

“Germany’s Strong Public Support for Israel Has Made the Country the Main Target”

Stefan Talmon, Julian A. Hettihewa

2024-03-11T14:00:26

On 1 March 2024, the Republic of Nicaragua [instituted proceedings](#) against the Federal Republic of Germany before the International Court of Justice. The core allegation: With its support for Israel, Germany is contributing to the commission of genocide and other serious violations of international law against the Palestinian people in the Gaza Strip. Nicaragua’s application raises certainly not only legal but also sensitive political questions. In order to discuss the most pressing legal issues, I have spoken to Professor Stefan Talmon. He is one of the most visible and vocal international lawyers in Germany commenting on the devastating situation in Gaza and a renowned expert of German practice in international law.

Professor Talmon, in the [past](#), you shared the view of Jordan’s King Abdullah II, criticising that “the West is conspicuously silent on any violations of international humanitarian law currently going on in Gaza”. Are you welcoming Nicaragua’s initiative? Will the international rule of law be strengthened by Nicaragua’s proceedings against Germany?

First of all, let me say that Nicaragua is, of course, entitled to institute these proceedings against Germany. Nicaragua claims violations of obligations *erga omnes partes* as well as obligations *erga omnes*, and such violations give Nicaragua standing before the International Court of Justice (ICJ) to bring such a case. The Court also has jurisdiction, both under Article IX of the Genocide Convention and the two countries’ optional declarations under Article 36 (2) of the ICJ Statute. I assume that Nicaragua would even argue that it does not only have a right to bring this case but also an obligation to do so, as by bringing the case it is fulfilling its obligations to prevent violations of the Genocide Convention and to ensure respect for international humanitarian law.

Having said that, I assume these proceedings will lead to further divisions in the international community. One side will see these proceedings as purely politically motivated, as an abuse of process and an exercise of “lawfare”, while the other side will see these proceedings as a means to hold Israel to account and to strengthen the international rule of law.

I think the action by Nicaragua, a country of the global south, is a reaction to the conspicuous silence of Western countries with regard to what is happening in the Gaza Strip. While countries like Germany acknowledge the humanitarian catastrophe in the Gaza Strip and the plight of the Palestinians and call for a

humanitarian pause or pauses (rather than for a ceasefire) to allow for the delivery of aid, they do not publicly address, let alone criticize Israel for any violations of international humanitarian law in Gaza. The focus in Germany is on Israel's right to self-defence. At best, Israel is reminded that the right to self-defence must be exercised in line with international law.

Germany's strong public support for Israel and its policy of unquestioning solidarity has made the country the prime respondent for the present proceedings; especially as Israel's main backer, the United States, cannot be brought before the ICJ for complicity in Israel's alleged genocide because of its reservation to the compromissory clause in Article IX of the Genocide Convention. As you will recall, on 2 February 2024 Nicaragua sent a diplomatic note to four States – Canada, the Netherlands, the United Kingdom, and Germany – reminding them of their obligations under the Genocide Convention and international humanitarian law. In the end, the only country Nicaragua instituted proceedings against was Germany.

Coming back to your initial question: Do I welcome Nicaragua's initiative? I generally welcome the peaceful settlement of disputes which contributes to strengthening the international rule of law. In addition, the present case also may provide the Court with an opportunity to clarify the law in an area that is still largely uncharted territory: the obligations to prevent and not to be complicit in genocide. After all, the *Bosnian Genocide* case left open many questions. With regard to the ultimate goal of the proceedings, to improve the situation of the Palestinians in Gaza, the case may, however, be detrimental, if anything. If the case is dismissed on procedural grounds, this may encourage both Germany and Israel to persist with their present conduct.

You have touched on an interesting point with the last part of your answer: What does Nicaragua hope to achieve with the proceedings? Why is it that Nicaragua, a State with an appalling human rights record (see [here](#) and [here](#)), has taken the initiative?

Nicaragua's institution of proceedings against Germany must be seen against the background of the historical relationship between Nicaragua under the Somoza government and Israel, and between the Sandinista Liberation Front and the Popular Front for the Liberation of Palestine (PFLP), which later became the Palestine Liberation Organization (PLO). Israel supported the Somoza dictatorship militarily, especially during the Sandinista insurrection of 1978/1979. As you will recall, the Somoza government was overthrown by the Sandinista rebels. During the insurrection, the Sandinista rebels received support from the PFLP. The first president of Nicaragua under the Sandinista government was Daniel Ortega, who returned to power in 2007 and is the present president of Nicaragua. Ortega and the Sandinistas thus have a long-standing friendly relationship with the Palestinians. This may explain why Nicaragua is so committed to the Palestinian cause. As you know, Nicaragua is not just bringing the case against Germany, it has also applied to intervene in the case brought by South Africa against Israel. Unlike the interventions by third States in the cases of *Ukraine v. Russia* and *The Gambia v. Myanmar*, Nicaragua is not intervening under Article 63 of the ICJ Statute in order to assist the Court in construing the provisions of a convention at issue in the case, but under

Article 62 of the ICJ Statute, claiming that it has its own interest in the case. That shows the strong feeling on the part of Nicaraguans to further the Palestinian cause.

