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

PROVISIONAL MEASURES, 9 April 2024

Samuel Wordsworth KC - The absence of *prima facie* jurisdiction / a *prima facie* basis for any exercise of jurisdiction by the Court
(30 minutes)

A. Introduction

1. Mr President, Members of the Court, it is a privilege to appear before you and to have been asked by Germany to set out its position that no order can be made given the absence of *prima facie* jurisdiction and/or a *prima facie* basis for any exercise of jurisdiction.

2. Germany makes two points.

3. First, it is plain from the Application, and was no less plain yesterday, that alleged violations of international law by Israel constitute the essential bedrock of Nicaragua's Application and Request. The Honourable Agent's first speech yesterday was replete with assertions that "Serious breaches of International Humanitarian Law and other peremptory norms of international law including genocide are taking place in Palestine", alongside references to "the genocide committed by Israel".[1] The case on genocide against Germany is entirely dependent upon this, upon a prior finding of breach by Israel. The same applies to Nicaragua's case on international humanitarian law. The Agent summarised this as follows: "The violations of International Humanitarian Law by Israel create obligations for Germany."[2] I'll return to the details in a moment, but the basic point is that Nicaragua seeks determinations on the conduct of Israel, an absent party, which determinations are a prerequisite to any finding of responsibility on the part of Germany. However, Nicaragua

[1] CR 2024/15, pp. 12, 15, at paras. 3, 13 (Argüello Gómez). See also pp. 13, 17, 19-20, at paras. 8, 20-21, 27-30.

[2] CR 2024/15, p. 15, at para. 13 (Argüello Gómez).

must establish that, at least *prima facie*, the Court is able to exercise jurisdiction,[3] and it cannot do so given the manifest absence of an indispensable third party, namely Israel.[4]

4. Second, it was said by the Agent yesterday that "Nicaragua has not had the opportunity to be informed of the position of Germany".[5] Yet, the reason for this is Nicaragua's decision to lodge its Application without allowing Germany an opportunity to engage and to inform Nicaragua of the basic factual inaccuracies that Professor Tams has just spelled out. Instead, just 17 days after Germany received Nicaragua's Note Verbale, the current proceedings were commenced without prior warning, relying for the supposed existence of a dispute on a few words by a governmental representative in a general press conference where Germany was seeking to withhold its position – because it had then seen only a short press statement from Nicaragua, concerning the alleged conduct of four States, one of which was Germany. Nicaragua sought to skate over this issue yesterday,[6] but it cannot show, even *prima facie*, the existence of the dispute required to establish the Court's jurisdiction.

B. Determinations on the conduct of Israel are a prerequisite to the determinations sought against Germany

14. Turning to the details, I start with the central need in this case for determinations by the Court concerning the conduct of Israel, an absent party. Nicaragua showed itself yesterday to be very sensitive about this, with Professor Pellet seeking to neutralize this key point – first by saying that, at the provisional measures phase, the Court is only concerned with the *prima facie* existence of jurisdiction, not the ability to exercise it, and then by suggesting that the *Monetary Gold* line of jurisprudence made no sense.[7] Neither contention is remotely serious.

15. First, at the provisional measures phase, the Court will of course examine both the existence of *prima facie* jurisdiction and the issue of whether, *prima facie*, it is able to exercise jurisdiction.

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[3] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 20 January 2020, paras. 39-42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024, paras. 33-34.

[4] See also *The Statute of the International Court of Justice, A Commentary*, eds. Zimmermann and Tams, pp. 1150-1151, referring to Kaikobad, *Australian YIL* (1996), p. 132 et seq.

[5] CR 2024/15, p. 15, at para. 13 (Argüello Gómez).

[6] CR 2024/15, pp. 12-13, at paras. 7-8 (Argüello Gómez).

[7] CR 2024/15, pp. 37-39, at paras. 7-9 (Pellet).

