

Nicaragua V. United States from International Competence to International Responsibility

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ABSTRACT

Nicaragua suit brought against the US has been novel and unprecedented both in terms of thematic problems and also in the matter of law. United States has been accused of violating established duties in the Charter of the United Nations and International Common Law (as a source of commitments independent from the Charter). The research has been performed to the aim of studying the most important points of the case including jurisdiction of the International Court of Justice and its rejection by the United States as well as the Court's criterion in substantive proceeding. In this case, the Court inevitably establishing its ruling on the rules of the International Common Law and general rules of Law and upon ascertainment of competence reminded that how the rules of the Conventional Law and the rules of International Common Law with similar content can exist alongside each other, but independently. Also, the Court provided strictly stringent criterion in order for what have been done by the Contras to be attributed to the US, which is the same effective control that has to be implemented in cases of violation of international humanitarian law.

Keywords: International Court of Justice; jurisdiction; Nicaragua; United States; International Common Law; control criterion.

Introduction

International Court of Justice is the main judicial organization of the United Nations. It is an organization to guarantee security and to reach everlasting peace. Power in internal societies will be stemmed from the ideal; however, in international system, there are powers trying to create ideals. Primarily, it has been international society and then effort has been made to create international community. International

community includes general and fundamental values and norms. Main core of all of these values are the two fundamental norms of peace and humanity. Through creation and empowerment of these values, a new space has been created in international society within which governments had to have activity and interaction i.e. a space based on respecting the two fundamental peace and humanity norms. Then, in this international society absolute will of governments came into contact with fundamental norms and values and halted there. Since then, will of governments have been limited to boundaries and this is where the International Court of Justice as an international actor has to take into consideration all of the evolutions made in socio-political structure of the international society and superiority of some of the values over the will of governments, as an international actor.

In June 1986, the International Court of Justice issued one of the most important verdicts of its own forty years of existence. Undoubtedly, the Court's ruling in relation to the Nicaragua case has been of special importance to the US. Some of the observers considered the verdict as the best one issued by the Court with consideration of highly difficult situations of the time. Some others have remembered of the verdict as the worst one during the history of the Court that had to lead to dissolution of this reliable judicial reference. However, both of the views agreed upon the point that the case of Nicaragua is undoubtedly the most important law suit dealt with by the Court during a long period of time.

Nicaragua's suit has set forth new, sensitive, and difficult problems in the Court. In the case, problems have been complex and had multiple dimensions. The United States have been accused by Nicaragua of using force against this country through direct attacks (mining Nicaraguan harbors) and direct and indirect support of armed uprisings inside the country. It has been claimed that economic sanctions imposed by the US, flight of American warplanes over Nicaragua and doing military maneuvers adjacent to the borders of that country is violation of the International Law.^a It was also claimed by Nicaragua that actions taken by American public organizations in preparation of mechanisms for rebellions of this country means violation of International Humanitarian Law. Justifying such claims, Nicaragua has been relied on the Charter of the United Nations, multilateral treaties, and General International Law in addition to the International Common Law. There are many important effects imposed by Nicaragua's law suit on the US. In continuation, the case under investigation will be stated in addition to analyses made on its highlights.

In April 9th, 1984, Nicaragua filed a law suit against the US after several references made to the United Nations Security Council to prevent military and paramilitary actions taken by the US in that country; and, it did not gained positive results due to the US exercising veto power. In its petition against the US, Nicaragua asked the Hague Tribunal to investigate the following charges:

- A) America has violated its explicit contractual obligations and especially the Charter of United Nations (Articles 2 and 4) comprising the rule of no use of force by the states in international relations as well as Articles 18 and 20 of the Charter of the Organization of the American States confirming the rules on no interference and also immunity of the territories;
- B) America has violated the rules set by General International Law and International Common Law and as a result, Nicaraguan sovereignty has been violated through military air, ground and marine attacks on the country's maritime boundaries and airspace. America has made effort in threatening Nicaragua government; has used force and threatened to use force against Nicaragua; has interfered with internal affairs of Nicaragua; has violated principle of free shipping in the high seas and free trade; and finally, has killed, injured and arrested citizens of Nicaragua.^b

In aforementioned petition, it has been reminded by Nicaragua that these operations are still at work and at the time the complaint has been filed, the followings have been resulted due to the attacks performed by the North America in: more than 1400 people killed, 3000 people injured, and 113000 people displaced.

1- Hight, Kate; "Between sledge and anvil of the United States, International Court of Justice and Nicaragua", p 2
2-case concerning Militarily and paramilitary Activities in and Against Nicaragua, I.C.J. Reports 1986, p.8.

Moreover, agricultural production companies, bridges, airports, oil pipes, energy production facilities, schools, and hospitals have been ruined and the losses resulted have been estimated to be 200 million dollars. As suggested by Nicaragua, military and paramilitary attacks against the country are explicitly recognized as authorized by one of the Federal Laws of America. That is, in December 1983 and based on Reagan's request; payment of 24 million dollars to the CIA has been passed by the American Congress in order for direct and indirect support to be made of military or paramilitary activities against Nicaragua. One month before filing the petition (March 1984), antirevolutionary units of Nicaragua have made the most important of their attacks with 6000 soldiers (estimated by Nicaragua) and at the same time, Corinto, Poerto Sandino, and El Bluff harbors have been mined; while, five commercial ships from Panama, Netherlands, England, Japan, and Soviet Unions have been damaged. Many other ships have been banned to move towards Nicaraguan harbors.

