

## Law and Power: Some Reflections on Nicaragua, the United States, and the World Court

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## RECENT DEVELOPMENTS

### LAW AND POWER: SOME REFLECTIONS ON NICARAGUA, THE UNITED STATES, AND THE WORLD COURT†

THEODORE M. LIEVERMAN\*

In May, 1983, I was part of a delegation of U.S. lawyers who went to investigate conditions in Nicaragua for a week. During that trip we met with then U.S. Ambassador to Nicaragua, Anthony Quainton, who was very charming and, within limits, relatively candid. He began our one hour meeting by stating: "Nicaragua is a country obsessed with its history in relationship to the United States." He went on to say, essentially, that Nicaragua tended to see all of its problems and all of its history as well as its current military, economic and political situation in relation to the United States, whereas the United States, a world power, had no such preoccupation with Nicaragua. In fact, Quainton went on, Nicaragua played a very small part in the United States' vision of the world and the United States had many other things to keep it occupied. Ambassador Quainton was implying, of course, that the disparity in size and strength between the two countries had caused Nicaragua to blow the situation completely out of proportion.

Indeed, Nicaragua has good reason to be "obsessed" with U.S. policy. Nicaragua has a population of 3 million as compared to the United States' 250 million; United States Marines occupied Nicaragua for over twenty years during this century. At the time of our meeting, Nicaragua was under direct military attack by the United States through its proxy troops, the *contras*. The Sandinista government could reasonably conclude that the goal of American policy was to destroy the present government and the ongoing social revolution, and that the threat of military overthrow of the Nicaraguan government was far

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† This article is based on a talk given at the University of Maryland School of Law on January 30, 1986. The author has edited the text for style, supplied explanatory footnotes, and made certain changes in light of the subsequent decision on the merits of the case by the International Court of Justice, *see infra* note 7.

A more detailed treatment of these issues can be found in Lieverman and Schneider, Memorandum of Law on U.S. Policy Toward Nicaragua, Philadelphia Lawyers Committee on Central America (Nov. 1985), available from PLCCA, 1200 Walnut Street, Suite 400, Philadelphia, PA 19107.

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from an abstract threat.

Had U.S. policymakers thought about it in 1983, they might have realized that a country like Nicaragua, with a young, creative leadership and a highly organized population committed to their new revolution, might take some action and bring its conflict with the United States into an arena where the disparity between the military and the economic might of the two nations would no longer mean very much, and where Nicaragua and the United States would be forced to compete according to the same rules. One of those forums was, of course, the 1984 Summer Olympics held in Los Angeles, where Nicaragua did not do so well against the United States - although it is worth noting that Nicaragua, unlike the Soviet Union and many of its allies, did not boycott the games. The second forum was the International Court of Justice (ICJ), where on April 9, 1984, Nicaragua filed suit against the United States. Two years later, on June 27, 1986, the ICJ found for Nicaragua. Nicaragua's victory no doubt more than offset any disappointment from the Olympics. This article will examine certain aspects of the World Court's decision, the principles of law underlying it, and the prospects for enforcing the decision.

## I.

A brief history of the case is in order. On April 9, 1984, Nicaragua instituted proceedings against the United States,<sup>1</sup> alleging that the U.S. covert war violated the United Nations Charter,<sup>2</sup> the Charter of the Organization of American States,<sup>3</sup> other conventions, and customary international law. Nicaragua further requested that the Court indicate provisional measures - similar to what we would call a preliminary injunction - calling on the United States to cease and desist its actions while the Court decided the merits of the case. In response, the U.S. urged the Court to dismiss the case for lack of jurisdiction. In part, the United States relied upon a letter sent by Secretary of State Shultz to the United Nations Secretary-General on April 6, 1984, rejecting the jurisdiction of the Court over any Central American dispute for a period of two years.

On May 10, 1984, the ICJ unanimously rejected the U.S. motion

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1. *Military and Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States)*, Application of the Republic of Nicaragua, April 9, 1984.

2. UNITED NATIONS CHARTER, signed at San Francisco on June 26, 1945; entered into force on October 24, 1945. 59 Stat. 1031, T.S. 993, 3 Bevans 1953.

3. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (effective December 13, 1951), *as amended*.

to dismiss and voted 14-1 provisional measures, calling on the United States to halt its conduct and to respect the sovereignty and independence of Nicaragua.<sup>4</sup> The Court further ordered the parties to submit memoranda of law on the jurisdictional issue.

On November 26, 1984, the World Court determined that it did indeed have jurisdiction to hear and decide this case.<sup>5</sup> The United States responded by refusing to participate any further in the case.<sup>6</sup> The Court then considered the further evidence and arguments of Nicaragua and on June 27, 1986, issued its final judgment in favor of Nicaragua<sup>7</sup> as described more fully below.

The jurisdiction of the World Court is set forth in the Statute of the International Court of Justice which was adopted by most nations in 1945 at the same time that the UN Charter was adopted.<sup>8</sup> Article 36(2) of the ICJ Statute says that any state (meaning any nation) can accept the compulsory jurisdiction of the court over any legal dispute and that any state can further qualify that acceptance.<sup>9</sup> Many nations have deposited qualified acceptances of the Court's jurisdiction with the ICJ, stating that they will accept the jurisdiction of the Court only in certain types of cases, or only under certain circumstances. This is, of course, very different from the practices in the domestic courts of the United States, where jurisdiction is always compulsory. The United States, however, accepted the jurisdiction of the World Court with three narrow limitations<sup>10</sup>, and said only that they reserved the right to withdraw acceptance of the jurisdiction of the Court upon six months notice to the Court.<sup>11</sup>

What exactly does the ICJ have jurisdiction over? The Statute says that the Court has jurisdiction over all legal disputes, a rather

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4. *Nicaragua v. United States, Request for Indication of Provisional Measures, Order May 10, 1984, 1984 I.C.J. REPORTS, 186 (I.L.M. Vol. XXIII No. 3, May 1984, 468-478).*

5. *Nicaragua v. United States, ICJ Judgment Jurisdiction of the Court and Admissibility of the Application, 1984 I.C.J. REPORTS 392, 441-443. (I.L.M. Vol. XXIV No. 1, Jan. 1985 at 59).*

6. *N. Y. Times, Jan. 19, 1985 at 1, col. 6.*

7. *Nicaragua v. United States, Merits Judgment, 1986 I.C.J. Reports 14, June 27, 1986. (I.L.M. Vol. XXV, No. 5, Sept. 1986, at 1023-1289).*

8. Statute of the International Court of Justice, signed at San Francisco, June 26, 1945, 59 Stat. 1031 (1945), T.S. No. 933 (effective October 24, 1945). The Statute was included as an annex to the Charter of the United Nations when the latter was signed.

