

**INTERNATIONAL COURT OF JUSTICE JUDGMENT OF
26 NOVEMBER 1984
CASE CONCERNING MILITARY AND
PARAMILITARY ACTIVITIES IN AND AGAINST
NICARAGUA JURISDICTION OF THE COURT AND
ADMISSIBILITY OF THE APPLICATION**

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Introduction:

The International Court of Justice (ICJ) is open only to States in cases involving its contentious jurisdiction⁽¹⁾. The competence of the ICJ to deal with such cases depends upon the consent of the States parties to the dispute. Such consent may be expressed in a treaty, a compromis or in a declaration under the optional clause (Article 36, paragraphs 1 and 2), the optional clause being the most important basis of jurisdiction. Article 36, paragraph 2, provides:

“The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.”

(1) Art. 34, para.1, of the Statute of the ICJ. The States which have access to the ICJ are:

- (a) Members of the United Nations,
- (b) Non-Member States of the United Nations on conditions laid down by the General Assembly upon the recommendation of the Security Council, e.g., Switzerland and Liechtenstein,
- (c) States which are neither Members of the United Nations nor parties to the Statute of the ICJ, but use the Court in a particular case, subject to the conditions prescribed by the Security Council. See Article 93 of the United Nations Charter and Article 35, para.2, of the ICJ Statute.

Furthermore, Article 36, paragraph 5, of the Statute treats declarations made under Article 36 of the Statute of the Permanent Court of International Justice (PCIJ), which are still in force, as acceptances of the jurisdiction of the ICJ for the period which they still have to run and in accordance with their terms. And in accordance with Article 36, paragraph 6, in case of a dispute as to whether the ICJ has jurisdiction the matter shall be settled by the Court.

The position of the parties to the case:

On 9 April 1984, the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the ICJ an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In its Application, Nicaragua asserted that:

“The United State of America is using military force against Nicaragua and intervening in Nicaragua’s internal affairs, in violation of Nicaragua’s sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United Statyes has created an ‘army’ of more than 10,000 mercenaries... installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua and that Nicaragua has already suffered and is now suffering grievous consequences as a result of these activites. The purpose of these activities is claimed to be to harass and destabilize the Government of Nicaragua so that ultimately it will be overthrown, or, at a minimum, compelled to change those of its domestic and foreign policies that displease the United States⁽²⁾”. At the same time, Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Court’s Statute⁽³⁾.

(2) ICJ. Reports, 1984, p.429, para.85.

(3) Article 41 reads as follows:

“1. The Court shall have 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.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council”.

By a letter from the United States Ambassador at The Hague to the Registrar of the Court dated 13 April 1984, and in the course of the oral proceedings for the indication of provisional measures, the United States contended that the Court was without jurisdiction to deal with the Application, and requested that the proceedings be terminated by the removal of the case from the list⁽⁴⁾.

By an Order of 10 May 1984, the Court rejected the request of the United States and indicated, pending its final decision in the proceedings, certain provisional measures⁽⁵⁾. By that order, the Court further decided that the written proceedings in the case should first address the question of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application.

Written and oral proceedings having been completed, the Court delivered its judgement on 26 November 1984 and found: by 11 votes to 5 that it has jurisdiction to entertain Nicaragua's Application on the basis of Article 36, paragraphs 2 and 5, of its Statute⁽⁶⁾; by 14 votes to 2 that it has jurisdiction to entertain Nicaragua's Application in so far as relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 1956 on the basis of Article XXIV of that Treaty⁽⁷⁾; by 15

(4) See Case Concerning Military and Paramilitary Activities in and Against Nicaragua - Request for the Indication of Provisional Measures Order of 10 May 1984, ICJ Reports 1984, p.172, para.6.

(5) By its Order of 10 May 1984, the Court indicated, pending its final decision, the following provisional measures:

1. Unanimously, the United States should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines;

2. By 14 to one, the right to sovereignty and to political independence possessed by the Republic of Nicaragua... should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.

3. Unanimously, the United States and Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court. Ibid., p.187, para.41.

(6) Judges voting against were: Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.

(7) Judges voting against were: Ruda and Schwebel.

votes to 1 that it has jurisdiction to entertain the case⁽⁸⁾; and unanimously that the said Application is admissible⁽⁹⁾.

