

# Introduction from the Podium

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**Abstract** Nicaragua entered in the legend of the International Court of Justice in 1984 when it filed an Application against the United States, a ‘winning-bet’ which led to the epoch-making Judgment of 27 June 1986. It has since then based part of its ‘foreign legal policy’ on the World Court and entrusted it to settle most of its disputes with its neighbours. Before the Court, Nicaragua’s judicial strategy is marked by pragmatism and mutual confidence between Nicaragua, represented by the Agent, and Counsel which is stable even if it unavoidably evolves with the time. Globally Nicaragua’s judicial strategy appears as a success. Moreover, the fourteen cases Nicaragua participated in gave the Court an opportunity to deal with and clarify a significant number of questions of international law. Nicaragua deserves credit for that.

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With my deep appreciation to Benjamin Samson, PhD Candidate, University Paris Nanterre, and consultant in public international law, for his assistance in the preparation of this paper.

Alain Pellet was part of the legal team representing the Republic of Nicaragua in the following cases: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*; *Border and Transborder Armed Actions (Nicaragua v. Costa Rica)*; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia (Nicaragua v. Colombia)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*; *Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*. The views and opinions expressed in this Chapter are those of the author and do not necessarily reflect the views and opinions of the Republic of Nicaragua.

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## 1 Introduction

Nicaragua is on the podium of the States that have competed most often in the arena of the International Court of Justice<sup>1</sup>—in fourteen cases to be exact: eight times as applicant, five as respondent, and once as an intervener.<sup>2</sup> The most famous of all is the case concerning the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Besides the durable and in depth influence that the judgments in these 'Nicaraguan cases' have exerted in numerous fields of international law, Nicaragua has played a considerable role in awakening the Court from the semi-lethargy in which it had fallen since 1963. Indeed, no proceedings had been instituted between 1963 and 1966, 1968 and 1970 or again between 1977 and 1980. In the few years that did have cases, they were seldom more than one per year. The Court had in particular lost the confidence of what was then called the 'Third World' following its unfortunate decision of 1966 in the *South West Africa* case.<sup>3</sup> The 1974 Judgments in the *Nuclear Tests*

<sup>1</sup>Less than the USA (23 cases) but the same record as the UK (14) and France (14 if one includes the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*).

<sup>2</sup>See by date of introduction: *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (hereinafter '*Nicaragua v. United States*'); *Border and Transborder Armed Actions (Nicaragua v. Costa Rica)*; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (hereinafter '*El Salvador/Honduras*'); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*; and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*.

<sup>3</sup>The case concerned the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory thereunder. Implicitly, it raised the question of the compatibility of the extension of the apartheid regime to the Mandate with international law. The

cases<sup>4</sup> had also led France, one of the traditionally most faithful supporters of the Court, to withdraw its optional declaration. The trend was reversed by the solidly motivated and skilful judgments rendered in the *Nicaragua v. United States* case,<sup>5</sup> as well as in the *Frontier Dispute* between Burkina Faso and Mali.<sup>6</sup> They showed that the Court was not an 'irresponsible' body<sup>7</sup> relying on excuses to evade its responsibilities<sup>8</sup> or systematically taking the side of the strongest. Since then, the General List has more than doubled, with an average of three cases being filled per year, largely by 'small' States against more 'powerful' States, if not 'top-ten economies'.<sup>9</sup> In March 2017, the General List includes 166—contentious and advisory—cases, against 68 before the introduction of the 'Big Case' in 1983. Between these two dates, the Court has given 83 Judgments in 69 different cases.<sup>10</sup> A significant number of these cases have come from Central America, with the participation of Nicaragua and/or its neighbours—as well as from Africa.

Court first declared to be competent to rule on the merits (*South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, *Preliminary Objections, Judgment, ICJ Reports 1962*, p. 319). In its Judgment on the second phase, it ultimately held that the Applicant States could not be considered to have established any legal right or interest in the subject matter of their claims and accordingly decided to reject them (*Second Phase, Judgment, ICJ Reports 1966*, p. 6). It triggered widespread and vigorous criticisms from the dissenting Judges, scholars in international law and various States. See notably, the Declaration of the Representative of Liberia to the General Assembly according to which 'seven men perverted justice and brought upon the International Court the greatest opprobrium in its history' (21st session, A/PV.1414, 23 September 1966, para 67); the Declaration of the Foreign Minister of the Ivory Coast, Assouan Usher, speaking of 'an international scandal' (21st session, A/PV.1418, 27 September 1966, para 12); or the Declaration of the President of Senegal Léopold Senghor using a similar wording (AFP, *Bulletin d'Afrique*, 21 July 1966). See also Falk (1967), pp. 1–23; Fischer (1966), pp. 144–154; Friedmann (1967), pp. 1–16; or the tough dissenting opinions of Judges Koretsky (*ICJ Reports 1966*, pp. 239–249 (not. p. 239) and Jessup (*ibid.*, pp. 325–442 (not. pp. 325 or 342)).

<sup>4</sup>*Nuclear Tests (Australia v. France)* and (*New Zealand v. France*), *Judgments, ICJ Reports 1974*, p. 253 and p. 457 respectively.

<sup>5</sup>*Nicaragua v. United States, Preliminary Objections, Judgment, ICJ Reports 1984*, p. 392 (hereinafter '*Nicaragua v. United States (Jurisdiction)*') and *Merits, Judgment, ICJ Reports 1986*, p. 14 (hereinafter '*Nicaragua v. United States (Merits)*').

<sup>6</sup>*Frontier Dispute (Burkina Faso/Mali)*, *Judgment, ICJ Reports 1986*, p. 554. As I have explained elsewhere, this case, based on a special agreement of 16 September 1983, has, no doubt, also played a role in the revival of the Court's activity (see Pellet 2012, p. 483; and Pellet 2013, p. 277).

<sup>7</sup>Declaration of the Representative of Nigeria, General Assembly, 21st session, A/PV.14294 October 1966, paras 11–12.

<sup>8</sup>The President of Madagascar, Philibert Tsiranana, declared that the *South West Africa* Judgment used a '*grossier faux-fuyant permettant à la Cour d'échapper à ses responsabilités*' ['a coarse red herring enabling the Court to escape its responsibilities'] (AFP, *Bulletin d'Afrique*, 22 July 1966).

<sup>9</sup>Satzer (2007), pp. 27–28.

<sup>10</sup>Including 5 Judgments regarding applications to intervene; 6 regarding applications for revision and/or interpretation; 28 regarding preliminary objections/jurisdiction and admissibility. These data are up-to-date on 6 March 2017.

Asia itself has started to take again the track to The Hague following the *Soverignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* case.<sup>11</sup>

Doubtlessly, the *Nicaragua v. United States* case was perceived largely as a kind of revenge of the weak against the strong. As the now lifetime Agent for Nicaragua declared at the end of his pleading on preliminary objections:

This case has aroused worldwide interest not because of the technical legal problems involved, but because the world's hope for peace is placed on the possibility of a small nation obtaining sanctuary in this Palace of Peace. Nicaragua is here before you sincerely hoping there is a way for peace through law on this earth.<sup>12</sup>

In his final statement on the merits, Ambassador Argüello further emphasized: 'The cause of my country is also the cause of all the small nations on earth, who see in the rule of law their only means of survival'.<sup>13</sup> And, as I have written elsewhere,

In my career as counsel, I have often invoked *Nicaragua* in answer to the haunting questions asked systematically by small weak countries that I had the privilege to advise: "are Judges really independent? Do they not tend to be guided by political considerations? Are they not guided by the great northern States?" Or even more common questions: "Do they not always meet halfway?" On these recurrent questions, *Nicaragua* allows a negative answer to be given.

[. . .]

