MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

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Background

On 10 May 1984 the International Court of Justice made an Order in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua.*[1] The Order was in the following terms:–

> The Court,
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> A. Unanimously,
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> *Rejects* the request made by the United States of America that the proceedings on the Application filed by the Republic of Nicaragua on 9 April 1984, and on the request filed the same day by the Republic of Nicaragua for the indication of provisional measures, be terminated by the removal of the case from the list;
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> B. *Indicates*, pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America, the following provisional measures:
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> 1. Unanimously,
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> The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines;
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> 2. By fourteen votes to one,
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> 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.
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> In Favour: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.
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> Against: Judge Schwebel.

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[1] I.C.J. Reports 1984 169.

3. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court.

4. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case;

C. Unanimously,

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

D. Unanimously,

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

And reserves the fixing of the time-limits for the said written proceedings, and the subsequent procedure, for further decision.[2]

The Order was done in English and French, but it was made clear that the English text was authoritative.

The proceedings were started on 9 April 1984 when the Government of the Republic of Nicaragua filed with the Court an Application. In this document the Court was asked to adjudge and declare that the United States was in breach of its international obligations towards Nicaragua in a number of respects. These obligations were said to flow both from customary international law and from a number of treaties (e.g. the Charter of the United Nations; the Charter of the Organization of American States; the Convention on Rights and Duties of States; and the Convention concerning the Duties and Rights of States in the Event of Civil Strife). The activities which were said to account for the alleged breaches included "recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua". Specifically alleged were such actions as "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; and killing, wounding and kidnapping citizens of Nicaragua". The United States was further accused of "infringing the freedom of the high seas and interrupting peaceful maritime commerce". This was a reference to the aspect of the dispute which aroused most interest in other countries, namely the alleged laying of mines in and around Nicaraguan ports. Finally the Court was asked to declare that "the United States has an obligation to pay Nicaragua, in its own right and as *parens patriae* for the citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy

[2] *Id.* 186 187.

caused by the foregoing violations of international law in a sum to be determined by the Court". It was explained that Nicaragua reserved the right to introduce to the Court at a later stage of the case "a precise evaluation of the damages caused by the United States".

Also on 9 April 1984 the Republic of Nicaragua had filed with the Court a request for the indication of certain "provisional measures to be in effect while the Court is seised of the case" introduced by the Application filed on the same day. These were to the effect that "the United States should immediately cease and desist from providing, directly or indirectly, any support—including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support—to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua"; and that "the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua".

So, substantially, through the Order made by the Court on 10 May 1984, the Government of Nicaragua achieved the object it had sought in its request for the indication of provisional measures. The only qualification lay in the finding that "the Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case". It is, however, customary for the Court, when indicating provisional measures, to lay this injunction upon the Applicant as well as the Respondent. This injunction is in fact the international law equivalent of the famous maxim in English law that "He who seeks equity must do equity".

It will, however, be noted from the Court's Order that Nicaragua has more hurdles to clear before it can obtain full satisfaction. These are the following:

(1) It must establish that the Court has jurisdiction to entertain the dispute;
(2) It must establish that the Application is admissible;
(3) It must satisfy the Court that its various claims against the United States are valid on the merits; and
(4) It must satisfy the Court on the "precise evaluation of the damages caused by the United States" which it proposes to introduce to the Court at a later stage in the proceedings—presumably, if and when it has succeeded on points (1), (2) and (3) above.

Before dealing with each of these four points separately, it may be briefly noted that all the paragraphs in the Court's Order were agreed unanimously with the exception of paragraph B2, on which the United States member of the Court, Judge Schwebel, dissented. Paragraph B2 was a rather verbose—and, in the view of the present writer, unnecessarily generalised—statement about "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"; and also about two principles contained

in the Charter of the United Nations and the Charter of the Organization States, namely 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. This enabled Judge Schwebel to make the point that the Court's Order was not even-handed and did not comply with the maxim that "He who comes into equity must come with clean hands." For, as he put it, Nicaragua was the State which "is at root responsible for the internationally wrongful acts which are at issue in this case". Nicaragua was responsible, in his view, because of her alleged violations of the sovereignty of Costa Rica, Honduras and El Salvador and, further, "the alleged violation by Nicaragua of their security is a violation of the security of the United States".[3] Judges Hermann Mosler (Federal Republic of Germany) and Sir Robert Jennings (United Kingdom) made the same point, though more briefly, when they appended a separate opinion stating that, in their view the duties "to refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and to refrain from intervention in matters within the domestic jurisdiction of a State, are duties which apply to the Applicant State as well as to the Respondent State".[4]

The Law

1. *The Jurisdiction of the Court to entertain the Dispute*

The Court has already decided in the present case that it had jurisdiction to make an Order for the indication of provisional measures. It did so under Article 41(1) of its Statute which says: "the Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". What has proved a constant problem for the Court is the relation between its "incidental" jurisdiction under Article 41, and its "principal" jurisdiction[5] to consider the merits of disputes under Articles 36 and 37 of its Statute.[6] Space does not permit of a full

