

NOTES AND COMMENTS

THE *NICARAGUA* CASE: A RESPONSE TO PAUL REICHLER

*By Stephen M. Schwebel**

My editorial¹ was directed to the fraud on the Court perpetrated by Nicaragua. Nothing in it refers to any knowledge or action of counsel of Nicaragua. Nothing in it implies ethical lapses on the part of the counsel of Nicaragua. Nothing in it questions the participation of the distinguished speakers at The Hague conference, who expressed a marked diversity of views, including the conclusion of the principal speaker on the question of jurisdiction, Professor James Crawford, that the Court lacked jurisdiction in the case.

Paul Reichler observes that the Court politely discounted the affidavit of the foreign minister of Nicaragua and also other official statements, whatever the source. But would the Court have so indicated if the affidavit of the Nicaraguan foreign minister had revealed the facts? The foreign minister's affidavit was inconsistent not only with the testimony of David MacMichael, the former CIA analyst, but with the multiple admissions against interest of President Ortega and other Nicaraguan officials set out in my dissent to the 1986 judgment as well as with a great deal of other evidence.²

Accurately stated, my central thesis is that Nicaragua misled the Court in maintaining not only that it was not engaged, but that it *never* had been engaged, in the trafficking of arms to Salvadoran rebels.³ That rendering is sustained by the precise position stated before the Court by the Nicaraguan vice minister of the interior, Commander Luis Carrión.⁴ It is the precise position stated by the Nicaraguan minister of finance, William Huper.⁵ Nicaragua's Agent was asked in Court whether the policy of Nicaragua was precisely what MacMichael conceded it to be in 1980 and early 1981—to send arms to insurgents in El Salvador.⁶ The Agent, Carlos Argüello Gomez, replied to a series of related questions⁷ by saying that “it is of no relevance to discuss happenings five years ago” and that “it has not been the policy of the Nicaraguan Government to support insurgencies anywhere.”⁸ In a letter to the Court of November 26, 1985, the Nicaraguan Agent declared: “As the Government of Nicaragua has consistently stated, it

* Of the Board of Editors.

¹ Editorial Comment: *Celebrating a Fraud on the Court*, 106 AJIL 102 (2012).

² *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 ICJ REP. 14, Diss. Op. Schwebel, J., paras. 24–32, factual appendix, paras. 16–224 (June 27).

³ Cf. Paul S. Reichler, *The Nicaragua Case: A Response to Judge Schwebel*, 106 AJIL 316 (2012) (paraphrasing editorial's “central thesis”).

⁴ ICJ Pleadings (5 *Military and Paramilitary Activities in and Against Nicaragua*) 31.

⁵ *Id.* at 102.

⁶ *Id.* at 142, 145.

⁷ *Id.* at 140–46.

⁸ *Id.* at 146.

has never supplied arms or other material assistance to insurgents in El Salvador or sanctioned the use of its territory for such purpose.”⁹

The contention that it was “of no relevance” to address Nicaragua’s provision of arms to the Salvadoran insurgents for their “final offensive”¹⁰ was a recurrent theme of Nicaragua’s argument before the Court. Its confessional implication remains as clear today as when the argument was made.

The mass of evidence, including admissions by Nicaragua’s officials and its prime witness, cannot be reconciled with the crucial conclusion of the Court that the evidence regarding the flow of arms from Nicaragua to the armed opposition in El Salvador before and after the early months of 1981 was insufficient to satisfy the Court “that the Government of Nicaragua was responsible for any flow of arms at either period.”¹¹ In so concluding, the Court accepted—not literally, but essentially—the truth of the false affidavit of the Nicaraguan foreign minister.

The explosion of an immense arsenal of arms—an arsenal of sophisticated construction, officially acknowledged to belong to the Salvadoran insurgents—in the capital of Nicaragua, along with the discovery of their fifteen other arms depots elsewhere in Nicaragua, ineluctably implicates the Sandinistas. References to Sandinista involvement in the arsenal are contained in the extensive published reports of the explosion, particularly that of the *Washington Post* of July 14, 1993, cited in note 15 of my editorial. The *Post*’s correspondent interviewed officials, investigators, and diplomats, and was enabled to read incriminating documentation found in the arsenal.

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Nicaragua did not mislead the Court in any manner. Contrary to what Judge Schwebel writes, Nicaragua did *not* deny that arms were sent to rebels in El Salvador in 1979 and 1980. What its foreign minister and other officials asserted was that there was no government *policy* to supply arms to the rebels during that period and, more to the point, that there were no arms shipments at all *after* January 1981. Commander Luis Carrion, whom Judge Schwebel cites, actually told the Court: “My Government has never had a *policy* of sending arms to opposition forces in Central America. *That does not mean that this did not happen*, especially in the first years after the revolution in 1979 and 1980”¹ Thus, Nicaragua did not argue that it “never” shipped arms to Salvadoran rebels. Its position was that, as of the time it filed its suit against the United States in April 1984, and for more than three years prior, it “has not been engaged” in such practice.² It argued that any arms shipments prior to early 1981 were irrelevant because, as the undisputed evidence showed: (1) after that date Nicaragua did not engage in or allow any further shipments from its territory; and (2) notwithstanding Nicaragua’s abstinence,

⁹ *Id.* at 430.

¹⁰ *Id.* at 123; Diss. Op. Schwebel, J., *supra* note 2, *passim*.

¹¹ 1986 ICJ REP., para. 160.

¹ Verbatim Record, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), ICJ Doc. CR 1985/17, at 31 (emphasis added).

² See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 147 (June 27).