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THE UNITED STATES ON TRIAL: AN ANALYSIS OF THE CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, The United States Army, or any other governmental agency.

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35TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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THE UNITED STATES ON TRIAL: AN ANALYSIS OF THE CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

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ABSTRACT: This thesis examines the recent decision by the International Court of International Justice concerning the activities of the United States with respect to Nicaragua. The Court's decision spoke authoritatively on various critical concepts in customary international law: the use of force, collective self-defense, intervention, sovereignty and humanitarian law. Many of these customary international law doctrines are codified and declared in treaty law. This thesis concludes that the Court's decision was reasonable. The United States should comply, and, indeed, is under legal obligation to comply with the Court's holding. Non-compliance by the United States will lessen world respect for the rule of law and it will sound the death knoll for the International Court of Justice.

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INTRODUCTION

On June 27, 1986, at the historic Peace Palace in the Hague, the International Court of Justice[1] decided the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America).[2] The Judgment, which consisted of sixteen parts,[3] was a legal defeat for the United States on the major issues concerning its policies toward Nicaragua.[4] The Court spoke decisively and with authority on key issues making the case a landmark decision in international law.[5] The case is also important as the Court addressed many vital international law concepts which are rarely litigated. These concepts include: the use of force, collective self-defense, the limits of intervention, sovereignty and humanitarian law. Relying almost in toto on customary international law, the decision illustrates the unique interplay and reliance between customary international law and treaty law. Much of the Court's rationale expands, develops and illuminates existing treaty law including the all-important United Nations Charter.

On April 9, 1984, the Government of Nicaragua filed an Application with the International Court of Justice to begin the proceedings against the United States.[6] Nicaragua based jurisdiction on the declarations by both the United States and Nicaragua, which accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the International Court of Justice.[7] From the beginning, the United States contended the Court was without jurisdiction to hear the Application.[8] The ICJ, however, refused to dismiss the Application outright;[9] instead, it scheduled public hearings and required the parties to file memorials on the jurisdictional issues.[10]

On May 10, 1984, the ICJ issued an interim protective order[11] under Article 41 of the ICJ Statute.[12] The Interim Order resolved the issue of the U.S. Declaration of April 6, 1984 that excluded disputes arising in Central America from the Court's jurisdiction.[13] The Court noted that the original U.S. Declaration did not have a similar reservation and the United States could not amend its Declaration for a period of six months.[14] Following the Interim Order the Court proceeded with the hearings to resolve the dispute between the two States.

This paper will examine the ICJ's decision in the Paramilitary Activities case on both its jurisdictional and substantive aspects. This paper also will discuss the legal implications of the U.S. policies in Central America and the U.S. strategy in litigating the case before the Court. Finally, this paper will examine the U.S. decisions to ignore the Court's holding and to terminate its Article 36(2) Declaration and discuss the implications of those decisions.

FACTUAL BASIS FOR THE DISPUTE

In 1979, the government of General Anatosio Somazo fell.[15] A popular insurrection by the Sandinistas caused the downfall.[16] The revolutionaries formed a new government and received international recognition.[17] The United States initially responded favorably to the new Nicaraguan government and sent large amounts of economic aid to the revolutionary government.[18] Indeed, the United States had greatly aided the Sandinista revolution by ending military aid to Somoza in 1977 and encouraging other governments to do the same.[19]

This favorable attitude quickly changed in January 1981 when the Carter Administration suspended aid to Nicaragua alleging that the new government was supporting revolutionary insurgencies in

their Central American neighbors.[20] The United States terminated aid in April 1981.[21] The United States was also concerned about increasing evidence indicating that Cuba was sending arms and advisors to Nicaragua,[22] as well as reports of large numbers of Sandinista human rights violations.[23]

Almost immediately after the Sandinistas took contol of Nicaragua, resistance arose against the new government.[24] This resistance movement consisted mainly of former members of Somoza's National Guard.[25] For its first two years, the resistance movement was small and ineffective.[26] In 1981, after suspending aid to the Nicaraguan government, the United States began aiding the rebels who were known as contras.[27] As a result of U.S. support, the contra movement grew and became more pluralistic including former Sandinistas, students as well as the former national guardsmen.[28]

The contra movement consisted of several organizations and eventually organized into the Fuerza Democratica Nicaraguense (FDN) and the Alianza Revolucionaria Democratica (ARDE).[29] The FDN was the larger organization.[30] The contras suceeded militarily against the Sandinista government until August 1984 when Congress stopped U.S. aid.[31] In July 1985, Congress approved $27 million in humanitarian aid to the contras.[32] In 1986, Congress approved $100 million in assistance to the contras, a portion of which Congress earmarked for humanitarian aid.[33]

The U.S. purpose in supporting the contras was as follows:

> The United States does not seek to destabliize or overthrow the Government of Nicaragua; nor to impose or compel any particular form of government there.
>
> We are trying, among other things, to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreements with their neighbors on peace in the region.
>
> We believe that a pre-condition to any successful negotiations in these regards is that the Government of Nicaragua cease to involve itself in the internal or external affairs of its neighbors, as required of member nations of the OAS.[34]

The United States maintained throughout the Paramilitary Activities case that its purpose was not the overthrow of the Sandinistas, but rather to stop Nicaragua's export of revolution.[35]

Although the initial U.S. support to the contras consisted of money, training and information-sharing, the United States began direct military action, often through surrogates, against the Nicaraguan government in 1983.[36] These actions included attacks on Nicaraguan oil facilities, the mining of Nicaraguan ports, air overflights above Nicaraguan territory and the publication of a contra-training manual by the CIA.[37]

The United States also applied economic pressure to the Nicaraguans.[38] It cut off economic aid, decreased sugar quotas to the United States, and, finally, declared a trade embargo in May 1985.[39]

Against this backdrop, Nicaragua filed its Application with the ICJ and began the lengthy case against the United States.

