

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA) (PROVISIONAL MEASURES)

Order of 10 May 1984

By an Order issued in the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court:

A. Rejected the request made by the United States of America that the case be removed from the list and

B. Indicated the following provisional measures, pending the final decision;

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

B.2. The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, 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;

B.3. The United States of America and Nicaragua

should ensure that no action is taken which might aggravate or extend the dispute submitted to the Court;

B.4. The United States of America and Nicaragua should ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render.

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These decisions were unanimously adopted, except in respect of paragraph B.2 which was adopted by fourteen votes to one.

The Court was composed as follows:

President T. O. Elias, *Vice-President* J. Sette-Camara, *Judges* M. Lachs, P. Morozov, Nagendra Singh, J. M. Ruda, H. Mosler, S. Oda, R. Ago, A. El-Khani, S. M. Schwebel, Sir Robert Jennings, G. de Lacharrière, K. Mbaye, M. Bedjaoui.

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Judges Mosler and Sir Robert Jennings appended a joint separate opinion to the Order of the Court. Judge Schwebel,

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who voted against paragraph B.2 of the Order, appended a dissenting opinion. (A brief summary of these opinions may be found annexed hereto.)

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Proceedings before the Court
(paras. 1–9)

In its Order, the Court recalled that on 9 April 1984 Nicaragua instituted proceedings against the United States of America, in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. On the basis of the facts alleged in its Application, Nicaragua requested the Court to adjudge and declare (*inter alia*):

— that the United States of America had violated and was violating its obligations to Nicaragua, under several international instruments and under general and customary international law;

— that the United States of America was under a duty to cease and desist immediately from all use of force against Nicaragua, all violations of the sovereignty, territorial integrity or political independence of Nicaragua, all support of any kind to anyone engaged in military or paramilitary actions in or against Nicaragua, and all efforts to restrict access to or from Nicaraguan ports;

— that the United States of America has an obligation to pay Nicaragua reparation for damages incurred by reason of these violations.

On the same day, Nicaragua urgently requested the Court to indicate provisional measures:

“— That the United States should immediately cease and desist from providing, directly or indirectly, any support—including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support—to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua;

“— That the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua.”

Shortly after the institution of these proceedings, the United States of America notified the Registry that it had appointed an Agent for the purposes of this case and, being convinced that the Court was without jurisdiction in the case, requested the Court to preclude any further proceedings and to remove the case from the list (letters of 13 and 23 April 1984). On 24 April, taking into account a letter of the same date from Nicaragua, the Court decided that it had then no sufficient basis for acceding to the request of the United States.

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Jurisdiction
(paras. 10–26)

Declaration of Nicaragua and request for removal from the List made by the United States
(paras. 10–21)

Nicaragua claims to found the jurisdiction of the Court to entertain this case on the declarations of the Parties accepting the compulsory jurisdiction of the Court under Article 36,

paragraph 2, of the Statute of the Court, namely the Declaration made by the United States of America dated 26 August 1946 and the Declaration made by Nicaragua dated 24 September 1929. Under the system of international judicial settlement of disputes in which the consent of the States constitutes the basis of the Court's jurisdiction, a State having accepted the jurisdiction of the Court by a declaration may rely on the declaration by which another State has also accepted the jurisdiction of the Court, in order to bring a case before the Court.

Nicaragua claims to have recognized the compulsory jurisdiction of the Permanent Court of International Justice by its declaration of 24 September 1929, which, it claims, continues in force and is deemed by virtue of Article 36, paragraph 5, of the Statute of the present Court to be an acceptance of the compulsory jurisdiction of that Court.¹

The United States contends that Nicaragua never ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, that Nicaragua never became a party to the Statute of the Permanent Court, and that consequently the declaration by Nicaragua of 1929 never came into force and that Nicaragua cannot be deemed to have accepted the compulsory jurisdiction of the present Court by virtue of Article 36 of its Statute. The United States therefore requests the Court to preclude any further proceedings and to remove the case from the list.