The arguments of the parties:

Nicaragua relied on the following grounds to establish the jurisdiction of the Court:

1. Nicaragua's declaration of 24 September 1929 accepting the jurisdiction of the PCIJ, in conjunction with Article 36, paragraph 5, of the Statute of the ICJ; which declaration Nicaragua considered still in force as a valid and binding acceptance of the jurisdiction of the ICJ. The Nicaraguan declaration reads as follows: "On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice".

Nicaragua argued that it meets the conditions laid down in Article 36, paragraph 5, because Nicaragua ratified the United Nations Charter on 6 September 1945 and became an original Member of the United Nations on 24 October 1945, When the Charter came into force. Under Article 93 (1) of the Charter, it automatically became a party to the Statute of the Court on the same date. On that date, its declaration of 24 September 1929 accepting the compulsory jurisdiction of PCIJ was in effect. Being of unlimited duration, it had not expired. Thus, when the Charter and the Statute entered into force, that declaration was, by the terms of Article 36 (5), deemed as between the parties to the Statute, to be an acceptance of the compulsory jurisdiction of this Court⁽¹⁰⁾.

2. The declaration of the United States of 14 August 1946 under Article 36, paragraph 2, of the ICJ Statute⁽¹¹⁾.

3. Nicaragua, in argument, relied also on Article XXIV, paragraph 2,

(8) Judge Schwebel voting against.

(9) ICJ Rep. 1984, p.442, para.113.

(10) Ibid., pp.563-564.

(11) The U.S. Declaration of 1946 provides that the U.S. "...recognizes as compulsory ipsofacto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes here — after arising concerning.

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to:

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of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 1956⁽¹²⁾. Nicaragua further submitted that the ICJ is not precluded from adjudicating the legal dispute in its Application, which it considered admissible.

The United States argued that:

1. The Court had no jurisdiction to hear the case; and
2. Even if it had jurisdiction, the Application was inadmissible.

So far as lack of jurisdiction of is concerned, the United States submitted that Nicaragua never became a party to the Statute of the PCIJ because its ratification of the Protocol of Signature of the Statute of the PCIJ was not deposited with the Secretariat of the League of Nations, as required by the Protocol. Accordingly, Nicaragua could not make an effective acceptance of the compulsory jurisdiction of the PCIJ; the 1929 acceptance was therefore not "still in force" within the meaning of the English version of Article 36, paragraph 5, of the Statute of the ICJ⁽¹³⁾. The United States also objected to the invocation by Nicaragua of the 1969 Treaty, as a basis for founding the jurisdiction of the Court. It argued that in proceedings instituted by means of application, the jurisdiction of the Court is founded upon the legal grounds specified in that application. "An Applicant is not permitted, in the view of the United States, to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its application⁽¹⁴⁾".

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- (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
 - (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
 - (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration".

Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1982, pp.23-2, UN Doc. ST/LEG/SER.R/2 (1983).

- (12) Article XXIV, para.2, reads as follows: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means".

(13) ICJ. Rep.1984, p.400, para.17.

(14) Ibid., p.426, para.78.

As regards admissibility, the United States advanced five grounds against this heading:

1. "... Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application⁽¹⁵⁾". These parties were Honduras, Costa Rica and El Salvador.

2. "... Each of Nicaragua's allegations constitutes no more than a reformulation and restatement of a single fundamental claim, that the United States is engaged in an unlawful use of force or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and practice to the competence of other organs, in particular the United Nations Security Council". It went on "under Article 52 of the Charter there is also a commitment of responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates⁽¹⁶⁾".

3. "... Nicaragua's Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and... that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua⁽¹⁷⁾".

4. "The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings⁽¹⁸⁾".

5. "... Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America... The Contadora process, to which Nicaragua is a party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appropriate method for the resolution of the

(15) Ibid., p.430, para.86.

(16) Ibid., pp.431 and 432, para.89.

(17) Ibid., p.432, para.91.

(18) Ibid., p.436, para.99.

issues of Central America⁽¹⁹⁾”.

