

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

(MERITS)

Judgment of 27 June 1986

Výňatky:

VIII. *The conduct of Nicaragua* (paras. 126-171)

The Court has to ascertain, so far as possible, whether the activities of the United States complained of, claimed to have been the exercise of collective self-defence, may be justified by certain facts attributable to Nicaragua.

1. The United States has contended that Nicaragua was *actively supporting armed groups operating in certain of the neighbouring countries*, particularly in El Salvador, and specifically in the form of the *supply of arms*, an accusation which Nicaragua has repudiated. The Court first examines the activity of Nicaragua with regard to El Salvador.

Having examined various evidence, and taking account of a number of concordant indications, many of which were provided by Nicaragua itself, from which the Court can reasonably infer the provision of a certain amount of aid from Nicaraguan territory, the Court concludes that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. Subsequently, evidence of military aid from or through Nicaragua remains very weak, despite the deployment by the United States in the region of extensive technical monitoring resources. The Court cannot however conclude that no transport of or traffic in arms existed. It merely takes note that the allegations of arms traffic are not solidly established, and has not been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

Even supposing it were established that military aid was reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that such aid is imputable to the authorities of Nicaragua, which has not sought to conceal the possibility of weapons crossing its territory, but denies that this is the result of any deliberate official policy on its part. Having regard to the circumstances characterizing this part of Central America, the Court considers that it is scarcely possible for Nicaragua's responsibility for arms traffic on its territory to be automatically assumed. The Court considers it more consistent with the probabilities to recognize that an activity of that nature, if on a limited scale, may very well be pursued unknown to the territorial government. In any event the evidence is insufficient to satisfy the Court that the Government of Nicaragua was responsible for any flow of arms at either period.

2. The United States has also accused Nicaragua of being responsible for *cross-border military attacks* on Honduras and Costa Rica. While not as fully informed on the question as it would wish to be, the Court considers as established the fact that certain trans-border military incursions are imputable to the Government of Nicaragua.

3. The Judgment recalls certain events which occurred at the time of the fall of President Somoza, since reliance has been placed on them by the United States to contend that the present Government of Nicaragua is in violation of certain alleged *assurances* given by its immediate predecessor. The Judgment refers in particular to the "Plan to secure peace" sent on 12 July 1979 by the "Junta of the Government of National Reconstruction" of Nicaragua to the Secretary-General of the OAS, mentioning, *inter alia*, its "firm intention to establish full observance of human rights in our country" and "to call the first free elections our country has known in this century". The United States considers that it has a special responsibility regarding the implementation of these commitments.

IX. *The applicable law: customary international law* (paras. 172-182)

The Court has reached the conclusion (section V, *in fine*) that it has to apply the multilateral treaty reservation in the United States declaration, the consequential exclusion of multilateral treaties being without prejudice either to other treaties or other sources of law enumerated in Article 38 of the Statute. In order to determine the law actually to be applied to the dispute, it has to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

The Court, which has already commented briefly on this subject in the jurisdiction phase (*I.C.J. Reports 1984*, pp. 424 and 425, para. 73), develops its initial remarks. It does not consider that it can be claimed, as the United States does, that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. Even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Consequently, the Court is in no way bound to uphold customary rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying.

In response to an argument of the United States, the Court considers that the divergence between the content of the customary norms and that of the treaty law norms is not such that a judgment confined to the field of customary international law would not be susceptible of compliance or execution by the parties.

X. *The content of the applicable law* (paras. 183 to 225)

1. *Introduction: general observations* (paras. 183-186)

The Court has next to consider what are the rules of customary law applicable to the present dispute. For this purpose it has to consider whether a customary rule exists in the *opinio juris* of States, and satisfy itself that it is confirmed by practice.

