CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS (NICARAGUA V. HONDURAS) (JURISDICTION AND ADMISSIBILITY)

Judgment of 20 December 1988

In this judgment, delivered in the case concerning *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), the Court found, unanimously, that it had jurisdiction to entertain the Application filed by Nicaragua and, unanimously, that that Application was admissible.

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The complete text of the *operative* clause of the Judgment is as follows:

"THE COURT,

"(1) Unanimously,

"*Finds* that it has jurisdiction under Article XXXI of the Pact of Bogotá to entertain the Application filed by the Government of the Republic of Nicaragua on 28 July 1986;

"(2) Unanimously,

"*Finds* that the Application of Nicaragua is admissible."

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The Court was composed as follows: *President* Ruda; *Vice-President* Mbaye; *Judges* Lachs, Elias, Oda, Ago, Schwebel, Sir Robert Jennings, Bedjaoui, Ni, Evensen, Tarassov, Guillaume and Shahabuddeen.

Judge Nagendra Singh, who died unexpectedly on 11

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December 1988 had participated fully in the case up to the date of his death.

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Judge Lachs appended a declaration, and Judges Oda, Schwebel and Shahabuddeen appended separate opinions to the Judgment.

In these opinions the Judges concerned stated and explained the position they adopted in regard to certain points dealt with in the Judgment.

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Proceedings and Submissions of the Parties
(paras. 1–15)

The Court begins by recapitulating the various stages in the proceedings, recalling that the present case concerns a dispute between Nicaragua and Honduras regarding the alleged activities of armed bands, said to be operating from Honduras, on the border between Honduras and Nicaragua and in Nicaraguan territory. At the suggestion of Honduras, agreed to by Nicaragua, the present phase of the proceedings is devoted, in accordance with an Order made by the Court on 22 October 1986, solely to the issues of the jurisdiction of the Court and the admissibility of the Application.

Burden of Proof
(para. 16)

I. *The Question of the Jurisdiction of the Court to Entertain the Dispute*
(paras. 17–48)

A. *The two titles of jurisdiction relied on*
(paras. 17–27)

Nicaragua refers, as the basis of the jurisdiction of the Court, to

> "the provisions of Article XXXI of the Pact of Bogotá and to the Declarations made by the Republic of Nicaragua and by the Republic of Honduras respectively, accepting the jurisdiction of the Court as provided for in Article 36, paragraphs 1 and 2, respectively of the Statute"

Article XXXI of the Pact of Bogotá provides as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> "(*a*) the interpretation of a treaty;
>
> "(*b*) any question of international law;
>
> "(*c*) the existence of any fact which, if established, would constitute the breach of an international obligation;
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> "(*d*) the nature or extent of the reparation to be made for the breach of an international obligation."

The other basis of jurisdiction relied on by Nicaragua is constituted by the declarations of acceptance of compulsory jurisdiction made by the Parties under Article 36 of the Statute of the Court. Nicaragua claims to be entitled to found jurisdiction on a Honduran Declaration of 20 February 1960, while Honduras asserts that that Declaration has been modified by a subsequent Declaration, made on 22 May 1986 and deposited with the Secretary-General of the United Nations prior to the filing of the Application by Nicaragua.

Since in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court first examines the question whether it has jurisdiction under Article XXXI of the Pact.

B. *The Pact of Bogotá*
(paras. 28–47)

Honduras maintains in its Memorial that the Pact "does not provide any basis for the jurisdiction of the . . . Court" and puts forward two series of arguments in support of that statement.

(i) *Article XXXI of the Pact of Bogotá*
(paras. 29–41)

First, its interpretation of Article XXXI of the Pact is that, for a State party to the Pact which has made a declaration under Article 36, paragraph 2, of the Statute, the extent of the jurisdiction of the Court under Article XXXI of the Pact is determined by that declaration, and by any reservations appended to it. It also maintains that any modification or withdrawal of such a declaration which is valid under Article 36, paragraph 2, of the Statute is equally effective under Article XXXI of the Pact. Honduras has, however, given two successive interpretations of Article XXXI, claiming initially that to afford jurisdiction it must be supplemented by a declaration of acceptance of compulsory jurisdiction and subsequently that it can be so supplemented but need not be.

