Conspicuously Absent

The Indispensable Third Party Principle at the ICJ in Nicaragua v Germany

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On 1 March, Nicaragua instituted proceedings against Germany at the International Court of Justice (ICJ). With the war in Gaza still raging, Nicaragua's application added a new chapter to the legal battles that accompany the conflict. Nicaragua alleges that Germany violates the Genocide Convention and international humanitarian law (IHL) by assisting Israel and also by failing to prevent violations of these bodies of law. Nicaragua requests the Court to indicate provisional measures, which would oblige Germany *inter alia* to stop assisting Israel in so far as this assistance may be used in violating international law, to ensure that weapons already delivered are not used for such acts, and resume its support for UNRWA (para. 101). Yet, can the Court actually hear Nicaragua's claims even though Israel is not a party to the proceedings? We argue that the Court may be barred from exercising its jurisdiction over some of Nicaragua's claims – notably those relating to the Genocide Convention. The Court may, however, be able to hear certain other claims – notably (at least some of) those regarding Germany's duties under IHL.

Why Nicaragua and Germany?

To the casual observer, it may seem surprising that Nicaragua and Germany are now litigating the war in Gaza. The application aligns with a recent trend of 'public interest' cases brought by States that are not directly affected by the alleged violations of international law invoking *erga omnes* obligations, most notably *Gambia v Myanmar* and *South Africa v Israel*. Nicaragua extends the ambit of this *erga omnes* litigation by holding Germany responsible for supporting Israel (see, eg, here), the alleged primary wrongdoer.

Besides their opposing positions towards Israel (for further context, see Talmon and Hettihewa), there are also reasons pertaining to the jurisdiction of the Court for bringing a case against Germany and not against other allies of Israel. In its application, Nicaragua bases the Court's jurisdiction on two grounds.

First, Nicaragua relies on the compromissory clause in Article IX Genocide Convention, which provides for the Court's jurisdiction over disputes regarding the interpretation, application or fulfilment of the Convention. Both Nicaragua and Germany are parties to the Convention, and neither of them has made a reservation to Article IX–unlike the US (see here).

Secondly, Nicaragua relies on Article 36(2) ICJ Statute. Under this optional clause, both Nicaragua and Germany have declared that they recognise the Court's jurisdiction in disputes on international law as compulsory in relation to any other State accepting the same obligation. Leaving aside here whether Germany may rely on the reservation to its declaration for disputes 'connected with the deployment of armed forces abroad', these declarations enable Nicaragua to extend its case beyond genocide to IHL. Such a case could neither have been brought against Israel nor the US, since both states withdrew their optional clause declaration in 1985. However, Germany is not the only ally of Israel which has such a declaration, for so do the other States that Nicaragua notified of its intention to hold them responsible for violating international law by assisting Israel militarily (see here), ie Canada, the United Kingdom, and the Netherlands. Accordingly, while jurisdictional reasons are crucial to understand Nicaragua's choice of the respondent, they cannot fully explain that choice. Nevertheless, the fact that Nicaragua could also have sued other supporters of Israel in no way damages the case against Germany.

Indispensable third parties: the Monetary Gold rule

By contrast, the fact that Nicaragua has not sued Israel and that Israel is, therefore, not a party to this case may be more of an obstacle. This is because Israel could be an 'indispensable third party', which could bar the Court from exercising its jurisdiction over some or all of Nicaragua's claims.

In the *Monetary Gold case*, the ICJ ruled that it cannot address claims involving as their 'very subject matter' the rights of a State that is not party to the dispute before the Court. This principle flows from the nature of the Court's jurisdiction, that is, its power to hear a case. That power is based on the consent of States, which in turn, reflects the structure of international law itself. The principles of sovereign equality and independence command that States cannot, without their consent, be subjected to the authority of other States and, by implication, international courts created by States (see Akande, 141). These principles also entail that the legal position of States that are not parties to a particular case – and have thus not consented to it – must not be adjudicated. While the *Monetary Gold* rule has been criticised in scholarship, the ICJ has held on to it, though the Court has applied the principle with varying degrees of strictness.