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[3] *Id.* 198. In making this point Judge Schwebel was reopening a wound in the jurisprudence of the Court. In the *South-West Africa* cases (I.C.J. Reports 1966 3 at 47) the Court had stated that "a right resident in any member of a community to take legal action in vindication of a public interest" was "not known to international law as it stands at present." But, claimed Judge Schwebel, the Court had rejected that view when, in the later *Barcelona Traction* case (I.C.J. Reports 1970 3 at 32), it had referred to "the obligations of a State towards the international community as a whole" and had gone to to say that, "in view of the importance" of the rights which all States have in the observance by other States of these obligations "towards the international community as a whole," "all States can be held to have a legal interest in their protection." Applying this principle to the present case, Judge Schwebel maintained that "if the concept of collective security has any meaning, if the essentials of the Charter of the United Nations are to be sustained, then every State is indeed the guardian of the security of every other State" (at 196).

[4] *Id.* 189.

[5] The terms "incidental" and "principal" are taken from Shabtai Rosenne, *The Law and Practice of the International Court*, vol. 1 (1965) 318.

[6] Article 36 reads as follows:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as

treatment of this question here. The basic dilemma can be simply stated. It has been declared over and over again that the jurisdiction of international tribunals over sovereign States depends upon consent.[7] Yet, although the Court has been making valiant efforts to expedite its procedures, it may well take at least a year, or even two, to establish whether the Court has jurisdiction under Article 36 (or occasionally Article 37) to deal with the merits of a dispute. Article 41(1) on the other hand gives the Court the very necessary power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". It may well be that, even in a long drawn-out case, provisional measures are not needed to preserve the rights of one or other party. This could happen because a prejudiced party may, if successful on the merits, be able to be sufficiently compensated financially for any damage done in the meantime. Similarly, in a territorial dispute, both parties will be protected by the substantive rule that, after "the critical date", which cannot be later than the date of the submission of the dispute to the Court, "no act on the part of the said Governments in the territory in question can have any effect whatever as regards the legal situation which the Court is called upon to define".[8] But in other cases provisional measures may be required in order to preserve rights, and then the Court may be put in the position of having to decide whether it can indicate such measures under Article 41 before it has had the opportunity to decide whether it has jurisdiction under Article 36 or Article 37.

The relation between the two types of jurisdiction has never been better,

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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;
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.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37 reads as follows:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

[7] E.g. "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement" (P.C.I.J. Series B. No. 5 27); "The Court's jurisdiction depends on the will of the Parties" (P.C.I.J. Series A, No. 15 22); "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases" (I.C.J. Reports 1950 65 at 71); "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (I.C.J. Reports 1954 19 at 32).

[8] *Legal Status of the South-Eastern Territory of Greenland* (P.C.I.J. Series A/B, No. 48 287).

or more succinctly, described than by Judge Sir Hersch Lauterpacht, as follows:

> Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which prima facie confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.[9]

Another good way of attempting to resolve this dilemma was that adopted in a masterly article[10] by Dr M. H. Mendelson, in which the author considered eleven possibilities with respect to the Court's jurisdiction under Article 36 (or 37). These ranged from Case No. 1 ("jurisdiction is absolutely certain") to Case No. 11 ("definitely no jurisdiction"). The actual cases with which the Court has been mostly concerned have been within the range of No. 4 to No. 7, namely Case No. 4 ("On the *summaria cognitio* which the urgency of the request for interim measures necessarily involves, a positive finding looks distinctly the more probable, but lack of jurisdiction is by no means unarguable"); Case No. 5 ("The arguments are fairly evenly balanced, but at this stage a positive finding seems marginally the more likely"); Case No. 6 ("The arguments are very evenly balanced, and it is impossible, or at any rate very difficult, to form a definite view without extensive further argument about jurisdiction"); and Case No. 7 ("The arguments are fairly evenly balanced, but at this stage a negative finding seems marginally the more likely").

For example, in the first case of this kind to come before it, the present Court made an Order on 5 July 1951 indicating interim measures despite a powerful dissent by two judges (Winiarski from Poland and Badawi Pasha from Egypt) who said that their provisional conclusion was that "the Court will at the time of its final decision be compelled to hold itself without jurisdiction in this case".[11] Moreover their provisional conclusion was justified because, approximately a year later, the Court held by 9 votes to 5 that it did lack jurisdiction and that consequently the Order indicating the interim measures "ceases to be operative upon the delivery of this Judgment."[12] In making its original Order the Court had been careful to avoid committing itself in any way on the issue of its jurisdiction, beyond referring to its powers under Article 41 of the Statute and also saying that "it cannot be accepted *a priori* that the United Kingdom's claim falls completely outside the scope of international jurisdiction".[13] This case

[9] *Interhandel* case (I.C.J. Reports 1957 105 at 118).

