Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)

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A. Overview

1 This was perhaps the most complex and intractable instance of serial litigation so far brought before the → *International Court of Justice (ICJ)*. It arose from the activities of the contras, opponents of the Nicaraguan (Sandinista) government, who in 1981 commenced a guerrilla insurgency movement, operating from bases in neighbouring States and funded and assisted, covertly and overtly, by the United States of America ('US'). One aspect of this assistance was the mining by CIA personnel of several Nicaraguan harbours. Nicaragua claimed that the US support for the contras was an unlawful use of force against it, as well as unlawful intervention in its internal affairs (→ *Intervention, Prohibition of*; → *Use of Force, Prohibition of*). El Salvador, Honduras and Costa Rica in turn claimed that Nicaraguan forces had engaged in military activities and assisted rebels on their territory (→ *Military Assistance*), and the US claimed that it was acting throughout in the collective self-defence of those States at their request (→ *Self-Defence, Collective*).

2 The phases of the litigation were as follows. The Nicaraguan application, relying principally on the US acceptance of the court's jurisdiction under the optional clause (→ *International Court of Justice, Optional Clause*), was lodged on 9 April 1984. On 6 April 1984 the US had purported to vary its optional clause → *declaration* by excluding cases involving disputes with any Central American State or related to events in Central America (the 'Shultz letter'; see also → *Treaties, Multilateral, Reservations to*). The US argued that for this and other reasons the court had no jurisdiction, that the claim was inadmissible, that the court should not exercise its jurisdiction having regard to the continuing regional → *negotiation* process (the so-called 'Contadora process') aimed at settling the dispute, and that as to the merits of the dispute it was acting in collective self-defence of the three neighbouring States (see also → *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*). The US lost, wholly or in substance, on each of these grounds, by majorities which varied but were always substantial. Factual issues were made even more difficult to resolve by the non-appearance of the US to contest the merits after having lost in the jurisdiction and admissibility phase (→ *International Courts and Tribunals, Non-Appearance*). Incidental aspects of the litigation included the court's indication of → *interim (provisional) measures of protection* (15–0, except on one point where the court divided 14–1), with which the US refused to comply; and the refusal of El Salvador's application to intervene (14–1, on procedural grounds), which included (9–6) a refusal to conduct an oral hearing on El Salvador's application. In 1985 the US withdrew its acceptance of jurisdiction under the optional clause, largely as a result of disagreement with the court's handling of the case.

3 In 1986 Nicaragua commenced related proceedings against Honduras and Costa Rica. The case against Costa Rica was subsequently discontinued by agreement. In 1988 the court held, unanimously, that the case against Honduras was within its jurisdiction under the American Treaty on Pacific Settlement ('Pact of Bogotá'), and admissible (→ *Bogotá Pact [1948]*).

4 The underlying dispute was partly resolved by the election defeat of the Nicaraguan Sandinista government in 1990, and the accession to power of the Chamorro government, which was committed to better relations with the US. The contras were, eventually, disarmed (→ *Disarmament*). The compensation phase of the claim against the US was suspended and subsequently discontinued by an order of the court of 26 September 1991.

B. El Salvador's Intervention

5 The application by El Salvador was the first attempt to intervene under Art. 63 Statute of the ICJ ('ICJ Statute') at the jurisdictional phase of a case. The court's refusal of El Salvador's application was based on its failure to comply with Art. 82 ICJ Rules of Court : it had not specified what points of 'construction' were at issue (Art. 82 (2) (b) ICJ Rules of Court). The court reserved decision on El Salvador's right to apply to intervene under Art. 62 ICJ Statute at the merits phase (→ *International Courts and Tribunals, Intervention in Proceedings*). Such an application would probably have been successful, but given the position of the US by that stage the application was never made. More questionable was the court's refusal of a hearing to El Salvador (see the joint dissent *Military and Paramilitary Activities in and against* Nicaragua Case [*Nicaragua v United States*] *[Declaration of Intervention of the Republic of El Salvador] [Order]* , and Judge Lachs' subsequent admission of error 'Nicaragua Case [Merits] Separate Opinion of Judge Lachs]' 170–71). But although the court in later cases has seemed to regard intervention under Art. 62 ICJ Statute more favourably, there is no reason to think that the refusal of intervention was substantively incorrect. Not merely is jurisdiction intrinsically bilateral, but El Salvador's declaration was so vague it would have failed to get over even a less stringent threshold.

