

ICJ's mechanism to improve the regularity and accountability of its jurisdiction practices: a reflection on the case of Nicaragua vs United States in 1986

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Abstract. In face of deviant actions or situation in the international society, the international intervention can take place in various ways, among which legal proceedings of international legal institutions are one resolution that is easily ignored or even treated with contempt as nothing but either the tool leveraged by the great powers or the emotional rhetoric. This essay therefore investigates the mechanism of the International Court of Justice (ICJ) to improve the regularity and accountability of its jurisdiction system. These two aspects combine together to form a panorama of the mechanisms of ICJ: while the regularity of ICJ demonstrates objectively the degree to which the jurisdiction of ICJ can be further regulated, the accountability refers to the subjective observation from states in terms of its influence and authority. This essay argues that the Nicaragua case is a ground-breaking effort of ICJ to improve its jurisdiction system by enforcing a series of its fundamental principles and international laws. To argue this, this essay will first shed light on the background of the disputes, and then analyse how ICJ intervened in the issue, before carefully examining how this effort has exhibited ICJ's mechanism to improve its regularity by clarifying and enforcing pertinent rules.

Keywords: International Court of Justice; jurisdiction system; Nicaragua case; regularity and accountability.

1. Introduction

The Sandinista National Liberation Front (Frente Sandinista de Liberación Nacional, FSLN) overthrew the government of President Somoza and replaced it with a new government where its role in the administration eventually evolved into a sole leadership after years of operations [1]. The US initially favoured the government of FSLN, but later shifted its attitude and suspended the economic assistance to it in 1981, since the government was reported to have provided logistic support to the guerrillas in El Salvador [1]. The US government later started to support the fighting against the present Nicaraguan Government, which is collectively referred to as the Contras, and even distributed its budget to support those military or paramilitary operations within Nicaragua against the authority [1].

Accordingly, Nicaragua applied to initiate legal proceedings with the United States in 1984, claiming that the US had effective control over the Contras, and hence held responsible for the massive loss caused by the Contras, ranging from the indiscriminate killing of civilians, torture and kidnapping, etc [2]. The US was claimed to also be responsible for the mining of Nicaraguan ports in early 1984, the destruction of its oil facilities, the withdrawal of economic aid, and the initiation of trade embargo, etc [1]. Nicaragua alleged, inter alia, that US's behaviour is in breach of several sources of international law, including Article 2(4) of UN Charter and the customary international law that asks states to refrain from the use of force and intervention on other states' domestic affairs, etc [1]. But US claimed that it acted in reliance on Article 51 of the UN Charter, which recognised the right of collective self-defence. The country announced its decision not to take part in the legal proceedings in the merit of this case later in 1985, with the subsequent procedures taking place in the absence of US [2].

2. Pathways of intervention: expanding jurisdiction

The International Court of Justice made significant efforts during its intervention, managing to expand its jurisdiction over the dispute and prove the justiciability of the issue. In pursuit of this objective, the Court argued that issues of the use of force non-intervention and self-defence raised by the two sides are regulated by customary international law, and hence falling under the realm of the Court under Article 36(2) of its Statute. The Court then considered the facts imputable to the United States and Nicaragua respectively. It later concluded that Nicaragua's military supports to the armed opposition in El Salvador had become weak after 1981, rendering the US claim unsubstantiated; meanwhile, although the Contras forces are not attributed to the US based on its level of autonomy, and although US's withdrawal of economic aid is not a coercive act, US conducts have violated Article 2(4) of the UN Charter, and UNGA resolution 2625, and other customary international laws. ICJ further explained that US's plea of collective self-defence could not be upheld, since according to Article 51 of UN Charter, the armed attack should reach a threshold of scale and gravity, and a collective self-defence should be an invitation of El Salvador rather than an act based on US's own assessment and conviction of the situation, let alone the fact that measures taken out of the so-called self-defence were not reported immediately to the UN Security Council [3]. The Court urged the US to cease its wrongful behaviours and make reparations for the injuries and damages caused by its breaches of laws. However, the two states failed to reach an agreement on subsequent procedures, and the case was removed from the Court in 1991 without compensation being made [2].