9. *Id.*

10. 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9, deposited with the United Nations, August 26, 1946. For the exceptions, *see infra* note 40.

11. *Id.*

broad and somewhat ambiguous phrase. It is not unreasonable to conclude that in any dispute between two or more nations, where the dispute turns on an issue of international law, whether it be a treaty or customary law, the ICJ has the authority to decide the legal issues. There may be, as there were in the Nicaraguan case, questions about whether the court has jurisdiction, but the Statute is clear that when there are disputes over jurisdiction it is the Court itself which determines its own jurisdiction.<sup>12</sup>

The United States initially appeared in the World Court and made a number of arguments about why the ICJ should not hear the merits of the case.<sup>13</sup> First, the United States argued that this is not a justiciable case; the World Court was designed to resolve such issues as disputes over fishing rights, interpretation of commercial treaties, and determining boundaries between states. The Court, it was asserted, was not to become involved in ongoing military disputes. These involve political questions not susceptible of judicial resolution. Domestically,<sup>14</sup> the political question doctrine is an amorphous concept, deadly to civil rights lawyers, which allows federal courts to avoid deciding constitutional questions on the grounds that they involve fundamental notions of separation of powers or are not susceptible to judicial review.<sup>15</sup>

The United States further argued that a dispute involving ongoing armed conflict should be addressed by the Security Council, not the International Court of Justice. This is, of course, a satisfactory situation for the United States, which has a veto in the Security Council<sup>16</sup> but not in the ICJ. The U.S. position here is very different from that in

12. Article 36(6) of the Statute states, "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The Report of the Senate Foreign Relations Committee concerning ICJ jurisdiction stated that by accepting jurisdiction under Article 36(2), the United States "would give the Court the power to decide whether the case properly falls within the terms of the agreement." S.Rep. No. 1835, 79th Cong., 2d Sess. (1946), reprinted at 92 Cong. Rec. 10706 (August 2, 1946).

13. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), Countermemorial of the United States submitted August 17, 1984.

14. *Id.*

15. Baker v. Carr, 369 U.S. 186 (1962); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §3-16 (1978); see L. Henkin, "Is There a 'Political Question' Doctrine?" 85 YALE L. J. 597 (1976).

16. After the ICJ issued its decision on the merits, Nicaragua indeed applied to the Security Council for enforcement of the decision pursuant to Article 94 of the U.N. Charter. The resolution would have passed 11-1 but for the U.S. exercising its fatal veto, U.N. SCOR (2704th mtg.), U.N. Doc. S/P.V. 2704 (1986), I.L.M. Vol. XXV, No. 5, 1986, at 1352, 1363.

1980, when the United States invoked the jurisdiction of the World Court against Iran over the seizure of the hostages from the American Embassy.<sup>17</sup> In that case, Iran chose not to appear before the Court, claiming that the ICJ lacked jurisdiction because the matter was then before the Security Council. The United States adamantly maintained that there was jurisdiction.

In fact, the Security Council does not preempt the jurisdiction of the ICJ to decide the legal issues in a dispute, even where the same conflict is before the Security Council. Nor does it constitute a reason for the Court to voluntarily refrain from exercising that jurisdiction. One may bring the same crisis to both places. That is what the World Court ruled in the case that the United States brought against Iran,<sup>18</sup> and what it ruled in the case Nicaragua brought against the United States.<sup>19</sup> The Court asserted that the Court itself determines jurisdiction, not the parties. The fact that the Security Council has considered the claims of Nicaragua does not matter. The fact that the Contadora process of negotiation<sup>20</sup> is going on is a welcome sign and the Court endorsed their efforts, but it is not relevant to the jurisdiction of the World Court.

As noted above, when the Court took jurisdiction, the United States reacted in a way which hardly fostered a respect for international law. The United States refused to take part in the case on the merits, thus allowing a decision to be made without further argument or submissions by the United States. The reason for this decision is almost certainly because the Reagan administration analyzed its legal position and decided it was going to lose. The lawyers involved in the initial submissions on behalf of the United States on jurisdiction are eminent international lawyers who no doubt understood that the United States was going to lose this case on the facts and the law. The United States apparently calculated that it could minimize the loss by simply walking away and later claiming that the Court was biased and did not hear the whole story.<sup>21</sup> It is worth noting that the 14 judges of the ICJ

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17. United States Diplomatic and Consular Staff in Tehran, (United States v. Iran), 1980 I.C.J. REPORTS 3, May 24, 1980 (I.L.M. Vol. XIX, No. 3, May 1980, at 553-584).

18. *Id.* at 28-29.

19. Nicaragua v. United States, *supra* note 5, at 442.

20. The nations of Columbia, Mexico, Panama, and Venezuela have formed a de facto group to mediate the dispute in Central America; it is named after the place of its first meeting in Contradora, Venezuela. *See id.*

21. This has been the consistent line of the present Administration since the decision was issued, *see, e.g.*, Remarks of Ambassador Vernon Walters, U.N. SCOR (2701st mtg.), U.N. Doc. S/P.V. 2701 (1986), I.L.M. vol. XXV, No. 5 1986, at 1343;

all come from different countries. Some of those countries are allies of the United States, others are neutral or Eastern bloc countries. The justices themselves are not particularly "pro" or "anti" American. The decision of the ICJ to take jurisdiction over this case was made 14 to 1, the sole dissenter being the justice from the United States, Stephen Schwebel.<sup>22</sup>

While we do not know exactly what the United States' defense of its policy in Nicaragua would have been, a review of the U.S. Counter Memorial on jurisdiction and statements by the State Department and the President over the last few years shows that the U.S. relies primarily on the several related theories of self-defense. The United States would claim that U.S. support for the *contras*, and its economic warfare, its mining of the harbors, and attacks on ports — all of these things amounted to a defense of the United States against the aggressors — the government of Nicaragua. Although the United States would probably admit that no Nicaraguan troops have landed in the United States as of yet and that their army of 40,000 regulars and 60,000 militia is slightly smaller than the United States 3.1 million members under arms supported by nuclear weapons, the United States would probably point out that this was a special form of self-defense to protect other Central American governments from falling to the communists. This is the familiar domino argument, which became infamous in justifying U.S. intervention in Vietnam twenty years ago. The argument, asserted quite seriously by U.S. policymakers, is not that Nicaragua has now attacked the United States, but that Nicaragua — a militarized, communist, totalitarian state — will subvert and eventually overrun El Salvador, Costa Rica, and Honduras, and then Guatemala and Belize. Then, of course, there is Mexico, an extremely populous, potentially rich country, and next the Sandinistas will be at the doors of the United States and it will be too late.<sup>23</sup> Just as we could have

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U.N. SCOR (2704th mtg.), U.N. Doc. S/P.V. 2704 (1986), I.L.M. vol. XXV, No. 5 1986, at 1364-5.