2. *The prohibition of the use of force, and the right of self-defence* (paras. 187 to 201)

The Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or

political independence of any State, or in any other manner inconsistent with the purposes of the United Nations (Art. 2, para. 4, of the Charter). The Court has however to be satisfied that there exists in customary law an *opinio juris* as to the binding character of such abstention. It considers that this *opinio juris* may be deduced from, *inter alia*, the attitude of the Parties and of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". Consent to such resolutions is one of the forms of expression of an *opinio juris* with regard to the principle of non-use of force, regarded as a principle of customary international law, independently of the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

The general rule prohibiting force established in customary law allows for certain exceptions. The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an "inherent right", and from the declaration in resolution 2625 (XXV). The Parties, who consider the existence of this right to be established as a matter of customary international law, agree in holding that whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.

Whether self-defence be individual or collective, it can only be exercised in response to an "armed attack". In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces. The Court quotes the definition of aggression annexed to General Assembly resolution 3314 (XXIX) as expressing customary law in this respect.

The Court does not believe that the concept of "armed attack" includes assistance to rebels in the form of the provision of weapons or logistical or other support. Furthermore, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to have been attacked.

3. *The principle of non-intervention* (paras. 202 to 209)

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. Expressions of an *opinio juris* of States regarding the existence of this principle are numerous. The Court notes that this principle, stated in its own jurisprudence, has been reflected in numerous declarations and resolutions adopted by international organizations and conferences in which the United States and Nicaragua have participated. The text thereof testifies to the acceptance by the United States and Nicaragua of a customary principle which has universal application. As to the content of the principle in customary law, the Court defines the constitutive elements which appear relevant in this case: a prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is

wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.

With regard to the practice of States, the Court notes that there have been in recent years a number of instances of foreign intervention in one State for the benefit of forces opposed to the government of that State. It concludes that the practice of States does not justify the view that any general right of intervention in support of an opposition within another State exists in contemporary international law; and this is in fact not asserted either by the United States or by Nicaragua.

4. *Collective counter-measures in response to conduct not amounting to armed attack* (paras. 210 and 211)

The Court then considers the question whether, if one State acts towards another in breach of the principle of non-intervention, a third State may lawfully take action by way of counter-measures which would amount to an intervention in the first State's internal affairs. This would be analogous to the right of self-defence in the case of armed attack, but the act giving rise to the reaction would be less grave, not amounting to armed attack. In the view of the Court, under international law in force today, States do not have a right of "collective" armed response to acts which do not constitute an "armed attack".

5. *State sovereignty* (paras. 212 to 214)

Turning to the principle of respect for State sovereignty, the Court recalls that the concept of sovereignty, both in treaty-law and in customary international law, extends to the internal waters and territorial sea of every State and to the airspace above its territory. It notes that the laying of mines necessarily affects the sovereignty of the coastal State, and that if the right of access to ports is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce.

6. *Humanitarian law* (paras. 215 to 220)

The Court observes that the laying of mines in the waters of another State without any warning or notification is not only an unlawful act but also a breach of the principles of humanitarian law underlying the Hague Convention No. VIII of 1907. This consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Nicaragua has not expressly invoked the provisions of international humanitarian law as such, but has complained of acts committed on its territory which would appear to be breaches thereof. In its submissions it has accused the United States of having killed, wounded and kidnapped citizens of Nicaragua. Since the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the *contras*, the Court rejects this submission.

The question however remains of the law applicable to the acts of the United States in relation to the activities of the *contrast*. Although Nicaragua has refrained from referring to the four Geneva Conventions of 12 August 1949, to which Nicaragua and the United States are parties, the Court considers that the rules stated in Article 3, which is common to the four Conventions, applying to armed conflicts of a non-international character, should be applied. The United States is under an obligation to "respect" the Conventions and even to "ensure

respect" for them, and thus not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3. This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression.

7. *The 1956 treaty* (paras. 221 to 225)

In its Judgment of 26 November 1984, the Court concluded that it had jurisdiction to entertain claims concerning the existence of a dispute between the United States and Nicaragua as to the interpretation or application of a number of articles of the treaty of Friendship, Commerce and Navigation signed at Managua on 21 January 1956. It has to determine the meaning of the various relevant provisions, and in particular of Article XXI, paragraphs I (c) and I (d), by which the parties reserved the power to derogate from the other provisions.

