CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(Nicaragua v. United States of America)

International Court of Justice
November 26, 1984
General List No. 70

*392 JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of its Statute....

5. In the Memorial, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court....

11. The present case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America occasioned, Nicaragua contends, by certain military and paramilitary activities conducted in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. In the present phase the case concerns the jurisdiction of the Court to entertain and pronounce upon this dispute, and the admissibility of the Application by which it was brought before the Court. The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits....

13. Article 36, paragraph 2, of the Statute of the Court provides that:

'The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.'

The United States made a declaration, pursuant to this provision, on 14 August 1946, containing certain reservations, to be examined below, and expressed to

'remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration'.

On 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a notification, signed by the United States Secretary of State. Mr. George Shultz, referring to the Declaration deposited on 26 August 1946, and stating that:

'the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.'

This notification will be referred to, for convenience, as the '1984 notification'.

14. In order to be able to rely upon the United States Declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a 'State accepting the same obligation' within the meaning of Article 36, paragraph 2, of the Statute. For this purpose, Nicaragua relies on a *399 Declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice. That Article provided that:

'The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court'

in any of the same categories of dispute as listed in paragraph 2 of Article 36 of the Statute of the postwar Court, set out above. Nicaragua relies further on paragraph 5 of Article 36 of the Statute of the present Court, which provides that:

'Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.'

15. The circumstances of Nicaragua's Declaration of 1929 were as follows. The Members of the League of Nations (and the States mentioned in the Annex to the League of Nations Covenant) were entitled to sign the Protocol of Signature of the Statute of the Permanent Court of International Justice, which was drawn up at Geneva on 16 December 1920. That Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to theSecretary-General of the League of Nations. On 24 September 1929, Nicaragua, as a Member of the League, signed this Protocol and made a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which read:

[Translation from the French]

'On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, 24 September 1929.

(Signed) T. F. MEDINA.'

...

59. 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. In the Nuclear Tests cases the Court expressed its position on this point very clearly:

'It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.' (I.C.J. Reports 1974, p. 267, para. 43; p. 472, para. 46.)

60. In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms, also in the Nuclear Tests cases:

'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.' (Ibid., p. 268, para. 46; p. 473, para. 49.)

*419 61. The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six months' notice which, freely and by its own choice, it had appended to its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it vis-a-vis other States parties to the

Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice....

63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if *420 reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a 'reasonable time'....

65. In sum, the six months' notice clause forms an important integral part of the United States Declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the United States to submit to the compulsory jurisdiction of the Court vis-a-vis Nicaragua, a State accepting the same obligation....

* *

67. The question remains to be resolved whether the United States Declaration of 1946, though not suspended in its effects vis-a-vis Nicaragua by the 1984 notification, constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States has invoked proviso (c) to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

'disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before *422 the Court, or (2) the United States of America specially agrees to jurisdiction'.

This reservation will be referred to for convenience as the 'multilateral treaty reservation'. Of the two remaining provisos to the declaration, it has not been suggested that proviso (a), referring to disputes the solution of which is entrusted to other tribunals, has any relevance to the present case. As for proviso (b), excluding jurisdiction over 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America', the United States has informed the Court that it has determined not to invoke this proviso, but 'without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings, or cases before this Court'.

68. The United States points out that Nicaragua relies in its Application on four multilateral treaties, namely the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26

December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. In so far as the dispute brought before the Court is thus one 'arising under' those multilateral treaties, since the United States has not specially agreed to jurisdiction here, the Court may, it is claimed, exercise jurisdiction only if all treaty parties affected by a prospective decision of the Court are also parties to the case. The United States explains the rationale of its multilateral treaty reservation as being that it protects the United States and third States from the inherently prejudicial effects of partial adjudication of complex multiparty disputes. Emphasizing that the reservation speaks only of States 'affected by' a decision, and not of States having a legal right or interest in the proceedings, the United States identifies, as States parties to the four multilateral treaties above mentioned which would be 'affected', in a legal and practical sense, by adjudication of the claims submitted to the Court, Nicaragua's three Central American neighbours, Honduras, Costa Rica and El Salvador.