The Court considers that the first interpretation advanced by Honduras—that Article XXXI must be supplemented by a declaration—is incompatible with the actual terms of the Article. As regards the second Honduran interpretation, the Court notes the two readings of Article XXXI proposed by the Parties: as a treaty provision conferring jurisdiction in accordance with Article 36, paragraph 1, of the Statute or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that Article. Even on the latter interpretation, however, the declaration, having been incorporated into the Pact of Bogotá, can only be modified in accordance with the rules provided for in the Pact itself. However, Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect.

The fact that the Pact defines with precision the obligations of the parties lends particular significance to the absence of any indication of that kind. The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States. Moreover, some provisions of the Treaty (Arts. V, VI and VII) restrict the scope of the parties' commitment. The commitment in Article XXXI can only be limited by means of reservations to the Pact itself, under Article LV thereof. It is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a dec-

laration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute.

Further confirmation of the Court's reading of Article XXXI is to be found in the *travaux préparatoires* of the Bogotá Conference. The text which was to become Article XXXI was discussed at the meeting of the Committee III of the Conference held on 27 April 1948. It was there accepted that, in their relations with the other parties to the Pact, States which wished to maintain reservations included in a declaration of acceptance of compulsory jurisdiction would have to reformulate them as reservations to the Pact. That solution was not contested in the plenary session, and Article XXXI was adopted by the Conference without any amendments on the point. That interpretation, moreover, corresponds to the practice of the parties to the Pact since 1948. They have not, at any time, linked together Article XXXI and the declarations of acceptance of compulsory jurisdiction made under Article 36, paragraphs 2 and 4, of the Statute.

Under these circumstances, the Court has to conclude that the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.

(ii) *Article XXXII of the Pact of Bogotá*
(paras. 42–47)

The second objection of Honduras to jurisdiction is based on Article XXXII of the Pact of Bogotá, which reads as follows:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute."

It is the contention of Honduras that Article XXXI and XXXII must be read together. The first is said to define the extent of the Court's jurisdiction and the second to determine the conditions under which the Court may be seised. According to Honduras it follows that the Court could only be seised under Article XXXI if, in accordance with Article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which is not the situation in the present case. Nicaragua on the other hand contends that Article XXXI and Article XXXII are two autonomous provisions, each of which confers jurisdiction upon the Court in the cases for which it provides.

Honduras's interpretation of Article XXXII runs counter to the terms of that Article. Article XXXII makes no reference to Article XXXI; under that text the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation. It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires* of the Bogotá Conference: the Sub-Committee which had prepared the draft took the position "that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice". Honduras's interpretation would however imply that the commitment, at first sight firm and unconditional, set forth in Article XXXI would, in fact, be emptied of all content if, for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and the purpose of the Pact. In short, Articles XXXI and XXXII provide for two distinct ways by which access may be had to the Court. The first relates to cases in which the Court can be seised directly and the second to those in which the parties initially resort to conciliation. In the present case, Nicaragua has relied upon Article XXXI, not Article XXXII.

C. *Finding*
(para. 48)

Article XXXI of the Pact of Bogotá thus confers jurisdiction upon the Court to entertain the dispute submitted to it. For that reason, the Court does not need to consider whether it might have jurisdiction by virtue of the declarations of acceptance of compulsory jurisdiction by Nicaragua and Honduras referred to above.

II. *The Question of the Admissibility of Nicaragua's Application*
(paras. 49–95)

Four objections have been raised by Honduras to the admissibility of the Nicaraguan Application, two of which are general in nature and the remaining two presented on the basis of the Pact of Bogotá.

