avoid providing aid or assistance to another State in maintaining a situation that constitutes a breach of peremptory norms of international law?*
- 12.** With respect to the reference in sub-question (a)(i) to the human rights obligations arising under the ATT and other relevant treaties, the claimant queried whether non-compliance with such obligations by vessels transiting through a coastal State’s territorial sea could justify the suspension or interruption of the innocent passage regime for a specific vessel. While the ATT does not, strictly speaking, create standalone “human rights obligations” applicable in this context, it underscores the need for States to respect and uphold existing human rights commitments under other legal frameworks. Therefore, this legal opinion will examine the relevant provisions of the ATT in the broader context of international human rights obligations and assess their potential implications.
- 13.** The term “human rights obligations” should be understood as encompassing obligations to respect, protect, and fulfil the rights of individuals or groups, including those who may be directly or indirectly impacted by the activities of vessels transiting through a coastal State’s territorial sea. However, this legal opinion does not specifically address the implications of non-compliance with human rights obligations as they relate to individuals on board the vessel, such as seafarers, although many of the conclusions and considerations discussed herein could extend to those circumstances.
- 14.** As for “other relevant treaties,” this term should be understood within the context and objectives of the ATT. Entered into force on 24 December 2014 and being today in force for 116 States, the ATT was conceived, negotiated, and adopted within the framework of existing international legal and policy instruments. Its primary aim is to prevent the misuse of deadly weapons to undermine peace and security or to perpetrate acts such as genocide, crimes against humanity, war crimes, and other human rights violations.²² The treaty

²² ATT, Preamble Paragraph 4.

recognizes the interdependence and mutual reinforcement of peace, security, and human rights—the foundational pillars of the UN system.²³

15. In light of the foregoing, while the term “other relevant treaties” could be interpreted broadly, the authors of this legal opinion propose that it should, at a minimum, include the Genocide Convention and the Apartheid Convention. Accordingly, the analysis presented in this legal opinion will, to the extent possible, also consider these legal instruments.
16. The **ATT** establishes provisions regulating the transfer of conventional arms outlined in Article 2(1)²⁴ and additional items covered by Articles 3²⁵ and 4.²⁶
17. Article 6 explicitly prohibits States Parties from authorizing the “transfer”, including transit,²⁷ of conventional arms and related items if they have knowledge that such arms or items will be used to commit genocide, crimes against humanity, or other serious human rights violations.²⁸ The Voluntary Guide on implementing Article 6 clarifies that the phrase “shall not authorize any transport” should be interpreted broadly, obliging States Parties to prohibit and prevent any export, import, transit, trans-shipment, or brokering of arms and other items covered by Articles 2(1), 3, and 4 of the ATT under their jurisdiction.²⁹

²³ Ibid., Preambular Paragraph 7.

²⁴ ATT, Article 2(1): “This Treaty shall apply to all conventional arms within the following categories: (a) Battle tanks; (b) Armoured combat vehicles; (c) Large-calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons.”

²⁵ Ibid., Article 3: “Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions.”

²⁶ Ibid., Article 4: “Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.”

²⁷ Ibid., Article 2(2): “For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as ‘transfer’.”

²⁸ Ibid., Article 6(3): “A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.”

²⁹ Working Group on Effective Treaty Implementation, *Voluntary Guide to Implementing Articles 6 and 7 of the Arms Trade Treaty* (19 July 2024) 20, para 45.

18. The obligations under Article 6 are reinforced by Articles 5(5)³⁰ and 14³¹ which require States Parties to adopt necessary measures, including enforcement action to implement treaty provisions.³²
19. The text of the treaty does not imply a strict territorial limitation on its obligations and provisions. References to “territory” in certain provisions of the ATT (e.g., Articles 9 and 12) should be understood to encompass, at a minimum, waters under the coastal State’s territorial sovereignty—specifically, internal waters, territorial seas, and archipelagic waters—which are recognized under international law as integral and inseparable components of a coastal State’s territory.³³
20. Turning to the **Genocide Convention**, the prevention and punishment of genocide—a crime under international law—is a fundamental duty under Article I³⁴ and constitutes a peremptory norm of international law applicable to all States.³⁵
21. The Convention defines “genocide” in Article II³⁶ as any of the acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”, whether in

³⁰ ATT, Article 5(5): “Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2 (1) and of items covered under Article 3 and Article 4.”

³¹ Ibid., Article 14: “Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.”

³² Although Article 9 of the Treaty explicitly refers to “transit” and could arguably have been mentioned here, it is reasonable to conclude that this provision does not apply in the context of Article 6, which is more exceptional in nature. For further analysis, see Expert Group on ATT Implementation, Prevention, Transit, and Innocent Passage under the Arms Trade Treaty (Briefing No. 3, August 2015), p. 8.

³³ The *Grisbådarna* case (Norway v. Sweden), Award, (1909) XI RIAA 155, (1910) XVII RGDIP 177, ICGJ 404 (PCA 1909), 23rd October 1909, Permanent Court of Arbitration, 4; and Article 2(1) UNCLOS.

³⁴ Genocide Convention, Article I: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

³⁵ E.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, para 161; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, para 87. See also the non-exhaustive list of norms with peremptory character published in 2022 by the ILC in its ‘Fifth Report on Peremptory Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur’, available at <<<https://documents.un.org/doc/undoc/gen/n21/284/83/pdf/n2128483.pdf>>>.

³⁶ Genocide Convention, Article II: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

times of peace or war.³⁷ Article III further obliges States to punish conspiracy, direct and public incitement, attempt and complicity in committing genocide, alongside the crime itself.³⁸ The International Criminal Tribunal for Rwanda has clarified that complicity in genocide encompasses “all acts of assistance or encouragement that have substantially contributed to, or had a significant effect on, the commission of the crime of genocide.”³⁹

22. The Convention imposes obligations on its State Parties, which are characterized as obligations *erga omnes partes*, meaning that each State Party has a vested interest in ensuring compliance in any given case.⁴⁰
23. States Parties to the Genocide Convention are legally obliged to prevent and punish genocide from the moment they “[learn] of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”⁴¹ At that point, if the State possesses means reasonably capable of deterring individuals suspected of preparing to commit genocide or harbouring the requisite specific intent (*dolus specialis*), it must employ such means to the fullest extent permitted by the circumstances.⁴²
24. For the duty to prevent to be triggered, two conditions must be met: (i) the situation must constitute a “grave risk”, and (ii) the State must have known, or should have known, of the risk. The “grave risk” criterion is closely linked to the “plausibility” standard, as highlighted by the ICJ in its indication of interim measures in *South Africa v. Israel*.⁴³ The ICJ’s finding of “plausible rights” and “imminent risk” serves as the threshold for knowledge of the risk of genocide, which activates the legal obligations of third States under the Convention.

³⁷ Ibid., Article I.

³⁸ Ibid., Article III: “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”

³⁹ Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), International Criminal Tribunal for Rwanda, May 15, 2003, paras 393 and 395.

⁴⁰ *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, 26 January 2024, ICJ, para 33. See also, *Barcelona Traction, Light and Power Company Limited* (New Application, 1962), (Belgium v. Spain), Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970), 5 February 1970, ICJ, paras 33-34; and *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19 December 2005, ICJ, para 64.

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 431.

⁴² Id.

⁴³ *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, 26 January 2024, ICJ, para 54.

25. In *Bosnia v. Serbia*, the ICJ clarified that the duty to prevent requires States “to employ all means reasonably available to them” to prevent genocide.⁴⁴ This obligation is one of *conduct*, not of *result*, meaning the focus is on whether the State has taken all reasonable measures, made its best efforts, and acted to the fullest extent possible to achieve the prevention of genocide, regardless of the outcome.
26. The obligation to prevent requires States to act with due diligence by taking all necessary measures to avert genocide. This obligation applies extraterritorially.⁴⁵ A State’s responsibility for an international wrongful act arises if it “manifestly failed to take all measures within its power to prevent genocide.”⁴⁶
27. Finally, regarding the **Apartheid Convention**, apartheid is recognized as a “crime against humanity”, constituting a grave threat to international peace and security and violating fundamental principles of international law, including those enshrined in the UN Charter.⁴⁷
28. The crime of apartheid encompasses a range of “inhuman acts” outlined in Article II of the Convention, committed “for the purpose of establishing and maintaining domination by one racial group over any other racial group and systematically oppressing them.”⁴⁸

⁴⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 430.

⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Preliminary Objections, I.C.J. Reports 1996 (II), para 31; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 183.

⁴⁶ *Ibid.*, para 431. See also, *M/T “San Padre Pio”* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, Sep. Op. Judge ad hoc Petrig, 15-16.

⁴⁷ Apartheid Convention, Article I: “1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security. 2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.”

⁴⁸ Apartheid Convention, Article II: “For the purpose of the present Convention, the term “the crime of apartheid”, which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic

29. Similar to the Genocide Convention, Article III of the Apartheid Convention affirms the extraterritorial application of its provisions and extends legal consequences to acts of participation in, direct incitement, abetment (complicity), conspiracy, encouragement, and cooperation in the commission of apartheid.⁴⁹ The prohibition of apartheid is recognized as a peremptory norm (*jus cogens*) under customary international law, giving rise to *erga omnes* obligations owed to the international community as a whole.⁵⁰
30. All States Parties are obliged to prevent and punish the crime of apartheid, including through the adoption of necessary measures to suppress, prevent, and prosecute its commission.⁵¹

Innocent passage regime under the UNCLOS

31. Before addressing Question 1, sub-question (a), it is important to outline the legal regime governing innocent passage, as established in Part II, Section 3 of the UNCLOS.

human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour; (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.”

⁴⁹ Ibid., Article III: “International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention; (b) Directly abet, encourage or co-operate in the commission of the crime of apartheid.”

⁵⁰ See the non-exhaustive list of norms with peremptory character published in 2022 by the ILC in its ‘Fifth Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur’, available at <<<https://documents.un.org/doc/undoc/gen/n21/284/83/pdf/n2128483.pdf?>>>.

⁵¹ Ibid., Article IV: “The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts.”

