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## Between a Rock and a Hard Place - The United States, the International Court, and the Nicaragua Case

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## PERSPECTIVES

# Between a Rock and a Hard Place— The United States, the International Court, and the *Nicaragua* Case\*\*

In June 1986 the International Court handed down one of its most important judgments in forty years. It was certainly the most important for the United States. According to some observers, the decision was the best that the Court has delivered, and under difficult circumstances too. According to others, the decision was the worst in the history of the Court, one that was bound to destroy the Court as an authoritative judicial institution.<sup>1</sup> Both sides would agree, however, that the *Nicaragua* decision<sup>2</sup>

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\*\*This article is adapted from a speech delivered on November 11, 1986, to the American Branch of the International Law Association and the American Society of International Law at the "International Law Weekend in New York" held at the Association of the Bar of the City of New York.

The Editorial Reviewer for this article is Linda S. Foreman.

1. For thorough background discussions (and contrasting points of view) on the content and importance of the *Nicaragua* case, see Almond, *The Military Activities Case: New Perspectives on the International Court of Justice and Global Public Order*, 21 INT'L LAW. 195 (1987); Rowles, *Nicaragua v. United States: Issues of Law and Policy*, 20 INT'L LAW. 1245 (1986); see also the broad variety of views on the *Nicaragua* case, in *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)* 81 A.J.I.L. 77 (1987) (including comments by: Herbert W. Briggs, Francis A. Boyle, Gordon A. Christenson, Anthony D'Amato, Richard Falk, Tom J. Farer, Thomas M. Franck, Michael J. Glennon, Edward Gordon, John Lawrence Hargrove, Mark Weston Janis, Frederick L. Kirgis, Jr., John Norton Moore, Fred L. Morrison, W. Michael Reisman and Fernando R. Tesón).

2. *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, Merits, 1986 I.C.J. 14 (June 27).

was, without question, the most important case that the Court has decided in a long, long, time.<sup>3</sup>

The case presented a number of novel, sensitive, and difficult issues to the Court. It was a case of first impression, both in fact and in law. Nicaragua had accused the United States of using force against it, both by direct attacks (such as the mining of Nicaragua's harbors)<sup>4</sup> and by the direct and indirect support of armed insurgencies within Nicaragua.<sup>5</sup> It claimed as violations of international law the economic boycott of Nicaragua by the United States,<sup>6</sup> overflights of Nicaragua by United States military aircraft,<sup>7</sup> and the conduct of military maneuvers close to the Nicaraguan border.<sup>8</sup> Nicaragua also claimed that the preparation of written manuals and materials for the insurgent Contras by agents of the United States constituted a violation of international humanitarian law.<sup>9</sup> These various claims were founded on the United Nations Charter,<sup>10</sup> on various other multilateral treaties,<sup>11</sup> and on "general and customary international law."<sup>12</sup> The *Nicaragua* case possesses important long-range implications for both the United States and the Court.

There is always difficulty with true separation between international law and international politics. After all, it is States that are the actors in international law, the world being their stage. Their actions and interactions are by their very definition political. These comments, however, are

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3. In terms of the finding of the law and the ordering of procedures it is possibly more significant than any other case ever decided, ranking with the *Lotus* case, the *Silesia* cases and *Chorzów Factory*, the *Corfu Channel* case, the *South West Africa* cases, and the *Hostages* case. The S.S. "Lotus" (Fr./Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); German Interests in Polish Upper Silesia (Ger. v. Pol.) (Jurisdiction), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25); German Interests in Upper Silesia, 1926 P.C.I.J. (ser. A) No. 7, at 73 (Merits); German Interest in Polish Upper Silesia and the Factory at Chorzów (Ger. v. Pol.) (Jurisdiction), 1927 P.C.I.J. (ser. A) No. 9 (July 26); (Interim Protection), 1927 P.C.I.J. (ser. A) No. 12 (Order of Nov. 21); (Interpretation), 1927 P.C.I.J. (ser. A) No. 13 (Dec. 16); (Indemnity), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13); (Expert Enquiry), 1928 P.C.I.J. (ser. A) No. 17 (Order of Sept. 13); *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4 (Apr. 9); Assessment of Amount of Compensation, 1949 I.C.J. 244 (Dec. 15); *South West Africa* (Eth. v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319 (Dec. 21); Second Phase, 1966 I.C.J. 6 (July 18); *United States Diplomatic and Consular Staff in Tehran* (US v. Iran), 1980 I.C.J. 3 (May 24).

4. *Nicaragua* case, 1986 I.C.J. at 45-48, paras. 75-80.

5. *Id.* at 18-20, para. 15 & at 48-65, paras. 81-116.

6. *Id.* at 18-20, para. 15 & at 69-70, paras. 123-25.

7. *Id.* at 18-20, para. 15 & at 51-53, paras. 87-91.

8. *Id.* at 18-20, para. 15 & at 53, para. 92.

9. *Id.* at 18-20, para. 15 & at 65-69, paras. 117-22; and the Geneva Conventions referred to, *id.* at 114-15, para. 220.

10. *Id.* at 18-20, para. 15 & at 92-97, paras. 172-82.

11. *Id.* at 18-20, para. 15 & at 35-38, paras. 49-56.

12. *Id.* at 18-20, para. 15 & at 92-106, paras. 172-201.

intended to be legal, and not political in nature. They should be interpreted as professional legal commentary from an international lawyer who is concerned, as all of us must be, about the present state of international law in the light of the *Nicaragua* decision.

## I. Nonappearance and Disappearance

The whole context of the *Nicaragua* case was highly abnormal. The United States walked out of the Court after the jurisdictional decision was rendered but before the merits phase got under way.<sup>13</sup> This action was unprecedented in the history of either Court.<sup>14</sup> No other State—not even South Africa in the *South West Africa* cases<sup>15</sup>—had ever walked out after losing on jurisdiction but before arguing the merits. The U.S. non-appearance, which could more aptly be described as a “disappearance,” has profound implications for what many still perceive as the United States’ position as a world leader.

