

INTERNATIONAL COURT OF JUSTICE

Nicaragua v. United States

BY SABRINA FORTE

Historical Background

**Note: This is a historical case, which means that the Court must address the facts and merits surrounding the case as if oral argument were taking place in 1986. Information after this date should not be cited in argument or used in reaching a verdict.*

The Sandinista Junta of National Reconstruction (Sandinistas) emerged as the governing party of Nicaragua after leading the upheaval of dictator Anastasio Somoza Debayle in July 1979. The newly installed Nicaraguan leadership instituted policies that elicited various grievances from its constituency. These policies included the nationalization of land, exploitation of natural resources, mistreatment of indigenous peoples residing within the country, and the systematic arrest, abuse, and imprisonment of dissenters.

The term "Contra" refers to the collection of groups that actively opposed the ideology and leadership of the Sandinistas, from peasant militias to displaced indigenous communities. The Argentine and United States governments are known to be the primary benefactors of the Contras' military efforts against the Sandinista government and sought to unite the disparate groups into a larger, more cohesive movement. Fearing the spread of Soviet-supported, communist governments into Latin America a la Cuba, US President Ronald Reagan signed the National Security Decision Directive 17 on 23 November 1981. The directive authorized the Central Intelligence Agency (CIA) to provide up to \$19 million in military aid to the Contras. One year later, the US Congress passed the Boland Amendment, which prohibited direct military aid to the Contras from the Department of Defense and the CIA (it was later expanded to restrict pro-Contra activity by all national government agencies).

Yet the extent of US involvement in Nicaragua following the passage of the Boland Amendment remains dubious. Suspicions abound of covert operations conducted by Na-

tional Security Council (NSC) leadership and US facilitation of the Nicaraguan drug trade as a means of revenue for the Contras. On 1 May 1985, the US declared a general trade embargo on Nicaragua.

History of UN/ICJ Involvement

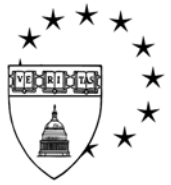
Nicaragua submitted an Application to the ICJ on 9 April 1984 asking the Court to "declare and adjudge" that the United States "has violated and is violating its express charter and treaty obligations to Nicaragua" through its military activities and sponsorship of the Nicaraguan Contras. Accompanying this Application was a request for the Court to impose "provisional measures" that would require the US to "cease and desist" the military and paramilitary activities being conducted within Nicaragua until the conclusion of legal proceedings. In spite of a US claiming that "questions regarding the use of force during hostilities are more properly committed to resolution by the political organs of the United Nations and of the Organization of American States," the Court approved Nicaragua's request on 10 May 1984.

Jurisdiction

Nicaraguan counsel cites Article 36 of the Statute of the Court, to which both Nicaragua and the US are party, as justification of the Court's jurisdiction in these legal proceedings. Article 36 states the following:

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

(a) the interpretation of a treaty;



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

Nicaraguan counsel also relies, "as a subsidiary basis," upon the 1956 Treaty of Friendship, Commerce and Navigation. It reads: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the ICJ, unless the Parties agree to settlement by some other pacific means."

US counsel contends otherwise, citing four primary grounds upon which this case is inadmissible before the Court:

- (1) Nicaragua had failed to bring before the Court "indispensable parties," such as Honduras, Costa Rica, and especially El Salvador, who has brought forth allegations against the Nicaraguan government in various fora;
- (2) Charges in the nature of those which Nicaragua has brought before the Court (simply put, **matters of international peace and conflict**) have been customarily within the jurisdiction of the Security Council, not the Court;
- (3) As described below, the US claims to have been committing collective self-defense as a third party defending El Salvador, Costa Rica, et al, against alleged attacks coordinated by the Nicaraguan government. The US further claims that collective self-defense "could not appropriately be subjected to judicial examination in the midst of the conflict"; and
- (4) Customarily, judicial functions cannot deal with situations involving ongoing conflict

The US has threatened to not attend subsequent proceedings if the Court accepts Nicaragua's claims regarding jurisdiction and proceeds with oral argument.