- 32.** Under Article 17 of the UNCLOS, the right of innocent passage is granted to the ships⁵² of all States through the territorial sea of a coastal State⁵³ and, with certain exceptions, extends to other maritime zones.⁵⁴ Innocent passage consists of two key elements: “passage” and “innocence”. To lawfully exercise this right, vessels must satisfy the criteria for both. Additionally, ships engaged in innocent passage are required to adhere not only to the provisions of the UNCLOS but also to other applicable rules of international law.⁵⁵
- 33.** Passage may occur laterally through the territorial sea or vertically when entering or exiting the territorial sea to or from internal waters,⁵⁶ the exclusive economic zone (EEZ), or the high seas. Such passage must be continuous and expeditious, without stopping or anchoring, except in cases of force majeure, distress, or to provide assistance to persons or vessels in distress at sea.⁵⁷ Passage is “innocent” so long as it is not prejudicial to the peace, good order or security of the coastal State.⁵⁸ Article 19(2) of the UNCLOS provides a list of activities which render passage not innocent.
- 34.** Coastal States exercise sovereignty over their territorial sea,⁵⁹ which includes the power to enact laws and regulations governing specific activities of vessels engaged in innocent passage.⁶⁰ These laws and regulations must be public, non-discriminatory, and must not hamper passage, including by imposing requirements on foreign ships that effectively deny or impair the right of innocent passage.⁶¹
- 35.** Warships⁶² and other government vessels operating for non-commercial purposes are also required to comply with the laws and regulations of the coastal State while exercising the

⁵² Including underwater vehicles (Article 20). For a definition of “ships” in the context of the innocent passage regime under the UNCLOS see Murat Sumer, ‘Applicability of the right of innocent passage to maritime autonomous surface ships: Exploring the potential role of advisory opinions’, in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 3: Maritime Security, New Technology and Ethics* (Luglio Editore 2024) 149-178.

⁵³ UNCLOS, Article 17: “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”

⁵⁴ Internal waters (UNCLOS, Article 8(2)), straits used for international navigation (UNCLOS, Article 45), and archipelagic waters (UNCLOS, Article 52).

⁵⁵ See Articles 18 and 19 of the UNCLOS, as they will be examined below in this legal opinion.

⁵⁶ UNCLOS, Article 18(1).

⁵⁷ Ibid., Article 18(2).

⁵⁸ Ibid., Article 19(1).

⁵⁹ Ibid., Article 2(1).

⁶⁰ Ibid., Article 21(1).

⁶¹ Ibid., Article 24.

⁶² As defined in Article 29 of the UNCLOS.

right of innocent passage through its territorial sea. In cases of non-compliance, the coastal State may demand that such vessels immediately leave its territorial sea.⁶³ Although these vessels enjoy immunity from the coastal State's enforcement jurisdiction,⁶⁴ the flag State remains liable for any loss or damage caused by acts of non-compliance by its vessels.⁶⁵

- 36.** Coastal States have the authority to take measures against passages that does not qualify as “innocent” and to prevent violations of the conditions governing entry into their internal waters or ports.⁶⁶ They may also temporarily suspend innocent passage in specified areas of their territorial sea, provided such suspension is duly published, non-discriminatory, and essential for safeguarding their security, including during weapons exercises.⁶⁷
- 37.** The coastal State's sovereignty over its territorial sea includes the right to exercise full jurisdiction vis-à-vis vessels that are not engaged in innocent passage. Additionally, a coastal State may assert criminal or civil enforcement jurisdiction over individuals on foreign vessels exercising the right of innocent passage in the territorial sea, in accordance with the UNCLOS.⁶⁸ This includes cases where the consequences of the crime extend to the coastal State, where the offense occurred within the coastal State's land territory or internal waters, or where such action is requested by the vessel's master or flag State.
- 38.** Based on the foregoing, and without prejudice to the special status of warships and other government vessels used for non-commercial purposes, the UNCLOS would allow coastal States to interrupt or suspend the passage of foreign vessels through their territorial sea in at least four scenarios: **first**, when a vessel engages in passage that is not “innocent”; **second**, when a vessel is bound for internal waters or ports in violation of the conditions governing its admission to those areas; **third**, when such suspension is deemed essential for the protection of the coastal State's security, subject to the conditions outlined in the UNCLOS; and **fourth**, when suspension is necessary for criminal or civil enforcement related to offenses committed by individuals on board the vessel, within the limits prescribed by the UNCLOS. An analysis of these four scenarios is needed to reply to Question 1(a).

⁶³ UNCLOS, Article 30.

⁶⁴ Ibid., Article 32.

⁶⁵ Ibid., Article 31.

⁶⁶ Ibid., Article 25(1) and (2).

⁶⁷ Ibid., Article 25(3).

⁶⁸ Ibid., Articles 27 and 28.

First scenario – vessels engaging in non-innocent passage

39. Article 25(1) of the UNCLOS⁶⁹ grants coastal States the authority (“may”) to take the necessary steps within their territorial sea to prevent passages that does not qualify as “innocent”, which may include stopping the vessel for enforcement purposes.⁷⁰

40. The “meaning of innocent passage” is provided for by Article 19 of the UNCLOS:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities;

⁶⁹ UNCLOS, Article 25(1): “The coastal State *may* take the necessary steps in its territorial sea to prevent passage which is not innocent.” Emphasis added.

⁷⁰ As noted by Petrig: “Jurisdiction under the law of the sea is permissive in nature, not prescriptive. This means that the coastal state is authorised, but not obliged, to exercise it. This is confirmed by Article 25(1) UNCLOS, stating that “The coastal State *may* take the necessary steps in its territorial sea to prevent passage which is not innocent” (emphasis added). The word ‘may’ indicates that the coastal state has the option to not take any action at all against a non-innocent ship.” See Anna Petrig, ‘Coastal State Jurisdiction in the Territorial Sea and the Protection of People on board foreign-flagged vessels’ (2024), available at <<<https://www.ejiltalk.org/coastal-state-jurisdiction-in-the-territorial-sea-and-the-protection-of-people-on-board-foreign-flagged-vessels/>>>.

- (j) the carrying out of research or survey activities;*
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;*
- (l) any other activity not having a direct bearing on passage.*

- 41.** Article 19 outlines three key elements in defining the concept of innocent passage. First, there is the requirement that the passage must not prejudice the “peace, good order, or security of the coastal State” (paragraph 1, first sentence). Second, the passage must be consistent with other provisions of the UNCLOS and broader international law (paragraph 1, second sentence). Finally, paragraph 2 provides a detailed list of activities qualifying the types of “prejudice” that render a passage non-innocent.
- 42.** It is reasonable to view the first and third elements outlined in point 41 of this legal opinion as closely interdependent. The “prejudice” described in paragraph 1 of Article 19 is legally substantiated by one or more of the activities enumerated in paragraph 2. As such, although the wording of paragraph 2(l) may allow for some interpretive flexibility, the list should be regarded as relatively strict.
- 43.** This interpretation is further supported by the preparatory work of the Convention.⁷¹ Article 19 of the UNCLOS draws upon Article 14(4) of the 1958 Territorial Sea and Contiguous Zone (TSC) Convention,⁷² which, while nearly identical to Article 19(1) of the UNCLOS, did not include a list of activities explicitly qualifying a passage as non-innocent. The inclusion of such a list, now found in Article 19(2), arose during the UNCLOS negotiations to limit the discretionary power of coastal States in determining the non-innocence of a vessel’s passage through their territorial sea.⁷³
- 44.** Regarding the second element outlined in point 41 of this legal opinion—namely, the requirement that passage be exercised in a manner consistent with other provisions of the UNCLOS and broader rules of international law—it should be stressed that, irrespective of any prejudice caused by the activities of the transiting vessel, passage cannot qualify as innocent if it contravenes other provisions of the UNCLOS or other rules of international

⁷¹ For a summary of which see Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne. *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume 2* (Brill | Nijhoff 1993) 164-174.

⁷² Convention on the Territorial Sea and the Contiguous Zone, opened to signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964). According to Article 14(4) “[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law”.

⁷³ See Richard Barnes, ‘Article 19’, in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 189.

law. This conclusion, among other things, is supported by the underlying separation between the first and second sentences of Article 19(1), the hierarchical relationship between the UNCLOS and other sources of international law (in particular, *jus cogens*), and a contextual reading of Article 17,⁷⁴ which explicitly conditions the right of innocent passage on compliance with the Convention as a whole.⁷⁵

45. Neither Article 19(1) nor 19(2) explicitly address the two scenarios outlined in point 11 of this legal opinion—namely, vessels acting in violation of international human rights law or peremptory norms of international law—unless such violations fall within the scope of the activities enumerated in Article 19(2).⁷⁶ However, the specific content of Article 19(2)(a), as well as the conditional nature of the innocent passage regime in Article 19(1), which requires conformity with other provisions of the UNCLOS and international law more broadly, may hold significant relevance in this context.
46. Specifically, Article 19(2)(a) identifies two distinct sets of actions, either of which can independently render a passage non-innocent: threatening or using force against the sovereignty, territorial integrity, or political independence of the coastal State; and threatening or using force “*in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations*”. The authors of this legal opinion hold the view that, under certain circumstances, the second action may provide a legal basis for interrupting or suspending the passage of vessels that violate international human rights law or peremptory norms of international law.
47. This is particularly relevant in cases of **complicity in the threat of force**, such as when a vessel transports weapons or equipment through the territorial sea with the intention of facilitating actions that breach human rights obligations or violate peremptory norms of international law. Such actions could constitute an indirect threat of force inconsistent with the principles enshrined in the UN Charter. Yet, for these actions to qualify as non-innocent passage under Article 19(2)(a) of the UNCLOS two key conditions must be met. First, there must be a **real and credible risk of future use of force** substantiated by a declaration of intent or conduct that reasonably conveys the likelihood of force being used. Second, the

⁷⁴ UNCLOS, Article 17: “*Subject to this Convention*, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” Empasis added.

⁷⁵ Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne. *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume 2* (Brill | Nijhoff 1993) 174.