First and foremost, the disappearance of the United States from the courtroom in January 1985 created the inescapable implication that the United States had no confidence in its own case. It destroyed public confidence in the affirmative defense by the United States, of “collective self-defense.” It rang hollow: how could a party walk away from a fight that it asserted it must so clearly and obviously win? This impression was unfortunately reinforced by an unsuccessful last-ditch attempt by the United States in April 1984, on the very eve of Nicaragua’s filing its complaint, to oust the Court of jurisdiction by withdrawing from the jurisdiction of the Court concerning Central America.<sup>16</sup>

13. See Department of State, *United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, Jan. 18, 1985, reprinted in 24 I.L.M. 246 (1985); the Statement was supported by *Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the Case of Nicaragua v. United States of America*, 24 I.L.M. at 249.

14. See Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 A.J.I.L. 992 (1985).

15. *Supra* note 2.

16. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. United States) (Jurisdiction of the Court and Admissibility of the Application), 1984 I.C.J. 392, 415-21, paras. 52-65 (Nov. 26). The attempt to withdraw was unsuccessful because it was untimely filed: the U.S. declaration on its face required a six-months’ notice period before termination of the jurisdictional clause. 39 I.C.J. Y.B. 99, 100 (1985). This impression was also confirmed by a general withdrawal by the United States on October 7, 1985, from compulsory jurisdiction under the “optional clause” of the Court’s Statute, which provides for the jurisdiction of the Court over a wide possibility of subjects in the absence of special treaty and on the condition of reciprocity. *Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction*, Oct. 7, 1985, reprinted in 24 I.L.M. 1742 (1985). The “optional clause” is found in Statute of the International Court of Justice, art. 36, para. 2, (and its predecessor, the Permanent Court of International Justice). It provides that:

In consequence, the United States was required to assert that its defense was strong, but that *the forum* was inappropriate, biased and inhospitable. Thus, the United States commented on "the impression that the Court is determined to find in favor of Nicaragua in this case."<sup>17</sup> Criticism by the United States on the jurisdictional decision came perilously close to hyperbole; it even suggested that the Court lacked integrity: "We will not risk U.S. national security by presenting such sensitive material in public or *before a Court that includes two judges from Warsaw Pact nations.*"<sup>18</sup>

The disappearance also rendered a certain type of decision all but inevitable: once the United States had disappeared, the Court possessed no real alternatives in certain important respects. It was the decision to "disappear" that forced the Court to structure the *Nicaragua* decision in several ways; the irony is that these aspects are now the most likely targets for criticism by the United States.

In a nutshell: the United States brought its present difficulties with the Court on itself.<sup>19</sup>

## II. Effect of the Affirmative Defense of the United States

The United States did not in any meaningful way controvert or deny most of the factual charges in the *Nicaragua* case during the jurisdiction phase of the case or otherwise. To the contrary, what it did was to allege an *affirmative defense*: that of the exercise of the "inherent right of in-

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2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

For a useful discussion of the optional clause and the United States' action in withdrawing jurisdiction thereunder, see T. FRANCK, *JUDGING THE WORLD COURT* 24-33 (1986).

17. *Statement on the U.S. Withdrawal*, *supra* note 13, at 248.

18. *Id.* (emphasis added). This last comment received the stinging rebuke it deserved, most notably in the separate opinions of Judge Lachs, 1986 I.C.J. at 158-60, who, in spite of his judicial distinction and intellectual independence unfortunately was one of the targets of the implications in the United States' suggestion, and of Sir Robert Jennings, an innocent bystander, *id.* at 528.

19. One is necessarily reminded of what Hans and Fritz, in the brilliant 1930s-1940s comic strip called *The Katzenjammer Kids*, used to tell Momma and Poppa after their mischievous cousin Rollo had, once again, found himself in a predicament of his own making: "He brought it on himself." This is a less elegant version of Shakespeare's oft-quoted: "For 'tis the sport to have the engineer / Hoist with his own petard." (*Hamlet*, Act III, Scene 4, l. 206.)

dividual or collective self-defense" under article 51 of the Charter.<sup>20</sup> Although the United States was not present in Court in the second phase of the proceedings to argue that defense on the merits, it had been made clear during the earlier phase of the proceedings<sup>21</sup> and was fully taken into account by the Court.<sup>22</sup>

The right of self-defense so alleged was of course asserted in relation to justifying the various actions complained of by Nicaragua, which were alleged to be in response to the aggressive behavior of Nicaragua toward her neighbors, El Salvador, Costa Rica, and Honduras. The right sought to be exercised was "collective" and not "individual" in that the United States was asserting that its actions were on behalf of its Central American allies.

What happens to an affirmative defense, however, when the party relying on it refuses to appear in Court and present evidence on the issue? Article 53 of the Statute was specifically designed to take care of instances when a party was absent from proceedings before the Court, and requires the Court to satisfy itself that the plaintiff's (the "applicant's") case is "well founded in fact and in law."<sup>23</sup> Yet how can the Court seriously be expected to advance and evaluate every argument and counter-case that might have been raised by the respondent if it had been present?

The Court noted repeatedly in its opinion that there was no evidence—or at least insufficient evidence—before it to support various assertions that had been made by the United States, including specifically a residual defensive charge of Nicaraguan aggression against El Salvador.<sup>24</sup> To compound the problem, El Salvador (which had failed to renew its earlier application to intervene in the *Nicaragua* case) was not present in Court to produce evidence<sup>25</sup> that, no doubt, would have gone to the heart of

20. "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. . . ." U.N. CHARTER, art. 51.

21. See the Counter-Memorial Submitted by the United States of America, Aug. 17, 1984, in *Nicaragua* (Jurisdiction), 1984 I.C.J. at 515-19, paras. 189-219.

22. *Nicaragua* case, 1986 I.C.J. at 102-06, paras. 193-201.

23. U.N. CHARTER art. 53 reads:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law. (Emphasis added.)

24. *Nicaragua* case, 1986 I.C.J. at 70-86, paras. 126-160, especially para. 160. See the dissenting opinion of Judge Oda, *id.* at 240-41, para. 61, and examples given; see also *id.* at 46, para. 76, at 56, para. 85, at 65-66, para. 117, at 70, para. 125, at 87-88, para. 165 (*contra* comments in the dissenting opinion of Judge Schwebel, *id.* at 323, para. 134), at 119-21, paras. 231-33, at 141, para. 282.