Judgment of the Court:

(1)Jurisdiction

The Court started its consideration of the case by limiting itself to the question of jurisdiction and the admissibility of the Application. It said “the issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits⁽²⁰⁾”. The Court then dealt with the Nicaraguan Declaration accepting the Optional Clause of 24 September 1929. The Protocol of Signature of the Statute of the PCIJ was subject to ratification the instrument of which should be communicated to the Secretary-General of the League of Nations (L.o.N.). On 24 September 1929, Nicaragua, as a Member of the League, signed this Protocol and made a declaration under Article 36, paragraph 2, of the Statute of the PCIJ. On 18 September 1939, The Ministry of External Relations of Nicaragua sent a telegram to the Seretary-General of the L.o.N. advising him of Nicaragua’s ratification of the PCIJ’s Statute and that the instrument of ratification would be sent in due course. However, the instrument had never reached the Secretary-General of the League, and this was acknowledged by both parties. This did not deter the Court from going deeper into the question. The Court found that when made, Nicaragua’s declaration was valid. Under the PCIJ’s Statute, a declaration was valid on condition that it be made by a State “either when signing or ratifying the Protocol of Signature of the Statute”. Nicaragua signed that Protocol. The Court conceded that the Nicaraguan declaration thought valid, had not become binding under the PCIJ’s Statute for lack of deposit of the instrument of ratification with the L.o.N. Sereterial⁽²¹⁾. The Court further found that the 1929 declaration of Nicaragua was valid at the moment Nicaragua became a party to the Statute of the ICJ and had retained its potential effect, because Nicaragua, which could have limited the duration of that effect, e.g. for 5 years, had expressly refrained from doing so⁽²²⁾. The Court then turned to the conditions of the applicability of Article 36, paragraph 5, of its Statute and held that paragraph 5 “refrains from stipulating that declarations must have been made by States parties to the Statute of the Permanent Court: it

(19) Ibid., p.438, para.102.

(20) Ibid., p.426, para.78.

(21) Ibid., p.404, para.25.

(22) Ibid., para.27.

is sufficient for them to have been made ‘under’ (in French ‘en application de’) Article 36 of that Statute. But those who framed the new text were aware that under that Article,... a State could make a declaration when it had not ratified the Protocol of Signature of the Statute, but only signed it. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua’s declaration⁽²³⁾”. The Court went on to say that apart from this relationship with the PCIJ’s Statute, “the only condition which declarations have to fulfil is that they should be ‘still in force’ (in English) or ‘faite pour une durée qui n’est pas encore expirée’ (in French)”. The Court interpreted Article 36, paragraph 5, on the basis of the actual terms used, which in its view do not include the word “binding”. It went on “according to the **travaux préparatoires**, the word ‘binding’ was never suggested; and if it had been suggested for the English text, there is no doubt that the drafters would never have let the French text stand as finally worded. Furthermore, the Court does not consider the French text to imply that **la durée non expirée** (the unexpired period) is that of a commitment of a binding character. ...A declaration validly made under Article 36 of the Statute of the Permanent Court had a certain validity which could be preserved or destroyed, and it is perfectly possible to read the French text as implying only this validity⁽²⁴⁾”.

The Court considered the deliberate choice of the expression “pour une durée qui n’est pas encore expirée” as denoting “an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force”. The Court concluded that “the English version in no way expressly excludes a valid declaration of an unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of a binding character⁽²⁵⁾”. The Court further stated that “the general system of devolution from the old Court to the new thus lends support to the interpretation whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force⁽²⁶⁾”. Taking this interpretation into account, the Court applied to Nicaragua what it stated in the **Aerial Incident** case, 1955:

“Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be

(23) Ibid., p.405, para.28.

(24) Ibid., p.406, para.30.

(25) Ibid., pp.406-407, para.31.

(26) Ibid., p.408, para.35.

regarded as effectively given by a State which, having been represented at the San Francisco conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears" (I.C.J. Reports 1959, p.142).

The Court invoked the conduct of States and international organizations to "attest a certain interpretation of Article 36, paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article)⁽²⁷⁾". The Court referred to its Yearbook since 1946-1947, its Reports to the General Assembly of the United Nations since 1968 and the annually published collection of Signatures, Ratifications, Acceptances, Accessions, etc. concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository, noting that "ever since they first appeared, all these publications have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. Even if the **I.C.J. Yearbook** has, in the issue for 1946-1947 and as from the issue for 1955-1956 onwards, contained a note recalling certain facts concerning Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice, this publication has never modified the classification of Nicaragua or the binding character attributed to its 1929 Declaration—indeed the **Yearbooks** list Nicaragua among the States 'still bound by' their declarations under Article 36 of the Statute of the permanent Court. The Same observation is valid for the Secretariat publication **Signatures, Ratifications, Acceptances, Accessions**, etc., which derived its data, including footnotes, from the **I.C.J Year-books**. As for the Reports of the Court, they are quite categorical in stating that Nicaragua had accepted compulsory jurisdiction...⁽²⁸⁾".