⁷⁶ E.g., a vessel violating international human rights law binding upon the coastal State by unlawfully disembarking migrants at sea, thereby falling within the scope of Article 19(2)(g) of the UNCLOS.

vessel must **engage in activities that support or facilitate the threat of force**, such as complicity, which is a legally recognizable act under international law.⁷⁷

48. The phrase in the final sentence of Article 19(2)(a) of the UNCLOS echoes the language of Article 301,⁷⁸ particularly in its reference to “*the principles of international law embodied in the Charter of the United Nations*.” According to the UNCLOS commentaries, these principles encompass not only those outlined in Chapter I of the Charter⁷⁹ but also “all the principles of international law contained in the Charter.”⁸⁰ This includes the principles articulated in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (Friendly Relations Declaration), annexed to UN General Assembly Resolution 2625 (XXV) of 1970,⁸¹ which “continue to serve as an interpretative aid for the basic principles of the Charter as these are to be incorporated into the law of the sea...”⁸²
49. Due to space constraints, a comprehensive enumeration of the “principles of international law” relevant to this discussion is not feasible. However, three principles stand out as

⁷⁷ In *Nicaragua v. United States*, the ICJ interpreted the threat of force to encompass covert activities such as funding or arming rebels with the intent to destabilize another State, even in the absence of an explicit threat. This interpretation broadens the concept of the threat of force to include actions with indirect coercive effects—activities that, while not overtly aggressive, can reasonably be perceived as preparations for aggression or intimidation. Examples include the unexplained massing of troops at a border or the transport of military arms and equipment intended for use in conflict. This notion of an indirect threat of force aligns with the ICJ’s reasoning in its *Israeli Wall Advisory Opinion*, where the Court held that actions contributing to an illegal situation, even if they do not involve direct force, could still breach international obligations. This principle could extend to cases where a State’s assistance or support in certain activities effectively constitutes an indirect threat of force, thereby violating international law. See *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27 June 1986, ICJ, para 228; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 159. See also, Christine D. Gray, *International Law and the Use of Force* (4th Edition, Oxford University Press 2018) 29-31.

⁷⁸ UNCLOS, Article 301: “In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.” Article 301 reproduces almost verbatim the text of Article 2(4) of the UN Charter.

⁷⁹ Principles provided for by Chapter 1 of the Charter are included in Article 2, for which reference is made to Andreus Palaus, ‘Article 1’, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf (eds.), *The Charter of the United Nations: A Commentary* (Volume I, Oxford Academic, 3rd ed., 2012) 122-132.

⁸⁰ Alexander Proelß (Ed.), *United Nations Convention on the Law of the Sea: A Commentary*, C. H. Beck/Hart/Nomos 2017) 1947. See also Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 154.

⁸¹ United Nations General Assembly Resolution 2626(XXV) of 24 October 1970 ([A/RES/2625\(XXV\)](#)).

⁸² Killian O'Brien, ‘Article 301’, in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 1946.

particularly pertinent in the context of Article 19(2)(a) of the UNCLOS: cooperation in the maintenance of international peace and security,⁸³ sovereign equality,⁸⁴ and the principle of equal rights and self-determination of peoples.⁸⁵

50. According to the *Friendly Relations Declaration*, these principles require States, among other things, to promote and uphold human rights and fundamental freedoms, including those reflecting peremptory norms of international law.⁸⁶ This obligation extends not only to activities within a State's territory but also to those occurring in its territorial sea and aboard vessels flying its flag, in line with the case law of international courts and tribunals, which emphasizes the need to interpret and apply UNCLOS provisions consistently with the "considerations of humanity" that apply to the law of the sea, as they do in other areas of international law.⁸⁷
51. Consequently, acts of passage by vessels through the territorial sea of a coastal State that contravene these principles or otherwise undermine their purpose could be deemed prejudicial to the peace, good order, or security of the coastal State. This includes acts such as complicity in apartheid, which Article I(1) of the Apartheid Convention expressly identifies as "*violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security*".
52. The above interpretation is further reinforced by the wording of Article 19(2)(a), which suggests that passage cannot be considered innocent if the vessel or its cargo poses a threat to fundamental principles of international law, even when such a threat is not directed specifically against the coastal State but impacts the international community as a whole.

⁸³ UN Charter, Articles 1(1), 11(1) and 26; and *Friendly Relations Declaration*, para 1.

⁸⁴ *Ibid.* Article 2(1); and *Friendly Relations Declaration*, para 1.

⁸⁵ *Ibid.*, Article 55; and *Friendly Relations Declaration*, para 1.

⁸⁶ *Friendly Relations Declaration*, para 1.

⁸⁷ E.g., *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 155, 61-62; *Guyana v. Suriname*, Final Award, ICGJ 370 (PCA 2007), 17 September 2007, Permanent Court of Arbitration, para 405, 112-113; *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 359, 102; *Enrica Lexie* case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24 August 2015, ITLOS, para 133, 24; and the *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, paras 83-4, 21, and para 130, 32. See also, Francesca Delfino, "Considerations of Humanity" in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals', in Angela Del Vecchio, Roberto Virzo (eds.), *Interpretations of the United Nations Convention on the Law of the Sea by international courts and tribunals* (Springer International Publishing, 2019) 421-443.

Notably, the placement of a comma between “coastal State” and “or” highlights that the provision is not confined to threats solely targeting the coastal State.

53. Turning now to the other consideration referenced in points 44 and 45—namely, the conditional nature of the innocent passage regime under Article 19(1) of the UNCLOS—it has already been noted that the requirement for passage to be consistent with other provisions of the UNCLOS and broader international law, as set out in the second sentence of Article 19(1), possesses a quasi-independent character. This requirement functions as a legality test for determining the *innocence* of passage. In other words, no passage through a coastal State’s territorial sea can benefit from the “innocent passage” regime if it contravenes other provisions of the UNCLOS or applicable rules of international law.
54. While applying this legality test may pose practical challenges—requiring a preliminary assessment of the passage’s compatibility with the UNCLOS and international law—some cases are more straightforward. For example, where a vessel’s activities while transiting the territorial sea clearly violate human rights obligations reflecting peremptory norms of international law, the test is more easily satisfied. In this context, “the *jus cogens* nature of the obligation could provide a benchmark” for determining the applicability of the innocent passage regime.⁸⁸ Nonetheless, the same level of certainty is harder to achieve when the vessel’s passage appears to conflict with human rights obligations stemming from treaty or customary international law that do not rise to the level of peremptory norms. In those cases the relationship between those obligations and the UNCLOS provisions should be assessed in practice.
55. Lastly, Article 19(1) of the Convention should be considered within the broader context of State responsibility for internationally wrongful acts, as codified in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁸⁹
56. Specifically, Article 41 of the ARSIWA outlines several legal consequences for third States in relation to serious breaches of peremptory norms of general international law, as referenced in Article 40 of ARSIWA.⁹⁰ These elements were reaffirmed in 2022 in Draft

⁸⁸ Anna Petrig, ‘Coastal State Jurisdiction in the Territorial Sea and the Protection of People on board foreign-flagged vessels’ (2024), available at <<<https://www.ejiltalk.org/coastal-state-jurisdiction-in-the-territorial-sea-and-the-protection-of-people-on-board-foreign-flagged-vessels/>>>.

⁸⁹ ILC, *Responsibility of States for Internationally Wrongful Acts*, 2001. Despite their non-binding nature, they are “widely regarded as a codification of customary international law” (Arbitral Award rendered on 12 October 2005 in the case *Noble Venture Inc. and Romania* (ICSID Case No. ARB/01/11)).

⁹⁰ Article 40 of the ARSIWA sets out the definition of “serious breach by a State of an obligation arising under a peremptory norm of general international law,” which is integral to the application of Article 41. The provision

Conclusion 19 of the ILC's *Draft Conclusions on Identification and Consequences of Peremptory Norms of General International Law*.⁹¹

57. First, under Article 41(1) of ARSIWA, States have an obligation to cooperate to bring an end to serious breaches of peremptory norms of general international law through lawful means. This obligation, recognised as customary international law, emphasizes a coordinated international response to counteract the effects of such breaches.⁹²
58. The obligation to cooperate does not specify the measures States must take to address serious breaches of peremptory norms but requires that such measures be lawful and context-dependent. As highlighted by the ILC, this entails “a joint and coordinated effort by all States to counteract the effects of these breaches”, irrespective of whether individual States are directly affected.⁹³
59. Second, under Article 41(2) of ARSIWA, States are prohibited from recognizing as lawful situations created by serious breaches of peremptory norms and from rendering aid or assistance that would maintain such situations. These obligations, also recognized as customary international law, are distinct yet interconnected; the prohibition of aid or assistance logically follows from the prohibition of recognition.⁹⁴
60. Importantly, the prohibition of aid or assistance under Article 41(2) differs from the one in Article 16 of ARSIWA, which addresses aiding or assisting in the commission of an internationally wrongful act. By contrast, Article 41(2) applies to conduct “after the fact”,

states as follows: “1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. *A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.*” Emphasis added.

⁹¹ Draft Conclusion 19: “1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens). 2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens), nor render aid or assistance in maintaining that situation. 3. A breach of an obligation arising under a peremptory norm of general international law (jus cogens) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation. 4. This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens) may entail under international law.”

⁹² Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 2. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 155; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2004] ICJ Rep 2019, para 182.

⁹³ Yearbook of the International Law Commission (2001, Volume II, Part Two—Report of the Commission to the General Assembly on the work of its fifty-third session), 114.

⁹⁴ Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 12.

which supports the responsible State in maintaining a situation “opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law”.⁹⁵

61. Compliance with Article 41(2) requires States to have “knowledge of the circumstances of the internationally wrongful act” and a causal link between their conduct and the maintenance of the unlawful situation. ILC commentary,⁹⁶ international practice and scholarship suggest that a “significant contribution” to the maintenance of the violation suffices for the prohibition to apply.⁹⁷
62. The commentaries to Article 41(1) and Draft Conclusion 19 emphasize that the preferred framework for cooperative action is the institutional system of the UN.⁹⁸ However, the ILC has clarified that cooperation may also occur through non-institutionalized or unilateral measures,⁹⁹ provided they are consistent with international law.¹⁰⁰
63. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ indicated that individual States have an obligation to take steps to bring situations created by breaches of peremptory norms to an end.¹⁰¹
64. More recently, the ICJ reaffirmed these obligations in its advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*.¹⁰² In this case, the ICJ identified obligations *erga omnes* that were violated, including the right of the Palestinian people to self-determination, the prohibition of the use of force to acquire territory, and certain obligations under international humanitarian and human rights law.¹⁰³

⁹⁵ ARSIWA, commentary article 41 para 11.

⁹⁶ The ARSIWA commentary pertinent to this analysis is that of Article 16, which, while distinct in scope from Article 41(2), employs the same terminology (“aid or assistance”) and is therefore relevant to the discussion.

⁹⁷ ARSIWA commentary article 16 para 5. See also Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016), and Alexander Orakhelashvili, *Causation in International Law* (Edward Elgar 2022) 84 ff.

⁹⁸ Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 7.

⁹⁹ ARSIWA, commentary article 41 para 2

¹⁰⁰ Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 7.

¹⁰¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 159.

¹⁰² *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, ICJ Advisory Opinion of 19 July 2024.

¹⁰³ *Ibid.*, para 274.