Merits of the Case

Nicaraguan Claim

The written memorial submitted by Nicaraguan counsel requests that the Court adjudge and declare the following:

- (a) *That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and direct-*

ing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua and, in particular, its charter and treaty obligations under:

- Article 2 (4) of the UN Charter;
- Articles 18 and 20 of the Charter of the Organization of American States;
- Article 8 of the Convention on Rights and Duties of States;
- Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife

(b) *That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:*

- armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua

(c) *That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.*

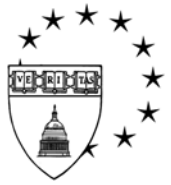
(d) *That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.*

(e) *That the United States, in breach of its obligation under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce.*

(f) *That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua...*

Additional clauses request that the US "cease and desist" its military and paramilitary activities that occur on Nicaraguan territory or support activities that violate Nicaraguan sovereignty. Nicaragua also requests **"reparations for damages to person, property and the Nicaraguan economy caused by the foregoing violations of international law in a sum to be determined by the Court..."**

Nicaragua justifies its accusations by citing various incidents, including a series of attacks on the Nicaraguan port Puerto Sandino in 1983 and mines found in territorial waters and thought to have been funded, provided, and/or planted by American military personnel without



any explanation of the location or number of mines present in said waters. The latter incident resulted in “personal and material injury” and increased marine insurance rates. Also cited is the manual “Operaciones psicológicas en Guerra de guerrillas,” which the US published in 1983 and has allegedly distributed to the **Contras** in mass quantities thereafter. This document encourages various military tactics toward opposing forces, especially regarding prisoner interrogation, that run contradictory to international humanitarian law.

US Claim

US counsel recalls its objection to the Court’s declaration of compulsory jurisdiction in this case. According to the US, compulsory jurisdiction is invalid unless “(1) **all parties to the treaty affected by the decision are also parties to the case before the Court**, or (2) the United States of America specially agrees to jurisdiction” on an **ad hoc** basis. These reservations were outlined in what has become referred to as the US Declaration of 1946, written when the ICJ was still the Permanent Court of International Justice.

The US further responds that the Nicaraguan government was actively supporting armed groups in neighboring countries, especially **El Salvador**. Following the Sandinista’s assumption of power, dissident groups emerged throughout Central America, bearing arms provided by dubious sources and suspected to have come from Nicaragua. The US also attributes various “cross-border military attacks” on Honduras and Costa Rica to Nicaragua, with whom both states share a border. In this sense, the US is appealing to the customary international legal principle of “collective self-defense,” wherein the US was acting as a third party in defense of ally nations that had been previously attacked by Nicaragua.

Moreover, the US felt compelled and obligated to enforce the “Plan to secure peace,” a document that had been sent to the Secretary-General of the Organization of American States on 12 July 1979 from the Nicaraguan “Junta of the Government of National Reconstruction.” Among its various commitments to rebuilding the country, the Nicaraguan government mentioned the establishment of “full observance of human rights in our country.” Alerted to violations of such an observance, the US felt that it had no choice but to act—not in violation of Nicaraguan sovereignty and welfare, but in protection of them.

Applicable International Law

Customary International Law (CIL)

Because international law is constantly evolving, customary international law exists to reflect legal principles as they exist in the status quo and is assessed by the Court in the same way that legal documents are. To declare a legal principle a part of CIL, the Court must consider whether said principle exists in the *opinio juris* of its member States—do States feel not only compelled, but *bound by law*, to follow this principle in spite of its absence from hard law? Has this consensus been confirmed by practice? If so, the principle becomes incorporated into CIL and can be cited in Court decisions as an equivalent to documented legal rhetoric.