The Court rightly concluded that "... the listing found appropriate for Nicaragua amounted over the years to a series of attestations which were entirely official and public, and extremely numerous, and ranged over a period of 40 years; and that hence the States concerned—first and foremost, Nicaragua — had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36, paragraph 5, to the Nicaraguan Declaration of 1929⁽²⁹⁾".

(27) Ibid., p.409, para.37.

(28) Ibid., pp.408-409, para.36.

(29) Ibid., p.409, para.38.

It is difficult not to accept this argument, for if a State considers such a listing in such public documents is contrary to its position, surely, it would have protested and demanded the correction of the record. By not doing so, that State must be considered as agreeing with the position contained in those documents. As the Court pointed out, the silence of the Nicaraguan government "can only be interpreted as an acceptance of the classification thus assigned to it⁽³⁰⁾". The Court also found it difficult "not to consider that the United States letter of 6 April 1984 [the Shultz letter] implies that at that date the United States, like other States, believed that Nicaragua was bound by the Court's jurisdiction in accordance with the terms of its 1929 Declaration⁽³¹⁾". The Court also observed that the conduct of Nicaragua in relation to its publications and those of the United Nations Secretariat also supports a finding of jurisdiction under Article 36, paragraph 2, of its Statute independently of the interpretation and effect of paragraph 5 of that Article. The Court went on to hold that "...having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-a-vis the United States, a State accepting 'the same obligations' under that Article⁽³²⁾".

Some of the judges who delivered separate opinions disagreed with the majority opinion on this issue. They argued that the Nicaraguan declaration of 1929 did not have any legal effect, because while the Protocol of Signature had been ratified, the instrument of ratification was never deposited with the Secretary-General of the L.o.N. as required by the Protocol. Judge Sir Robert Jennings said "the question is whether Article 36, paragraph 5, of the present Court's Statute had the effect of transferring to the new Court, Nicaragua's subscription to the Optional Clause of the Protocol of Signature and the Statute of the Permanent Court, which entire instrument required ratification; but which was never ratified, with the admitted consequence that Nicaragua never became obligated by the compulsory jurisdiction of the Permanent Court? The answer would seem to be placed beyond doubt according to the English text of Article 36, paragraph 5." He cited that provision and went on to

(30) Ibid., p.410, para.39.

(31) Ibid., pp.410-411, para.41.

(32) Ibid., p.413, para.47.

say “Thus the declarations which are by that provision deemed to be acceptances of the compulsory jurisdiction of the new Court are those” ‘which are still in force’. And since Nicaragua’s Declaration was never ‘in force’ in respect of the old Court, it would seem to follow that it cannot be held to be “still in force’ for the purposes of Article 36, paragraph 5.”⁽³³⁾ He reiterated the point, later on in his opinion, by saying that “a declaration of acceptance of compulsory jurisdiction, which declaration never came into operation under the old Statute, certainly cannot be said, under the new Statute, to be ‘still in force’...”⁽³⁴⁾ Referring to the French text of Article 36, paragraph 5, he said: “a declaration to which, owing to failure to ratify the Protocol no date of commencement of the obligation in respect of the Permanent Court could be assigned, cannot be said to be **pour une durée qui n’est pas encore expirée**. That which never began cannot be said to have had a duration at all.”⁽³⁵⁾ He concluded: “... to say that the effect of Article 36, paragraph 5, was to create for Nicaragua an obligation in respect of the new Court, which never in fact existed in respect of the Permanent Court, is straining the language of that Article beyond what it can bear.”⁽³⁶⁾

It is submitted with respect that position of these Judges seems to be based on a technicality, for they have insisted that until ratification of the Protocol of Signature is completed, the declaration of Nicaragua had no legal effect. One wonders whether such an attitude is justified given the circumstances of the position of Nicaragua, namely the telegram of 1939 and the absence of any protest by Nicaragua against its being listed for a very long time in the Court’s and United Nations’ documents as a State “still bound” by the compulsory jurisdiction of the ICJ. On the other hand, could the Court not imply in the wording of Article 36, paragraph 5, the word “binding”, instead of relying on a literal interpretation of the provision? It could have done so and still had jurisdiction on the basis of Article XXIV paragraph 2, of the Nicaragua-United States Treaty of Friendship, Commerce and Navigation 1956.

