

The *Nicaragua* Case: ‘Mafiosi’s’ and ‘Veteran’s’ Approaches Combined

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Abstract

This presentation is twofold. The first part shows that the *Nicaragua* case played a significant role in reconciling the Third World with the International Court of Justice and, more generally, in revitalizing the Court. In the second part, the author, who was counsel for Nicaragua in that case, casts an eye as external analyst on the judgments of 1984, about which he has some reluctance, and 1986, which he largely approves of, even though Nicaragua did not win 100 per cent and some points may be debatable.

Key words

ICJ; judicial settlement of dispute; judicial strategy; non-appearance; state responsibility

Since our hosts – and I first mention Paul Reichler and Foley Hoag – have provided us with excellent interpreters, I will make my first short presentation in French, although I am conscious that this might be a bad idea, since Professor Philippe Sands recently declared, as reported by the *London Evening Standard* and *The Telegraph* (Mr Sands very much likes to speak in the media), that he and his friends constitute their pleading teams ‘to avoid having any French people, because our productivity drops by about 38 per cent when a French person is on the team’.¹ Just thinking how much loss of productivity I have caused in my 40 and something cases before the Court puts me in absolute dismay! However, I will venture to speak French² and ‘tant pis’ if they do not associate me in their legal teams.

Before going to the heart of the matter, I would like to say a few words about two counsel of *Nicaragua* whose passing deprives us of their presence today.

Abe Chayes first – a former legal adviser to the State Department – one of the ‘best and the brightest’,³ reached this position of responsibility in the wake of John Fitzgerald Kennedy. He was gaiety and elegance incarnated – elegance of thought and mind. He chose to plead for Nicaragua, aware of the criticism he would face

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1 See <http://londonersdiary.standard.co.uk/2011/06/le-long-lunch-is-a-crucial-issue-in-the-hague.html> or <http://www.telegraph.co.uk/culture/hay-festival/8556321/Hay-Festival-day-nine-as-it-happened.html>.

2 This speech was delivered in French. The author is grateful to Olivia Nederlandt and Catherine Harwood, students from the Leiden LL M advanced programme on Public International Law, for their assistance with the translations.

3 D. Halberstam, *The Best and the Brightest* (1972).

from much US public opinion (his portrait was even taken from the wall of legal counsel in the State Department!) but he considered that there was at stake, in fact, the honour of his country. One day, when I ventured to ask him whether it bothered him to plead against his country, he replied, 'We are a free country!' . . . *Touché!*

The other late eminent person I wish to mention is Ian Brownlie. Our relations were not always easy, but he was nevertheless my mentor and my friend. As I entered the beginning of my career thanks to the trust of Carlos Argüello, he already had an impressive practice at the Court and welcomed me with good nature. He introduced me to the small world of the International Court of Justice (ICJ). I observed him and, somehow or other, I reproduced what he taught me in the context of *Nicaragua* in the other case in which I was counsel at the same time, *Burkina Faso/Mali*. We could bicker within the teams – often in the Nicaraguan teams – in which we were sitting, but I have nonetheless great gratitude to him.

I want to tell Tony Chayes and Lady Brownlie how much I miss Abe and Ian.

When we prepared this celebration of the 25th anniversary of the Court's Judgment in the 'big case', as it is still often called, we had hesitated between two approaches – which I characterized as the 'mafiosi's'⁴ or the 'veteran's' approaches: either to ask the 'usual suspects', those who very usually take the floor in international-law conferences, to evaluate the impact of the 1986 judgment on various aspects of the evolution of international law, or to call the 'actors' in the case to give a personal testimony of their recollection of the case. Eventually, we decided to mix both aspects. Since I have been asked to speak on both, I will successively speak in my capacity as a 'mafioso' and as a 'veteran' of the *Nicaragua* case.⁵

I. THE IMPACT OF THE *NICARAGUA* CASE ON THE COURT AND ITS ROLE: REFLECTIONS OF AN INTERNATIONAL LAWYER

First, a few words on how I perceive the impact of the *Nicaragua* case on the Court and its role.