We have already touched upon what Nicaragua hopes to achieve. I think the ultimate aim is to stop German military and political support for Israel and to make Germany resume funding of UNRWA or, at least, make it much more costly in foreign policy terms to continue its present policy. The other purpose is to draw the world's attention to the fate of the Palestinians in Gaza. Nicaragua will be able to do so by way of its application for provisional measures. A request for provisional measures has priority over all other cases. The Court is therefore expected to hold a hearing within the next few weeks. The hearing in the Peace Palace in The Hague will give Nicaragua a world stage to highlight the catastrophic humanitarian situation of the Palestinians in Gaza and to publicly shame Germany for its military and political support of Israel and its decision to suspend any decision on new funding for UNRWA. Last but not least, the case might also serve to make the German public aware that the world is not as black and white as it is sometimes portrayed on German media, and that there is also a Palestinian side to the conflict.

Moving away from the context and focusing more on the application itself; Nicaragua's application makes little, or no mention of the atrocities committed by Hamas and the suffering of the people in Israel. While this is without a doubt horrific and alarming, will it ultimately diminish any chances of success in Court? And with respect to the ICJ's [indispensable third party rule](#) (p32), will the Court refuse to render a decision given that Israel is not a party to the proceedings?

You are quite right. The unfathomable atrocities of 7 October 2023 are not mentioned at all. Perhaps even worse, the application in paragraph 6 speaks of "Palestinian paramilitary forces from Hamas [attacking] the Israeli settlements located in the occupied Palestinian territories of Sderot, Kfar Azza, Nir Oz and Be'ri." The four settlements mentioned are all in territory which according to the UN Partition Plan of 1947 was to be part of the Jewish State and which has been part of Israel since 1948. This sentence either reflects ignorance or implicitly calls into question Israel's right to exist by labelling as "occupied Palestinian territories" territories which are clearly part of Israel. If it were the latter, it would be very alarming and unbecoming of an application to the ICJ. And, of course, referring to the atrocities as "attacks" by "paramilitary forces" glosses over the fact that Hamas and other armed groups present in the Gaza Strip killed more than 1,200 persons, injured thousands and abducted some 240 people, many of whom continue to be held hostage. Actions which may be considered gross violations of international humanitarian law, war crimes, crimes against humanity and, possibly, genocide.

These considerations may call into question the credibility of the application but will not affect its chances of success. The application will be judged on its legal merits. In my view, the biggest legal hurdle to overcome is the indispensable third-party rule, which is sometimes also referred to as the Monetary Gold Principle as it was first developed in the case concerning *Monetary Gold Removed from Rome in 1943*. The decisive question is: can the Court rule on the allegations against Germany without having to rule first on alleged violations of international law by Israel? In my view this

is impossible because a State can be held responsible for breaching the obligations to prevent genocide or not to be complicit in genocide only if genocide was actually committed by another State. Similarly, a breach of the obligation to ensure respect for international humanitarian law presupposes that international humanitarian law is actually violated or that there is at least a serious risk of such violations based on past violations by the other State. If there were no established present or past violations of international humanitarian law, the obligation to ensure respect would be based on pure speculation. With regard to Nicaragua's allegations against Germany, I cannot see how the Court could rule on them without first or at the same time ruling on the alleged (past) violations of international law by Israel. Israel, however, is not before the Court. As it is an indispensable party to the proceedings, the Court does not have jurisdiction to decide the allegations against Germany. In my view, the case will therefore hit the buffer stop at the preliminary objections stage – at the latest.

Things may be slightly different at the provisional measures stage of the proceedings. Here, the applicant must prove only on a *prima facie* basis that the Court has jurisdiction and that the case is admissible. This is a rather low threshold. The indispensable third-party rule does not concern the Court's jurisdiction but relates to the admissibility of the case. I assume that even at the provisional measures stage, Israel, or better Israel's absence, will be the elephant in the Great Hall of Justice. It is therefore surprising that Nicaragua has not addressed this question at all in its application. Will Nicaragua be able to establish *prima facie* the admissibility of the case, or is it so obvious that the Court cannot decide the allegations levelled against Germany without Israel's presence? Although it is difficult to predict how the Court will decide, I think a good case could be made for the Court to dismiss the case already at the preliminary measures stage due to Israel's absence.

You have mentioned the important aspects of admissibility but let us nevertheless advance to the substance of Nicaragua's application with respect to the provisional measures. In its [order](#) in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), the ICJ found that at least some of the rights claimed by South Africa and for which it is seeking protection, including "the right of the Palestinians in Gaza to be protected from acts of genocide", are plausible (para. 54). It is certainly difficult to predict the outcome of the proceedings, but do you think the Court will similarly find that at least some of the rights claimed by Nicaragua are plausible?

