INTERNATIONAL COURT OF JUSTICE

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Summary
Unofficial

Summary 2024/4
30 April 2024

Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)

Request for the indication of provisional measures

The Court begins by recalling that, on 1 March 2024, Nicaragua filed in the Registry of the Court an Application instituting proceedings against Germany concerning alleged breaches of certain international obligations in respect of the Occupied Palestinian Territory. The Application contained a Request for the indication of provisional measures. At the end of its oral observations, Nicaragua requested the Court

> "as a matter of extreme urgency, pending the Court's determination of this case on the merits, and after recalling to the Parties the obligation of compliance with humanitarian law as well as of the obligation of cooperation to bring to an end all serious breaches of peremptory norms of international law, to indicate the following provisional measures with respect to Germany in its 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, as well as in other parts of Palestine, namely, to order that:
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> (1) Germany must immediately suspend its aid to Israel, in particular its military assistance, export and authorization of export of military equipment and war weapons, in so far as this aid is used or could be used to commit or to facilitate serious violations of the Genocide Convention, international humanitarian law or other peremptory norms of general international law;
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> (2) Germany must immediately ensure that military equipment, war weapons, and other equipment used for military purposes already delivered by Germany and German entities to Israel are not used to commit or to facilitate serious violations of the Genocide Convention, international humanitarian law or other peremptory norms of general international law;
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> (3) Germany must resume its support and financing of UNRWA in respect of its operations in Gaza."

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In the Order, the Court first recalls that, pursuant to Article 41 of the Statute, it has "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". In the present proceedings, the Court considers that it must first ascertain whether Nicaragua has sufficiently shown that the circumstances as they now present themselves to the Court are such as to require the exercise of its power to indicate provisional measures.

The Court notes that, according to Nicaragua, by providing weapons to Israel and by suspending the provision of funds to UNRWA, the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Germany has failed to comply with its obligations under the Genocide Convention and international humanitarian law, including the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977, and its intransgressible principles. Nicaragua contends that, for the year 2023, the German Government authorized exports of "military equipment and war weapons" worth more than ten times those for the year 2022, the great majority of which were granted after the beginning of the military operation by Israel in the Gaza Strip. Nicaragua claims that Germany could not be unaware of the situation in Gaza nor ignore the likelihood that the "military equipment and war weapons" provided by it would be used by Israel "to bomb and kill thousands of Palestinian children, women and men". It also claims that Germany has not only violated its obligations to prevent and punish breaches of the Genocide Convention and of international humanitarian law, but that it is also "complicit in them by aiding and assisting the commission of [those] breaches".

In response, the Court notes that Germany first states that it has fulfilled the obligation incumbent on States parties to the Genocide Convention to prevent the occurrence of genocide by continuously using all reasonable means at its disposal to exert its influence on Israel in order to improve the situation in Gaza and to furnish humanitarian aid to the population of Gaza. Second, it contends that the obligation that could be derived from common Article 1 of the Geneva Conventions incumbent on non-parties to an armed conflict does not oblige a State to refrain completely from providing military support to a State involved in an armed conflict. Germany further contends that it has stringent licensing standards to assess whether there is any risk of serious violations of the Genocide Convention, international humanitarian law and other peremptory norms of international law by the recipient State. According to Germany, there is no evidence that the supply of military equipment to Israel by Germany would have contributed to an alleged genocide or to breaches of international humanitarian law.

The Court notes that Germany, as it has stated, is bound by the Arms Trade Treaty of 2 April 2013 and by the European Council Common Position of 8 December 2008, as amended on 17 September 2019, which defines common rules governing the control of exports of military technology and equipment.

The Court further notes that, as Germany has also stated, the German legal framework on the manufacturing, marketing and export of weapons and other military equipment involves an inter-agency process with consideration by at least two ministries, and potentially other ministries depending on the content of the licence application. Under this legal framework, there are two categories of military technology and equipment subject to licensing: "war weapons", whose export requires two licences, and "other military equipment", whose export requires only one licence. Under the German legal framework, for every licence that is granted, an assessment is carried out by the German Government to ascertain whether there is 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.

The Court notes in addition that, as stated by Germany, there has been a significant decrease since November 2023 in the value of material for which the licences were granted, from approximately €200 million in October 2023 to approximately €24 million in November 2023, to approximately €1 million in March 2024. The Court also notes that, since 7 October 2023, according

to Germany, only four licences for "war weapons" have been granted: two for training ammunition, one for propellant charges for test purposes, and one concerning the export of 3,000 portable anti-tank weapons. The Court further notes that Israel had also approached the German Government in 2023 for tank ammunition and that no decision by the Respondent has thus far been made regarding this request. In addition, according to Germany, the licensing for export of a submarine to Israel is currently pending, as only one of the two licences required for this export has so far been granted. Finally, the Court takes note of Germany's statement that 98 per cent of the licences granted since 7 October 2023 concerned "other military equipment" and not "war weapons".