[10] "Interim Measures of Protection in Cases of Contested Jurisdiction" (1972-73) 46 *British Year Book of International Law* 259.

[11] *Anglo-Iranian Oil Co.* case, *United Kingdom v. Iran.* I.C.J. Reports 1951 89. The dissent of Judges Winiarski and Badawi Pasha is at 96-98.

[12] I.C.J. Reports 1952 93.

[13] I.C.J. Reports 1951 93.

seems therefore to be an example of Case No. 7 in Dr Mendelson's list.

In the *Nuclear Tests* case, brought by Australia against France, the Court made an Order on 22 June 1973 indicating provisional measures, but only by the narrow margin of 8 votes to 6. In making the Order the Court said that it could not be assumed *a priori* that Australia's claims "fall completely outside the purview of the Court's jurisdiction, or that the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application".[14] The last part of this sentence may be taken to mean that *prima facie* Australia's Application was not inadmissible, whereas the four judges who appended dissenting opinions clearly had doubts concerning both the jurisdiction of the Court and the admissibility of the Application.[15] The other two judges who voted against the Order without indicating why they did so may be presumed to have shared these doubts. In the second phase of the case, the Court declared in its Judgment of 20 December 1974, by 9 votes to 6, that "the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon".[16]

In the *Aegean Sea Continental Shelf* case, brought by Greece against Turkey, the Court made an Order on 11 September 1976 in which it declined by 12 votes to 1 to make an Order for provisional measures requested by Greece. Various reasons were given for this refusal. For instance, it was said that the power of the Court to indicate interim measures under Article 41 "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" and that the alleged breach by Turkey of Greece's rights was one which, if established, "might be capable of reparation by appropriate means"; and also that the Security Council had already adopted a resolution urging both Greece and Turkey "to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated".[17] It must be borne in mind that the decision whether or not to indicate interim measures is always to some extent a discretionary one and that the reasons advanced by the Court for refusing to make an Order in this case may have had much to commend them. But it is also not unreasonable to believe that another reason, though not disclosed at the time, may have been serious doubts in the minds of some judges as to whether the Court had jurisdiction to deal with the case. This impression is confirmed by the fact that, just over two years later, the Court made a Judgment in which it held by as many as 12 votes to 2 that it was "without jurisdiction" to entertain the Greek Application.[18]

It seems, therefore, that, in deciding whether or not to decree interim measures, the Court is never likely to go further down Dr Mendelson's list than Case No. 7, and probably prefers not to go beyond his Case No. 5. It now remains for us to consider the more substantive question of the Court's jurisdiction to deal with the merits of a case as such. As has already

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[14] I.C.J. Reports 1973 99 at 103.

[15] The four dissenting judges were Forster (Senegal), Gros (France), Petrén (Sweden), and Ignacio-Pinto (Dahomey).

[16] I.C.J. Reports 1974 253 at 272.

[17] I.C.J. Reports 1976 3 at 9, 12.

[18] I.C.J. Reports 1978 3 at 45.

been indicated, that jurisdiction depends basically upon the consent of the Parties having been given.[19]

In the present case, the question of Nicaragua's consent to the jurisdiction of the Court is rather unusual. The Government of Nicaragua claims that on 24 September 1929 it made a declaration accepting the compulsory jurisdiction of the Permanent Court of Justice, and that this acceptance, which was "unconditional and without reservations, and without limitation of time", applies also to the present Court by virtue of Article 36(5) of the Statute of the present Court. There is, however, some doubt as to whether Nicaragua ever ratified the Protocol and Statute of the Permanent Court of Justice, and even more doubt as to whether such ratification, if indeed it took place, was ever deposited with the Secretary-General of the League of Nations in Geneva, as it should have been. Unless these steps can be proved to have been undertaken, it is at least arguable that the declaration made by Nicaragua on 24 September 1929 is without effect and that Nicaragua has not properly accepted the jurisdiction of the present Court.

As for the United States, it deposited on 26 August 1946 with the Secretary-General of the United Nations a declaration under Article 36(2) of the Statute of the present Court. This declaration has proved to be extremely controversial because it contained the so-called "automatic" or "self-judging" reservation to the effect that the acceptance would not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America". It would scarcely be consistent with good faith for the United States to determine that its alleged interventions in Nicaragua were "matters which are essentially within the domestic jurisdiction of the United States of America", and, so far, it seems, the United States has not invoked this potentially crippling reservation. Instead, the United States has relied on a document deposited with the Secretary-General of the United Nations on 6 April 1984, in which it purported to exclude from the ambit of its 1946 declaration for the next two years "disputes with any Central American State or arising out of or related to events in Central America". However, Nicaragua claims that this purported amendment of the 1946 declaration is without effect mainly because it is an amendment, whereas according to its terms the 1946 declaration was to "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate" it. Nicaragua thus argues that the amendment deposited on 6 April 1984 was not sufficient to affect the continuing validity of the 1946 declaration with respect to the Nicaraguan Application filed with the Court on 9 April 1984.

