



IN THE
INTERNATIONAL COURT OF JUSTICE
OF THE
AMERICAN MODEL UNITED NATIONS

Nicaragua v. Colombia

Argued: 22 November 2009

Decided: 23 November 2009

The majority opinion was signed by and agreed to by Vice-President Justice Milla, Justice Eldred, Justice Garber, Justice Klipfel, Justice Lara, Justice Merchant, Justice Placek, Justice Vega-Siferd.

Question

Does the Court have jurisdiction in this case?

Jurisdiction

The Court does not recognize binding jurisdiction at this time.

Opinion and Explanation

The Court finds that at the present time, sufficient evidence was not presented by the applicant to prove coercion or duress in the signing of the 1928 Barcenas-Esguerra Treaty. Noting this, the Court rejects arguments pursuant to Articles 51 & 52 of the Vienna Convention on the Law of Treaties and Article XXXI of the Pact of Bogota. Therefore, in compliance with Article VI of the Pact of Bogota, the Court is not the final binding arbiter in this dispute .

Decision

By a vote of Eight to Five,

- 1) The Court therefore ORDERS that if any further judgment is to be made, the parties return with sufficient, documented evidence and argumentation regarding the coercion and validity of the Barcenas-Esguerra Treaty of 1928. Thus, this court continues to recognize coercion as a legitimate means for treaty invalidation as expressed in the Vienna Convention on the Law of Treaties of 1969 based on Article 51 and Article 52.
- 2) The Court FURTHER ORDERS that Nicaragua and Colombia retain control of the land pursuant to the Barcenas-Esguerra Treaty of 1928 and the territorial waters resulting from that treaty according to the customary and statutory maritime laws until such time the Court renders a final opinion.

Vice-President Justice Milla

Justice Eldred

Justice Garber

Justice Klipfel

Justice Lara

Justice Merchant

Justice Placek

Justice Vega-Siferd

Opinion of President West, Justice Abduljaber, Justice Feikema, Justice Kernosky and Justice Licari. Dissenting in part and concurring in part with the majority opinion.

We respectfully dissent to the majority's finding that a second hearing is necessary in this case, and find that the Court does not have jurisdiction to rule on this case.

Pursuant to the rules of the International Court of Justice, in order for the court to have jurisdiction to rule on a dispute, both parties to the dispute must consent to the Court's jurisdiction. Nicaragua, the petitioner in this case, has consented to our jurisdiction. However, Colombia contends that it has given no such consent, and as such that we have no jurisdiction to rule on the case. It is clear that Colombia has not

specifically agreed to give us jurisdiction on this issue. However, Colombia may be compelled to accept our jurisdiction in relation to issues such as this one based upon their ratification of the 1948 Pact of Bogota. Therefore, the issue of whether or not Colombia is compelled to accept our jurisdiction relies on whether or not Colombia, by ratifying the 1948 Pact of Bogota, has submitted to the Court's jurisdiction on issues such as the one currently before the court.

The 1948 Pact of Bogota, to which both Nicaragua and Colombia are party, states in Article 31 that the International Court of Justice will have jurisdiction to review disputes between parties to the Pact which concern:

“ a) The interpretation of a treaty;”

-or-

“ b) Any question of international law;”

Under Article 31, we acknowledge that it is possible for the Court to claim jurisdiction, over states party to the Bogota Pact, when matters such as the one before the court arise. However, pursuant to Article 6 of this same pact, this Court no longer has jurisdiction over such questions if the matter in dispute has “already been settled by arrangement between the parties” or if the matter is already “governed by agreements or treaties in force on the date of the conclusion of the present Treaty.”

The question now becomes whether or not the current dispute is one governed and/or previously resolved by an agreement or treaty between Nicaragua and Colombia that is currently in effect, and was in effect at the time the Pact of Bogota was ratified in 1948.

Such a treaty does exist. The 1928 Barcenas-Esguerra Treaty sets maritime boundaries in the area in question, as well as settles the matter of which islands are to be governed by which party. As it is undisputed that such a governing treaty exists, the only question remaining is that of the treaty's validity.

Nicaragua contends that the 1928 treaty is invalid because it was negotiated and ratified under duress, as U.S. armed forces were occupying Nicaragua at this time. Specifically, Nicaragua contends that these forces coerced Nicaragua into ratifying a disadvantageous treaty. Such a claim is within the purview of the court.

Under the customary international law established in Article 51 of the Vienna Convention on Treaties, the court may find that a treaty is “without legal effect” if said treaty was negotiated or signed by a state representative who was influenced by coercion “through acts or threats directed against him”. Another way the Court may invalidate a treaty is under Article 52 of the same convention, which reads:

“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

The Court has agreed that there are two ways to establish coercion. First, coercion can be established by direct evidence. However, no direct evidence of coercion was established in this case. No statements of threat by any representatives of the United States, however veiled, were presented to this court. No documentation was presented to establish that the Nicaraguan negotiators and/or signatories of this treaty felt threatened or coerced. As such, we have no direct evidence to invalidate this treaty under Article 51 or under Article 52 of the Vienna Convention on Treaties.