65. The Court emphasized that these breaches triggered obligations on third States, not only within the UN framework but also as a matter of general international law.¹⁰⁴ These obligations included non-recognition, non-assistance, and cooperation to bring an end to the breaches.
66. Based on the above, **coastal States may, under certain circumstances, hold not only the right, but also the obligation to take appropriate action, which may involve interrupting or suspending the passage of foreign vessels through their territorial seas, particularly when they are aware that such passage would contribute to maintaining a situation arising from breaches of peremptory norms.** For instance, coastal States aware that granting passage to foreign ships would facilitate the transfer—including the transit—or use of weapons in serious breaches of peremptory norms must refrain from actions contributing to maintaining such unlawful situations. In such cases, their duty of non-assistance may require the suspension of passage. **Additionally, the suspension of passage may also be justified by the coastal States’ obligation to cooperate in ending breaches of peremptory norms.** As this duty may be fulfilled through unilateral actions under general international law, coastal States may suspend the right of passage to meet their secondary obligations. In both scenarios, the right and duty to suspend passage may be grounded in the legality test under Article 19(1) of UNCLOS and broader principles of international law.

Second scenario – violation of the conditions governing admission to internal waters or ports

67. Article 25(2) of the UNCLOS provides that:

In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

68. Based on the language of Article 25(2), coastal States have the authority to interrupt the passage of foreign vessels in the territorial sea, if they are proceeding to certain port

¹⁰⁴ Ibid., paras 278-279.

facilities or internal waters.¹⁰⁵ Article 25(2) extensively draws on the text of Article 16(2) of the 1958 TSC Convention.¹⁰⁶

69. While, in principle, this scenario permits a coastal State to interrupt (“prevent any breach”) the passage of foreign vessels that fail to comply with human rights obligations or peremptory norms of international law—particularly when access to internal waters or port facilities is contingent upon such compliance—its practical application to the cases referenced in point 11 of this legal opinion is limited. As such, it will not be addressed further. This limitation arises because any interruption under Article 25(2) would likely necessitate clear evidence of an intent to breach the conditions governing access to internal waters or ports, or other compelling indications of a significant risk of non-compliance (e.g., navigation speed relative to the vessel’s proximity to those areas).

70. **The foregoing is without prejudice to the right—and, in some instances, the duty¹⁰⁷—of coastal States to adopt national regulations prohibiting or restricting the entry of foreign vessels into their ports and internal waters for non-compliance with specific human rights obligations binding upon those States, including those established under the ATT and other relevant treaties.** This aligns with the practice of States forming “The Hague Group”, which includes Belize, Bolivia, Colombia, Cuba, Honduras, Malaysia, Namibia, Senegal, and South Africa. In their inaugural joint statement, the Group emphasized their commitment to *“Prevent the docking of vessels at any port, if applicable, within our territorial jurisdiction, in all cases where there is a clear risk of the vessel being used to carry military fuel and weaponry to Israel, which might be used to commit or facilitate violations of humanitarian law, of international human rights law, and of the prohibition on genocide in Palestine, in keeping with states’ peremptory legal obligation to cooperate towards preventing genocide and other violations of peremptory norms by all legal measures at their disposal.”*¹⁰⁸

¹⁰⁵ As such, the provision would not apply to internal waters covered by innocent passage under Article 8(2) of the UNCLOS.

¹⁰⁶ TSC, Article 16(2): “In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.”

¹⁰⁷ For instance, when coastal States are required to take necessary measures to fulfil a specific obligation or achieve a particular outcome, as stipulated under Articles 5(5) and 14 of the ATT.

¹⁰⁸ The Hague Group, *Inaugural Joint Statement*, 31 January 2025, The Hague (Netherlands), para 3, available at <<<https://thehaguegroup.org/>>>.

Third scenario – suspension for the protection of the coastal State’s security

71. Article 25(3) of the UNCLOS sets forth a specific circumstance under which the passage of foreign vessels through the territorial sea may be suspended:

The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

72. There are five cumulative conditions for the suspension outlined in the provision: the suspension shall be non-discriminatory, temporary, geographically circumscribed, duly published, and essential for the protection of the security of the coastal State. This provision extensively draws on Article 16(3) of the 1958 TSC Convention.¹⁰⁹
73. It could be argued that serious human rights violations or breaches of certain peremptory norms of international law might present significant security concerns for the coastal State, potentially justifying the suspension of passage through its territorial sea. However, the purpose of Article 25(3) is different. It allows suspension only in specific areas of the territorial sea, not for passage as a whole. Moreover, such suspension cannot target individual vessels based on their conduct but shall be imposed pre-emptively, addressing inherent security risks, and only after prior publication. Consequently, while Article 25(3) provides a legal basis for suspension, its applicability to the present discussion remains marginal and as such will not be discussed further.

Forth scenario – criminal and civil enforcement jurisdiction

74. Articles 27 and 28 of the UNCLOS establish rules governing the exercise of criminal and civil jurisdiction, respectively, over foreign ships engaged in innocent passage through the

¹⁰⁹ TSC, Article 16(3): “Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.”

territorial sea. These provisions extensively draw on Articles 19¹¹⁰ and 20¹¹¹ of the 1958 TSC Convention.

75. The rules on civil jurisdiction over foreign ships engaged in innocent passage, as outlined in Article 28 of the UNCLOS, will not be addressed here due to their limited scope and the specific focus of this legal opinion.

76. As for Article 27 of the UNCLOS, the provision establishes that:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) if the consequences of the crime extend to the coastal State;

(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

¹¹⁰ TSC, Article 19: “1.The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (a) If the consequences of the crime extend to the coastal State; or (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or (d) If it is necessary for the suppression of illicit traffic in narcotic drugs. 2.The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters. 3.In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship’s crew. In cases of emergency this notification may be communicated while the measures are being taken. 4.In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation. 5.The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.”

¹¹¹ TSC, Article 20: “1.The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship. 2.The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State. 3.The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.”

(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

77. Without prejudice to the powers conferred upon coastal States under Article 25 of the UNCLOS, as previously discussed in this legal opinion, Article 27 grants coastal States the authority to stop a vessel engaged in innocent passage through their territorial sea in order to exercise criminal jurisdiction over individuals onboard.

78. The circumstances under which passage may be interrupted under Article 27 are outlined in its first paragraph. Furthermore, paragraphs 2 and 5 of the same Article authorize the coastal State to stop a vessel in its territorial sea to exercise criminal enforcement jurisdiction when the vessel entered the territorial sea from the State's internal waters, or in connection with specific environmental crimes (under Part XII of the UNCLOS) or criminal offences related to laws and regulations adopted by the coastal State in its EEZ (under Part V of the UNCLOS).

79. Articles 27(2) and 27(5) are of limited relevance to this discussion due to their narrow scope and as such will not be discussed further. By contrast, two cases outlined in Article 27(1) merit closer consideration in the context of this legal opinion. Specifically, subpoints (a)

and (b) of Article 27(1) permit the exercise of criminal enforcement jurisdiction over offences committed onboard a vessel during its passage through the territorial sea in the following instances: (a) “if the consequences of the crime extend to the coastal State,” and (b) “if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea”.

- 80.** A comprehensive analysis of the circumstances in which these two conditions might apply is not feasible here. However, it is worth highlighting that criminal offences related to human rights, including those reflecting peremptory norms of international law, may fall within the scope of Article 27(1)(a) or (b), particularly where the failure to take enforcement action might result in the coastal State’s international responsibility—as observed in points 56 to 66—or where the offence could disturb the peace of the coastal State or strain peaceful relations between the coastal State and other States (e.g., in the context of a dispute or regional conflict).
- 81.** As clarified by the ILC in 1956, the above should not be interpreted as granting the coastal State: “*authority to stop a foreign ship passing through the territorial sea without entering internal waters merely because some person happens to be on board who is wanted by the judicial authorities of that State in connection with some punishable act committed elsewhere than on board the ship*”.¹¹² This does not, however, preclude the coastal State from stopping vessels in innocent passage to enforce criminal offences that fall within the categories of Article 27(1)(a) and (b), or in other cases as required under international law, provided those offences, although initiated elsewhere, continue within the territorial sea.

Conclusions

- 82.** Question 1, sub-question (a) seeks to determine whether the coastal State, under UNCLOS or broader international law, has a right or an obligation to interrupt or suspend the passage of a foreign vessel through its territorial sea:
- i. In response to non-compliance with international human rights obligations binding upon those States, including obligations arising under the UN Arms Trade Treaty and other relevant treaties?*

¹¹² ILC, *Articles concerning the Law of the Sea with commentaries*, Yearbook of the International Law Commission, 1956, Volume II, 275.

- ii. *To avoid providing aid or assistance to another State in maintaining a situation that constitutes a breach of peremptory norms of international law?*

83. To address these sub-questions, points 31 to 81 of this legal opinion analysed the regime of innocent passage and other relevant provisions under the UNCLOS. Broader aspects of international law were not discussed in that context, as the customary status of those provisions will be examined in response to Question 1, sub-question (b) of this legal opinion.
84. Based on the foregoing analysis, **it is reasonable to conclude that the UNCLOS grants coastal States both the right and, in certain circumstances, the obligation to interrupt or suspend the passage of vessels in the territorial sea** that violate peremptory norms of international law, including those of international human rights law.
85. **The right to stop a vessel and interrupt or suspend its passage arises when the vessel engages in activities during passage that are prejudicial to the peace, good order, or security of the coastal State. This may include conduct that aids or facilitates actions contravening human rights obligations or peremptory norms of international law, as reflected in the principles of international law embodied in the UN Charter (Article 19(2)(a)). It also encompasses violations of other UNCLOS provisions or the broader international legal obligations of the coastal State, depending on the relationship between those obligations and the Convention (Article 19(1)).** Additionally, coastal States may exercise criminal enforcement jurisdiction by stopping a vessel in innocent passage, particularly where failure to take action could result in the State's international responsibility or where the offence disrupts the peace of the coastal State or strains its peaceful relations with other States (Article 27(1)(a) and (b)).
86. A combined reading of Articles 19 and 301 of the UNCLOS, interpreted in light of the UN Charter, the *Friendly Relations Declaration*, ARSIWA, and relevant international case law, may also impose **a duty on the coastal State to prevent further violations of international law resulting from the vessel's conduct**, including by stopping the vessel during its passage. **This duty arises, for instance, when the vessel engages in activities that contravene peremptory norms of international law, or when it aids or assists**

States in the commission of such crimes, especially if the coastal State's inaction would result in its own responsibility or liability under international law.¹¹³