JURISDICTION

1. Jurisdiction Under Article 36(2).

Nicaragua based its primary claim to jurisdiction in the dispute upon Article 36(2) of the Statute.[40] It provides:

> 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.[41]

Therefore, the Court would have jurisdiction only when both parties had accepted the compulsory jurisdiction of the Court.[42]

The parties did not dispute the contents or the fact of the U.S. Declaration of August 14, 1946,[43] although the United States attempted to modify its declaration on April 6, 1984 to exclude any South American States.[44]

The Nicaraguan Declaration, however, was controversial and much debated. Nicaragua claimed it accepted the compulsory jurisdiction of the Permanent Court of International Justice as a member of the League of Nations in 1929.[45] Paragraph 5 of Article 36 of the Statute states:

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.[46]

Nicaragua, therefore, would be deemed to have accepted the compulsory jurisdiction of the ICJ if it had accepted the compulsory jurisdiction of the Permanent Court of International Justice and that Declaration was "still in force."

Nicaragua was unable to fully substantiate that it had, in fact, accepted the compulsory jurisdiction of the PCIJ. To perfect the declaration for the PCIJ, the State had to ratify the declaration and deposit the ratification instruments with the Secretary-General for the League of Nations.[47] The Nicaragua representative accepted the PCIJ's compulsory jurisdiction on September 24, 1929 and the Nicaraguan executive power, Senate, and Chamber of Deputies eventually ratified the Declaration.[48] The Nicaraguan Minister of External Relations sent a telegram to the Secretary-General stating that Nicaragua had ratified the Declaration and would send the instrument of ratification.[49] The League, however, never received the instrument.[50] At the hearings,

the Nicaraguan representatives suggested that the instrument must have been lost in Axis attacks on commercial shipping during World War II, but admitted the facts were "scanty" as to what exactly had happened to the instrument.[51]

The United States argued that Nicaragua did not have a Declaration "still in force" at the time the Statute was signed and, therefore, the provisions of Article 36(5) were inoperative.[52] Nicaragua countered that the "still in force" language excluded only expired declarations and not those that merely had not been perfected, such as Nicaragua's.[53]

The Court held that it had jurisdiction to hear the case under Article 36, based on Court publications, the conduct and practice of the parties, and the opinion of international legal scholars.[54] The Court noted that Nicaragua was included in the first ICJ Yearbook (1946-1947) as one of the nations that was bound by the compulsory jurisdiction of the Court under Article 36(5).[55] Subsequent Yearbooks also included Nicaragua in the list of nations recognizing the Court's compulsory jurisdiction.[56] While the United States argued that the U.N. publications were not authoritative, the Court believed "it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations" to hold that Nicaragua should have made a new Declaration accepting jurisdiction.[57]

The Court noted that Nicaragua, as indicated by its conduct, believed itself to be bound by the 1929 Declaration.[58] First, Nicaragua did not deny that it was bound by the Court's compulsory jurisdiction despite being so listed for almost forty years in a variety of U.N. publications.[59] Second, in the ICJ case entitled Arbital Award Made by the King of Spain on 23 December 1906,[60] which was decided in 1961, Nicaragua did not contest the jurisdiction of the Court.[61] Although the Court did not have to

rule on the validity of the Nicaraguan Declaration in that case, Honduras, which brought the proceedings, initially based jurisdiction on Nicaragua's Declaration.[62] Finally, the Court observed that the United States initially believed Nicaragua to be bound by its 1929 Declaration; the U.S. attempt of April 6, 1984, to modify its declaration of compulsory jurisdiction, implied the validity of the Nicaraguan Declaration.[63]

2. Jurisdiction Based on the 1956 Treaty.

Nicaragua submitted an additional basis for jurisdiction in its Memorial on jurisdiction and admissibility.[64] The new grounds for jurisdiction was the 1956 United States-Nicaraguan Treaty of Friendship, Commerce and Navigation.[65] Article XXIV, paragraph 2, of the Treaty states:

> Any dispute between the Parties as to the interpretation or application of the present treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.[66]

Under paragraph 1 of Article 36 of the ICJ Statute, the ICJ has jurisdiction over such disputes. It states: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[67] Thus, Nicaragua believed the Court had jurisdiction under Article 36(1) and the compromissory clause of the 1956 Treaty, as well as jurisdiction under Article 36(2) and (5).