25. Yugoslavia, not a party to the *Corfu Channel* case, produced evidence for the Court to consider in 1947. *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 17, (Apr. 9).

the matter; it was, after all, largely in response to alleged Nicaraguan aggression against El Salvador that the United States had invoked the "inherent right of . . . collective self-defense" under article 51 of the Charter.

And yet, with the United States absent, in what form of proceedings would El Salvador have been seeking to intervene? Had El Salvador's application been granted, it would eventually have found itself in an impossible quandary: it would have become a "quasi-respondent," alone at the counsel table without its "champion," the United States,<sup>26</sup> bearing an unacceptably heavy burden of responsibility as to the outcome of the case against that champion.

Much of the criticism to be leveled at the Court's judgment will no doubt concern its handling of the facts. It doubtless will be said by the United States and others that the Court misconstrued the voluminous and complex facts before it; was proceeding with an incomplete or one-sided dossier; and did not properly test the evidence before it. When viewed from the Court's perspective, however, what a bitter irony. How could the evidence before it be complete, in the absence of the defending State? How could the Court have a complete dossier? How could the Court fully test the evidence before it?<sup>27</sup>

The Court adopted several new approaches to cope with the one-sidedness of the situation. First, the Court relied upon inference and deductive reasoning more obviously than it had ever done before. Second, the Court placed substantial reliance on a form of judicial notice of matters in the public record<sup>28</sup> or facts described in press reports that had not been

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26. To borrow the felicitous word used by Judge Sir Robert Jennings, 1986 I.C.J. at 545.

27. See Highet, *Evidence, the Court, and the Nicaragua Case*, 81 A.J.I.L. 1 (1987), especially at 1-5, 49-51.

28. The *Hostages* case (United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 9-10, paras. 12 & 13 (May 24)). See also the comments by Judge Jessup, at page x of his introduction to D.V. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* (rev. ed. 1975), with respect to the Court's use of extra-judicial public knowledge relating to French intentions in the *Nuclear Tests* case (Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)), 1974 I.C.J. 253, 457 (Dec. 20). The Court referred to its decision in the *Hostages* case, 1980 I.C.J. at 9, para. 12: "The Court [there] referred to facts which 'are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries' " and proceeded to state that:

The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

(*Nicaragua* case, 1986 I.C.J. at 41, para. 63; see also *id.* at 53, para. 92 & at 65-66, para. 117; but see the dissenting opinion of Judge Schwebel, *id.* at 317, para. 120 & at 324, paras. 138-39). See Highet, *supra* note 27, at 39-40.

denied by responsible officials of the State chargeable with those facts.<sup>29</sup> In this regard, the Court developed a somewhat novel, but quite sensible, theory of evaluation of public official statements: it accepted them as true, as a form of admission, when made by a governmental official against the interest of the State of which that person was an official,<sup>30</sup> but discounted them as possibly self-serving when made in its favor.<sup>31</sup> This double-edged approach was applied to statements made by officials both of the United States and of Nicaragua.

These approaches constitute the most significant evolution in the Court's methods of dealing with questions of fact since its use of circumstantial evidence in the *Corfu Channel* case in 1949.<sup>32</sup> In that case Albania was held liable by the application of circumstantial evidence, in the absence

29. *Nicaragua* case, 1986 I.C.J. at 87, paras. 163-64; at 50, para. 84; at 51-52, paras. 88-89. (In discussing press reports attributing certain overflights to the United States, the Court stated that it was "not however aware of any specific denial of these flights by the United States Government," *id.* at 52, para. 89); *but see* the dissenting opinion of Judge Schwebel, *id.* at 317, para. 120 & at 326-31, paras. 145-53. *See* Highet, *supra* note 27, at 40.

30. *Nicaragua* case, 1986 I.C.J. at 41, para. 64 (emphasis added). A refusal to comment was treated as an admission, *id.*, at 49, para. 83 ("In the view of the Court, the President's refusal to comment on the connection between covert activities and 'what has been going on, or with some of the specific operations down there' can, in its context, be treated as an admission that the United States had something to do with the Corinto attack, but not necessarily that United States personnel were directly involved." (Emphasis added.)) Presidential statements were also used in a corroborative sense, *id.* at 47, para. 78; at 50, para. 86; at 68, para. 121; at 71-73, paras. 128 and 131; at 79-82, paras. 144-51. *See* Highet, *supra* note 27, at 36-38.

31. *Nicaragua* case, 1986 I.C.J. at 41, para. 65:

However, it is natural also that the Court should treat such statements [made by high officials of the States concerned] with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (*cf.* I.C.J. Reports 1980, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree they constituted acknowledgements of a fact.

*See also id.* at 43, paras. 69 & 70; this principle was applied *inter alia* to the affidavit of Secretary of State Shultz that had been annexed to the Counter-Memorial of the United States: *id.* at 71-72, para. 128: "In connection with this declaration, the Court would recall the observations it has already made . . . as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict." *But see* the dissenting opinion of Judge Schwebel, *id.* at 271-72, para. 14 & Factual Appendix Part G, *id.* at 410-11, para. 27. *See* Highet, *supra* note 27, at 38-39.

32. *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4 (Apr. 9).



of any forthcoming explanation, for the presence in its territorial waters of armed mines that caused loss of life and severe damage to two Royal Navy destroyers on a post-war patrol.<sup>33</sup>

### III. Effect of the Multilateral Treaty Reservation of the United States

Courts unquestionably benefit from hearing both sides of an argument. The International Court of Justice is no exception. Indeed, it can be said that that Court benefits even more than most others from the presentation of arguments by both sides, if only because the subject-matter of disputes before it tends to be very complex and the written pleadings extraordinarily lengthy.<sup>34</sup> In order to steer the judges through the thickets of the written arguments and to refine the issues before the Court, participation in the oral proceedings is essential.