With regard to Nicaragua's request that Germany "resume its support and financing of UNRWA in respect of its operations in Gaza", the Court notes that Germany announced its decision to suspend its contribution to UNRWA on 27 January 2024 in respect of operations in Gaza. In this regard, the Court observes, first, that contributions to UNRWA are voluntary in nature. Second, it notes that, according to the information provided to it by Germany, no new payment was due from the latter in the weeks following the announcement of its decision. Finally, the Court notes that Germany stated that it has supported initiatives aimed at funding the agency's work, in particular through the payment of €50 million by the European Union to UNRWA on 1 March 2024, as well as providing financial and material support to other organizations operating in the Gaza Strip.

Based on the factual information and legal arguments presented by the Parties, the Court concludes that, at present, the circumstances are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

As to Germany's request that the case be removed from the List, the Court notes that, as it has held in the past, where there is a manifest lack of jurisdiction, it can remove the case from the List at the provisional measures stage. Conversely, where there is no such manifest lack of jurisdiction, the Court cannot remove the case at that stage. In the present case, there being no manifest lack of jurisdiction, the Court cannot accede to Germany's request.

The Court recalls that, in its Order of 26 January 2024 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, it noted that the military operation conducted by Israel following the attack of 7 October 2023 had resulted in "a large number of 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 addition, the Court remains deeply concerned about the catastrophic living conditions of the Palestinians in the Gaza Strip, in particular in view of the prolonged and widespread deprivation of food and other basic necessities to which they have been subjected, as acknowledged by the Court in its Order of 28 March 2024 rendered in the same case.

The Court further recalls that, pursuant to common Article 1 of the Geneva Conventions, all States parties are under an obligation "to respect and to ensure respect" for the Conventions "in all circumstances". It follows from that provision that every State party to these Conventions, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with. Such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. With regard to the Genocide Convention, the Court has had the opportunity to observe that the obligation to prevent the commission of the crime of genocide, pursuant to Article I, requires States parties that are aware, or that should normally have been aware, of the serious risk that acts of genocide would have been committed, to employ all means reasonably available to them to prevent genocide so far as possible. Further, States parties are bound by the Genocide Convention not to commit any other acts enumerated in Article III.

Moreover, the Court considers it particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the above-mentioned Conventions. All these

obligations are incumbent upon Germany as a State party to the said Conventions in its supply of arms to Israel.

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The full text of the operative clause of the Order reads as follows:

"For these reasons,

THE COURT,

By fifteen votes to one,

Finds 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.

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Judge* ad hoc Al-Khasawneh."

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Vice-President SEBUTINDE appends a separate opinion to the Order of the Court; Judge IWASAWA appends a separate opinion to the Order of the Court; Judges CLEVELAND and TLADI append declarations to the Order of the Court; Judge *ad hoc* AL-KHASAWNEH appends a dissenting opinion to the Order of the Court.

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Separate opinion of Vice-President Sebutinde

Although she has voted with the majority in rejecting Nicaragua's request for provisional measures, Vice-President Sebutinde does not agree with the approach the Court has adopted in handling the request, nor with the scanty reasoning that underpins the Order. She regrets that the Court has not strictly adhered to the criteria it has developed in its provisional measures jurisprudence. In her view, the Court lacks prima facie jurisdiction because a dispute had not crystalized between the Parties as of 1 March 2024, when Nicaragua prematurely filed its Application. She also considers that the Court cannot exercise its jurisdiction in relation to any of Nicaragua's claims against Germany, since deciding on Germany's impugned conduct would, as a prerequisite, require the Court to assess the lawfulness of the conduct of Israel, an indispensable third party that has not consented to the present proceedings. Finally, Vice-President Sebutinde explains that Nicaragua has not shown that Germany's impugned conduct poses a real and imminent risk of irreparable prejudice to the rights of Nicaragua. She therefore considers that the requirement of urgency has not been met. Accordingly, Vice-President Sebutinde considers that Nicaragua's request was rightly rejected.

Separate opinion of Judge Iwasawa

Judge Iwasawa elaborates on the reasons why the circumstances are not such as to require the Court to exercise its power to indicate provisional measures in the present case.

In Judge Iwasawa's view, Germany's framework governing exports of military equipment appears robust, and Nicaragua has not shown that Germany's conduct will give rise to any real and imminent risk of irreparable prejudice before the Court gives its final decision. Therefore, the requirement of urgency is not satisfied. He considers that the Court's decision not to indicate any provisional measures appears to be predicated on the same reasoning, even though the Court does not state so explicitly.

According to Judge Iwasawa, the five requirements which must be satisfied for the Court to indicate provisional measures are cumulative. Since one of the requirements for the indication of provisional measures is not satisfied, the Court is not obliged to examine the others, including the requirement of prima facie jurisdiction and the plausibility of rights.