No authority was cited to suggest the contrary, and indeed any different approach would be wholly counter-intuitive. The longstanding purpose of provisional measures is "to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent".[8] It makes no difference at all whether the reason for there being no ability to adjudicate on relevant rights is due to absence of jurisdiction, or the ability to exercise jurisdiction. Moreover, Nicaragua's contention is flatly inconsistent with the Court's established jurisprudence.[9] In the *Gambia v Myanmar* case, for example, as you can see on your screens, the Court was not content simply to establish its jurisdiction *prima facie*, but then went on to consider a disputed issue of admissibility, in that case, one of standing.

16. Second, the *Monetary Gold* type situation is not wholly exceptional as was suggested yesterday,[10] and the approach of the Court there or in *East Timor*,[11] for example, does no more than reflect the basic rule on the essential need for consent. This is to be found in many other contexts including, for example, maritime delimitation, where the Court has held, as one would expect, that it "will not rule on an issue when in order to do so the rights of a third party that is not before it have first to be determined".[12]

17. It is obviously wrong to say that there is no need for such an approach given Article 59 of the Statute and the possibility of intervention, and the current Request offers an apt example in this respect. Suppose the Court were to make an order in the terms sought by Nicaragua, on the basis of the allegedly plausible rights under the Genocide and Geneva Conventions, which presuppose that Israel is in breach of these treaties or at least that there is a serious risk of such breach. Such a finding would be treated as a generally applicable and objective assessment of breach or risk of breach of international law by Israel. Yet Israel would have no standing to challenge the order. If Israel wished to see the order amended or lifted, it would have to intervene as a party under Article 62 of the Statute, but it could only do so

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[8] *Anglo-Iranian Oil Co. Case*, Order of 5 July 1951, I.C.J. Reports 1951, p. 89, at p. 93.

[9] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 20 January 2020, paras. 39-42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024, paras. 33-34.

[10] CR 2024/15, pp. 38-39, at paras. 9 (Pellet).

[11] *East Timor (Portugal v. Australia),* Judgment, I.C.J. Reports 1995, p. 90.

[12] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, para. 312.

with the consent of both parties given the absence of a jurisdictional link so far as concerns the claims of breach of IHL.

18. Thus not only does the claim put forward by Nicaragua seek determinations on the lawfulness of Israel's conduct that will directly impact Israel, it leaves Israel without any avenue to challenge those determinations save for submission to the Court's jurisdiction,[13] with a critical key to even being able to challenge any Order held by Nicaragua, given the need for its consent to intervention. That would be radically to undermine the most fundamental principles concerning consent to jurisdiction.

19. I turn to the further points made by Professor Pellet.

20. The first was simply to repeat the contention that the issue of the exercise of jurisdiction does not arise at the provisional measures phase as there will be no determination on the merits.[14] I say no more on that, other than to recall that issues going to jurisdiction are assessed *prima facie* by reference to whether the Court will be able to make a judgment specifically on the merits, not by looking at the provisional measures phase in isolation.[15]

21. As a second point, it was argued that the current case is one where the legal interests of a third State might be affected, but no more, and hence the principle in *Monetary Gold* is not engaged. It was said that no demand was made impacting the rights of a third State, and that the reference point had to be Nicaragua's Application, from which it is clear that: "the issue is not whether *Israel* has breached its international obligations but indeed whether Germany has breached its own".[16]

22. While the fundamental rules on consent could not in any event be bypassed by attempts at artful pleading, it is useful to focus on Nicaragua's Application. This shows that the essential keystone in the construct of the current claim is the unlawful nature in which Israel is said to be pursuing its current military operations in Gaza. This is plain, for example, from paragraphs 8-9 of the Application, where it is asserted that "actions by the Israeli

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[13] Cf. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment, I.C.J. Reports 1992, p. 240 at p. 261, para. 54.

[14] CR 2024/15, pp. 39-40, at para. 10, second indent (Pellet).

