Nicaragua Comes Up Empty

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On 30 April 2024, the International Court of Justice (ICJ) rejected a request by Nicaragua for the indication of provisional measures in connection with claims relating to Germany's support for Israel in the ongoing Gaza conflict. In a terse, sparsely-reasoned decision, the Court decided 15-1 that the circumstances were 'not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures'. While this outcome was not necessarily surprising to those who had followed the proceedings, the Court's approach—in which it declined to address the usual requirements for the indication of provisional measures—was unusual. Indeed, this may be an instance in which various individual opinions reveal more than the decision itself.

Nicaragua's claims and request for provisional measures

Nicaragua initiated its ICJ case against Germany on 1 March 2024, approximately two months after South Africa brought a case against Israel alleging violations of the 1948 Genocide Convention—a case that has already led to two provisional measures orders against Israel (on 26 January 2024 and on 28 March 2024). With Nicaragua invoking the Court's jurisdiction based on the parties' respective optional clause declarations and Article IX of the Genocide Convention, this marks the latest example of 'strategic' or 'public interest' ICJ litigation aimed at the enforcement of collective obligations.

Nicaragua's claims can be summarized as follows:

- First, that by providing weapons and other military equipment to Israel and by suspending funding to UNRWA, Germany is in breach of its obligation to prevent genocide under Article I of the Genocide Convention and is actively contributing to the alleged commission of genocide in Gaza;
- Secondly, that based on the same conduct, Germany is failing to meet its obligation to ensure respect for international humanitarian law, as required by Common Article 1 of the 1949 Geneva Conventions; and
- Thirdly, that Germany's conduct violates the Palestinian people's right to self-determination.

Nicaragua requested the Court to indicate provisional measures that would direct Germany 'to immediately suspend its aid to Israel, in particular its military assistance including military equipment' that may be used to violate international law, and that Germany reverse its decision to suspend UNRWA funding and 'do everything possible to ensure that humanitarian aid' reaches Gaza (Application, para 101).

Germany's response

At a hearing held on 8-9 April, Germany asked the Court to reject the request and to remove the case from the General List. In addition to arguing that Nicaragua had filed the case prematurely and therefore failed to establish the existence of a dispute (CR 2024/16, pp 23-24, 30-34), Germany also argued that Israel was an indispensable third party to the proceedings because the claims under the Genocide Convention and IHL could proceed only upon a determination that Israel had committed an internationally wrongful act (CR 2024/16, pp 24-30). (For additional analysis of the *Monetary Gold* issue, see Alexander Wentker and Robert Stendel here and Imogen Saunders here).

Germany also highlighted the domestic legal framework that provides oversight over the export licensing of 'war weapons' and 'other military equipment', including the due diligence required by German law to ensure that military aid not be used to commit violations of international law (CR 2024/16, pp 17-18). Germany's position was that the obligation to ensure respect for IHL did not mean that a state could never provide military support to a state involved in an armed conflict, but rather that states must undertake a proper risk assessment before doing so (CR 2024/16, p 38-41, 44-45).

Germany also took issue with Nicaragua's factual allegations, which it consistently portrayed as false, misleading, or exaggerated. This included the accusation that Germany had dramatically *increased* aid to Israel following the 7 October attacks. By contrast, Germany represented to the Court that military aid to Israel had *decreased* substantially since the end of October 2023, with hardly any licenses approved for 'war weapons' (CR 2024/16, pp 18-22). It also explained how Nicaragua had mischaracterized various types of military kit and equipment. Taken together, this was damaging to the credibility of Nicaragua's claims. Finally, Germany made the case that it had been working assiduously on the diplomatic front to improve the humanitarian situation in Gaza and had supported other efforts to provide funding to UNRWA, even following the suspension of direct payments by Germany (CR 2024/16, pp 14-16, 44, 47-48).

The ICJ's decision

As noted above, the Court's Order of 30 April 2024 concluded that present circumstances did not require the indication of provisional measures, but it did so in a curious decision that was almost entirely devoid of reasoning. In five short paragraphs (paras 16-20), the Court recounted Germany's arguments about the domestic legal framework for the oversight of military assistance, including the assessment carried out to determine whether items 'would be used in the commission of genocide, crimes against humanity or grave breaches of the four Geneva Conventions' (para 17). The Court also highlighted the 'significant decrease' in export licenses since November 2023, including only four licenses relating to 'war weapons' (para 18). The ICJ also noted that UNRWA contributions were 'voluntary in nature' and that no payments from Germany to UNRWA had actually been due at

the relevant time (para 19). For the Court, this evidence led to the conclusion that provisional measures were not required (para 20).

In short, this was a judicial determination that turned entirely on facts—and these facts ultimately went to whether the situation presented an urgent risk of irreparable prejudice to the rights at issue in the case. This is a requirement for the indication of provisional measures. As Judge Iwasawa pointed out at paragraph 4 of his separate opinion, the Court need not examine each of the requirements for provisional measures if any single requirement is not satisfied.