As far as the Court was concerned, it demonstrated that sometimes David can triumph over Goliath.<sup>14</sup>

On the contrary, following the *Nicaragua v. United States* Judgment, the Court's 'traditional clientele from Western Europe and North America retrenched (at least for some years) from affirmatively invoking the Court's jurisdiction'.<sup>15</sup> This is not to say that the Court has exclusively 'become a forum in which the weak sue the strong, or the weak sue each other, but no longer one in which major States feel comfortable bringing disputes as significant as those they chose to submit in earlier years'.<sup>16</sup> Recent developments show that 'Western' States—at least some of them—have in fact not ceased to view the Court as an impartial forum for resolving their disputes.<sup>17</sup>

<sup>11</sup>See the Judgment of 17 December 2002, *ICJ Reports 2002*, p. 625.

<sup>12</sup>*Nicaragua v. United States, ICJ Pleadings*, Statement by Mr. Argüello Gómez of 10 October 1984, Vol. III, p. 141.

<sup>13</sup>*Ibid.*, 20 September 1985, Vol. V, p. 236.

<sup>14</sup>Pellet (2012), p. 484.

<sup>15</sup>Damrosch (2012), p. 141.

<sup>16</sup>*Ibid.*, p. 142.

<sup>17</sup>See e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *ICJ Reports 2012*, p. 99; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, *ICJ Reports 2014*, p. 226; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*.

As regards the subject-matter of the contentious—but also advisory—proceedings heard by the Court, a salient feature of its docket 'has been the invocation of the judicial process in the midst of armed conflict, or to obtain a judicial ruling on the lawfulness of a forcible action taken in the recent past, or to attempt to head off anticipated coercive action, or to challenge the legality of the choices States have made to deter or defend themselves against armed attacks'.<sup>18</sup> *Nicaragua* was, of course, not the first case involving use of force but it gave a considerable boost to such cases.<sup>19</sup>

## 2 The ICJ as an Element of Nicaragua's '*politique juridique extérieure*' (Foreign Legal Policy)<sup>20</sup>

Common sense indicates that the weakest have an interest in a system which does not allow the strongest to freely interpret the law, proportionally to their military power.<sup>21</sup> They are thus more inclined to accept a mandatory system of dispute settlement. On the contrary, the powerful nations have conspicuously rejected any proposal to allocate compulsory jurisdiction for all legal disputes to an international court<sup>22</sup> and only yielded to a system of optional acceptance.<sup>23</sup>

Consequently, and as early as 1929, Nicaragua recognized 'as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice'.<sup>24</sup> This exceptionally wide declaration was deemed as being valid before the ICJ,<sup>25</sup> though Nicaragua made a reservation to it in 2001 in relation to cases based on the interpretation of treaties or awards concluded prior to 31 December 1901.<sup>26</sup>

Nevertheless, once the use of force is ruled out as a means for settling disputes, the interest of the weak for third party procedures diminishes considerably.<sup>27</sup> In any

<sup>18</sup>Damrosch (2012), p. 142.

<sup>19</sup>*Ibid.*

<sup>20</sup>On this concept, see the remarkable essay by Guy de Lacharrière (who was the ICJ Vice-President when the Nicaragua's Application was examined), *La politique juridique extérieure*. Economica, Paris, 1983.

<sup>21</sup>Lacharrière (1983), p. 139.

<sup>22</sup>Such proposal was opposed by France, Italy and the United Kingdom before the Committee of Jurists in charge of establishing the Permanent Court of International Justice, and by the United States and the USSR in 1945 in respect to the ICJ.

<sup>23</sup>See Article 36 of the PCIJ Statute and Article 36(2) of the ICJ Statute.

<sup>24</sup>*LNTS*, Vol. LXXXVIII, p. 283.

<sup>25</sup>Article 36(5) of the ICJ Statute.

<sup>26</sup>*UNTS*, Vol. 2163, p. 347. Following a formal objection by Costa Rica, Nicaragua undertook, by an Agreement of 26 September 2002 between the two governments, 'to maintain, for a period of three years from today's date, the legal status existing on today's date with respect to its declaration of acceptance of the jurisdiction of the International Court of Justice'.

<sup>27</sup>Lacharrière (1983), p. 139.

case, their general and abstract inclination for judicial settlement does not prevent them from trying to escape the jurisdiction of the Court whenever the opportunity arises and with as much determination as the great powers.<sup>28</sup>

Nowadays, the first and most obvious reason which leads States to submit a dispute to the Court rather than to negotiate is their desire and chances to win. In theory at least, the Court could grant all the Applicant's claims if they are well founded, while such a total victory is unlikely in an international negotiation where concessions must be made.<sup>29</sup> A party convinced of the quality of its cause, of the good dispositions of the judges towards it, and not inclined to make even the slightest concession, may then be tempted to resort to the Court to achieve unmitigated success.<sup>30</sup> In practice however, the uncertain content of international law in a rapidly changing world risks to make international litigation into a game of chance.

On the other hand, in some instances, a government can consider referring to the Court a 'lost cause' when it is convinced that sacrifices are reasonable, if not indispensable, to solve peacefully a given dispute but that the public opinion would disavow it if it were to conclude any agreement with the other party or that the Parliament would refuse its ratification.<sup>31</sup> These risks are indeed obviated when the envisaged concessions are imposed by a third party.

## 2.1 The 'Big Case', a Winning Bet

In a conference given in June 1996 at the Institute of Social Studies of Rotterdam, Ambassador Argüello explained.

Between July 1979 and November 1980, two events took place that were to radically change the history of Nicaragua. The first of these was that the Revolution headed by the Sandinista Front succeeded in overthrowing the nearly fifty year long dictatorship of the Somoza family in Nicaragua. The other was the election of Ronald Reagan to the Presidency of the United States. It was inevitable that a "left" oriented revolutionary government would have strong differences with practically any US Administration. But the new Administration was not typical, it was led by a President whose political platform was based on the fight against the "evil empire" and whose only interest in Central America, before the fall of Somoza, had been in opposing the Panama Canal negotiations and the ensuing Treaty. All this spelled trouble for Nicaragua, and it did not take long in coming: less than two months after assuming the presidency, President Reagan made a formal 'Presidential finding', authorizing the Central Intelligence Agency (CIA) to plan and undertake 'covert activities' directed against Nicaragua. Over the next years, these covert operations would increase until they reached the proportions of an all out war against

<sup>28</sup>*Ibid.*

<sup>29</sup>*Ibid.*, p. 142.

<sup>30</sup>*Ibid.*

<sup>31</sup>*Ibid.*, p. 143. I would think this to have been the case when Libya accepted to seize the ICJ in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case.

Nicaragua. This was the background when Nicaragua took the decision at the beginning of 1984 to bring its case to the International Court of Justice.<sup>32</sup>

First prepared by a young radical US lawyer, Paul Reichler, who involved his former Professor of law at Harvard Law School, Abraham Chayes, Nicaragua's Application reflected the perception that the only defence of a small nation against a super power, was respect for international law, and that coming to the Court would be the only way to win the struggle between small and big.