22. The justices who heard this case were: President Nagendra Singh (India); Vice-President deLacharriere (France); Judges Lachs (Poland), Ruda (Argentina), Elias (Nigeria), Oda (Japan); Ago (Italy), Sette-Camara (Brazil), Schwebel (United States), Jennings (United Kingdom), Mbaye (Senegal), Bedjaoui (Algeria), Zhengyu (China), Evensen (Norway); Judge *ad hoc* Colliard (France). Justice Schwebel, prior to joining the Court in 1981, had been a Legal Advisor to the State Department and helped represent the United States in the Iran case, *supra* note 17.

23. See, e.g., Remarks at a White House Briefing, March 5, 1986, 22 Weekly Comp. Pres. Doc. 309, 310, 312 (March 10, 1986); Remarks and a Question and Answer Session with Regional Press Representatives, March 11, 1986, 22 Weekly Comp. Pres. Doc. 322-335 (March 17, 1986).

stopped Hitler in Munich in 1938 but did not, so now can we stop the communists in Nicaragua before they overrun the Western Hemisphere.

The second part of this special form of self-defense is collective security. It is not the United States but El Salvador that is under armed attack by Nicaragua because of Sandinista support for the rebels. Moreover, the theory goes, Honduras and Costa Rica are menaced by Nicaragua, as evidenced by border incidents and Nicaragua's "massive" military build-up. The United States is an ally of those countries with mutual obligations under the Charter of the Organization of American States and the Rio Pact of 1947,<sup>24</sup> and the United States' conduct in Nicaragua right now is an aspect of collective security and collective self-defense, if you will, to protect those countries which are under attack or are being subverted.<sup>25</sup> Frequently in connection with this argument, U.S. policymakers refer to the phrase "revolution without frontiers", attributing it to the Sandinistas. It is worth noting that the probable origin of this phrase is the State Department, not Nicaragua.<sup>26</sup>

There is also a claim frequently made that Nicaragua is engaged in international terrorism. It is hard to tell if this argument is made literally and seriously. I think it is hinted at, because terrorism is on the minds of many people in the United States and around the world. If stated at length, the argument would be that terrorism is an international crime like piracy, and it is therefore the moral and legal responsibility of every civilized nation to fight terrorism, even by means of armed force. Thus the United States has not only the legal authority, but the moral obligation to fight terrorism in Nicaragua which, according to the United States, is a terrorist state. While not stated quite that boldly, it is certainly hinted at.

Lastly, the United States defends its policy in Central America by citing the Monroe Doctrine, claiming that the Marxist totalitarians in

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24. Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro, September 2, 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838, 21 U.N.T.S. 77 (effective December 3, 1948).

25. See Countermemorial, *supra* note 13; Departments of State and Defense, *Background Paper: Nicaragua's Military Buildup and Support for Central American Subversion* (July 18, 1984).

26. According to Congressman Edward J. Markey, the phrase "revolution without frontiers," frequently ascribed to the Sandinistas, was actually created in Washington. Wash. Post, October 24, 1984 at . Administration officials have admitted that they cannot confirm the source of the phrase, and that at the time, they had not believed that Nicaragua intended to attack its neighbors, "Nicaraguan Army: 'War Machine' or Defender of a Besieged Nation?", N.Y. Times, March 30, 1985, at 11, col. 2.



Nicaragua are not really Nicaraguans but aliens to the Hemisphere, Soviet proxies who by definition are illegitimate.<sup>27</sup> Because they are alien to the Western Hemisphere, their government is prohibited by the Monroe Doctrine, proclaimed in 1823 when the United States took up the mantle of anti-imperialism and announced to Europe that it would not accept any European intervention in the Western Hemisphere.<sup>28</sup> U.S. involvement in Nicaragua is thus a continuation of that burden and responsibility.

The problem with all of these arguments made by the United States government is that they ignore the development of international law during this century. The United Nation's Charter and the Charter of the Organization of American States are premised on two fundamental concepts: first, that nations will not intervene directly or indirectly in the affairs of other nations, and secondly, nations will not resolve their disputes with other nations through a resort to war or the use of armed force.<sup>29</sup> The fundamental obligation of a nation is to avoid

27. The political doctrine that communism is an alien force in the Western Hemisphere was probably never so graphically portrayed as in the 1956 movie, *Invasion of the Body Snatchers*. Released during the Cold War, the movie depicted an alien life force which traveled to earth in pods, invaded living bodies, and replaced the human spirit with a zombie-like intelligence which subserviently worked with other aliens to disperse still more pods throughout the world. The point was not lost on frantic audiences of the time.

28. MESSAGES AND PAPERS OF THE PRESIDENTS OF THE UNITED STATES 776-789 (J. Richardson ed. 1897).

29. Article 2 of the U.N. Charter states as follows:

3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.

Article 33 is more specific:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

In 1965, the General Assembly approved its "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty," G.A. Res. 20/2131 (XX) (December 21, 1965), which states in part:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are condemned.

See also the Definition of Aggression, G.A. Res. 29/3314 (XXIX), 29 U.N. GAOR

war, to seek a peaceful resolution of conflicts, and to leave other nations alone. There is one exception spelled out in customary international law and in the United Nation's Charter which recognizes the right of a state to use armed force in the exercise of self-defense. Article 51 of the U.N. Charter states as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

As a practical matter, the Security Council almost can never take control of the situation, but Article 51 is very specific about when the use of armed force is permitted. If the soldiers of another country are parachuting into the airports, or if they are crossing the border, or they are mining the harbors, that is an armed attack on a state and it then has the right of self-defense. But a state does not have a justification for use of armed force short of such an attack.<sup>30</sup> Article 51 in some ways creates a narrower scope of self-defense than that available under customary international law. It was meant to be narrower. The drafters of the U.N. Charter had just emerged from a war where upwards of 70 million people had been killed; they were anxious to avoid another global catastrophe. Article 51 of the Charter therefore provides a very limited exception for the use of force.

The United States has not met the test for self-defense, either under the Charter or customary international law. As stated earlier, there are no Nicaraguan troops fighting in the United States or massed on the United States borders. No Nicaraguan planes have bombed the United States, no American harbors have been mined by Nicaraguan scuba divers. There is no attack making the use of force by the United

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Supp. (No. 31) 142; Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103 (December 9, 1981); Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (October 24, 1970).

