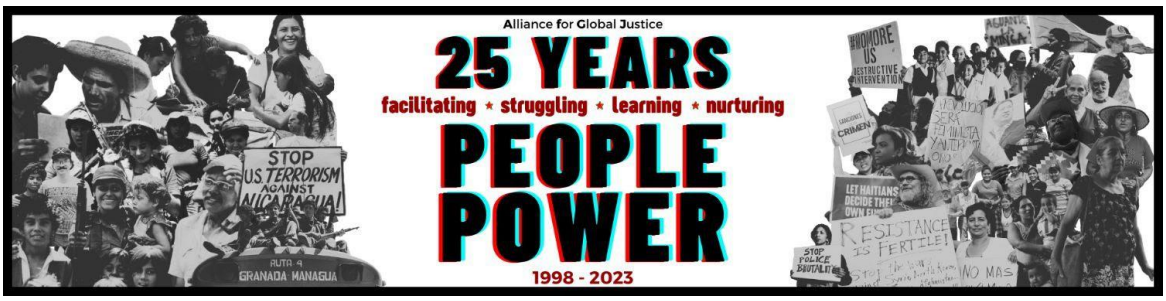

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NicaNotes:

World Court Israel Ruling and the 1986 Judgment against the US in the Nicaragua Case

By Nat Parry

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On Nov. 26, 1984, the Court of International Justice in The Hague considered the case of Nicaragua vs. the United States concerning military and paramilitary activities in and against Nicaragua. (UN Photo)

Now that the International Court of Justice has ruled that South Africa's claims of genocide against Israel are plausible and ordered Israel to "take all measures within its power to prevent the commission of all acts within the scope" of the U.N. Convention on Genocide, the question is how Israel and its backers will respond.

Israel has one month to submit a report on the steps it is taking to comply with the court's orders. Although the court has no enforcement mechanism, the orders are mandatory and substantially increase the international pressure on Israel and its supporters. ICJ judgments are final and without appeal.

If Israel does not comply, the issue may go to the U.N. Security Council where the United States will have to decide whether to exercise its veto. If that effort fails, it could then go to the General Assembly, where the U.S. has no veto, and the result could be an overwhelming — and deeply embarrassing — vote supporting the ICJ's ruling.

Some allies of Israel have called for compliance with the ruling. "The International Court of Justice did not rule on the merits of the case but ordered provisional measures in interim proceedings," German Foreign Minister Annalena Baerbock said. "These are binding under international law. Israel must also comply with them."

The United States, on the other hand, dismissed the notion that actions in the Gaza Strip constitute genocide. "We continue to believe that allegations of genocide are unfounded and note the court did not make a finding about genocide or call for a ceasefire in its ruling and that it called for the unconditional, immediate release of all hostages being held by Hamas," a State Department spokesperson said.

So far, the reaction from Israel has been predictably bellicose, with Prime Minister Benjamin Netanyahu saying on Saturday that the allegations of genocide against Israel are "ridiculous" and demonstrate "that many in the world have not learned a thing from the Holocaust." The main lesson of the Holocaust, he said, "is that only we will defend ourselves by ourselves. Nobody will do it for us."

Looking to the Past

For an idea of how this might play out, it could be useful to look to the past, in particular a World Court case from 40 years ago.

In 1984, Nicaragua brought suit against the U.S. in the World Court in relation to U.S. policies of arming, training and financing the contra rebels who were fighting to overthrow the Nicaraguan government, as well as mining the harbors of the small Central American nation.

The United States, in justifying its policies, claimed that it was acting in Nicaragua only in "collective self-defense," a justification that the court rejected by a vote of 12-3 in its 1986 ruling.

The court further overwhelmingly ruled that the United States, "by training, arming, equipping, financing and supplying the contra forces … has acted, against the Republic of Nicaragua, in breach of its obligation

under customary international law not to intervene in the affairs of another State."

It determined that the United States had been involved in the "unlawful use of force," with violations including attacks on Nicaraguan facilities and naval vessels, the invasion of Nicaraguan air space and the training and arming of the contras.

The court also found that President Ronald Reagan had authorized the C.I.A. "to lay mines in Nicaraguan ports" and "that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines."

The U.S. was ordered to cease its activities and pay reparations.

The response of the United States to this ruling was revealing. The U.S. essentially dismissed the ICJ judgment on the grounds that the United States must "reserve to ourselves the power to determine whether the Court has jurisdiction over us in a particular case" and what lies "essentially within the domestic jurisdiction of the United States."

In other words, the Reagan administration considered armed attacks against the sovereign state of Nicaragua within its "domestic jurisdiction."

Undeterred, Nicaragua then brought the matter to the U.N. Security Council, where the Nicaraguan representative argued that recourse at the ICJ was one of the fundamental means of peaceful solution of disputes established by the U.N. Charter.

He further emphasized that it was essential for the Security Council and the international community to remind the United States of its obligation to abide by the court's ruling and cease its war against Nicaragua.

The United States responded that the jurisdiction of the ICJ was a matter of consent and that the U.S. had not consented to the jurisdiction of the ICJ in this case. The ambassador asserted that U.S. policy towards Nicaragua would be determined solely by the national security interests of the United States, noting that Nicaragua maintained close security ties to Cuba and the Soviet Union.

On Oct. 28, 1986, the U.S. vetoed the resolution calling for full and immediate compliance with the ICJ's judgment, with France, Thailand and the United Kingdom abstaining.

Following this decision, Nicaragua turned to the General Assembly, which passed a resolution 94-to-3 calling for compliance with the World Court ruling. Only two states, Israel and El Salvador, joined the U.S. in opposition.

A year later, on Nov. 12, 1987, the General Assembly again called for "full and immediate compliance" with the ICJ decision. This time only Israel joined the United States in opposing adherence to the ruling.

Anthony D'Amato, writing in The American Journal of International Law, argued that "law would collapse if defendants could only be sued when they agreed to be sued, and the proper measurement of that collapse would be not just the drastically diminished number of cases but also the necessary restructuring of a vast system of legal transactions and relations predicated on the availability of courts as a last resort."

This, he said, would be "a return to the law of the jungle."

Whether the current case against Israel plays out similarly to the 1984 case is a major test for the international system, and specifically about which reigns: the law of the jungle or the "rules-based international order" that the U.S. frequently champions.

Needless to say, the United States never recognized its obligation to adhere to the ruling, continuing to assert that it did not consent to the ICJ's jurisdiction.

The case led to a flurry of criticism from international law experts, with Noreen M. Tama writing in the Penn State International Law Review that "the International Court of Justice is the final authority on the issue of its own jurisdiction."

She pointed out that “the Court was clearly seized of the requisite incidental jurisdiction necessary to indicate interim measures in the case of Nicaragua v. United States.”