3. Casual effects:

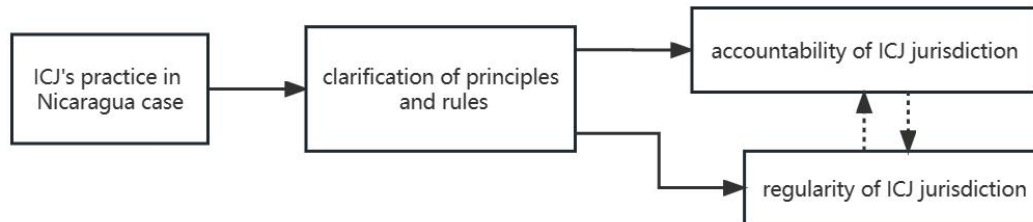


Fig. 1 casual effects

The following section will explain the casual effects, including how ICJ's practice in Nicaragua case clarifies the principles and rules, and how that has enhanced the accountability of ICJ jurisdiction and regularity of ICJ jurisdiction. On top of that, the dotted arrows illustrate that by treating states equally and launching stable resolution of the underlying situations, ICJ strikes to improve its accountability, while increasing the accountability enables ICJ to improve its regularity of ICJ jurisdiction.

3.1 How does the clarification of rules contribute to the regularity of ICJ?

This can be demonstrated in two aspects.

To start with, the Nicaragua case involved substantive rules and principles of international law that are binding on all states and therefore bring essential changes to the international law order [4]. Firstly, the Nicaragua case is the first time that the Court addressed and circumscribed the notion of "armed attack", which lies at the heart of Article 51 of the UN Charter, the law on the use of force in self-defence [5]. Secondly, by clarifying the requirement for collective self-defence, the Court sought to reduce the risk of direct involvement by a superpower, which tended to entitle a minor conflict with a grander name and launch a so-called humanitarian intervention. Thirdly, the Court also took a step to enforce the principle of "non-intervention" by stressing that intervention is wrongful and prohibited when it uses methods of coercion, whether it is direct military action or indirect aggression by supporting insurgencies or terrorism activities in another state [4]. It also

enforced the vital principle in Article 2(4) that member states shall refrain from the threat or use of force against the sovereignty of another state or other principles and purposes of the UN [6]. To conclude, the Court was good in its motivation, trying to utilise the jurisdiction to uphold the principles, eliminate violence, and strengthen its role to resolve international disputes.

Some scholars, however, see the overall jurisdiction as a failure and challenge its real benefits on the reproduction of international laws. The conceptualisation of “armed attack” was largely based on the context of this case, failing to elaborate on two important issues: the specific threshold for armed attack and the discretion on how to react lawfully in face of attack below this threshold [5]. In other words, by creating a higher threshold of gravity to recognise an act as an armed attack, it simultaneously created another high threshold for collective self-defence to be a lawful recourse, which would be detrimental to countries like El Salvador. Additionally, the Court also excluded the assistance to insurgence by proving logistics and weapons from “armed attack”, which Moore worries would encourage secret aggression in the form of supporting guerrillas and even guerrillas, and its relatively narrow definition of right of collective self-defence may deprive small states, El Salvador in this case, of rights to fight back and defence itself [7]. On top of that, the Court is also challenged for having a distorted factual basis. Moore points out that it was ignorant of the overwhelming evidence of Nicaragua’s aggression against El Salvador, and instead concentrates on the lesser defensive response to the aggression [7]. For example, the Court condemns the United States for not giving notice of the mining in Nicaraguan ports. However, research shows that the Nicaraguan Democratic Force (FDN) had announced the mining in 1983 and 4 months before the first explosion in 1984. While Moore’s argument about the defensive nature of US actions needs to be reconsidered, it is sensible to argue that in its rush to pursue international justice, future misinterpretation may derive from its initial intention.