87. Given the above considerations, a general aspect is worth noting regarding specific obligations contained in the ATT provisions and other relevant rules examined in points 16 to 30 of this legal opinion: assessing the compatibility of the innocent passage regime with other international obligations binding upon States is inherently challenging, particularly when such obligations fall outside the regulatory framework of the law of the sea, as is the case with the ATT, the Genocide Convention and the Apartheid Convention.
88. If the rules contained in such treaties rise to the level of *jus cogens* norms or give effect to one or more of the principles outlined in points 48 to 50, it is reasonable to conclude that a coastal State may have the authority, and potentially the duty, to suspend or redirect the passage of foreign vessels through its territorial sea to avoid violating its binding international law obligations. **This applies, for instance, to the prohibitions against complicity in genocide and apartheid, as enshrined in the Genocide Convention and the Apartheid Convention and reflecting peremptory norms of international law.**
89. In the remaining cases, the right of innocent passage must be weighed against the coastal State's specific international legal obligations. These obligations may warrant the interruption or suspension of a vessel's passage through the territorial sea, especially when the coastal State's inaction would constitute a breach of its legal duties. **For example, this could occur in relation to the obligation to prohibit the transfer of weapons or other items, in accordance with Article 6 of the ATT.** Notably, Article 2(2) of the ATT explicitly includes the "transit" of arms within the scope of activities classified as "transfer." Under Article 6(3), a State Party is prohibited from authorizing such transfers if it has knowledge that the arms would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks intentionally directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which the State is a party.
90. Either way, the considerations and conclusions outlined in this legal opinion extend only in part to foreign warships or government vessels used for non-commercial purposes. Under

¹¹³ It should be noted, in this respect, that Article 304 of the UNCLOS recognises that: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

Articles 29 to 32 of the UNCLOS and customary international law,¹¹⁴ such vessels benefit from a special regime of sovereign immunity. In peacetime, this immunity generally limits coastal States to requesting these vessels to leave the territorial sea immediately, without taking enforcement action to prevent their passage through the territorial sea—even if their passage is deemed non-innocent. **This, however, does not absolve the flag State of its responsibilities under international law**, as affirmed in Article 31 of the UNCLOS and relevant international case law.¹¹⁵ The flag State remains obligated to investigate the matter and take appropriate action against vessels flying its flag and persons on board that are suspected or confirmed to have acted inconsistently with the Convention or other rules of international law.¹¹⁶

QUESTION 1, SUB-QUESTION (b)

91. Having established that the UNCLOS provides coastal States with both the right and, in certain circumstances, the duty to interrupt or suspend the passage of vessels in the territorial sea that violate international human rights law or peremptory norms of international law, sub-question (b) of the claimant’s first question seeks to clarify:

- i. Under what circumstances and conditions may or should [this right/duty] be exercised?*
- ii. What enforcement measures can a coastal State lawfully implement against foreign ships engaged in non-innocent passage?*
- iii. Does [this right/duty] reflect customary international law?*

92. The response to **numeral (i) of sub-question (b)** has already been thoroughly addressed in points 31 to 81 of this legal opinion. Accordingly, no further elaboration on the

¹¹⁴ Natalino Ronzitti, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law* (Éditions A. Pedone, 2011) 140. See also, “ARA Libertad” case (*Argentina v. Ghana*), Order, provisional measures, ITLOS Case No 20, [2012] ITLOS Rep 21, ICGJ 454 (ITLOS 2012), 15 December 2012, ITLOS, Sep. Op. Wolfrum and Cot, paras 43 and 46.

¹¹⁵ In *Germany v. Italy*, the ICJ emphasized that the rules on sovereign immunity, as reflective of customary international law, are relevant for determining whether jurisdiction can be exercised in a specific case by a State or a court. However, these rules do not impact the substantive provisions that may have been violated, including *jus cogens* norms, nor do they alter the legal consequences arising from such violations. In essence, sovereign immunity governs jurisdictional matters without negating responsibility under international law. Jurisdictional Immunities of the State (*Germany v. Italy; Greece intervening*), Judgment, 3 February 2012, I.C.J. Report 2012, paras 91-95.

¹¹⁶ UNCLOS, Article 94(6).

circumstances and conditions governing the exercise of the right or duty to interrupt or suspend passage is required here.

- 93.** Regarding **numeral (ii) of sub-question (b)**, the UNCLOS does not provide an exhaustive list of enforcement measures that a coastal State may lawfully implement against foreign ships engaged in non-innocent passage. Article 25 of the UNCLOS merely refers to the “necessary steps” a coastal State may take to prevent such passage. The determination of what constitutes “necessary steps” depends on the specific circumstances of each case and must be guided by the general principles of proportionality and necessity that govern enforcement actions under the UNCLOS.¹¹⁷ Such measures may include, among other actions, stopping and boarding the vessel for investigations or, where appropriate, arresting individuals onboard.¹¹⁸ Additional steps could involve diverting the vessel’s passage, rerouting it to a designated port, ordering it to leave the territorial sea, or, where proportionate and necessary, employing force.
- 94.** It should be noted that, despite the UNCLOS’s silence on the use of force in enforcement operations, international courts and tribunals have consistently acknowledged that a certain degree of force may be permissible, provided it is unavoidable and applied in a reasonable and necessary manner under the circumstances.¹¹⁹ As Judge Paik observed in the *M/V Virginia G* case, the principle of “necessity” seeks to balance two competing interests: the freedom of a State to achieve its objectives using appropriate means and the obligation of that State to avoid employing measures that would unduly infringe on the rights or interests of another State.¹²⁰
- 95.** As discussed in points 35, 38 and 90 of this legal opinion, under the UNCLOS, the sole measure permitted regarding warships and government vessels used for non-commercial

¹¹⁷ See Pierandrea Leucci, ‘Enforcing Fishery Legislation in the Exclusive Economic Zone of Non-Parties to UNCLOS: A Commentary to Article 73’, in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 1: Law of the Sea, Interpretation and Definitions* (Luglio Editore 2022), 335-337.

¹¹⁸ E.g., under Article 27 of the UNCLOS.

¹¹⁹ E.g., *M/V “SAIGA” (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 155, 61-62; *Guyana v. Suriname*, Final Award, ICGJ 370 (PCA 2007), 17 September 2007, Permanent Court of Arbitration, para 405, 112-113; *M/V “Virginia G”* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 359, 102; *Enrica Lexie* case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24st August 2015, ITLOS, para 133, 24; and the *M/T “San Padre Pio”* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, paras 83-4, 21, and para 130, 32.

¹²⁰ *M/V “Virginia G”* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, Sep. Op. Paik, para 9.

purposes is to request their immediate departure from the territorial sea while urging the flag State to take appropriate action.

96. Finally, regarding **numeral (iii) of sub-question (b)**, which concerns the legal status of the innocent passage regime under international law, it suffices to note that the preparatory works of the Convention,¹²¹ authoritative academic literature,¹²² and international case law¹²³ collectively support the customary nature of the innocent passage provisions in the UNCLOS. This conclusion is further substantiated by State practice and by the very high number of ratifications and accessions to the UNCLOS—currently 170.
97. Furthermore, the customary status of its provisions is bolstered by the ratifications and accessions to the 1958 TSC Convention, one of the predecessors to the UNCLOS, which, as observed in points 43, 68, 72, and 74 of this legal opinion, provides the foundation for many of the contemporary innocent passage rules. Notably, States such as the United States, Israel, and Venezuela, which have not yet acceded to the UNCLOS, are parties to the 1958 TSC Convention. This Convention remains in force under Article 311¹²⁴ of the UNCLOS and reinforces the broad acceptance and customary nature of the innocent passage regime.

¹²¹ ILC, *Articles concerning the Law of the Sea with commentaries*, 1956, 272. The right of innocent passage was originally included in Art. 15 of the ILC’s Articles and, according to the ILC, it reiterated “a principle recognized by international law and confirmed by the 1930 Codification Conference”.

¹²² E.g., Hitoshi Nasu, ‘The regime of innocent passage in disputed waters’ (2018) 94 int’l L. Stud. 241, 242; Pierandrea Leucci, ‘Innocent passage in the territorial sea within the framework of the law of the sea Convention’ (2018) KMI International Journal of Maritime Affairs and Fisheries, Volume 10, Issue 1, 1-9, 14; O.G. de Vries Reilingh, ‘Warships in territorial waters, their right of innocent passage’ (1971) Netherlands Yearbook of International Law, Volume 2, December 1971, 30; and Kari Hakapää, ‘Innocent Passage’, in Rüdiger Wolfrum, Max Planck Encyclopaedia of Public International Law (Oxford Public International Law, 2023) para 4. See also the Statement delivered by the former President of the ITLOS, Rüdiger Wolfrum, entitled ‘Freedom of Navigation: New Challenges’, 8.

¹²³ *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9 April 1949, ICJ, 28; and *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27 June 1986, ICJ, para 214. See also, *See Compañía de Navegación Nacional (Panama) v. U.S.*, Arbitral Award rendered on 29 June 1933. While at the time no international convention was in force yet, the Commission found that “[t]here is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters”.

¹²⁴ UNCLOS, Article 311(1) and (2): “1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958. 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention...”

Conclusions

98. The UNCLOS grants coastal States both the right and, in certain circumstances, the obligation to interrupt or suspend the passage of vessels in the territorial sea that violate international human rights law or peremptory norms of international law, as outlined in points 31 to 81 of this legal opinion.
99. Without prejudice to the specific regime governing warships and government vessels used for non-commercial purposes, **this right and duty encompass the implementation of “necessary” enforcement measures to prevent non-innocent passage through the territorial sea.** Such measures may include stopping or boarding the vessel, redirecting its passage, ordering it to leave the territorial sea, or employing a proportionate degree of force, subject to UNCLOS and broader international law.
100. The relevant UNCLOS provisions on the innocent passage regime, as discussed in this legal opinion, **arguably reflect customary international law and are therefore binding on States that are non-parties to UNCLOS.**

QUESTION 2, SUB-QUESTION (a)

101. The second issue raised by the claimant concerns the jurisdiction and due diligence obligations of flag States under the law of the sea. As noted in point 1, and similar to the first issue, this matter comprises several sub-questions.
102. The initial inquiry focuses on whether flag States, under the UNCLOS, are obligated to *effectively exercise control and jurisdiction over vessels flying their flag, including when those vessels operate within the waters of another State.*
103. To address this question, an analysis of the role and responsibilities of the flag State under the UNCLOS is required, starting with its Articles 91, 92 and 94. These provisions draw on Articles 5, 6 and 10 of the High Seas (HS) Convention, adopted in Geneva in 1958, and largely based on the work of the ILC.¹²⁵
104. Article 91 establishes rules governing the “nationality” of ships:
- 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the*

¹²⁵ Convention on the High Seas, opened to signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

105. Only paragraph 1 of Article 91 is relevant for this discussion and will therefore be examined further. The latter comprises three interconnected elements, each with significant implications.

