

NICARAGUA AND A NEW GLOBAL ORDER: HOW *NICARAGUA* V. *UNITED STATES* SHIFTED INTERNATIONAL LAW

BY RYLIE TAYLOR

REVIEWED BY DR. FRANZISKA NEWELL

EDITED BY ELEKTRA JORDAN

This paper is a case study concerning the International Court of Justice case *Nicaragua v. United States*, detailing what precedents and clarifications the case established for the ever-dynamic field of international law. In 1984, after the United States financially supported military and paramilitary groups in Nicaragua to overthrow the Nicaraguan FSLN government (which was installed by the United States in the early 1970s), the Nicaraguan government filed an appeal with the International Court of Justice. Overall, *Nicaragua v. United States* advanced the implementation of international law by effectively clarifying the implications and accountability of international law and establishing a universal definition of collective self-defense.

THE International Court of Justice (ICJ, or the court) has significantly contributed to the development of international law (IL) since its conception in 1945. This paper will review changes made to the ICJ through the case study of *Nicaragua v. United States*. The analysis of the case, opened in 1984, reveals important innovations in international law regarding the court's jurisdiction over states who deny said jurisdiction, states'

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accountability for the military and paramilitary groups they financially support abroad, and the question of self-defense when that force is seemingly unsolicited. The United States violated international law by threatening Nicaragua's sovereignty through its financial support of military and paramilitary contra groups in the country. Nicaragua brought the U.S. to court, arguing the United States' intent of intervention was to overthrow

the Nicaraguan government. The U.S. proceeded to make things difficult— withdrawing compulsory consent, misusing the concept of collective self-defense, denying accusations, then failing to accept the reparations it owed Nicaragua following Nicaragua's victory in the ICJ. This paper will explore the ways in which the United States' violation of international law in Nicaragua led to dra-

matic changes in the ICJ.

The case first reveals the International Court of Justice's jurisdiction when not all parties consent to a hearing. The ICJ is—for the most part—unable to act as a mediator without the consent of jurisdiction by both parties. However, in this particular case, the United States withdrew consent after the case's preliminary stage when the ICJ found that it did in fact have jurisdiction over the matter. Thus, by the merits stage of the case, the United States was out. This pullout challenged whether the initial compulsory consent of the United States granted the ICJ sufficient jurisdiction or if consent must be continual throughout court proceedings.

The case's next issue regards the accountability tied to funding the military and paramilitary activities in a foreign state. If the United States supports a violent political group abroad, can they be sure that the funds they supply will not be used to enact violence? If it cannot be proven that the United States knew violence would occur due to their monetary contributions, their sequential guilt cannot be determined. While the use of force in self-defense is legal under international law, the use of unsolicited force without authorization from the UN Security Council (UNSC) is not. The issue of military and paramilitary funding is essentially a question of plausible deniability. However, the United States aimed to justify their use of force in Nicaragua through El Salvador's collective self-defense. The argument was thin from the get-go, and without El Salvador's corroboration, the claim became a non-starter.

Although the case itself did not formulate until 1984, the brunt of the conflict began five years earlier. In the summer of 1979, The Frente Sandinista de Liberación Nacional, or FSLN, government

rose to power in Nicaragua. In the wake of the FSLN's succession, supporters of the former president, Anastasion Somoza, and former National Guard members formed an opposition to the new government. Initially, the United States acted in support of the FSLN. However, upon the U.S.' discovery that the Nicaraguan government provided logistical support to El Salvadoran guerrillas by transporting arms and advisors from the U.S.S.R. and Cuba, the U.S. began undertaking armed activities against the FSLN due to the perceived threat of communism (U.S. State Department, 1985).

The U.S.' unsolicited activities against the official Nicaraguan government included the support of the Fuerza Democrática Nicaragüense, or FDN, and the support of the Alianza Revolucionaria Democrática, or ARDE, with both monetary funds and U.S. military intelligence support. These two groups worked along the Honduran and Costa Rican borders of Nicaragua, respectively, coalescing against the current FSLN government. U.S. support of these contras, or Nicaraguan organized oppositions, was kept hidden; the U.S. did not acknowledge its involvement until 1983 (Rostow, 1986) Through the U.S.' covert and subsequently violent oppositions towards the FSLN, utilizing the FDN and ARDE contras, Nicaragua alleged to the ICJ that the U.S. acted with the intent to overthrow the government of Nicaragua, infringing on numerous levels on the state's sovereignty. This is illegal under international law. In addition to U.S. support of the contras, Nicaragua claimed the U.S. mined multiple Nicaraguan ports while sabotaging other harbors, oil installations, and a naval base

through various violent actions, all in the name of collective self-defense (Rostow, 1986). The U.S. mining of Nicaraguan ports was particularly contentious due to the U.S. government's lack of official warning before or after the placing of the mines (*Nicaragua v. United States*, 1986).