[15] See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures,* Order of 10 May 1984, I.C.J. Reports 1984, p. 169 at p. 179, para. 24.

[16] CR 2024/15, p. 40, at para. 11 (Pellet) (with informal translation).

Government constituted serious breaches of universally accepted peremptory norms of international law" and that "serious violations of international humanitarian law were evident from the start".

23. The responsibility of Germany is alleged, but in complete reliance on asserted wrongful acts of Israel. This can be seen, for example, from paragraph 38 of the Application (emphasis added):

> 38. The German Government has engaged in political, military and financial support to Israel despite its awareness that the military operation launched in the OPT, particularly Gaza, was being conducted in complete disregard of international humanitarian law, human rights law and the Genocide Convention, among other sources of international law. [Then, a few lines down.] Germany has not acted to bring to an end the wrongful acts of Israel perpetrated against the Palestinians, and has instead supported Israel by providing it with all type of aid, including military aid that would be used to commit grave crimes under international law, … ."

24. Turning then to the specific declarations sought from the Court, at paragraph 67 of the Application, Nicaragua first alleges that Germany has breached Article 1 of the Genocide Convention through a failure to prevent genocide.

a. But, in order to determine that there has been such a breach, the Court must first determine that Israel has committed genocide.

b. This can be seen, for example, from the *Bosnian Genocide* case, and please note that this is a paragraph that Nicaragua put up on the screen yesterday, but omitting the passages underlined on the screen, despite their obvious importance. In particular:

> "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed."[17]

c. The passage read out by Nicaragua is in italics. The Court there emphasizes that it is not saying that there is no obligation of prevention until the perpetration of genocide commences. But the Court is clear on the need for a prior finding on genocide before any breach of the obligation to prevent can be determined. And this is reiterated in the second underlined passage: "if neither genocide nor any of the

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, p. 221, para. 431.

other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent."

d. The same basic point follows from the *Croatia v Serbia* case. The Court found that no genocide had taken place, and hence there could not be "any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide".[18]

25. Turning back to the Application, Nicaragua then alleges that Germany has aided and assisted Israel in the commission of genocide and breaches of obligations under IHL, at paragraphs 67(3) and (4), and these allegations again cannot be determined without a prior determination that the conduct of Israel is unlawful.

a. Article 16 of the ILC Articles on State responsibility, which the Court has considered to be reflective of customary international law, is concerned with aid or assistance "in the commission of an internationally wrongful act".[19]

b. There must be "an internationally wrongful act". The Commentary further clarifies that this must be a "completed act",[20] and that of course is only confirmed by the subsequent conclusion of the Court on complicity in the *Croatia v Serbia* case. Moreover, the ILC Commentary expressly notes:

> "The International Court has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, it would have to rule, as a prerequisite, on the lawfulness of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle. That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed [*note the use of the past tense*] an internationally wrongful act."

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[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment, I.C.J. Reports 2015, p. 3, para. 441.

[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, p. 217, para. 420.

[20] Commentary to Art. 16, para. 3.

c. Although the Commentary suggests that the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case,[21] and indeed there may in a given case be the requisite prior finding or indeed consent from the third State, in the current case, *Monetary Gold* does indeed apply, and I will return to the case and its application shortly.

26. As to the declarations sought at paragraphs 67(3) and (4) of the Application for breach of Common Article 1 and related customary international law due to a "failure to ensure" compliance, a breach of the obligation to "ensure respect … in all circumstances" is necessarily predicated on there having been a lack of the required "respect" by the other State.