30. VON GLAHN, *LAW AMONG NATIONS* 133 (4th Ed. 1981).

States an "instant and overwhelming necessity."<sup>31</sup>

If the United States has a dispute with Nicaraguan conduct with regard to El Salvador, there were very specific steps the United States (or El Salvador, for that matter) could take. The United States or El Salvador could take the matter to the World Court, the Security Council of the United Nation, or the Organization of American States. The one thing El Salvador and the United States cannot do is overthrow the government of Nicaragua to benefit El Salvador.

Another principle of international law with respect to self-defense is that a state must use the minimum amount of force that is necessary to deal with the situation.<sup>32</sup> This is a common sense notion that is also applicable in American domestic law. If somebody slaps you on the face, it is not really self-defense to pull out a gun and blow the person away. Where there is a marked disparity in what you are trying to protect against and the amount of force used, the law refuses to sanction that use of force. Why? Because the goal is to minimize the use of force. The same is true at international law.

Even assuming for a moment that Nicaragua has been, as a matter of state policy, sending arms to El Salvador,<sup>33</sup> there is absolutely no justification at law for the United States to respond by attempting to overthrow the government of Nicaragua. And that, of course, is exactly what the United States is trying to do. President Reagan made that abundantly clear in his famous "cry-uncle" comment.<sup>34</sup> The policy has

31. See, e.g., Corfu Channel Case (United Kingdom v. Albania), Judgment, 1949 I.C.J. REPORTS at 35.

32. VON GLAHN, *supra* note 30; JESSUP, MODERN LAW OF NATIONS 163-166 (1948); 5 WHITMAN, DIGEST OF INTERNATIONAL LAW § 25, *passim* (1971); BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 246 (1958); BRIERLY, LAW OF NATIONS 405-407 (6th ed. 1978); 2 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 156 (7th ed. 1952).

33. Although the evidence presented in the U.S. press has been vague at best, the ICJ concluded that arms and other material assistance were delivered through Nicaragua to the Salvadoran rebels at least through 1981, with the evidence of such activity thereafter becoming "weak". However, the Court found the evidence insufficient to conclude that the Nicaraguan government itself was responsible for such shipments, and expressly held that such conduct did not amount to an armed attack justifying the use of armed force in self-defense. Judgment, *supra* note 7 at paras. 152-53, 160, 238-39.

34. Press conference, 21 Weekly Comp. Pres. Doc. 212-213 (February 21, 1985). Other statements of the President are also clear, see News Conference, 19 Weekly Comp. Pres. Doc. 650 (May 4, 1983); Radio Address, 21 Weekly Comp. Pres. Doc. 186-187 (February 16, 1985); Radio address, 21 Weekly Comp. Pres. Doc. 765 (June 8, 1985); Interview, 21 Weekly Comp. Pres. Doc. 1006 (August 24, 1985). The House Permanent Select Committee on Intelligence concluded in 1983 that the purpose of

nothing to do with the transfer of small arms to the Salvadoran rebels.<sup>35</sup>

With respect to collective security, again the United States has a right of self-defense to its own territorial integrity, not with respect to the territory of El Salvador.<sup>36</sup> It is not like a tag team wrestling match.

As to the Monroe Doctrine, it is sometimes forgotten that the Monroe Doctrine was a unilateral declaration of American policy, not a principle of international law to which other nations have agreed. In 1823 the United States was a relatively weak nation, and the Monroe Doctrine was disputed by European states and was tested occasionally. Today, the United States is the strongest nation in the world. When the United States says it is not going to allow European nations to come into the western hemisphere, no country will dispute that by force of arms. But that does not make it law; it is still a unilateral declaration of policy. The Monroe Doctrine has about as much legal force as a declaration by Premier Gorbachev that the United States henceforth will not be allowed into any nation in Europe and that Europe is the responsibility of the Soviet Union.

It is also worth noting that when the policy was first announced by President Monroe, it was made very clear that it was an anti-imperialist, anti-intervention policy that applied not just to the European states but also to the United States.<sup>37</sup> As part of that declaration of policy, the United States itself pledged that it would not intervene in the affairs of Latin and Central America. Unfortunately, that policy did not last and the United States began a rather notable history of repeated intervention in the affairs of practically all the nations in Latin and

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U.S. support for the *contras* was aimed at overthrowing the Nicaraguan government, not at interdicting arms, H.R. Doc. No. 122, 98th Cong., 1st Sess. 11 (1983).

35. See Brinkly, "Vote on Nicaraguan Rebels: Either Way a Turning Point," N.Y. Times, March 17, 1985, at A1, col. 5.

36. STONE, *Legal Controls of International Conflict* 245 (1954), Bowett, *supra* note 31, at 206-207, 216-217; Falk, "The Cambodian Operation and International Law," 65 AM. J. INT'L. L. 1 (1971), *reprinted in* 3 VIETNAM WAR AND INTERNATIONAL LAW 33 (Falk ed. 1972).

37. In a letter to the American Minister in Columbia in 1829, Secretary of State van Buren declared:

It is the ancient and well-settled policy of this country not to interfere with the internal affairs of any foreign country. *However deeply the President might regret changes in the governments of the neighboring American States*, which he might deem inconsistent with those free and liberal principles which lie at the foundation of our own, he would not, on that account, advise or countenance a departure from this policy. [emphasis added]

MOORE, DIGEST OF INTERNATIONAL LAW 14 (1906).

Central America.<sup>38</sup>

The United States is not practicing self-defense in Central America or in Nicaragua. It is practicing a policy of intervention and a policy of war; the United States is attempting to change the internal politics, the internal social and economic structure of Nicaragua, because the United States does not like that structure. It is precisely this type of attempt to dominate and control other nations which creates wars, and it is why the international legal structure under the United Nations was established after World War II.

## II.

A brief review of the World Court's final decision on the merits of the case illustrates the principles stated earlier in this article. The Court began by addressing the jurisdictional and procedural issues posed by the refusal of the United States to participate in the proceedings on the merits. Although Article 53 of the Statute gives the Court the authority to determine a controversy even in the absence of a party, the Court noted that it must still be satisfied that it has jurisdiction and that the claim is well-founded in fact and law. To insure that the U.S. position was not ignored, the Court made frequent reference to the earlier submissions of the United States on jurisdiction, to the extent they touched on the merits of the controversy. However, the Court reminded the United States that it was nonetheless bound by the judgment.<sup>39</sup>

The ICJ next gave the United States a critical procedural victory, by finding that the multilateral treaty reservation to U.S. acceptance of ICJ jurisdiction prevented the Court from deciding this case under any multilateral treaty.<sup>40</sup> This meant that the United Nations Charter, the

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38. See R. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 102-140 (1974); W.O. DOUGLAS, *HOLOCAUST OR HEMISPHERE CO-OP: CROSSROADS OF AMERICAN DIPLOMACY* (1971); W.A. WILLIAMS, *TRAGEDY OF AMERICAN DIPLOMACY* (1962); R. BARNET, *INTERVENTION AND REVOLUTION* (1972); D. WISE & T. ROSS, *THE INVISIBLE GOVERNMENT* (1964); P. AGEE, *INSIDE THE COMPANY: CIA DIARY* (1975); S. NEARING & J. FREEMAN, *DOLLAR DIPLOMACY*, chaps. 5, 6, 9 (1925).