According to Professor TD Gill, Nicaragua had five objectives:

1. to gain support from world public opinion by portraying Nicaragua as a victim of superpower intervention;
2. to influence US public opinion and especially Congressional opinion to oppose further funding of the contra guerrillas;
3. to influence US and especially Congressional opinion to end authorization of "covert" CIA activities against Nicaragua – in particular the mining of its harbours, attacks upon shipping by speedboats and light aircraft, and sabotage of its oil depots and storage facilities, etc.;
4. to isolate the US diplomatically from both its regional Latin American neighbours and allies and its Western partners in its opposition to Nicaragua;
5. to improve Nicaragua's negotiating position in any subsequent bilateral or regional negotiations.<sup>33</sup>

This, I think, is a rather good analysis, although the members of the Legal Team assembled by Nicaragua had first of all the strong feeling that they were acting in defence of international law scorned by the new US Administration. This feeling was reinforced by the strong recommendation which was made to Counsel upon their recruitment: 'you are in charge of a purely legal – by no means a political – defence.'<sup>34</sup>

The Order on Provisional Measures of 10 May 1984, adopted by a quasi-unanimous Court,<sup>35</sup> constituted a strong encouragement to maintain this strategy

<sup>32</sup>Notes by the Agent of Nicaragua on the Occasion of the 10th Anniversary of the Judgment of the Court in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). The text of this conference is with the author.

<sup>33</sup>Gill (1989), p. 208.

<sup>34</sup>However, it was clear that retained Counsel were not supportive of the US violent actions against Nicaragua. My colleagues were however probably more supportive 'activists' than I was: during my long service for Nicaragua, I have been invited in Managua only one time in relation with the cases—in order to celebrate the anniversary of the Revolution; I declined the invitation; my colleagues accepted it. . .

<sup>35</sup>*Nicaragua v. United States, Provisional Measures, Order of 10 May 1984, ICJ Reports 1984*, p. 169. All but one paragraph were unanimously adopted. Paragraph B(2) was adopted by fourteen votes to one (Judge Schwebel). Paragraph B(2) reads as follows: '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.'

and so was the Judgment on the jurisdiction of the Court and the admissibility of the Application of 26 November of that same year.<sup>36</sup> So, of course, was the Judgment on the Merits,<sup>37</sup> which can be seen as a kind of 'judicial treatise of international law'—the authority of which is not reduced by the US Judge's dissent<sup>38</sup>: too voluminous, too harsh, too obviously one-sided. It was, however, unfortunate that two respected 'Western' Judges joined Judge Schwebel in his opposition to the Judgment: it made the Court look as a forum for East-West opposition. Fortunately, the French Vice-President and the Italian (although with apparent reluctance)<sup>39</sup> and Norwegian Judges voted with the majority, together with the French Judge *ad hoc* appointed by Nicaragua, Dean Claude-Albert Colliard.

Whatever its composition, the strong majority in favour of Nicaragua—on rather obvious grounds to say the truth<sup>40</sup>—confirmed the soundness of the strategy followed by Nicaragua: Goliath could be defeated by David when weapons were equals—in fact Goliath refused to fight: probably conscious that they had no serious legal argument to oppose to Nicaragua's case on the substance, the USA did not appear during the merits phase. This, in itself can be held as a sign of weakness.

As could be expected the United States did not recognize—at least in a first time—the decision of the Court. Nicaragua having requested—as early as 27 June 1986—the convening 'of an emergency meeting of the Security Council to consider the escalation of the United States' policy of aggression,<sup>41</sup> without fear of ridicule, the representative of the United States argued 'that, even at first reading, serious questions could be raised about certain conclusions of law which were included in the Court's opinion [*sic*]. He went on to add that those conclusions were uniquely dependent on the evidence and the facts presented by Nicaragua. He did not believe that the Court was equipped to deal with complex facts and intelligence information which was not available to it.'<sup>42</sup>

<sup>36</sup>*Nicaragua v. United States* (Jurisdiction), *supra* n. 5, p. 392.

<sup>37</sup>*Nicaragua v. United States* (Merits), *supra* n. 5, p. 14.

<sup>38</sup>*Nicaragua v. United States* (Merits), *supra* n. 5, Dissenting opinion of Judge Schwebel, p. 259.

<sup>39</sup>*Nicaragua v. United States* (Merits), *supra* n. 5, Separate opinion of Judge Ago, p. 181.

<sup>40</sup>This is not to say, however, that it was a full victory. I have in mind in particular, the most regrettable 'Nicaragua test' concerning attribution of acts of individuals or groups of individuals to a State according to which 'it would in principle have to be proved that that State had effective control' over these individuals and it must 'be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations' (*Nicaragua v. United States* (Merits), *supra* n. 5, p. 65, para 115). Probably inspired by Judge Ago, this very debatable position has had a quite impressive posterity (see e.g. Article 8 of the ILC Articles on the Responsibility of States for internationally wrongful acts (*YbILC 2001*, Vol. II, Part Two, p. 47) or *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Merits, Judgment*, ICJ Reports 2007, p. 208, para 400).

<sup>41</sup>Letter from the Permanent Representative of Nicaragua to the United Nations addressed to the President of the Security Council, 27 June 1986, UN doc. S/18187.

<sup>42</sup>2694th meeting, 1 July 1986 (*Repertoire of the Practice of the Security Council*, 1985–1988, UN Doc. ST/DPA/1/Add.10, p. 344). See also the position expressed by the representative of the USA

Although the Court's Judgment was not devoid of any concrete effect,<sup>43</sup> the hostile actions of the USA against Nicaragua persisted and there was no question of complying with the Judgment, which led Nicaragua to request a new emergency meeting of the Security Council, that time, expressly 'in accordance with the provisions of Article 94 of the Charter, to consider the "non-compliance" by the United States with the Judgment of the International Court of Justice dated 27 June 1986 concerning Military and Paramilitary Activities in and against Nicaragua.'<sup>44</sup> The draft resolution, sponsored by five Non-Aligned States members of the Council at the time,<sup>45</sup> read e.g. as follows:

Having considered the events that have taken place in and against Nicaragua after the said Judgment, in particular, the continued financing by the United States of military and other activities in and against Nicaragua,

Emphasizing the obligation of States, under customary international law, not to intervene in the internal affairs of other States,

1. Urgently calls for full and immediate compliance with the Judgment of the International Court of Justice of 27 June 1986 in the case of "Military and Paramilitary Activities in and against Nicaragua" in conformity with the relevant provisions of the Charter.<sup>46</sup>

The adoption of the resolution was defeated by the US veto.<sup>47</sup>

Although Nicaragua's Legal Team had prepared a Memorial on Compensation which was filed on 29 March 1988, the text of which can be found at the Court's website,<sup>48</sup> the 1986 Judgment has never been concretely implemented—although never violated either.

Following the elections held in 1990, Violeta Barrios de Chamorro, supported by a coalition of opposition parties replaced the Sandinista President Daniel Ortega.

at the 2718th meeting, focusing on the alleged lack of jurisdiction of the Court (PV.2718, 28 October 1986, pp. 44–46).

<sup>43</sup>It resulted in a least overt support to the *contras*, but the US assistance, more or less private, but publicly encouraged persisted. In her book *Compliance with Decisions of the International Court of Justice*, C. Schulte notes that '[o]n 25 May 1984, after the Court had indicated interim measures at the request of Nicaragua and ordered the US to cease any support for military and paramilitary activities in and against Nicaragua, the House of Representatives rejected the White House's request for *Contra* aid for the first time, and subsequent requests were denied until 25 June 1986, two days before the delivery of the judgment on the merits. There was thus a period of over two years in which there was no official assistance for the *Contras*' (p. 209; see also p. 197 and footnote 746). 'As later revealed, however, the White House and the CIA had engaged in illegal covert support of the *Contras*' (*ibid.*, pp. 209 and 332; see also Reichler (2001), pp. 34–35 and 44–45).

<sup>44</sup>*Repertoire of the Practice of the Security Council, 1985–1988*, UN Doc. ST/DPA/1/Add.10, p. 353.

<sup>45</sup>Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates.

<sup>46</sup>Draft Resolution of 28 October 1986, UN Doc. S/18428.

<sup>47</sup>There were three abstentions: France, Thailand and the UK (S/PV.2718, p. 51).