Another aspect is how the Nicaragua case has been a practice that has been constantly referred by other cases in the following years. One example would be the ICJ’s judgments in Oil Platforms and Armed Activities, where the Court recalled the high threshold of the use of “armed attack” and the requirement for a use of force to be authorised as legitimised individual self-defence and pointed out that none of the series of actions involving US [5]. Thus, none of the series of actions associated with the U.S. ship and the naval escort, accordingly, constituted an “armed attack” in law vessels and naval escorts are grave enough to constitute an “armed attack” in law.

3.2 How does the clarification of rules and the improved regularity of ICJ contribute to the accountability of this institution?

Given the situation in the 1960s, it is arguable that the Nicaragua case may be seen as a revolutionary reconciliation of the Third World with the Court, and revenge of the weak against the powerful [8]. Back in the 1960s, some scholars have reservations about whether the ICJ can realise a significant role in international affairs and whether its jurisdiction can be recognised by states, due to its inherent limitations as an international institution [9]. In fact, many states question the authority of the contemporary international law system, regarding them as an instrument designed to serve the interests of great powers, rather than a system of binding rules and accepted norms that can treat states as equal actors [9]. However, the years following the end of the Cold War has seen the increasing legalisation of international issues, the more significant role of international courts [10]. In the 1970s, it had an average of one or two pending cases; in 2014, there were 14 cases on the docket [10]. After a small developing country won a judicial victory against a large country in the Nicaragua case, it has also given developing countries greater confidence in the Court, which is one of the reasons for the growing willingness of developing countries to use international judicial institutions and the increasing caseload of the Court. In other words, the case has been attached with the symbolic value that international laws and justice applies to every sovereign state, regardless of the size and developing status of the state.

However, Gray points out that what the ICJ truly aimed to convey through the opposition against the US was its accountability to defend the interests of small countries against the dominance of the

great powers, and its claim that every state should be treated equally with the increasing regularity of its judicial system [11]. While the emotional rhetoric of “a small developing country winning a judicial victory against a large country” inherent in this discourse is encouraging, the ICJ may not be as powerful enough to reverse the behaviour of the contesting states substantially, but instead a de facto battlefield of propaganda when a solution is already being sought by other means [11]. For instance, the US government saw the case as an overreaching of the Court’s remit and was unsatisfied about its risky venture into politics, since from its perspective, if it was to intertwine its judgments with a political bias against the Western powers, it would affect the impartiality of the final judgments and trigger unprecedented results for its future operations [12]. As a matter of fact, the mechanism of the ICJ is more of non-compulsory jurisdiction: there is no way to compel a party to appear before the Court unless the State has consented to its jurisdiction and is hence legally obliged to comply with its decision [10]. Although Article 36 (2) of its Statute provides a way for states to recognize ICJ jurisdiction as compulsory, the Nicaragua case has encountered the failure of it, with the US terminating its acceptance of the compulsory jurisdiction of the Court when the two sides are undergoing disputing opinions.

4. Conclusion

In conclusion, ICJ’s practice in Nicaragua case has influenced the regularity and the accountability of ICJ jurisdiction by the clarification of principles and rules in international law, among which are "armed attack", "non-intervention" and "collective self-defence", and the regularity and accountability of ICJ jurisdiction may reinforce each other.

This study aims to investigate the ICJ's mechanism to improve the regularity and accountability of its jurisdiction practices, hence focusing on the interaction within the systemic level, i.e., the comparison of strength of states and inter-state interactions. However, a major limitation of this study is that it does not pay further attention to the domestic level, i.e., the situation of domestic governments and their motives other than compliance with jus cogens and other rules set up by ICJ which, if included in the analytical framework, might explain some of the anomalous cases of international jurisdiction and its implementation. Therefore, the mechanisms at the micro level are yet to be further elaborated, which is a direction to consider in terms of the analysis on the institutional change in international organisations.

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