C. Jurisdiction and Admissibility

6 Nicaragua based the court's jurisdiction both on the optional clause and on a Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua ('Treaty of Friendship' 367 UNTS 3; → *Treaties of Friendship, Commerce and Navigation*). The US objected to the jurisdiction and to the admissibility of the claim on a number of grounds. These did not include reliance on the → *Connally Reservation* ('matters … within the domestic jurisdiction of the United States as determined by the United States' [Declaration of the United States of America of 14 August 1946]): the case was argued and decided on the basis that the US declaration was valid and effective notwithstanding the Connally Reservation. In the event, the court held by 11 votes to 5 that it had jurisdiction under the optional clause and by 14 votes to 2 that it had jurisdiction under the Treaty of Friendship. Only one judge, Judge Schwebel, thought the court had no jurisdiction at all. The court held unanimously that the Nicaraguan claim was admissible.

1. Jurisdictional Issues

(a) Nicaragua's Failure to Ratify the Statute of the Permanent Court of International Justice: Interpretation of Art. 36 (5) ICJ Statute

7 Although it had lodged an unconditional acceptance of the jurisdiction of the → *Permanent Court of International Justice (PCIJ)* at the time of signing the statute of that court in 1929 and despite completion of the domestic constitutional requirements for ratification, Nicaragua never deposited an instrument of ratification of the Statute of the PCIJ ('PCIJ Statute'). The question was whether its subsequent ratification of the Art. 36 (5) 1945 ICJ Statute by virtue of 1945 ICJ Statute, by virtue of Art. 36 (5), brought the 1929 optional clause declaration into effect so far as the new court was concerned.

8 The court held that the words 'Declarations … which are still in force' ('*déclarations faites … pour une durée qui n'est pas encore expirée*') in Art. 36 (5) included declarations which would have been effective in accordance with their terms in 1945 if the State in question had then been a party to the PCIJ Statute. The 1929 declaration had a 'potential effect' (*Nicaragua Case [Jurisdiction of the Court and Admissibility of the Application]* para. 27) which Art. 36 (5) made actual—a conclusion reinforced by the practice of the court in listing Nicaragua as a party to the optional clause in its yearbook and in other official documents. Indeed the court went so far as to hold that the:

> constant acquiescence of Nicaragua in affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitute[d] a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court. (ibid para. 109.)

9 This was the issue on which the majority was most vulnerable, with powerful dissents on different aspects from Judges Mosler, Oda, Schwebel and, especially, Ago and Jennings. And surely they were right. Ratification is an international, not a municipal act. It is difficult to see how a potential acceptance of the jurisdiction of one court could be transformed into something actual by the ratification of a different instrument, the → *United Nations Charter* ('UN Charter'), not itself entailing any acceptance of jurisdiction in relation to another court. A declaration never *made* vis-à-vis the PCIJ was no more *made* by Nicaragua's becoming an Original Member of the → *United Nations (UN)*.

(b) Effect of the Shultz Letter: Modification of an Optional Clause Declaration Other than in Accordance With Its Terms

10 An issue of more general importance was whether the Shultz letter produced an immediately effective variation of the US optional clause declaration, notwithstanding that the declaration provided for variation only on six months' notice. The US argued in the alternative that the principle of → *reciprocity* entitled it to rely on Nicaragua's right of immediate unilateral modification, the Nicaraguan declaration not being expressed to be terminable only after a specified period of notice (→ *Unilateral Acts of States in International Law*). The court held that unilateral undertakings under the optional clause system were not inherently revocable without notice, and that in accordance with the governing principle of → *good faith (bona fide)* the US was bound by the six-month notice provision in its own declaration.