<sup>48</sup><http://www.icj-cij.org/docket/files/70/9621.pdf>.

This change resulted in the normalization of the relations between Nicaragua and the United States. On 17 April 1991, President Chamorro was received by President Bush who declared.

Dona Violeta, I am proud to stand with you, and our nation is proud to stand by you. We're offering over \$500 million in aid over your first 2 years as President. And we've joined with other developed countries to work with the international financial institutions to help Nicaragua. And beyond aid, we're offering opportunities for trade and investment that will benefit both our countries through the Enterprise for the Americas Initiative.<sup>49</sup>

One of the main results of this normalisation was the conclusion on 25 September 1991 of an Agreement by which (*inter alia*) the two countries 'expressed their desire "to enhance the friendship and spirit of cooperation between each other" and "in furtherance of the goals of the Enterprise for the Americas Initiative and the Caribbean Basin Initiative" the United States discharged and waived all right of repayment on a total amount of debt outstanding of US\$ 259,529,555.95<sup>[50]</sup> that had its origin in a Program of the Agency for International Development. Additionally, the United States Government has been providing bilateral financial assistance to Nicaragua and also through international institutions.'<sup>51</sup>

While this Agreement was about to be concluded, on 12 September 1991, the Agent of Nicaragua informed the Registrar of the Court that:

Taking into consideration that the Government of Nicaragua and the Government of the United States of America have reached agreements aimed at enhancing Nicaragua's economic, commercial and technical development to the maximum extent possible, the Government of Nicaragua has decided to renounce all further right of action based on the case in reference and, hence, that it does not wish to go on with the proceedings.

It is my duty, therefore, to request that the Court make an Order officially recording the discontinuance of these proceedings and directing the removal of the case from the list.<sup>52</sup>

This request was confirmed by a letter of 25 September 1991 of the Legal Adviser of the United States Department of State informing the Court that,

<sup>49</sup>Remarks at the Welcoming Ceremony for President Violeta Chamorro of Nicaragua (17 April 1991) <http://web.archive.org/web/20030421023609/http://bushlibrary.tamu.edu/papers/1991/91041700.html>.

<sup>50</sup>In its Memorial on Reparation, Nicaragua had requested the payment of more than 11 billion dollars as a compensation for the damages caused by the US violations of international law (see Memorial of Nicaragua, 29 March 1988, paras 492-497).

<sup>51</sup>Argüello (1996), note 153. See also Central Bank of Nicaragua, *Nicaragua en la Iniciativa HIPC—Memoria y Perspectivas*, Managua, Central Bank of Nicaragua, p. 31. On 6 January 1992, Nicaragua and the United States concluded an Agreement of Friendship and Cooperation between the Government of the United States of America and the Government of Nicaragua (TIAS, No. 11844) and a few years later, on 28 August 1995, they signed a new Agreement regarding the consolidation and rescheduling of certain debts owed to, guaranteed by or insured by the United States Government and its agencies (KAV, No. 4461).

<sup>52</sup>The text of this letter is available on the Court's website: <http://www.icj-cij.org/docket/files/70/9635.pdf>.

Taking into account the agreement of the United States and Nicaragua to take steps to enhance their friendship and mutual cooperation, including the renunciation by Nicaragua of all further right of action based on the aforementioned case, the United States welcomes the Nicaraguan request for discontinuance of the proceedings.

The United States takes this action without prejudice to its longstanding view that the Court is without jurisdiction to entertain the dispute and that the Nicaraguan Application of April 9, 1984 is inadmissible.<sup>53</sup>

Therefore, it is apparent that, against a common belief,<sup>54</sup> the 1986 Judgment cannot be considered as not having been implemented<sup>55</sup>—for good or bad reasons, the case has been discontinued on request of Nicaragua itself. In the words of Ambassador Argüello:

The United States in this letter of 25 September recognized that the Judgment of the Court created obligations that it had to negotiate with Nicaragua. Another question is whether it somehow forced its way out of its obligations or tricked Nicaragua into releasing it from them. The fact remains that the United States felt the need to comply with the Judgment of the Court. Whether this agreement with Nicaragua included a payment of one peso compensation or ten billion dollars, the result is the same: the United States finally complied with the Judgment of the International Court of Justice.

What about Nicaragua? Did it do the right thing in discontinuing... did it receive something of real value from its legal victory over Goliath? As I asked myself these questions, I remembered a meeting of Agents called by the President of the Court in 1985 to settle some questions of procedure in the Merits phase of the case. This was after the Judgment on Jurisdiction and the disappearance of the United States, so the meeting was in fact between the President and some officials of the Registry and the Agent of Nicaragua. At that meeting I indicated that Nicaragua wanted an opportunity to address the issue of compensation in the merits phase. After a while, President Elias asked: did Nicaragua bring this case looking for compensation or for peace?

The answer I gave President Elias in early 1985, is the same answer I repeated to myself in September 1991 when I received the instructions for discontinuance. The case against the United States always had one real objective: peace.<sup>56</sup>

## 2.2 *The Other Cases Building on the Momentum of the 'Big Case'*

It is certainly true that Nicaragua felt strongly encouraged in using the ICJ as an instrument of its external legal policy by the 1984 then 1986 successes.

<sup>53</sup>*Ibid.*

<sup>54</sup>See e.g. Gill (1989), p. 297 or Speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 29 October 2010, p. 6.

<sup>55</sup>For a detailed review of actions related to compliance with the 1986 Judgment, see Schulte (2004), pp. 197-211.

<sup>56</sup>Argüello (1996), p. 55.

The cause and effect link is squarely apparent inasmuch the two *Border and Transborder Armed Actions* cases versus Costa Rica on the one hand and Honduras on the other hand are concerned.<sup>57</sup> Both were introduced on 28 July 1986<sup>58</sup> and bore upon the assistance given by Nicaragua's two neighbours to 'armed bands of counter-revolutionaries' (the '*contras*') based on their respective territories and carrying armed attacks on Nicaragua's territory and, concerning Honduras, the direct participation of the Honduran military forces in military attacks on Nicaragua.

Contrary to Costa Rica, Honduras raised preliminary objections in which it alleged in particular that.

the overall result of Nicaragua's action is "an artificial and arbitrary dividing up of the general conflict existing in Central America", which "may have negative consequences for Honduras as a defendant State before the Court", because [...] certain facts appertaining to the general conflict "are inevitably absent from the proceedings before the Court", and other facts have already been in issue before the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Honduras contends that no real distinction can be made between the general situation of tension in the region and the various bilateral disputes which Nicaragua claims to exist there, and that the "procedural situation" created by Nicaragua's splitting-up of the overall conflict into separate disputes is contrary to the requirements of good faith and the proper functioning of international justice.<sup>59</sup>

Although these assertions were indisputably legally irrelevant,<sup>60</sup> they realistically describe the then existing situation: backed by the United States, both Costa Rica and Honduras served as a rear base for the *contras* and the ensuing situation was an overall armed conflict and all three cases related to it.

Both cases were discontinued at Nicaragua's requests following an agreement between the Parties, but separate in time. Concerning Costa Rica the discontinuance of the case occurred as early as 1987 following the conclusion, on 7 August 1987, of the 'Esquipulas II' Agreement, entitled 'Procedure for the establishment of a firm

<sup>57</sup>Interestingly, Nicaragua lodged no Application against El Salvador which however had been the only State which had filed, on 15 August 1984, a declaration of intervention in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case. The Court summarily found this declaration inadmissible (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984*, p. 216, para 3(ii)) and was harshly criticized for this summary dismissal by Judges Ruda, Mosler, Ago, Jennings and de Lacharrière (Joint Separate Opinion, *ICJ Reports 1984*, p. 219) Oda (Separate Opinion, *ibid.*, pp. 220–221) and Schwebel (Dissenting Opinion, *ibid.*, pp. 223–244). According to the present writer, such an intervention, as Preliminary Objections phase was clearly premature; it would have been shocking to dismiss an intervention on the merits in such a cavalier manner; but neither El Salvador nor Costa Rica or Honduras attempted to intervene at that stage.