This example of direct violence against Nicaragua is illegal under the UN Charter, which explicitly forbids the use or threat of force by states against other states' territorial integrity or political independence, except when in self-defense or with UNSC authorization (United Nations, 1983). On April 9, 1984, Nicaragua applied for proceedings against the U.S., requesting the implementation of provisional measures for the U.S. to cease and refrain from any further violent action, and for the U.S. to reopen Nicaraguan ports (*Nicaragua v. U.S.*, 1984). The FSLN wanted to rule the country it had fought for, and they wanted to engage in trade without interference from the United States.

The U.S. remained insouciant to Nicaragua's claims, refusing to appear before the ICJ during the merits stage while arguing steadily against the ICJ's claim of jurisdiction in the face of its non-consent. However, the United States had granted compulsory jurisdiction to the ICJ in 1946, making its withdrawal of consent significant regarding the history of jurisdiction within the ICJ (U.S. State Department, 1985). The U.S. argued that, despite giving compulsory jurisdiction in 1946, which allowed the ICJ automatic jurisdiction whenever a case opened against the U.S., the U.S. should be entitled to revoke that consent whenever it suited its interests. The U.S. also argued that because Nicaragua did not give the

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ICJ compulsory jurisdiction, as the U.S. did in 1946, entertaining this case misrepresented the basic principle of reciprocity. The U.S.' refusal to engage in a trial raises the question of court jurisdiction when not all parties accept ICJ intervention. Yet, the ICJ responded affirmatively in its decision to pursue the case without the U.S (U.S. State Department, 1985). By pursuing the case with only U.S. compulsory jurisdiction, the ICJ began sowing the seeds for a new facet of justice. Convinced by Nicaragua's claims against the U.S., the ICJ determined that with compulsory consent in the bag, withdrawal of consent was not enough to cease intervention in a case.

The U.S. also insisted that its actions were grounded in the inherent right of collective self-defense guaranteed in Article 51 of the United Nations Charter and the Rio Treaty, citing Nicaragua's involvement with guerrilla warfare in El Salvador for justification. According to Article 51, individual or collective self-defense is allowed if an armed attack occurs against a UNSC member (Rostow, 1986). The U.S. claimed that every action taken in light of this case was "in defense of the vital national security interests of the United States and in support of the peace and security of the hemisphere" (U.S. State Department, 1985).

By breaking down the case, the United States' violations of international law become clear. Per Nicaragua's arguments, the ICJ held that the U.S. violated international law by 1) intervening in another state's affairs when the U.S.

financially and administratively supported contra activities against the FSLN, 2) when it used force against Nicaragua when it engaged in direct attacks in 1983 and 1984, 3) when the U.S. violated Nicaragua's sovereignty through its use of intimidating aircraft activity, and 4) when the U.S. failed to uphold Nicaragua's sovereignty by mining Nicaraguan ports in Nicaragua's internal and territorial waters.

The ICJ decided that the U.S. was unable to rely on collective self-defense as its justification of attacks on Nicaragua

due to the inequality of the threats imposed by Nicaragua to the U.S. and El Salvador compared to the U.S.' violent response. Plus, Nicaraguan interference and arms supply in El Salvador occurred primarily in 1981 and 1982, not when the U.S. admitted to attacking Nicaragua in 1983 (Lewis, 1986). This indicates that the U.S. did not fulfill the criteria for collective

self-defense: armed attack, necessity, and proportionality (Green, 2017). Nicaragua selling arms to support insurrectionists in El Salvador while working with Communists from Cuba was not proportional to the U.S. financially supporting violent groups and directly committing violent acts with the intent of overthrowing the Nicaraguan government. On top of this, Nicaragua denies its intervention in El Salvador altogether anyway (Rostow, 1986). However, despite U.S. funding and support of military and paramilitary operations through the Nicaraguan contras, which was a definite violation of international law and the bilateral Treaty of Friendship, Commerce, and Navigation

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of 1956, the ICJ decided that the U.S. would not be held directly accountable for the contras' actions (*Nicaragua v. U.S.*, 1984). This particular decision would become known as the 'effective control' test because it rendered a paramilitary organization legally separate from its operating state. The Treaty of Friendship (1956) defined a relationship between the U.S. and Nicaragua existing with mutual amity, unrestricted commerce, and port safety. While the treaty focuses primarily on the unaffected trade between the two states, which the U.S. threatened through the mining of Nicaraguan ports, the U.S. also breached mutual amity by supporting organized government opposition groups like FDN and ARDE.

The court's response to the U.S.' hearing in 1984 did not so much provide comprehensive clarification, but narrowed the circumstances in which collective self-defense was applicable as a justification for violent retaliation or the imposition of trade restrictions. Now, the application of collective self-defense demanded that the presumed "victim" state—in this case, El Salvador—must declare itself to be the victim of an armed attack and request military aid in response (Green, 2017). El Salvador's failure to provide these declarations nullified the U.S.' claim that collective self-defense was an acceptable justification of its action against Nicaragua. This substantially weakened any argument the U.S. made for its case, including both the ICJ's jurisdiction and the accountability the U.S. should express in light of its support of the contras.