Before entering into the heart of the matter, one more small introductory note: this is the first time that I derogate from the principle that I have set for myself to never comment publicly on specific cases in which I acted as lawyer or as arbitrator. I have hesitantly resigned myself to do so on this occasion, due to the passage of time, which allows me now to consider this exceptional case with a form of academic detachment.

From this perspective, I will say a few words of the *Nicaragua* judgment first from a rather political point of view – I refer to the policy of states towards the Court – and then from a more exclusively legal perspective.

4 This disrespectful appellation was used by the late Sir Ian Brownlie to design the small group of lawyers used to plead before the ICJ.

5 In fact, I was asked to make two different presentations, which have been merged into one on request of the editors of this special issue of this journal. Moreover, I had prepared the second one but, the format having changed, I had no occasion on which to formally deliver it.

1.1. *Nicaragua* and the states' policy towards the Court

First, remember: the situation of the Court itself was, at the time, not brilliant. The unfortunate decision of 1966 in the *South-West Africa* case repelled Third World countries from the Court for a long time. France, one of the traditional, most faithful supporters of the Court, had withdrawn its optional declaration following the 1974 judgments in the *Nuclear Tests* cases. And the 'ICJ crisis' seemed not purely conjectural, since no case had been submitted to the Court between 1963 and 1966 (that is during the four years *prior* to the 1966 judgment, the supposed root of all evil). No further case was introduced between 1968 and 1970 (inclusive) or again between 1977 and 1980. In the years that did have cases during the time period 1960–70, it was seldom for there to be more than one case per year – no request, no *compromis*, therefore no decision (there is no *Report* for 1977). Finally, the *Nicaragua* case came – or rather, two cases came: *Nicaragua v. United States*, on the one hand, but also (and I believe we should not forget it) *Burkina Faso/Mali*, too, submitted to the Court by the Special Agreement of 16 September 1983. The case was less spectacular than *Military Activities* but, conducted in parallel, it has, I think, also played a role in the kind of resurrection of the Court that is generally credited to *Nicaragua* alone.

The conclusion of the Special Agreement in *Burkina Faso/Mali* was strongly encouraged by France (and this is rather an understatement . . . I am not sure that the two countries, former colonies of France, and still very close to the former administering power, were really given a choice, despite the salutary impertinence of Captain Sankara⁶). Anyway, what I know is that the short-lived but determined minister of development cooperation of the time, Professor Jean-Pierre Cot, had 'sold' to the two states a 'turnkey' agreement (I know it for sure, since I had prepared it). This marked the return of Africa to The Hague. The return was quite successful, since the decision of 22 December 1986, highly impregnated with the style of the president of the Chamber, Judge Bedjaoui, exerted durable influence upon the law of territorial delimitation, which is one of the Court's staples. In addition, the decision is solidly motivated and skilful, and has certainly helped to persuade African states and perhaps, in the longer term, Latin American and now Asian countries to resume or to take the road to The Hague. However, for various reasons, it has not generated enthusiasm for the Chamber procedure and I must say that I am still not in favour.

It is difficult to determine how much can be attributed respectively to *Nicaragua* and *Burkina Faso/Mali* in reversing the trend and creating the new support enjoyed by the Court today.

However, this at least is certain: *Nicaragua* must have appreciated its venture in The Hague, because it has since appeared in eight⁷ cases before the Court, five times as applicant, twice as respondent, and once as an intervener.

6 See the excellent play by J. Jouet, *Miterranand et Sankara* (1998).

7 Nine if one adds the recent application (made on 22 December 2011) against Costa Rica with regard to 'violations of Nicaraguan sovereignty and major environmental damages to its territory'.

1.2. *Nicaragua* or the triumph of David over Goliath?