For its part, Nicaragua asserts that it duly ratified the Protocol of Signature of the Statute of the Permanent Court, and sets forth a number of points in support of the legal validity of its declaration of 1929. The two Parties explained their arguments at length during the oral proceedings.

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The Court finds that in this case, the question is whether Nicaragua, having deposited a declaration of acceptance of the jurisdiction of the Permanent Court, can claim to be a “State accepting the same obligation” within the meaning of Article 36, paragraph 2, of the Statute, so as to invoke the declaration of the United States. As the contentions of the Parties disclose a “dispute as to whether the Court has jurisdiction”, the matter has to be settled by the decision of the Court, after having heard the Parties. The Court is therefore unable to accede to the United States' request summarily to remove the case from the list.

Declaration of the United States
(paras. 22 and 23)

The United States also disputes the jurisdiction of the Court in this case by relying on a declaration which it deposited on 6 April 1984, referring to its 1946 Declaration, and providing that that Declaration “shall not apply to disputes with any Central American State or arising out of or related to events in Central America” and that it “shall take effect immediately and shall remain in force for a period of two years”. Since the dispute with Nicaragua, in its opinion, clearly falls within the terms of the exclusion in the declaration of 6 April 1984, it considers that the 1946 Declaration cannot confer jurisdiction on the Court to entertain the case. For its part, Nicaragua considers that the declaration of

¹Under Article 36, paragraph 5, of the Statute of the Court, a declaration made pursuant to the Statute of the Permanent Court which is “still in force” is to be deemed, as between the Parties to the Statute, to be an acceptance of the jurisdiction of the International Court of Justice for the period which it still has to run.

6 April 1984 could not have modified the 1946 Declaration which, not having been validly terminated, remains in force.

Conclusion
(paras. 24–26)

The Court observes that it ought not to indicate provisional measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction might be founded. It does not now have to determine the validity or invalidity of the declaration of Nicaragua of 24 September 1929 and, the question whether or not Nicaragua could thus rely on the United States Declaration of 16 August 1946, or the question whether, as a result of the declaration of 6 April 1984, the Application is excluded as from this date from the scope of the United States acceptance of the compulsory jurisdiction of the Court. It finds that the declarations deposited by the two Parties respectively in 1929 and in 1946 nevertheless appear to afford a basis on which the jurisdiction of the Court might be founded.

Provisional Measures
(paras. 27–40)

The Order sets out the circumstances alleged by Nicaragua as requiring the indication of provisional measures, and the material it has provided to support its allegations. The Government of the United States has stated that the United States does not intend to engage in a debate concerning the facts alleged by Nicaragua, given the absence of jurisdiction, but it has admitted no factual allegations by Nicaragua whatever. The Court had available to it considerable information concerning the facts of the present case, including official statements of United States authorities, and has to consider whether the circumstances drawn to its attention require the indication of provisional measures, but it makes it clear that the right of the respondent to dispute the facts alleged must remain unaffected by its decision.

After setting out the rights which, according to Nicaragua, should be urgently protected by the indication of provisional measures, the Court considers three objections raised by the United States (in addition to the objection relating to jurisdiction) against the indication of such measures.

First, the indication of provisional measures would interfere with the negotiations being conducted in the context of the work of the Contadora Group, and would directly involve the rights and interests of States not Parties to this case; secondly, these negotiations constituted a regional process within which Nicaragua is under a good faith obligation to negotiate; thirdly, the Application by Nicaragua raises issues which should more properly be committed to resolution by the political organs of the United Nations and of the Organization of American States.

Nicaragua disputes the relevance to this case of the Contadora process—in which it is actively participating—denies that its claim could prejudice the rights of other States, and recalls previous decisions of the Court, by virtue of which, in its opinion, the Court is not required to decline to undertake an essentially judicial task merely because the question before it is intertwined with political questions.