To stop such situation, the Court has been asked by Nicaragua to issue immediate order as for interim measures of protection. The request has been quickly accepted. The order for interim measures of protection has been issued one month after filing the petition (May 10th, 1984); and, it was ordered unanimously by the Court including the American judge himself to: "America would be obligated to end any action resulting threat or siege of Nicaraguan harbors or putting traffic to and from these harbors in danger through mining them and to avoid taking such actions and similar to them from this point on." Interim measures of protection accepted by the Hague Tribunal upon 14 positive votes against one opposite vote of the American judge established that the sovereignty and political independence of Nicaragua and the rights of governments in the region and the world should be completely respected and not put at risk by no means through "military and paramilitary activities prohibited by principles of the International Law".^c In continuation, details of the Court's jurisdiction in this case will be dealt with.

Analyzing the Court's Jurisdiction Problem

Claims set forth by Nicaragua government about jurisdiction:

One of the foundations Nicaragua relied on regarding jurisdiction of the Court was declarations of both parties through which compulsory jurisdiction of the Court has been accepted based on Article 36 of the Court's Statute. ^dAlso, in a note by Nicaraguan government, in addition to what has been set forth in the petition the Court has jurisdiction based on a Treaty of Amity, Commerce and Navigation concluded between the two governments of America and Nicaragua; and, this treaty is an independent basis for jurisdiction according to paragraph one of Article 136 of Statute of the Court.

During written proceedings, it was stated by the Nicaraguan government that:

- a) The International Court of Justice has jurisdiction to investigate the petition based on provisions set forth in declaration by Nicaragua dated September 24th 1929, according to paragraph 5 of the Article 36 of the Statute of the Court and declaration of US government dated August 14th, 1946 based on paragraph 2 of Article 36 of the Statute of the Court.
- b) Declaration of September 24th, 1929 of Nicaragua has been put in force and is considered as valid and binding acceptance of the Court's jurisdiction.
- c) Measures taken by the US Secretary of State George Shultz in a letter dated April, 6th, 1984 addressed to the Secretary General of the United Nations to amend or end the regulations set forth in declaration of August 14th, 1946 has not effect.

1-Ashrafi Esfahani Group of International Law, "Actions taken by Hague Tribunal in case of Nicaragua", p 8

2-Hight, Kate; "Between sledge and anvil of the United States, International Court of Justice and Nicaragua", p 16

- d) The Court is competent according to the Article 24 of Treaty of Amity, Commerce, and Navigation dated May 24th, 1958 concluded between the US and Nicaragua in investigating aforementioned claims set forth in the petition which is in the scope of that treaty.^e

Claims set forth by American government

During written proceedings, American government also stated that the Court has no jurisdiction over investigating aforementioned claims in terms of petition filed by Nicaragua and the petition is not acceptable. As claimed by the US, declaration of Nicaragua has not to be binding due to lack of submission of approval document. On the other hand, it was claimed by the US that the Court has not jurisdiction; because, in jurisdiction acceptance declaration of the US, reservation has been established by America and disputes resulted from multilateral treaties have been put aside from scope of jurisdiction of the Court. Moreover, three days before the petition filed by Nicaragua to seek an order from the Court, George Shultz the then US Secretary of State submitted a declaration to General Secretary of the United Nations excluding the disputes between the US and Latin America Countries or resulted from what happens in the region unilaterally and immediately for the period of two years from the scope of provisions of 1946 declaration.^f

Legal Status of Nicaraguan Declaration of 1929

1- Status of declarations within the framework of the Statute of the International Court of Justice

At that time- contrary to the new Court- providing amendment to the statute had not been done automatically and signatories of the Covenant of the League of the Nations have not been considered as the members of the Statute of the permanent Court. So, separate legal action had to be taken as for membership to the Statute of the old Court. Signing the concerned protocol and especially its “Section A” was leading the countries to gain membership of the Statute of the Court. It was established by “Section B” the so called “Arbitrary Article” that “following signatories declare on behalf of their governments that from this date on, compulsory jurisdiction of the Court is accepted automatically and with no need to especial contract according to paragraph 2 of the Article 36 of the Statute.” Also, approval documents have to be sent to the Secretary General of the United Nations. Currently, there is no protocol of signing the Statute for the International Court of Justice; because, according to the paragraph 1 of the Article 93 of the Charter “All members of the United Nations automatically are considered as members of the Statute of the International Court of Justice and the Court is considered as one of the United Nations Organizations based on the Article 7 of the Charter.”^gIn the new system and as established by paragraph 4 of the Article 36 of the Statute “Declarations will be submitted to the Secretary General of the United Nations and a copy sent by him to those who have signed the Statute and also the office of the Court.” Nicaragua is from among those governments accepting the jurisdiction of the Court through amendment to the “Section B” of signing protocol of the permanent Court. Declaration of 1929 is an obvious example of a brief and unconditional declaration. This declaration signed by Medina states that “I the undersigned, on behalf of Republic of Nicaragua accept unconditionally the compulsory jurisdiction of the permanent International Court of Justice.”^hBased on the documents provided to the Court, in November 29th, 1939, Foreign Minister of Nicaragua sent this telegram addressed to the Secretary General of the United Nations: “Protocol and the Statute of permanent International Court of Justice passed previously will be sent to you according to the procedure set for approved documents”. Receiving documents has not been registered by the archive of the United Nations. No reason has been provided in the Court to show such approved document has been communicated to Geneva. In December 16th, 1942, legal consultant of the Secretariat of the United Nations reminds through a letter the foreign minister of Nicaragua of not receiving the approval document and the point that its registrations is required as for commitments of Nicaragua to be put in force. During verbal proceedings, representative of Nicaragua suggests that there are a few numbers of notes and records. He

¹ case concerning *Military and paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 1986, p

