

## EDITORIAL COMMENT

### CELEBRATING A FRAUD ON THE COURT

*By Stephen M. Schwebel*

The International Court of Justice issued its judgment on the merits in the case of *Military and Paramilitary Activities in and Against Nicaragua* on June 27, 1986.<sup>1</sup> A public discussion to mark the twenty-fifth anniversary of the rendering of that judgment took place in The Hague on June 27, 2011. The meeting—“The Nicaragua Case 25 Years Later: Its Impact on the Law and the Court”—was arranged with the participation of individuals involved in the formulation and presentation of Nicaragua’s case.<sup>2</sup> A diversity of views was expressed on whether the Court had jurisdiction in the case and on elements of its judgment on the merits, but the mood of the Hague session was celebratory.

In its written and oral pleadings on the merits of the case, Nicaragua readily demonstrated that the United States had mined Nicaraguan waters and given critical support to the *contras*, because the United States so acknowledged and its *Congressional Record* so manifested. The essential contentious questions were posed by the nature of the United States’ defense to these Nicaraguan allegations.

The United States contended that Nicaragua was fueling insurrection in El Salvador by providing arms, training, and command and control facilities to the insurrectionists, and that these actions were tantamount to an armed attack on El Salvador. The United States further claimed that the government of El Salvador had requested the United States’ assistance in responding to these Nicaraguan actions. The government of El Salvador filed a declaration of intervention at the jurisdictional stage of the proceedings strongly supporting these contentions of the United States, but the Court declined to accept El Salvador’s intervention or to grant it an oral hearing in respect of it.<sup>3</sup>

In an affidavit submitted to the Court, the foreign minister of Nicaragua asserted that U.S. allegations that the Nicaraguan government

“is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false. . . . In truth, my

<sup>1</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 ICJ REP. 14 (June 27).

<sup>2</sup> Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT’L L. J. 15, 22–24 (2001) (describing roles in proposing, developing, and arguing Nicaragua’s case).

<sup>3</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Oct. 4). El Salvador sought to intervene by invoking its “right to intervene” under Article 63 of the Court’s Statute. The Court did not give effect to that right. It further failed to follow Article 84 of its rules providing that “the Court shall hear the State seeking to intervene and the parties before deciding.”

government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador[.]”<sup>4</sup>

However, the main witness presented by Nicaragua on this issue accepted under questioning from the bench that “it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency.”<sup>5</sup>

The Court concluded that it was

satisfied that, between July 1979, the date of the fall of the Somoza regime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.<sup>6</sup>

By absolving the government of Nicaragua of responsibility for “any flow of arms” to the Salvadoran insurrection “at either period,” the Court essentially accepted the truth of the affidavit of the Nicaraguan foreign minister.

To what should have been the profound embarrassment of the Court, it subsequently was proved that the affidavit of the Nicaraguan foreign minister was false and that the Sandinista government of Nicaragua grossly misled the Court.

After the electoral defeat of the Sandinista government by Violeta Barrios de Chamorro, and in one of his several authoritative works on the Court, Shabtrai Rosenne in 1995 wrote a post-script to an analysis of aspects of the case, stating:

An explosion in a car repair shop in Managua on 23 May 1993 led to the discovery of a weapons cache containing, among other things, a number of surface-to-air missiles, large quantities of ammunition and military weapons, and plastic and other explosives. Many documents were also found, including 300 passports of different nationalities. This was established as belonging to the Salvadorean guerrillas, material assistance to whom had been denied before the Court by Nicaragua. As part of the agreements of 1987 and later for the establishment of a firm and lasting peace in Central America and particularly for the settlement of hostilities in El Salvador, the Salvadorean guerrillas had undertaken to declare and surrender all these arms and war materiel to the United Nations Observer Mission in El Salvador (ONUSAL) for destruction. The cache, which had not been declared, both demonstrated the violation of the agreements by the Salvadorean guerrillas and Nicaragua’s involvement in aiding and abetting them. This cannot be reconciled with statements made in the Court on behalf of Nicaragua.

The revelations that followed this explosion led to a grave crisis of confidence between the Secretary-General of the United Nations and the Salvadorean guerrillas, who later acknowledged their deception of the Secretary-General and of ONUSAL and apologized to the Secretary-General. This incident gave rise to prolonged correspondence duly reported to the Security Council, which adopted two resolutions on the matter.

<sup>4</sup> 1986 ICJ REP., para. 147.

<sup>5</sup> *Id.*, para. 135.

<sup>6</sup> *Id.*, para. 160.

To a very large extent these revelations brought to light a situation closely resembling that which had been described by the State Department . . . and confirmed facts elucidated by Judge Schwebel in his questioning from the Bench.

This is not the first time that an international tribunal has been misled by one of the parties in its appreciation of the facts. It remains to be seen how far these later revelations, following on an accidental explosion in Managua, will affect the different assessments that have been made of this case and its value as a precedent . . . .<sup>7</sup>

Rosenne cites UN documents that conclusively sustain his points. In a letter of June 8, 1993, to the president of the Security Council, the secretary-general recounts the

explosion at an automobile repair shop in Managua, Nicaragua, [that] led to the discovery of a weapons cache . . . . Nicaraguan authorities linked . . . one of the constituent groups of the [Farabundo Marti National Liberation Front (FMLN)] to the presence of these illegal weapons on Nicaraguan territory . . . .