At this stage the conclusion can only be that this seems to be a case fitting squarely within the terms of Case No. 6 on Dr Mendelson's list, namely where the arguments about jurisdiction are "very evenly balanced, and it is impossible, or at any rate very difficult, to form a definite view without extensive further argument about jurisdiction". This leads to the further conclusion that, on the basis of precedents, the Court was justified in making the Order for provisional measures that it did make on 10 May 1984.

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[19] *Supra* n. 7.

2. *The Admissibility of the Nicaraguan Application*

It requires a considerable degree of sophistication to be able to distinguish between an argument that the Court lacks jurisdiction to entertain a dispute and an argument that an Application filed with the Court is inadmissible. An acknowledged expert on the subject, the late Sir Gerald Fitzmaurice, devoted several pages to it in a lengthy article he wrote before being elected as a judge of the International Court of Justice.[20] Sir Gerald said that an objection to the admissibility of a claim is "a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits," whereas an objection to the jurisdiction of the tribunal is "a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim".[21] Sir Gerald gave as examples of inadmissible claims that the claimant lacked the proper nationality, or that local remedies had not been exhausted or that there had been undue delay in presenting the claim. Having attained the bench at The Hague, Sir Gerald took the opportunity to expound on this issue at greater length,[22] although he maintained the basic distinction he had already laid down. He now made it clear that in certain situations the Court should consider objections as to admissibility "in advance of any question of competence", although in most cases it was to be expected that the Court would deal with questions of competence before it dealt with questions of admissibility.[23]

At this stage, and on the face of it, there does not seem to be any reason why the Nicaraguan Application should be found to be inadmissible, although clearly the Court has not yet determined it to be admissible. Attention has been drawn to this point for two reasons. The first is the obvious one that, unless the Court determines that it has jurisdiction, it clearly cannot go on to consider the merits of the case. The second is that, although it might be expected that the next question which the Court should consider is whether it possesses jurisdiction, on the basis of the Court's own precedents this is not necessarily so.

In his 1958 article Sir Gerald Fitzmaurice made a statement, which may have come as a surprise to some people, to the effect that "The fact that an international tribunal has jurisdiction in a given case, does not mean that it will necessarily be bound to, or will, exercise it".[24] Sir Gerald identified this as the question of "propriety" and this question has come to the fore in two judgments which the Court has given since Sir Gerald wrote his article. In one of these cases he was a member of the Court at the time. This was the *Case Concerning the Northern Cameroons*, where the Court in its Judgment of 2 December 1963 found "that the proper limits of its judicial function do not permit it to entertain the claims

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[20] "The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure" (1958) 34 *British Year Book of International Law* 1-161 especially at 8-25.

[21] *Id.* 12-13.

[22] In his Separate Opinion at 97-130 in the *Case Concerning the Northern Cameroons* (I.C.J. Reports 1963 15).

[23] *Id.* 105 Sir Gerald Fitzmaurice said: " . . . a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence".

[24] *Supra* n. 20 at 21.

submitted to it in the Application" and consequently, by 10 votes to 5 that "it cannot adjudicate upon the merits of the claim of the Federal Republic of Cameroon".[25] At first sight this might simply seem to be a declaration that the Cameroon Application was inadmissible, but a perusal of the Judgment indicates that the Court's refusal to continue with the case arose for different reasons. For example, the Court said that its duty was "to safeguard the judicial function", and arising out of this it would not "pass expressly upon the several submissions of the Respondent in the form in which they have been cast" just as it would not "entertain the claims submitted to it in the Application".[26] As for the question of competence, the Court said "Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose". The basic reason why the Court adopted this negative approach was that at the time of the adjudication there was no "actual controversy involving a conflict of legal interests between the parties".[27]

Basing itself upon the *Northern Cameroons* case, the Court, in a Judgment made on 20 December 1974, found by 9 votes to 6 that "the claim of Australia", in the *Nuclear Tests* case which it had brought against France, "no longer has any object and that the Court is therefore not called upon to give a decision thereon".[28] This was clearly not a decision on competence, and it is unlikely that it was one ruling the Australian claim to be inadmissible since the Court referred to the possibility that, "if the basis of this Judgment were to be affected", Australia might once again "request an examination of the situation". The reasoning behind the Court's decision was that in its Application, as interpreted by the Court, the Australian Government had sought the cessation by France of nuclear tests in the atmosphere in the Pacific, and that, as a result of various undertakings given by the French Government, that object had been essentially achieved, notwithstanding the Australian Government's view that the French undertakings were neither sufficiently binding nor sufficiently specific.[29]

Again at this stage, and on the face of it, there does not appear to be any reason why the Court's scruples about its "judicial function" should prevent it from entertaining the present dispute. However, things move fast in international affairs and a situation could arise in which the Court might feel inhibited from continuing to adjudicate upon the dispute, even though there may be no formal reason why it should not do so. The most

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[25] *Supra* n. 22 at 38.