39. Judgment, *supra* note 7 at para. 28.

40. *Id.* at para. 56. The U.S. acceptance of ICJ jurisdiction, *supra* note 10, states that it excludes "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specifically agrees to jurisdiction." *Id.* The U.S. argued in its countermemorial on jurisdiction that El Salvador was a party to the treaties involved and would be affected by the decision of the Court, but was not a party to the case, *see supra* note 13.

Indeed, El Salvador's petition to intervene in the case was denied as premature by the Court, *Nicaragua v. United States*, ICJ Order with Regard to the Declaration of

Charter of the Organization of American States, the General Agreement on Tariffs and Trade, and other multilateral conventions could not be used as bases for finding a violation of law by the United States. However, the Court held that it still had jurisdiction to determine whether the United States had violated customary international law which exists independent of the multilateral treaties.<sup>41</sup>

In making its factual findings, the Court recognized the limitations of its abilities in this area and treated the facts conservatively.<sup>42</sup> The greatest weight was placed on the admissions and declarations of each party, and on those pieces of evidence which were uncontested. However, the mere declarations of fact by government ministers were considered to be self-serving and entitled to little weight on either side except as admissions of facts unfavorable to the state represented by the declarant.<sup>43</sup> Thus, the Court rejected Nicaragua's argument that the United States has admitted its intervention by arguing self-defense in its previous submissions.<sup>44</sup>

Applying its criteria, the Court found that President Reagan authorized the mining of Nicaraguan ports without warning to international shipping,<sup>45</sup> and that the United States was responsible for several motorboat attacks, including the bombing of Corinto and the destruction of the oil tanks there.<sup>46</sup> The Court further found the United States responsible for high altitude reconnaissance overflights and low altitude overflights that caused sonic booms over Managua on November 7-11, 1984.<sup>47</sup>

Most importantly, the Court found that the United States was the primary party responsible for the financing, training, equipping, arming, training and organizing the FDN, the main *contra* army in the north.<sup>48</sup> However, the Court was not satisfied that the evidence presented was sufficient to find that the *contras* could be treated as an arm of the United States.<sup>49</sup> Thus, the Court held that the United States could not be held automatically liable for the conduct or miscon-

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Intervention, 1984 I.C.J. REPORTS 215. In its Judgment, the Court agreed that El Salvador was a nonparty affected by the decision. Judgment, *supra* note 7, at 36, paras. 51-52.

41. *Id.* at para. 179.

42. *See id.* at paras. 57-70.

43. *Id.* at paras. 64, 70.

44. *Id.* at para. 74.

45. *Id.* at para. 80.

46. *Id.* at para. 86.

47. *Id.* at para. 91.

48. *Id.* at para. 108.

49. *Id.* at para. 109-110.

duct of the *contras*, but that the United States was liable only for its own conduct in supporting the *contras*.<sup>50</sup>

Addressing the legal issues in the case, the Court made what will no doubt be its most controversial ruling in this decision by determining that although the U.N. Charter could not serve as the basis for finding a violation by the United States, similar rules in customary international law could be the basis for a decision.<sup>51</sup> The Court noted, for example, that the U.N. Charter provision on self-defense "refers to pre-existing customary international law . . ." Thus, ". . . Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter."<sup>52</sup> Article 51 says nothing about proportionality and necessity of the force used in self-defense, nor does the Charter anywhere define "armed attack"; these concepts cannot be understood without reference to customary law.<sup>53</sup> Thus, the concept of self-defense as used in the Charter and as it exists in customary law "do not have the same content" and are thus separate entities.<sup>54</sup>

Moreover, in determining customary international law, the Court decided that it may examine the attitude of the parties and states in general with respect to certain U.N. General Assembly resolutions<sup>55</sup> or other obligations assumed by the parties.<sup>56</sup> The Court even stated that the multilateral treaties, although not an independent basis for finding a violation, may nevertheless constitute evidence that certain principles have been so universally accepted as to have become a part of international law.<sup>57</sup>

On this basis, the Court reaffirmed the longstanding precept that the threat or use of force against another state violates international law, including the exercise of force through the use of "armed bands, groups, irregulars or mercenaries."<sup>58</sup> Customary international law also forbids direct or indirect intervention into the affairs of another state.

A prohibited intervention must accordingly be one bearing on mat-

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50. *Id.* at para. 116.

51. *Id.* at para. 175, 179.

52. *Id.* at para. 176.

53. *Id.*

54. *Id.*

55. *Id.* at para. 188.

56. *Id.* at para. 189.

57. *Id.* at paras. 190, 200, 218.

58. *Id.* at para. 195.

ters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.<sup>59</sup>

With respect to mining of harbors, the Court found that customary international law has long prohibited the mining of ports without notice to the shipping community.<sup>60</sup>

Applying the law to the facts as found, the Court determined that U.S. conduct in arming and training the *contras* constituted illegal use of force under customary international law. The Court further noted that the mere funding of *contra* activity amounted to unlawful intervention into the affairs of another state, but was not illegal use of force.<sup>61</sup>

The Court also held that the United States violated international law by mining the Nicaraguan harbors,<sup>62</sup> and by conducting overflights of Nicaraguan territory.<sup>63</sup> However, the Court stated that it could not find, based on the facts presented, that the massive U.S. military maneuvers on the Nicaraguan borders amounted to prohibited intervention under international law.<sup>64</sup>

Additionally, the Court further found that through the use of the CIA Manual which encouraged assassinations, the United States encouraged the *contras* to commit certain acts "contrary to general principles of international humanitarian law reflected in treaties."<sup>65</sup>

In making its legal determinations, the Court discussed all of the defenses and issues previously raised by the United States, the most important of which was self-defense. Finding that Nicaragua had been involved in transferring arms to El Salvador at least until 1981, the Court went on to hold that such arms shipments did not legitimize U.S. claims of self-defense.<sup>66</sup> The Court held that arms shipments were not an armed attack which justified the use of force in self-defense.<sup>67</sup> Moreover, self-defense must be claimed by the party being attacked

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59. *Id.* at para. 205.