<sup>58</sup>*Border and Transborder Armed Actions (Nicaragua v. Costa Rica)*, Application, 28 July 1986 and *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Application, 28 July 1986.

<sup>59</sup>*Border and Transborder Armed Actions (Nicaragua v. Honduras), Preliminary Objections, Judgment, ICJ Reports 1988*, p. 91, para 53.

<sup>60</sup>*Ibid.*, pp. 91–92, para 54.

and lasting peace in Central America' ('*Procedimiento para establecer una paz firme y duradera en Centro América*')<sup>61</sup> between the five States of the region.<sup>62</sup> This circumstance was not of such a nature to induce Nicaragua to request the discontinuance of the Honduras' case—probably because the military and counter-revolutionary pressure from the North was stronger than from the South; moreover, in the post-Esquipulas discussions<sup>63</sup> Costa Rica had shown more open to a constructive dialogue than Honduras. And it is only in 1992, 1 year after the discontinuance of the case against the United States, that 'by a letter dated 11 May 1992, [...] the Agent of Nicaragua informed the Court that, taking into consideration that the Parties had reached an out-of-court agreement aimed at enhancing their good neighbourly relations, the Government of Nicaragua had decided to renounce all further right of action based on the case, and that that Government did not wish to go on with the proceedings.'<sup>64</sup> The difference in timing between both requests for discontinuance is a topical example confirming the use of the Court as a means of pressure as part of Nicaragua's judicial and, more widely, legal policy: bigger the threat, longer the use of the judicial pressure.

Be this as it may, again, the Court's unanimous Judgment recognising its competence and the admissibility of Nicaragua's Application in the *Honduras* case was indeed a supplementary incitement to have recourse to the Court for settling its disputes with its neighbours with which it had often had difficult relations since the times of their respective independence in 1821.

This is certainly why Nicaragua, with the certainty of the Court's jurisdiction based on the Pact of Bogotá confirmed by the Judgment of 22 December 1988 against Honduras, decided to launch or participated in several new cases in order to solve maritime disputes with its neighbours:

- *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*<sup>65</sup>;
- *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*<sup>66</sup>;
- *Territorial and Maritime Dispute (Nicaragua v. Colombia)*<sup>67</sup>;

<sup>61</sup>See UN doc. S/19085, 31 August 1987. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/19085](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/19085).

<sup>62</sup>*Border and Transborder Armed Actions (Nicaragua v. Costa Rica), Order of 19 August 1987, ICJ Reports 1987*, p. 183.

<sup>63</sup>See pp. 26–27 below.

<sup>64</sup>*Border and Transborder Armed Actions (Nicaragua v. Honduras), Order of 27 May 1992, ICJ Reports 1992*, p. 223.

<sup>65</sup>Special Agreement of 11 December 1986; Application for permission to intervene of 17 November 1989 and the Judgment on this Application of 13 September 1990; and Judgment on the Merits of 11 September 1992.

<sup>66</sup>Application of 8 December 1999 and Judgment on the Merits of 8 October 2007.

<sup>67</sup>Application of 6 December 2001 and Judgment on the Merits of 19 November 2012.

- *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*<sup>68</sup>;
- *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*.<sup>69</sup>

The ongoing situation in this respect is as follows:

- In the Gulf of Fonseca, El Salvador, Honduras and Nicaragua have joint sovereignty over its water, with the exception of a belt ‘extending 3 miles [...] from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State’.<sup>70</sup> This leaves unresolved the delimitation of the maritime spaces inside or outside the Gulf<sup>71</sup>;
- The maritime boundary between Nicaragua and Honduras has been fixed by an ICJ Judgment of 8 October 2007, which Honduras attempted to partly challenge by introducing a request for intervention in the *Nicaragua v. Colombia* case, which was, rightly, rejected by the Court’s Judgment of 4 May 2011.<sup>72</sup>
- The maritime boundary with Colombia is partially delimited; however the Court did not decide on the limit of the continental shelf beyond 200 nautical miles because Nicaragua had ‘not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast’<sup>73</sup> ‘[Nicaragua] had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS’<sup>74</sup> This limitation in the Court’s decision has led Nicaragua to make a new Application on 16 September 2013 in order to have the delimitation completed.<sup>75</sup> Moreover, since Colombia refused to implement the 2012

<sup>68</sup> Application of 16 September 2013.

<sup>69</sup> Application of 25 February 2014.

<sup>70</sup> *El Salvador/Honduras, Merits, Judgment, ICJ Reports 1992*, p. 616, para 432(1).

<sup>71</sup> *Ibid.*, p. 617, para 432(2).

<sup>72</sup> On the same day, the Court also dismissed a request by Costa Rica to intervene in *Nicaragua v. Colombia*. While there is no doubt concerning the wisdom of the rejection of the Honduras’ request on the basis of the principle *res judicata*, I have doubts concerning the dismissal of the Costa Rican request: the decision of the Court in that case can be seen as a step backward hardening the conditions for the admissibility of requests for intervention. See the contribution of Miron A.

<sup>73</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012*, p. 669, para 129.

<sup>74</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016*, para 84.

<sup>75</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*. The Court found jurisdiction in this case in a Judgment of 17 March 2016.

Judgment, Nicaragua filed another Application in view of requesting the Court to decide that Colombia is in breach of its obligations to respect its rights in its maritime areas and is bound to comply with the Judgment of 19 November 2012.<sup>76</sup>

- As far as the maritime boundaries with Costa Rica, both in the Caribbean Sea and the Pacific Ocean, are concerned, it is the object of proceedings introduced by Costa Rica on 25 February 2014 which are pending at the time when this paper is being drafted. Hearings in this case—to which the Court has joined another case artificially introduced by Costa Rica on 16 January 2017 with regard to a dispute concerning *Land Boundary in the Northern Part of Isla Portillos*—were held in July 2017.

These last two cases are episodes of the ‘judicial guerrilla’ between Costa Rica and Nicaragua. While Costa Rica, by contrast with Honduras, had not opposed preliminary objections to the Nicaragua’s Application in the *Transborder armed actions* case, it introduced on 29 September 2005 an Application accusing Nicaragua to be in breach of its obligations to recognize Costa Rica’s free exercise of its rights of navigation and associated rights on the San Juan River in violation of the Treaty of 15 April 1858 and its interpretation given by the Arbitral Award of US President Cleveland of 22 March 1888. This was the object of the Judgment of 13 July 2009.

Although this nearly unanimous Judgment was extremely balanced, it seems to have been badly received by some portions of the public opinion in both countries and was at the origin of regrettable and irrational operations among which from the Nicaraguan side the digging of a *caño* in a part of the delta of the San Juan River belonging to Costa Rica and, on the part of Costa Rica, the rather badly conceived and hasty construction of a road along the San Juan. Both actions called for cross applications from one and the other State,<sup>77</sup> which were (very artificially) joined<sup>78</sup>

<sup>76</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Application of 26 November 2013. The Court found jurisdiction in this case in a Judgment of 17 March 2016. In its Memorial of 17 November 2016, Colombia raised counter-claims (pp. 233–342). At the time of writing of this contribution, the Court has not yet decided upon the admissibility of these counter-claims.

<sup>77</sup> See *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Application of 18 November 2010 and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application of 21 December 2011.