[26] *Ibid.*

[27] *Id.* 34. The basic reason why, in the Court's view, there was no "actual controversy" between the parties was that the fate of the Northern Cameroons had already been settled by the United Nations General Assembly, taking account of a plebiscite held in the Territory under United Nations auspices. In his Separate Opinion, Sir Gerald Fitzmaurice dealt with the question of "propriety" or proper exercise of the judicial function (at 105-108). See also L. Gross, "Limitations upon the Judicial Function" (1964) 58 *American Journal of International Law* 415.

[28] *Supra* n. 16 at 272.

[29] The Court said it saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony" (at p. 271). Following the precedent set in the *Anglo-Iranian Oil Co.* case (see *supra* n. 12), the Court declared that the Order it had made on 9 May 1973 "ceases to be operative upon the delivery of the present Judgment," and that in consequence the provisional measures it had indicated in that Order "lapse at the same time."

likely development is on the diplomatic front. At the oral hearings in May 1984 the United States advanced vigorously the argument that the Court should not indicate provisional measures because the situation in Central America was a very complex one, involving many other countries besides Nicaragua and the United States and could best be solved through the United Nations or the Organization of American States, and especially through the so-called "Contadora process" (an initiative on the part of representatives of Colombia, Mexico, Panama and Venezuela who met in Contadora, an island in Panama, in January 1983). In response to this Nicaragua claimed that previous decisions of the Court had established the principle that "the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, and that the Court should not decline an essentially judicial task merely because the question before the Court is intertwined with political questions".[30]

This question is obviously a difficult one for the Court, and is one on which the Court must be allowed a good deal of discretion. In the *Namibia* advisory opinion the Court did indeed reject a South African argument that the Court should decline to give an opinion because "in order to answer the question the Court will have to decide legal and factual issues which are actually in dispute between South Africa and other States".[31] Also, in the *Aegean Sea Continental Shelf* case, the Court rejected a Turkish argument to the effect that "the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's existence of jurisdiction in the present case".[32] On the other hand, in an earlier phase of the same case, the Court, in declining to order provisional measures, was obviously influenced by the fact that the Security Council had already taken cognizance of the dispute.[33] The problem which confronts the Court in such cases is to determine the extent to which it is possible to separate the legal aspects of the dispute from the political aspects. On that issue, especially in as fluid and evolving a situation as now exists in Central America, it would be idle to speculate at this stage.

3. *The Merits of the Dispute*

Common lawyers, accustomed to strict rules of evidence which apply when a single person is accused of a single crime, such as murder or theft, must be aghast at the prospect of an international tribunal, with practically no rules of evidence and with very little experience of the examination and cross-examination of witnesses, adjudicating upon the wide range of the charges brought by Nicaragua against the United States in the present case. The problem is compounded by the fact that the Court has two official languages (English and French) and that the Applicant in this case is a Spanish-speaking country.

In practice the Court tends to make light of difficulties in this area.

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[30] *Supra* n. 1 at 186.
[31] I.C.J. Reports 1971 24.
[32] *Supra* n. 18 at 12.
[33] *Id.* 10.

In the *Namibia* advisory opinion, handed down on 21 June 1971, the Court found that

> . . . no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

Accordingly the Court rejected the suggestion of South Africa that a plebiscite should be held in Namibia, and it also refused a request by South Africa "to be allowed to supply the Court with further factual material concerning the situation there". The Court said it did not "find itself in need of further arguments or information".[34]

In considering whether the interim measures ordered by the Court on 17 August 1972 in the *Fisheries Jurisdiction* case[35] should be renewed, a number of judges gave as reasons for not renewing the measures the fact that the measures were not working properly. Judge Ignacio-Pinto (Dahomey) said that "as no-one can be unaware, there have been numerous clashes in the disputed fishery-zone between Icelandic coastguard vessels and trawlers flying the British or Federal German flag".[36] Judge Gros (France), relying on statements made in the House of Commons and in a British Government White Book, said there was

> . . . no dearth of information preventing an examination of the situation at the moment when the Court was called upon to pronounce upon the question of interim measures. The Court is aware that both of the interested States accuse each other of employing force with a view to exercising the respective rights which they claim.[37]

Judge Petrén (Sweden) simply referred to "the many incidents that have occurred at the fishing grounds" which, in his view, showed that the interim measures of protection ordered nearly a year before "have not been fulfilling their purpose".[38] In the event the Court, without even requiring an oral hearing to test these assertions or to obtain further evidence, overruled these objections and confirmed that the provisional measures indicated on 17 August 1972 should "remain operative until the Court has given final judgment in the case".[39]

The way the Court proceeded in the *Tehran Hostages* case[40] is even more striking. It stated, in its Judgment delivered on 24 May 1980, that

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[34] I.C.J. Reports 1971 16 at 21, 57.
[35] I.C.J. Reports 1972 12.
[36] I.C.J. Reports 1973 305.
[37] *Id.* 307.
[38] *Id.* 310.
[39] *Id.* 304.
[40] I.C.J. Reports 1980 3.