The United States also tried to invoke an estoppel against Nicaragua stating that “...even if Nicaragua is otherwise entitled to invoke against the United State the jurisdiction of the Court under Article 36, paragraphs 2 and 5, of the Statute, Nicaragua’s conduct in relation to the United

(33) Ibid., p.536.

(34) Ibid., p. 538.

(35) Ibid., pp 538-539 See also separate opinion of Judges Mosler, Ibid., p.462. Oda, Ibid., p.476 and Ago, Ibid., p.524, para.23

(36) Ibid., p.540.

States over the course of many years estops Nicaragua from doing so.”⁽³⁷⁾ It relied on a dispatch from its ambassador to Nicaragua, in 1943 stating that” while appropriate legislative action was taken in Nicaragua to approve adherence to the Protocol. [of Signature of the Statute of the PCIJ], Nicaragua is not legally bound thereby, in as much as it did not deposit its official document of ratification with the League of Nations.”⁽³⁸⁾ Further. in 1955-1958, there was diplomatic contact between Honduras, Nicaragua and the United states over the dispute which was eventually determined by the Court as the case of the **Arbital Award by the king of Spain on 23 December 1906** (I.C.J. Reports 1960, P.192). In a conversation between United States officials and the Nicaraguan ambassador in Washington on 21 December 1955, “reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction” and the ambassador was recorded to have “indicated that an agreement between the two countries would have to be reached to overcome this difficulty”. The United States interpreted this as a statement of Nicaragua’s understanding that it was not bound by the Optional Clause.⁽³⁹⁾ On 2 March 1956, the ambassador was alleged to have observed that there was some soubt as to whether Nicaragua would be officially obliged to submit to the International Court because an instrument of ratification of the Court’s jurisdiction was never sent.

The Court rightly rejected this argument of estoppel observing that it could not regard the information obtained by the United States in 1943, or the doubts expressed in diplomatic contacts in 1955 as sufficient to overturn its conclusion that the conduct of Nicaragua was such as to evince its consent to be bound in such a way as to constitute a valid mode of acceptance of jurisdiction⁽⁴⁰⁾. The Court further held that Nicaragua cannot be taken to come within the criterion of estoppel laid down by the Court in the **North Sea Continental Shelf cases**. The views of these officials of the United States may be their own subjective assessment of the situation and as such cannot attribute to Nicaragua a certain position, in the absence of objective evidence.

The United States further contended that effect must be given to its

(37) Ibid., p.413, para.48.

(38) Ibid., para.49.

(39) Ibid., p.414, para.50.

(40) Ibid., para.51.

notification to the United Nations Secretary-General of 6 April 1984 (the Shultz letter). That notification was intended to exclude the application of the United States Declaration of 26 August 1946 from "disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree." The notification further stated "notwithstanding the terms of the aforesaid declaration' this proviso shall take effect immediately and shall remain in force for two years..." If upheld, this notification would have denied the Court the right to adjudicate the dispute. However, the Court rejected this plea, relying on the terms of the United States declaration: it said "although the United States retained the right to modify the contents of the 1940 Declaration or to terminate it... a power... inherent in any unilateral act of State,⁽⁴¹⁾ it has, nevertheless, assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of the notice⁽⁴²⁾". It concluded "the six months' notice clause forms an important integral part of the United States Declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, The 1984 notification, in the present case, cannot override the obligation of the United States to submit to the compulsory jurisdiction of the Court vis-à-vis Nicaragua, a State accepting the same obligation".⁽⁴³⁾ The Court has rightly applied the terms of the declaration of the United States, and thus denied the possibility to a respondent State to try to change its position when it realizes that it is about to be sued before the Court, without due regard to the condition of its declaration under the optional clause.

In his separate opinion, Judge Sir Robert Jennings disagreed with the Court on this point. Relying on the practice of States in the Optional-Clause system, he said "In face of the unmistakable trend of recent developments' I feel bound to conclude that States now... have the right

(41) In the **Nuclear Test** cases, the ICJ had the following to say on unilateral acts: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration". ICJ Rep.1974, p.267, para.43.

(42) ICJ Rep. 1984, p.419, para.61.