<sup>78</sup> See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Joinder of Proceedings, Order of 17 April 2013, ICJ Reports 2013*, p. 166 and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Joinder of Proceedings, Order of 17 April 2013, ICJ Reports 2013*, p. 184. In the *Certain Activities* case, Nicaragua raised several counter-claims: (1) Nicaragua has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte; (2) Nicaragua has a right to free navigation on the Colorado Branch of the San Juan de Nicaragua River until the conditions of navigability existing at the time the 1858 Treaty was concluded are re-established; (3) Costa Rica bears responsibility to Nicaragua — for the construction of a road along the San Juan de Nicaragua River in violation of Costa Rica’s obligations stemming from the 1858 Treaty of Limits and various treaty or



at the request of Nicaragua and resulted in a Judgment of 16 December 2015 which can be seen as being globally unfavourable to Nicaragua: although the Court unanimously found ‘that Costa Rica has violated its obligation under general international law by failing to carry out an environmental impact assessment concerning the construction of Route 1856’ (the road along the San Juan River), it also decided that Costa Rica has sovereignty over the ‘disputed territory’, and that, by excavating *caños* and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica and has the obligation to compensate Costa Rica for material damages caused by its unlawful activities on Costa Rican territory.<sup>79</sup> Four Judges showed irritation vis-à-vis Nicaragua in going as far as approving Costa Rica’s request that Nicaragua be ordered to pay costs incurred in the proceedings—a request which was rejected by the majority.<sup>80</sup>

Immodestly triumphant, Costa Rica saw fit to introduce two new actions against Nicaragua and (1) asked the Court to fix the *quantum* of the compensation due to it in application of the 2015 Judgment at what seems to be a most exaggerated amount<sup>81</sup> and (2) submitted a new Application instituting proceedings against Nicaragua with regard to a dispute concerning the precise definition of the boundary in the area of the delta of the San Juan River and the establishment of a new military camp by Nicaragua on allegedly Costa Rican territory.<sup>82</sup> This new case is quite artificial since for determining the maritime boundary between the two States, the Court ought, in any case, to fix the starting point of the land boundary.

There can be no doubt that recourse to the ICJ by both Nicaragua and Costa Rica was in part inspired by irrational reflexes. However, from the part of one and the other State, these reflexes bear witness of the confidence of their respective

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customary rules relating to the protection of the environment and good neighbourliness; and — for the non-implementation of the provisional measures indicated by the Court’s Order of 8 March 2011’ (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, *ICJ Reports 2013*, p. 206, para 15). The Court found the first two counter-claims inadmissible and considered that there was no need to entertain the third and fourth counter-claims as such (*ibid.*, pp. 215–216, para 41) since the Court decided to join both proceedings.

<sup>79</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, para 229(1), (2) and (6).

<sup>80</sup>*Ibid.*, para 144.

<sup>81</sup>See Letter of the Co-Agent of the Republic of Costa Rica, 16 January 2017 (see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order of 2 February 2017). This request is pending at the time of writing of this contribution. Costa Rica deposited its Memorial on 3 April 2017 and Nicaragua deposited its Counter-Memorial on 2 June 2017.

<sup>82</sup>*Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Application of 16 January 2017. This case has been joined to the case concerning *Maritime Delimitation* between Costa Rica and Nicaragua (Order of 2 February 2017).

governments in the Court’s wisdom and its ability to settle disputes having a deep political dimension. Even if some requests could, considered from an external point of view, be seen as unwarranted, not to say abusive, the recourse to the ICJ has been no doubt a means to ease the tension between the two States and, all things considered, the Court has been able to find balanced and appeasing solutions—even if it is always possible to criticise one aspect or another in its reasoning.

More globally, it is difficult to deny that Nicaragua has made political use of the ICJ, the recourse to which being an essential part of its ‘foreign legal policy’. But there is nothing wrong in that: law is a legitimate part of the tools to be used in international relations and indeed it is better to obtain decisions from the World Court than to let the weapons do the talking. And one can only approve the ICJ when it claims that ‘[i]t must [...] be remembered that, as the *Corfu Channel* case (*ICJ Reports 1949*, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.’<sup>83</sup>

### 3 Nicaragua’s Judicial Strategy Before the ICJ

Is there a specificity of Nicaragua’s judicial strategy before the ICJ? I would say yes in that it is characterized by both linked words: continuity and confidence. ‘Continuity’ in that I think the whole ‘strategy’ of Nicaragua has been inspired, from the very beginning by its confidence in the ICJ as a ‘civilized means’ of settling dispute (a confidence enhanced by the 1984 and 1986 Judgments). But continuity also with regard to the composition and working traditions of the Legal Team which are based on mutual confidence from the Agent and between the members of the Team.

#### 3.1 Continuity and Renewal in the Composition of the Nicaraguan Team

There still is a core ‘historical Team’ dating back from the ‘Big Case’ which I have described in some details elsewhere.<sup>84</sup>

Key is of course the nearly perpetual<sup>85</sup> Agent of Nicaragua, Ambassador Carlos Argüello Gómez. As such he was the signatory of the Application against the USA on 9 April 1984. To that end, he was appointed as the Ambassador of Nicaragua to

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<sup>83</sup>*Nicaragua v. United States* (Jurisdiction), *supra* n. 5, p. 435, paras 95–96.

<sup>84</sup>Pellet (2012). I summarize here in large part what I have written in that book.

<sup>85</sup>In the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Nicaragua first appointed Dr. Mauricio Herdocia Sacasa as its Agent. After the 2006 elections, he was replaced by Ambassador Argüello Gomez.

The Hague where he stayed until 1990, then again from 1993 to 1997 and from 2000 until now.<sup>86</sup> At the time of his appointment, Argüello had been Vice-Minister (1980) then Minister for Justice (1982). In spite of his long stay far from Managua, he seems to have kept close links with the Nicaraguan leadership.

No doubt that he was fit for the job exactly as the job was made for him: a good lawyer,<sup>87</sup> very knowledgeable in international law,<sup>88</sup> usually staid,<sup>89</sup> he is intransigently patriot, which from time to time, induces him in polarizing on matters which seem rather secondary to foreign lawyers (and probably to the Judges); and, while he is usually flexible and open to change his mind on many things, he will be unyielding when he thinks—rightly or not—that the political interests or, even more, the honour of Nicaragua are at stake. There is no doubt that his (strong) personality has a decisive influence on the atmosphere and the methods of work of the Nicaragua's Legal Team.

Originally, the Team counted two very well-known senior members: in order of appearance, Professors Abram Chayes and Ian Brownlie.

Abe Chayes, a former Legal Adviser to the State Department—one of the 'best and the brightest',<sup>90</sup> reached this position of responsibility in the wake of John Fitzgerald Kennedy. He was gaiety and elegance incarnated—elegance of thought and mind.<sup>91</sup> Introduced to the Nicaraguan authorities by his former student at Harvard Law School, Paul Reichler,<sup>92</sup> he chose to plead for Nicaragua, aware of the criticism he would face from a large part of US public opinion,<sup>93</sup> but he considered that honour of his country was at stake. One day, when I ventured to ask him whether it bothered him to plead against his country, he replied, 'We are a free country'... No comment!

<sup>86</sup>Since 2009 he is the Dean of the diplomatic corps to the Netherlands.

<sup>87</sup>He is Doctor of Law of the Universidad Centroamericana (1970) and became an attorney specializing in civil law (1970–1979). He renewed with private practice during the periods 1990–1993 and 1997–2000 when he was called back to Managua; during these same periods he was a professor at the Faculty of Law and Social Sciences of the Universidad Centroamericana of which he was the Dean from 1997 to 2000.

<sup>88</sup>He has been elected a member of the International Law Commission of the United Nations in 2016 for a 5-year term.