"The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries". It next referred to documents furnished by the United States; to statements made by the United States Agent and Counsel during the oral proceedings; to written replies by the United States to questions put by Members of the Court; to statements made by Iranian and United States officials, either at press conferences or on radio or television; and concluded by saying that "the result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case". There was a difficulty in that, so far as the reports emanating from Iran were concerned, "the Court has necessarily in some cases relied on translations into English" submitted by the United States. As, however, Iran had chosen not to appear before the Court, and as all the relevant information had "been communicated by the Court to the Iranian Government without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States", the Court was satisfied that "the allegations of fact on which the United States bases its claims in the present case are well founded".[41]

The case brought by Nicaragua against the United States is different in that the United States will obviously deny before the Court all, or at least some, of the charges made against it, and there may be conflicts of testimony. But, especially as the United States is such an open society, and many accusations concerning United States activities "in and against Nicaragua" are openly bandied about in the Congress and in United States media, the Court is not likely to face any insurmountable difficulties. Should the need arise, the Court has powers under its Statute which it can use to obtain further information.[42]

4. *The Question of Damages*

There seems therefore to be no reason why the Court, assuming that problems concerning its own competence and judicial function and the admissibility of the Application, have been overcome, should not be able to render a Judgment on the merits of the present case. There is, however, a likelihood amounting almost to a probability that any finding by the Court on the merits will have to be in very broad terms, possibly accepting some of Nicaragua's charges and dismissing others. Nor should the possibility of counter-claims by the United States be excluded. The real difficulty for the Court will arise when it tries—if it has to—to evaluate the various claims and counter-claims with sufficient precision to enable the question of damages, which was raised by Nicaragua in its Application, to be resolved.

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[41] *Id.* 9-10.

[42] E.g. Article 49:

> The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50:

> The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51:

> During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

The Court could follow the precedent of the *Corfu Channel* case.[43] In that case the Court, in its Judgment of 9 April 1949, found by 11 votes to 5 that Albania was responsible under international law for explosions which had occurred on 22 October 1946 in Albanian waters and which had resulted in damage caused to two British warships and also in loss of life and injuries; and by 10 votes to 6 that the assessment of the amount of compensation should be reserved for further consideration.[44]

The British Government claimed compensation amounting to a total of £843,947 (£700,087 in respect of H.M.S. *Saumarez*; £93,812 in respect of H.M.S. *Volage*; and £50,048 for pensions, costs of administration, medical treatment etc.). However, the Court, exercising its powers under Articles 48, 50 and 53 of its Statute, made an Order on 19 November 1949[45] in which it appointed two Dutch naval experts to "examine the figures and estimates" submitted by the British Government. These experts estimated the damage to H.M.S. *Saumarez* at £716,780—higher than the amount claimed by the British Government—and the damage to H.M.S. *Volage* at £90,800—lower than the amount claimed by the British Government. As regards the H.M.S. *Volage* claim, the Court said that "the slightly lower figure of the experts . . . may . . . be explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". On the whole the Court expressed the view "that the figures submitted by the United Kingdom Government are reasonable and that its claim is well founded". What is more interesting is how the Court handled the situation arising from the fact that the experts estimated the damage to H.M.S. *Saumarez* to be higher than the amount claimed by the British Government. On that the Court said that "it cannot award more than the amount claimed in the submissions of the United Kingdom Government".[46] In other words the Court applied the *non ultra petita* rule.

Sir Gerald Fitzmaurice described this rule in 1958 as a rule "which entails that an international tribunal will not decide more than it is asked to decide, and will not award by way of compensation or other remedy more than it is asked to award".[47] There has been some discussion as to whether this rule is a rule of procedure or a jurisdictional rule. In 1957 Rosenne wrote: "While not disputing that the *non ultra petita* rule may properly be regarded as one of procedure, it is believed that in international litigation it is more appropriate to regard it as an aspect of the problem of jurisdiction".[48] Fitzmaurice, however, was even more definitely of the view that it is a jurisdictional rule, "being, at any rate in its main aspect, a derivative of the consent principle". As he explained, "an international tribunal's powers are limited to what is conferred upon it by the parties". Fitzmaurice also dismissed the suggestion that "a State will always be a consenting party to being given more than it asked for". Relying on his

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[43] I.C.J. Reports 1949 4.

[44] *Id.* 36.

[45] I.C.J. Reports 1949 237.

