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Jurisdiction and Applicable Law

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Abstract
This article provides a reappraisal of the International Court of Justice's approach to jurisdiction and applicable law in *Nicaragua*, 25 years later. In the first phase of the proceedings arising from the US support of the activities of the Contras against the Sandinista government, the Court robustly asserted its jurisdiction despite the US reliance on its multilateral treaty reservation and the subsequent attempted modification of its Optional Clause declaration. At the same time, the Court approached the related question of applicable law with a wide, if not effusive, reliance on multilateral customary international law operating conjunctively with treaty law. The Court's dismissal of negotiations as a procedural precondition for invoking its jurisdiction in *Nicaragua* is contrasted with its recent findings in *Georgia* v. *Russia*.

Key words
customary law; jurisdiction; *Nicaragua* case; Optional Clause; reservations

1. Overview

On the 25th anniversary of the judgment of the International Court of Justice (ICJ) in the *Nicaragua* case, it is useful to look back and reassess its impact on international law in general and on the case law of the Court in particular. The focus of this paper is the first phase of the litigation, specifically the issues of jurisdiction and applicable law. The question is whether the Court's approach, seen as progressive and liberal at the time, has indeed stood the test of time and the changing pressures of international affairs.[1]

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1 See, for discussion of the *Nicaragua* case, M. J. Glennon, 'Nicaragua v. United States: Constitutionality of US Modification of ICJ Jurisdiction', (1985) 79 AJIL 682; A. Chayes, 'Nicaragua, the United States and the World Court', (1985) 85 Col LR 1445; P. Norton, 'The Nicaragua Case: Political Questions before the International Court of Justice', (1987) 27 Virginia JIL 459; P. W. Kahn, 'From Nuremberg to the Hague: The United States Position in Nicaragua v. United States', (1987) 12 Yale JIL 1; S. Oda, 'Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of those Declarations: The Effect of the Shultz Letter', (1984) 59 BYIL 1; W. Czaplinski, 'Sources of International Law in the Nicaragua Case', (1989) 38 ICLQ 151; M. H. Mendelson, 'The Nicaragua Case and Customary International Law', (1989) 26 Coexistence 85; H. Charlesworth, 'Customary International Law and the Nicaragua Case', (1991) 11 Austral YBIL 1; J. J. Quintana, 'The *Nicaragua* Case and the Denunciation of Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice', (1998) 11(1) LJIL 97; J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case', in P. M. Capps and M. D. Evans (eds.), *International Law* (2009), 85.

The complex serial litigation in the *Nicaragua* cases arose from the activities of the 'Contras', opponents of the Nicaraguan (Sandinista) government, who, in 1981, commenced a guerrilla insurgency movement, operating from bases in neighbouring states and funded and assisted by the United States, including the mining by CIA personnel of several Nicaraguan harbours. Nicaragua claimed that the US support for the Contras constituted an unlawful use of force against it, as well as unlawful intervention in its internal affairs.

Nicaragua seized the Court, relying principally on the United States' acceptance of the Court's jurisdiction under the Optional Clause, on 9 April 1984. On 6 April 1984, the United States had, by the so-called 'Shultz letter', purported to vary its Optional Clause declaration by excluding cases involving disputes with any Central American state or related to events in Central America. The United States argued that, for this and other reasons, the Court had no jurisdiction, that the claim was inadmissible, and that, in any event, the Court should not exercise its jurisdiction having regard to the continuing regional negotiation process aimed at settling the dispute. The United States lost, wholly or in substance, on each of these grounds, by majorities that varied but were always substantial. In 1985, the United States withdrew its acceptance of jurisdiction under the Optional Clause, largely as a result of disagreement with the Court's handling of the case.[2]

The underlying dispute was partly resolved by the election defeat of the Nicaraguan Sandinista government in 1990, and the accession to power of the Chamorro government, which was committed to better relations with the United States. The Contras were, eventually, disarmed.

2. Jurisdiction and applicable law

Nicaragua purported to base the Court's jurisdiction on two instruments: (i) the declaration of the United States under the Optional Clause in conjunction with Nicaragua's declaration under Article 36(5) of the Statute of the ICJ and (ii) a 1956 Treaty of Friendship, Commerce and Navigation, Article XXIV(2).[3] The United States objected to both grounds. The case was argued and decided on the basis that the US declaration was valid and effective notwithstanding the Connally Amendment. This was in line with the prediction that the demise of declarations containing automatic reservations has been much exaggerated.[4] In the event, the Court held by 11 votes to five that it had jurisdiction under the Optional Clause and by 14 votes to two (Judges Ruda and Schwebel dissenting) that it had jurisdiction under the Treaty of Friendship. Only one judge, Judge Schwebel, thought the Court had no jurisdiction at all.