The United States acknowledged existence of the 1956 Treaty and contended that it could not be a basis for jurisdiction, as Nicaragua had not alleged any violations of it in its Applicaton to the Court.[68] The United States also argued that the phrase "not satisfactorily adjusted by diplomacy" was a prerequisite to

Nicaragua's submission of the case to the ICJ.[69] The United States claimed Nicaragua's failure to attempt to resolve the dispute diplomatically precluded it, in theory similar to the exhaustion of administrative remedies, from obtaining the Court's review.[70]

The Court held, however, based on the facts Nicaragua alleged in its Application and the provisions of the Treaty, that the dispute between the United States and Nicaragua involved the 1956 Treaty.[71] Therefore, even though Nicaragua did not specifically aver violations of the 1956 Treaty in its Application, it had alleged sufficient facts to convince the Court that the 1956 Treaty was involved.[72]

The Court also dismissed the second U.S. argument.[73] It reasoned that Nicaragua need not specifically refer to the 1956 Treaty in its pre-ICJ negotiations with the United States, and that the United States was on notice that Nicaragua believed U.S. actions constituted a breach of U.S. international legal obligations regardless of the source of those obligations.[74] To hold otherwise, according to the Court, would merely require Nicaragua to institute new proceedings.[75] Such a result would place procedure over substance and cause unnecessary delay.[76] Thus, the Court held, in a fourteen-to-one vote, that the ICJ had jurisdiction for as much of the dispute as relates to the 1956 Treaty.[77]

ADMISSIBILITY

The U.S. alleged in its Counter-Memorial that Nicaragua's Application was "inadmissible" for five separate reasons.[78]

Each of these reasons, according to the United States, was sufficient to prevent the Court from hearing the case in "the exercise of precedential discretion in the interest of the integrity of the judicial function."[79] The five bases for the U.S. contention were as follows:

> (1) the absence of indispensible parties whose presence is necessary for complete adjudication of the issues;[80]
> (2) the subject matter of Nicaragua's claim, the unlawful use of force, is the type of issue committed to resolution by the Security Council;[81]
> (3) the nature of Nicaragua's claims involve an ongoing armed conflict and that subject matter is not appropriate for judicial adjudication;[82]
> (4) the judicial fact-finding process is unable to properly determine facts with claims involving armed conflicts[83] and finally,
> (5) Nicaragua has failed to exhaust other established remedies to resolve the claims, specifically the Contadora process.[84]

The Court had little problem resolving these contentions in favor of Nicaragua; it found unanimously that Nicaragua's Application was admissible.[85]

As regards the first U.S. contention, the Court noted that it had on occasion declined jurisdiction when an indispensible third party is absent, but the absent party must be one that "would form the very subject-matter of the decision."[86] In this case, the Court believed it could decide the issues based on the submissions and the decision would be binding only on the parties to the case.[87] The Court viewed the U.S. arguments as "an attempt to transfer municipal-law concepts of separation of powers to the international plane."[89] The Court noted that as recently as the United States Diplomatic and Consular Staff in Tehran case, the Court had adjudicated a matter that was also before the Security Council.[90] The Court also had adjudicated cases in the past that involved the use of armed force.[91]

Regarding the fourth ground for inadmissibility, the inability of the Court to establish facts in an armed conflict, the Court noted the applicable rules concerning burden of proof and the need for the moving party to establish the alleged facts.[92] The Court should not dismiss an application merely because of "an anticipated lack of proof."[93]

Finally, the Court was able to dismiss the fifth ground for inadmissibility. It had been previously resolved in other cases, including the Iranian Hostage case,[94] and no requirement existed to exhaust regional negotiations, such as the Contadora process, prior to invoking the jurisdiction of the Court[95]. The Court's rather summary disposition of the U.S. arguments and the unanimous vote on the issue of admissibility indicate the issues are fairly well settled.

VALIDITY OF THE U.S. DECLARATION

The U.S. Declaration accepting the Court's compulsory jurisdiction raised two issues: whether the 1946 Declaration was valid; and, if it was, whether reservations in the Declaration excluded some, or all, of Nicaragua's claims. The U.S. Declaration was made with the following exceptions to the Court's jurisdiction:

> (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America,
> (c) 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.[96]

Part b of the reservation is the so-called "Connally Reservation" and part c is the so-called "Vandenberg Reservation;"[97] both are the results of U.S. Senate amendments in ratifying the Declaration.[98] This paper will discuss each in turn.

1. The Connally Reservation.

Judge Schwebel raised the Connally Reservation in his dissent, although the majority opinion did not raise the issue.[99] He noted that Judge Lauterpacht believed such self-judging reservations to be invalid:

> (a) [T]he reservation in question [referring to the Connally reservation with its self-judging provisions], while constituting an essential part of the Declaration of Acceptance, is contrary to paragraph 6 of Article 36 of the Statute of the Court; it cannot, accordingly, be acted upon by the Court; which means that it is invalid;
> (b) that, irrespective of its inconsistency with the Statute, that reservation by effectively conferring upon the Government of the United States the right to determine with finality whether in any particular case it is under an obligation to accept the jurisdiction of the Court, deprives the Declaration of Acceptance of the character of a legal instrument, cognizable before a judicial tribunal, expressing legal rights and obligations;
> (c) that reservation, being an essential part of the Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party, through the purported Declaration of Acceptance, to the system of the Optional Clause of Article 36(2) of the Statute, cannot invoke it as an applicant; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance.[100]

Judge Schwebel agreed with Lauterpacht's position,[101] but he conceded that "the passage of time may have rendered Judge Lauterpacht's analysis less compelling today than when it was made."[102] Judge Schwebel, however, never decided if he would invalidate a declaration with self-judging provisions, as he determined, on other grounds, that the Court lacked jurisdiction over the dispute.[103] The validity of self-judging declarations appears well-settled as shown by the total absence of discussion of

the issue in the other opinions. Although the other opinions do not give any indication as to the reasons for the absence of discussion of the Connally Reservation, the only logical explanation is the Reservation's acceptablility. A number of other States have similar self judging reservations which is, of course, evidence that such reservations are valid.[104] In the past the Court has upheld the validity of self-judging reservations and, therefore, despite the absence of stare decisis in ICJ practice,[105] the legal practitioner can safely assume the Court does not seriously question the validity of such self-judging reservations.