11 On the reciprocity point, the court drew a distinction between the terms of an optional clause declaration, as to which reciprocity applied, and the basis for its continuing legal operation, as to which reciprocity was irrelevant. Thus Nicaragua was entitled to insist that the US comply with its own six-month notice requirement. However the court went on to say that even if the principle of reciprocity had applied to the issue of variation or termination the result would not have been different (see also → *Treaties, Termination*). This was because optional clause declarations which did not expressly reserve the right of immediate termination could only be terminated on reasonable notice, and the period in question (three days) was not reasonable notice (→ *Reasonableness in International Law*). There were dissents on this general issue from Judges Oda, Jennings and, in some respects, Schwebel.

12 In dealing with the Shultz letter the court applied the → *Analogy in International Law* of treaty law to optional clause declarations. It did not need to decide a separate issue raised by Nicaragua, ie, whether the Shultz letter was invalid because it purported to vary a declaration made with the advice and consent of the US Senate. On the analogy of Art. 46 → *Vienna Convention on the Law of Treaties (1969)*, Nicaragua had argued that the US constitutional rule requiring Senate consent to treaties was an 'internal rule of law of fundamental importance' (*Nicaragua Case [Jurisdiction of the Court and Admissibility of the Application]* para. 66), and that the failure to comply with that rule was 'manifest' (ibid). The court avoided the issue but it is hard to see how, given the various exceptions to the US constitutional rule and the doubt whether it applies at all to unilateral declarations, any violation could have been 'manifest' (ibid).

(c) Effect of the Vandenberg Amendment: Disputes under a Multilateral Treaty where Not All Parties to the Treaty Are Parties to the Case

13 Another reservation attached to the US optional clause declaration was the so-called Vandenberg amendment, reserving 'disputes arising under a multilateral treaty, unless … all parties to the treaty affected by the decision are also parties to the case before the Court' (ibid para. 67). At the preliminary stage the court merely commented that it could not determine which parties to the relevant treaties (in particular the UN Charter and the → *Organization of American States [OAS]* Charter) would be 'affected by the decision' (ibid) until it considered the merits of the case. Thus under Art. 79 (7) of the ICJ Rules of Court of 1978 it declared that the objection did not possess an exclusively preliminary character, and in effect joined it to the merits.

14 The court returned to the issue in 1986. It held that El Salvador, at least, was 'affected' (*Nicaragua Case [Merits]* para. 51) by its decision, and accordingly (by 11–4) that the dispute to the extent that it arose under the UN and OAS Charters was outside its jurisdiction. But the effect of the Vandenberg amendment was:

> confined to barring the applicability of the United Nations Charter and the Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply. (ibid para. 56.)

15 There are many difficulties with this approach, as Judge Jennings pointed out in a persuasive dissent (*Nicaragua Case [Merits] [Dissenting Opinion of Judge Jennings]* 529–38; see also *Nicaragua Case [Merits] [Dissenting Opinion of Judge Oda]* 216–19; *Nicaragua Case [Merits] [Dissenting Opinion of Judge Schwebel]* 302–6). The court focused on the words 'affected by the decision' (*Nicaragua Case [Jurisdiction of the Court and Admissibility of the Application]* para. 72) in the declaration, but the words 'disputes arising under a multilateral treaty' (ibid para. 69) were just as important. The court

tacitly interpreted those words as if they read disputes to the extent that the disputes relate to or involve a multilateral treaty as such. But this ignores the distinction between a dispute and a cause of action. The essential dispute between the parties concerned US support for and involvement in the activities of the contras. The Vandenberg amendment, despite its obscurity, was intended to limit the court's jurisdiction over certain classes of dispute, not its capacity to apply certain sources of law (→ *Treaties, Amendment and Revision*; → *Sources of International Law*). Parties do not cease to have disputes under a treaty because the ICJ has no jurisdiction over the treaty. Provided that a substantive ground of Nicaragua's complaint against the US was that its conduct violated multilateral treaties in force between the parties, the dispute surely arose under those treaties. The fact that the dispute had also been formulated in terms of → *customary international law* was beside the point: there was a single dispute, whether or not there were several grounds of complaint, and that dispute did not cease to meet the description of a dispute arising under a multilateral treaty because it might also be described as a dispute arising under general international law (→ *General International Law [Principles, Rules and Standards]*). Distinct aspects of the dispute which related to customary international law obligations—eg as to freedom of navigation—would be in a different category (→ *Navigation, Freedom of*).

