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## Going to Court, Internationally

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# GOING TO COURT, INTERNATIONALLY

Detlev F. Vagts\*

THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS. Edited by *Lori Fisler Damrosch*. Dobbs Ferry: Transnational Publishers. 1987. Pp. xxviii, 511. \$67.50.

Writing a review of a book on international law for an audience of non-international lawyers makes one aware of the great differences in the assumptions governing international as distinct from domestic law. The domestic litigator would hardly expect to consider such issues as: (1) Should we submit to the jurisdiction of the court, and if so, to what extent? (2) If a court finds that it has jurisdiction, should we be so gracious as to participate in its proceedings? (3) If it determines the issues against us, should we obey or disregard the decree that results? Yet, these are the issues which the book under review must address as it considers the litigation between the United States and Nicaragua in the International Court of Justice. *The International Court of Justice at a Crossroads* collects and analyzes the materials necessary for making a decision about the future relationship of the United States to the Court in the aftermath of the Nicaragua litigation. It makes no collective recommendations and each of the various contributors understandably has different inclinations. Indeed, so neutral is this work that it slides smoothly over the fact that its sponsor, the American Society of International Law, voted to deplore the first step the United States took to restrict its consent to the Court's jurisdiction.<sup>1</sup> But the volume provides much useful information for deciding whether the United States should again make a general consent to be sued in The Hague.<sup>2</sup> Such a step would require the consent of the Senate, so the matter will be debated in circles far wider than the restricted world of international lawyers.

To begin such an inquiry, one needs to review the bases for the International Court's jurisdiction, the United States' initial acceptance of the Court's optional jurisdiction, and the steps that led the United

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1. The book correctly notes, however, that "[a]s a general rule the Society does not take positions on matters of public policy." P. xx. For the text of the Society's resolution, see Gill, *The United States and the Rule of Law*, INTL. PRAC. NOTEBOOK No. 31, 17, 19 (July 1985).

2. There are other studies of the relationship between the United States and the Court, but they lack the detail and thoroughness of this volume. See, e.g., THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (A. Arend ed. 1986); T. FRANCK, JUDGING THE WORLD COURT (1986); *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INTL. L. 77 (1987).

States to revoke that acceptance. The Court's jurisdiction over disputes between states is limited to three categories: (1) cases that have already matured into disputes and are submitted to the Court by the disputants, (2) cases arising under prior treaties between the parties which contain clauses submitting future disputes to the Court, and (3) cases arising between two or more parties that have accepted the so-called "optional clause," which submits cases arising under international law to the jurisdiction of the Court. We are here primarily concerned with the third type of jurisdiction, which is sometimes confusingly referred to as the "compulsory jurisdiction" of the Court, although it arises under the "optional clause." In 1946, at the time of the creation of the United Nations, the United States chose to file a submission to the compulsory jurisdiction of the Court, although it appended the so-called Connally Reservation, which excluded all cases that the United States should determine to be essentially within its domestic jurisdiction.<sup>3</sup> On April 6, 1984, the United States tried to modify this acceptance by excluding "disputes with any Central American State or arising out of or related to events in Central America."<sup>4</sup> On April 9, 1984, Nicaragua initiated proceedings against the United States before the Court. On November 26, 1984, the Court, over the objections of the United States, ruled that it had jurisdiction.<sup>5</sup> On January 18, 1985, the United States gave the six-months' notice to terminate its acceptance of the Court's jurisdiction that was specified in its original submission of 1946. On June 27, 1986, the Court announced its judgment that the United States had violated international law in its actions toward Nicaragua.<sup>6</sup>

Where does the United States go from here? The basic preliminary question is whether the International Court is, by virtue of its composition and organization, a satisfactory place in which to settle at least some of the international disputes in which the United States finds itself involved. In matters arising under domestic law, a lawyer has control over such questions only to the extent that she might challenge a certain judge for cause or, in some cases, might manipulate the court calendars or venue provisions so as to avoid a particular judge or court. At the international level, the United States has much more control. Thus, we may ask ourselves whether the court's behavior in the Nicaragua case suggests that it might not treat the United States

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3. Pp. 14-17. The 1946 Declaration, 61 Stat. 1218 (1947), is reprinted as Annex C at pp. 469-70.

4. See *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 398 (Jurisdictional Order of Nov. 26); DEPT. ST. BULL. (no. 2087), June 1984 at 89 (summary of letter).

5. *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Jurisdictional Order of Nov. 26).