² - case concerning *Military and paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 1986, p.13

³ - case concerning *Military and paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 1986 p.50

⁴ - Hight, Kate; “Between sledge and anvil of the United States, *International Court of Justice and Nicaragua*”, p 19

adds that if approval documents have been sent, they had to be sent through shipping by sea when the World War has been in process; so, commercial ships being attacked could be the reason for documents not received. After the War, Nicaragua took part in San Francisco Conference regarding formation of the United Nations and became one of its main members approving the Charter of the United Nations in September 6th, 1945. In October 24th, 1945, the Statute of the International Court of Justice has been put in force as an integrated part of the Charter.¹

According to the above events, it was suggested by the US that firstly Nicaragua has never been a member of the Statute of the International Court of Justice and has not accepted compulsory jurisdiction of the permanent Court and has not being able to accept such. Acceptance declaration of 1929 of Nicaragua has not been remained in force upon interpretation of English version of paragraph 5 of the Article 36 of the Statute of the Court of Justice. As suggested by the US government, French version of the Statute also requires a declaration to be binding according to the Statute of the permanent International Court of Justice so that it would be considered as acceptance of jurisdiction of the Court.

It is not claimed by Nicaragua that declaration of 1929 by itself is sufficient to prove binding acceptance of compulsory jurisdiction of the permanent International Court of Justice. To do so, Nicaragua has been required to finalize the approval process of signing protocol of the Statute of the Court. However, the US interpretation of paragraph 5 of the Article 36 of the Statute of the current Court is not accepted by Nicaragua. As argued by this country, the phrase “Still in force” wants to exclude those declarations expired and it is not effective on such declarations as that of Nicaragua; because, this declaration is not expired even if the process was not finalized. According to what is stated by Nicaragua, the Article wants continuation of already available status of acceptance declarations of compulsory jurisdiction. So, Nicaragua is of the same status against the Statute of the International Court of Justice as it has had against the permanent Court. Anyway, approving the Statute of the Court finalizes declaration of 1929.^j

It is claimed by Nicaragua that upon type of encounter of publications of the Court by bringing name of Nicaragua in the list of countries signing arbitrary article in the yearbook of the Court and also behaviors of the parties to the current claims and behavior of the government of Honduras in relation to the dispute of 1957-1960 between India and Nicaragua regarding arbitration vote of King of Spain in 1906 that has been finally investigated by the Court, correct interpretation of the Statute through declaration of Nicaragua is confirmed. Also, views provided by law experts and procedure taken by the American government also confirm correctness of the recent interpretation.^k

However, the US claimed that mentioning this declaration in the yearbook and publications of the Court does not mean that they are validated by the Court; instead, the Court itself states at its own introduction to the yearbook that the publications do not create any responsibility whatsoever for the Court. It is mentioned in the yearbook of 1956 that, providing the texts of declarations by the countries in this yearbook is just for simplicity of references made.

To specify whether regulations mentioned in paragraph 5 of the Article 36 can be applied on declaration of 1929 of Nicaragua or not, the Court has to primarily make clear legal characteristics of that declaration. Then it has to match them with provisions set forth in the paragraph. As far as characteristics of Nicaraguan declaration are concerned, it is reminded by the Court that that declaration has been valid at time the Statute of new Court has become binding. The reason is that, according to the system followed by permanent International Court of Justice, it is a valid declaration when issued by a government at time of signing or approving signing protocol of the Statute of the Court or sometimes later. Also, according to the latest Statute, only those governments can issue declarations that are a member of new Statute (according to paragraph 2 of the Article 36). As far as that protocol has been signed by Nicaragua, its declaration

²- case concerning *Military and paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 1986, p 17.

³- case concerning *Military and paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 1986, p 18.

Ashrafi Esfahani Group of International Law, “Actions taken by Hague Tribunal in case of Nicaragua”, p 12.1-

regarding compulsory jurisdiction of the permanent Court not being ended in approval would be undoubtedly valid.¹

Receiving the Statute of permanent Court has not established special form or ethic to issue such declarations and governments have practically used different methods for such. However, despite validity of such declarations, they are not enforceable according to the status of the Court. This has to be proved that required steps have been taken nationally as for approval of signing protocol of the Status; however, Nicaragua is not capable of proving that required steps have been taken to send approval documents to the General Secretary of the United Nations. The country just informed dispatch of the approval documents; however, after being clearly informed by legal consultant of secretariat of the United Nations that this can bring about problems in terms of the Court jurisdiction, there is no reason that Nicaragua would have done this. Required step has not been taken by Nicaragua so that simply it can be suggested that the country has accepted compulsory jurisdiction of the Court.

Phrasing in Article 36 has not excluded such declarations as that of Nicaragua; but also, it even has covered it up. Except for this connection with the Statute of the permanent Court, the only condition that has to be observed by a declaration is being still in force. This was for the first time that the Court had to make respond regarding whether a declaration not being in force at the time of establishment of the new Court can be included in paragraph 5 of the Article 36 or not? In case of air accident dated July 27th, 1955, there was a completely different problem i.e. whether a declaration undoubtedly being in force at time of permanent Court can be transferred to the new Court or not. Meanwhile, the government issuing the declaration has not been present in San Francisco Conference and for a long period of time after dissolution of permanent Court has not become a member of International Court of Justice.^m

Finally, repeated stipulation of Nicaragua declaration in the yearbooks of the Court and no objection made by concerned country has been considered as its consent by the Court and accordingly objection made by the US in this respect has been rejected. The only basis for contentious jurisdiction of the Court is the consent of government parties. What are important in such domain are the countries declaring their consent; and, method of such consent has no effect in the subject of jurisdiction axiom.