16 Moreover, to say that the dispute arose under general international law, when the governing provisions were those of a multilateral treaty, was to misstate the position. The OAS Charter bound the parties as a treaty, not as customary international law. Without a finding that the relevant provisions of the OAS Charter had the status of peremptory norms (and the court carefully avoided such a finding), the operative legal provisions were those of the treaty as such. A treaty prevails over custom unless the customary rule concerned has the status of a peremptory norm. Since the breach of the OAS Charter was a substantial and substantive ground of Nicaragua's complaint, that should have been enough to exclude the court's jurisdiction under the Vandenberg amendment.

17 The result of the court's decision on the Vandenberg amendment was to leave it free to exercise jurisdiction over the entire Nicaraguan claim, which was formulated in parallel as a claim under the relevant treaties and under general international law. In the event the court found little or no difference between the two. Thus the Vandenberg amendment had little or no effect.

(d) Jurisdiction under the 1956 Treaty of Friendship

18 The final jurisdictional issue related to the Treaty of Friendship, which was relied on in the Nicaraguan memorial, although it had not been referred to in the application. The court held that it was entitled to consider additional grounds for jurisdiction, provided that these did not alter the nature of the dispute, and that, although the Treaty of Friendship had not been specifically invoked by Nicaragua in diplomatic negotiations, it sufficiently related to the dispute—especially Art. XIX, providing for freedom of commerce and navigation—and could therefore be invoked as a basis for jurisdiction. The failure to invoke it earlier was at most a defect in form which the court could ignore (*Nicaragua Case [Jurisdiction of the Court and Admissibility of the Application]* 428–29). On this point only Judges Ruda and Schwebel dissented. No doubt one reason why the parties had paid relatively little attention to the Treaty of Friendship was that it could be terminated on 12 months' notice. In fact the US did terminate it, with effect from 1 May 1986.

2. Admissibility Issues

19 The various admissibility issues were generally less difficult than those involving jurisdiction, and the court was unanimous in its rejection of the US arguments.

(a) Non-Joinder of Necessary Parties: Scope of the Monetary Gold Principle

20 The most important was the question whether the three Central American States involved were necessary parties to the case, in whose absence the court could not proceed. A similar argument had prevailed in the *Case of the Monetary Gold Removed from Rome in 1953* ('*Monetary Gold Case*', [1954] ICJ Rep 19, 32; → *Monetary Gold Case*). But the court sharply distinguished the *Monetary Gold Case*, restricting it to situations where the very subject-matter of the dispute was a right or legal interest (eg, an acknowledged proprietary interest) of the third State. That was not the position here. In all other cases the interests of third States were sufficiently protected by their right to intervene under Arts 62 and 63 ICJ Statute and by the non-binding character of the court's decision, vis-à-vis third parties, under Art. 59 ICJ Statute .

(b) Non-Exercise of Jurisdiction over Disputes before other Forums; Capacity of the Court to deal with Situations involving Continuing Conflict

21 The US also argued that the court had no competence to deal with disputes actively being considered by the → *United Nations Security Council*, or by applicable regional processes such as the Contadora process. Having regard to its established case law (→ *Corfu Channel Case*; → *United States Diplomatic and Consular Staff in Tehran Case [United States of America v Iran]*), these arguments stood little chance of success. The UN Security Council's authority under Art. 24 ICJ Statute Art. 24 UN Charter is primary, not exclusive: it is for the court to consider the rights of the parties (including the 'inherent right' [*Nicaragua Case (Jurisdiction of the Court and Admissibility of the Application)* para. 98] of self-defence)—that is, those matters with a 'legal dimension' (ibid), even though the dispute might have other dimensions. The court emphasized that it had never 'shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force' (ibid para. 96).