I think Nicaragua would first have to overcome the indispensable third-party hurdle before the Court can address this question. If the Court were to decide this question, I think there would be a good chance that the Court reaches a similar result. After all, the facts and circumstances with regard to the Palestinians in Gaza are the same in both cases. One could argue that the situation today is even worse than it was on 26 January 2024, when the Court issued its Order in *South Africa v. Israel*. In that Order, the Court found not only the right of the Palestinians in Gaza to be protected from acts of genocide to be plausible but also their right to be protected

from “related prohibited acts identified in Article III” of the Genocide Convention. These related prohibited acts, of course, include complicity in genocide – one of the allegations levelled against Germany. As the obligations not to be complicit in genocide and to prevent genocide are obligations *erga omnes partes*, Nicaragua also has its plausible own right to seek Germany’s compliance with the latter’s obligations under the Convention. Some of the provisional measures Nicaragua is requesting (para. 101 of the application) are also clearly aimed at preserving the plausible rights it asserts on the basis of the Genocide Convention. As the Court has already established that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible, it would seem likely that the Court indicated provisional measures to Germany.

Already in October 2023, you were critical of Germany’s approach to international law, [writing](#): “Solidarity does not have to be blind or unquestioning. After all, Germany is under an obligation ‘to ensure respect’ for the Geneva Conventions and for international humanitarian law more generally. Looking the other way when friends and allies violate international law while calling out the slightest infraction of international law committed by strategic rivals and opponents in the long run undermines Germany’s credibility with regard to international law.” Do you view Nicaragua’s application as a direct result of Germany’s position on international humanitarian law in the Gaza War and do you expect other States that now want to denounce Germany to intervene on the side of the applicant?

As I said before, Germany’s strong public support for Israel and its policy of unquestioning solidarity has made the country the main target for such proceedings. You may recall that, for example, at the end of October 2023 the German Chancellor declared that “one can be certain that the Israeli army will also respect the rules that arise from international law in everything it does. I have no doubt about that.” This statement was made at a time, when the UN Secretary-General, the EU’s High Representative for Foreign Affairs and Security Policy and the ICRC already accused Israel of actions “not compatible with international humanitarian law” or even “clear violations of international humanitarian law”.

Unlike in the case between South Africa and Israel, I do not expect many other States to intervene. In fact, I would be surprised if any other State intervened in Nicaragua’s case against Germany. Such interventions are always politically sensitive and come at a certain political and economic cost.

Germany has stylised itself as a champion of international law. Germany is not tired to stress its fight against impunity, even [declaring](#) that this forms “one of the most significant tenets of German justice and foreign policy”, and [arguing](#) that “[f]ighting impunity is not only a question of principle, it is also a moral and political imperative, and a matter of security for the international community”. Does Nicaragua have a point when it asks the International Court of Justice to decide that Germany “has breached and continues to breach international law by refusing to prosecute, bring to trial and punish persons responsible for, or accused of grave crimes under international law” (para. 67

(6) or would it indeed be conceivable for an Israeli official to be tried for war crimes in Germany?

Taking the first question first, I do not think that Nicaragua has got a point here. What would be the legal basis for such a general and far-reaching obligation? I cannot see any basis for such a sweeping obligation – especially one that does not distinguish between suspects present in the territory of a State and those that are not. The obligation in common Article 1 of the Geneva Conventions to ensure respect for the Conventions does not include a general obligation to prosecute, bring to trial and punish. Otherwise, the specific obligations with regard to grave breaches of the Conventions; namely to enact legislation and to search for persons alleged to have committed such grave breaches, would be superfluous. There is also no State practice to establish a customary international law obligation to prosecute grave crimes under international humanitarian law. I also think that such an obligation would be unfeasible as it would mean that every State would have to prosecute and bring to trial potential suspects worldwide. While States may prosecute international crimes on the basis of universal jurisdiction, they are not obliged to do so. I therefore think that this submission will fail for the simple reason that there is no corresponding obligation under international law.

With regard to your second question, whether Israeli officials could be tried for war crimes in Germany: Yes, of course, that is possible. Under the Code of Crimes against International Law, Germany has assumed universal jurisdiction for genocide, war crimes and crimes against humanity worldwide. German courts can hear cases irrespective of the nationality of the perpetrator or the place where the crime was committed. But it is not only Israeli officials that could be tried in Germany, the same applies to members of Hamas or other groups that have committed international crimes in Israel or in Gaza.

On a final note, do you expect the proceedings to lead to any shifts or revisions in Germany's foreign policy with respect to Israel and Palestine?

I do not think that the proceedings will substantially affect Germany's foreign policy; after all, Israel's security has officially been declared "Germany's reason of State". This means that Germany has a special responsibility to protect and assist Israel in defending itself. I cannot see Germany stopping aid and assistance to Israel. And I do not think that Germany will be forced to do so. As I said before, I do not think that Nicaragua's application will ultimately be successful.

Thank you very much.