2. The Vandenberg Reservation

The United States argued that Nicaragua relied upon various treaties[106] in its Application before the Court and, therefore, to the extent the dispute was one "arising under" those treaties, the Court would not have jurisdiction unless all States that were parties to the treaties and that would be "affected" by the Court's decision were parties to the case.[107] The United States alleged that El Salvador, Honduras, and Costa Rica, all of whom were parties to the cited treaties, would be "affected" by any ICJ decision in the dispute and, yet, they were not before the Court as parties.[108]

The Court's opinion gives short shrift to the U.S. argument on the Vandenberg Reservation.[109] The Court noted that the Court, not the United States, must determine whether a third state is affected, and the resolution of the case on the merits was necessary to resolve the issue.[110] For example, a judgment in favor of the U.S. would not "affect" any third party. Therefore, the jurisdictional effect of the Vandenburg Reservation could be held in abeyance until the Court reached the merits of the dispute;

the Reservation, simply put, did not have "an exclusively preliminary character for the Court."[111]

In his dissent, Judge Schwebel was critical of the Court's ruling on the Vandenberg Reservation:

> The Court's interpretation of the multilateral treaties reservation is inconsistent with the Pleadings of the Parties in the case, which themselves quite clearly demonstrate which are the States whose interests are to be affected by the Court's judgment on the merits.... Nicaragua seeks a judgment...requiring the United States to cease and desist from actions which Nicaragua claims are unlawfully directed against Nicaragua, with the assistance of Honduras, Costa Rica and El Salvador, whereas the United States, Honduras and El Salvador claim that these very actions are conducted in collective self-defence against Nicaraguan acts of aggression. The judgment which the Court reaches on this critical point accordingly must 'affect' not only the United States but Honduras and El Salvador, and--in view of Nicaragua's allegations--Costa Rica as well.[112]

Judge Schwebel, however, did not prevail in his interpretation of the Vandenberg Reservation's applicability.[113] The Court concluded that the ICJ did have jurisdiction to hear Nicaragua's Application based on each party's declaration of compulsory jurisdiction under Article 36,[114] and that the ICJ had jurisdiction based on the 1956 Treaty to hear those portions of the dispute based upon that treaty.[115] Overall, the Court held, in a fourteen-to-one decision, that it had jurisdiction to hear Nicaragua's Application.[116] The Court unanimously rejected the U.S. contention that Nicaragua's Application was inadmissible.[117] Finally, the Court ordered the provisions of its May 10,1984, Interim Order to remain in effect until final judgment.[118]

THE JUDGMENT ON THE MERITS

1. Introduction

On June 27, 1986, the Court handed down its long-awaited Judgment on the Merits.[119] The landmark decision was marred by the lack of U.S. participation; the United states withdrew from the case on the merits and later terminated its declaration accepting the compulsory jurisdiction of the Court.[120] The remainder of this paper will examine the details of the ICJ's judgment on the merits and focus specifically on the principles of force, non-intervention, and self-defense as embodied in customary international law.

2. Effect of the U.S. Withdrawal

Shortly after the Court rendered its November 24, 1984 Judgment on jurisdiction and admissibility, the United States withdrew from the dispute before the World Court.[121] In response to the U.S. withdrawal, Nicaragua invoked Article 53 of the ICJ Statute which permits the Court to proceed despite the non-appearance of a party to the case.[122] Unlike domestic courts that merely enter default judgments against the non-appearing party, the ICJ has an obligation under Article 53 to insure that it has jurisdiction and that the claim is "well founded in law and fact," even in the absence of one of the parties.[123] In interpreting its Article 53 responsibilities, the Court noted, it must "consider on its own initiative all rules of international law which may be relevant to the dispute."[124] Thus, the Court was obligated to consider the U.S. position and potential legal arguments, despite the non-appearance of the United States.

The Court's burden in this respect was reduced somewhat because the United States participated in the earlier proceedings on jurisdiction and admissibility and submitted a Counter-Memorial stating its various positions.[125] While the U.S. absence was not unusual,[126] withdrawal from the case after earlier participation is rare.[127] In its withdrawal, the United States attempted to "reserve its rights in respect of any decision by the Court regarding Nicaraguan claims."[128] Despite this attempt, the Court validly noted that under Article 36(6), the Court, not the respondent State, determines the Court's jurisdiction and any judgment the Court renders is binding on the parties under Articles 59 and 60 of the ICJ Statute.[129]

One has difficulty seeing any advantage in the U.S. decision to withdraw. Article 53 affords only minimal protection to the absent party. The United States was disadvantaged by not presenting evidence and facts to substantiate its defenses to the Nicaraguan claims and to rebut evidence presented by Nicaragua.[130] As the Court stated in the Iranian Hostage case:

> The Iranian Government, not withstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. By its own choice it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem."[131]

This disadvantage would be greater in "a case of this kind involving extensive question of facts."[132] The doctrine of forum prorogatum would not apply and does not justify U.S. withdrawal; a State need not withdraw from the proceedings to preserve jurisdictional objections.[133] Thus, the only good explanations to support U.S. withdrawal are political considerations or a lack of evidence to support of the U.S. position.