(c) Non-Justiciability

22 In the first phase the US did not claim that the dispute was inherently non-justiciable, although some of its arguments touched on issues of justiciability. In the merits phase, however, two judges did rely on the non-justiciability argument. Judge Oda's dissent offers little to combat the court's own standard response to the argument. That response was, simply, that a matter which can be described as 'political' or 'military' (*Nicaragua Case [Merits]* para. 34) is nonetheless justiciable if there are applicable norms of → *international law* by which the respective claims of the parties can be determined (*Nicaragua Case [Merits]* 26–27; see also *Nicaragua Case [Merits] [Dissenting Opinion of Judge Oda]* 219–46), and that that was the case here. Judge Schwebel took a more nuanced view. While accepting in principle the standard view of the justiciability of international disputes, he held that there was, in effect, a temporary exception for disputes involving a continuing use of force, where the facts were disputed and unclear, and where the court was in no position to reach a reliable ('final') judgment (*Nicaragua Case [Merits] [Dissenting Opinion of Judge Schwebel]* 284–96). Thus though the laws may not be silent amidst the clash of arms, according to Judge Schwebel the court may have to be—a position that held no attraction for the majority. (See also *Case concerning Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v Uganda] [Judgment] ['(Armed Activities (Congo v Uganda)']* [International Court of Justice, 19 December 2005] <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm> [20 September 2006] for a more recent reaffirmation of the majority approach; → *Armed Activities on the Territory of the Congo Case*.)

D. Merits

23 Given its approach to the Vandenberg amendment, the court had to determine the scope of the customary international law rules relating to non-intervention and the use of force. In doing so it concentrated on the terms of certain declaratory General Assembly resolutions, especially the → *Friendly Relations Declaration* (UNGA Res 2625 [XXV] of 1970), as well as various resolutions of the Organization of American States, and the Helsinki Declaration of 1975 (→ *United Nations, General Assembly*). This constitutes the most extensive reliance by the court on resolutions of international organizations as a source of law—albeit, having regard to the Vandenberg amendment issue, in a distinctly artificial context (see also → *International Organizations or Institutions, Secondary Law*).

24 The court spelt out in greater detail than before the limits on the right of collective self-defence against an armed attack: necessity, → *proportionality*, the existence of an → *armed attack* (which does not include the mere provision of weapons or logistical support), and the requirement that the State defended should have declared itself the subject of an armed attack and have requested the other State to act in its defence. It also spelt out the scope of the customary principle of non-intervention, emphasizing that that principle had not—at least, outside the → *decolonization* context—been modified so as to allow intervention in aid of a democratic opposition. The court went on to define the scope of lawful countermeasures, which, in the absence of an armed attack on the State, cannot involve the use of force. Finally, the court found that the customary principles of humanitarian law, both in international and non-international armed conflict, required respect for basic → *minimum standards*, expressed in common Art. 3 Geneva Conventions of 1949 (→ *Geneva Conventions I-IV [1949]*; → *Humanitarian Law, International*).

25 In this context the court gave a detailed account of the parallel existence of customary international law and treaty law (*Nicaragua Case [Merits]* 92–97). In its decision on jurisdiction it had pointed out—what is undoubtedly the case—that the fact that principles of customary or general international law have been embodied in a multilateral convention does not mean that they cease to exist as such. At the merits phase the court developed and refined these remarks. It was true that the relevant customary rules might not have had the same content as the rules contained in the UN Charter or the OAS Charter. But even if the customary norm and the treaty norm were to have *exactly* the same content, the incorporation of the customary norm into treaty law did not necessarily deprive the customary norm of its separate applicability.

26 As to the facts, after a lengthy assessment of the evidence (ibid 45–92) the court held that the contras were not an arm or agency of the US, although they had been extensively assisted by it (→ *International Courts and Tribunals, Evidence*). The court then considered whether the conduct of the contras was nonetheless attributable to the US so as to hold it generally responsible for breaches of international humanitarian law committed by them. The court found —uncontroversially—that the US was responsible for the 'planning, direction and support' (ibid para. 86) it gave to the contras, but it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the US by reason of its control over them. It concluded that:

> despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields so as to justify treating the *contras* as acting on its behalf. … All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetuation of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. (ibid paras 109, 115.)