Military and paramilitary accountability and the 'effective control' test affected international law in future cases as well. One significant example is *Bosnia and Herzegovina v. Serbia and Montenegro*, which opened in 1993 and closed with a decision in 2007. Serbia and Montene-

gro recruited, trained, armed, equipped, financed, and encouraged military and paramilitary actions in and against Bosnia and Herzegovina, employed numerous military and paramilitary organizations, and violated its charter and treaty obligations to Bosnia and Herzegovina under Article 2 (4) of the United Nations Charter, as well as its obligations under general and customary international law. While the ICJ did not extend a definitive ruling against the U.S. for its accountability for funding military and paramilitary organizations in 1984, the court decided in 2007 that Serbia and Montenegro were knowledgeable in its pursuit of violence through these organizations and so prosecuted the states under the assumption that, despite outward appearances, these groups were "*de facto* organs" of the Serbian and Montenegrin government. So, the actions of these military and paramilitary groups, specifically the massacres committed at Srebrenica, would be attributable to Serbia and Montenegro as if they had been organs of that state under international law ("Application of the Convention on Prevention and Punishment," 2007).

Furthermore, this case highlighted the discrepancies between the U.S.' agreements in international law and the U.S.' actions as a state. By intervening in Nicaragua's affairs, infringing on its sovereignty, and interrupting peaceful maritime commerce, the U.S. violated both international law and the Treaty of Friendship, Commerce, and Navigation of 1956. Subsequently, the U.S. was to provide reparations in the wake of its injury toward Nicaragua due to its breaches of both the 1956 treaty and the UN Charter (*Nicaragua v. U.S.*, 1984). This aspect of the case is significant due to the ICJ's assurance that states should be held accountable for violating international law—especially when using force in foreign states—demanding a level of consis-

tency for states' future actions. By calling for reparations from the U.S., arguably the most powerful and influential state on the planet, even after the U.S.' withdrawal of consent, the ICJ also boasted its might and increased the weight of ICJ hearings across the board. However, the ICJ's strength was short-lived. The U.S. did not ever pay Nicaragua the reparations it owed. When the ICJ acted through the United Nations Security Council to enforce U.S. compliance, the U.S. simply vetoed the action, as is its power as a permanent member of the UNSC (Tanzi, 1995).

Despite the questionable accountability assigned to the U.S. for its military and paramilitary actions in Nicaragua, the financial and military support of organized opposition, such as contras, was determined a violation of state sovereignty. A decided weakness of this case was the failure to address which circumstances, in particular, would have determined U.S. accountability. Which specific actions of the contra groups warranted reparations? The ICJ also should have detailed the extent to which necessary monetary support—"necessary," meaning the opposition groups would not have been able to function without this support—warrants blame and responsibility. However, the court's decision against Serbia and Montenegro, which builds upon the foundation of *Nicaragua v. United States*, does aid in the clarification of such accountability by demanding proof of the violating state's knowledge of the actions and violations that military and paramilitary groups commit with their support. The court's decision cemented the illegality of direct attacks on foreign states without the justification of self-defense.

In conclusion, the U.S. violated the principle of proportionality and directly threatened Nicaragua's sovereignty. The accountability of illegal military and

paramilitary activity was significantly affected through the development of the 'effective control' test, which is still in use to this day. Finally, the ICJ held that jurisdiction is still applicable in cases where compulsory consent is withdrawn after the preliminary stages of a case, an outlier in the face of customary international law. Overall, *Nicaragua v. United States* advanced the implementation of international law by effectively clarifying the implications and accountability of IL and establishing a universal definition of collective self-defense.

References

- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.
- Green, James A. (2017, May 16). The ‘additional’ criteria for collective self-defence: Request but not declaration. *Journal on the Use of Force and International Law*, 4(1), 4-13. DOI: 10.1080/20531702.2017.132599
- Lewis, P. (1986, June 28). *World court supports Nicaragua after U.S. rejected judges’ role*. The New York Times. <https://www.nytimes.com/1986/06/28/world/world-court-supports-nicaragua-after-us-rejected-judges-role.html>
- Nicaragua v. United States of America, Military and Paramilitary Activities*. (International Court of Justice, Judgment of 26 Nov. 1984). <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>
- Nicaragua v. United States of America, Military and Paramilitary Activities*. (International Court of Justice, Judgment of 27 June 1986), Merits. <https://casebook.icrc.org/case-study/icj-nicaragua-v-united-states>
- Rostow, Nicholas. (1986). Nicaragua and the law of self-defense revisited. *Yale Journal of International Law*, 11(437), 437-461. Retrieved from <https://digitalcommons.law.yale.edu/yjil/vol11/iss2/5>
- Tanzi, A. (1995). Problems of enforcement of decisions of the International Court of Justice and the law of the United Nations. *European Journal of International Law*, 6(4), 539-572. doi:10.1093/oxfordjournals.ejil.a035935
- Treaty of Friendship, Commerce, and Navigation, United States-Nicaragua, Jan. 21, 1956, 367 U.S.T. 3.
- United Nations. (1983, December 31). Action with respect to threats to the peace, breaches of the peace, and acts of aggression. *Repertory of the United Nations organs*.
- U.S. State Department. (1985, January 19). Statement on the U.S. withdrawal from the proceedings initiated by Nicaragua in the International Court of Justice. *International Legal Materials*, 24(1), 246-263. Doi:10.1017/S0020782900027960