In the *Nicaragua* case the issues presented were complex and wide-ranging. They included allegations of breach by the United States of its obligations under the United Nations Charter, and under customary international law (separate and independent from the Charter).<sup>35</sup> These obligations include the nonuse of force and nonintervention in the internal affairs of other States.<sup>36</sup> They also include the requirement not to take action inconsistent with the object and purpose of, and violate provisions of, the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua, which had not been denounced or terminated by the United States.<sup>37</sup> Nicaragua also adduced obligations under the Charter of the Organization of American States<sup>38</sup> and under customary international law.<sup>39</sup>

It was this last submission that won the case for Nicaragua, since the Court was confronted by a patently absurd dilemma concerning the "Van-

33. See Hight, *supra* note 27, at 30-32.

34. In most cases it is not unusual to have written pleadings that run to *thousands* of pages (there being two and sometimes three "rounds" of such pleadings, and the pleadings themselves being normally amply endowed with annexes, exhibits, and supporting materials); there is of course, in the absence of agreement, no formal limitation on the length or content of the pleadings that can be filed by the parties (which are sovereign States), except that they must contain submissions and set forth the facts and the law.

35. *Nicaragua* case, 1986 I.C.J. at 18-20, para. 15.

36. U.N. CHARTER, art. 2, para. 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 Purposes of the United Nations." See *Memorial of Nicaragua of 30 April 1985* in the *Nicaragua* case, 1986 I.C.J. at 114-45, paras. 213-74.

37. *Id.* at 196-223, paras. 376-433.

38. *Id.* at 168-82, paras. 319-48.

39. *Id.* at 224-54, paras. 434-502.

denberg Amendment," the multilateral treaty reservation that then formed part of the U.S. "optional clause" declaration (a general accession to the Court's jurisdiction, under which the case had been successfully pressed by Nicaragua).<sup>40</sup> This reservation *excluded* jurisdiction as to "disputes arising under a multilateral treaty, unless . . . all parties to the treaty affected by the decision are also parties to the case before the Court. . . ."<sup>41</sup> This meant that if the Court were to honor the reservation, it would be required to throw out any Nicaraguan claims based on treaty law (such as that of the United Nations Charter) *unless all other parties to the treaty "affected by the decision" were brought into the case.*<sup>42</sup>

The Court had never been faced with this reservation in such a virulent form, since the reservation, when applied to the United Nations Charter, is either unintelligible or surrealistic; it would have required over 157 member States to intervene successfully in the *Nicaragua* case in order for the reservation not to serve as a bar to the Court's jurisdiction.<sup>43</sup> The Honorary President of the American Society of International Law, Herbert Briggs—who earlier in his long and illustrious career actually heard the oral arguments in the *Lotus* case<sup>44</sup> in 1927—aptly characterized the Vandenberg Reservation in 1958 as "betray[ing] such confusion of thought that to this day no one is quite sure what it means."<sup>45</sup>

How does a court respond to such an extreme and extraordinary reservation as the multilateral treaty reservation in its "Vandenberg" form? One interesting approach might have been to adopt the reasoning of Judge Lauterpacht concerning "self-judging" reservations in his separate opinion in the *Norwegian Loans*<sup>46</sup> case in 1957, in which he found, in the instance of the Connally Amendment of the United States (the companion to the Vandenberg Amendment), that "the element of legal obligation is reduced to a vanishing point."<sup>47</sup> In context, is this characterization not also true of the multilateral treaty observation of the United States in the *Nicaragua* case?

40. See *supra* note 16 for discussion of the "optional clause."

41. 39 I.C.J. Y.B. 99, 100 (1985) (emphasis added).

42. See *Nicaragua* case, 1986 I.C.J. at 28-38, paras. 36-56.

43. Even *one* intervention, under the existing law and procedure of the Court, is a near impossibility to achieve: The S.S. "Wimbledon" (Gr. Brit., Fr., It., Jap., Pol. v. Ger.) (Intervention by Poland), 1923 P.C.I.J. (ser. A) No. 1 (June 28); Continental Shelf (Tunisia/Libyan Arab Jamahiriya); Application [Malta] for Permission to Intervene, 1981 I.C.J. 3 (Apr. 14); Continental Shelf (Libyan Arab Jamahiriya/Malta); and Application [Italy] for Permission to Intervene, 1984 I.C.J. 3 (Mar. 21).

44. The S.S. "Lotus" (Fr./Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

45. Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 1958 RECUEIL DES COURS 229, at 307.

46. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 34, 47-55 (July 6), see also Briggs, *supra* note 45, at 306-08.

47. 1957 I.C.J. 52.

Nevertheless, the Court in the *Nicaragua* case did not go as far as Judge Lauterpacht would have done; it decided to keep the case while simultaneously giving effect to (that is to say, not disregarding) the Vandenberg Reservation.<sup>48</sup> Yet it also found that the proscription against the use of force expressed in article 2, paragraph 4 of the Charter<sup>49</sup> had passed into customary international law that was *independently* binding upon Nicaragua and the United States.<sup>50</sup>

The Court's several important findings in the *Nicaragua* case will doubtless come under hostile fire by those who are disappointed with the decision. Had the United States been present in Court during the merits phase, however, it doubtless could have focused the argument far more sharply on the important issue of the nature and extent of customary international law rules parallel to, and reflective of, the conventional rules of the United Nations Charter. The Court's views might well have been refined and strengthened—as well as judiciously limited, perhaps—had the Court had the benefit of opposing arguments on this intricate point.<sup>51</sup> It could also have sharpened its analysis of the key issues of the nature and extent of intervention and justifiable self-defense in response to an armed attack.

By appearing, the United States at least could have avoided placing itself in the “no-win” situation that has now ensued; at most, it might actually have prevailed on a number of these major points, or have shaped the decision of the Court more consistently with the positions it espoused. Instead, the United States now must say that the judgment on jurisdiction was a nullity, stonewall the decision on the merits, veto efforts to enforce it, and impugn the honor and the independence of the Court and its judges.