2 Symposium 'Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)', (1987) 81 AJIL 77.
3 367 UNTS 3.
4 J. Crawford, 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court', (1979) 50 BYIL 63.

2.1. Jurisdictional issues

2.1.1. Nicaragua's failure to ratify the Permanent Court of International Justice statute: interpretation of Article 36(5) of the Statute of the International Court

Although it had lodged an unconditional acceptance of the jurisdiction of the Permanent Court of International Justice (PCIJ) at the time of signing the Statute of that Court in 1929 and despite completion of the domestic constitutional requirements for ratification, Nicaragua never deposited an instrument of ratification of the Statute with the League of Nations. The question was whether its subsequent ratification of the 1945 Statute, by virtue of Article 36(5), brought the 1929 Optional Clause declaration into effect so far as the new Court was concerned.

The Court held that the words 'Declarations ... which are still in force' ('déclarations faites ... pour une durée qui n'est pas encore expirée') in Article 36(5) included declarations that would have been effective in accordance with their terms in 1945 if the state in question had then been a party to the PCIJ Statute. The 1929 declaration had a 'potential effect which could be maintained indefinitely'[5] – an effect made actual by Article 36(5). That conclusion was reinforced by the practice of the Court in listing Nicaragua as a party to the Optional Clause in its *Yearbook* and in other official documents. Indeed, the Court went so far as to hold that:

> Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a State to its compulsory jurisdiction have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitute[d] a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court.[6]

This was the issue on which the majority was most vulnerable, with powerful dissents on different aspects from Judges Mosler, Oda, Schwebel, and, especially, Ago and Jennings. And surely they were right. Ratification is an international, not a municipal, act. It is difficult to see how a potential acceptance of the jurisdiction of one court could be transformed into something actual by the ratification of a different instrument, the Charter, not itself entailing any acceptance of jurisdiction in relation to another court. A declaration never 'made' vis-à-vis the Permanent Court was no more 'made' by Nicaragua's becoming an Original Member of the United Nations. Or, to put it metaphorically, with regard to signing and ratifying the treaties at hand, Nicaragua kissed the frog but it kissed the wrong one. The magic worked regardless. However, it is difficult to say whether it has stood the test of time given that no case has been brought to the Court under Article 36(5) ever since, let alone one based on conduct rather than written consent.

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5 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, [1984] ICJ Rep. 392, at 404.

6 Ibid., at 412–13, para. 47.

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2.1.2. Effect of the Shultz letter: modification of an Optional Clause declaration other than in accordance with its terms

An issue of more general importance was whether the Shultz letter of 6 April 1984 purporting to modify, if not indeed terminate with respect to Nicaragua, the terms of the United States Optional Clause Declaration produced an immediately effective variation, notwithstanding that the Declaration itself provided for variation only on six months' notice. The United States argued in the alternative that the principle of reciprocity entitled it to rely on Nicaragua's right of immediate unilateral modification, the Nicaraguan declaration not being expressed to be terminable only after a specified period of notice. The Court held that unilateral undertakings under the Optional Clause system were not inherently revocable without notice and that, in accordance with the governing principle of good faith, the United States was bound by the six-month notice provision in its own Declaration. It reasoned that:

> Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it. However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases.[7]

On the reciprocity point, the Court drew a distinction between the terms of an Optional Clause declaration, as to which reciprocity applied, and the basis for its continuing legal operation, as to which reciprocity was irrelevant. Thus, Nicaragua was entitled to insist that the United States comply with its own six-month notice requirement. However, the Court went on to say that, even if the principle of reciprocity had applied to the issue of variation or termination, the result would not have been different. This was because Optional Clause declarations that did not expressly reserve the right of immediate termination could only be terminated on reasonable notice, and the period in question (three days) was not 'reasonable notice'.[8] There were dissents on this general issue from Judges Oda, Jennings, and, in some respects, Schwebel.[9]

In dealing with the Shultz letter, the Court applied the analogy of treaty law to Optional Clause declarations, concluding that 'the notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction'.[10] It did not need to decide a separate issue raised by Nicaragua, namely whether the Shultz letter was invalid because it purported to vary a declaration made with the advice and consent of the US Senate. On the analogy of Article 46 of the Vienna Convention on the Law of Treaties, Nicaragua had argued that the US constitutional

7 Ibid., at 418, para. 59.
8 Ibid., at 420.
9 Ibid., Schwebel Dissenting, at 558, 617–28, paras. 92–116.
10 Ibid., at 419, para. 62.

rule requiring Senate consent to treaties was an 'internal rule of law of fundamental importance' and that the failure to comply with that rule was 'manifest'. The Court avoided the issue but it is hard to see how, given the various exceptions to the US constitutional rule and the doubt about whether it applies at all to unilateral declarations, any violation could have been 'manifest'.