Nonetheless, the decision departed from the Court's usual approach. The Court did not engage closely with the nature or scope of the legal obligations invoked by Nicaragua or whether the rights invoked by Nicaragua were plausible. Nor did the Court consider *prima facie* jurisdiction, including whether the *Monetary Gold* issue should be addressed at the provisional measures phase. Moreover, the Court never even stated expressly that Nicaragua had failed to establish an urgent risk of irreparable prejudice, even if this was ultimately why the request did not succeed.

While Nicaragua therefore came up empty on provisional measures, the Court rejected Germany's request to have the case removed from the General List. This was not a case of 'manifest lack of jurisdiction' (para 21). Left unsaid was whether the *Monetary Gold* question (which goes to admissibility rather than jurisdiction) had any relevance to this question, despite the extensive attention devoted to it in the oral hearing. The issue will undoubtedly be fully aired at the preliminary objections phase if the case moves ahead.

Finally, the Court concluded with three paragraphs that reiterated its deep concern with 'the catastrophic living conditions of the Palestinians in the Gaza Strip' (para 220) and repeated the obligations under IHL and the Genocide Convention invoked by Nicaragua, noting that it was important 'to remind all States of their international obligations relating to the transfer of arms to parties in an armed conflict' (paras 23-24). As Juliette McIntyre points out, the Court dedicated more words to reminding states about their general obligations under international law than it did to explaining its decision in the case at hand.

Separate and Dissenting Opinions

In total, five judges (Vice President Sebutinde, Judges Iwasawa, Cleveland, and Tladi, and Judge *ad hoc* Al-Khasawneh) wrote separately—and the opinions and declarations make for more interesting reading than the Order itself.

On 'scanty reasoning' and a 'novel approach'

One theme was the Court's decision not to engage with the specific requirements for the indication of provisional measures. Expressing concern with states asking the Court to 'micro-manage' the conduct of hostilities through provisional measures requests, Vice-President Sebutinde described the Court's decision 'not to reference or apply any specific criteria' as regrettable (para 1). In her view, the Court took

a ‘strange approach’ marked by ‘scanty reasoning’ and should have rejected Nicaragua’s request outright, rather than adopting softer language ‘for no discernible reason’ (para 3).

Judge Al-Khasawneh (the judge *ad hoc* appointed by Nicaragua, but who served previously as a member of the Court from 2000 to 2011) also criticized the ‘unusual document’ produced by the Court and described it as ‘truly unfortunate’ that the Court ‘opted for a novel approach constituting a departure’ from its established approach to provisional measures requests (paras 1-2). But unlike Vice President Sebutinde—who viewed Nicaragua’s request as unable even to satisfy the requirement of *prima facie* jurisdiction (para 27)—Judge Al-Khasawneh (who cast the sole dissenting vote) concluded that Nicaragua’s claim satisfied each prong of the five-part test (para 4).

In what appeared to be a response to such criticisms, Judge Iwasawa, as noted above, explained that it was enough for the Court to address Nicaragua’s failure to have established ‘any real and imminent risk of irreparable prejudice’ or urgency (para 13). It was enough that Nicaragua had ‘not sufficiently shown that Germany had failed to exercise due diligence in reviewing its exports of military equipment to Israel’ (para 11). In his view, this was the thrust of the Court’s reasoning at paragraphs 16-19 of the Order (discussed above).

Taking a different position, Judge Tladi endorsed the Court’s willingness to get away from the ‘straitjacket’ of provisional measures requirements that may compel the Court ‘to tick untickable boxes’ (para 7). In his view, the nature of Germany’s assurances justified the Court’s more ‘fluid’ approach (para 8).

On plausibility

While the Order did not address the question of ‘plausibility’ (which is now a standard part of the Court’s approach to provisional measures), several judges took up this issue, which continues to generate confusion (and which was addressed briefly by the Court’s former president in a recent BBC interview). At its root, the lingering question is whether the Court’s plausibility standard requires the party seeking provisional measures to establish (i) the plausibility of the *rights* at issue in the case (and for which interim protection is sought) or (ii) the plausibility of the *claims* or *allegations* in the main case. While the Court expressly refers to the plausibility of rights in its orders, it has sometimes applied the requirement in ways that suggest a focus on the plausibility of the requesting party’s claims on the merits (see, for example, the plausibility analysis at paragraphs 49-56 of the provisional measures order in *The Gambia v Myanmar* case).

Part of this confusion is due to the fact that the plausibility of rights will be obvious in some cases (and, indeed, will be more than merely ‘plausible’). The plausibility requirement makes better sense when the rights invoked by a party depend on a novel theory of treaty interpretation, such as Ukraine’s claim in its Genocide Convention case against Russia, or an untested proposition of customary international law, as in Timor Leste’s claim against Australia in the *Certain Documents* case. In other words, the idea that a party requesting provisional

measures must establish the plausibility of *rights* (rather than *claims*) is not incoherent, as some have suggested. But this rationale for plausibility gets lost in those cases where the rights at issue are essentially beyond dispute. This does not mean that it would not be justifiable for the Court to extend the plausibility analysis to a party's claims, but this would constitute a different standard whose exact requirements remain unclear.