27 Although the court found the acts of the contras were not generally attributable to the US, it held that in certain individual instances the acts of the contras were attributable to the US, based upon actual participation of and directions given by the US. Hence, the court found that the US was responsible for the mine-laying and for certain other operations in which it had direct involvement.

28 The court noted that, from 1 October 1984, the US Congress had restricted the use of the funds appropriated for assistance to the contras to 'humanitarian assistance' (ibid para. 242). It commented that the provision of strictly humanitarian aid to persons or forces in another country could not be regarded as unlawful intervention or in any way contrary to international law. However, '[a]n essential feature of … humanitarian aid is that it [be] given "without discrimination" of any kind' (ibid para. 243); aid given only to the contras and their dependents, and not to all in need in Nicaragua, could not qualify as humanitarian assistance (ibid 124–25).

29 With respect to self-defence, the court held that Nicaragua had engaged, to some extent, in supporting rebels in El Salvador, but that its activities had not amounted to an armed attack on any neighbouring State. It held that the limited direct use of force against Nicaragua by the US, and the much greater level of intervention, were not necessary in the circumstances, were in key respects disproportionate, and were thus unlawful. Nor was the US action justified in response to any breaches of the 1979 commitments made to the OAS by the Nicaraguan junta which became the government of Nicaragua after the overthrow of the Somoza government: these commitments were political, not legal, and gave no right to the US to take military or paramilitary action to enforce them. The mine-laying was also held to be independently unlawful as an interference with maritime navigation. Certain propaganda activities carried out by the CIA were held to amount to an incitement to the contras to breach general principles of international humanitarian law applicable in civil conflict.

30 There was also a breach of the Treaty of Friendship, both of a general—apparently customary law—obligation not to frustrate the 'object and purpose of the Treaty' (ibid para. 276)—jurisdiction over which was conferred under the optional clause and not under the treaty itself—and of certain of its specific provisions, especially Art.XIX Treaty of Friendship guaranteeing freedom of navigation and commerce. Those breaches were not justified by Art. XXI (1) (d) Treaty of Friendship , which reserved 'measures necessary to fulfil' obligations for the restoration of international peace and → *security* or to protect the 'essential security interest' of a party, because the measures taken, and especially the mining and the trade embargo, were not 'necessary' for any of these purposes.

31 The court declined to make an interim award of damages and reserved the question of damages to a subsequent phase of the proceedings.

32 The court also discussed the applicable principles of evidence before international courts (ibid 38–45). It noted that there were particular difficulties where the respondent State does not appear to contest the merits. But in accordance with Art. 53 ICJ Statute , the court is bound to satisfy itself that the applicant State's submissions are well-founded in fact and law, and this precludes anything in the nature of summary judgment. On the contrary there is a continuing need to respect the equality of the parties even in the absence of one of them (→ *States, Sovereign Equality*).

33 Specifically the court referred to four kinds of materials submitted as evidence before it. First, many documents were supplied in the form of reports in press articles and extracts from books. The court was careful to treat these with great caution: they were not evidence capable of proving facts, but materials which could contribute, in some circumstances, to corroborate the existence of a fact. This was subject to one proviso—that of notoriety: public knowledge of a fact could be established by such sources of information, as was the case in the → *United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran)* (*[Judgment]* [1980] ICJ Rep 3 paras 12–3). But the court was cautious not to rely solely on this kind of evidence: widespread reports of a fact could prove to have derived from a single source, in which case the numerous reports could have no greater value than their original source.

34 The second type of evidence discussed consisted of statements of State officials, sometimes at the highest political level. Such statements were of particular probative value when they amounted to admissions against the interest of the State.

35 The third type of evidence was from witnesses, either in the form of oral testimony or by affidavit. Evidently oral witnesses could not be cross-examined by a non-appearing respondent, but they were subjected to extensive questioning from the bench, principally by Judge Schwebel. In respect of the government representatives who gave evidence, again the court regarded statements against interest as carrying particular weight. But the absence of one party required it to treat the remainder of this evidence with great caution.