[46] See *Corfu Channel Case* (Assessment of the Amount of Compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland) I.C.J. Reports 1949 244 at 249.

[47] *Supra* n. 20 at 98.

[48] *The International Court of Justice* (1957) 272.

long experience as a legal adviser to the Foreign Office, Sir Gerald explained that "elements of policy, expediency, realism, or even of forbearance" may lead a claimant government to ask for less than it is entitled to, and, as he further explained, "it has to be remembered that the conduct by the other party of its case will have been affected, at the least, and may even have been determined by the character of the claimant's submissions, and of the remedies (and even where damages are concerned, by the amount) asked for".[49]

Conclusions

1. As has already been indicated, the dispute between Nicaragua and the United States which has been referred to the International Court of Justice is only part of a complex situation which has developed in Central America. It is clear that the situation is essentially one which requires a political solution. It will be for the Court to decide if—on the assumption that questions concerning its own jurisdiction and the admissibility of the Application do not of themselves prevent the Court from adjudicating in the present case—its concerns for "the judicial function" either permit it to continue with the case or inhibit it from doing so.
2. Whatever may be the assistance which international law, and in this instance international litigation, can render towards a political solution, it is to be hoped that the parties involved will not seek a solution through military means.
3. It is gratifying that the United States has not followed recent precedents[50] and has come to the Court to argue its case and has so far not invoked the full panoply of objections it could possibly make to adjudication of the dispute by the Court.
4. On the other hand, the attempt by the United States, through the document it filed on 6 April 1984, to circumvent the capacity of the Court to adjudicate upon the case which it had reason to believe Nicaragua was about to bring against it, was a blunder. So far it has achieved nothing except to sully the reputation of a country which has in the main—and certainly more than most countries—stood for the rule of law in international affairs. It was a fortunate coincidence that the American Society of International Law happened to be meeting in Washington soon after this document had been filed, and this enabled the Society to pass a resolution in which it said that, although it did

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[49] *Supra* n. 20 at 98. In the later edition of his work, *The Law and Practice of the International Court* (1965), Rosenne referred at 327, n. 1, to the "valuable discussion of Fitzmaurice" but saw no reason to amend his formulation.

[50] Iceland declined to appear in the *Fisheries Jurisdiction* cases brought against it by the United Kingdom and the Federal Republic of Germany; France declined to appear in the *Nuclear Tests* cases brought against it by Australia and New Zealand; Turkey declined to appear in the *Aegean Sea Continental Shelf* case brought against it by Greece; and Iran declined to appear in the *Tehran Hostages* case brought against it by the United States. Not only has this practice resulted in severe damage to the prestige of the Court but, worse still, the Court, by failing to use powers which it undoubtedly has to penalise non-appearing States, has actually permitted a situation to develop in which a non-appearing Respondent is in a better position than a Respondent State which does appear. On this question see the excellent article by Sir Gerald Fitzmaurice in "The Problem of the 'Non-appearing' Defendant Government" (1980) 51 *British Year Book of International Law* 89. In this article, the last he wrote before his death, Sir Gerald may truly be said to have crowned with a characteristically worthy contribution a career of over fifty years in the service of international law.

not ordinarily take positions on matters of policy, it had "previously departed from this practice to support the acceptance by the United States of the jurisdiction of the International Court of Justice", so that on this particular occasion "The Society therefore deplores, and strongly favors recision of, the recent action of the United States Government in attempting to withdraw from the jurisdiction of the International Court of Justice 'disputes with any Central American State' ".[51]

Postscript

Since this article was prepared, there have been some interesting developments, e.g.

(i) The Republic of El Salvador made an attempt to intervene in the case. On 4 October 1984 the Court made an Order in which it decided by nine votes to six not to hold a hearing on El Salvador's attempted intervention, and by fourteen votes to one (Judge Schwebel) that El Salvador's attempted intervention was inadmissible, at any rate at this stage of the case (I.C.J. Press Release No. 84/30).

(ii) On 26 November 1984 the Court delivered a Judgment in which it held, by fifteen votes to one (Judge Schwebel), that it had jurisdiction to entertain Nicaragua's Application, and, unanimously, that the Application was admissible. On this point Judge Schwebel concurred, but only of course on the assumption that the Court had jurisdiction. That the Court now consisted of sixteen judges was due to the appointment by Nicaragua of Professor Colliard of the University of Paris as judge *ad hoc* under Article 31 of the Statute of the Court. (I.C.J. Press Release No. 84/39).