60. *Id.* at para. 214.

61. *Id.* at paras. 228, 242.

62. *Id.* at para. 253.

63. *Id.* at para. 251.

64. *Id.* at para. 227.

65. *Id.* at paras. 255-256.

66. *Id.* at para. 238.

67. *Id.* at paras. 230, 249.



(i.e., El Salvador), not an intervening third party (the United States).<sup>68</sup> Since there is not a right of self-defense under these circumstances, there is not a right of collective self-defense.<sup>69</sup> The Court noted that it could not find any evidence of a request for armed defense by El Salvador, Honduras or Costa Rica.<sup>70</sup>

The Court further found that the U.S. action was not proportionate to the conduct allegedly justifying the use of force, and was not calculated to address the alleged violations by Nicaragua. Indeed, the Court found that U.S. action against Nicaragua increased as evidence of Nicaraguan arms shipments decreased.<sup>71</sup>

In finding that the United States unlawfully intervened in Nicaragua, the Court declared it unimportant to determine whether the United States intended to actually overthrow the government of Nicaragua. It was enough, said the Court, that the United States intended to coerce the government into acting in a certain way, and intended to support the *contras*, whose own intent was to overthrow the government.<sup>72</sup>

On its own, the Court examined domestic statutory restrictions on U.S. aid which commenced on October 1, 1984, to the effect that aid to the *contras* was limited to "humanitarian assistance". Rejecting the implicit claim that such aid was lawful, the Court observed that to be considered humanitarian, aid must be limited to humanitarian purposes and must be given to everyone without discrimination. Since U.S. aid was given only to one side, and supported military activities, it plainly did not meet the test.<sup>73</sup>

The Court briefly considered and rejected other U.S. arguments to support its conduct. The United States claimed that the Sandinistas had broken the commitments to pluralistic democracy they made to the Organization of American States at the time of the revolution.<sup>74</sup> The Court found no evidence of any legally binding commitments and held that such commitments, even if binding, could not justify U.S. intervention or use of force.<sup>75</sup> As to the U.S. claim that Nicaragua "had taken significant steps towards establishing a totalitarian Communist

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68. *Id.* at paras. 195-196, 199, 209.

69. *Id.* at para. 211.

70. *Id.* at paras 232-233.

71. *Id.* at para. 237.

72. *Id.* at para. 241.

73. *Id.* at paras. 242-243.

74. *Id.* at paras. 169-170.

75. *Id.* at paras. 261-262.

dictatorship,"<sup>76</sup> the Court curtly noted that the internal affairs of states did not justify intervention;

However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State . . . . The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.<sup>77</sup>

This same reasoning extended to Nicaragua's foreign policy.<sup>78</sup> The Court treated in the same manner allegations that the Nicaraguan government did not respect human rights, and that it had militarized the country.<sup>79</sup>

Addressing the treaty of friendship between the United States and Nicaragua, the Court found that the U.S. armed attacks on ports and oil installations and the mining of the harbors violated the treaty of friendship,<sup>80</sup> as did the trade embargo ordered by President Reagan on May 1, 1985.<sup>81</sup>

Having found that U.S. conduct violated international law, the Court ordered the United States to refrain from its unlawful conduct<sup>82</sup> and declared that the United States would be liable to Nicaragua for restitution. Since the exact amount of damages needed to be ascertained, the Court granted further proceedings at a later date to determine the amount due.<sup>83</sup> However, the Court denied Nicaragua's request that it make an interim award of damages pending a "final valuation."<sup>84</sup>

Although procedural aspects of the case may be controversial, the Court grounded its decision in accepted standards of customary inter-

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76. *Id.* at para. 263.

77. *Id.* at para. 263.

78. *Id.* at para. 265.

79. *Id.* at paras. 268-269.

80. *Id.* at paras. 275, 282. "Any action less calculated to serve the purpose of strengthening the bonds of peace and friendship traditionally existing between the Parties . . . could hardly be imagined." *Id.* at para. 275.

81. *Id.* at paras. 276, 279, 282.

82. *Id.* at paras. 286-288.

83. *Id.* at paras. 283-284.

84. *Id.* at para. 285.

national law. Even the vigorous dissent of Justice Schwebel relies, for the most part, on lack of jurisdiction, procedural irregularities and the claimed failure of the Court to recognize facts showing Nicaragua's alleged aggression against its neighbors. Perhaps the most radical aspect of the decision is that the Court issued it at all, and that one of the superpowers has had a national security claim subjected to the strictures of international law as applied by a neutral tribunal.

### III.

Although Nicaragua has won a judgment in its favor, the question arises as to whether this judgment can be enforced. If this were a court in the United States, enforcement would be simple. A prevailing plaintiff goes to the other side and demands payment of the judgment. If they do not pay, then the plaintiff files a Request for Order of Execution with the Court. The Sheriff or United States Marshall goes to the defendant's home or business and seizes property which is then sold at auction. The proceeds go to satisfy the judgment. Unfortunately, it will be very hard for the clerk of the International Court of Justice to come to the United States to try and attach the Capitol Building or the White House and sell it at auction to pay off the damages. Fortunately, there may be another way of enforcing the judgment.

There are no sanctions that the International Court of Justice can declare or enforce against the United States for failure to obey its judgment. Article 94 of the U.N. Charter compels states to comply with ICJ decisions in cases to which they are a party, and provides for action by the Security Council in the event a party fails to comply. However, the United States can simply veto any Security Council action, as it indeed did when Nicaragua brought the matter to the Security Council.<sup>84.1</sup> The real issue of enforcement is not what the ICJ can do, but what can be done here in the United States.

There is no reason why a party with proper standing should not be able to bring an action in federal district court to enforce the judgment of the World Court.<sup>85</sup> From almost the inception of the Republic, the federal courts have had the power and authority to remedy a breach of federal law by the Executive.<sup>86</sup> A treaty is binding on the Executive in

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84.1. See note 16, *supra*.

85. Indeed, such a suit is currently pending, Committee of U.S. Citizens Living in Nicaragua v. Reagan, C.A. No. 86-2620 (D.D.C.) (Complaint filed September 23, 1986).

86. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Nixon*, 418 U.S. 683 (1974).

the same way as any federal statute.<sup>87</sup> Here, the United States entered into a binding commitment to adjudicate all legal disputes in the World Court, and to be bound by the judgment thereof. This commitment should be treated no differently than international commercial arbitrations, or labor arbitrations between unions and management.