36 Finally the court referred to a publication from the US State Department entitled *Revolution Beyond Our Borders: Sandinista Intervention in Central America* , which was issued in September 1985 and circulated as an official document of the UN at the request of the US. This had not been formally submitted to the court, but the representatives of Nicaragua were aware of its existence. Nicaragua's position was that it did not constitute evidence and could not be considered by the court. The court held that it could, within limits, make use of the information in such a publication in view of the special circumstances of the case.

37 The court's findings in relation to general international law were made by 12 votes to 3. Only one of the dissents (Judge Schwebel) went to the substance of the claims, the others (Judges Oda and Jennings) being essentially jurisdictional. One specific finding, of breach of the Art. XIX Treaty of Friendship , was nearly unanimously supported (14–1, Judge Schwebel dissenting). Another, relating to CIA distribution of a publication inciting breaches of international humanitarian law, was also supported by 14 votes to 1 (Judge Oda dissenting on jurisdictional grounds only). The tensions associated with the case led to some incidents and statements which can only be described as unfortunate (see *Nicaragua Case [Merits] [Separate Opinion of Judge Elias]* 178–80; *Nicaragua Case [Merits] [Dissenting Opinion of Judge Schwebel]* 314–15; *Nicaragua Case [Merits] [Dissenting Opinion of Judge Jennings]* 528).

E. Related Proceedings

38 Of the two cases relating to the contra conflict subsequently brought by Nicaragua, only the case against Honduras proceeded (→ *Border and Transborder Armed Actions Case [Nicaragua v Honduras; Nicaragua v Costa Rica]*). The court's unanimous decision in 1988 that the claim was within its jurisdiction and admissible was a striking success for Nicaragua. The jurisdictional issues were comparatively straightforward. The court held *a)* that Art. XXXI Pact of Bogotá, which was a submission to jurisdiction in terms drawn from Art. 36 (2) ICJ Statute , was an independent source of jurisdiction, so that reservations to optional clause declarations were of no relevance to Art. XXXI Pact of Bogotá and *b)* that Art. XXXI Pact of Bogotá was also independent of Art. XXXII Pact of Bogotá , which referred only to disputes which had been the subject of → *conciliation* proceedings.

39 As to admissibility, the principal issue was whether the Contadora process meant that Arts II or IV Pact of Bogotá were not satisfied. Art. II Pact of Bogotá bound the parties to apply the procedures for pacific settlement contained in the Pact only to 'a controversy … which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels'. The French text, however, reads '*de l'avis de l'une des parties*'. Without resolving the discrepancy with the French text, the court held that the Contadora process was markedly different from direct negotiations through the usual diplomatic channels (*Case concerning Border and Transborder Armed Actions*[*Nicaragua v Honduras*] *[Jurisdiction of the Court and Admissibility of the Application]* 99). Art IV Pact of Bogotá bound the parties not to commence other procedures of pacific settlement until the conclusion of any prior pacific procedure initiated by agreement between the parties. The court's analysis of the Contadora process led it to the conclusion—differing from the submissions of both parties—that at the time the Nicaraguan application was lodged, the original Contadora process had failed, and that the later negotiations (Esquipulas II) were of an essentially different kind. It was accordingly unnecessary to decide whether the Contadora process was a 'pacific procedure' under Art. IV Pact of Bogotá .

40 On all these issues the court's conclusions were powerfully reinforced in a separate opinion of Judge Shahabuddeen which drew heavily on the Inter-American experience and literature. By contrast, Judge Schwebel, while not dissenting, was caustic in his comments on the Nicaraguan process of serial litigation, and emphasized the importance of the protection afforded Honduras by Art. 59 ICJ Statute—given the potentially adverse factual findings in the *Nicaragua Case* (ibid 130–32).