For the case brought by Nicaragua against Germany, this would mean that the Court could not exercise its jurisdiction over Nicaragua's claims to the extent that Israel's legal position constitutes their very subject matter.

The indispensable third party principle and provisional measures

Before analysing whether Israel is, indeed, an indispensable third party, it is worth considering whether the Court will (have to) address the issue already at the provisional measures stage. While the Court applied the *Monetary Gold* rule in several judgments, it has not appeared in orders for provisional measures, as far as we are aware. Thus, the Court might reserve the issue for a potential judgment on Germany's probable preliminary objection on this point. As we will now see, however, the Court could deal with the issue at this stage.

For the Court to address *Monetary Gold* during provisional measures, it would have to fall into the requirements for indicating provisional measures: The Court has *prima facie* jurisdiction (1), the rights whose protection is sought are plausible and sufficiently linked to the provisional measures requested (2), and there is 'a real and imminent risk' of irreparable harm to these rights (3) (see, eg, *Ukraine v Russia* paras 24, 50, 65 et seq).

As procedural matters appear to be covered by the first condition exclusively, it all seems to boil down to the controversial question of whether *Monetary Gold* concerns the Court's jurisdiction or the admissibility of the case. Conspicuously, the Court held before that it 'cannot exercise …[its] jurisdiction' if the rule applies (*Monetary Gold* 33, see *East Timor* para. 35), implying that the rule does not affect jurisdiction but only its exercise. In *Croatia v Serbia*, the Court addressed Serbia's invocation of the rule among jurisdictional objections and before admissibility, suggesting that *Monetary Gold* concerns jurisdiction (para. 116).

There may, however, be room for the Court to address the *Monetary Gold* rule at the provisional measures stage without classifying it. The Court has repeatedly addressed the issue of (*prima facie*) standing in provisional measures orders under a separate heading, in addition to the usual requirements for provisional measures (*The Gambia v Myanmar* paras 39-42; *South Africa v Israel* paras. 33-34) although standing would seem to concern admissibility. The Court could simply treat *Monetary Gold* the same way. Addressing *Monetary Gold* at the provisional measures stage would also make sense as the principle protects a fundamental rule of international law, state consent. It would be odd if the Court were barred from enforcing such a rule in incidental proceedings.

Is Israel an indispensable third party in this case?

This brings us to the question of whether Israel is, indeed, an indispensable third party to Nicaragua's case under the *Monetary Gold* rule. In *East Timor*, the Court has specified the rather opaque 'very subject

matter' formula: a third State is an indispensable third party if the Court must necessarily determine the legal position of that State in deciding a claim (para. 22).

As d'Argent noted, the *Monetary Gold* rule can only be assessed regarding specific *claims*. Accordingly, the Court may find that it can exercise its jurisdiction over some of Nicaragua's claims but not others. To assess whether Israel is an indispensable third party, Nicaragua's different claims can usefully be distinguished in two ways: on the one hand, we may distinguish claims relating to violations of the Genocide Convention of the obligation to ensure respect for IHL under Common Article 1 GC I-IV and customary international law. On the other hand, within each of these sets of claims, we may distinguish obligations not to assist violations of the Genocide Convention and IHL allegedly committed by Israel (*negative* obligations) from obligations to prevent genocide or to ensure respect for IHL (*positive* obligations).