106. First, the *nationality* of a vessel is primarily determined by the conditions set forth in the national legislation of its flag State. These conditions generally consist of eligibility criteria required for the vessel's registration in the national register of the flag State, achieved through administrative acts or procedures.¹²⁶ As former ITLOS Vice-President Wolfrum aptly noted in his separate opinion in the *M/V Saiga (No. 2)* case: "*Registration of ships has to be seen in close connection with jurisdictional powers flag States have over ships flying their flag and their obligation concerning the implementation of rules of international law in respect to these ships.*"¹²⁷

107. Second, Article 91(1) establishes the entitlement of vessels holding a State's nationality to fly its flag. While not definitive on its own, this act formalizes the *jurisdictional* relationship between the vessel and its flag State—a relationship explicitly recognized in Article 92(1) of UNCLOS and under broader international law.¹²⁸ The flag State's jurisdiction encompasses both legislative and enforcement jurisdiction, extending to all persons and activities on board the vessel, regardless of its destination or the duration of their presence. Legislative jurisdiction is general in nature and may be exercised at any time, including when a vessel is located within the territorial sea or ports of another State. By contrast, enforcement jurisdiction is spatially constrained, applying primarily within the flag State's maritime zones and on the high seas, and to a limited extent within the EEZ of other States pursuant to Article 58(2). Enforcement jurisdiction may only be exercised in the territorial sea of another State in exceptional circumstances provided for under international law.

¹²⁶ Simon W. Tache, 'The national of ships: the definitional controversy and enforcement of genuine link' (1982) *The international lawyer*, Vol. 16, No 2, 301-312, 302.

¹²⁷ *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, Sep. Op. Wolfrum, para 17.

¹²⁸ Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edition, Manchester University Press 2022) 381-382; and Douglas Guilfoyle, 'Article 92', in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 701.

108. Third, a *genuine link* must exist between the vessel and its flag State. As ITLOS has observed, “*the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State*”.¹²⁹ The genuine link is not an independent criterion for assessing vessel’s nationality, which is conferred through registration. Rather, it functions as a conceptual bridge, linking the vessel’s nationality to the rights and obligations the flag State assumes under international law.¹³⁰

109. ITLOS has explicitly tied the genuine link requirement in Article 91(1) of the UNCLOS to the duties of the flag state set forth in its Article 94.¹³¹ The latter reads as follows:

1. *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

2. *In particular every State shall:*

(a) *maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and*

(b) *assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.*

3. *Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:*

(a) *the construction, equipment and seaworthiness of ships;*

¹²⁹ *M/V “SAIGA” (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 112.

¹³⁰ *M/V “SAIGA” (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, paras 83 and 94. See also, Simon W. Tache, ‘The national of ships: the definitional controversy and enforcement of genuine link’ (1982) *The international lawyer*, Vol. 16, No 2, 301-312, 304-306; Robin R Churchill, ‘The meaning of the “genuine link” requirement in relation to the nationality of ships’ (2000), A study prepared for the International Transport Workers’ Federation, 35-37; available at <<<https://orca.cardiff.ac.uk/id/eprint/45062/1/itf-oct2000.pdf>>>; Léna Kim, ‘The place of economic actors as “Nationals” under the UN Convention on the Law of the Sea’, in Pierandrea Leucci, Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 1: Law of the Sea, Interpretation and Definitions* (Luglio Editore, 2022) 143; and Douglas Guilfoyle, ‘Article 92’, in in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 697-699.

¹³¹ E.g., *M/V “Virginia G”* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, paras 81 and 113; and *Tomimaru* case (Japan v. Russian Federation), Judgment, Prompt Release, ITLOS Case No 15, ICGJ 419 (ITLOS 2007), 6 August 2007, ITLOS, para 70.

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

110. Article 94(1) explicitly imposes an overarching obligation on the flag State to “effectively exercise its jurisdiction and control in administrative, technical, and social

matters over ships flying its flag”. This general duty is further detailed through a non-exhaustive list of specific obligations outlined in paragraphs 2 to 7 of the same Article.

111. Although positioned in Part VII of the UNCLOS, the duties of the flag State in Article 94 are not confined to the high seas but extend across all maritime zones,¹³² including waters under the sovereignty of another State, subject to any jurisdictional limitations imposed on the flag State under the UNCLOS or broader international law.¹³³

112. The phrase “administrative, technical, and social matters” in Article 94(1) should be construed broadly, encompassing virtually all aspects requiring administrative control or jurisdiction over a vessel, unless explicitly limited by international law. This expansive interpretation is supported by the wide scope of the flag State’s jurisdiction, as well as by authoritative academic literature¹³⁴ and relevant international case law.¹³⁵

113. Finally, as the duty outlined in Article 94(1) is intrinsically tied to a vessel’s nationality and to the genuine link between that vessel and its flag State, the same duty shall be deemed to apply uniformly to all vessels, including warships and government vessels used for non-commercial purposes.

¹³² Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 152. See also Haijiang Yang, *Jurisdiction of the coastal state over foreign merchant ships in internal waters and the territorial sea* (Springer, 2006) 27; Sondre Torp Helmersen, ‘The sui generis nature of flag State jurisdiction’, in *Japanese Yearbook on the Law of the Sea*, 2015, 320; and Richard Barnes, ‘Flag State duties’, in Donald R. Rothwell (et al.), *The Oxford Handbook on the Law of the Sea* (Oxford University Press 2015) 314.

¹³³ *Id.*

¹³⁴ As Barnes noted, “States are required to exercise effective jurisdiction and control over the somewhat ambiguously phrased ‘administrative, technical and social matters’. Since flag State jurisdiction is exclusive, *this phrase must be constructed broadly to include any matters affecting vessel operations in order to avoid regulatory lacunae*” (emphasis added). See Richard Barnes, ‘Flag State duties’, in Donald R. Rothwell (et al.), *The Oxford Handbook on the Law of the Sea* (Oxford University Press 2015) 314.

¹³⁵ In its 2015 advisory opinion on IUU fishing, the ITLOS observed that “the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters [under Article 94 of UNCLOS], must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention in respect of the conservation and management of marine living resources.” This suggests, among other things, that the term “administrative...matters” in Article 94(1) and (2) should be interpreted broadly, encompassing “administrative control” over all activities conducted on and by the vessel at sea. See *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015, para 119.

Conclusion

114. Based on the above analysis, it can be concluded that **UNCLOS imposes a duty on flag States to effectively exercise control and jurisdiction over vessels flying their flag, even when those vessels operate within the waters of another State.**
115. This obligation is rooted not only in the language of Article 94(1), which is quite explicit in its formulation, but also in the interconnected concepts of nationality, genuine link, and flag State jurisdiction, as outlined in Articles 91(1) and 92(1). These provisions must be interpreted in light of ITLOS jurisprudence and other relevant legal sources.

QUESTION 2, SUB-QUESTION (b)

116. Having established that the UNCLOS provides flag States with a duty to effectively exercise control and jurisdiction over vessels flying their flag, sub-question (b) of the claimant's second question seeks to clarify:

- i. *Does [this duty] include a due diligence obligation for flag States to monitor the compliance of vessels flying their flag with the State's binding human rights obligations, including those arising under the UN Arms Trade Treaty and other relevant treaties, and to take appropriate action in cases of non-compliance?*
- ii. *Does [this duty] reflect customary international law?*

117. To address this sub-question, it is first necessary to clarify several aspects of due diligence obligations under international law.
118. Generally, due diligence represents the standard of conduct expected from a responsible State to effectively fulfil its obligations.¹³⁶
119. In recent years, international courts and tribunals, including ITLOS, have extensively examined and defined the content and scope of due diligence obligations. These discussions often draw on the ICJ landmark 2010 judgment in the *Pulp Mills on the River Uruguay*

¹³⁶ Pierre Dupuy, 'Due diligence in the International Law of Liability' in *Legal Aspects of Transfrontier Pollution*, OECD, 1977, Paris, France, para 3; Patricia Birnie and Alan Boyle, *International Law and The Environment* (2nd ed., Oxford University Press 2002) 112.

case,¹³⁷ which sought to establish a general framework for understanding such obligations, among other things, by stressing that:

*“...an obligation to act in due diligence... is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party...”*¹³⁸

120. The ICJ’s definition has since been employed by ITLOS and arbitral tribunals in significant decisions pertaining to the law of the sea,¹³⁹ which recognised the due diligence implications of several UNCLOS provisions.¹⁴⁰ Key principles emerging from these decisions, relevant to this discussion, are outlined below.

121. First, due diligence obligations under international law are obligations of *conduct*, not *result*.¹⁴¹ They do not require States to achieve a specific outcome but rather “to deploy adequate means, to exercise best possible efforts, to do the utmost” to obtain the intended result.¹⁴²

122. Second, due diligence is a “variable concept” that may change over time.¹⁴³ Measures deemed adequately diligent at one point may later be considered insufficient, particularly in light of advancements in scientific or technological knowledge. Additionally, the required level of diligence may vary depending on the risks associated with the activity in question.¹⁴⁴

¹³⁷ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13 July 2006.

¹³⁸ *Ibid.*, para 197.

¹³⁹ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, ITLOS Case No 17, [2011] ITLOS Rep 10, ICGJ 449 (ITLOS 2011), 1 February 2011; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015; *South China Sea* arbitration (Philippines v. China), Final Award, PCA Case No 2013—19, ICGJ 495 (PCA 2016), 12 July 2016; and *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024.

¹⁴⁰ E.g., those concerning seabed activities, fisheries, marine pollution and climate change.

¹⁴¹ (More recently) *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024, para 233.

¹⁴² *Ibid.*, para 405.

¹⁴³ *Ibid.*, para 239.