While Nicaragua relies primarily upon the UN Charter, the ICJ Statute, and various treaties—that is, hard law—to justify its case, both parties appeal fundamentally to CIL, as well. The text of the UN Charter strongly discourages the “threat or use of force against the territorial integrity or political independence of any State,” and this is overwhelmingly supported by treaty-law. The US insists, however, that **exceptions exist in CIL that would permit the use of force in certain circumstances**. US counsel argues that the principle of collective self-defense stems from Article 51 of the UN Charter, which reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

A dispute arises, then, over the customary definition of an “armed attack”. Nicaragua, maintaining its denial of any military action in bordering states, includes one State’s sponsorship or sending of an armed group to the territory of another State. What are the implications of the Court incorporating this definition into CIL? If the Court accepts this definition, then the US is certainly culpable of an “armed attack”. However, if the Court accepts US allegations of Nicaraguan military activities in El Salvador, Honduras, and Costa Rica, then this might be grounds for justification of the US’s claim to collective self-defense.

The principle of non-intervention

The principle of non-intervention is defined by the UN Charter as “the right of every sovereign State to



conduct its affairs without outside interference.” Nicaraguan counsel argues that intervention takes at least two forms: direct military action and indirect support for hostile military activity within the territory of other States. Nicaragua claims further that this definition has become a fixture in CIL, and the US offers no exception to this rule.

State sovereignty

The principle of state sovereignty is strongly ingrained into international law and is often considered the most important aspect of international law. Article 2 of the UN Charter declares the organization’s dependence on “the principle of the sovereign equality of all of its Members.” The extent to which States should honor one another’s sovereignty, however, is constantly in question. Does sovereignty extend to internal waters and territorial seas, as Nicaragua claims in response to the clandestine installation of mines in Nicaraguan ports and waters? Does airspace qualify as territory over which a state is sovereign? If so, US infringement of Nicaraguan airspace constitutes an infringement of state sovereignty. Nicaragua further claims that the high marine insurance premiums that resulted from the discovery of the mines constitute an infringement upon economic sovereignty.

International humanitarian law

The Hague Convention No. VIII of 1907 declares the installation of mines a breach of humanitarian law. Article 3 of the 1949 Geneva Conventions cites a universal “obligation to respect and ensure the respect of other states” as a facet of humanitarian law. If the Court rules in favor of Nicaragua, what approach might it take toward the US within the context of humanitarian law? While Nicaragua has no explicitly invoked any principles of international humanitarian law, it has accused the US of various acts of killing, arresting, kidnapping, and wounding Nicaraguan people on Nicaraguan territory. The document that US government officials disseminated to Contra forces also implies some intentional breaches of humanitarian norms. Can the Court punish the US for human rights law violations even if it rules in favor of US claims of non-intervention and collective self-defense? Are acts of individual or collective self-defense bound by humanitarian legal principles, as well?

Reaching a Verdict

In spite of initial US claims that the ICJ holds no jurisdiction over this case, the Court has continued with

oral hearings under the assumption of its compulsory jurisdiction. We then reach the stage at which the Court must assess the merits of the case as presented by both parties. With regard to said merits, judges ought to consider the following issues in reaching a verdict:

Can the Court claim jurisdiction over this case? Is this matter, occurring in the context of ongoing military conflict, better suited for another UN organ, such as the Security Council? How does the Court respond to the US argument that “indispensable” parties (El Salvador, Honduras, and Costa Rica, all of whom will be affected in some way by your decision) should also be parties to this case? Were the Contras acting on behalf of the United States? Is a military attack by the Contras tantamount to an attack by the US? What criteria should the Court use to determine causality?

Does a right to collective self-defense exist? Under what conditions may a third party intervene in the affairs of a State on behalf of another? If, according to the UN Charter, a State can appeal to the principle of collective self-defense in response to an “armed attack,” might sponsorship of a direct military attack also constitute an “armed attack”?

Both Nicaragua and the US attempt to define various international legal principles and incorporate those definitions under customary international law. How can the Court determine *opinio juris* and systematically accept and reject these definitions as CIL?

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