The *Nicaragua* cases in 1984 and 1986 were doubtlessly perceived as a kind of revenge of the weak against the strong and, for many Third World countries and for 'progressive' lawyers, it was evidence that the Court could state the law without necessarily taking the side of the strongest.

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.⁸

And, again, in his final statement on the merits, on 20 September 1985, Ambassador Argüello declared: '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.'⁹

While making allowances for the emotional rhetoric inherent in this type of exercise, it is certainly so that the case was seen in many developing countries that have, subsequently, felt encouraged to appear before the Court or to initiate proceedings.

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 stated by the Agent of Nicaragua in his conclusion on 10 October 1984:

The U.S. vetoed the Security Council action

...

The U.S. vetoed Contadora.

...

They must not be allowed to veto the International Court of Justice.¹⁰

They could not do so, but when the Security Council was seized under Article 94 of the Charter, they again paralysed its action.

As far as the Court was concerned, it demonstrated that sometimes David can triumph over Goliath. It is trite to recall, but this is certainly the way the 1986 decision, of which the content looks to me to be evident (unlike that of 1984, to which I will return), was seen. Thanks to this, it not only removed the painful impression caused by the 1966 decision in the case of *South-West Africa*, but certainly helped to give the Court renewed youth.

8 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Pleadings of 10 October 1984, [1984] ICJ Rep. 141, Vol. III.

9 *Ibid.*, Vol. V, at 236.

10 *Ibid.*, Vol. III, at 283.

2. RETROSPECTIVE: REFLECTIONS OF A PARTICIPANT¹¹

As stated earlier, I subscribe to the two lists, that of 'mafiosi' of international law, as Sir Ian Brownlie would have said, and that of the 'veterans'. Let me go into more personal recollections of our work on the case.

2.1. Non-appearances

First, a note on the composition of this panel: the 'Nicaraguan camp', if I can say so, is well represented, even though its two most important members have left us. But, no doubt, Ian Brownlie and Abraham Chayes would have attended had they still been with us, along with Claude-Albert Colliard, the robust judge ad hoc that Nicaragua had chosen. On the contrary, for the American side, only Professor John Norton Moore, to whom I pay tribute, has elegantly agreed to join us in this retrospective, which must be objective and measured. I regret that his example has remained isolated, as I regret that the current US Judge Donoghue, who participated in the American team in 1986, has not responded positively to our invitation; nor has President Schwebel, whereas, 25 years later, there is a unique opportunity to have this detached retrospective regard to which the title of this panel invites us. This imbalances matters – a bit like the row of seats left empty during the pleadings on the merits that had, by necessity, unbalanced the presentation of the case, even if

Even if it seems to me that the Court made a generous interpretation of Article 53 of its Statute, in which it saw the implied obligation to consider the position of the absent respondent state as it could be expressed outside the Court.

Even if US Judge Schwebel also felt obliged to take the place of the absent respondent, I must say I have never understood his attitude, which was otherwise rather counterproductive. Over the years, I gained respect for President Schwebel and our rapport became cordial and pleasant (after quite a few years of cold – which is also a sign).

Due to the absence of the respondent, the distinguished judge considered that he had to 'cross-examine' Nicaragua's witnesses and he did so in a way that did not seem to show much calm or great neutrality. Moreover, Judge Schwebel seemed to make a point of honour to write a dissenting opinion almost twice the length of the decision, which was already long: 268 pages for the dissenting opinion as against 135 for the judgment. That said, I must admit, after rereading his river-plea, that the tone is rather less virulent than in my memory – or is it that my long practice of the Court has hardened and seasoned me? And I must note that, in 1984, Judge Schwebel voted in favour of the admissibility of the Nicaraguan request.¹²

¹¹ This section reproduces the text of the author's draft, which was not delivered that way, for the fourth panel of the conference.

¹² [1984] ICJ Rep. 562.

2.2. The 1984 judgment

I must admit, however, that I have not much changed my mind with respect to the two decisions of 1984 and 1986 (I arrived on the team after the order indicating provisional measures of 10 May 1984 – I must say this order seems reasonably balanced and, again, it is unfortunate that the American judge felt obliged to write a dissenting opinion when in fact he did not disagree with the content of the order).