69. The United States recognizes that the multilateral treaty reservation applies in terms only to 'disputes arising under a multilateral treaty', and notes that Nicaragua in its Application asserts also that the United States has 'violated fundamental rules of general and customary international law'. However, it is nonetheless the submission of the United States that *423 all the claims set forth in Nicaragua's Application are outside the jurisdiction of the Court. According to the argument of the United States, Nicaragua's claims styled as violations of general and customary international law merely restate or paraphrase its claims and allegations based expressly on the multilateral treaties mentioned above, and Nicaragua in its Memorial itself states that its 'fundamental contention' is that the conduct of the United States is a violation of the United Nations Charter and the Charter of the Organization of American States. The evidence of customary law offered by Nicaragua consists of General Assembly resolutions that merely reiterate or elucidate the United Nations Charter; nor can the Court determine the merits of Nicaragua's claims formulated under customary and general international law without interpreting and applying the United Nations Charter and the Organization of American States Charter, and since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all Nicaragua's claims....

73. It may first be noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua's claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above (paragraph 68). On the contrary, Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The Court 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 abovementioned 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. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated. Therefore, since *425 the claim before the Court in this case is not confined to violation of the multilateral conventional provisions invoked, it would not in any event be barred by the multilateral treaty reservation in the United States 1946 Declaration. [Honduras, El Salvador and Costa Rica.]

74. The Court would observe, further, that all three States have made declarations of acceptance of the compulsory jurisdiction of the Court, and are free, at any time, to come before the Court, on the basis of Article 36, paragraph 2, with an application instituting proceedings against Nicaragua - a State which is also bound by the compulsory jurisdiction of the Court by an unconditional declaration without limit of duration -, if they should find that they might be affected by the future decision of the Court. Moreover, these States are also free to resort to the incidental procedures of intervention under Articles 62 and 63 of the Statute, to the second of which El Salvador has already unsuccessfully resorted in the jurisdictional phase of the proceedings, but to which it may revert in the merits phase of the case. There is therefore no question of these States being defenceless against any consequences that may arise out of adjudication by the Court, or of their needing the protection of the multilateral treaty reservation of the United States.

76. At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem....the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court *426 to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984.

* * *

77. It is in view of this finding on the United States multilateral treaty reservation that the Court has to turn to the other ground of jurisdiction relied on by Nicaragua, even though it is prima facie narrower in scope than the jurisdiction deriving from the declarations of the two Parties under the Optional Clause....

81. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua, signed at Managua on 21 January 1956, reads as follows:

'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, unless the Parties agree to settlement by some other pacific means.'

The treaty entered into force on 24 May 1958 on exchange of ratifications; it was registered with the Secretariat of the United Nations by the United States on 11 July 1960. The provisions of Article XXIV, paragraph 2, are in terms which are very common in bilateral treaties of amity or of establishment, and 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). In the present case, the United States does not deny either that the Treaty is in force, or that Article XXIV is in general capable of conferring jurisdiction on the Court. It contends however that if the basis of jurisdiction is limited to the Treaty, since Nicaragua's Application presents no claims of any violations of it, there are no claims properly before the Court for adjudication. In order to establish the Court's jurisdiction over the present dispute under the Treaty, Nicaragua must establish a reasonable connection between the

Treaty and the claims submitted to the Court; but according to the United States, Nicaragua cannot establish such a connection. Furthermore, the United States has drawn attention to the reference in Article XXIV to disputes 'not satisfactorily adjusted by diplomacy', and argues that an attempt so to adjust the dispute is thus a prerequisite of its submission to the Court. Since, according to the United States, Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application, Nicaragua has *428 failed to satisfy the Treaty's own terms for invoking the compromissory clause.

82. Nicaragua in its Memorial submits that the 1956 Treaty has been and was being violated by the military and paramilitary activities of the United States in and against Nicaragua, as described in the Application; specifically, it is submitted that these activities directly violate the following Articles:

Article XIX: providing for freedom of commerce and navigation, and for vessels of either party to have liberty 'to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation', and to be accorded national treatment and most-favorednation treatment within those ports, places and waters.

