

# Why the Provisional Measures Order in Nicaragua v. Germany severely limits Germany's ability to transfer arms to Israel

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2024-05-02T14:07:38

Published 02 May 2024 Author: Stefan Talmon

In response to the barbaric terrorist attack by Hamas on 7 October 2023, Israel, in exercising the right to self-defence, embarked on an extensive aerial bombardment of Hamas positions in the Gaza Strip followed by a large-scale ground invasion of the territory. In the words of Judge Al-Khasawneh, Israel's military operation has given rise to '[an ongoing human tragedy of semi-apocalyptic proportions](#)'. The events in the Gaza Strip triggered South Africa in December 2023 to institute proceedings against Israel before the International Court of Justice (ICJ) accusing Israel of breaches of the Genocide Convention, including the commission of genocidal acts against the Palestinians in Gaza.

This was followed on 1 March 2024, by an [Application](#) brought by Nicaragua against Germany for alleged violations of the Genocide Convention, international humanitarian law, and other norms of general international law in relation to the Occupied Palestinian Territory, particularly the Gaza Strip. Nicaragua claimed that by providing political, financial and military support to Israel and by defunding the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Germany was facilitating the commission of genocide by Israel and violating its obligation to ensure respect for international humanitarian law. Nicaragua also requested that the ICJ indicate provisional measures as a matter of extreme urgency with respect to Germany's 'participation in the ongoing plausible genocide and serious breaches of international humanitarian law and other peremptory norms of general international law occurring in the Gaza Strip'.

While Nicaragua did not get any of the provisional measures requested, the request for provisional measures may nevertheless have achieved its aim of preventing Germany from providing arms to Israel for use in the Gaza Strip.

## Nicaragua's Request for Provisional Measures

Requests for provisional measures have priority over all other cases and thus the Court held public hearings on 8 and 9 April 2024. At the [hearings](#), Nicaragua requested that the Court indicate three provisional measures to Germany: (1) Germany was to suspend exports of military equipment and war weapons to Israel, in so far as these items would be used to commit or facilitate serious violations of international humanitarian law or genocide; (2) ensure that military items already

delivered by Germany to Israel were not used to commit or to facilitate serious violations of international humanitarian law or genocide; and (3) resume its support and financing of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) in respect of its operations in Gaza. Germany, on the other hand, asked the Court to reject Nicaragua's request for provisional measures and to remove the case from its general list of cases due to a lack of jurisdiction.

In its [Order on Provisional Measures](#) in the case concerning *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, the ICJ decided on 30 April 2024 not to accede to Germany's request to remove the case from its list because there was 'no manifest lack of jurisdiction'. This means that the case will go ahead. However, it is expected that, as a next procedural step, Germany will raise preliminary objections to the Court's jurisdiction and the admissibility of Nicaragua's application. In that case, the Court will suspend the proceedings on the merits and hold another public hearing on the questions of jurisdiction and admissibility. This will probably not take place before the end of 2025. Only if the Court rejects Germany's preliminary objections will the case proceed on the merits, which seems highly unlikely. Even in the best-case scenario, the court will not render a final decision in the case before 2027.

### **The Victory That Wasn't**

The more important aspect of the Order is, however, that the ICJ declined to indicate any provisional measures. This is not surprising with regard to Nicaragua's request that Germany be ordered to resume its support and financing of UNRWA because, as the Court observed, 'contributions to UNRWA are voluntary in nature', and Germany had continued to support UNRWA through the European Union and had provided financial and material support to other organisations operating in the Gaza Strip. In the meantime, Germany had also announced that it would resume direct funding of UNRWA's Gaza operations.

The ICJ also did not order Germany to suspend the export of war weapons and other military equipment to Israel. In an almost unanimous decision, by fifteen votes to one, the Court found that 'the circumstances, as they now present themselves to the Court, are not such as to require' the indication of provisional measures. Only Judge Al-Khasawneh, the judge ad hoc appointed by Nicaragua, dissented.

The Court's Order was widely interpreted as a victory for Germany. In particular, it was said that Germany could continue to deliver arms to Israel. A closer examination of the Order, however, points to the opposite.