6. *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgment on Merits of June 26).

even-handedly in future cases. After nearly thirty years of treating jurisdictional questions in a most cautious and conservative way,<sup>7</sup> the Court stretched to bring this case within its jurisdictional scope. For one thing, the Court overrode the fact that Nicaragua had never actually filed consent to the Court's jurisdiction. The Court found instead that, by ratifying the Statute of the new International Court of Justice, Nicaragua had in effect ratified its unfiled consent to be sued before the old Permanent Court of International Justice. Arguably, the filing requirement should have been strictly enforced, thus disabling Nicaragua from suing the United States in the International Court (since, under the Court's Statute, a state is deemed to have consented to jurisdiction only vis-à-vis other states which have undertaken reciprocal obligations).<sup>8</sup> The Court's finding that Nicaragua had effectively consented seemed unwarranted to quite a few Americans, including some, such as Leo Gross, who are generally sympathetic to wider use of the Court<sup>9</sup> and are not committed to United States policy in Central America.

Other decisions en route to the ruling on the merits have seemed strained to American viewers. For example, the denial without a hearing of El Salvador's application to intervene aroused not only American opposition but dissent among members of the Court itself.<sup>10</sup> Moreover, the title given to the case, "Military and Paramilitary Activities in and against Nicaragua" assumes the very facts which were to be determined.<sup>11</sup> And in an extraordinary press interview, the President of the Court attacked the United States for its activities in Gre-

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7. See, e.g., *Nottebohm Case (Liecht. v. Guat.)*, 1953 I.C.J. 111 (inventing requirement of "genuine link" between state party and injured national); *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (barring state of corporation's shareholders from protecting it). Prof. Gross thus refers to the Nicaragua case "as an aberration." P. 48.

8. 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.

STAT. OF THE I.C.J. art. 36, para. 2.

9. See Gross, *Underutilization of the International Court of Justice*, 27 HARV. INTL. L.J. 571 (1986). Five of the judges of the Court dissented on the jurisdictional point and one other admitted doubts. Foreign scholars have also expressed skepticism of the Court's opinion. Oellers-Frahm, *Die "Obligatorische" Gerichtsbarkeit des Internationalen Gerichtshofs*, 18 Z.A.O. R. V. 243, 247 (1987); Eisemann, *L'arrêt de la C.I.J. du 26 Novembre 1984 (Compétence et Recevabilité) dans L'Affaire des Activités Militaires et Paramilitaires au Nicaragua et Contre Celui-ci*, 1984 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 372.

10. See 1986 I.C.J. Adv. Rel. 1-3 (Schwebel, J., dissenting) (copy on file with the Michigan Law Library). The denial of a hearing was sustained by a vote of 9-6. 1984 I.C.J. 215, 216.

11. 1986 I.C.J. Adv. Rel., at 7 (Schwebel, J., dissenting).

nada while the Nicaragua matter was pending.<sup>12</sup> All in all, the negative reaction by the United States officials who were involved with the litigation is understandable. Only one article in the book under review assembles those objections, though in a rather conclusory fashion, and examines them as they relate to U.S. consent in the future (p. 421).

An interesting contribution by Professor Edith Brown Weiss offers another way to assess the objectivity of the Court. She analyzes the voting patterns of the judges of the Court by grouping their votes in tables that will seem familiar to readers of commentary on the United States Supreme Court. Weiss comes to the conclusion that "there have not been persistent voting alignments which have significantly affected the decisions of the Court" (p. 134). She compares the Court's votes with the "persistent alignments that we find in the voting behavior of the [United Nations General Assembly], and to a lesser extent in that of the U.S. Supreme Court" (p. 133). Yet amateur statisticians may wonder whether the population of cases Weiss uses suffices to bear the weight of her analysis. The thirty-four contentious cases she uses, involving nearly twice as many separate rulings (pp. 135-38), represent the life's work of the Court in its forty years in existence. By contrast, an analysis of alignments on the U.S. Supreme Court will process some 150 cases for a single term.<sup>13</sup> Thus, Weiss' analysis does not provide a reliable basis for arguing against American decisionmakers' reactions to the Nicaragua case itself.

Understandably, the United States is weighing its options with caution. One of those options is to do nothing about its cancellation of submission under the optional clause, which would leave the United States subject to the Court's jurisdiction only in cases arising under clauses in various treaties which commit disputes over their application to resolution by the I.C.J.<sup>14</sup> Submission to International Court jurisdiction even to this limited extent has been questioned since *Nicaragua*. There are now at least seventy treaties which so bind the United States (p. 62). These include both bilateral treaties with some thirty countries and multilateral conventions which commit us with respect to virtually every country in the world. However, these obligations can and do work for our benefit. We were able, for example, to bring the plight of American hostages in Tehran to the Court under

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12. *Id.* at 314-15.

13. *See, e.g.*, p. 132, n.49 (citing *The Supreme Court, 1983 Term*, 99 HARV. L. REV. 120 (1984)). A pedantic note — the cited volume of *Harvard Law Review* actually is dated 1985 and contains the Supreme Court note for the 1984 term, not the 1983 term. However, the statement that Burger, Rehnquist, and O'Connor voted together in over 88% of the votes is true for both the 1983 and the 1984 terms. *See The Supreme Court, 1983 Term*, 98 HARV. L. REV. 1, 308 (1984). This slip of a digit aside, the book is obviously carefully edited and pains have been taken to pull together the products of many different contributors.