The *first ground of inadmissibility* (paras. 51–54) put forward is that the Application "is a politically inspired, artificial request which the Court should not entertain consistently with its judicial character". As regards the alleged political inspiration of the proceedings the Court observes that it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement. As to Honduras's view that the overall result of Nicaragua's action is "an artificial and arbitrary dividing up of the general conflict existing in Central America", the Court recalls that, while there is no doubt that the issues of which the Court has been seised may be regarded as part of a wider regional problem, "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important", as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Teheran* (*I.C.J. Reports 1980*, p. 19, para. 36).

The *second ground of inadmissibility* (paras. 55–56) put forward by Honduras is that "the Application is vague and the allegations contained in it are not properly particularized". The Court finds in this respect that the Nicaraguan Application in the present case meets the requirements of the Statute and Rules of Court, that an Application indicate "the subject of the dispute", specify "the precise nature of the claim", and in support thereof give no more than "a succinct statement of the facts and grounds on which the claim is based.

Accordingly none of these objections of a general nature to admissibility can be accepted.

The *third ground of inadmissibility* (paras. 59–76) put forward by Honduras is based upon Article II of the Pact of Bogotá which reads:

> "The High contracting Parties recognize the obligation to settle international controversies by regional pacific

procedures before referring them to the Security Council of the United Nations.

"Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties [in the French text "de l'avis de l'une des parties"], cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

The submission of Honduras on the application of Article II is as follows:

"Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedure established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice."

The contention of Honduras is that the precondition to recourse to the procedures established by the Pact is not merely that both parties should hold the opinion that the dispute could not be settled by negotiation, but that they should have "manifested" that opinion.

The Court notes a discrepancy between the four texts (English, French, Portuguese and Spanish) of Article II of the Pact, the reference in the French text being to the opinion of *one* of the parties. The Court proceeds on the hypothesis that the stricter interpretation should be used, i.e., that it would be necessary to consider whether the "opinion" of both Parties was that it was not possible to settle the dispute by negotiation. For this purpose the Court does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect: it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it.

The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344), and in this case is thus 28 July 1986.

To ascertain the opinion of the Parties, the Court is bound to analyse the sequence of events in their diplomatic relations; it first finds that in 1981 and 1982 the Parties had engaged in bilateral exchanges at various levels including that of the Heads of States. Broadly speaking, Nicaragua sought a bilateral understanding while Honduras increasingly emphasized the regional dimension of the problem and held out for a multilateral approach, eventually producing a plan of internationalization which led to abortive Nicaraguan counter-proposals. The Court then examines the development of what has become known as the Contadora process; it notes that a draft of a "Contadora Act for Peace and Cooperation in Central America" was presented by the Contadora Group to the Central American States on 12–13 September 1985. None of the Central American States fully accepted the draft, but negotiations continued, to break down in June 1986.

The Court has to ascertain the nature of the procedure followed, and ascertain whether the negotiations in the context of the Contadora process could be regarded as direct negotiations through the usual diplomatic channels within the meaning of Article II of the Pact. While there were extensive consultations and negotiations between 1983 and 1986, in different forms, both among the Central American States themselves and between those States and those belonging to the Contadora Group, these were organized and carried on within the context of mediation to which they were subordinate. At this time, the Contadora process was primarily a mediation, in which third States, on their own initiative, endeavoured to bring together the viewpoints of the States concerned by making specific proposals to them. That process, therefore, which Honduras had accepted, was as a result of the presence and action of third States, markedly different from a "direct negotiation through the usual diplomatic channels". It thus did not fall within the relevant provisions of Article II of the Pact of Bogotá. Furthermore, no other negotiation which would meet the conditions laid down in that text was contemplated on 28 July 1986, the date of filing of the Nicaraguan Application. Consequently Honduras could not plausibly maintain at that date that the dispute between itself and Nicaragua, as defined in the Nicaraguan Application, was at that time capable of being settled by direct negotiation through the usual diplomatic channels.

