

ICJ's Provisional Measures Approach in *Nicaragua v. Germany* – Unusual or a Practice in Judicial Economy?

Introduction

On April 30, 2024, the International Court of Justice (ICJ or the Court) issued its decision on Nicaragua's provisional measures application in *Nicaragua v. Germany*,¹ a case brought under the Genocide Convention.² The decision appeared to depart from the Court's usual approach, in that it did not record a detailed examination of prima facie jurisdiction, plausibility of rights, and urgency. Rather, the ICJ decided that Germany's actions did not warrant provisional measures. This is one of the few times the Court decided not to record a detailed examination, rejecting the application based on the statements made by the non-applicant state.

This *Insight* will discuss: (1) the Court's order, along with its separate and dissenting opinions, (2) a relevant summary of its approach in deciding provisional measures applications, and (3) why it may have departed from such an approach in *Nicaragua v. Germany*.

Background

On March 1, 2024, Nicaragua instituted proceedings against Germany before the ICJ. Alleging Germany to be a participant of "plausible genocide and serious breaches of international humanitarian law" in the Gaza Strip as a result of Germany's provision of military support, including both weapons and other military equipment, to Israel in 2023 and 2024, Nicaragua sought provisional measures against Germany. It requested, *inter*

alia, that the ICJ direct Germany to: (1) suspend military aid to Israel that may be used in the Gaza Strip in violation of the Genocide Convention; (2) make efforts to ensure weapons already delivered were not used to commit genocide; and (3) reverse its January 27, 2024 decision to suspend its funding of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA).³

In its oral submissions, Germany emphasized its “special historical responsibility for Israel’s security.” It took serious objection to Nicaragua’s submission that the October 7 attacks were directed at settlements in the occupied Palestinian territories and not in the state of Israel, implying that Nicaragua denied Israel’s right to exist. Germany further argued that Nicaragua’s request failed to meet the criteria for provisional measures. However, at its core, Germany disputed Nicaragua’s factual submissions, arguing that the actual position was different and that it did not warrant the Court to exercise its power.⁴

Provisional Measures Decision

In its April 30, 2024 order, the ICJ rejected Nicaragua’s application for provisional measures. It held that, “[b]ased on the factual information and legal arguments presented by the Parties, . . . the circumstances [were] not such as to require the exercise of” the Court’s power to indicate provisional measures.⁵

In support, the Court’s decision noted the statements made by Germany on: (1) the extensive assessment that the German legal framework mandated before a license to export weapons and other military equipment was granted; (2) the significant decrease in the overall value of German exports to Israel from October 2023 (approximately €200 million) to November 2023 (approximately €24 million) and March 2024 (approximately €1 million), during which time period only four licences for “war weapons” had been granted; (3) the fact that 98 per cent of the licences granted since October 7, 2023, were for military equipment and not war weapons; and lastly, (4) that contributions to the UNRWA were voluntary, no new payment was due from Germany, and that it supported initiatives for funding the agency’s work.⁶

Separate and Dissenting Opinions

Vice-President Judge Sebutinde felt that the Court’s approach was “strange” and “scanty.” In her separate opinion, she highlighted the criteria the Court developed for indication of provisional measures, which typically involved: (1) an examination of *prima facie* jurisdiction; (2) a test of plausibility of the rights asserted by the requesting party and

its link to the requested provisional measures; and (3) an assessment of urgency in the sense of whether there was a real and imminent risk of irreparable prejudice.⁷

Judge Sebutinde noted Nicaragua failed to establish the above criteria, which in her view was the actual reason the Court rejected Nicaragua's request although the Court did not explicitly undertake an analysis of each—or any—of the above criteria.⁸ She further explained that Nicaragua failed to show that a dispute had crystallized between the parties at the time Nicaragua instituted its Request, that being a prerequisite for the Court to exercise its jurisdiction.⁹ Additionally, she observed that the Court's prima facie jurisdiction was barred by the *Monetary Gold* principle¹⁰ because a decision 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."¹¹ Lastly, Judge Sebutinde found there was a lack of urgency, based on the statements made by Germany.¹²

Judge Al-Khasawneh in his dissenting opinion shared Judge Sebutinde's concerns over the Court's lack of reasoning, although in his view the provisional measures criteria were met.¹³ Additionally, he highlighted a "serious procedural flaw" in the conduct of the proceedings as Germany did not file a written response to Nicaragua's request and was the last to present oral arguments, which thus did not allow Nicaragua any opportunity to respond to Germany's submissions.¹⁴ However, he disagreed with the majority that Germany's statements allayed any concerns of real and imminent risk of irreparable harm, or that the *Monetary Gold* principle was applicable.¹⁵

Judge Iwasawa's separate opinion highlighted that the criteria for indicating provisional measures are cumulative, i.e., if either condition (e.g., urgency) is not satisfied, the Court is not required to examine others.¹⁶ In what serves as a clarification of the Court's order, Judge Iwasawa explained the Court's decision predicated on lack of urgency, demonstrable through Germany's statements.¹⁷ This means that because the urgency requirement was not met, the Court rightly declined the indication of provisional measures.¹⁸

The ICJ's Examination of the Provisional Measures Criteria

Although the Court did not explicitly undertake the analysis described by Judge Sebutinde in her separate opinion, it seems that the Court implicitly decided that there was no urgent and imminent risk to the rights claimed. This approach is inconsistent with the approach it took in every other provisional measures application filed under the Genocide

Convention, including the *Bosnian Genocide*,¹⁹ *The Gambia v Myanmar*,²⁰ and *Ukraine v Russian Federation*²¹ cases, where it analyzed the applications against the criteria.