These figures suggest that, at the outset of the case, the majority of the Court probably regarded it as a No. 4 type of case within the range of Dr Mendelson's classification,[52] and not as a No. 6 type of case, as suggested by the present writer. They also suggest that the United States has fared very badly before the Court. It is, however, not quite as simple as that. Judges Ruda (Argentina), Mosler, Ago (Italy), Jennings and de Lacharrière (France) indicated that, in their view, it would have been more appropriate for the Court at least to hold a hearing on El Salvador's attempted intervention, and the Court itself seems to have left open the possibility of that country being allowed to intervene later in this case. Also Judges Mosler, Oda (Japan), Ago and Jennings, as well as Judge Schwebel, voted against the principal decision of the Court, which was to find that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court. However, only Judge Ruda joined Judge Schwebel in rejecting an alternative submission by Nicaragua which was to the effect that the Court had jurisdiction based on Article 24 of the Treaty of Friendship, Commerce

[51] For the text of this resolution see [1984] *Australian International Law News* 683.
[52] See *Supra* p. 490.

and Navigation signed at Managua between the United States and Nicaragua on 21 January 1956.[53]

So, although the United States has found some support among members of the Court, it is beyond dispute that that support is largely limited to judges from Western countries, and that the Court as a whole is evincing a marked anti-American trend. It is perhaps too early to speculate what the consequences of that will be. Not surprisingly, the State Department issued a statement expressing its "disappointment" with the Court's decision (*International Herald Tribune*, 27 November 1984). Other circles in the United States may be expected to express more than "disappointment". For example, Mrs Kirkpatrick, United States ambassador to the United Nations, when addressing the American Society of International Law in Washington on 12 April 1984, attacked Nicaragua's decision to refer the dispute to the Court and said that there was "overwhelming evidence" that Nicaragua was an aggressor against its neighbours; that, under the United Nations Charter, those neighbours enjoyed the right of individual and collective self-defence; and that to portray Nicaragua as a victim of aggression was "a complete Orwellian inversion". On the very same day the *Wall Street Journal* published (at p. 32) an article by Mr Burton Yale Pines, vice-president of the influential Heritage Foundation, in which he said that "The World Court, despite its pretensions and grand quarters at The Hague, is a hollow and rather useless institution to which hardly any nation ever turns for settling hardly any dispute. It is a relic of an earlier age whose internationalism and simplistic idealism are now discredited." He added that "it would be foolish for the United States to submit itself to public assault from a regime that routinely disregards international law and violates its citizens' human rights", and more ominously—in the light of the impending withdrawal of the United States from UNESCO, which some commentators have seen as a warning-shot across the bows of the United Nations itself—he praised "the Reagan Administration's refusal to grant jurisdiction to the World Court" as "simply a reaffirmation of America's two-century-old vigorous defence of its sovereignty". Mr Pines concluded his attack on the Court with the following words: "It is this reaffirmation of sovereignty and independence from international bodies—at a time when the United Nations, UNESCO and almost every other international organization have been turned into an anti-American and anti-West lynch mob—that deserves the support of Congress and the American people."

In an interesting, and balanced, assessment of the situation, the weekly news magazine *Time* discusses the dilemma in which the Reagan Administration now finds itself. It refers to the document deposited by the United States on 6 April 1984 as "an ill-conceived pre-emptive strike" and considers the possibility that the United States may lose the case on the merits. Then it makes the interesting suggestion that "some Washington officials believe that the United States can win the case only by releasing

[53] This Treaty, as its name suggests, is concerned with promoting friendly commercial relations between the two countries. Many of its provisions seem irrelevant to the present dispute, but Article 19(1) contains a reference to "freedom of navigation" and Article 24(2) provides that "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 International Court of Justice, unless the Parties agree to settlement by some other pacific means".

classified intelligence information", but observes that "such a disclosure could hamper future United States intelligence gathering throughout Central America". Finally, the *Time* article suggests that the required information might consist of transcripts based on tapes of telephone conversations of Nicaraguan officials, but warns that "even those costly disclosures would be no guarantee of victory before the judges".[54] On this last point, it is respectfully agreed that, even if it could be proved that Nicaragua had committed aggression against its neighbours, that would not necessarily get the United States out of the wood. The United States would still have to satisfy the Court that it was entitled to join the neighbours of Nicaragua in collective self-defence under Article 51 of the Charter of the United Nations and that "the military and paramilitary activities" of the United States "in and against Nicaragua" came within the ambit of that Article.[55]

[54] See *Time*, 10 December 1984, p. 48. The journal's suggestion of providing evidence from transcripts based on illegal wiretaps will cause a wry smile among Australian readers, who have been provided with similarly acquired information concerning alleged misconduct by prominent public figures consistently throughout the year 1984. The suggestion, however, draws attention to a serious and difficult problem, namely the extent to which it is proper for tribunals to admit unlawfully acquired evidence—a problem which of course occurs in international, as well as in municipal, law. See W. M. Reisman and E. E. Freedman, "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication", 76 *A.J.I.L.* 737 (1982); H. Thirlway, "Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication", 78 *A.J.I.L.* 622 (1984); R. Pattenden, "The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia", 29 *I.C.L.Q.* 664 (1980).

[55] Article 51 of the United Nations Charter reads as follows:

> 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.