a. The reasoning of the Court in the *Bosnian Genocide* case applies equally in the current context. There, the Court explained how the State's obligation to prevent, and the corresponding duty to act, arises when the State learns of the existence of a serious risk of genocide, which is the same as how Nicaragua portrays the operation of Common Article 1. But, as the Court also explained a genocide "must occur for there to be a violation of the obligation to prevent".[22]

b. Precisely the same applies here, and it makes no difference at all if Common Article 1 is envisioned as a rule of due diligence, as that is just how the obligation to prevent under the Genocide Convention is interpreted. The basic question remains: how can it be said that there was a failure to "ensure respect" of a third State if the failure on the part of that third State to "respect" is not established in the first place? I would add that this is how the Court envisaged the nature of this obligation in its 1986 judgment in *Nicaragua v. USA*,[23] and that this is also the intuitive result. It is entirely usual for one State to support another in the context of an armed conflict, and this is not an activity that the international community rigidly seeks to deter. It is only if

[21] Commentary to Art. 16, para. 11.

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, p. 221, para. 431.

[23] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits,* Judgment. I.C.J. Reports 1986, p. 14, at p. 114, para. 220 referring to "violations". See also ICRC Rules of Customary IHL, Article 144.

the conduct of the conflict turns out to be in breach of IHL that the acts of the State offering support would be expected to be ruled upon.

27. The same basic points apply to paragraph 67(5) of the Application which is predicated on Israel denying Palestine's right to self-determination and maintaining and imposing an apartheid regime.

28. As to the Court's jurisprudence, the current case is substantially the same as *Monetary Gold*. There the Court explained: "The Court is not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom. It is requested to determine first certain legal questions upon the solution of which depends the delivery of the gold."[24]

29. Just so here. The Court is not merely called upon to pronounce on the State responsibility of Germany. It is required first to make determinations as to the State responsibility of Israel. And Nicaragua cannot avoid this by saying that the Court can find breach by Germany on the basis of a serious risk of breach by Israel. On the correct analysis, such determinations would not be sufficient to establish breach by Germany as follows from the analogy to the *Bosnian Genocide* case; but anyway, as a matter of principle it makes no difference whether the required determination is of actual breach or risk of breach. There is still an essential prior determination of the conduct of an absent third State on which the responsibility of the respondent State wholly depends.

30. The consequent reasoning of the Court in *Monetary Gold* concerning the absence of jurisdiction regarding the underlying issue of breach by Albania thus applies in the current context:

> "In the determination of these questions – questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy – only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania. The Court cannot decide such a dispute without the consent of Albania."[25]

31. And this is not a case like *Nauru*, where the determinations with respect to Australia's conduct merely might have had "implications" for the legal situation of the UK and New

[24] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, p. 19 at p. 31.

[25] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, p. 19 at p. 32.

Zealand, and the Court was in a position to hold that "no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia."[26]

32. By contrast, the current case is precisely analogous to *East Timor*, where Portugal's claim as to the unlawfulness of Australia's conduct in entering into the 1989 Treaty with Indonesia could "not be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, …".[27]

C. The absence of a dispute

33. I turn to the existence of a dispute, which is a basic prerequisite to consent to jurisdiction under both Article IX of the Genocide Convention and Article 36(2) of the Court's Statute.

34. The dispute that is relied on must exist, objectively, at the time the Court is seised.[28] Equally well-established is the need for a "claim of one party that is positively opposed by another", and that the two sides must "hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations".[29]

35. As to the basic facts in this case, Nicaragua relies on its Press Release of 1 February 2024 and a Note Verbale attaching a letter of 2 February,[30] as well as the excerpts from the German governmental press conference of 7 February.[31] So, Nicaragua says claim plus opposition, hence a dispute. But:

    a. As the Court has explained, the question is whether there is a dispute or not is one of substance, not of form. This is not a box ticking exercise, as can be seen from the

[26] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment, I.C.J. Reports 1992, p. 240 at p. 261, para. 55. Cf. also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece),* Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644 at p. 660, para. 43.

[27] *East Timor (Portugal v. Australia),* Judgment, I. C.J. Reports 1995, p. 90 at p. 102, para. 28.

[28] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 84-85, para. 30.

[29] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order of 26 January 2024, at para. 19.

[30] Application, Annexes 1 and 3.