14. The contribution by Prof. Morrison (pp. 58-81) describes these treaties and lists them in a series of useful appendices at pp. 78-81.

such a provision.<sup>15</sup> The interpretation of the bilateral and multilateral treaties involved in the Nicaragua case, which seems somewhat strained to American observers, should not discourage us from continuing with this course. Such jurisdiction should be kept intact, and indeed extended through new treaties.

Another possibility for the United States would be to return to a submission under the optional clause, since the United States can confine and structure its submission as it chooses. The problem is one of finding words that will provide a meaningful consent to jurisdiction without opening possibilities for overgenerous construction by the Court in the future. As Professor Gordon notes, there is no preexisting rule that inhibits the Court from taking up political or other sensitive disputes — such limits cannot be inferred from the fact that the Court under its Statute can only handle “legal” disputes (pp. 183-84). Similarly, Professor Schachter finds no rule that keeps the Court from deciding cases involving the use of force (p. 223). Thus any new reservation by the United States must expressly provide for such limits if we want them. The words must be so chosen that they will bar the Court from ruling at a preliminary stage that it has the right to proceed. A reservation as to acts of self-defense would be insufficient, since an intense exploration of the facts would be required to determine whether an action was aggressive or in self-defense. On the other hand, perhaps a reservation that would exclude any controversy having to do with a reasonably perceived threat to national security would stop offensive litigation *in limine*. The best professional crafting should be applied to this task before the Senate is asked to give its consent to a new submission.<sup>16</sup> We will certainly have to do better this time than we did with the Connally Reservation in 1946, which for years impeded our own resort to the Court and then failed us in the Nicaragua case because nobody was willing to claim that the case fell within the “domestic jurisdiction of the United States of America as determined by [the United States].”

An alternative to renewing assent to the ICJ's jurisdiction is to submit our disputes to other institutions. The United States has taken cases to panels composed of a few members of the Court, once before the Nicaraguan case with Canada and once afterwards with Italy.<sup>17</sup>

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15. Relating to the U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

16. For an example of a “national security” reservation, see the form used by France from 1966 until 1974. 1965-1966 I.C.J.Y.B. 49 (1966). A number of articles suggesting submission to the optional clause with new reservations are listed at p. 179 n.68.

17. The Canadian controversy resulted in Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246; the Italian matter thus far has resulted in two preliminary orders, Concerning Elettronica Sicula S.p.A. (U.S. v. Italy), 1987 I.C.J. 3, and 1987 I.C.J. 185. Messrs. Leigh and Ramsey propose “that the U.S. adhere to the compulsory jurisdiction of the Court subject to the condition that the Court's compulsory jurisdiction would be exercised only by an *ad hoc* chamber — composed of members acceptable to the

The United States recently has responded to an unexpected challenge by the Soviet Union by offering to submit disputes between the two powers to a panel.<sup>18</sup> If the underlying problem with the ICJ from an American perspective is that the attitudes of the Third World play too large a role in the Court's thinking, the cure is to submit controversies to a panel representing First World thought. On the other hand, this idea dispenses with something significant: the concept of a true world court generating law for the whole community of nations.<sup>19</sup>

The current position of the United States is thus troubling. In a variety of unilateral maneuvers, such as the withdrawal from UNESCO, the operations in Grenada, the closure of the PLO liaison office at the United Nations, and the failure to pay full UN dues, the United States has largely isolated itself from world public and legal opinion. There were some signs by the fall of 1988 that decisionmakers wanted to move back into the mainstream, most clearly in the resumption of payments on United Nations dues.<sup>20</sup> By the time this appears in print, we may know more about how far our government will be willing to go along that road. The costs of continuing on a separatist course are various, ranging from its direct effect on foreign opinion, to its effect on the overall systemic consideration of the value of strengthening the rule of law internationally by allowing for judicial resolution of disputes.

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United States . . . ." P. 122. They concede that this proposal is subject to unilateral frustration by the United States as to the acceptability of judges and is thus somewhat like the Connally Reservation. However, they seek to minimize the significance of that precedent and do so fairly convincingly, though their statement that "the United States has never invoked the self-judging provision of the Connally Reservation" (p. 119) needs qualification in the light of our action in the *Interhandel Case* (*Switz. v. U.S.*), 1959 I.C.J. 6, 11.

18. DEPT. ST. BULL. (no. 2140), Nov. 1988, at 5.

19. Leigh and Ramsey reply that "some type of compulsory jurisdiction is better than no compulsory jurisdiction at all." P. 118.

20. Williamson, *Developments in the UN System*, DEPT. ST. BULL. (no. 2138), Sept. 1988, at 62, 64.