Changing and modification of acceptance declaration of compulsory jurisdiction of the Court by America

In April 6th, 1984 and three days before filing the petition by Nicaragua and as mentioned before, George Shultz informed Secretary General of the United Nations through a letter that the United States unilaterally and immediately for the period of two years excludes disputes related to the countries of Central America from the scope of inclusion of its own declaration. If such action by the US has been considered as the change of declaration of 1946, there is no such condition stipulated in it; and, America has not been authorized to do so. Also, if cancelling declaration of 1946 has been in relation to the countries of Central America; it would be enforceable after six months after submission of related note to the Secretary General and not three days after that. According to the US, declarations related to the arbitrary article are unique legal institutions and not considered as treaty; so, they are not governed by the Law of Treaties. Accordingly, governments can restrict their acceptance whenever required. In response, contractual conditions governing declarations have been referred to by Nicaragua which prevents their unilateral cancellation or amendment except for those conditions stated in the declaration itself. It was reminded by the Court that unilateral characteristic of the declaration will not let government to change or modify its domain of obligations freely.^o

²- *I.c.j.reports.1957,p.146.*

³- *case concerning Military and paramilitary Activities in and Against Nicaragua,I.C.J. Reports 1986,p 29.*

¹- *I.C.j Reports, 1984,pp.392.*

²- Hight, Kate; "Between sledge and anvil of the United States", *International Court of Justice and Nicaragua*, p 24.

Despite the fact that declarations are unilateral legal actions; in fact, they create bilateral legal obligations against other governments accepting such commitment. To establish such group of obligations forming the ethic of compulsory jurisdiction; “Principle of good will” plays essential role. Then, it was concluded by the Court that the US cannot cancel or change unilaterally its own declaration; because, obligations resulted from the ethic of compulsory jurisdiction has contractual nature and America has taken the responsibility that makes the country accountable against other governments. Accordingly, the Court ignored declaration of April 6th, 1984 of the US and attained its own jurisdiction based on declaration of both parties.

Treaty of amity, commerce and navigation as the basis for the Court’s jurisdiction

Paragraph 2 of the above treaty concluded between America and Nicaragua in January 21st, 1956 in Managua in terms of compulsory jurisdiction of the Court between the parties establishes that: “Any dispute between the parties about interpretation or implementation of present treaty that would not be settled satisfactorily through policies will be referred to the International Court of Justice, except for the parties’ agreement to settle it through other peaceful ways.”^p

Nicaragua government relied on the same condition in addition to declarations issued by both countries. Finally, the Court gained its jurisdiction based on declarations of both parties and declared that Nicaragua and the US would be obligated through compulsory jurisdiction of the Court to the extent that claims provided by Nicaragua comprises violation of provisions set forth in such treaty.⁴ This has to be remembered that based on Article 37 of the Statute of the Court, investigating those disputes resulted from enforceable contracts of the period related to the United Nations and permanent Court bearing the provision for compulsory jurisdiction would be due on the International Court of Justice.

Reservation available in American declaration

In fact Nicaragua relying on International Common Law guaranteed its success in this lawsuit; because, availability of Vandenberg reservation about the right provided by the provision related to multilateral treaties at the time of issuance of the US declaration regarding “arbitrary article” (related to acceptance of general jurisdiction of the Court) has made the court confronted with obviously irrational and useless impediment. In fact, at the time of issuance of declaration regarding acceptance of the Court jurisdiction it was reminded by the US that disputes resulted from multilateral treaties will not be within the authorization scope of the Court, except for when all the parties to the treaty affected by the ruling of the Court in respect of the concerned case would be present at the Court and/or jurisdiction of the Court would be agreed by the US in a certain manner (Vandenberg reservation). It has to be noted that “Apparent effort made by the US to protect the countries as members of multilateral treaty seems unnecessary. Article 63 of the Court has authorized the countries being a party to a multilateral treaty to be present at Court as a third party as for interpretation of a convention by the Court.”^r Article 6 also is considered as a guarantee for protection of the rights of third party countries. Moreover, Article 59 of the Statute has limited effects of the Court’s ruling to the parties to the dispute and just specific to that subject. All of these leverages seem to be sufficient to protect the rights of third party countries. According to the aforementioned amendment, jurisdiction of the Court has been accepted “in proceeding related to the claims resulted from multilateral treaties that all the parties included in the ruling by the Court would be also considered as a party to the law suit.” Observing such provision on behalf of the Court would be resulted in rejection of any claim by Nicaragua except for those cases that all committed parties (affected by the Court’s ruling) would be participating in the lawsuit, relying on the rule resulted from the treaty (Charter of the United Nations).

3- Ashrafi Esfahani *Group of International Law, “Actions taken by Hague Tribunal in case of Nicaragua”, p 18.*

¹- *I.c.j. Rports, 1984, ,p87.*

2- Hight, Kate; “Between sledge and anvil of the United States”, International Court of Justice and Nicaragua, p 10

Till that time, no case has been arisen as for the Court coping with such provision. Gathering the aforementioned provision and the Charter of the United Nations together has been unimaginable or absolutely impossible; because, observing the provision, the Court's jurisdiction had to be proved upon presence of 157 governments as members of the United Nations. Herbert Briggs participating in permanent International Court of Justice in proceedings on Lotus claim, provided following description in 1958 regarding Vandenberg condition: "The provision explains mental confusion of its writers; and, till present time no one has understood the real meaning behind it." Against such strange condition about multilateral treaties and as reflected in amendment made to the Vandenberg's condition, how the Court can react? Accepting reasoning by Judge Lauterpacht about provision of "being the judge to your own claim" in his "separate view" provided in case of "Norwegian Loans" in 1975 seems to be interesting reaction. In his reasoning, Lauterpacht interpreted Connally Amendment (twin of Vandenberg Amendment) as the factor of "degradation or even decline of legal element of commitment"; an interpretation that may not be doubted in its correctness regarding establishment of condition in multilateral treaties of the US in Nicaragua case.¹