The Court therefore considers that the provisions of Article II of the Pact of Bogotá relied on by Honduras do not constitute a bar to the admissibility of Nicaragua's Application.

The *fourth ground of inadmissibility* (paras. 77–94) put forward by Honduras is that:

"Having accepted the Contadora process as a 'special procedure' within the meaning of Article II of the Pact of Bogotá, Nicaragua is precluded both by Article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived."

Article IV of the Pact of Bogotá, upon which Honduras relies, reads as follows:

"Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

It is common ground between the Parties that the present proceedings before the Court are a "pacific procedure" as contemplated by the Pact of Bogotá, and that therefore if any other "pacific procedure" under the Pact has been initiated and not concluded, the proceedings were instituted contrary to Article IV and must therefore be found inadmissible. The disagreement between the Parties is whether the Contadora process is or is not a procedure contemplated by Article IV.

It is clear that the question whether or not the Contadora process can be regarded as a "special procedure" or a "pacific procedure" within the meaning of Articles II and IV of the Pact would not have to be determined if such a procedure had to be regarded as "concluded" by 28 July 1988, the date of filing of the Nicaraguan Application.

For the purposes of Article IV of the Pact, no formal act is necessary before a pacific procedure can be said to be "concluded". The procedure in question does not have to have failed definitively before a new procedure can be commenced. It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.

In order to decide this issue in the present case, the Court resumes its survey of the Contadora process. It considers that from this survey it is clear that the Contadora process was at a standstill at the date on which Nicaragua filed its Application. This situation continued until the presentation in February 1987 of the Arías Plan and the adoption by the five Central American States of the Esquipulas II Accord, which in

August 1987 set in train the procedure frequently referred to as Contadora-Esquipulas II.

The question therefore arises whether this latter procedure should be regarded as having ensured the continuation of the Contadora process without interruption, or whether on 28 July 1986 that process should be regarded as having "concluded" for the purposes of Article IV of the Pact of Bogotá, and a process of a different nature as having got under way thereafter. This question is of crucial importance, since on the latter hypothesis, whatever may have been the nature of the initial Contadora process with regard to Article IV, that Article would not have constituted a bar to the commencement of a procedure before the Court on that date.

After noting the views expressed by the Parties as to the continuity of the Contadora process, which however could not be seen as a concordance of views as to the interpretation of the term "concluded", the Court finds that the Contadora process, as it operated in the first phase, is different from the Contadora-Esquipulas II process initiated in the second phase. The two differ with regard both to their object and to their nature. The Contadora process initially constituted a mediation in which the Contadora Group and Support Group played a decisive part. In the Contadora-Esquipulas II process, on the other hand, the Contadora Group of States played a fundamentally different role. The five countries of Central America set up an independent mechanism of multilateral negotiation, in which the role of the Contadora Group was confined to the tasks laid down in the Esquipulas II Declaration, and has effectively shrunk still further subsequently. Moreover, it should not be overlooked that there was the gap of several months between the end of the initial Contadora process and the beginning of the Contadora-Esquipulas II process; and it was during this gap that Nicaragua filed its Application to the Court.

The Court concludes that the procedures employed in the Contadora process up to 28 July 1986, the date of filing of the Nicaraguan Application, had been "concluded", within the meaning of Article IV of the Pact of Bogotá, at that date. That being so, the submissions of Honduras based on Article IV of the Pact must be rejected, and it is unnecessary for the Court to determine whether the Contadora process was a "special procedure" or a "pacific procedure" for the purpose of Articles II and IV of the Pact and whether that procedure had the same object as that now in progress before the Court.

The Court has also to deal with the contention, made in the fourth submission of Honduras on the admissibility of the Application, that Nicaragua is precluded also "by elementary considerations of good faith" from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. In this respect, the Court considers that the events of June/July 1986 constituted a "conclusion" of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.