Furthermore, we find that no additional hearing is required concerning direct

evidence of coercion, because it is extremely unlikely that such threatening statements exist. If Nicaragua possessed documentation establishing that its representatives were threatened, it would have been presented. Assuming that Nicaragua has such documents but neglected to present them is to assume gross incompetence on the part of Nicaraguan advocate. We find no reason to assume this. The Nicaraguan advocate consistently presented relevant evidence to support his case and advance his claims. As such there is no reason to grant a second hearing based on a desire for evidence that is unlikely to exist.

The Court found that, lacking direct evidence, there is a second way that coercion can be established. This can be done by demonstrating a strong preponderance of circumstantial evidence. We find that Nicaragua failed to do this. Furthermore, we find that there are two points of circumstantial evidence that are necessary to establish, conclusively, that coercion occurred. These are:

1. Proof that the allegedly coerced action was in line with a goal of the alleged coercer state;

-and-

2. Proof that the actions taken by the allegedly coerced state were against the interests of that state.

As a point of common sense, in the absence of direct evidence of coercion, a sensible theory of why threats would be used must exist in order for the Court to assume that coercion occurred. A powerful country may have the ability to force a weaker state to act in accordance with the will of that more powerful country, but unless we can establish that the allegedly coerced action was in line with a goal of the alleged coercer, it is unreasonable to simply assume that coercion occurred.

The theory offered by Nicaragua was that the United States wanted to appease Colombia, and thereby normalize relations, in order to atone for inciting Panama to revolution against Colombia. We find that this theory is not supported by the facts presented. The court finds that Colombia already possessed the areas it was granted by the 1928 treaty. Therefore, Colombia gained nothing new from this treaty that would work to appease it. Furthermore, the 1928 treaty was ratified 25 years after the United States incited the people of Panama to revolt against the Colombian government. No evidence was presented that relations between the U.S. and Colombia were still strained at this late date. Thus Nicaragua failed to establish the first crucial piece of direct evidence.

The second crucial point of indirect evidence that would point to coercion is whether or not the treaty was contrary to the interests of Nicaragua. A country cannot claim that it was coerced into a treaty if it would have ratified such a treaty in the absence of coercion. Obviously if this treaty was beneficial for Nicaragua, it would be counterintuitive to grant relief based on the notion that they were forced into it. Logic would dictate that the same holds true if the treaty merely recognizes the established status quo. If a country signs a treaty affirming a status quo that existed before any alleged coercion, it has not acted in a way that can be taken as evidence of coercion. We find that the 1928 treaty did just that; it merely formalized the existing dominions over the areas in question.

In summary and in relation to indirect evidence, if no motive for the coercing state

is found, and the effects of the allegedly coerced action were not against the interest of the allegedly coerced state, there is no way this court can definitively conclude that coercion occurred.

In relation to this indirect method of proving duress, we once again find that a new hearing would be of little or no value. The fact that Colombia gained nothing new as a result of the 1928 treaty cannot be changed by new evidence. This proves the claim that the U.S. was motivated to appease Colombia invalid. Furthermore, the fact that Nicaragua lost nothing that they actually held as a result of the 1928 treaty cannot be changed by new evidence. New indirect evidence cannot sufficiently establish coercion when no motive to coerce can be established and no clear and convincing reason why Nicaragua would have been opposed to the treaty can be established.

Aside from coercion, Nicaragua advances a second theory under which the Court could invalidate the 1928 treaty. Nicaragua contends that, in the year 1969, Colombia violated said treaty, thus nullifying it. This theory is not without legal force. Pursuant to Article 60 on the Vienna Convention on Treaties, "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty." A "material breach" is then defined in part 3b of that article as: "(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

The "violation" claimed by Nicaragua was that Colombian authorities rebuked a Nicaraguan attempt to fish within waters granted to Colombia by the 1928 treaty. It is clear that Colombia was merely enforcing its territorial sovereignty over the area given to it by that treaty. We cannot find that the claim that Colombia violated the treaty by enforcing the provisions of said treaty is valid. Therefore we reject this second method of treaty invalidation. Once again, we find that additional arguments would in no way be helpful in relation to this claim. Colombia did not violate the treaty, and certainly not in a "material" way, and no new evidence can change this fact.

While the notion that more arguments should occur is appealing, the problem is that such an appeal exists in every case. No advocate can ever hope to perfectly address every question that the 15 Justices of this Court can come up with. Correspondingly no advocate in any case can be expected to present every relevant fact that exists in relation to his or her case. Human beings are not omniscient, and as a result will regularly fail to be familiar with every potential relevant fact. Therefore the temptation of requiring additional arguments always exists. However, if cases are ever to end or if dockets are to function efficiently, courts need to draw a line at some point. The most logical place to draw this line is when it can be found that additional arguments are unlikely to affect the final judgment of the Court. As established by the arguments above, we find that to be the case here.

In conclusion, we find that the 1928 treaty is valid and as such we have no jurisdiction to rule on this case. Furthermore, additional arguments from the involved parties are not necessary as it is extremely unlikely that additional arguments would cause the court to find the 1928 treaty invalid.

Justice Abduljaber

Justice Feikema

Justice Kernosky

Justice Licari