#### IV. Enforcement and Propriety of a Veto

The conduct of the United States before the Court creates a number of grave concerns with regard to the United Nations Charter. The Statute of the Court provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case,”<sup>52</sup> and that “[t]he judgment is final and without appeal.”<sup>53</sup>

The hitherto unused provision of the U.N. Charter for enforcement of a Court judgment against a recalcitrant losing party is contained in article 94, paragraph 2:

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48. See *Nicaragua* case, 1986 I.C.J. at 31-38, paras. 42-56.

49. See *supra* note 36.

50. See *Nicaragua* case, 1986 I.C.J. at 92-97, paras. 172-82.

51. *Id.* at 97-104, paras. 183-95.

52. Statute of the International Court of Justice, art. 59.

53. *Id.* art. 60.

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Nevertheless, it is not merely the second paragraph of article 94 that must be kept in mind. Its first paragraph states: "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Two elements, therefore, are present under the Charter: the obligation of a party to comply with the judgment, and the possibility that the Security Council may enforce it.

Following the decision of the Court in June 1986, there was a stunned silence. Nicaragua promptly sought to obtain confirmation of the Court's decision by an appeal to the Security Council of the United Nations.<sup>54</sup> This attempt was vetoed by the United States on July 31, 1986.<sup>55</sup> On October 21, 1986, Nicaragua again addressed the question of enforcement of the judgment to the Security Council.<sup>56</sup> After discussion in several sessions,<sup>57</sup> on October 28, 1986, the United States again vetoed the draft resolution.<sup>58</sup> The matter has now been dealt with (albeit in a nonbinding manner) by a resolution of the U.N. General Assembly on November 6, 1986,<sup>59</sup> that: "*Urgently calls* for full and immediate compliance with the Judgment of the International Court of Justice of 27 June 1986 . . . in conformity with the relevant provisions of the Charter of the United Nations. . . ."<sup>60</sup>

This case represents the first instance of a veto of article 94 enforcement in the U.N. repertory of practice. No question was raised that a "no" vote in one's own interest could be considered as inappropriate in light

54. By Letter dated June 27, 1986, from the Permanent Representative of Nicaragua to the United Nations, addressed to the President of the Security Council (S/18187), initially considered at the 2694th Meeting of the Security Council on July 1, 1986 (S/PV.2694).

55. S/PV.2704, July 31, 1986, at 54-55.

56. By Letter dated October 17, 1986, from the Permanent Representative of Nicaragua to the United Nations, addressed to the President of the Security Council (S/18415), initially considered at 41 U.N. SCOR (2715th mtg.), U.N. Doc. S/PV.2715 (Oct. 21, 1986).

57. Oct. 22, 26, 28, 1986 U.N. Doc. S/PV.2716, S/PV.2717 and S/PV.2718 respectively.

58. U.N. SCOR (2718th mtg.) at 51, U.N. Doc. SC/4880 (Oct. 28, 1986); see N.Y. Times, Oct. 28, 1986, at 3, col. 4.

59. U.N. Doc. A/41/PV.53 at 92 (Nov. 6, 1986), 93 votes to 3, with 47 abstentions. The negative votes were cast by the United States, El Salvador and Israel. Costa Rica and Honduras, the United Kingdom and France were amongst the abstainers. Canada and Mexico, as well as Colombia and Venezuela, voted in favor of the resolution. A/RES/41/31 (Nov. 24, 1986); see also U.N. Doc. A/41/244 (Oct. 29, 1986).

60. A/RES/41/31 at 2 (Nov. 24, 1986) (emphasis added). The resolution recites specifically, in a preambular clause, "that Article 36, paragraph 6 of the Statute of the Court provides that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court' " *Id.* at 1; this was obviously intended to counter the argument, frequently repeated by the United States representatives, that the Court did not have jurisdiction in the case.

of the provisions of article 94, paragraph 1 of the Charter, cited above. The United States agreed to be bound by that provision when it joined the United Nations in 1945.

Perhaps the only way to resolve the conflict between the provisions of article 94, paragraph 1 and the United States' veto of the resolution seeking to enforce the Court's *Nicaragua* judgment is by reference to the 1925 opinion of the Permanent Court of International Justice<sup>61</sup> in the *Treaty of Lausanne* case. In that case the Permanent Court effectively set aside the potential veto of Great Britain in a matter in which it was directly interested, stating: "The well-known rule that no one can be judge in his own suit holds good."<sup>62</sup> This "well-known rule" would appear to be just as applicable today with regard to article 94 of the Charter as it was over fifty years ago in the *Treaty of Lausanne* case.

Technically the veto of a permanent member of the Security Council is only disallowed under the Charter in relation to matters specifically enunciated in article 27, paragraph 3, which contains (by implication) the "veto" power in the first place.<sup>63</sup> Following the maxim *inclusio unius est exclusio alterius* would result in excluding any other possibilities of disqualifying a negative vote in the Security Council. On the other hand, faced with the blunt obligations of article 94, paragraph 1, it is hard to see how the exercise of a veto could be consistent with other Charter obligations and, therefore, valid as to the Charter.<sup>64</sup>

It is certainly still wrong for the United States to veto an enforcement action against it, when article 94, paragraph 1 of the Charter is also taken into account. The Charter should be read, and applied, as a whole. The

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61. In many ways and to a great extent the "predecessor" institution to the present International Court of Justice, although the Permanent Court was not constitutionally an organ of the League of Nations in the same manner that the International Court is the "principal judicial organ" of the United Nations. U.N. CHARTER, art. 92. In fact, the Court is the only United Nations organ whose role is characterized in constitutional terms. See the illuminating discussion in Gross, *The World's Empty Court House*, VISTA, May-June 1970, at 24-27, especially at 26.

62. Interpretation of art. 3, para. 2, Treaty of Lausanne (Frontier Between Iraq and Turkey), 1925 P.C.I.J. (ser. B) No. 12, at 32 (Advisory Opinion of Nov. 21, 1925).

63. Art. 27, para. 3 provides: "Decisions of the Security Council on all other matters [other than 'procedural'] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." (Italics added.) Ch. VI relates to the pacific settlement of disputes, and art. 52, para. 3 relates to the Security Council's power to refer disputes for settlement to regional organizations and arrangements.