(43) Ibid., p.421, para.65.

before seisin of the Court, to withdraw or alter their declarations of acceptance, with immediate effect, and moreover, even in anticipation of a particular case or class of cases. If this is so, then it follows that the Shultz letter was effective to deprive the Court of jurisdiction under Article 36, paragraph 2, of the Court's Statute."⁽⁴⁴⁾

The United States had also invoked what the Court called the "multilateral treaty reservation", which excludes from the Court's jurisdiction 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." The United States pointed out that Nicaragua relied in its Application on four multilateral treaties, namely the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. The United States claimed that the Court may exercise jurisdiction "only if all treaty parties affected by a prospective decision of the Court are also parties to the case."⁽⁴⁵⁾

The Court joined this objection to the merits on the ground that it "does not possess, in the circumstances of the case, an exclusively preliminary character."⁽⁴⁶⁾

The Court then addressed the objection of the United States to the invocation by Nicaragua of the Treaty of Friendship, Commerce and Navigation as a basis of the Court's jurisdiction. The Court observed that "the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial." The Court went on to say "... it is certainly desirable that 'the legal grounds upon which the jurisdiction of the Court is said to be based' should be indicated at an early stage in the proceedings... 'as far as possible' in the application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed on that basis, ... and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character... Both these conditions are satisfied in the present case."⁽⁴⁷⁾

(44) Ibid. p.553.

(45) Ibid., p.422, para.68.

(46) Ibid., p.425, para.76.

(47) Ibid., pp.426-427, para.80.

The Court then proceeded to consider Article XXIV, paragraph 2, of that Treaty and held that taking into account Articles I,XIV,XVII,XIX and XX of the Treaty, particularly the provision in, *inter alia*, Article XIX, for the freedom of commerce and navigation. "there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the Treaty. That dispute is also clearly one which is not 'satisfactorily adjusted by diplomacy' within the meaning of Article XXIV of the 1956 Treaty"⁽⁴⁸⁾

It may be interesting to point out that United States invoked a similar provision in the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between itself and Iran to found the jurisdiction of the Court to deal with its dispute with Iran regarding the American hostages in Tehran.⁽⁴⁹⁾

2. Admissibility

It may be recalled that the United States contended that the Nicaraguan Application was inadmissible on five grounds. First, "Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application" These parties are Honduras, Costa Rica and El Salvador. The United States further claimed that "... it is fundamental to the jurisprudence of the Court that it cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court."⁽⁵⁰⁾ Replying to this, the Court said that in none of the communications from the three States was any indication of an intention to intervene in the proceedings before the Court between Nicaragua and the United States, and one (Costa Rica) made it abundantly clear that it was not to be regarded as indicating such intention. At a later date El Salvador did of course

(48) Ibid., p.428, para.83. In the *Mavrommatis Concessions* case, the PCIJ defined "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons". PCIJ Series A, No.2, p.11. See also the South-West Africa cases, I.C.J. Rep. 1962, p.328.

(49) See ICJ Rep. 1980, p.27, para.51.

(50) ICJ Rep. 1984, p.430, para.86.

endeavour to intervene. ⁽⁵¹⁾The Court further stated that “there is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning **Monetary Gold Removed from Rome in 1943**, to exercise the jurisdiction conferred upon it where the legal interests of a State party to the proceedings ‘would not only be affected by a decision, but would form the very subject-matter of the decision’ (ICJ Reports 1954, p.32)”. The Court went on to say: “there is no trace, either in the Statute or in the practice of international tribunals, of an ‘indisponible parties’ rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the **Monetary Gold** case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings”⁽⁵²⁾.

The second ground was that each of Nicaragua’s allegations constituted no more than a reformulation and restatement of a single fundamental claim that the “United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nation Security Council”. It went on “under Article 52 of the Charter there is also a commitment or responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates.”⁽⁵³⁾

The third ground was that “... Nicaragua’s Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and... that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua.”⁽⁵⁴⁾

(51) Ibid., p.431, para. 87. In its Order of 4 October 1984, the Court decided that the declaration of intervention of El Salvador is inadmissible inasmuch as it relates to the current phase of the proceedings brought by Nicaragua against the United States. ICJ Rep. 1984, p.216.

(52) ICJ Rep. 1984, p.431, para.88.

(53) Ibid., pp.431-432, para.89.

(54) Ibid., p.432, para.91.