3. Remaining Jurisdictional Issues: Justiciability and the Vandenberg Reservation.

The Court reconsidered a number of jurisdictional issues which it had either deferred or which surfaced during the proceedings on the merits.[134] First, the Court examined whether the issues of force and collective self-defense were justiciable: Was Nicaragua's claim one that encompassed the term "legal dispute" of Article 36(2) and was the ICJ the proper body for resolving the claim?[135] The Court raised the former part of the first issue sua sponte; the United States did not address it in its 1984 Counter-Memorial.[136] Second, the Court explained that the matter of the multilateral or Vandenberg Reservation to the U.S. Declaration, decided in its 1984 Judgment, was not of a preliminary character.[137] In a rather perfunctory manner and with little explanation, the Court disposed of the first issue,[138] but it more closely analyzed the second issue .

The Court noted that the jurisdiction of the Court was based on the consent of the parties; it could not refuse to give effect to a reservation in the declaration of compulsory jurisdiction.[139] The United States did not, either by its non-participation on the merits or by asserting collective self-defense as justification to Nicaragua's claims, waive the Vandenberg Reservation.[140] The Court, having now heard the case on the merits, would have to determine if any States that were parties to the treaties cited by Nicaragua would be "affected," within the meaning of the Vandenbery Reservation, by any judgment of the Court.[141] The Court first examined whether El Salvador would be "affected" by a judgment. The Court recognized that, if any State would be "affected," the Vandenberg Reservation would apply, and the Court would be without jurisdiction.[142]

With respect to El Salvador, the Court held that any U.S. right of collective self-defense would be the same under either the United Nations or the Organization of American States Charters.[143] Both permit self-defense as an exception to the general prohibition against the use of force.[144] The United States, of course, claimed that any actions it took toward Nicaragua were to help El Salvador in response to Nicaraguan armed attacks.[145] If the Court found that the United States was not permitted to give "indirect aid"[146] to El Salvador in response to an illegal Nicaraguan armed attack, El Salvador obviously would be "affected" by the judgment, even if the Court was silent on El Salvador's own right to self-defense.[147] On the other hand, if the Court found that no armed attack occurred, El Salvador would be "affected" in its own right to individual self-defense.[148] The Court held that El Salvador would be "affected" by the Judgment and, therefore, the Court declined to examine Nicaragua's claims arising under the U.N. Charter or the OAS Charter.[149] This holding was somewhat of a Pyrrhic victory for the United States, as the holding dismissed only those claims based on multilateral treaty obligations; the Court still proceeded to examine those claims based on customary international law and the 1956 Friendship Treaty, which was bilateral in nature.[150]

Ironically, the Court's result and rationale appear to follow Judge Schwebel's dissent in the 1984 Judgment on Jurisdiction and Admissibility.[151] Although, in that decision, the Court refused to characterize the Vandenberg Reservation as a preliminary objection,[152] nothing in the Court's holding in the 1986 Judgment indicates why it needed to hear the case on the merits before ruling on the U.S. objection to Nicaragua multilateral treaty claims.

4. Evidence Before the ICJ

In this case, proof of the allegations made by both parties was critical. As previously mentioned, the major U.S. disadvantage in withdrawal was its subsequent loss of opportunity to present evidence and to refute Nicaraguan evidence.[153] Article 50 of the ICJ Statute provides: "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."[154] Although this case appeared to be the type of case where an appointed fact-finding commission would be useful, especially on site, the Court declined to use Article 50.[155]

Much of the evidence before the Court was press reports.[156] Press reports were not, according to the Court, evidence per se, but the Court would consider public knowledge as evidenced by press coverage.[157] The Court cited the Iranian Hostage case to support the proposition that it could rely on facts as reported by the world press.[158]

Both parties submitted affidavits (the United States submitted its affidavits during the jurisdictional proceedings) from high government officials [159] and submitted official government declarations.[160] The Court regarded such affidavits "with caution"[161] and the declarations with "necessary critical scrutiny."[162] The Court apparently recognized the weak evidentiary value of such self-serving forms of evidence.[163]

The Court found more credibility in testimony of disinterested witnesses and official statements against self interest.[164] An example of the latter is the United States's claim of collective self-defense; the Court regarded that claim, rather than an outright denial, as some evidence of the "imputability of some of the activities complained of."[165] On the other hand, a similar admission by Daniel Ortega in which he offered to stop

shipments of arms to El Salvador was not interpreted to mean that Nicaragua was in a position to stop the arms shipments.[166]

During the public hearings on the dispute, Nicaragua presented five witnesses who testified on the merits and another who submitted evidence in the form of an affidavit.[167] One of those witnesses was David MacMichael, a CIA employee from March 1981 to April 1983.[168] Nicaragua apparently called MacMichael to refute the allegation that Nicaragua was supplying arms to rebels in El Salvador.[169] Although MacMichael testified that Nicaragua was not supplying the rebels in El Salvador in "any significant manner over this [referring to his period of employment] period of time,"[170] he also testified that the Nicaraguan government was supplying arms to the rebels in late 1980 and early 1981.[171] Thus, his testimony both helped and hurt Nicaragua.[172]

MacMichael also gave his opinion of the situation in Central America after he left the CIA, based on news reports and official statements.[173] The Court, however gave this opinion evidence, along with other opinion evedence, little weight.[174] Considering the Court gave weight and credibilty to MacMichael's testimony and allowed him to testify in conclusory terms,[175] one wonders if the United States erred in not litigating the dispute on the merits and proving Nicaragua was supplying arms to the rebels in El Salvador.

