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HAGUE INTERNATIONAL TRIBUNALS

International Court of Justice

Nicaragua: 25 Years Later

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The case concerning *Military and Paramilitary Activities in and against Nicaragua*,[1] better known as the '*Nicaragua* case' or simply *Nicaragua*, is arguably one of the most important and controversial cases ever to be heard by the International Court of Justice.[2] Twenty-five years after the judgment on the merits was handed down, it is high time to reassess the impact of *Nicaragua* on international law.[3] The joint efforts of the Grotius Centre of the Leiden Law School, the Centre on International Courts and Tribunals at University College London, the Netherlands Society of International Law, and the law firm Foley Hoag LLP resulted in a one-day conference, on 27 June 2011, the very day on which the judgment on the merits of the *Nicaragua* case was handed down, 25 years ago.

By fortuitous circumstances, this year marks the 25th anniversary of the *Leiden Journal of International Law*.[4] Accordingly, it seemed fitting to the editors of this journal to commemorate both occasions by publishing the proceedings of the conference. The editors are grateful to those speakers who accepted the invitation to publish their contributions, which will appear in the current and following issues.

Even after 25 years, international lawyers can get unusually emotional when discussing particular issues dealt with by the Court, not only in its 1986 judgment on the merits, but also in the equally controversial 1984 judgment on jurisdiction that notoriously resulted in the United States of America retracting its optional clause declaration accepting the Court's jurisdiction.[5] The fact that the

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1 *Military and Paramilitary Activities in and against Nicaragua (Republic of Nicaragua v. the United States of America)*, [1986] ICJ Rep. 3, at 14.

2 It gave rise to one of the longest dissenting opinions in the history of the Court; see the Dissenting Opinion of Judge Schwebel, [1986] ICJ Rep. 3, at 259–527.

3 While the judgment was rendered in 1986, the case was on the docket of the Court for another five years, at which time it was removed from the Court's list and discontinued at the initiative of Nicaragua. In these five years, Nicaragua had filed a Memorial and the United States had filed a Counter-Memorial on the issue of reparation.

4 Reference to Larissa's editorial in this issue.

5 See the letter and statement concerning termination of acceptance of the compulsory jurisdiction of the ICJ reproduced in (1985) 24-II ILM 1742.

Nicaragua case is present in so many legal discussions and has been referred to in numerous subsequent judicial decisions is due to not only the outcome of the case, the participation of a 'superpower', or even its political implications. The Court's pronouncements in that case are significant in that they confronted almost all of the most important issues of the international legal order at the time. It is therefore not surprising that *Nicaragua* became a major reference for international lawyers. Indeed, the case could serve as a textbook for an 'Introduction to Public International Law'.[6]

The case posed, first of all, existential questions on the law and procedure of the Court (the mechanism of declarations recognizing the Court's jurisdiction and their relationship with compromissory clauses, the effect of reservations to such declarations, the scope of the Court's jurisdiction, etc.), but also on the very role of the judiciary in international dispute settlement, especially in those disputes that are considered to be more of a political than of a legal nature, as required by Article 36(2) of the Court's Statute. The Court had also to decide on several issues relating to the proceedings before it, including the establishment of the consent of a state to its jurisdiction, the indication of provisional measures, the admissibility of a request for intervention,[7] and the problem of the non-appearance of the respondent party in the merits phase of the case.[8] For this reason, the judgment on the merits also contains significant developments regarding the fact-finding powers of the Court and the principle *jus novit curia*, among many others.

The case further led the Court to deal with a wide range of substantive issues. These included, for example, fundamental questions regarding the sources of international law, reservations to treaties, the establishment of the existence of a customary rule of international law, and the relationship of customary international law and treaty law. In its judgment on the merits, the Court also dealt with the principle of non-intervention and the scope of application of the rules of international humanitarian law, as well as matters relating to humanitarian assistance. It made significant pronouncements on the classification of armed conflicts and on the obligations under common Article 3 of the Geneva Conventions. The judgment further contained momentous findings on the rules relating to the prohibition of the use of force in international law, both within the system of collective security designed by the Charter of the United Nations and in customary international law, and it remains a landmark decision in this area. The *Nicaragua* judgment was equally groundbreaking in the field of state responsibility, both crystallizing the

6 And, indeed, the *Nicaragua* case *was* used for several years by at least one international lawyer, Professor Luigi Condorelli, as a tool to introduce students at the University of Geneva to international law (see L. Condorelli, *Cours de droit international public*, Département de droit international public et organisation international, Faculté de droit, Université de Genève, 1994–95).

7 Order of 4 October 1984, [1984] ICJ Rep. 3, at 215; the Court rejected El Salvador's 'Declaration of intervention' on the grounds that the Court was not then dealing with the merits, but only with jurisdictional issues. With hindsight, Judges Lachs and Oda expressed their regrets for not having admitted El Salvador's request for permission to intervene – see [1986] ICJ Rep., at 170–1, and 244, para. 66 – Judge Lachs calling it a 'judicial error'. El Salvador did not, however, make any further attempt to intervene at the merits stage of the proceedings.

8 See the letter of the Agent of the United States cited in the Court's judgment on the merits, [1986] ICJ Rep. 3, at 17, para. 10.

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achievements of the first phase of the works of the International Law Commission and providing food for thought in a debate that continues – in many respects – even today, most notably with respect to the attribution to the state of conduct of paramilitary entities and the famous criterion (which has now become famous as the '*Nicaragua* test') of 'effective control'.

In view of the breathtaking range of topics considered by the Court, it is not surprising that, in its 25 years of existence, there has been a backlash against certain of the conclusions reached in *Nicaragua*. Most famously, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in 1999 cast doubt on the 'effective control' test applied in the *Nicaragua* judgment,[9] which led the Court to revisit the matter in the *Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case in 2007.[10] A second backlash took place in the context of the 'war on terror', which triggered discussions in political circles and academia on the seeming death of *Nicaragua*.[11] Exchanges such as these, catalysed by the Court's pronouncements in *Nicaragua*, have fed the international legal debate and thought in academic circles for years, and have raised in turn more general, systemic, questions relating to the so-called 'fragmentation' of international law,[12] to the authority of the International Court of Justice as the principal judicial organ of the United Nations in a legal environment witnessing the proliferation of international tribunals, or even to the role of the law in international relations.

The *Nicaragua* case is considered to be the leading case of the International Court of Justice – a 'milestone', as Professor Kohen puts it.[13] Even outside the jurisprudence of the Court, *Nicaragua* ranks amongst the most important cases decided in the past century.

For all these reasons, the editors of this journal are delighted to publish several contributions to the conference that reflect on the influence of the judgment and its lasting relevance for the perception of international law and dispute settlement today.

9 *Prosecutor v. Dusko Tadić Case*, Appeals Chamber, Case No. IT-94–1-A, 15 July 1999; cf. the Opinion of Judge Shahabudeen.

10 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep. 43, at 210–11; see A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 EJIL 649, at 649–68.

11 C. Stahn, 'Nicaragua Is Dead, Long Live Nicaragua: The Right to Self-Defence under Art. 51 UN Charter and International Terrorism', in C. Walter, F. Schorkopf, and S. Voeneky (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004), 827.

12 See Report of the Study Group Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006.

13 See Kohen's article in this issue.