64. It could be argued that vetoing an enforcement action is technically not prohibited, and that what is not prohibited is permitted. It can also be argued that the most that such a veto would entail would be the breach of an obligation under another article of the Charter, but not under art. 27.

fact that there may be a technical defense to invalidating a veto in this circumstance does not justify the United States' taking advantage of it when another provision of the Charter is clearly violated and when the principle of *nemo idex in re sua*, enunciated in the *Lausanne* precedent, cannot be avoided.

The matter is still far from settled. A further stage of the proceedings will evaluate damages and assess compensation.<sup>65</sup> Moreover, the United States' refusal to comply with the Court's judgment in the *Nicaragua* case and its subsequent vetos in the Security Council raise a number of related and unanswered questions.

*First*, does not the present attitude of the U.S. Government require a conclusion that the United States is wedded to an interpretation of the Charter that article 94, paragraph 1 is not binding?

*Second*, does the United States, bound by article 94, still have a duty to reenter the proceedings to assist the Court in the compensation phase, and to mitigate damages?<sup>66</sup>

*Third*, does the Executive Branch of the United States Government not have a responsibility to avoid the needless accumulation of liabilities under treaties and other international agreements?

*Fourth*, does not the present position of the United States reflect an assumption that no judgment of the International Court is enforceable against a permanent member of the Security Council?<sup>67</sup>

*Fifth*, does not such a recognition of unenforceability by an important past supporter of the Court lead to the conclusion that the Court is henceforth irreversibly weakened?

*Sixth*, and last, is there anything that would legally prevent the United States from reconsidering its position?

The answers to these questions are complex and thought-provoking. It is likely that they will depart from the realm of international law and cross the border into policy and political judgment. Yet answers must be sought with all the intelligence and wisdom of which our policymakers are capable. International lawyers in the United States have an obligation to reflect on these difficult questions before their answers become cast in stone and part of our history forever.

65. *Nicaragua* case, 1986 I.C.J. at 142-43, paras. 283-85; at 149; para. 292(15) (*dispositif*).

66. The Court even touched on this eventuality: "[W]hile the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes." 1986 I.C.J. at 143, para. 284.

67. Because of the possibility of that member's exercising a "veto" against any enforcement action, as discussed above.

## V. Effect on the Court: the Medium- and Long-Term Future?

What is to be the impact on the International Court of Justice of the conduct of the United States with regard to the *Nicaragua* case? By defying the Court in *Nicaragua*, the United States has made it clear that it may well defy the Court again. In doing so, it tends to undermine the entire organization of which the Court is the principal judicial organ.<sup>68</sup> Although this may not create immediate adverse effects on the United States,<sup>69</sup> the long-range policy effects are obviously grave. By seeming to attack the Court as an institution, however, the United States' action could precipitate and reinforce a more positive attitude toward the Court on the part of the vast preponderance of other member States.

It may well be urged that the same type of inactivity that the Court experienced following its decision in the *South West Africa* cases<sup>70</sup> twenty years ago will be repeated. It will be said that the Court in *Nicaragua* was overly attentive to the Third World<sup>71</sup> and adopted an unrealistic posture concerning the war and peace issues confronting the Western democracies. Such accusations would be both unfortunate and unfair, as they would ascribe an ideological position to a legal determination. Although it is of course entirely possible not to agree with the Court's determinations in the *Nicaragua* case, it is not necessary to base that disagreement on a declaration that the Court is necessarily biased, and any such declaration should only follow rigorous demonstration and concrete proof.

It is nonetheless inevitable that the Court and its clientele will become increasingly sensitive to Third World States. Already a general increase in Court traffic on the part of Third World States is apparent.<sup>72</sup> They are

68. U.N. CHARTER, art. 92; see *supra* note 61.

69. However, the possibility of third-party or collateral enforcement of the decision should not be lightly dismissed.

70. *South West Africa* (Eth. v. S. Afr.; Liberia v. S. Afr.), Second Phase, 1966 I.C.J. 6 (July 18). See L. HENKIN, *HOW NATIONS BEHAVE* 187 (2d ed. 1979); and M. KATZ, *THE RELEVANCE OF INTERNATIONAL ADJUDICATION* 103-44 (1968).

71. If such terminology is of any real continuing usefulness and propriety, where it would now appear to apply to the great majority of member States of the United Nations.

72. They have played a surprisingly active role even in the past two decades, in spite of the slump following the *South West Africa* judgment in 1966. See for example these cases (in addition to the *Nicaragua* series) involving Third World interests: Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 328 (Interim Protection Order of July 13), and removal from list, *id.* at 347 (Order of Dec. 15); Western Sahara, 1975 I.C.J. 12 (Advisory Opinion of Oct. 16); Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3 (Interim Protection Order of Sept. 11), and 1978 I.C.J. 3 (Dec. 19); Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73 (Advisory Opinion of Dec. 20); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24); Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application [Malta] for Permission to Intervene, 1981 I.C.J. 3 (Apr. 14); Continental Shelf (Tunisia/Libyan Arab Ja-

encouraged perhaps by the reasonably accurate perception that the Court, in the *Nicaragua* case, succeeded in placing distance between its methods and the earlier positivistic approach for which it had been so extensively criticized in 1966 following the *South West Africa* decision.<sup>73</sup>

The Court does not now find itself in a desert of inactivity, as was the case in the years following 1966 and *South West Africa*. It is actually busier today than it has been for years: the Chamber in the *Mali/Burkina Faso* boundary dispute has rendered a decision;<sup>74</sup> the United States and Italy have submitted a case to a chamber of the Court;<sup>75</sup> the damages or "reparations" phase of the *Nicaragua* case is still pending;<sup>76</sup> and an advisory opinion has just been handed down.<sup>77</sup> Additionally, Nicaragua has filed two new cases<sup>78</sup> with the Court since the Court's *Nicaragua* decision,<sup>79</sup> and a third (or fourth) Central American case, involving the territorial and maritime boundary dispute between El Salvador and Honduras, has also been brought.<sup>80</sup>

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mahiriya), 1982 I.C.J. 18 (Feb. 24); Continental Shelf (Libyan Arab Jamahiriya/Malta), Application [Italy] for Permission to Intervene, 1984 I.C.J. 3 (Mar. 21); Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13 (June 3); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), 1985 I.C.J. 192 (Dec. 10); Frontier Dispute (Burkina Faso/Mali) 1986 I.C.J. (Dec. 22).