The Court also considered a U.S. State Department publication entitled "Revolution Beyond Our Borders," Sandinista Intervention in Central America.[176] The document, published by the State Department, justified U.S. policy in Central America.[177] The document was not presented in accordance with "any formal manner contemplated by the Statute and Rules of Court."[178] The Court, however, felt it could consider the publication in light of the "very special circumstances of this case."[179]

5. Whether Contra Acts Were Attributed to the United States.

The Court struggled to determine whether United States support of the contra forces was of such a magnitude and extent that contra acts could be attributed to the United States, or whether the United States exercised such dominion and control over the contras that they would be U.S. agents.[180] In regard to the first aspect of this issue, the Court found that the United States had supported the contra forces in

> various forms over the years, such as logistical support, the supply of information on the locations and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage.... [A] number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisors, then at least in close collaboration with them....[181]

Despite this massive assistance which "largely financed, trained, equipped, armed and organized" the contras,[182] the Court did not believe that the United States was responsible for creating the contra opposition.[183] The Court cited a May 1983 Report of the Permanent Select Committee on Intelligence of the House of Representatives as evidence of the lack of U.S. control of the contras.[184] The report stated that the only control the United States exercised over the contras was "cessation of aid."[185] The Court also noted that contra activity continued during the time when only so-called humanitarian assistance was authorized, thereby indicating the contras were independent of the United States.[186] Therefore, the Court did not impute the alleged illegal acts of contra forces to the United States; the issue instead was if U.S. support for contra rebels by itself violated international law.[187]

Much adverse publicity surrounded the revelation of two publications, Operaciones Sicologicas en Guerra de Guerrillas (Psychological Operations in Guerilla Warfare) and the Freedom Fighter's Manual, which Nicaragua presented to the Court as CIA

publications.[188] The Court found Nicaragua had not presented sufficient evidence to attribute the publication of the Freedom Fighter's Manual to the U.S. government.[189] Newspaper accounts were the only evidence of the CIA authorship that Nicaragua had alleged.[190] Such accounts were insufficient, by themselves, to establish facts before the Court.[191]

On the other hand, the Court found the CIA authored Psychological Operations because Nicaragua presented evidence of acknowledgements from U.S. officials.[192] Portions of the publication advocated violations of domestic law and the international law of war.[193] It counseled the contras to "kidnap officials of the Sandinista government...[and] neutralize carefully selected and planned targets, such as court judges, mesta judges, police and State Security officials, CDS chiefs....If possible, professional criminals will be hired to carry out specific selective jobs."[194] It also encouraged causing the deaths of persons who would become martyrs of the contra cause.[195]

After Congress discovered Psychological Operations, the CIA recalled the publication and told the contras to ignore the manual's advice.[196] The House Intelligence Committee investigated the publication and concluded that portions of it were "repugnant to American values."[197] The Committee concluded that the original purpose of Psychological Operations was laudatory--to discourage indiscriminate violence toward civilians--and that high-level U.S. officials were unaware of the specifics contained in the manual.[198] The Court apparently concurred with the Intelligence Committee in its assessment of the CIA's operation. It did hold the United States responsible for the manual's publication and concluded that such publication was a violation of humanitarian law, but the Court did not attribute any contra acts, which followed the publication's advice, to the United States.[199] The

publication certainly did not tip the scales of equity in favor of the United States' positions.

LEGAL ISSUES

1. Choice of Law.

In determining what law to apply, the Court held it would not apply multilateral treaty law because the Vandenberg Reservation precluded the Court's jurisdiction over such disputes.[200] The United States argued that all of Nicaragua's claims were based upon the U.N. Charter, which would "subsume and supervene related principles of customary and general international law."[201] Thus, under the U.S. argument, the Court would have no law to apply to adjudicate the dispute. The Court rejected this argument in the 1984 Judgment by noting:

> The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.[202]

The Court noted, however, that customary international law does not equate, although it can, with treaty law; in some areas, the two sources of law overlap and in some areas, they do not.[203] Unless treaty law changes or diverges to a great extent from the customary international law, the latter will still have effect.[204] The Court held that customary international law as it has developed over the past forty years and the relevant treaty law--

specifically the U.N. Charter--had common principles against the use of force; any differences between the two were too minor to prevent the Court from applying customary international law.[205]

Although the Court could not apply multilateral treaty law, it could refer to such law in determining the nature of the customary international law to be applied.[206] The Court noted that, to some extent, the Parties had agreed that Article 2(4) and customary international law were identical regarding the lawfulness of the use of force.[207] In a classical discussion of what constitutes customary international law, the Court correctly observed that mere agreement between parties is insufficient to establish customary international law.[208] Under Article 38 of the ICJ Statute, the Court must find "evidence of a general practice accepted as law."[209] The law must be confirmed by the actual practice of nations.[210] Thus, the Court looked to the practice of nations to determine the law on the use of force and intervention.