This pronouncement of the Court is consistent with, if not reflected in, the position of the International Law Commission (ILC) set out in Principle 10 of its Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations providing that:

> A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (a) Any specific terms of the declaration relating to the revocation.[11]

In its authoritative commentary on the principle, the ILC relied explicitly on the 1984 *Nicaragua* judgment.[12]

2.1.3. *Effect of the Vandenberg Amendment: disputes under a multilateral treaty in which not all parties to the treaty are parties to the case*

Another reservation attached to the United States Optional Clause declaration was the so-called Vandenberg Amendment, reserving 'disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court'. At the preliminary stage, the Court merely commented that it could not determine which parties to the relevant treaties (particularly the UN Charter and the OAS Charter) would be 'affected by the decision' until it considered the merits of the case. The Court did note, however, in a paragraph much debated in doctrine thereafter, that it:

> cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the Conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.[13]

Thus, Article 79(7) of the 1978 Rules of the Court declared that the objection did not possess an exclusively preliminary character, and joined it to the merits. The Court also gave weight to the fact that all states 'that might be affected' by the judgment had made declarations accepting its compulsory jurisdiction and were free to resort to intervention as opposed to being 'defenceless' against the possible consequences of the adjudication.

The Court returned to the issue in 1986. It held that El Salvador, at least, was 'affected' by its decision, and accordingly (by 11:4) that the dispute, to the extent that

11 *2006 Yearbook of the International Law Commission* II/2, 369, at 380.
12 Ibid., at 381.
13 [1984] ICJ Rep. 424, para. 73.

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it arose under the UN and OAS Charters, was outside its jurisdiction. But the effect of the Vandenberg Amendment was:

> confined to barring the applicability of the United Nations Charter and the Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.[14]

There are many difficulties with this approach, as Judge Jennings pointed out in a persuasive dissent.[15] The Court focused on the words 'affected by the decision' in the declaration, but the words 'disputes arising under a multilateral treaty' were just as important. The Court tacitly interpreted those words as if they had read 'disputes to the extent that the disputes relate to or involve a multilateral treaty as such'.[16] But this ignores the distinction between a dispute and a cause of action. The essential dispute between the parties concerned US support for and involvement in the activities of the Contras. The Vandenberg Amendment, despite its obscurity, was intended to limit the Court's jurisdiction over certain classes of dispute, not its capacity to apply certain sources of law. Parties do not cease to have disputes under a treaty because the International Court has no jurisdiction over the treaty. Provided that a substantive (and non-trivial) ground of Nicaragua's complaint against the United States was that its conduct violated multilateral treaties in force between the parties, the dispute surely arose under those treaties. The fact that the dispute had also been formulated in terms of customary international law was beside the point: there was a single dispute, whether or not there were several grounds of complaint, and that dispute did not cease to meet the description of a dispute arising under a multilateral treaty because it might also be described as a dispute arising under general international law. Distinct aspects of the dispute that related to customary international-law obligations (e.g., as to freedom of navigation) would be in a different category.

Moreover, to say that the dispute arose under general international law, when the governing provisions were those of a multilateral treaty, was to misstate the position. The OAS Charter bound the parties as a treaty, not as customary international law. Without a finding that the relevant provisions of the OAS Charter had the status of peremptory norms (and the Court carefully avoided such a finding), the operative legal provisions were those of the treaty as such. A treaty prevails over custom unless the customary rule concerned has the status of a peremptory norm. Since the breach of the OAS Charter was a substantial and substantive ground of Nicaragua's complaint, that should have been enough to exclude the Court's jurisdiction under the Vandenberg Amendment.

The result of the Court's decision on the Vandenberg Amendment was to leave it free to exercise jurisdiction over the entire Nicaraguan claim, which was formulated in parallel as a claim under the relevant treaties and under general international law.

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14 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] ICJ Rep. 14, at 38, para. 56.

15 Ibid., at 529–38; see also Judge Oda, ibid., at 216–19; Judge Schwebel, ibid., at 302–6.

16 Cf. ibid., at 94.

In the event, the Court found little or no difference between the two. It entirely failed to distinguish the issue of jurisdiction under a treaty from the question of applicable law – an elementary error. Thus, the Vandenberg Amendment had little or no effect, despite the manifest intent of the United States in making the reservation.

In dealing with the Vandenberg Amendment, I have focused on the OAS Charter rather than on the UN Charter. It is extremely difficult to interpret the reservation as applicable to the UN Charter itself given that the Charter (and the Statute of the Court as an integral part) provides the very basis on which the Court's jurisdiction is founded and under which the reservation is made. It seems a meaningless act to assert a reservation to all the disputes referable to the Court under the Charter and its Statute, defeating the very object of its jurisdiction. However, Nicaragua treated its dispute as having special reference to the OAS Charter and there is no difficulty whatever in interpreting the Vandenberg Amendment to cover this treaty.