However, in Nicaragua case, the Court did not proceed to the extent that Judge Lauterpacht did and decided to accept validity of Vandenberg condition and investigate the claim with consideration of it. The Court had no choice but to establish its verdict on International Common Law and principles of the General Laws; so, gaining its jurisdiction, it reminded that how regulations of Contractual Law and those of international common Law with unit content can be independently available alongside each other and how common rules are formed. "In fact, verdicts of 1984 and 1986 of the Court have provided appropriate position for future of common law in international relations. These two verdicts call us for study of the relationship between common law and Roman-Germanic Law from one hand; and, they guide us towards position of common law among other sources of international law."

In this case and considering principle of prevention of use of force and also no-intervention as common laws, the Court confirmed the point that omission of act also can take common aspect and create commitment. About procedure adopted by governments, the Court believes that "Procedure for applying rules concerned has not to be expected to be complete and precise... and to establish a common rule there is no need for the related procedure to be completely and precisely matched with that rule." "In fact, considering the point that "There is a very strong hypothesis against changes of rights", the Court states at this paragraph that "In order for a common rule to be available, governments have to just match their behavior with it generally and to consider behaviors not matching concerned the rule in the same way. That is, considering them as violation of rules not as an evidence and reason for identification of a new rule." In case of Nicaragua, the Court relies on several conventions in order to prove its own view regarding principle of prevention of use of force and also no-intervention, suggesting that: respecting sovereignty of countries related to the principle of no use of force and no-intervention... can spread to internal seas, land seas and its airspace. Convention of Chicago (1944) has put emphasis on exclusive and complete governance of a country on its own airspace; and, Conventions of Geneva (1958) on Law of the Sea and that of Monego Bay (1982) have also taken steps in this respect. Relying on the above conventions, the Court concludes that "Regulations of aforementioned conventions are just positive response to already established principles of the International Common Law." Also, to prove its own view, it was suggested by the Court that the charter is somehow proof of common laws not completely included. In Article 51 of the Charter, legitimate defense is considered as inherent right and believes that none of its regulations damage it; however, all of its substantive aspects are not explicitly put in order. For example, the Charter does not include a rule based on which legitimate defense has to be proportionate to the armed attack and also the necessity for making respond to it. The rule has been established in International Common Law. Moreover, there is no definition of invasion in the Charter and this is not a part of Contractual Law. Accordingly, it cannot be established

¹- Ashrafi Esfahani Group of International Law, "Actions taken by Hague Tribunal in case of Nicaragua", p 20

²- I.C.J. Reports, 1986, pa. 186. □

³- I.C.J. Reports., 1986, p. 212

that Article 51 of the Charter has made a complete formulation of International Common Laws; and, such reasoning also proves to be a supporting instance of other principles including no-intervention.”^{7w}

After decision made by the Court regarding its own jurisdiction and before beginning the substantive proceedings; the United States left the Court as an unprecedented action with no record during the history of both of the Courts. Till that time, no other government even that of South Africa at the stage in which lost jurisdiction and before substantive defense in the case related to South West Africa has had left the Court. Lack of presence of the US in the Court which is better to be called “disappearing” made some certain type of decision making inevitable. In fact, upon this action by America, The Court had no choice to issue the verdict based on various reasoning methods in Nicaragua case.

To justify the actions objected by Nicaragua, the United States has been relying on the right for legitimate defense during jurisdiction proceedings, claiming that its own actions have been taken as collective right and not individual right used regarding its own allies in Central America and in response to hostile behavior of Nicaragua against its neighbors El Salvador, Costa Rica, and Honduras.⁸ However, when the US relying on positive defense avoids presence at the Court to provide its own reasons; Article 53 of the Charter clearly forecasts a case in which the defendant to a claim is not present at judicial proceeding in the Court. In such case and according to the aforementioned Article, the Court has to be convinced that claims by plaintiff (applicant) are justified in terms of subject and judgment. Repeatedly, the Court reminded the point that there is no reason for confirmation of claims set forth by the US including that of Nicaragua invasions against El Salvador. Especially, absence of El Salvador in judicial proceedings (not renewing its previous application to enter the case of Nicaragua) made the case more complicated. As a result, those documents and reasons undoubtedly being capable of making nature of the case clear couldn't be provided. Of course, it was known by El Salvador that its intervention on the assumption that it would be accepted to enter the case has been only resulting in heavy load of responsibility of the outcome against the main defendant, playing the similar role to the “defendant”. Most objections to the verdict of the Court is undoubtedly related to quality of it dealing with thematic subjects.⁹ However, at absence of defendant government, would it be possible for the file or evidences to be complete? And, has the Court basically been able of comprehensive evaluation of reasons and evidences but avoiding this?