Notwithstanding the absence of 'plausibility' from the Court's order, some judges addressed the question. Judge Iwasawa took the view that plausibility relates to *rights* (including the rights of states parties to seek compliance with obligations *erga omnes partes* under human rights treaties) (para 18). A further inquiry into specific evidence relating to alleged violations of those rights goes to the risk of irreparable prejudice and urgency, not plausibility (para 20). He acknowledged, however, that in some past cases, it has appeared as if the Court were also assessing the plausibility of *claims* (para 20).

By contrast, Judge Tladi took the view that plausibility helps the Court to establish that a party has at least '*some* prospect of success on the merits' and that this includes assessing 'whether there is a plausibility that the rights are being or have been infringed' (para 8). Judge Al-Khasawneh indirectly touched upon the issue by describing the Court as having found Israel 'to be plausibly engaged in an ongoing genocide' (para 3) in its Order of 26 January in *South Africa v Israel*. In short, these different views mainly served to underline a continuing lack of agreement on plausibility.

Final observations: Losing but winning?

On its face, Nicaragua's request for provisional measures failed—and failed badly. Moreover, to the extent that Nicaragua's case also seeks to embarrass Germany, that effort also seems to have gone awry. Indeed, the fact that Nicaragua has highlighted its acceptance of the Court's compulsory jurisdiction might even encourage some other state to bring a new ICJ case against Nicaragua in connection with its own problematic record on human rights.

However, the Court's Order does not mean that Nicaragua's decision to seek provisional measures will necessarily have been for naught. Germany persuaded the Court that provisional measures were not warranted by emphasizing the significant reduction in military assistance to Israel and by simultaneously acknowledging the gravity of the situation (see the Declaration of Judge Tladi, para 3). The practical effect of this representation to the Court may be akin to that of a unilateral declaration, even if (as Judge Tladi points out at paras 10-11) Germany's assurances to the Court were not quite presented as such. But Germany may now find it difficult—both politically and as a matter of litigation risk—to reverse course and resume any substantial provision of military aid to Israel amidst the continuing conflict in Gaza, notwithstanding the special role that Israel's national security plays in German foreign policy. Nicaragua did not obtain the injunction that it sought from the Court, but the practical effect on Germany's conduct may be little different.

Two other points merit comment.

Judge Cleveland's Declaration largely sought to elaborate upon the duties of prevention under the Genocide Convention and the Geneva Conventions. This offered a potential preview of the substantive legal issues to be addressed at the merits stage, if the case survives, and the potential opportunity for the Court to clarify the requirements for aiding or assisting in the commission of an internationally wrongful act, especially in the context of IHL (questions that remain contentious, as illustrated here and here.) Judge Cleveland also drew a helpful contrast (para 14) between Germany's legal framework governing military exports and the Dutch approach, as examined in the recent case involving the transfer of F-35 fighter jet parts from the Netherlands to Israel (discussed here).

Finally, it is worth returning to Judge Al-Khasawneh's strident dissent. As noted above, the Court's decision turned largely on the Court's willingness to accept Germany's version of the facts. Yet Judge Al-Khasawneh expressed disbelief that the Court could be so naïve as to not understand the actual use for the 3,000 anti-tank weapons sent from Germany to Israel after 7 October. As he put it, such weapons, 'especially when employed against an enemy which does not have tanks, as is the case in Gaza . . . are used to target homes and other buildings with the devastating effect of penetrating the building and indiscriminately incinerating everyone inside' (para 6). That said, this was not an argument that Nicaragua made directly in the proceedings.

More pertinently, Judge Al-Khasawneh also noted that Nicaragua had submitted additional information to the Court, subsequent to the oral hearing, that seemingly cast some doubt upon Germany's assertions about the non-provision of 'war weapons' since late 2023 (see para 9). This may raise serious questions, but it was apparently not enough to persuade any other judge to advocate for provisional measures. Nonetheless, this goes to Judge Al-Khasawneh's 'serious misgivings' about the fact that one round of pleadings left Nicaragua with no opportunity to respond to Germany's arguments, which it heard for the first time in the Great Hall of Justice; this constituted 'a serious procedural flaw' (para 18). These concerns have some merit. While the Court may have organized the hearing with a view to speed and efficiency, it may have been prudent to allow for an additional round of pleadings in such a fact-heavy case.

In sum, Nicaragua's request for provisional measures—which some always viewed as an uphill battle—did not succeed. If the case proceeds, there will be an important opportunity to consider how the indispensable third-party rule intersects with obligations that focus on risk and prevention. If Nicaragua survives that hurdle, it will then be able to mount a new challenge to the adequacy of Germany's oversight framework. At the end of the day, the case may yet provide the Court with opportunities to address and clarify an important legal question: the nature and scope of due diligence obligations in the context of arms transfers and other forms of aid and assistance to parties engaged in armed conflict.