Article XIV: forbidding the imposition of restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.

Article XVII: forbidding any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either party.

Article XX: providing for freedom of transit through the territories of each party.

Article I: providing that each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party.

83. Taking into account these Articles of the Treaty of 1956, particularly the provision in, inter alia, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty. That dispute is also clearly one which is not 'satisfactorily adjusted by diplomacy' within the meaning of Article XXIV of the 1956 Treaty (cf. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pp. 26-28, paras. 50 to 54). In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. 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 *429 based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned' (Certain German Interests in Polish Upper

Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14).

Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims.

* * *

84. The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contended in its Counter-Memorial that Nicaragua's Application is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as 'a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function'....

*430 86. The first ground of inadmissibility relied on by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. The United States first asserts that adjudication of Nicaragua's claim would necessarily implicate the rights and obligations of other States, in particular those of Honduras, since it is alleged that Honduras has allowed its territory to be used as a staging ground for unlawful uses of force against Nicaragua, and the adjudication of Nicaragua's claims would necessarily involve the adjudication of the rights of third States with respect to measures taken to protect themselves, in accordance with Article 51 of the United Nations Charter, against unlawful uses of force employed, according to the United States, by Nicaragua. Secondly, it is claimed by the United States that it is fundamental to the jurisprudence of the Court that it cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court....

88. There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision' (I.C.J. Reports 1954, p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.

*

89. Secondly, the United States regards the Application as inadmissible because each of Nicaragua's allegations constitutes no more than a reformulation and restatement of a single fundamental claim, that the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council. All allegations of this kind are confided to the political organs of the Organization for consideration and determination; the United States quotes Article 24 of the Charter, which confers upon the Security Council 'primary responsibility for the maintenance of international peace and security'. The provisions of the Charter *432 dealing with the ongoing use of armed force contain no recognition of the possibility of settlement by judicial, as opposed to political, means. Under Article 52 of the Charter there is also a commitment of responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates.

91. It will be convenient to deal with this alleged ground of inadmissibility together with the third ground advanced by the United States namely that the Court should hold the Application of Nicaragua to be inadmissible in view of the subject-matter of the Application and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the ongoing exercise of the 'inherent right of individual or collective self- defence' under Article 51 of the Charter. This is, it is argued, a reason why the Court may not properly exercise 'subject-matter jurisdiction' over Nicaragua's claims. Under this head, the United States repeats its contention that the Nicaraguan Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and proceeds to demonstrate that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua. The United States points to the approach made by Nicaragua to the Security Council on 4 April 1984, a few days before the institution of the present proceedings: the draft resolution then presented, corresponding to the claims submitted by Nicaragua to the Court, failed to achieve the requisite majority under Article 27, paragraph 3, of the Charter. However, this fact, it is argued, and the perceived likelihood that similar claims in future would fail to secure the required majority, does not vest the Court with subject-matter jurisdiction over the Application. Since Nicaragua's Application in effect asks the Court for a judgment in all material respects identical to the decision which the Security Council did not take, it amounts to an appeal to the Court from an adverse consideration *433 in the Security Council. Furthermore, in order to reach a determination on what amounts to a claim of aggression the Court would have to decide whether the actions of the United States, and the other States not before the Court, are or are not unlawful: more specifically, it would have to decide on the application of Article 51 of the Charter, concerning the right of self-defence. Any such action by the Court cannot be reconciled with the terms of Article 51, which provides a role in such matters only for the Security Council. Nor would it be only in case of a decision by the Court that the inherent right of self-defence would be impaired: the fact that such claims are being subjected to judicial examination in the midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment.

93. The United States is thus arguing that the matter was essentially one for the Security

Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the United States Diplomatic and Consular Staff in Tehran case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued pari passu. In that case the Court held:

'In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.' (I.C.J. Reports 1980, p. 21, para. 40.)