The government response to such a suit will be that it intrudes in an area specifically reserved to the President under the Constitution: the conduct of foreign affairs. The case therefore presents a "political question" which is not justiciable. Our response should be that this case does not address Presidential conduct of foreign affairs. Instead, it addresses a peculiarly judicial function: the enforcement of an adjudication which was submitted to a neutral party by the voluntary contract of two parties.<sup>88</sup> The United States agreed, in the Statute of the ICJ, and in the 1956 Treaty of Friendship with Nicaragua<sup>89</sup> that disputes would be submitted to binding resolution by the World Court. There is nothing in domestic or international law which states that the President has discretion to disobey a binding contractual commitment of the United States to obey a World Court decision in a specific case submitted for adjudication. To the contrary, U.S. domestic law and treaties over the last 60 years support a U.S. commitment to final and binding arbitration of international disputes. Treaties commit states to act in a certain way with respect to each other. If one or more states then violate the treaty, it is up to the parties to seek a resolution of that dispute. With a decision to arbitrate (or litigate), there is indeed an explicit self-limitation on the exercise of sovereignty to the extent that the tribunal is empowered to decide that case and render a binding decision. Having accepted this limitation, it would seem that no subsequent assertion of a right to ignore the decision can prevail over the original decision. While most international awards are difficult to enforce if the loser refuses to abide by them, here a plaintiff would have available the domestic courts of the state which has refused to abide by the award.

In *Frelinghuysen v. Key*,<sup>90</sup> the Supreme Court recognized the binding effect of international arbitration. Mexico and the United States had established by treaty a joint commission for resolution of private claims against the other nation. A U.S. company won a sizable award which the U.S. government later suspected had been obtained by

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87. U.S. CONST. art. VI, cl. 2; see *Japan Whaling Association v. American Cetacean Society*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2860, 2866 (1986).

88. *Japan Whaling Assn.*, *supra* note 87.

89. Treaty of Friendship, Commerce and Navigation, January 21, 1956, United States-Nicaragua, 9 U.S.T. 499, T.I.A.S. No. 4024 (effective May 24, 1958).

90. *Frelinghuysen v. Key*, 110 U.S. 63 (1883).

fraud. Although Mexico distributed the awarded funds to the United States as required under the treaty, the United States refused to transfer the funds to the company pending an investigation. The company filed a mandamus action.

In upholding the U.S. action, the Court emphasized that the U.S. government's actions as to its own citizens was not governed by the treaty, and further stated:

No nation treats with a citizen of another nation except through his government. . . . As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do. . . .

International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come . . .

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Thereafter, at the request of the President, Congress passed a law authorizing the executive to seek review of the claim in the Court of Claims, and to seek denial of the compensation if it was, indeed, the product of fraud. The United States did proceed to court, the court found fraud, and the company appealed. The Supreme Court affirmed the courts below, and in doing so stated:

It was also said in argument that the act of Congress in some way - not clearly defined by counsel - was inconsistent with the principles underlying international arbitration, a mode for the settlement of disputes between sovereign states that is now more than ever before approved by civilized nations. We might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken *the force that should be attached to the finality of an award made by an international tribunal of arbitration*. So far from the act of Congress having any result of that character, the effect of such legislation is to *strengthen the principle that an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned, and must be*

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91. *Id.*, 110 U.S. at 71-73.

*executed in good faith unless there be ground to impeach the integrity of the tribunal itself.*<sup>92</sup> [emphasis added].

The United States has a long and firm policy of encouraging and supporting private and pacific resolution of disputes, both domestic and international. The Federal Arbitration Act<sup>93</sup> sets out the procedure by which the court will enforce agreements to arbitrate as well as the awards themselves by private persons. The Supreme Court has repeatedly emphasized the importance of arbitration to the stability and regularity of labor-management relations.<sup>94</sup> Indeed, so important is that policy that the Court will impute a no-strike clause to a collective bargaining agreement that is silent on the subject, if the contract contains an arbitration clause.<sup>95</sup> Arbitration is the alternative to a strike, i.e. violence and class struggle; the analogy to the international arena is obvious.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>96</sup> provides a comprehensive scheme for the arbitration and enforcement of awards in international commercial disputes, even where sovereign states are parties. U.S. courts have enforced decisions against other nations where they have determined that the state involved specifically agreed to arbitrate the dispute and to have the decision be final and binding; in those circumstances, the state waives its sovereign immunity.<sup>97</sup>

The United States has repeatedly entered into binding instruments to have international disputes resolved by final and binding arbitration. Indeed, 22 U.S.C. §261 states, "It is hereby declared to be the policy of the United States to adjust and settle its international disputes

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92. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 20 S. Ct. 169, 182 (1899).

93. Federal Arbitration Act, 9 U.S.C. §§1-9.

94. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

95. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

96. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, Codified in 9 U.S.C. §§ 201-208 (1984).

97. *See Birch Shipping Corp. v. Embassy of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980); *Ipitrade International v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978); *see also* Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq.*; H. Rep. No. 94-1487, 94 Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6617, 6627 (1976).

through mediation or arbitration, to the end that war may be honorably avoided."<sup>98</sup> The act, never judicially examined, was passed as part of the Naval Appropriations Act of 1916,<sup>99</sup> which provided an ambitious naval building program in response to the ominous course of the European War. The legislative history of the act shows that members of Congress were specifically concerned with resolving major issues of dispute with other nations through binding arbitration.<sup>99.1</sup>

As recently as 1985, the Foreign Relations Authorization Act<sup>100</sup> gave permanent authority to pay expenses for arbitrations "and other proceedings for the peaceful resolution of disputes under treaties and other international agreements."<sup>101</sup>

The United States further committed itself to such adjudication through its ratification of such multilateral treaties as the U.N. Charter, the ICJ Statute, the Hague Convention of 1907, and various multilateral inter-American treaties.<sup>102</sup> The United States has also agreed to such adjudication of disputes through numerous bilateral treaties of friendship, commerce and navigation. These commitments to arbitrate or adjudicate before the ICJ are not limited to commercial matters, but include all issues of dispute, including those that would encompass the use of force.

Whether a federal court would enforce this World Court decision is, at the time of writing this article, unknown. The political question doctrine offers an attractive avenue for any court to avoid a decision on a complicated and murky yet highly charged issue. However, the federal courts should not be allowed to duck important issues and, at their best, they have not done so. *United States v. Nixon*<sup>103</sup> was a key decision in the history of this country, in which a claim of unlimited presidential authority was decisively quashed. In *Brown v. Board of Education*<sup>104</sup> the Supreme Court determined that it would outlaw segregation and that it would embark on a legal crusade to end the institutional underlinings of racial discrimination. There is potential for taking a

98. 39 Stat. 618 (1916).