The Court replied to the second and third grounds jointly. It held that “having regard to the **United States Diplomatic and Consular Staff in Tehran** case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*”. The Court quoted the following passage from its judgement in that case: “whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court... It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important’ and sometimes decisive, factor in promoting the peaceful settlement of the dispute. this is indeed recognized by Article 36 [paragraph3] of the Charter’... (ICJ Reports 1980, p.22, para. 40)”⁽⁵⁵⁾

In rejecting the United States argument, the Court said that “it is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement”⁽⁵⁶⁾ With respect to the question of the submission of the dispute to the Security Council, the Court said “the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same event”⁽⁵⁷⁾. The Court then observed that “... in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purpose of the case.”⁽⁵⁸⁾

(55) Ibid., p.434, para.93. Article 36, para.3, of the Charter reads: “In making recommendations under this Article the Security council should also take into Consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court”.

(56) Ibid., para.94.

(57) Ibid., p.435, para.95.

(58) Ibid., para.97.

.The fourth ground of inadmissibility put forward by the United States was that “the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving conflict. ... The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernable by the means available to the adjudicating tribunal, establishable in conformity with the applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings.”⁽⁵⁹⁾

The Court replied to this objection by observing that “any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law”. It went on “ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it, and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof”.⁽⁶⁰⁾

The fifth ground of inadmissibility was that “... Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America.... The contadora process, to which Nicaragua is party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appropriate method for the resolution of the issues of Central America.”⁽⁶¹⁾

The Court rejected this ground and observed that “... even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court.” The Court recalled that in the **Aegean Sea Continental Shelf** case, it held that “... the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial functions.” (ICJ Reports 1978 p.12, para. 29)⁽⁶²⁾ As regards the Contadora process, the Court said that it “does not consider that the Contadora process, whatever its merits, can properly be regarded as a ‘regional arrangement’ for the purposes of Chapter VIII of

(59) Ibid., p.436, para.99.

(60) Ibid., p.437, para.101.

(61) Ibid., p.438, para.102.

(62) Ibid., p.440, para.106.

the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case have made, touching on the issue of the settlement of disputes or of the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter...⁽⁶³⁾ It is not insignificant that the finding of the Court on the admissibility of Nicaragua's Application was unanimous.

On 18 January 1985, the United States decided not to participate in further proceedings of the ICJ in the case. The United States claimed that "... the proceedings initiated by Nicaragua in the International Court of Justice are a misuse of the Court for political purposes and that the Court lacks jurisdiction and competence over such a case. The Court's decision of November 26, 1984, finding that it has jurisdiction is contrary to law and fact."⁽⁶⁴⁾ It went on to say "the Court's decision is a marked departure from its past cautious approach to jurisdictional questions. The haste with which the Court proceeded to a judgment on these issues ... only adds to the impression that the Court is determined to find in favour of Nicaragua in this case."⁽⁶⁵⁾

It is, indeed, surprising to see such accusations leveled against the Court, for it has examined, objectively and meticulously, the arguments of both parties to the case before concluding that it has jurisdiction. The manner in which the Court dealt with the case shows very clearly the fair and impartial conduct expected of such a highly respected judicial body. And each of the Court's conclusions has been based on a legal basis. As an American international lawyer, commenting on this question said: "no part of [the Court's decision], however, appears to this American international lawyer to be insupportable in law and thus, evidently, a manifestation of 'politicization'. It is a decision as to which reasonable men and women versed in the law can and will differ."⁽⁶⁶⁾ It may be

(63) Ibid., para. 107. Article 103 reads: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

(64) See Statement on the United States Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice (18 January 1985), reproduced in **XXIV International Legal Materials**, January 1985, p.246.

(65) Ibid., p.448.

(66) See Thomas M. Franck "Icy Day in the ICJ" 79 **American Journal of International Law** (1985) p.384.

recalled that the United States itself resorted to the same Court in its dispute with Iran on the American hostages in Tehran, a dispute which is similar, in several respects to the present dispute' and got satisfaction. "this is, after all, the same Court that, despite its socialist and Third World membership, overwhelmingly endorsed the U.S. complaint against Iran during the hostage crisis in 1980,"⁽⁶⁷⁾

The Court went on to consider the merits of the case, in spite of the non-participation of the United States, in accordance with Article 53 of its Statute⁽⁶⁸⁾, and its judgment thereon is expected shortly.⁽⁶⁹⁾

(67) Loc. cit. p.381.

(68) Art. 53 reads as follows: "1. Whenever one of the parties does not appear before the Court, or fails to defend his case, the other party may call upon the Court to decide in favour of its claim. 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law".

(69) The ICJ delivered its judgment on 27 June 1986.