To cope with unilateral judicial proceedings, the Court had to adopt several new methods. Firstly, inductive and deductive reasoning have been more than ever relied on as the criterion. Secondly, information available to the public and the news published in the press not being denied by government authorities have been widely relied on by the Court. In terms of proving the evidence in substantiation of the claim, a new but deliberate theory has been established by the Court in order for evaluation of what have been suggested by official authorities of the involved governments upon which statements contrary to the interest of the state to which one belongs is considered to be true, and a confession as a result; and, confirmatory statements will be considered to have no probative value as far as they are provided by the beneficiary.^z This initial attitude has been used by the Court in relation to the statements of official authorities in both governments of America and Nicaragua. Aforementioned method can be considered as the most evolutionary action taken regarding coping method of the Court with thematic subjects since it has been used “evidence and circumstance” in the Straits of Corfu case (1949). In such case, the Court

4-Zamani, Ghasem; “Contractual Laws and formulation of Common rules in process taken by the International Court of Justice with emphasis put on the case of Nicaragua”, p 13

5-Alhoie, Hamid; “Domain protected by the verdicts issued by the International Court of Justice”, p5

1-Hight, Kate; “Between sledge and anvil of the United States”, International Court of Justice and Nicaragua”, p 16

2-Hight, Kate; “Between sledge and anvil of the United States”, International Court of Justice and Nicaragua”, p 17

1-Iranian Jurnal of International Laws, “Set of verdicts issued by the Court”, p 28

1-Hight, Kate; “Between sledge and anvil of the United States”, International Court of Justice and Nicaragua”, p 16

2-Hight, Kate; “Between sledge and anvil of the United States”, International Court of Justice and Nicaragua”, p 17

relied on circumstantial evidence declared Albanian government responsible for mines in its own coastal seas, resulting in damage and human loss imposed on the two English Destroyers.^{aa}

Analyzing the Court's Ruling

In June 27th, 1986 the Court issued the verdict in case of Nicaragua. To assign the actions to the US, different paths have been taken by the Court. First path according to the Article 4 of the project of basic commission concerns the actions taken by those people being a member of US Army which have been directly assignable to that government. Second path has been assignment of actions taken by those people not considered as the organization for the US government but receiving directly some orders from official authorities of the United States and working under its supervision. This can be reviewed within the framework of Article 8 of the project of international responsibility of government.

One of the reasons set forth by Nicaragua in relation to assignment of actions to the US was the point that this country has created the Contras in reality. Considering the Contras as equal to a US organization is not irrational. It was concluded by the Court that supporting the Contras and helping them has led to intervention in Nicaraguan internal affairs. It was concluded by the International Court of Justice that this group is responsible for their own actions especially regarding violation of humanitarian rights claimed. To assign these actions to the US, it has to be proved that this government has had real control of those operations during which claimed violations have been taken place.^{bb}

According to the views provided by the International Court of Justice, general control to attribute all of the actions taken by the Contras to the United States is not sufficient. The control has to be complete and to attribute such actions to the government full dependence is a must. That is, government should have effective control on certain actions taken during violation of human and humanitarian rights.^{cc}

Regarding violation of humanitarian rights by the Contras forces, this had to be made clear by the Court that whether their relationship with government of the US has been in a way that they would be considered as its organization and/or they have acted on behalf of that government? According to the Court the reasons available to show full dependence of the Contras on assistance of the US were not sufficient and partial dependence can be inferred from such issues like their leaders selected by the US and or some other factors like organizing, mobilization, and designing the operations, and selecting targets. There is no clear reason whether such degree of control has been really implemented by the US.^{dd}

Type and degree of control has to be equally like the control imposed by government over its own organizations; and, accordingly the government is responsible for all actions taken by this group, even if certain action would be taken outside the scope of authority and contrary to implicit orders. In this case, non-governmental group under control can be turned to unofficial organization of the government.

In case with control criterion, it was asserted by the Court that: "It has to be proved that relationship between rebellions and government of the US has reached dependence from one hand and control limit on the other hand so that from legal point, the Contra would be considered as organization of the US government or its agents." Relying on the principle of effective supervision and control it was suggested by the Court that "Despite wide range financial helps and other supports provided by the US to the Contras, there is no clear evidence as for such degree of control to be applied by the US in all fields. Effective control is related to the government control over certain actions ongoing in a certain operation during which many violations have taken place."

1-Iranian Jurnal of International Laws, "Set of verdicts issued by the Court", p 28

2-Malekizadeh, Amirhossein, "Control criterion in International accountability system", p8

3- Ashrafi Esfahani Group of International Law, "Actions taken by Hague Tribunal in case of Nicaragua", p 16
. Higgins, Rosalyn, *The international court of justice, legal journal* 4-

In this case, the Court made a distinction between two groups of people not with status of official organizations of a government but acting on behalf of that government. The first group has been totally dependent on foreign country, acting upon guides and projects of that government (some groups in Latin America). Second group concerns receiving equipment and financial support from a foreign government but having some sort of independence towards that government like Nicaragua rebellions i.e. the Contras.^{ee}

It was stated by the Court that, those actions done by the first group can be clearly attributed to a foreign government i.e. that of the US and there is a different situation compared to the actions taken by the Contras in violation of international humanitarian rules.

In terms of military actions and operations performed by the Contras including usage made of military forces in Nicaragua against territorial sovereignty and political independence of that government; it was found by the Court that the US is responsible for its financial and armament assistant to the Contras and making them equipped. Such responsibility is resulted from violation of commitment in relation to no-intervention in internal affairs of other governments like commitment for no use of force in violation of International Common Law stipulated in the Charter of the United Nations.

International Court of Justice has strictly stringent criterion for such attribution which is the same effective control that have to be performed against actions by the Contras in violation of international humanitarian rights; a criterion that is not proved in this case according the Court. In relation to such effective control, it was suggested by the Court that the United States had to direct or perform such actions against human rights or claimed humanitarian rights by the plaintiff government. From these phrases it seems that “Effective control” concerned by the Court has had two goals:

- a) Issuing instruction to the Contras by the US in relation to certain actions including killing civilians is an evidence of such being done upon order of the US.
- b) Each of certain actions taken by the Contras ordered by the US means that rebellions have been effectively forced by the US to perform such certain operations.