However, I have no doubt that Judge Schwebel had some reason to append his dissenting opinion to the 1984 decision, and I must say that I have always wondered what I would have done in 1984 if I had sat on this Olympus of international law that is the World Court.

I believe without reservation that the very dishonourable ‘Schultz letter’¹³ could not be a ground for lack of jurisdiction of the Court. However, I must say that I was always very sceptical about the validity of the declaration of Nicaragua. And you could ask me one question: Why did I plead for Nicaragua if I was convinced that it was wrong on jurisdiction?

Answer: first, I am not saying that it was wrong. What I say is that the reasoning of the majority does not seem to be self-evident. And, anyway, since no fundamental moral problem is concerned, it does not require a lawyer to be 100 per cent convinced of the soundness of the thesis of his client, but, what is required instead is to defend this thesis at 100 per cent of his capacity.

That being said, even if the arguments put forward by Judge Schwebel have weight, and if the opposing view was far from absurd, we must admit that, in such cases, a judge may be context-sensitive – here, to the fact that the fundamental mission of the Court is to decide in accordance with international law such disputes as are submitted to it in its capacity of the principal judicial organ of the United Nations; that is to say, a body whose primary function is to participate in the essential mission of the United Nations: the maintenance of international peace and security.

It seems to me not scandalous that a judge be context-sensitive, if we consider the issue from the standpoint of ‘*l’office du juge*’: after the unfortunate precedent of 1966, a decision of incompetence would probably have sounded the death knell of any lasting effective role of the Court for many years. Moreover, the vote on the issue of the validity of the Nicaraguan declaration was acquired by a majority of 11 votes against five – five votes, but a little too mono-coloured not to raise suspicion of pro-occidental ‘strabismus’ – Schwebel, of course, but also Mosler, Oda, Ago, and Jennings. Fortunately, Judge ad hoc Colliard and the French Judge Guy de Lacharrière were together in the other camp. Gaullism prevailing? Or well-established legal conviction? Conforming to the French tradition, Lacharrière was one of the three judges who did not append to the judgment any opinion or declaration.

What I do know, however, is that, even while I had been in charge of the FCN Treaty¹⁴ within the Nicaragua team, I would have undoubtedly joined

13 See *ibid.*, at 398, para. 13, and at 415–21, paras. 52–66.

14 *Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua*, [1984] ICJ Rep. 427, paras. 81–84.

President Ruda's grumbling and well-founded opposition to the artificial basis of jurisdiction found by an excessive majority (14 votes against two) with a certain enthusiasm.

Anyway, if I had voted for the decision of 1984, without taking into account the FCN Treaty, like the late Judge Ruda, I would have done so with much hesitation and unease.

2.3. The 1986 judgment

By contrast, regarding the 1986 judgment, my adherence would have been, I think, without hesitation. The United States was wrong to intervene heavily in the affairs of Nicaragua, to use armed force against that country, and to do so in clear violation of international law of armed conflict. Also, I am with those who consider that the conditions of the use of self-defence were not met. And I even think I would have gone further and would gladly have joined Judges Ruda, Elias, Sette-Camarra, and Ni to consider that the United States' reservation to multilateral treaty (the 'reservation Vandenberg') could not be opposed to Nicaragua.

But I was not then a judge any more than I am today, and what I would have done has no importance, be it concrete, theoretical, prospective, or even retrospective.

But there is another aspect of the 1986 judgment that I would like to address.

It is clear that the decision is considered almost unanimously as a great 'victory' of Nicaragua – it was without doubt globally so, even though I am not sure that Nicaragua has been able to derive all the profit they could from the judgment – but that is another story.

That said, the decision is, in my opinion, much more balanced than one may in general tend to think: we have not won everything, far from it. We lost, for example, on the 'Vandenberg reservation' and on economic sanctions. But I will stick to two other examples that I found most significant.