<sup>89</sup>I am more impetuous than 'CAG' is and, in spite of our long and profound complicity, his slowness to take decisions sometimes makes me nervous.

<sup>90</sup>From Halberstam (1993).

<sup>91</sup>In my memories, he is inseparable from his lovely and bright wife Antonia (Toni) Handler. Among the many positions she held in both the private and public sector, she served as United States Under Secretary of the Air Force from 1979 to 1981 before teaching at the John F. Kennedy School of Government and then at the The Fletcher School of Law and Diplomacy.

<sup>92</sup>See p. 33 below. Chayes' assistant was Anne-Marie Slaughter. I had the impression that, although he had chosen her among his Harvard students, he did not recognize her distinguished talents (one of which being her excellent French!). She later became a professor at Princeton and served as a President of the ASIL from 2002 to 2004.

<sup>93</sup>His portrait was even taken from the wall of legal counsel in the State Department!

The other late eminent person forming the initial Team was Ian Brownlie.<sup>94</sup> He already had an impressive practice and was familiar with the small (at the time very small) world of the International Court of Justice. He immediately and very naturally appeared as the lead Counsel of Nicaragua and remained so until his tragic passing in a car accident in Egypt in 2010.<sup>95</sup>

Besides the Agent and me,<sup>96</sup> the only survivor of the original Team, is Paul Reichler. He was at the time a young and bright Harvard-trained lawyer who had created a small law firm co-led by Judith C. Appelbaum based in Washington DC. Politically radical and fully committed in the fights for democracy and development in Latin America and more specifically in Nicaragua, Reichler was central in the launching of the case against the USA, which, I suspect, he initially conceived.<sup>97</sup> Although, at the time, quite discreet during the Team meetings—which is no more the case! he is now extremely talkative and sometimes 'tormented' but a wonderful teamer and a bright lawyer and pleader—he was omnipresent behind the scene. While he did not participate in some cases after 1986, he 'reappeared' as a strong member of the Team on the occasion of the first *San Juan* case in 2005. He now is a partner of Foley Hoag, a renowned U.S. law firm which is probably the World's leading law-firm in inter-State litigation, and the Chair of its International Litigation and Arbitration Department. *Chambers Global* rightly introduces him as 'one of the World's most respected and experienced practitioners of Public International Law, specializing for more than 25 years in the representation of Sovereign States in disputes with other States. He belongs to a select group of elite lawyers with extensive experience litigating on behalf of Sovereign States before the International Court of Justice in The Hague, and the International Tribunal on the Law of the Sea in Hamburg'.<sup>98</sup> He now is very aptly backed up by Lawrence (Larry) Martin, Deputy Chair of the same Department at

<sup>94</sup>Our relations were not always easy, but he was nevertheless my mentor and my friend. We could often bicker within the Nicaraguan (and other) teams in which we were sitting together, but I have nonetheless great gratitude to him, who introduced me to the very special job of being a Counsel before the ICJ (see Crawford et al. 2013; Crawford and Pellet 2008; Pellet 2000 or Pellet 1999).

<sup>95</sup>Abe Chayes passed in 2000.

<sup>96</sup>My recruitment in Nicaragua's Team deserves a brief anecdote: Ambassador Argüello Gomez visited Paris in search of a French Counsel. He paid a visit successively to the then Legal Adviser of the French Ministry of foreign affairs and to the Chief of staff of the then (socialist) Prime Minister asking for lists of possible Counsel (both reasonably knowledgeable in international law and moderate left-wing—this also was probably part of Nicaragua's judicial strategy: symbolically, their wish to have counsel having the nationality of this three Western permanent members of the Security Council, sympathetic to the new regime in Nicaragua, but not communist). I understand that my name was the only one appearing on the two lists. Although my job interview was calamitous (I had before a full night without sleep since I had to complete an important presentation in the annual colloquium of the French Society for International Law on the following day), it convinced the Agent. I suspect that the low-level of my fees had decisive role in his decision...

<sup>97</sup>He also introduced A. Chayes to the Nicaraguan authorities—see above, p. 32.

<sup>98</sup><http://www.foleyhoag.com/people/reichler-paul>; see also: [http://www.chambersandpartners.com/15649/96/editorial/2/1#1757\\_editorial](http://www.chambersandpartners.com/15649/96/editorial/2/1#1757_editorial).

Foley Hoag, who brightly ensures continuity.<sup>99</sup> They are also often backed by more junior members of the firms, all of them skilled and most helpful.

It is no secret that I have some reservation with systematically resorting to law-firms in inter-State cases: it unavoidably and considerably arises the cost of the case and, quite usually, makes the procedure more cumbersome.<sup>100</sup> This said, resorting to a law-firm will be virtually indispensable in two circumstances: *first*, for very poor States ill-equipped to face rather complex and heavy procedures<sup>101</sup>; *second*, when the case implies difficult factual or archives researches for which law professors are poorly equipped. And, besides their indisputable skill in international law, it is in this second capacity that Foley Hoag has been tremendously efficient in several Nicaragua's case.

Progressively, the Nicaraguan Legal Team gained new members more or less permanently involved in the pleading. First among them the Spanish Professor Antonio Remiro Brotons, who first appeared in the case against Honduras in 1988. I have a particular admiration for his talent in analysing complex legal issues and finding solutions; he is central for putting legal issues in historical perspective. Enjoying the Agent's confidence, this pure hispanophone is an influential member of the Team.

Later, along with the needs, other eminent colleagues joined the 'community': Professor Vaughan Lowe, indisputably, one of the top contemporary international lawyers, mainly involved in law of the sea issues, also dealt with extreme skill by Alex Oude Elferink, professor at Utrecht University School of Law and at the University of Tromsø and Director of the Netherlands Institute for the Law of the Sea. For his part, Stephen McCaffrey has been called to join the Team on the occasion of the first *San Juan* case and provides Nicaragua with his formidable expertise in environment and river law—which does not prevent him of being both an excellent 'general international lawyer' and a good companion.

This description of the Nicaraguan Legal Team would not be complete without mentioning the experts on the one hand and the Embassy task force on the other hands.

As for the experts, they are sometimes—not always!—indispensable to explain technical matters. Some are 'quasi-permanent'—this is the case of the successive hydrographers and cartographers who were called to participate in the five boundary cases confronted by Nicaragua, Robin Cleverly, former Head of the Law of the Sea Group at the United Kingdom Hydrographic Office and now leading a consulting

<sup>99</sup>Martin is as reserved and quiet as Reichler is expansive and talkative—sometimes prolonging unduly the discussion! but with such an endearing personality that you cannot blame him. Both are great and totally reliable lawyers.

<sup>100</sup>See Pellet (2000), pp. 155–156; Crawford et al. (2013), pp. 13–14; and Pellet (2016), p. 411; see also: Malintoppi (2017), pp. 49–54.

<sup>101</sup>In such a case the intervention of the law-firm should be strictly confined to material and formal tasks.

firm at a time together with Dick Gent, Law of the Sea Consultant. Others are resorted to in a particular case for intervening on specific technical issues.<sup>102</sup>

Last but not least, the 'Embassy Task Force'. In truth, this might be a rather excessively formal appellation to designate the single or two collaborators of the Agent who is or are beautifully performing a lot of ungratifying but indispensable tasks: assembling the documentation, answering questions by grumbling counsel, answering last minute demands from the Agent, assembling written pleadings, preparing Judges' folders. . . In some legal teams, this can keep ten persons or more busy full time. For Nicaragua one or two will more often than not do two or more cases together. They, indeed deserve to be mentioned: Tania Pacheco (who is now participating in the Team as counsel) and, since 2009 and 2011 respectively, Edgardo Sobenes and Claudia Loza.<sup>103</sup> And I should not forget Sherly Noguera de Argüello, the Agent's wife who takes care of two essential aspects of the life of any legal Team: securing quick payments of the Counsel's fees and feeding the Team during the meetings and the hearings—I maintain that she is the best cook in The Hague (at least!).