In relation to effective control criterion, it was concluded by the Court that there has been a general control imposed by the US over the Contras; and, these forces have been highly dependent on the US. However, this does not mean that the US has been involved in violation of human or humanitarian rights by the Contras.^{ff}

From view point of the Court, the Contras have been able of doing so also with no control of the US. In continuation, it refers to the effective control criterion and states that legal responsibility of the US can be suggested when it is proved that this country has had effective control on operations leading to violation of human and humanitarian rights. As mentioned before, since no reason has been provided to show participation of the US along with the Contras in the operations; aforementioned violation couldn't be attributed to the US upon the Court's opinion. As a result, actions taken by the US did not mean effective control over the Contras' operations. To consider the US as responsible, effective control had to be imposed.

Considerable point is the reasons encouraging the Court to consider high threshold as for attributing severe violation of humanitarian rights by the Contras to the US. Immediately, all actions taken by American organizations to the aim of arming the Contras has been attributed by the Court to the United States; however, severe violation of humanitarian rights by Nicaraguan rebellions like killing prisoners of war and civilians, kidnapping, terror, torture, and rape have not been attributed to the US. In this respect, studying international procedure before establishment of this specific court shows that how the European

1-Zamani, Ghasem; “Contractual Laws and formulation of Common rules in process taken by the International Court of Justice with emphasis put on the case of Nicaragua”.

2-Malekizadeh, Amirhossein, “Control criterion in International accountability system”, p 21

Court of Human Rights on one hand and Iran-United States Claims Tribunal on the other hand have used general control criterion to prove international responsibility of governments. Degree of control can be different based on thematic status of each case. Variability of control degree can be applied this way. In those cases that taking some actions leads to severe violation of international law including “Genocide”, general control is applied and effective control would be imposed in other cases. In terms of control criterion, International Law Commission considers this in each case as a discretionary issue that whether a certain behavior has been performed under control of a government or not and/or to what extent controlled behavior should be attributed to that government? Considering this, it is observed that International Law Commission has not provided a clear framework as for control criterion. According to the perspective of the International Law Commission “Legal problems and thematic status of the case like Tadic Case have been different from military and paramilitary activities of the US in Nicaragua. Jurisdiction of criminal court of Yugoslavia has been directed towards such problems as individual criminal responsibility not international accountability and the problem in that case was not responsibility but applicable rules of International Humanitarian Rights.”^{gg}

According to the Charter, problem concerned has two elements: duty of each party regarding execution of the court’s decree and possibility of execution of that by Security Council. After decision made by the Court has been declared in June 1986, there was a silence accompanied with surprise. Nicaragua immediately referred to the Security Council to registration of the court verdict. The request of Nicaragua has been vetoed by the US in July 31st, 1986. In October 21st, 1986, the problem of execution of the Court’s decree has been once again set forth in the Security Council. After several meetings, again in October 28th, 1986, draft resolution of the Security Council has been vetoed by the US. Finally, General Assembly of the United Nations declared (not in a binding way) according to its own resolution dated back to November 27th, 1986 that “Immediate and complete execution of the verdict issued in June 27th, 1986 of International Court of Justice ... is seriously required ... according to the rules related to the Charter of the UN.”

In the UN records, case of Nicaragua is the first one in which the request for execution of the verdict forecasted in Article 94 has been vetoed. The point that whether the losing party can resort to veto to prevent execution of regulations stipulated in paragraph 1 of Article 94 (above) to its own benefit or not is an implied question never answered; however, we know that when joining the UN in 1945, the US has accepted to be binding to the regulations set forth by the above Article.^{hh}

Maybe the only way to solve the conflict between regulations in paragraph 1 of Article 94 and veto of Resolution by the US about forcible execution of Nicaragua Verdict could be resorting to view of the permanent International Court of Justice in case of Treaty of Lausanne. In such case, permanent Court rejected potential right of the England to veto the case being directly beneficiary of it and stated that: “This famous rule that nobody can be a judge to its own case applies in this case.” To be able to apply this “famous rule” fifty years ago and in Lausanne Case; this has to be also still valid about Article 96 of the Charter of the United Nations.

According to the literal meaning of the Charter of the United Nations, permanent members to the Security Council cannot use their rights to veto except for such cases explicitly stipulated in paragraph 3 of the Article 27 of the Charter. From one hand, “Expressio unius est exclusio alterius” (express mention of an item excludes others) and this prevents prohibition of veto in Security Council to be also applied in other cases. On the other hand, duties stipulated in paragraph 1 of Article 94 is so explicit that it is difficult to consider application of veto in that case to be consistent with other duties of the Charter and to consider validity and influence for such veto from perspective of the Charter.

Paragraph 1 of Article 94 also makes clear certain mistake of the US taken in resorting to veto to prevent execution of verdict issued against it. The Charter has to be executed with consideration of all of its

^{gg} *Eslami, Reza, The concept of Non-international Armed conflicts in International Humanitarian Law custom, p14.*

^{hh} *Iranian Journal of International Laws, “Set of verdicts issued by the Court.”*

stipulations; if so, the reality that resorting to a verbal reasoning by the US cannot be justified as for validity of the veto, where using this right clearly is against other regulations of the Charter and also according to the recognized principle of “nobody can be a judge to his own case”.

Finally in case of Nicaragua, the Court has been successful to make a distance between its own initial dogmatic and strict methods of confrontation that have been criticized in 1966 following its decision made regarding South West Africa. Currently, there is no sign of the Court being recessed as it was after 1966 and the aforementioned decision regarding South West Africa.