Distinguishing Germany's obligations under the Genocide Convention from those under IHL may at first sight appear to be relevant because the legality of Israel's conduct in light of the Genocide Convention is the subject of a dispute pending before the ICJ between South Africa and Israel, unlike Israel's conduct under IHL. Conspicuously, Nicaragua has requested to intervene in that case under Article 62 ICJ Statute on 23 January 2024 (see here). The intervention does not alter the fact that Israel is no party to the case against Germany. Therefore, the intervention can hardly overcome the indispensable third party issue in Nicaragua's own case. If the alleged violations of the Genocide Convention by Israel had already been adjudicated, the ICJ could treat these violations as 'givens' (as implied in *East Timor*, para. 32) in deciding on Nicaragua's claims against Germany. So far, however, the Court has not made such a finding in *South Africa v Israel*; the Court merely found 'some' allegations to be 'plausible' (see here, para. 54). Without further specification, there is no finding that could be treated as 'given' for Nicaragua's case. In any case, the mere fact that parallel proceedings against Israel are pending would not overcome the lack of Israel's consent to Nicaragua's case.

While the relevance of the distinction between Germany's obligations under the Genocide Convention and IHL does not so much follow from the pending case between South Africa and Israel, the different ways both bodies of law construe their respective negative and positive duties is relevant for the purposes of applying the indispensable third party principle. A finding by the Court that Germany violated its negative duties not to assist Israel in committing genocide by supplying arms (ie that Germany is complicit in genocide under Article III(e) Genocide Convention) necessarily presupposes that Israel actually commits genocide (see also Talmon's assessment). The rule is derivative in nature – it cannot be found to be violated by the assisting State in the absence of a finding that the assisted State committed genocide. The duty to prevent genocide (Article I Genocide Convention) kicks in as soon as a State learns of, or should have learned of, a 'serious risk' of genocide, even before genocide actually commences (*Genocide Convention case*, para. 431). However, the ICJ held that a State incurs responsibility only if genocide actually occurs (ibid). Thus, while determining that Germany must take positive action would not entail concluding that Israel violated international law, holding Germany responsible for failing to prevent a violation would.

The matter may be different regarding some of Germany's obligations under IHL. Germany's obligation to take positive steps to ensure respect for IHL by Israel is triggered already by a 'foreseeable risk' of IHL violations (see here, para. 164). Finding that positive steps must be taken to ensure IHL compliance (eg exercising political pressure to ensure that already delivered weapons are not used in military operations causing disproportionate harm) does not require finding that Israel actually violated IHL. Finding a 'foreseeable risk' of IHL violations could only determine Israel's legal position to the extent that Israel would then violate its own obligation under Common Article 1 to prevent IHL violations. However, the exact scope of the positive duty under Common Article 1 depends on a State's available means to prevent IHL violations in a given situation. What is expected of Germany will, therefore, vary from what is expected from Israel. The

Court's finding on Germany's compliance with its positive duty does, therefore, not necessarily determine Israel's legal position, which would still require a separate assessment. Whether the same applies to Germany's negative obligation not to assist IHL violations under Common Article 1 (eg by supplying arms) depends on how one construes that duty. The duty could be understood as a specific complicity rule (like Article III(e) Genocide Convention), structured similarly to the general complicity rule reflected in Art. 16 ARSIWA. It would follow that it is derivative in nature and is violated only if the assisted State is found to have violated international law. By contrast, Longobardo argued that the negative duty only requires a finding of a serious risk of IHL violations by the assisted State, a finding that the Court could make without determining Israel's legal position (here) – in line with our analysis of the positive Common Article 1 duty.

Conclusion

In sum, it seems that the case is stronger for the Court to exercise its jurisdiction regarding Nicaragua's IHL claims. If it is true that Nicaragua's case regarding *Monetary Gold* is strongest insofar as it invokes positive obligations under Common Article 1, this would add to the relevance of these obligations in multilateral disputes. At the same time, it should be recalled that these positive obligations present a somewhat insecure footing for the case on the merits. This is not only due to the flexibility that positive due diligence obligations afford to those who bear them. It should be kept in mind that it is far more controversial whether States have a duty to take positive steps to ensure respect for IHL by another State than whether they must refrain from assisting violations of IHL.

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