[31] Application, Annex 4.

Court's very detailed consideration in past cases as to whether there was indeed the required dispute with respect to the asserted source of jurisdiction.[32]

b. In considering substance, the context is of critical importance. The parties are at two points of remove from the classic bilateral dispute situation: Nicaragua appears in this case only on the basis of alleged *erga omnes* obligations owed by Germany, which is not of course a participant in the ongoing conflict in Gaza. And this is not a case where the parties had already locked horns before the United Nations or in some other fora.[33]

36. In the current situation, for there to be a dispute as a matter of substance, there would have to have been some form of meaningful engagement with a claim, pursuant to which Germany communicated its position either to Nicaragua or in such a way that it could objectively be understood as crystallising a dispute.

37. It was said yesterday that: "The legal dispute was described in Nicaragua's letter of 2 February 2024."[34] But this Note Verbale was sent to the public information email address of Germany's Permanent Mission to the UN in New York, not any address that is used for official diplomatic communications. It was not picked up until 13 February, and it should be noted that equivalent Notes Verbales were also sent to public email addresses for Canada, The Netherlands and the United Kingdom, and we understand that these were likewise only picked up on 13 February, following a further email sent by Nicaragua to The Netherlands. This is most unusual, and indeed, in the past, Nicaragua has always sent Notes Verbales to the appropriate email-addresses of the ambassador and assistants at the German Embassy in Managua, often copying in other missions on the appropriate addresses.

38. It follows that, when at a press conference of 7 February, a representative of the German FFO was asked questions about having received a Note Verbale and how Germany intended to respond – as one aspect of a wide-ranging press conference – Germany was simply not in a position to say anything material. The excerpt of the press release is at Judges Folder,

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[32] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 85-120, paras. 31-113.

[33] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 477, pp. 502-507, paras. 65-75.

[34] CR 2024/15, p. 50, at para. 7 (Argüello Gómez).

tab xx, and in due course I ask you to read this carefully. You will see that the journalist asking the questions correctly understood Germany as not having received any Note Verbale, and you will also see that Germany did not consider itself ready to make any public statement of its position. This was not, and could not have been, a response crystallising a dispute on the basis of a claim in a Note Verbale that had not been seen.

39. Once it had in fact received the Note Verbale, Germany was actively considering its response and seeking coordination with the three States that had received similar emails when, without warning, Nicaragua commenced the current proceedings on 1 March.

40. There was no opportunity to engage and, it is to be emphasized that this is not a case like *Gambia v. Myanmar*, where the Court could infer the existence of a dispute following a failure to respond one month following the delivery of a note verbale, but in circumstances where there had already been a number of prior communications both outside and within the UN General Assembly that showed the mutual opposition of views.[35] Nicaragua sought to suggest, but was not able to point to, anything remotely equivalent, and notably seeks to invoke the German Note Verbale sent to the Court after it was seised, which is an irrelevance.[36]

41. Of course, the Court is only concerned with a *prima facie* showing. But the fact that this case is at the provisional measures phase cuts both ways. It is not just that extraordinary relief is sought given that jurisdiction and the ability to exercise it has not yet been established. Also, relief is sought on the basis that Germany, a peaceful democratic nation, a long time avowed supporter of international law and the international legal order, is breaching the Genocide Convention and conventional and customary IHL. The determinations sought could scarcely be more serious, and the relief sought also has, and is plainly intended to have, direct and indirect impacts on third States not before the Court.

42. It is precisely in circumstances such as this that jurisdiction *prima facie* demands a real showing of positive opposition and clearly opposed views, not a precipitate rush to Court on the basis that a box might be considered at best half-ticked.

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[35] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 477, pp. 502-507, paras. 65-75.

[36] CR 2024/15, pp. 50-51, at para. 8 (Argüello Gómez).

43. Mr President, Members of the Court, I thank you for your attention and ask you to call Professor Peters to the floor.