### 3.2 Working Methods and Judicial Strategy

There is no doubt that the combination of repeated cases before the Court, a stable and reasonably united Team used to work together, and the globally placid temperament of the Agent has an effect on the atmosphere and the methods of work of the Nicaraguan Team.

First of all, it is in order to speak of 'the Team' in the singular—in spite of its partly changing composition depending on the case at stake: we are used to work together and have to live with the qualities and defects of colleagues and after a

<sup>102</sup>In the *Certain Activities* case and the *Road* case, Nicaragua consulted e.g. an earth scientist (Danny K. Hagans), an aquatic ecologist (Blanca P. Ríos Touma), a geomorphologist and ecohydrologist (Scott P. Walls) and a geographer (Victoria Leader). Nicaragua also appointed a fluvial geomorphologist and environmental planner (G. Lathias Kondolf), as independent expert.

<sup>103</sup>The 'Embassy Task Force' works in close cooperation with Counsel's assistant—and this an occasion to pay tribute to my successive assistants in the various Nicaragua's cases: Nadine Susani (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*) and *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*)), Daniel Müller (*Dispute regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*)) Alina Miron (*Territorial and Maritime Dispute* (*Nicaragua v. Colombia*)), Romain Pieri (*Territorial and Maritime Dispute* (*Nicaragua v. Colombia*)) and Benjamin Samson (*Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*); *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v. Nicaragua*); and *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica v. Nicaragua*) in which he appeared during the Hearings on behalf of Nicaragua).

time of apprenticeship you even get used to last minutes planning and late requests from the Agent . . . I would even go as far as saying that if this can create some 'timing stress', it is in some respect reassuring: I am sincerely convinced that Nicaragua's pleadings—whether written or oral—are just as good as others which are not prepared in a rush and each phase being preceded by a great number of meetings—while, concerning Nicaragua, two meetings for a particular phase are (rightly I think) a great maximum.

The discussions within the Team take place in a friendly atmosphere<sup>104</sup> and are frank and usually fruitful. The Agent would shortly indicate where he thinks we are and ask Counsel to give their opinion. Paul Reichler will think aloud for quite a long time but come at the end with enlightening suggestions. Antonio Remiro Brotóns would make his point in his unique and characteristic idiom.<sup>105</sup> I would grumble my disagreement with what has been said and Vaughan Lowe or Steve McCaffrey would find a way out. And, as far as the written pleadings are concerned, all Counsel would send their final chapters late and the 'Embassy Task Force' would succeed in editing and having the piece of written pleading printed on time. . .

Now, while clearly these working methods are somewhat peculiar (but eventually quite efficient and, probably rather cost saving<sup>106</sup>), except if one considers that making recourse to the ICJ a usual means of a country's foreign legal policy is a specificity, I do not think that Nicaragua's judicial strategy can be particularized. Just as any party before an international court or tribunal, Nicaragua attempts to make the best case in order to achieve the best possible result. Usually it will plead with calm and, with the exception of some outcry by the Agent when sensitive political issues are at stake, Counsel will avoid vehement indignations. And, to my best knowledge, Nicaragua has always complied with the Court's decisions<sup>107</sup>—which has not always been the case of its opponents, the worst behaviour being that of Colombia following the Judgment of 19 November 2012.<sup>108</sup>

And it must be admitted that, globally, this legal strategy has paid off. With some exceptions, Nicaragua has won its cases. It scored a decisive point with the 'Big Case'—and this is all the more remarkable that it could have been rather defiant *vis-à-vis* the Court since it had no ground to celebrate the Judgment of 18 November 1960 in the case concerning the *Arbitral Award Made by the King of Spain*.

<sup>104</sup>More so, I must admit, since the tragic passing of Sir Ian Brownlie, who, notwithstanding his great qualities, could hardly accept to be contradicted.

<sup>105</sup>An abbreviation for Spanish/French/English.

<sup>106</sup>See the numbers given by Alina Miron in her article 'Le coût de la justice internationale: enquête sur les aspects financiers du contentieux interétatique' published in 2014 in *Annuaire français de droit international*. As explained by the author, 'Il est certain que "l'américanisation" du contentieux [...] a un coût financier considérable' ['It is certain that the "americanization" of litigation [...] has a considerable financial cost'].

<sup>107</sup>Except in one instance when uncontrolled initiatives put it in a difficult position (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Provisional Measures, Order of 22 November 2013*, *ICJ Reports 2013*, p. 354).

<sup>108</sup>See the contribution of Martin L and Parkhomenko Y.

Nicaragua certainly got both short term (decrease of the public assistance of the USA to the *contras*) and longer terms benefits (financial assistance; prestige) from the 1986 Judgment. Its judicial activism also resulted in the delimitation of most of its maritime boundaries.<sup>109</sup> The outcome is mixed with respect to the land boundaries: indeed, there is no question to put into question the 1906 King of Spain Award which was confirmed by the Court and the judgments concerning the San Juan River have clarified its legal regime—a welcome clarification given the uncertainties resulting from the 1858 Jerez-Cañas Treaty of Limits as interpreted by US President Grover Cleveland in its Award of 1988 and General Alexander in its five Awards of 1897–1900. However, new issues have arisen with the Court's judgments in this respect—notably concerning the starting point of the land boundary<sup>110</sup> or the extent of the right of Nicaragua to dredge the River. Moreover, it is to be noted that the abundant (and probably excessive) and mutual use of the Court by both countries seems to have made the relations between Costa Rica and Nicaragua worse than ever.

However, I would suggest that, while the outcome of its judicial strategy is overall positive for Nicaragua itself, it is even more positive seen from the point of view of the progress of international law.

Concerning the procedural law, the Nicaraguan cases are at the origin of important clarifications concerning establishment of consent to jurisdiction, the law of evidence or the conditions for intervening before the Court.<sup>111</sup> As for substantial law, the Nicaragua's cases contribution to the progress and clarification of the law is even more impressive quite often for the best, sometimes for the worst. In this last category, I would include the most unfortunate 'Nicaragua test' of effective control in view of establishing the responsibility of the State in the acts of individuals or groups acting in violation of international law with the assistance and/or at the instigation of the State.<sup>112</sup> Much more welcome are the clarifications made by the Court on the occasion of the Nicaragua's saga concerning issues as diverse as: treaty interpretation, formation of customs, the relations between treaties and customary rules, the law of armed conflicts and the principle of non-intervention, the application of international humanitarian law, State responsibility, sea delimitation, the law of the environment or river law. . .<sup>113</sup> There are in

<sup>109</sup>When the judgments will be rendered in the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* case and the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case, only the maritime boundary in and outside the Gulf of Fonseca and that with Jamaica will remain undetermined.

<sup>110</sup>The problem should be solved with the Judgment to come in the *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* case.

<sup>111</sup>However, in respect to intervention, the present writer has some doubts on whether the word 'clarification' is appropriate in view of the capricious and illegible jurisprudence of the Court in this respect—including regarding the various instances of intervention in the Nicaragua's cases.

<sup>112</sup>See *supra* n. 40.

<sup>113</sup>Other Chapters in this book elaborate more on this balance sheet, see the contribution of Bedjaoui M and d'Argent P.

fact very few fields of public international law which have not been touched upon in the course of the Nicaragua's cases and if one keeps in mind the enormous importance of the international case-law and, more specifically of the ICJ's jurisprudence in the formation, evolution and fixation of international law, Nicaragua certainly deserves credit for this impressive outcome.

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