F. Assessment

41 The court's authority and the system of the optional clause were shaken by the case—so far as the US was concerned, profoundly shaken. The range and complexity of issues presented were such that few commentators could agree with everything the court did and said. On the other hand, revelations about the domestic aspects of US aid to the contras (especially the Senate hearings in the Iran-Contra affair and the subsequent conviction of US officials for various related offences) tended to discredit US policy in the conflict, and substantial majorities in the UN called on the US to comply with the judgment (see eg UNGA Res. 44/217 of 27 December 1989). For the court to have maintained a substantial consensus, not merely on outcomes but, for the most part, on its reasoning, faced with such issues and such opposition, was an achievement—contrasting, for example, with the juristic divisions and prevarications of the Austro-German Customs Union of 1936 and the *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* of 1962 and 1966.

42 The reasoning of the court regarding attribution of the conduct of the contras to the US has attracted much comment. The 'effective control' standard was criticized by the majority of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Dusko Tadić* who preferred a standard of 'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations' (*Prosecutor v Dusko Tadić [Judgment]* para. 145; → *Tadić Case*; → *International Criminal Tribunal for the Former Yugoslavia [ICTY]*). Although the majority of the Appeals Chamber considered it necessary to disapprove the ICJ's approach to attribution in the *Nicaragua Case*, in fact the question before the Appeals Chamber in *Prosecutor v Dusko Tadić (Judgment)* was not one of → *State responsibility* at all. The Appeals Chamber was determining whether Bosnian Serb forces were under the control of the Federal Republic of Yugoslavia ('FRY') with the result that the armed conflict was to be considered as international in character, with the result that the more extensive rules of humanitarian law applicable in international armed conflict would apply. This was a quite different context: merely by accepting that an armed conflict is internationalized, the State does not—and should not be required to—accept responsibility for the acts of local militias engaged in the conflict, whatever their affiliations. The reasoning of the majority was cogently criticized by Judge Shahabuddeen in his separate opinion, noting that the question was not 'whether the FRY was responsible for any breaches of international humanitarian law committed by the [Bosnian Serb militia]' but the distinct question 'whether the FRY was using force through the [militia] against [Bosnia-Herzegovina]' (*Prosecutor v Dusko Tadić [Judgment] [Separate Opinion of Judge Shahabuddeen]* ICTY-94-1-A [15 July 1999] para. 17).

43 The matter was discussed by the → *International Law Commission (ILC)* in its work on State responsibility. The ILC Articles on Responsibility of States for Internationally Wrongful Acts ('ILC Articles') eventually adopted in 2001 adopt the somewhat stricter test of the court in the *Nicaragua Case*. Art. 8 ILC Articles provides that the conduct of a person or group of persons is attributable to the State 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. Likewise the ICJ affirmed the Art. 8 ILC Articles standard and its decision in the *Nicaragua Case* in *Armed Activities (Congo v Uganda)* (International Court of Justice, 19 December 2005] <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm> [20 September 2006] para. 160): in this case too the court found no probative evidence on which it could conclude that the relevant conduct was 'on the instructions of, or under the direction or control of' Uganda.

44 The decision in the *Nicaragua Case (Merits)* demonstrates clearly enough what the court itself called 'the difficulties that may arise where particular aspects of a complex general situation are brought before a Court for separate decision' (at 92). This was true not only procedurally but also as a matter of the substantive law of the case. But the court's approach to the two phases presents a strong contrast. Substantively, the case was characterized by the court's treatment of the Vandenberg amendment, its assumption that customary international law operates conjunctively with treaty law (independently of any issue of peremptory norms), its ready generation of custom from treaty and from resolutions of international organizations, and its refusal to limit itself to the bilateral Treaty of Friendship as a ground of decision. On the one hand, procedurally the court refused to defer to a multilateral diplomatic initiative, refused to allow intervention, at least at the jurisdictional stage, refused to hold the claim inadmissible because of the non-joinder of third parties on whose behalf the US claimed to be acting, refused to treat the series of Nicaraguan applications, or the evidentiary difficulties, as a basis for inadmissibility. The contrast presents a picture of resolute bilateralism on issues of competence, but of a wide, even effusive, reliance on multilateral law-making processes on issues of substance.

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