In conclusion the Court notes, by reference in particular to the terms of the Preamble to successive drafts of the Contadora Act, that the Contadora Group did not claim any exclusive role for the process it set in train.

SUMMARY OF THE DECLARATION AND OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Declaration of Judge Lachs

Judge Lachs in his declaration emphasizes the importance of procedural decisions, and points out that in the present case the Parties retain their freedom of action, and full possibilities of fiding solutions.

Separate Opinion of Judge Oda

Judge Oda has voted in favour of the Court's Judgment but with some reluctance. He suggests that, in view of the context of the Pact of Bogotá, an alternative interpretation, to the effect that Articles XXXI and XXXII are essentially interrelated and that the conciliation procedure provided for in Article XXXII is a prerequisite to judicial recourse, may also be tenable. The difficulty in confidently interpreting the Pact flows from the ambiguous terms in which it was drafted.

Judge Oda, in the light of the background to the 1948 Bogotá Conference and of the *travaux préparatoires*, shows that the American States which participated in the Bogotá Conference had no demonstrable intention of making the Pact into an instrument which would confer jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute, or would comprise a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that Article.

In conclusion, Judge Oda emphasizes the paramount importance of the intention of the Parties to accept the Court's jurisdiction, which is invariably required for it to entertain a case, and expresses his doubt as to whether the Court has given this particular point all the weight due to it.

Separate Opinion of Judge Schwebel

Judge Schwebel states that his most substantial reservations about the Judgment flow from the Court's treatment of the problem of the "serial" nature of applications brought by Nicaragua in three inter-related cases, that against the United States in 1984 and those against Honduras and Costa Rica in 1986.

In 1984, Nicaragua maintained that it made "no claim of illegal conduct by any State other than the United States" and that it sought "no relief . . . from any other State". Nevertheless, in 1984, it made grave accusations not only against the United States, but against Honduras, Costa Rica and El Salvador. For its part, the United States, which claimed to be acting in collective self-defence of those three States, maintained that they were indispensable parties in whose absence the Court should not proceed.

The Court had rejected that contention, and also rejected, inconsistently with the Statute and Rules of Court, the request for intervention of El Salvador. Honduras and Costa Rica showed no disposition to intervene and could not have been encouraged to do so by the Court's treatment of El Salvador. Nevertheless, Nicaragua, which made such serious charges against them, could have required Honduras and Costa Rica to be defendants in Court since in 1984 they both adhered unreservedly to the Court's compulsory jurisdiction. It did not.

Promptly after Judgment came down against the United States on 27 June 1986, Nicaragua discovered after all, contrary to its 1984 pleadings, that it did have legal claims against Honduras and Costa Rica. If the current case should reach the stage of the merits, it is to be expected that Nicaragua will invoke against Honduras, as it already has, the factual and legal findings of the Court's Judgment of 27 June 1986.

In response, the Court, while rejecting the consequent objections of Honduras, rightly emphasized that,

"In any event, it is for the Parties to establish the facts in

the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same Parties (see Art. 59 of the Statute)."

It follows that if, at the stage of the merits, a Party to the instant case should endeavour to rely on findings of fact of the Judgment of 27 June 1986, the Court will not accept such reliance. While this is no more than what Article 59 requires, it is important that the Court says it and still more important that it gives effect to what it says.

In Judge Schwebel's view, it is important for an extraordinary reason. To apply certain of the findings of fact of the Court's Judgment of 27 June 1986 to the current case would be the more prejudicial because certain of those findings do not correspond to the facts. And to apply certain of the Court's conclusions of law in that case to this case would be no less prejudicial because certain of those conclusions are in error.

Separate Opinion of Judge Shahabuddeen

Judge Shahabuddeen considers that the Judgment of the Court (with which he agrees) could be strengthened on three points relating to jurisdiction and on two relating to admissibility. He also thinks that these aspects admit of more specific treatment and of some account being taken of the regional literature cited by both sides.