99. Naval Appropriations Act of 1916, P.L. No. 241, c. 417, 39 Stat. 556 (1916).

99.1. See, e.g., 53 CONG. REC. 8793, 8813, 8814, 8877, 9143, (1916); but see Remarks of Rep. Gardner, *id.* at 9140-9141.

100. Foreign Relations Authorization Act, P.L. 99-93, 99 Stat. 405.

101. *Id.*, section 111, codified at 22 U.S.C. § 2710(a); see also 1985 U.S. Code Cong. & Ad. News 366 (1985).

102. See generally, M. HABICHT, POST-WAR TREATIES FOR THE PACIFIC STATEMENT OF INTERNATIONAL DISPUTES (1931); Lieverman and Schneider, Memorandum of Law on U.S. Policy Toward Nicaragua, *passim* (Nov. 1985).

103. See *U.S. v. Nixon*, *supra* note 86.

104. *Brown v. Board of Education*, 347 U.S. 483 (1954).

similarly courageous stance here. There is little doubt that the International Court of Justice decision is a golden opportunity to have a federal court in the United States review the legality of U.S. policy in Nicaragua.

Lastly, the enforceability of the decision is in many ways not a legal issue, but a political and moral issue. I use the term "political" in the broadest sense, not to refer to Democrats and Republicans, but to refer to the accumulation, use, and control of power in this society. Enforcement of the ICJ decision touches on whether the checks and balances of constitutional democracy can function in the nuclear age, or whether we are all subordinate to an Executive Branch which can act without restraint.

Nor can the moral dimension be ignored. U.S. policy in Nicaragua is not wrong simply because it is illegal. The policy is illegal because it is wrong, because it violates fundamental notions of civilized conduct which are the basis of international law. By refusing to obey the World Court decision, the United States has publicly and starkly repudiated the dream of the postwar world: that nations would recognize a higher authority than the power of their own armies. The U.S. rejection of the United Nations' proscription against war is all the more tragic because of the key role played by the United States in creating and defining the new responsibilities of states.

It was just forty years ago that the judges of the International Military Tribunal, sitting at Nuremberg, condemned the leaders of the Nazi organizations for the crimes of the Third Reich. As defined in the Tribunal's charter, one set of offenses to be punished was "crimes against peace." The Charter essentially restated the accepted international prohibition against the use of war and aggression as instruments of policy. It defined such crimes as:

. . . [P]lanning, preparation, initiation, or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.<sup>105</sup>

The United States took the position at Nuremberg that by 1939, aggression was recognized as a violation of customary international law. The position was forcefully stated by Robert H. Jackson, chief U.S. prosecutor at the International Military Tribunal and an Associ-

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105. Agreement for the Prosecution of the Major War Criminals of the European Axis, August 8, 1945, 59 Stat. 1544, 3 Bevans 1238, 82 U.N.T.S. 279, Article 6(a).



ate Justice of the U.S. Supreme Court.<sup>106</sup> In his opening address, he repeatedly expressed the point that international law applied to all nations, not just those defeated in war:

But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.<sup>107</sup>

As defined by Justice Jackson, "aggression" in international law was not limited to invasion or declaration of war, but also included:

[p]rovision of support to armed bands formed in the territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.<sup>108</sup>

Justice Jackson then ended with a stirring statement that "the real complaining party at your bar is Civilization." Civilization, he continued,

does not expect that you can make war impossible. It does expect that your juridical action will put the forces of International Law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace. . . .<sup>109</sup>

I think we have to make sure that our present leaders understand that we want them to put our nation's power on the side of peace. The United States has to be bound by the same standards of conduct, the same sense of international decency, that we expect the Soviet Union, Lebanon, Syria, or any other nation in the world to abide by. There has to be one standard of conduct for all nations: that states will not intervene in the affairs of other nations, that they will not resort to war, and that they will seek peaceful resolution of their disputes. I think most people who have read about Central America correctly understand and

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106. 1 International Military Tribunal, *Trial of the Major German War Criminals* 145-149 (1947).

107. *Id.* at 154.

108. *Id.* at 148.

109. *Id.* at 155.

believe that the disputes in Central America can be resolved through peaceful negotiations, and that Nicaragua is willing to do that. The principal obstacle to peaceful negotiations in Central America right now is not Nicaragua or the Soviet Union or the Cuban advisors; it is the policies of this Administration. It is our responsibility as American citizens to see that this obstacle to peace is removed.

As this article receives its final revisions for publication, the media has broken the story of how the United States secretly sold arms to Iran and then diverted payments for the arms to finance *contra* operations in Nicaragua, during a time when such U.S. aid was prohibited by Congress. At the same time, the press is reporting intimate involvement of administration officials in the purchase and shipment of arms to the *contras*, and even possible involvement by National Security Council personnel in creating a media campaign during the 1984 elections to defeat Members of Congress opposed to *contra* aid. While the details of these stories remain sketchy (and to some extent unverified), even the undisputed facts show a much more intense and emotional commitment of this administration to military action against the Nicaraguan government than was previously thought.

Indeed, the recent revelations show nothing less than an administration obsession with Nicaragua — an obsession as self-destructive as it is unwise. One wonders what former Ambassador Quainton would have said in our meeting had he known then what the public now knows.

It is perhaps no accident that a policy declared unlawful by the International Court of Justice was also carried out in a manner which necessitated keeping Congress and the American public unaware of its true nature and extent. As we should have learned in Vietnam, lawlessness and deceit in foreign policy go hand in hand. The result is not just misadventure abroad, but damage to the normal constitutional checks and balances at home.

In 1964, as officials of the Johnson administration secretly planned a sharp escalation of U.S. involvement in Vietnam, National Security Advisor William Bundy expressed his concern that such a secret plan might not work in "the klieg lights of democracy."<sup>106</sup> His fears proved justified; the more the public found out about the war, the more they opposed it. The more the executive branch sought to hide key facts from Congress and the public, the more bitter was the public rejection of the policy as the suppressed facts came to light. Presidents Johnson and Nixon saw their presidencies destroyed because they pursued the

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110. Pentagon Papers (Senator Gravel Edition) 648 (1971).

war in Indochina long after it had lost its legitimacy in the eyes of the world, including the eyes of the American public.

President Reagan now faces a similar problem. The recent press stories serve the same function as the decision of the World Court, in that they strip the administration policy of legitimacy. It remains to be seen whether the present administration will relinquish its obsession with Nicaragua, even for the sake of its own survival.