. . . Leaders of the same FMLN group have provided information about the existence in Nicaragua of other clandestine deposits containing considerable amounts of weapons.<sup>8</sup>

The president of the Security Council stated on June 11, 1993, that the Council had noted with concern the existence in Nicaragua of a weapons cache belonging to the FMLN.<sup>9</sup> On June 29, 1993, a further report of the secretary-general informed the Council of the recent discovery of illegal arms deposits of the FMLN in Managua and elsewhere, which he considered a “very serious violation of the Peace Accords.”<sup>10</sup>

I addressed a letter to the Coordinator-General of FMLN . . . in which . . . I expressed my distress that, contrary to the assurances that he had given me, the final inventory of weapons presented to ONUSAL by FMLN had been grossly inaccurate. . . . [S]uch a deliberate attempt to mislead me placed my credibility in doubt and raised very serious questions of confidence and trust.<sup>11</sup>

The secretary-general attached an apology of the FMLN while further reporting that sixteen safe houses containing large quantities of arms and explosives of the FMLN had been found in Nicaragua. On July 2, 1993, a letter from the foreign minister of Nicaragua was circulated informing the secretary-general “of the various actions taken by the Government of our country following discovery on national territory of secret arms caches belonging to the Salvadorian guerrillas.”<sup>12</sup> The minister noted that a Salvadoran guerrilla faction “has assumed total and

<sup>7</sup> SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 152–53 (5th ed. 1995) (footnotes omitted).

<sup>8</sup> Letter dated 8 June 1993 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/25901 (June 8, 1993).

<sup>9</sup> Note by the President of the Security Council, UN Doc. S/25929 (June 11, 1993).

<sup>10</sup> Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador, para. 1, UN Doc. S/26005 (June 29, 1993).

<sup>11</sup> *Id.*, para. 2.

<sup>12</sup> Letter dated 22 June 1993 from the Minister for Foreign Affairs [of Nicaragua] Addressed to the Secretary-General, UN Doc. S/26008, annex (July 2, 1993). The language included here summarizing the contents of the minister’s letter is taken from the transmittal letter, UN Doc. S/26008.

absolute responsibility for the existence in Nicaragua of these secret caches,” fifteen in number.<sup>13</sup> On August 30, 1993, a further report of the secretary-general surveyed the destruction of FMLN arms depots in Nicaragua, Honduras, and El Salvador in the wake of the Managua garage explosion.<sup>14</sup> They comprised, in addition to the armaments found in five safe houses in Nicaragua, thousands of individual arms; support weapons; 3,649,635 rounds of ammunition; 108 rockets; thousands of grenades; 4420 kilograms of explosives; 20 surface-to-air missiles; and 114 arms caches.<sup>15</sup>

It is lately reported that Nicaraguan president Ortega, having returned the Sandinistas to power, proposes to hold a referendum posing the question of whether Nicaragua should seek payment of U.S.\$17 billion in reparations from the United States pursuant to the Court’s judgment.<sup>16</sup> It appears that the fact that Nicaragua renounced “all further right of action based on the case” when it was removed from the Court’s list in 1991 may not deter him.<sup>17</sup> But it may be that a wider recognition of Nicaragua’s fraud on the Court—and the consequent question of whether the 1986 judgment is valid in law at all—may provide an additional dispositive answer.

<sup>13</sup> UN Doc. S/26008, annex, para. 2.

<sup>14</sup> Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL), UN Doc. S/26371 (August 30, 1993).

<sup>15</sup> *Id.*, para. 5. The Managua garage explosion and the items discovered in the garage arsenal were widely reported. They included documents indicating activities of a kidnapping ring extorting ransoms from leading Latin-American figures.

Investigators and diplomats said there is strong circumstantial evidence that the arsenal and the ring operated with at least the tacit approval of Nicaragua’s leftist Sandinista National Liberation Front, which held power from 1979 until 1990 and whose leaders still control the army and state intelligence.

The vault “looked like a one-stop shopping center for terrorist activities, where you could get guns and documents,” said a diplomat familiar with the case. “You would have to be extraordinarily naive to think this was not under the aegis of some part of the intelligence operation of the Sandinistas.”

Douglas Farah, *Managua Terrorist Base Exposed by Garage Blast*, WASH. POST, July 14, 1993, at A1; *see also* L.A. TIMES, July 28, 1993, at A1; *id.*, July 14, 1993, at A14; *id.*, May 30, 1993, at A4.

<sup>16</sup> *Nicaragua’s Daniel Ortega Proposes Vote on US Damages*, BBC NEWS, July 20, 2011, at <http://bbc.co.uk/news/world-latin-america-14213628>. Addressing the UN General Assembly in October 2011, Nicaragua’s representative, Carlos Argüello-Gomez, stated that the case of *Nicaragua v. United States* “was pending compliance and Nicaragua reserved the right to claim indemnification.” General Assembly Press Release, Presidents of International Criminal Court, International Court of Justice Present Annual Reports to General Assembly, UN Doc. GA/11163 (Oct. 26, 2011).

<sup>17</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Order, 1991 ICJ REP. 47, 47–48 (Sept. 26). The order provides, in part:

Having regard to the Judgment delivered by the Court on 27 June 1986, by which it found (*inter alia*) that the United States of America was under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by certain breaches of obligations under customary international law and treaty-law . . . .

. . . .

Whereas by a letter dated 12 September 1991 the Agent of Nicaragua informed the Court that his Government had decided to renounce all further right of action based on the case and did not wish to go on with the proceedings, and requested that an Order be made officially recording the discontinuance of the proceedings and directing the removal of the case from the list;

. . . .

*Places on record* the discontinuance by the Republic of Nicaragua of the proceedings instituted by the Application filed on 9 April 1984; and

*Orders* that the case be removed from the list.