XI. *Application of the law to the facts* (paras. 226 to 282)

Having set out the facts of the case and the rules of international law which appear to be in issue as a result of those facts, the Court has now to appraise the facts in relation to the legal rules applicable, and determine whether there are present any circumstances excluding the unlawfulness of particular acts.

1. *The prohibition of the use of force and the right of self-defence* (paras. 227 to 238)

Appraising the facts first in the light of the principle of the non-use of force, the Court considers that the laying of mines in early 1984 and certain attacks on Nicaraguan ports, oil installations and naval bases, imputable to the United States constitute infringements of this principle, unless justified by circumstances which exclude their unlawfulness. It also considers that the United States has committed a prima facie violation of the principle by arming and training the *contras*, unless this can be justified as an exercise of the right of self-defence.

On the other hand, it does not consider that military manoeuvres held by the United States near the Nicaraguan borders, or the supply of funds to the *contras*, amounts to a use of force.

The Court has to consider whether the acts which it regards as breaches of the principle may be justified by the exercise of the right of collective self-defence, and has therefore to establish whether the circumstances required are present. For this, it would first have to find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica, since only such an attack could justify reliance on the right of self-defence. As regards El Salvador, the Court considers that in customary international law the provision of arms to the opposition in another State does not constitute an armed attack on that State. As regards Honduras and Costa Rica, the Court states that, in the absence of sufficient information as to the transborder incursions into the territory of those two States from Nicaragua, it is difficult to decide whether they amount, singly or collectively, to an armed attack by Nicaragua. The Court finds that neither these incursions nor the alleged supply of arms may be relied on as justifying the exercise of the right of collective self-defence.

Secondly, in order to determine whether the United States was justified in exercising self-defence, the Court has to ascertain whether the circumstances required for the exercise of this right of collective self-defence were present, and therefore considers whether the States in

question believed that they were the victims of an armed attack by Nicaragua, and requested the assistance of the United States in the exercise of collective self-defence. The Court has seen no evidence that the conduct of those States was consistent with such a situation.

Finally, appraising the United States activity in relation to the criteria of necessity and proportionality, the Court cannot find that the activities in question were undertaken in the light of necessity, and finds that some of them cannot be regarded as satisfying the criterion of proportionality.

Since the plea of collective self-defence advanced by the United States cannot be upheld, it follows that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts referred to in the first paragraph of this section.

2. *The principle of non-intervention* (paras. 239 to 245)

The Court finds it clearly established that the United States intended, by its support of the *contras*, to coerce Nicaragua in respect of matters in which each State is permitted to decide freely, and that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua. It considers that if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow its government, that amounts to an intervention in its internal affairs, whatever the political objective of the State giving support. It therefore finds that the support given by the United States to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. Humanitarian aid on the other hand cannot be regarded as unlawful intervention. With effect from 1 October 1984, the United States Congress has restricted the use of funds to "humanitarian assistance" to the *contrast*. The Court recalls that if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of another State, it must be limited to the purposes hallowed in the practice of the Red Cross, and above all be given without discrimination.

With regard to the form of indirect intervention which Nicaragua sees in the taking of certain action of an economic nature against it by the United States, the Court is unable to regard such action in the present case as a breach of the customary law principle of non-intervention.

3. *Collective counter-measures in response to conduct not amounting to armed attack* (paras. 246 to 249)

Having found that intervention in the internal affairs of another State does not produce an entitlement to take collective counter-measures involving the use of force, the Court finds that the acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

4. *State sovereignty* (paras. 250 to 253)

The Court finds that the assistance to the *contras*, the direct attacks on Nicaraguan ports, oil installations, etc., the mining operations in Nicaraguan ports, and the acts of intervention involving the use of force referred to in the Judgment, which are already a breach of the principle of non-use of force, are also an infringement of the principle of respect for territorial

sovereignty. This principle is also directly infringed by the unauthorized overflight of Nicaraguan territory. These acts cannot be justified by the activities in El Salvador attributed to Nicaragua; assuming that such activities did in fact occur, they do not bring into effect any right belonging to the United States. The Court also concludes that, in the context of the present proceedings, the laying of mines in or near Nicaraguan ports constitutes an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce.