73. See *supra* note 70; and also: "In different respects and for different reasons, the Court was not [politically] responsive enough in the South West Africa Cases and in its Certain Expenses Advisory Opinion and probably was overly responsive in the Namibia Advisory Opinion." R.A. FALK, REVIVING THE WORLD COURT 23 (1986).

74. Frontier Dispute (Burkina Faso/Mali) 1986 I.C.J. (Dec. 22).

75. *Elletronica Sicula S.D.A.* (U.S. v. Italy); see Statement of 7 October 1985, reprinted in 24 I.L.M. 1745 (1985), and I.C.J. Communiqué No. 87/13 of May 27, 1987.

76. *Nicaragua* case, 1986 I.C.J. at 142-43, paras. 283-85, especially para. 284, & at 149, para. 292(15) (*dispositif*).

77. Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal (*Yakietetz v. Secretary-General of the United Nations*), Advisory Opinion of May 27, 1987; see I.C.J. Communiqué No. 87/12 of May 27, 1987.

78. See I.C.J. Communiqué No. 86/10 of July 29, 1986, announcing the filing of two applications by Nicaragua on July 28, 1986, one against Costa Rica and one against Honduras, each entitled "*Border and Transborder Armed Actions*" (Nicar. v. Costa Rica; Nicar. v. Honduras). Both respondents have appointed agents; Honduras is expected to contest its case on jurisdictional grounds, and Costa Rica has reserved the right to present a counterclaim on the merits; see, respectively, I.C.J. Communiqué No. 86/11 and I.C.J. Communiqué No. 86/12 of Sept. 3, 1986. Nicaragua's action against Costa Rica has subsequently been withdrawn. I.C.J. Communiqué No. 87/21 of Aug. 19, 1987.

79. It will however be interesting, and most important, to note carefully the extent to which (if at all) the Court's application of the principles and rules of evidence developed in the original case of *Nicaragua v. United States* in 1986 will be applied, adapted, modified, or may remain unused in these two subsequent cases, and also the extent to which (if at all) the Court will modify or alter its interpretation of the critical legal principles as set forth in the original *Nicaragua* case. See generally Highet, *supra* note 27; Highet, *Evidence and Proof of Facts*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 355-75 (L. Damrosch ed. 1987).

80. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), *Compromis* of May 24, 1986, registered with the Secretary-General of the United Nations on Oct. 7, 1986;



It is evident that many of the positive suggestions made over the years for improvement of the Court appear to have seen realization in the aftermath of *Nicaragua*. These include the oft-repeated urging the the Court be able to handle a greater number of cases in chambers; that the Court seek to establish rules of procedural order in questions of factual examination and evidentiary production; that the Court be utilized more by developing States; and that the Court not flinch from confronting difficult questions of international polity.

In fact, the Court *is* now becoming increasingly busy with certain traditional and relatively limited disputes, brought in large part by special agreement and relating to smaller States of the Third World. Chambers are being used with increasing frequency. The Court has dealt with complex facts in *Nicaragua* and has established new rules and approaches for future cases. The Court has not flinched from pronouncing on issues of serious international concern such as the security and intervention issues presented in *Nicaragua*. It is hoped that a steadily increasing number of new cases will continue to come to the Court, no matter what they involve, and no matter what their provenance.

What about the position and reaction of the United States? The fear is that, at the end of the day, the long-held antinomy in American political and intellectual life between what Tom Franck has called "Messianists"—the overt internationalist idealists—and "Chauvinists—the isolationist unilateralists—will be crystallized yet again. It may then become painfully clear that, although the United States may well have long wished to give a good appearance, it really never offered more than a camouflaged Chauvinist unilateralism.<sup>81</sup> Symptoms of that neo-unilateralism abound at the present time: the U.S. refusal to sign the Law of the Sea Convention, its withdrawal from UNESCO, its withdrawal of "optional clause" jurisdiction from the Court, the adoption of mandatory U.N. withholdings, increased pressure on U.N. diplomats, the entire context of the *Nicaragua* case, the Grenada operation, the confrontation with Libya over maritime rights, the bombings of Tripoli and Benghazi, the secret negotiations and arms trading with Iran, and now the unilateral decision to "reflag" Kuwaiti tankers in the Persian Gulf.

One may therefore anticipate some of the intricate unilateralist arguments that inevitably will be made about the *Nicaragua* case in an effort to soften what can only be described as the United States' revolutionary divergence from its obligations under the Charter and Statute. These

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see Order of the Court of May 8, 1987, I.C.J. Communique No. 87/9, May 11, 1987 and I.C.J. Communique No. 87/10, May 15, 1987.

81. See Franck, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, *supra* note 79, at 3-18.

arguments will no doubt include the assertion that the Court's clearly erroneous decision in the *Nicaragua* case is, because of its fundamental bias and overreaching, not truly a "decision" of the Court under article 59 of the Statute and article 94, paragraph 2 of the Charter, or a "judgment" of the Court under article 94, paragraph 1. It is not much further down this solipsistic path to urge that the United States was not in fact a "party" to a "case" at all, but rather to some species of nullity. One might also expect to hear the paroxysmic argument that the Court was no longer the "Court" intended by the Charter and the Statute, to the extent that it could have permitted itself to arrive at such an outrageously incorrect opinion as the *Nicaragua* decision.<sup>82</sup>

Each of these arguments, however, ignores the plain language of article 36, paragraph 6 of the Statute, "In the event of a dispute as to whether the Court has jurisdiction, *the matter shall be settled by the decision of the Court.*"<sup>83</sup> During the Security Council debates concerning enforcement of the *Nicaragua* judgment, U.S. Ambassador Walters stated: "No court, not even the International Court of Justice, has the legal power to assert jurisdiction where no basis existed for that jurisdiction."<sup>84</sup> What Ambassador Walters and the United States fail to acknowledge, however, is that in 1945 the United States, by signing the Charter, agreed that the *Court*, and not itself or any other single member State, would resolve any disputes over the Court's jurisdiction.<sup>85</sup>

In a sense we are confronted by a corollary of the story of the Oxford philosophy examination question which asked: "Can a man be happy on the rack? [*Discuss: 2 hours.*]" To this, the winning double-first candidate replied, after thinking about it for only one hour, and then in only one sentence: "Yes, but only if he is a *very good* man and it is a *very bad* rack." The corollary would be: "Can a State be justified in ignoring a judgment of the Court?" And the answer would be: "Yes, but only if it is a *very good* State, and it is a *very bad* judgment."