2. The Use of Force in Customary International Law.

The Court found a general prohibition in customary international law against the use of force.[211] Evidence of this prohibition included a number of treaties,[212] U.N. Resolutions,[213] and other international pronouncements.[214] While these evidences are not law in themselves, they indicate what States believe is customary international law. The Court also cited as evidence of the general prohibition against force in customary international law Article 2, paragraph 4, of the U.N. Charter:[215] "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."[216] The Court indicated, as did both Nicaragua and the United States, that the prohibition on

the use of force had risen to the level of jus cogens.[217] The Court observed that the prohibition on the use of force in customary international law included "grave forms" of force, presumably armed attack, and lesser forms as well.[218]

The right to collective self-defense, in response to armed attack, is an exception to the general prohibition in customary international law against the use of force.[219] The Court noted some specific limitations to the use of collective self-defense: it must be in response to an armed attack;[220] and, it must be invoked at the request of the victim State.[221] The Court also discussed the reporting requirements of Article 51 of the U.N. Charter[222] and whether any response was necessary and proportionate;[223] The Court used Article 3(g) of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX)[224] to define armed attack as embodied in customary international law.[225] It includes "the sending of or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State."[226] Thus, Nicaragua's shipments of arms and supplies to the insurgents, as the United States alleged, would satisfy the Court's definition of armed attack.

The Court examined the specific U.S. actions complained of by Nicaragua and determined which constituted the use of force or threat of force.[227] The Court then determined whether those acts could be justified by self-defense or collective self-defense. Nicaragua had alleged that the United States had unlawfully mined its harbors, conducted various attacks in its ports, conducted military maneuvers off its coast, and supported the contra insurgency.[228]

The Court specifically found that U.S. military maneuvers off the Nicaraguan coast did not constitute an illegal use or threat of force.[229] The mere giving of funds to the contras also did not constitute an unlawful use of force, although it was an

interference in another State's internal affairs and might be a violation of the principle of non-interference.[230] The Court did not, therefore, need to engage in the second part of the methodology with respect to the military maneuvers and financing of the contras: whether collective or individual self-defense justified the U.S. acts.

Another aspect of U.S. support for the contras did constitute the threat or use of force to the extent it was prohibited by the terms of General Assembly Resolution 2625 (XXV).[231] These acts would presumably include all those claimed activities, except financing, made by Nicaragua in its Application to the ICJ: "recruiting, training, arming, equipping...[and] supplying" contra forces.[232] Therefore, the Court next addressed the law of collective self-defense.

For collective self-defense to apply, Nicaragua would have to have conducted an "armed attack" upon another State: El Salvador, Costa Rica, or Honduras.[233] The United States alleged that Nicaragua supplied rebel insurgents in El Salvador and conducted various border incursions against Costa Rica and Honduras.[234] The Court examined whether those alleged acts rose to the level of the "armed attack" necessary to trigger self-defense.

Regarding the first allegation, the Court found that arms had flowed from Nicaraguan territory into El Salvador during late 1980 and early 1981.[235] The Court held, however, that the flow of arms could not be imputed to the Nicaraguan government, and even if the Nicaraguan government were responsible for the flow of arms, the amounts of weaponry were not significant enough to constitute an armed attack.[236] Of course, the flow of weapons might, as Judge Ruda observed in his dissenting opinion, be illegal because it violated the obligation not to intervene in the internal affairs of another State.[237]

In ruling that Nicaragua had not engaged in armed attacks against El Salvador, the Court attached significance to the failure of El Salvador to report or complain of the armed attack until its Declaration of Intervention in August, 1984.[238] The Court believed that El Salvador, if it was suffering an armed attack in 1981, would complain at the time rather than waiting three years. El Salvador, despite ample opportunity and forums to so complain, failed to allege an armed attack until long after the fact.[239] The Court's factual determination is not surprising in view of the failure of the United States to present evidence on the merits.

With reference to Costa Rica and Honduras, the Court noted that Nicaragua was responsible for various border incursions against those two States from 1982 through 1984.[240] The Court admittedly had little evidence by which to judge the nature of those incursions.[241] The lack of evidence made it difficult for the Court to decide if those incursions amounted to an armed attack on Costa Rica or Honduras.[242] Costa Rican and Honduran reaction to those border violations indicated that those two States believed they were victims of armed attacks.[243] This reaction was manifested after the United States began its actions toward Nicaragua.[244] For example, as late as March and April, 1984, the Costa Rican representative, during the Security Council debates, made no claim that Nicaragua engaged in armed attack against his country.[245] The Court glossed over the complaint made by the Honduran representative during the same debate: "My country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population."[246] This writer fails to see how Honduras could have stated more clearly that it considered Nicaraguan border incursions to be unlawful. The Court's conclusion is, however, that even accepting as true the U.S. allegations concerning Nicaragua's actions towards its neighboring States, such acts constitute

unlawful intervention, but do not amount to an armed attack to trigger collective self-defense.[247]