The Court in fact went further, to say:

'Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in *434 respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." (I.C.J. Reports 1980, p. 22, para. 40.)

95. It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that

'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security ...'

The Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose. While in Article 12 there is a provision *435 for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.

96. It must also be remembered that, as the Corfu Channel case (I.C.J. Reports 1949, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force. The Court

was concerned with a question of a 'demonstration of force' (cf. loc. cit., p. 31) or 'violation of a country's sovereignty' (ibid.); the Court, indeed, found that

'Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.' (Ibid., p. 35.)

What is also significant is that the Security Council itself in that case had 'undoubtedly intended that the whole dispute should be decided by the Court' (p. 26).

97. It is relevant also to observe that while the United States is arguing today that because of the alleged ongoing armed conflict between the two States the matter could not be brought to the International Court of Justice but should be referred to the Security Council, in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purposes of the case....

99. The fourth ground of inadmissibility put forward by the United States is that the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving ongoing conflict. The allegation, attributed by the United States to Nicaragua, of an ongoing conflict involving the use of armed force contrary to the Charter is said to be central to, and inseparable from, the Application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds. The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes....

101. The Court is bound to observe that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (Corfu Channel, I.C.J.Reports 1949, p. 18; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible in limine on the basis of an anticipated lack of proof. As to the possibility of implementation of the judgment, the Court will have to assess this question also on the basis of each specific submission, and in the light of the facts as then established; it cannot at this stage rule out a priori any judicial contribution to the settlement of the dispute by declaring the Application inadmissible. It should be observed however that the Court 'neither can nor should contemplate the contingency of the judgment not being complied with' (Factory at Chorzow, P.C.I.J., Series A, No. 17, p. 63). Both the Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter; and

'Once the Court has found that a State has entered into a commitment*438 concerning its

future conduct it is not the Court's function to contemplate that it will not comply with it.' (Nuclear Tests, I.C.J. Reports 1974, p. 272, para. 60; p. 477, para. 63.)

*

102. The fifth and final contention of the United States under this head is that the Application should be held inadmissible because Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America. In the contention of the United States, the Contadora process, to which Nicaragua is party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appopriate method for the resolution of the issues of Central America. That process has achieved agreement among the States of the region, including Nicaragua, on aims which go to the very heart of the claims and issues raised by the Application. The United States repeats its contention (paragraph 89, above) that the Contadora process is a 'regional arrangement' within the meaning of Article 52, paragraph 2, of the Charter, and contends that under that Article, Nicaragua is obliged to make every effort to achieve a solution to the security problems of Central America through the Contadora process. The exhaustion of such regional processes is laid down in the Charter as a precondition to the reference of a dispute to the Security Council only, in view of its primary responsibility in this domain, but such a limitation must a fortiori apply with even greater force with respect to the Court, which has no specific responsibility under the Charter for dealing with such matters....

107. The Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a 'regional arrangement' for the purposes of Chapter VIII of the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter which reads as follows:

'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

108. In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application and judicial determination *441 in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding....

* *

* * *

113. For these reasons,

THE COURT,

(1) (a) finds, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharriere, Mbaye, Bedjaoui; Judge ad hoc Colliard;

(AGAINST): Judges Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.

(b) finds, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, in so far as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty;

IN FAVOUR; President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharriere, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judges Ruda and Schwebel.

(c) finds, by fifteen votes to one, that it has jurisdiction to entertain the case;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharriere, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judge Schwebel.

(2) finds, unanimously, that the said Application is admissible.

*443 Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of November, one thousand nine hundred and eighty-four, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of Nicaragua and to the Government of the United States of America, respectively.

(Signed) Taslim O. ELIAS, President.

(Signed) Santiago TORRES BERNARDEZ, Registrar.

Judges NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO and Sir Robert JENNINGS append separate opinions to the Judgment of the Court.

Judge SCHWEBEL appends a dissenting opinion to the Judgment of the Court.

(Initialled) T.O.E.
(Initialled) S.T.B.