The first concerns the burden of proof and the role of witnesses. Against my advice, Nicaragua wanted to call five witnesses. Michael Glennon, who was one of them, will talk about it. I must say for myself that the exercise has convinced me that the hearing of witnesses, before the World Court in any case, is perfectly counterproductive: they are prepared; they get confused; or they are completely honest and it is 'dangerous' (not because I am in favour of lying to the Court – *horresco referens!* – but because the facts are not significant 'in themselves'). What matters is the presentation by witnesses – that makes the facts 'significant' or not significant at all, which is worse! Anyway, I fully approve of the position of the Court, which ignored the subjective opinions of witnesses and hearsay evidence¹⁵ and withheld from the statements by ministers called to testify by Nicaragua only the evidence regarded as 'contrary to the interests or contentions of the State to which the witness owes allegiance, or as

15 [1986] ICJ Rep. 42, para. 68.

relating to matters not controverted'.¹⁶ Restated in the cases of *Genocide*¹⁷ and *DRC v. Uganda*,¹⁸ this common-sense position should, I think, deter states from resorting to oral testimony before the Court. And the pathetic example of the witnesses called to the Bar by the parties in the *Genocide* case¹⁹ further strengthened my opinion. As to the affidavits that some counsel are fond of, in my opinion, they have no more (and maybe even less) probative value. Anyway, I want to say publicly that, if some affidavits were produced in the cases in which I participated, it has in almost all cases been against my advice!

The other argument made by Nicaragua that was rejected is more serious and, in this respect, I still think, unlike Paul Reichler, that we were right and the Court, which nevertheless perseveres (*perseverare diabolicum*), was wrong. This is the attribution, or rather the refusal to attribute, to the United States, the acts of the Contras. No offence to the legacy of Ago – for whom my admiration is otherwise so great – it has always seemed to me totally surreal first for the Court to establish that ‘the United States participation . . . in the financing, organization, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation’²⁰ were ‘crucial to the pursuit of their activities’²¹ and, at the same time, to declare that the United States had no control of their operations so that their actions did not engage the responsibility of the United States.²²

Despite Ago’s plea in his separate opinion,²³ this position does not make sense to me and is, in my opinion, totally untenable. The problem is that the Court not only applied this aberrant test of control in the *Nicaragua* case, but reiterated it with increased vigour in the 2007 *Genocide* case²⁴ – such a test being particularly aberrant in the case of a ‘global crime’ such as genocide. This attitude is probably explained by the fact that the Court was stung by the (welcome) resistance by the International Criminal Tribunal for the former Yugoslavia (ICTY) against its approach. And, to my great regret, the International Law Commission has not had the courage to challenge it in the Articles on Responsibility of States for Internationally Wrongful Acts (see Article 8: Conduct Directed or Controlled by a state).

That said, we must avoid not seeing the forest for the trees. This unfortunate aspect of the 1986 decision should not conceal its merits, both intrinsic and extrinsic.

16 *Ibid.*, at 43, para. 70.

17 *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep. 130, para. 213.

18 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, [2005] ICJ Rep. 201, para. 61.

19 [2007] ICJ Rep. 56, paras. 37–43.

20 [1986] ICJ Rep. 64, para. 115.

21 *Ibid.*, at 62, para. 110.

22 *Ibid.*, at 65, para. 116.

23 *Ibid.*, at 188–9, paras. 16, 17.

24 *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep. 207, paras. 398–407; see also *Case Concerning Armed Activities on the Territory of the Congo*, [2005] ICJ Rep. 226, para. 160.

Even if it can partly be seen as a 'Cold War decision', it is, overall, well motivated and constitutes a true textbook of international law on many points it treats and, without doubt, it contributed, to a great extent, to the revival of the Court from its ashes, almost cold in 1984 when *Nicaragua* seized it.

Having been counsel in the *Nicaragua* case is always for me a source of wonder and pride.