

Nicaragua's Suit against Germany May Be Good as Gold (Part II)

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In [Part I](#) of this blog piece, it was explained that Nicaragua is suing Germany over Germany's shipment of armaments to Israel. Part I recounted that Germany seeks dismissal of the suit on grounds that Israel is not party to the case. Part I disputed Germany's reliance on the 1954 *Monetary Gold* judgment, in which the ICJ declined to adjudicate because a claim was being made against a state that was not a party. Part II explains a second ICJ judgment involving an absent party on which Germany relies, that in 1995 in the *East Timor* case. Part II argues that the rationale of the ICJ in *East Timor* should not result in dismissal of Nicaragua's suit. Part II concludes by suggesting why, on jurisprudential considerations, it is important that Nicaragua's suit be adjudicated.

A Precedent "On All Fours"?

At the oral hearing on provisional measures in Nicaragua's suit, Germany cited the ICJ [judgment](#) in the *East Timor* case as additional authority for its contention that the ICJ should decline to adjudicate. *East Timor* is potentially more compelling than *Monetary Gold* for Nicaragua's cause. Whereas in *Mandatory Gold*, the plaintiff state was asserting a claim against an absent third state, in *East Timor*, the plaintiff was claiming against the respondent state. In Nicaragua's suit, similarly, its claim is against the respondent state (Germany).

At the oral hearing, Germany claimed in fact that the situation in *East Timor* is "on all fours" with that in Nicaragua's suit (transcript 9 April p. 30, para. 23). In *East Timor*, Portugal, in its capacity as Administrator for the non-self-governing territory of East Timor, sued Australia to challenge a lease agreement that Australia had concluded with Indonesia for offshore exploration from the territory of East Timor. Indonesia had purported to annex East Timor, and Australia considered that Indonesia had legal capacity to conclude an exploration agreement. Portugal countered that East Timor was not properly under Indonesia's control, hence the exploration agreement was invalid. Indonesia was not a party to the case. As the ICJ analyzed these facts, the rendering of judgment for Portugal would have required a finding that Indonesia's tenure in East Timor was not lawful. The ICJ [determined](#) (Judgment, para. 35) that it could not "exercise the jurisdiction" that it had over Portugal and Australia, because "it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent."

In its presentation at the oral hearing, Nicaragua did not mention *East Timor*. Its lead counsel Alain Pellet, however, represented Australia against Portugal's suit and was successful in gaining dismissal on the strength of *Monetary Gold*. Now in the position of opposing the applicability of *Monetary Gold*, Pellet is more than familiar with the circumstances that led the ICJ to dismiss Portugal's suit against Australia.

Would Israel's Legal Position Be Impacted?

The factual context in Nicaragua's suit differs from that in *East Timor* in one key respect. A judgment in favor of Portugal would have had a negative operative impact on Indonesia, because the ICJ would have been saying that Indonesia's treaty with Australia for exploration offshore of East Timor was invalid. Had the ICJ adjudicated and ruled in Portugal's favor, Australia, as the other party to the treaty for offshore exploration, would have had to forgo the treaty. Otherwise, Australia would have been in violation of its obligation under UN Charter Article 94 to comply with a judgment of the ICJ.

In a [separate opinion](#) in *East Timor* (at p. 124), Judge Shahabuddeen explained the circumstances that made Indonesia a necessary participant. "Indonesia would thus lose the benefit of implementation of the Treaty by Australia," he said of the consequences of a judgment in favor of Portugal. "That is not a matter of theoretical interest; Indonesia would be deprived of concrete benefits to which it is entitled under the Treaty, including possible financial benefits, in much the same way as the judgment requested in *Monetary Gold* would have deprived Albania of its right to the property involved in that case." In Nicaragua's suit, on the contrary, an ICJ ruling in its favor would have no operative impact on Israel. Israel has no treaty with Germany entitling it to purchase armaments. Israel's arrangements are with private parties in Germany. Israel might lose the benefit of armaments from Germany, but only if German suppliers continued to be willing to supply them, and only if Germany continued to issue export licenses.

The ICJ has never applied *Monetary Gold* to a delictual act of an absent state where a judgment would not cause it identifiable negative consequences. The delictual act of an absent state was raised by the Applicant in the *Corfu Channel* case. Britain sued Albania over undersea mines on the theory that Albania must have known of their presence. Britain accused Yugoslavia of having set the mines. To refute this allegation, Yugoslavia, despite not being a party to the proceedings, submitted documentary evidence. The ICJ proceeded to issue a [judgment](#) against Albania despite the absence of Yugoslavia.

In its 30 April Order in Nicaragua's suit, the ICJ did not mention the issue of Israel's absence from the case. In a [separate opinion](#) however, Vice-President Sebutinde said that the case should have been dismissed. "Even if one was to conclude that the Court did have jurisdiction in this case," she wrote, (para. 23) "prima facie the Court cannot exercise that jurisdiction in relation to any of Nicaragua's claims against Germany, since deciding on Germany's impugned conduct, would require the prior assessment, of the lawfulness of the conduct of Israel, an indispensable third party that has not given its consent to these proceedings." "[T]his conclusion," she wrote, is "fatal to Nicaragua's primary case against Germany."

Is the Legality of Israel's Conduct at Issue?

On at least a part of Nicaragua's allegations, Israel's commission of genocide might not need to be proved. The [Genocide Convention](#), by its Article 1, requires states to act to prevent genocide. As indicated, Nicaragua is including an allegation that

Germany's supply of armaments shows a failure to prevent genocide. The ICJ in its 30 April Order did not mention Nicaragua's Article 1 claim, but in his [dissent](#) (para. 13) from that Order, Judge *ad hoc* Khasawneh said that Germany could be violating its Genocide Convention obligations if there is merely a risk of genocide in Gaza.

Against such an eventuality, Germany cited (transcript 9 April p. 27 para. 15) language in the ICJ [judgment](#) (para. 431) in *Bosnia v. Serbia*, where the ICJ said that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed." Germany failed, however, to cite a follow-up statement in the same paragraph where the ICJ said, "This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."

There Is No Reason for the ICJ to Avoid Adjudicating Nicaragua's Claims

If the ICJ lets Nicaragua's case proceed on its complicity claim, Israel's liability under international humanitarian law and the Genocide Convention would have to be established by adequate proof. Factual determinations can be made about the liability of an absent state. ICJ Statute [Article 53](#) expressly authorizes findings adverse to a state that declines to appear. On Nicaragua's genocide claims, the ICJ may gain assistance from South Africa's pending [case](#) against Israel, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*. A finding in that litigation that Israel is, or is not, liable for genocide could be used by the ICJ in Nicaragua's suit.

The prospect in Nicaragua's suit of a finding of a delict on the part of Israel does not warrant abstention. In his dissent from the 30 April Order, Judge *ad hoc* Khasawneh said (para. 14) that the ICJ "never treated" *Monetary Gold* "as a *carte blanche* that would give third States a virtual veto power on the rights of other States to seek justice through resort to the Court." Complicity claims constitute an important category of dispute. Increasingly in the international community, states committing international wrongs gain assistance from other states. Wrongdoing on Israel's part is merely a fact to be proved like any other. The ICJ was created to provide states with an avenue for peaceful resolution of disputes. "The function" of the ICJ, according to Article 38 of its Statute, is "to decide in accordance with international law such disputes as are submitted to it." Israel's absence is no reason to avoid rendering a judgment in Nicaragua's suit.