Further, both *Nicaragua v. Germany* and *South Africa v. Israel* concern allegations of genocide of members of the Palestinian group in the Gaza Strip as a result of the Israeli offensive. South Africa filed three different provisional measures applications, which were decided on January 26, March 28 and May 24, 2024. In the first *South Africa v. Israel* order, the Court conducted a detailed examination of South Africa's request against the relevant criteria, as compared to the second and third applications, where the Court noted that it had already fully examined South Africa's first provisional measures application in its January 26, 2024 order, and decided against revisiting its previous conclusions.²² In the successive orders, it restricted its examination to imminent risk and urgency.²³

However, the Court's approach in *Nicaragua v. Germany* is not unusual. In the past decade, it refused provisional measures on at least five different instances without consideration of all conditions of the criteria noted above. These are *Mexico v. Ecuador* (May 23, 2024),²⁴ modifications requests in *Armenia v. Azerbaijan* (July 6, 2023, and October 12, 2022),²⁵ *Azerbaijan v. Armenia* (February 22, 2023),²⁶ and *Qatar v. United Arab Emirates* (June 14, 2019).²⁷

Conclusion

The Court has time and again reiterated that all conditions of the criteria must be satisfied before it can indicate provisional measures. For example, in *Ukraine v. Russian Federation*, the Court observed that it may indicate provisional measures "only if" all of the criteria are met.²⁸

However, the pattern that can be evinced from the above appears to be that the Court does not examine all conditions of the provisional measures criteria or enter into lengthy reasoning, if it reaches the conclusion that even one of the conditions is not satisfied. Moreover, as demonstrated above, if even one of the conditions is not met, the Court rejects the application.

This means that the Court's decision in *Nicaragua v. Germany* is not a complete departure from its usual approach in so far as it may avoid examination of the entire criteria. In making a similar observation, Judge Tladi even underscored that the Court's task is not a "box-ticking" exercise.²⁹

That being said, the Court's approach is indeed somewhat of a departure in the sense that it did not pinpoint which condition of the provisional measures criteria was not met. Rather, as referenced in Judge Sebutinde and Judge Iwasawa's separate opinions, the latter could only be surmised. For this, the Court has received criticism from its own bench.

Whether the decision is a departure or merely a practice in judicial economy, for example pursuant to the *lato sensu* rule, merits further examination.³⁰ In doing so, one must also consider the record number of pending cases currently on the ICJ's docket (22 pending cases and one under deliberation as of November 26, 2024).³¹

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¹ Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany) ("*Nicaragua v. Germany*"), Provisional Measures Order (Apr. 30, 2024).

² Convention on the Prevention and Punishment of the Crime Of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 (Genocide Convention).

³ *Nicaragua v Germany*, Application Instituting Proceedings (Mar. 1, 2024), ¶ 101.

⁴ *Id.*, Verbatim Record, Apr. 9, 2024, pp. 9, 13-22.

⁵ *Id.*, Provisional Measures Order, Apr. 30, 2024, ¶ 20.

⁶ *Id.* ¶¶ 17-19.

⁷ *Id.*, Separate Opinion of Vice-President Sebutinde, ¶ 2. See, e.g., Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures Order, 2022 I.C.J. Rep. 211 (Mar. 16).

⁸ *Id.* ¶¶ 2-3.

⁹ *Id.* ¶¶ 7-11.

¹⁰ *Id.* ¶¶ 12-23 (*Monetary Gold removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, 1954 I.C.J. Rep. 19 (Jun. 15), 32 ("*Monetary Gold*")).

¹¹ *Id.* ¶ 23.

¹² *Id.* ¶¶ 1-5, 22-23, 24-27.

¹³ *Id.*, Dissenting Opinion of Judge Ad Hoc Al-Khasawneh, ¶ 4.

¹⁴ *Id.* ¶ 18.

¹⁵ *Id.* ¶¶ 6-17.

¹⁶ *Id.*, Separate Opinion of Judge Iwasawa, ¶ 4

¹⁷ *Id.* ¶¶ 13-14.

¹⁸ *Id.* ¶¶ 4, 13-14.

¹⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ("*Bosnian Genocide*"), Provisional Measures Order, 1993 I.C.J. Rep. 3 (Apr. 8).

²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures Order, 2020 I.C.J. Rep. 3 (Jan. 23).

²¹ *Ukraine v. Russian Federation*.

²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (May 24, 2024), ¶¶ 31-33.

²³ South Africa v. Israel.

²⁴ Embassy of Mexico in Quito (Mexico v. Ecuador).

²⁵ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan).

²⁶ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures Order, 2023 I.C.J. Rep. 36 (Feb. 22).

²⁷ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures Order, 2019 I.C.J. Rep. 361 (Jun. 14).

²⁸ *Ukraine v. Russian Federation*, ¶¶ 24, 50, 61-66.

²⁹ *Nicaragua v. Germany*, Declaration of Judge Tladi, ¶¶ 1-3, 6-9, 11-12 (Judge Tladi noted that the conditions are important to ensure there is no arbitrariness. However, he also observed that the Court “must remain free to weigh all the elements together in a more fluid way than can be captured by a box-ticking exercise”).

³⁰ See, e.g., Fulvo Maria Palombino, *Judicial Economy and Limitation of the Scope of the Decision in International Adjudication*, 23 Leiden J. Int'l L. 909 (2010), 922 (This would require the Court to make the most efficient use of its powers, e.g., by giving precedence to an issue which logically may not precede other issues “but by itself enables the dispute to be settled and the resolution of that question to be precluded”).

³¹ See ICJ Pending Cases, <https://www.icj-cij.org/pending-cases>.