Nevertheless, Judge Iwasawa briefly discusses the plausibility of rights to clarify what this test entails. He points out that while in some cases the Court has examined the facts and evidence in determining whether the rights asserted by the applicant are plausible, in *Canada and the Netherlands* v. *Syria*, the Court examined evidence of alleged breaches of the plausible rights in the context of the risk of irreparable prejudice and urgency.

Declaration of Judge Cleveland

In her declaration, Judge Cleveland underscores that Article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as well as Article 1 common to the 1949 Geneva Conventions, encompass positive obligations to prevent violations of these treaties by third States and non-State armed groups. In the context of military assistance and arms transfers, these obligations impose a duty on all States parties to be proactive in ascertaining whether there is a risk that the weapons to be transferred might be used to commit breaches of international humanitarian law or the Genocide Convention by third States or non-State armed groups.

Judge Cleveland further explains that the information presently before the Court regarding the scope and nature of Germany's military assistance, as well as its multi-layered review system for

arms transfers, did not establish the existence of a real and imminent risk of irreparable prejudice to the rights invoked by Nicaragua as a result of the conduct of Germany. She contrasts the factual scenario before the Dutch Court of Appeals in its recent decision concerning the transfer for F-35 fighter jet parts to Israel by the Netherlands. Judge Cleveland therefore agrees with the Court's conclusion that Nicaragua has not sufficiently shown that the present circumstances require the indication of provisional measures.

Declaration of Judge Tladi

In his declaration, Judge Tladi explains his views on two issues arising from the present Order. *First*, Judge Tladi explains why the Court's approach of not addressing the specific conditions for indication of provisional measures is warranted in this case. According to Judge Tladi, when determining whether "the circumstances" require the indication of provisional measures, the Court must remain free to weigh all circumstances together in a fluid way and need not always refer to the conditions established by its jurisprudence individually to support its determination. In his view, the Court rightly did not refer to those conditions in arriving at its decision in this case. Judge Tladi clarifies, however, that he sees no inconsistency between the Court's approach in this case and in past cases where it has applied the conditions for exercise of Article 41.

Second, Judge Tladi highlights "the circumstances" on which the Court based its decision to not indicate measures in this case: Germany's submissions concerning its domestic framework for decision-making, its acknowledgement of the seriousness of the situation and its assurance of the exercise of due diligence in making further decisions on the transfer of weapons to Israel. He notes that the Court based its determination on all these submissions, rather than ticking each box — i.e. conditions — mechanically. Judge Tladi explains that Germany remains under a continuing duty to exercise due diligence in the export of arms and supply of military aid to Israel notwithstanding the Court's decision to not indicate measures. Noting the Court's observations in paragraphs 23 and 24 of the Order, he observes that the Order makes plain that the Court expects Germany, and other States supplying weapons to Israel, to exercise due diligence and ensure that weapons transferred to Israel are not used in the commission of acts of genocide or breaches of international humanitarian law.

Dissenting opinion of Judge *ad hoc* Al-Khasawneh

Judge *ad hoc* Al-Khasawneh feels compelled to dissent. In this regard, he first notes the unusual character of the Court's Order, in particular the Court's minimalistic approach and lack of reasoning that stands in stark contrast to the rich and constant jurisprudence of the Court. He notes that it is nevertheless clear that the requirements for the indication of provisional measures are met in the present case, focusing on two considerations that seem to have motivated the Court's decision and to have preoccupied Germany.

The first question is that of urgency, in relation to which Judge *ad hoc* Al-Khasawneh refers, among other things, to the transfer of 3,000 anti-tank weapons for use against an enemy that has no tanks and where its use against civilian dwellings in Gaza has been substantiated by evidence. He refers also to the continued licences for the export of weapons and other military equipment well into 2024, not for training or test purposes, as claimed by Germany in respect of earlier licences. He notes that Germany's decision to support Israel has taken place in the midst of blood-curdling genocidal statements by the Israel leadership.

The second question is that of *Monetary Gold*. In this regard, Judge *ad hoc* Al-Khasawneh recalls the unsuccessful earlier invocation of the principle at the provisional measures stage in light of the purpose of such measures. Additionally, he questions how the principle could logically be applied in respect of the duty to prevent genocide. He indicates also the relevance of a State's consent

to a compromissory clause in rendering the principle inapplicable, the legal policy dictating against widening the scope of the principle, and the lack of precedent for a finding to the contrary.

Finally, Judge *ad hoc* Al-Khasawneh expresses his misgivings about the procedural flaw in the treatment of Nicaragua's request that arises from the lack of a written German response and the structure of the oral proceedings which served to preclude Nicaragua from effectively responding to Germany's submissions.

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