The Provisional Measures Order is unusual in several respects. It is one of the shortest provisional measures orders in the history of the Court— the substantive part of the decision is under two pages. It does not provide any proper legal reasoning and, in particular, does not mention, let alone engage with the well-established requirements for the indication of provisional measures (prima facie jurisdiction, including prima facie admissibility; standing; plausibility of the rights asserted by the Applicant; link between the rights asserted and the measures requested; urgency in the sense of a real and imminent risk of irreparable prejudice). Instead, the Court

simply found that 'based on the factual information and legal arguments presented by the Parties..., at present, the circumstances are not such as to require' the indication of provisional measures. This suggests that the judges were divided on which points to address in the reasoning. It seems that some judges wanted to deal with the highly controversial question of whether Israel was an indispensable third party to the proceedings at the provisional measures stage of the proceedings, while others did not. In the end, not entering into any discussion of the requirements for provisional measures and simply referring to the 'circumstances' sidestepped this problem. This triggered criticism by Judge Al-Khasawneh who stated that the 'reasoning' deployed had 'much in common with the compromise-seeking parlance and *oratio obliqua* of political discourse.'

A close reading of the decision and especially the declarations, as well as the separate and dissenting opinions by individual judges reveals, however, why the Court did not indicate provisional measures. The Court considered that there was no real and imminent risk that Germany's conduct would cause irreparable prejudice to the rights at issue before the Court could give its final decision. The Court based this finding on Germany's submissions during the public hearings. In the four paragraphs of its Order that come closest to legal reasoning, the Court referred to Germany's statements no fewer than nine times. This prompted Judge Al-Khasawneh to note that the Court's entire 'reasoning' is comprised of five paragraphs, virtually all based on what Germany asserts. In the public hearings, Germany had pointed out that its rigorous domestic legal framework for the export of war weapons and other military equipment was sufficient to prevent any risk of prejudice to the rights at issue. For every arms export licence that was granted, an assessment was carried out by the German Government to ascertain whether there was a clear risk that the particular item subject to licensing would be used in the commission of genocide, crimes against humanity or grave breaches of the four Geneva Conventions. Germany had also pointed to the significant decrease in the value, content and volume of military assistance to Israel since November 2023. The value of material for which the licences were granted had decreased from approximately €200 million in October 2023 to approximately €24 million in November 2023 to approximately €1 million in March 2024. In addition, 98 per cent of the licences granted since 7 October 2023 concerned other military equipment and not war weapons. In a nutshell, there was no need for an order to stop the export of war weapons to Israel because Germany had stated before the Court that it currently did not export such weapons and that the other military equipment exported to Israel could not be used for the commission of genocidal acts or violations of international humanitarian law.

### **Significant restrictions on Arms Exports**

The Court nevertheless reminded Germany of its international obligation that when supplying arms to parties to an armed conflict it must 'avoid the risk that such arms might be used to violate the [Genocide and Geneva] Conventions.' Germany is thus subject to an obligation of due diligence when providing weapons to Israel. That there is a real risk of violations of the Geneva Conventions, becomes clear from the Court's finding that Israel's military operation in the Gaza Strip resulted in 'a large number of [civilian] deaths and injuries, as well as the massive destruction of homes,

the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure.’ In order to avoid the risk that German arms might be used by Israel in violation of the Genocide or Geneva Conventions, Germany must not provide war weapons to Israel for use in military operations in the Gaza Strip.

By expressly emphasising that, ‘at present’, circumstances did not require the indication of provisional measures, the Court made it clear that it could indicate such measures in the future. The Court put Germany on notice that it would accede to new request by Nicaragua if it resumed the export of war weapons and other military equipment to Israel that could be used to commit or to facilitate serious violations of the Genocide or Geneva Conventions. That the indication of provisional measures remains a real possibility is also shown by the fact that in the operative clause of the Order the Court did not ‘dismiss’ or ‘reject’ Nicaragua’s request for provisional measures outright, as asked for by Germany, but that it used the softer language of finding that ‘the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.’ As the decision not to indicate provisional measures was not based on legal but on factual grounds, that decision can change whenever the facts do.

Although the Court thus did not generally ban the provision of arms to Israel, it did impose significant restrictions on it. The supply of arms that are at risk of being used in violations of the Genocide Convention or international humanitarian law – in practice, any war weapon that could be used in active combat in the Gaza Strip – is contrary to Germany’s international obligations and may give rise to another request for the indication of provisional measures by Nicaragua.

*This article has been cross-posted with [Verfassungsblog](#).*

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