¹⁴⁴ *Id.*

123. Third, responsibility or liability for breaching due diligence obligations arises only if a State fails to take all appropriate and necessary measures to fulfil its duties. This includes neglecting to investigate reported instances of suspected non-compliance and, where warranted, failing to undertake the necessary enforcement actions.¹⁴⁵
124. Forth, due diligence obligations can have an extraterritorial dimension, and a breach may occur in relation to activities conducted by vessels operating within the maritime waters of a State other than their flag State.¹⁴⁶

Due diligence of the flag State and human rights under the UNCLOS

125. International courts and tribunals have recognized that several provisions of UNCLOS impose due diligence obligations on States Parties to the Convention, particularly in areas such as fisheries management, environmental protection, and climate change.¹⁴⁷ Certain obligations specifically address flag States, notably those outlined in Article 94(3). This provision requires flag States to adopt measures “necessary to ensure safety at sea”, including the implementation and enforcement of safety, labour, and environmental standards, as elaborated in paragraphs 4 and 5 of the same provision.
126. These standards may be closely tied to specific human rights obligations, for which Article 94(3) explicitly imposes a due diligence requirement. However, it remains contentious whether this provision alone can establish a broader due diligence obligation for flag States to monitor the compliance of vessels flying their flag with *all* binding human rights obligations, particularly considering that, as observed above, Article 94(3) strictly focuses on measures “necessary to ensure safety at sea”. This ambiguity is especially relevant to obligations arising under the ATT and other legal instruments referenced in this legal opinion, as they do not appear to set forth rules and standards that can be incorporated by reference through Article 94(3) of the UNCLOS.
127. That said, the authors of this letter take the view that a broader due diligence obligation may still be inferred from the UNCLOS through a combined reading of Articles 91 and 94,

¹⁴⁵ *South China Sea* arbitration (Philippines v. China), Final Award, PCA Case No 2013—19, ICGJ 495 (PCA 2016), 12 July 2016, para 944.

¹⁴⁶ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015 para 85 ff.; Samantha Besson, ‘Due diligence and extraterritorial human rights obligations’ (2020) ESIL Reflections, Volume 9, Issue 1, 5.

¹⁴⁷ See (n 139).

as examined above in this legal opinion. This position draws on the following considerations grounded in the history and preparatory works of the Convention, as well as in the work of the ILC and relevant international case law.

128. The UNCLOS commentaries and ITLOS case law establish that a vessel's registration, which determines its nationality, provides the legal foundation for the flag State to exercise jurisdiction over the vessel, including the exercise of effective jurisdiction and control to ensure the vessel's compliance with international rules and standards binding on the flag State.¹⁴⁸ As ITLOS has observed, "[t]he juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations, as indicated in article 94 of the Convention."¹⁴⁹

129. This network of rights and obligations has a direct bearing on compliance with the genuine link requirement established in Article 91(1).¹⁵⁰ Consequently, the concluding sentence of Article 91(1)—"*There must exist a genuine link between the State and the ship*"—should be interpreted as requiring the flag State to establish and maintain the genuine link through the effective exercise of jurisdiction and control over its flagged vessels.¹⁵¹ **Without this functional interpretation of Article 94(1) in conjunction with Article 91(1), the purpose of the jurisdictional link established under the latter provision would be effectively undermined, as the flag State would lack the necessary control over the vessel to sustain the genuine link required under Article 91(1) following registration.**¹⁵² This observation is supported by the ITLOS, which recognizes

¹⁴⁸ E.g., *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 112. See also, Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume III* (Brill/Nijhoff, 1995), 104-7 and 144.

¹⁴⁹ *Tomimaru* case (Japan v. Russian Federation), Judgment, Prompt Release, ITLOS Case No 15, ICGJ 419 (ITLOS 2007), 6 August 2007, ITLOS, para 70.

¹⁵⁰ Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 104.

¹⁵¹ *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 112.

¹⁵² See also *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, Diss. Op. Judge Jesus, para 46: "The Convention, in its article 94, outlines the duties to be observed by the flag State so as to ensure that it 'effectively exercise[s] its jurisdiction and control in administrative, technical and social matters over ships flying its flags.' In other words, *it is through the performance by the flag State of the duties referred to in article 94 in relation to a given ship that the test of whether there is a genuine link between the State and the ship is to be applied*". Emphasis added.

that the genuine link between a State and its vessel may be called into question if the flag State fails to exercise proper jurisdiction and control.¹⁵³

130. An obligation of due diligence can be inferred from the above.¹⁵⁴ Simply put, non-compliance by vessels with human rights obligations binding on their flag States does not, on its own, sever the genuine link between the vessels and their flag States. This holds true provided the flag State has enacted appropriate legislation, exercised vigilant enforcement, and taken decisive action in response to non-compliance. **In other words, the genuine link is preserved as long as the flag State “effectively exercises its jurisdiction and control” over the vessel.**

131. This implies, as a corollary, a duty to act in relation to activities or events occurring within a State’s jurisdiction or under its control that may cause harm to third States, their nationals, their property, or, more broadly, to interests of the international community as a whole.¹⁵⁵ In this context, flag States are obligated to respect international human rights, including the ones of persons and crew onboard their vessels and to ensure that these rights are upheld by those actors. This conclusion finds support in international practice and scholarship.¹⁵⁶ How does this specifically apply to the ATT, the Genocide Convention, and the Apartheid Convention?

132. Article 6(3) of the ATT stipulates that a State Party shall not authorize the transfer of conventional arms covered under Article 2(1), or items covered under Articles 3 and 4 of the Treaty, *“if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party”*.

¹⁵³ *M/V “Virginia G”* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 51.

¹⁵⁴ See also, Irini Papanicolopulu, ‘Due Diligence in the Law of the Sea’, in Heike Krieger, Anne Peters, Leonhard Kreuzer, *Due Diligence in the International Legal Order* (Oxford University Press 2020) 150-151 and 158-159; and Donald Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens, *The Oxford Handbook of The Law of the Sea* (Oxford University Press 2015) 323-324.

¹⁵⁵ See *Island of Palmas* case (Netherlands v. United States of America), reprinted in UNRIAA, vol. 2, 829, at 839; and *S.S. ‘Lotus’* case (France v. Turkey), 1927 PCIJ Series A, No. 10, at 88. See also, Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press 2022) 22, 144.

¹⁵⁶ See *Markovic and Others v. Italy* App no 1398/ 03 (Decision [GC] of 14 December 2006) para 49; *Assanidze v. Georgia* App no 71503/ 01 (Decision [GC] of 8 April 2004) para 137; and *Medvedyev and Others v. France* App no 3394/ 03 (Judgment (GC) of 29 March 2010) para 65; See also, Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018) 150 ff.

133. The application of this obligation is not limited to the territory of the State. The prohibition on authorizing transfers of conventional arms under the Treaty applies within the State's territory and in any other area under its jurisdiction, including ships flying its flag, provided the State has knowledge that the arms would be used to commit the crimes outlined in Article 6(3).
134. States are therefore required to adopt all necessary measures to ensure compliance with Article 6(3) of the ATT. For flag States, this obligation extends to ensuring that vessels flying their flag are not used to transfer arms in violation of this provision.
135. The obligation of flag States to ensure that vessels flying their flag do not engage in prohibited arms transfers under Article 6 is one of due diligence. As the ICJ stated in the *Pulp Mills* case, the obligation to act with due diligence “*entails not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators*”.¹⁵⁷
136. Similarly, in its Advisory Opinion on Climate Change and International Law, the ITLOS established that “*the obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures, and enforcement mechanisms necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective*.”¹⁵⁸
137. Thus, fulfilling an obligation of due diligence requires more than enacting appropriate legislation and administrative measures. It also necessitates exercising adequate vigilance to ensure that relevant actors comply with those laws and regulations, with the aim of achieving the objective of the obligation.
138. In the context of Article 6 of the ATT, the flag State's due diligence obligation to ensure that vessels flying its flag are not involved in prohibited arms transfers entails not only enacting appropriate legislation but also actively overseeing compliance with the relevant rules onboard its vessels.

¹⁵⁷ *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Merits) [2010] ICJ Rep., para 197.

¹⁵⁸ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS report 2024, para 235.

139. The extent of a flag State's duty to oversee and enforce compliance with rules prohibiting the transfer of arms will depend on both legal and factual circumstances.¹⁵⁹
140. Legally, the duty to act with due diligence is bounded by international law, as "every State may only act within the limits permitted by international law."¹⁶⁰ Consequently, while a flag State is responsible for the conduct of its vessels, its due diligence obligations may be constrained when those vessels are subject to the regulatory authority of a coastal State.
141. Factually, the scope of the duty depends on specific parameters. A flag State's obligation to act diligently arises when it has knowledge that an illegal arms transfer is occurring onboard its vessels.¹⁶¹ Additionally, the State's capacity to act in the specific circumstances of the case will influence the extent of its obligation.¹⁶² While international law generally presumes that States have authority and capacity to act over vessels flying their flag, the degree of such power and the effectiveness of intervention will vary depending on the circumstances.
142. In that respect, as the International Law Association (ILA) noted in its work on due diligence and international law: "[a]n enhanced degree of diligence can also result from a Court order (as in the case of the two Provisional Orders in the Bosnian Genocide case proceedings) or a Chapter VII Security Council resolution directed at a particular State."¹⁶³ This observation is particularly significant in evaluating the flag State's **"knowledge" of risks** and should reasonably extend to **advisory opinions** issued by international courts and tribunals. As recently recognized by ITLOS in the *Mauritius v. Maldives* case, such opinions may create legal expectations ("determinations") applicable to all States.¹⁶⁴
143. The considerations outlined above regarding the scope and implications of due diligence obligations under Article 6 of the ATT equally extend to the relevant peremptory provisions of the **Genocide Convention** and the **Apartheid Convention**, particularly the

¹⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 430.

¹⁶⁰ Ibid.

¹⁶¹ Ibid., para 431. See also, *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9 April 1949, ICJ, 16-17 and 22.

¹⁶² *South China Sea* arbitration (Philippines v. China), Final Award, PCA Case No 2013—19, ICGJ 495 (PCA 2016), 12 July 2016, paras 754–5.

¹⁶³ ILA, *Study group on due diligence in international law*, second report, July 2016, Tim Stephens and Duncan French, 17.

¹⁶⁴ See *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (Mauritius v. Maldives), Preliminary objections, ITLOS Case No 28, ICGJ 560 (ITLOS 2021), 28 January 2021, paras 203-205.

duties to prevent and punish the crimes of genocide and apartheid, including acts of **complicity in their commission**,¹⁶⁵ as well as to other peremptory norms and fundamental principles of international law, such as the **right to self-determination of peoples and the prohibition on the acquisition of territory by force**.¹⁶⁶ This gives rise to an enhanced responsibility for States to ensure that they do not, directly or indirectly, contribute to serious violations of these peremptory norms, whether through the actions of private actors under their jurisdiction or vessels flying their flag. **Compliance requires not only the adoption of appropriate legislation and the establishment of administrative frameworks, but also continuous oversight, effective enforcement mechanisms, and prompt corrective action** when the “knowledge” of risks arises—particularly in contexts of prolonged occupation, illegal annexation, or systematic persecution, which often involve grave and widespread human rights violations, as the ICJ has emphasised, notably concerning the Occupied Palestinian Territory.¹⁶⁷ **A failure to discharge these due diligence obligations may render flag States internationally responsible and liable for violations of international law, including human rights obligations, committed by their flagged vessels** (see points 56 to 66).