5. *Humanitarian law* (paras. 254 to 256)

The Court has found the United States responsible for the failure to give notice of the mining of Nicaraguan ports.

It has also found that, under general principles of humanitarian law, the United States was bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of common Article 3 of the four Geneva Conventions of 12 August 1949. The manual on "Psychological Operations in Guerrilla Warfare", for the publication and dissemination of which the United States is responsible, advises certain acts which cannot but be regarded as contrary to that article.

6. *Other grounds mentioned in justification of the acts of the United States* (paras. 257 to 269)

The United States has linked its support to the *contras* with alleged breaches by the Government of Nicaragua of certain solemn commitments to the Nicaraguan people, the United States and the OAS. The Court considers whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States in response to the alleged violations. With reference to the "Plan to secure peace" put forward by the Junta of the Government of National Reconstruction (12 July 1979), the Court is unable to find anything in the documents and communications transmitting the plan from which it can be inferred that any legal undertaking was intended to exist. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. Furthermore the Respondent has not advanced a legal argument based on an alleged new principle of "ideological intervention".

With regard more specifically to alleged violations of human rights relied on by the United States, the Court considers that the use of force by the United States could not be the appropriate method to monitor or ensure respect for such rights, normally provided for in the applicable conventions. With regard to the alleged militarization of Nicaragua, also referred to by the United States to justify its activities, the Court observes that in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

7. *The 1956 Treaty* (paras. 270 to 282)

The Court turns to the claims of Nicaragua based on the Treaty of Friendship, Commerce and Navigation of 1956, and the claim that the United States has deprived the Treaty of its object and purpose and emptied it of real content. The Court cannot however entertain these claims unless the conduct complained of is not "measures . . . necessary to protect the essential

security interests" of the United States, since Article XXI of the Treaty provides that the Treaty shall not preclude the application of such measures. With regard to the question what activities of the United States might have been such as to deprive the Treaty of its object and purpose, the Court makes a distinction. It is unable to regard all the acts complained of in that light, but considers that there are certain activities which undermine the whole spirit of the agreement. These are the mining of Nicaraguan ports, the direct attacks on ports, oil installations, etc., and the general trade embargo.

The Court also upholds the contention that the mining of the ports is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX of the Treaty. It also concludes that the trade embargo proclaimed on 1 May 1985 is contrary to that article.

The Court therefore finds that the United States is *prima facie* in breach of an obligation not to deprive the 1956 Treaty of its object and purpose (*pacta sunt servanda*), and has committed acts in contradiction with the terms of the Treaty. The Court has however to consider whether the exception in Article XXI concerning "measures . . . necessary to protect the essential security interests" of a Party may be invoked to justify the acts complained of. After examining the available material, particularly the Executive Order of President Reagan of 1 May 1985, the Court finds that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, and the general trade embargo of 1 May 1985, cannot be justified as necessary to protect the essential security interests of the United States.

XII. *The claim for reparation* (paras. 283 to 285)

The Court is requested to adjudge and declare that compensation is due to Nicaragua, the quantum thereof to be fixed subsequently, and to award to Nicaragua the sum of 370.2 million US dollars as an interim award. After satisfying itself that it has jurisdiction to order reparation, the Court considers appropriate the request of Nicaragua for the nature and amount of the reparation to be determined in a subsequent phase of the proceedings. It also considers that there is no provision in the Statute of the Court either specifically empowering it or debarring it from making an interim award of the kind requested. In a cases in which one Party is not appearing, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. The Court therefore does not consider that it can accede *at this stage* to this request by Nicaragua.

XIII. *The provisional measures* (paras. 286 to 289)

After recalling certain passages in its Order of 10 May 1984, the Court concludes that it is incumbent on each Party not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law

XIV. *Peaceful settlement of disputes; the Contadora process* (paras. 290 to 291)

In the present case the Court has already taken note of the Contadora process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly, as well as by Nicaragua and the United States. It recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting peace in Central America, in accordance with the principle of customary international law that

prescribes the peaceful settlement of international disputes, also endorsed by Article 33 of the United Nations Charter.