What does this mean? For the State to be "good," it cannot reasonably be argued that it has violated its international obligations; for the Court

82. As usual, Lewis Carroll expressed the problem succinctly and memorably:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "*which is to be master—that's all.*"

L. CARROLL, *THROUGH THE LOOKING-GLASS* 94 (1896; 1965 ed.) (emphasis added).

83. Emphasis added.

84. Security Council Meeting, Oct. 28, 1986, U.N. Doc. S/PV.2718, at 46.

85. See *Nicaragua* case, 1986 I.C.J. at 23-24, para. 27: "Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits."

to be "bad," it must have so obviously misinterpreted the international law it is bound to apply that substantially all informed commentators (and not just those within the State in question) agree that its decision is grossly erroneous. Only then could it be validly said that its decision has gone so far beyond its jurisdiction that it is abusive, and a nullity. This "critical level of error" should never be reached if international law scholars are substantially split as to the correctness of the Court's decision. (This would follow a fortiori if that split occurs in informed opinion within the very State contesting the correctness of the decision.)

Quite apart from the merits of the *Nicaragua* case, an important issue remains concerning the effectiveness of the Court *as an institution*. It is axiomatic that the Court is not a "court" at all if it is only respected by a party when it renders a favorable judgment; otherwise it is but a panel of convenience. Full faith and credit, the "binding force" of article 59 of the Statute, must be accorded to unfavorable and unpopular judgments as well as to victories. President Eisenhower put it simply and well: "It is better to lose a point now and then in an international tribunal, and gain a world in which everyone lives at peace under the rule of law."<sup>86</sup>

This is precisely the example that the United States is *not* setting, whether consciously or unconsciously. There is, in international life, a priceless and fragile element of moral accountability and leadership: at the end of the day and in the eye of history, one ounce of that leadership outweighs a thousand tons of *realpolitik*.

As a matter of historical contrast to the positions currently being adopted by the United States, in 1923 Secretary of State Charles Evans Hughes<sup>87</sup> wrote a letter to Norway enclosing a U.S. Government check for the full amount of a more than \$12 million dollars arbitral award in favor of Norway, on behalf of Norwegian shipowners whose vessels had been appropriated by the United States during World War I. Secretary Hughes sent the full amount of the award despite being highly critical of it, refusing to accept that it was declaratory of international law or capable of creating a precedent binding on the United States. The check nevertheless was delivered as a "tangible proof of the [United States Government's] . . . desire to respect arbitral awards," and of its "devotion to the principle of arbitral settlements even in the face of a decision proclaiming certain theories of law which it cannot accept."<sup>88</sup> This precept should not go unnoted at the present time.<sup>89</sup>

86. N.Y. Times, Dec. 11, 1959, at 15, col. 4, *quoted in* T. FRANCK, *supra* note 16, at 23.

87. Later to become both a Judge of the Permanent Court from 1928 to 1930 and also Chief Justice of the Supreme Court of the United States.

88. 1 R. Int'l Arb. Awards 344 (emphasis added).

89. See S. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 292-95 and note 410 (1987).

The hope remains that the Court's willpower and institutional courage will make it clear that the Court has *not* been biased, and that the challenge to its powers by the exercise of the "nonappearance technique"<sup>90</sup> will be proven a losing proposition.

## VI. Conclusion

In many ways, the Court is a fragile and delicate institution. International law itself is a fragile fabric, depending as it does on the express and implied consent of sovereign States. The Court, as the chief interpreter of international law and the supreme judicial organ of the United Nations, naturally inherits the fragility of the whole subject-matter. The lack of specific "enforcement" powers outside the provisions of article 94,<sup>91</sup> the willful attitude of noncompliant States, and the overall pressures of bloc conflicts all conspire to make the institution itself vulnerable and imperfect. Yet what other such institution do we possess?

In his poem *Burnt Norton*, T.S. Eliot wrote: "Human kind / Cannot bear very much reality." Nor can the Court bear too much realism; no institution can that is dependent on ideals and high principle. It is right, as well as astute, to apply Pascal's wager: it must logically be better to believe in the Court than not to believe in the Court since, if the Court does eventually emerge as an effective institution, one's belief will have been vindicated; whereas, if the Court's effectiveness is destroyed, it will not ultimately matter much *what* one believed about it.

"Legal realism," in ways perhaps an internal contradiction in terms, may in fact be the intellectual antithesis of the fabulous construct that we call international law and that has, perhaps in ways not intended by its creators or understood by its agents, become an indispensable mortar in the walls of our civilization, for whatever it may be worth to our grandchildren.

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90. See Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, 51 BRIT. Y.B. INT'L L. 89, 105; (1980); See also J.B. ELKIND, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (1984); G. GUYOMAR, LE DÉFAUT DES PARTIES A UN DIFFÉREND DEVANT LES JURIDICTIONS INTERNATIONALES (1960); H.W.A. THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (1985); Elias, *The International Court of Justice and the non-appearing respondent* in THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 33-66 (1983); Highet, *Nonappearance and Disappearance Before the International Court of Justice*, 81 A.J.I.L. 237 (1987); Sinclair, *Some Procedural Aspects of Recent International Litigation*, 30 INT'L & COMP. L.Q. 338 (1981).

91. See *supra* text following notes 52-53.