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The Court finds that the circumstances require that it should indicate provisional measures, as provided by Article

41 of the Statute, in order to preserve the rights claimed. It emphasizes that its decision in no way prejudices the question of its jurisdiction to deal with the merits of the case and leaves unaffected the right of the Government of the United States and of the Government of Nicaragua to submit arguments in respect of such jurisdiction or such merits.

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For these reasons, the Court gives the decision of which the complete text is reproduced below:

OPERATIVE PART OF THE ORDER

THE COURT,*

A. Unanimously,

Rejects the request made by the United States of America that the proceedings on the Application filed by the Republic of Nicaragua on 9 April 1984, and on the request filed the same day by the Republic of Nicaragua for the indication of provisional measures, be terminated by the removal of the case from the list;

B. *Indicates*, pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America, the following provisional measures:

1. Unanimously,

The United States of America 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 fourteen votes to one,

The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, 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.

FOR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

AGAINST: *Judge* Schwebel.

3. Unanimously,

The Governments of the United States of America and the Republic of 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.

4. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no

*Composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case.

C. Unanimously,

Decides further that, until the Court delivers its final judgment in the present case, it will keep the matters covered by this Order continuously under review.

D. Unanimously,

Decides that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application;

And reserves the fixing of the time-limits for the said written proceedings, and the subsequent procedure, for further decision.

SUMMARY OF OPINIONS APPENDED TO
THE ORDER OF THE COURT

*Separate opinion of Judges Mosler and
Sir Robert Jennings*

Judges Mosler and Jennings, in a separate opinion, emphasised that the duties to refrain from illegal use of force or threat of force, and from intervention in the affairs of another State, are duties which apply to Nicaragua as well as to the United States; and that both States are under an obligation to pursue negotiations in good faith in the context of regional arrangements.

Dissenting opinion of Judge Schwebel

Judge Schwebel voted in favour of the Court's rejection of the United States request to dismiss Nicaragua's case on jurisdictional grounds, and voted as well for the Court's indication that the United States should not restrict access to and from Nicaraguan ports, particularly by mine-laying. He "emphatically" dissented from the provision of the Court's Order holding that the right to sovereignty and to political independence possessed by Nicaragua "should be fully

respected and should not in any way be jeopardized by any military or paramilitary activities which are prohibited by the principles of international law". Judge Schwebel characterized that provision's "emphasis upon the rights of Nicaragua—in a case in which Nicaragua itself is charged with violating the territorial integrity and political independence of its neighbours"—as "unwarranted" and "incompatible with the principles of equality of States and of collective security".

Judge Schwebel observed that the charges advanced by the United States against Nicaragua were "of a gravity no less profound" than the charges of Nicaragua against the United States, and that like charges had been made against Nicaragua by El Salvador, Honduras and Costa Rica. Those three Central American States were not parties to this case. Nevertheless, claims that Nicaragua is violating their security may properly be made by the United States and acted upon by the Court, for the rights at issue in the case "do not depend", Judge Schwebel held, "upon narrow considerations of privity to a dispute before the Court. They depend upon the broad considerations of collective security". Every State has "a legal interest" in the observance of the principles of collective security. The United States accordingly was justified in invoking before the Court what it saw as wrongful acts of Nicaragua against other Central American States "not because it can speak for Costa Rica, Honduras and El Salvador but because the alleged violation by Nicaragua of their security is a violation of the security of the United States".

Judge Schwebel declared that he felt able to vote for the provision of the Court's Order concerning mine-laying—which is addressed only to the United States—because the United States had not alleged before the Court that Nicaragua is mining the ports and waters of foreign States.

Judge Schwebel supported the Court's rejection of the United States challenge to jurisdiction because, at the stage of indication of provisional measures, all Nicaragua had to do was to make out, *prima facie*, a basis on which the Court's jurisdiction might be founded.