2.1.4. Jurisdiction under the 1956 Friendship, Commerce and Navigation Treaty

The final jurisdictional issue, and the one most succinctly considered by the Court, related to the 1956 Treaty of Friendship, Commerce and Navigation (FCN),[17] which was relied on in the Nicaraguan Memorial (although it had not been referred to in the Application).

The Court held in 1984 that it was entitled to consider additional grounds for jurisdiction, provided that these did not alter the nature of the dispute, and that, although the 1956 Treaty had not been specifically invoked by Nicaragua in diplomatic negotiations, it sufficiently related to the dispute (especially Article XIX, providing for freedom of commerce and navigation) and could therefore be invoked as a basis for jurisdiction. The failure to invoke it earlier was, at most, a defect in form that the Court could ignore.[18] On this point, only Judges Ruda and Schwebel dissented. No doubt, one reason why the parties had paid relatively little attention to the 1956 Treaty was that it could be terminated on 12 months' notice. In fact, the United States did terminate it, with effect from 1 May 1986.

It is this minor aspect of the judgment, overlooked in the doctrine, which gave rise to divergences in the jurisprudence in the later case law, including, most recently, in the dispute between Georgia and Russia under the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[19] It is interesting to juxtapose the Court's approach to the interpretation of the jurisdictional clause of the 1956 FCN treaty with its interpretation of a similarly worded provision of CERD in *Georgia* v. *Russia*. It seems that the former did not stand the test of time by reference to the latter and the minority of two judges in 1984 became a majority of ten in 2011.

It should be recalled that Article XXIV(2) of the 1956 FCN Treaty provided 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' (emphasis added). The Court held that:

17 367 UNTS 3.
18 [1984] ICJ Rep. 428.
19 660 UNTS 195.

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> the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement (cf. *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 27 para. 52).[20]

It accordingly concluded that:

> The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.[21]

In *Georgia* v. *Russia*, the Court was faced with the interpretation of Article 22 of CERD, reading in the relevant parts:

> Any dispute between two or more State Parties with respect to the interpretation or application of this Convention, *which is not settled by negotiation* . . . shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement. (Emphasis added)

The Court approached the interpretation of this provision from quite a different standpoint, stating that 'at the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States'.[22] (CERD was concluded in 1965, almost a decade after the FCN treaty between the United States and Nicaragua.) The ICJ concluded that the clause established preconditions to be fulfilled before seizing and held further:

> Concerning the substance of the negotiations, the Court has accepted that the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83). However, to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.[23]

This approach, if not departing from, narrows substantially the interpretation of the formula of this and similar compromissory clauses adopted in the *Nicaragua* case. It remains to be seen whether the stringent formalism of *Georgia* v. *Russia* will itself stand the test of time.

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20 Ibid., at 427, para. 81.
21 Ibid., at 428–9, para. 83.
22 *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, [2011] ICJ Rep., para. 147.
23 Ibid., para. 161. But cf. Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, ibid. Cf. further *United States Diplomatic and Consular Staff in Tehran*, [1908] ICJ Rep. 3, at 27, para. 51.

3. Conclusion

The Court's authority and the system of the Optional Clause were shaken by the case – so far as the United States was concerned, profoundly shaken. The range and complexity of issues presented were such that few commentators could agree with everything the Court did and said. Certainly – as will be clear – I cannot agree with most of the Court's findings on jurisdiction.

The decision in *Nicaragua* demonstrates vividly what the Court itself called 'the difficulties that may arise where particular aspects of a complex general situation are brought before a Court for separate decision'.[24] This was true both procedurally and also as a matter of the substantive law of the case. But the Court's approach to the two phases presents a strong contrast. Substantively, the case was characterized by the Court's treatment of the Vandenberg Amendment, its assumption that customary international law that operates conjunctively with treaty law (independently of any issue of peremptory norms), its ready generation of custom from treaty and from resolutions of international organizations, and its refusal to limit itself to the bilateral 1956 Treaty as a ground of decision. On the one hand, procedurally, the Court refused to defer to a multilateral diplomatic initiative. Moreover, it refused to give effect to the multilateral treaty reservation and ignored the problem presented by the Connally Amendment, but was robust in ascertaining its jurisdiction under general and customary international law. The contrast presents a picture of resolute bilateralism on issues of competence, but of a wide, even effusive, reliance on multilateral law-making processes on issues of substance.

24 [1988] ICJ Rep. 92.