144. Consequently, a flag State’s failure to respond to potential or confirmed non-compliance by vessels flying its flag with peremptory norms of international law, including international human rights law—especially when the State has knowledge of the risk or has been informed of the violation—**would likely constitute a breach of its due diligence obligations under UNCLOS. This includes cases where vessels engage in the transfer of weapons or other prohibited equipment under Article 6 of the ATT, or facilitate acts of genocide or apartheid, with the flag State’s awareness and failure to take measures to prevent or punish the offense.**

¹⁶⁵ Genocide Convention, Articles I and III(e); and Apartheid Convention, Articles III and IV.

¹⁶⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, paras 87-88; and *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, ICJ Advisory Opinion of 19 July 2024, para 233. See also ILC’s *Draft Conclusions on Identification and Consequences of Peremptory Norms of General International Law* (2022), *Draft conclusion 23*; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27 June 1986, ICJ, para 190; and Human Rights Council resolution 49/28 of 11 April 2022.

¹⁶⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, paras 87-128; and *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, ICJ Advisory Opinion of 19 July 2024, paras 154-155, 173, 179, 229, 243.

145. In this regard, it is important to highlight that the prohibition under Article 6 of the ATT is not restricted to direct, country-to-country transfers—such as those from the flag State to the territory where human rights crimes are committed. Rather, it broadly applies to any transfer of arms or related items that “would be used in the commission” of such crimes, irrespective of where the crimes take place, provided that the State authorizing the transfer has “knowledge at the time of the authorization” of their intended use.¹⁶⁸

Effective jurisdiction and control under customary international law

146. Finally, with regard to the assessment of the legal status of the flag State’s duty to effectively exercise jurisdiction and control on vessels flying its flag, as outlined under **numeral (ii) of sub-question (b)**, it suffices to note that the preparatory works of the Convention and authoritative academic literature collectively support the customary nature of Articles 91 and 94 of the UNCLOS.¹⁶⁹ This conclusion is further substantiated by State practice and by the very high number of ratifications and accessions to the UNCLOS—currently 170.

147. Furthermore, the customary status of its provisions is bolstered by the ratifications and accessions to the 1958 HS Convention, one of the predecessors to the UNCLOS, which, as observed in point 103 of this legal opinion, provides the foundation for some of the rules on vessel’s nationality and flag State’s duties discussed so far. Notably, States such as the United States, Israel, and Venezuela, which have not yet acceded to the UNCLOS, are parties to the 1958 HS Convention. This Convention remains in force under Article 311¹⁷⁰ of the UNCLOS and reinforces the broad acceptance and customary nature of the relevant provisions discussed under Question 2.

¹⁶⁸ ATT, Article 6.

¹⁶⁹ See Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 137-152; Roach JA, ‘Today’s Customary International Law’ (2014) *Ocean Development and International Law*, 45:239-259, 248-249; and John King Gamble Jr., Maria Frankowska, ‘The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning’ (1984) *San Diego Law Review*, Vol. 21: 491, 1984, 499. See also, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015, Sep. Op. Judge Paik, para 12.

¹⁷⁰ See (n 124).

Conclusions

148. The sub-questions under Question 2 aim to determine the legal status of the duty imposed on flag States by UNCLOS to exercise effective jurisdiction and control over vessels flying their flag, as analysed above in this legal opinion. They further explore whether this duty includes a due diligence obligation to ensure that such vessels comply with the flag State's binding human rights obligations, particularly those reflected in the ATT and other relevant instruments.
149. The analysis in this legal opinion confirms that, **under UNCLOS and customary international law, flag States are obligated to exercise effective jurisdiction and control over vessels flying their flag. This obligation encompasses adopting and enforcing measures to ensure compliance with binding international obligations. A combined reading of Articles 91 and 94 of the UNCLOS provides the foundation for this duty, establishing a comprehensive framework that defines the scope and content of a general due diligence obligation incumbent upon flag States.**
150. This **due diligence obligation applies to all activities conducted by vessels flying their flag, including those involving potential violations of the flag State's binding human rights obligations under the ATT, the Genocide Convention, and the Apartheid Convention.** To fulfil these obligations, flag States must adopt appropriate legislation, establish oversight mechanisms, and actively enforce compliance in order to prevent arms transfers that could lead to grave breaches of international law, including genocide, crimes against humanity, or apartheid. **Failure by a flag State to fulfil its due diligence obligations—by neglecting to monitor, investigate, or act in cases of non-compliance—can give rise to international responsibility, including for the violation of the relevant UNCLOS provisions.**
151. In light of the foregoing, **obligations under the ATT, the Genocide Convention, and the Apartheid Convention must therefore be interpreted in conjunction with the legal principles outlined in Articles 91 and 94 of the UNCLOS.** These provisions elucidate and reinforce the flag State's responsibility to "effectively exercise jurisdiction and control" over vessels flying its flag. Consequently, a flag State's failure—whether due to incapacity or unwillingness—to fulfil its due diligence obligations under these instruments, including preventing vessels flying its flag from aiding or abetting the commission of offences under

these conventions, undermines its compliance with the corresponding obligations under the UNCLOS. Such failure also jeopardizes the genuine link between the vessels implicated in these offences and their flag State.

III. CONCLUSIONS

152. This legal opinion was prepared to clarify the rights and obligations of States concerning activities conducted by vessels flying their flag or operating within their waters, particularly in cases involving serious violations of human rights or breaches of peremptory norms of international law. The analysis focuses on the **regime of innocent passage** and the **due diligence obligations of flag States** under international law.
153. Regarding the **innocent passage regime (Question 1)**, this legal opinion examines the circumstances under which coastal States may lawfully suspend or interrupt the passage of foreign vessels through their territorial sea under UNCLOS. It identifies various scenarios where such suspension or interruption is legally permissible.
154. Based on the analysis, the letter concludes that UNCLOS grants coastal States both the **right and, in specific circumstances, the obligation to interrupt or suspend the passage of vessels through their territorial sea** when such vessels violate international human rights law or peremptory norms of international law.
155. This **right** is triggered when a vessel engages in activities prejudicial to the peace, good order, or security of the coastal State. Such activities may include aiding or facilitating violations of human rights obligations or peremptory norms, **as reflected in the principles of international law embodied in the UN Charter and outlined in Article 19(2)(a) of UNCLOS**. Additionally, breaches of other UNCLOS provisions or broader international obligations under **Article 19(1) may also warrant intervention**. Lastly, coastal states may exercise **criminal enforcement jurisdiction over vessels engaging in innocent passage**, especially when failure to act could result in their international responsibility or disrupt their peace or diplomatic relations with other States (**Article 27(1)(a) and (b)**).
156. A combined reading of Articles 19 and 301 of UNCLOS, along with principles derived from the UN Charter, ARSIWA, and relevant case law, may impose a **duty** on coastal States to prevent further violations of international law by a vessel. This duty arises particularly when a vessel violates peremptory norms or aids other States in committing

such violations, **especially if the coastal State's inaction would render it responsible under international law.**

157. In particular, where treaty obligations reflect *jus cogens* norms or align with fundamental international principles, coastal States may have **the obligation to suspend or redirect a vessel's passage** to prevent violations of binding international law. **This includes prohibitions on complicity in genocide or apartheid, as enshrined in the Genocide and Apartheid Conventions.**

158. In other cases, the coastal State's right to suspend passage must be balanced against its broader legal obligations. For instance, **a coastal State may need to act to prevent arms transfers, including transit, that would violate Article 6 of the ATT, especially if inaction would amount to a breach of its duties.**

159. Foreign warships and government vessels used for non-commercial purposes, however, enjoy **sovereign immunity** under Articles 29–32 of UNCLOS and customary international law. This precludes coastal States from taking certain enforcement actions against such vessels during peacetime, even in cases of non-innocent passage. Nevertheless, the **flag State remains responsible** under Article 31 of UNCLOS to investigate and take appropriate measures against vessels or individuals acting in contravention of international law.

160. Excluding the specific regime applicable to warships and government vessels used for non-commercial purposes, **the right and duty to suspend or interrupt the passage include implementing “necessary” enforcement measures to prevent non-innocent passage through the territorial sea.** These measures may involve stopping or boarding the vessel, redirecting its passage, ordering it to leave the territorial sea, or using proportionate force, subject to the constraints of UNCLOS and broader international law.

161. The relevant provisions of UNCLOS governing the innocent passage regime, as discussed in this legal opinion, are widely considered to **reflect customary international law and are thus binding on States that are not parties to UNCLOS.**

162. The claimant's second issue concerns the **jurisdiction and due diligence obligations of flag States under the law of the sea (Question 2).**

163. The analysis conducted in this legal opinion confirms that **UNCLOS and customary international law impose an obligation on flag States to exercise effective jurisdiction and control over vessels flying their flag.** This obligation includes adopting and enforcing measures to ensure compliance with binding international obligations. **Articles 91 and 94 of UNCLOS form the foundation for this duty, providing a comprehensive framework**

that establishes the scope and content of the flag State's general due diligence obligation.

164. This due diligence obligation extends to all activities conducted by vessels flying a State's flag, including those involving potential violations of the flag State's binding human rights obligations reflected in the ATT, the Genocide Convention, and the Apartheid Convention.

165. To meet these obligations, flag States must enact appropriate legislation, establish oversight mechanisms, and actively enforce compliance to prevent arms transfers that could result in grave breaches of international law, including genocide, crimes against humanity, or apartheid. Failure to fulfil these obligations—such as neglecting to monitor, investigate, or act in cases of non-compliance—can result in international responsibility, including for violations of relevant UNCLOS provisions.

166. Accordingly, obligations under the ATT, the Genocide Convention, and the Apartheid Convention must be interpreted in conjunction with the principles outlined in Articles 91 and 94 of UNCLOS. These provisions clarify and reinforce the flag State's responsibility to exercise effective jurisdiction and control over vessels flying its flag. A flag State's failure—whether due to incapacity or unwillingness—to fulfil its due diligence obligations, including preventing vessels flying its flag from aiding or abetting offences under these conventions, constitutes a violation of its obligations under UNCLOS. Such failure also undermines the genuine link between the vessels involved and their flag State.