At the end, this has to be noted that International Court of Justice is fragile from many perspectives. International Law obtaining its existence from explicit or implicit satisfaction of government also has a fragile texture. The Court as the main interpreter of the international law and exquisite judicial organization of the United Nations is naturally the heir to all of these fragilities and sensitivities. Lack of clear sanctions except for regulations of Article 94 and intentional behavior of those governments refusing to abide by its decisions as well as the whole pressure resulted from political conflicts have been cooperated to make this judicial organization vulnerable and incomplete. As no organization can rely just on ideals and excellent principles; so, it is advised by prudence and discretion to use the Pascal view and consider believe in the Court to be rationally better than lack of belief in it.

Conclusion

In general, total situation governing the case of Nicaragua has been very unusual. The United States made high effort not to let the Court to investigate the case, including objection to the Nicaraguan declaration of compulsory jurisdiction, putting emphasis on reservation in its own compulsory declaration, and finally ineffective retake of its own declaration.

However, in this lawsuit against the US, Nicaragua had not just based its jurisdiction for claim on the role played by multilateral treaties; but, the country also relied on international law and common principles. The US also with resort to its own declaration claimed that the only international common law that Nicaragua can establish its claims on is the Charter of the UN; and, the Court cannot investigate illegality of claimed use of military force without reliance on the main source i.e. paragraph 4 of Article 2 of the Charter. In fact, according to the United States, the Charter-related rules here have terminated International Common Law. However, the Court that had inevitably accepted the US reservation told that there is no exact unit content for all of the common and contractual rules relied on and even in case of complete unity of contents of one common rule and one contractual rule related to the current case; there would be no reason for a common rule to be necessarily excluded from its separate actions upon inclusion of common rule in the treaty. In general, every time that there are similar rules between International Common Law and treaty; there would be no reason for contractual rule to cancel the common rule. The Court's view here is based on independence and equality of common law and treaty. The result of this equality is that: “Subsequent treaty can revoke previous common law in case that there would be no contradiction between contents of the two rules.”

Finally, after a long period of doubt, it was decided by America not to participate in the Court sessions. The reasons set forth by the US regarding leaving the Court are surprising: one of them is that America predicts unfavorable judgment of the Court and feels that “The Court has decided to solve the problem to the benefit of Nicaragua in this case.” It also declared that “Information is very sensitive” and “we do not risk out security by providing public or the Court that two of its judges are citizens of member countries of Warsaw Pact with such sensitive information.” However, absence of the US did not prevent substantive investigation of the Court.

In Nicaragua case, high threshold has been considered by the Court as for attributing to the US the severe violation of humanitarian rights by the Contras; and, actions taken by the US as for arming them has been considered by the Court as attributable to the US. However, severe violation of humanitarian rights has not

been considered to be attributable to this government. Applying effective control criterion about wrongful acts of the Contras and to attribute wrongful acts of one group to a certain government, the Court noted that concerned government has to have issued certain orders as for performance of wrongful actions. According to the Court: "This has to be proved that the relationship between rebellions and the US government have reached dependency and control limit so that from legal perspective, the Contras would be considered as an American organization or its agent." Relying on principle of effective control and supervision, the Court stated that "Despite wide range of financial helps and other supports provided to the Contras by the US; there is no clear evidence that the US has imposed such degree of control in all fields.

References

- 1-Eftekhare jahromi,Godarz),National Competence of States and Charter of UN, Journal of Legal Research ,N16,1991.
- 2-Eslami,Reza,The concept of Non-international Armed conflicts in International Humanitarian Law custom,Journal of Legal Research,N79,2018.
- 3- Alhoie, Hamid;) "Domain protected by the verdicts issued by the International Court of Justice,Journal of Public Law Research, Tehran,2015.
- 4-Zulein,Parviz Fundamentals of International Law. Ministry Of Foreign Affairs Printing Institute.Tehran.1992.
- 5-Case Analysis: The *Nicaragua* Case and the Denunciation of Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice, Cambridge University Press:2004.
- 6-Constanze Schulte *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE*. . New York: Oxford University Press.2004.
- 7-Crawford, James . peel Jaeuelin, . olleson simon, "*The ILC'S articles on responsibility of states for internationally wrong full acts :completion of thesecond reading.*",2001.
- 8- Kawser Ahmed The comestic Jurisdiction Clause in the United Nations Charter: A Historical ViewT First Edition (Singapore: Year Book Of International Law and Contnbutors,2006).
- 9-*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP, 1986.
- 10- Robert J. Delahunty, John Yoo . "Executive Power V. International Law". *Harvard Journal of Law & Public Policy*.2006.
- 11-Zimmerman, Matilde *Sandinista: Carlos Fonseca and the Nicaraguan Revolution*. Duke University Press.2000.
- 12-Hight, Kate; "Between sledge and anvil of the United States, International Court of Justice and Nicaragua"Legal Journal, N16 and17,1987.
- 13-Ashrafi Esfahani Group of International Law, "Actions taken by Hague Tribunal in case of Nicaragua" Ashrafi international Law website,2006.
- 14-Zamani, Ghasem; "Contractual Laws and formulation of Common rules in process taken by the International Court of Justice with emphasis put on the case of Nicaragua",Legal Journal,N20,1991.
- 15-Iranian Jurnal of International Laws, "Set of verdicts issued by the Court",General international Law website,2010.
- 16-Malekizadeh, Amirhossein, "Control criterion in International accountability system",Legal Journal of Justice, N82,2013.
- 17-Higgins, Rosalyn,The international court of justice,legal journal,N34,2006.