The second condition for collective self-defense is for the victim State to make a request for aid.[248] The Court viewed with scepticism the requests for aid made by El Salvador, Costa Rica and Honduras. According to the evidence before the Court, the requests were made substantially after the United States acted against Nicaragua.[249] For example, in the Security Council debates of March and April 1984, El Salvador made no mention of armed attacks or requests for U.S. aid.[250] El Salvador did not mention "armed attacks" or requests to the United States to exercise collective self-defense until the August 15, 1984, Declaration of Intervention.[251] The Declaration of Intervention does not specify the precise date when El Salvador first requested aid, but implies that it was not long before the filing of the Declaration.[252] This delay on the part of El Salvador occurred despite its suffering Nicaraguan aggression since 1980.[253] Honduras and Costa Rica filed letters with the Court after Nicaragua filed its initial Application; neither Honduras nor Costa Rica, in their communications to the ICJ, made mention of requests for U.S. aid.[254] None of the parties--including the United States--mentioned requests for aid during the Security Council debates, and Honduras even implied that the problem needed to be solved without the help of the United States: "[The dispute] is a Central American problem ... and it must be solved regionally."[255] The Court could not, based on the evidence before it, find that any of the victim States had requested U.S. help "either at the time when the United States first embarked on the activities which were allegedly justified by self-defense, or indeed for a long period subsequently."[256] Once again, the United States, by not making an appearance before the Court, prejudiced its case; unless, as many suspect, the evidence simply was not there to contradict the

Court's finding.

The third and final condition for the use of collective self-defense is to report the use of force to the Security Council as required by Article 51 of the U.N. Charter.[257] Article 51 states, in part:

> 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.[258]

Since the Court was not judging U.S. obligations under multilateral treaties, but only under customary international law, it did not hold that the United States violated Article 51.[259] The Court also found that the Article 51 reporting requirements do not exist in customary international law.[260] Under customary international law, a State has no duty to report self-defense or collective self-defense measures to the Security Council or any other body. Although the United States did not violate customary international by its failure to report to the Security Council, the Court viewed the U.S. failure to report to the Council as an action inconsistent with the U.S. claim of collective self-defense under Article 51.[261] The Court also noted that the United States had argued, in past Security Council sessions, that the Article 51 reporting requirement was a condition precedent to a legitimate claim to collective self-defense.[262] Thus, just as the United States did not satisfy the first two conditions for collective self-defense--"armed attack" and a timely request for aid. The United States failed the third condition as well: immediate reporting to the Security Council.

The Court briefly addressed whether the United States's response to alleged Nicaraguan aggression was both necessary and proportional, as required by customary international law.[263] The Court did not discuss the origins or breadth of these requirements.[264] The majority opinion was equally unenlightening for the reader on the breadth of law in this area; the Court merely stated the obvious: any self-defense response must be both necessary and proportionate.[265]

The Court found, however, that even if U.S. actions were in response to an "armed attack" at the request of the victim State, the acts would be unlawful because they were neither a necessary nor a proportionate response to Nicaraguan activity.[266] The actions were not necessary because, according to the Court, the "major offensive of the armed opposition against the Government of El Salvador had been completely repulsed [in] January 1981."[267] The Court allowed that assistance to the contras might be a proportional response, but the United States exceeded the proportionality standard by mining Nicaragua's harbors and attacking various ports and installations.[268]

Judge Schwebel, in his dissenting opinion, discussed the law of necessity and proportionality more extensively.[269] He reached a different conclusion from the Court: "The decision of the United States in late 1981 that the exertion of armed pressures upon Nicaragua was necessary was not unreasonable."[270] He noted that principle of necessity does not require a finding that no other means, except armed force, are available to halt an armed attack.[271] To support this proposition he cites Judge Ago, one of the judges on the ICJ:

> The reason for stressing that action taken in self-defence must be <u>necessary</u> is that the state attacked...must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by

> measures not involving the use of armed force, it would have no justification for adopting which contravened the general prohibition against the use of force.[272]

Judge Schwebel concludes that the question of necessity depends, therefore, upon whether any peaceful means could achieve the same objectives.[273] He asserts that the United States had exhausted peaceful recourse and had no alternative except to resort to force, thereby satisfying the requirement of necessity.[274]

In discussing the principle of proportionality, Judge Schwebel observed that "perfect proportionality" need not exist.[275] Again he cited Judge Ago:

> It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself....Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals....In fact, the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale....[276]

Judge Schwebel concluded that the U.S. response to Nicaragua was proportionate to the nature of the Nicaraguan actions.[277]

Concerning the requirement that self-defense be an immediate response to armed attack and not delayed long after the attack has occurred, Judge Schwebel noted the law is more flexible when the armed attack consists of a series of acts.[278] Thus, if the attacking State conducted a series of attacks, "the requirement of

the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole."[279]

The law regarding self-defensive actions of necessity and proportionality with the corrollary requirement of immediacy appears well-established. The rub comes in applying the facts of the particular situation to the law. In the Paramilitary Activities case, reasonable men differed in that application. The exercise was more academic than practical in view of the Court's finding that self-defense was not justified and, except for Judge Schwebel, the judges did not see the need for discussing the principles of necessity and proportionality in their separate opinions.

3. The Use of Force in Response to Unlawful Acts Not Amounting to "Armed Attack."

Having held that U.S. use of force against Nicaragua was not justified under the self-defense exception to the general customary international prohibition against the use of force, the Court then examined a novel theory of possible justification for U.S. acts. It queried: "If one State [Nicaragua] acts toward another State [El Salvador] in breach of the principle of non-intervention, may a third State [the United States] lawfully take such actions by way of counter-measures against the first State [Nicaragua] as would otherwise constitute an intervention in its internal affairs?"[280] In other words, although the Court found that Nicaragua's actions against El Salvador did not amount to an armed attack, could they be considered unlawful intervention in El Salvadoran internal affairs? Could the United States justify its actions against Nicaragua as an appropriate response to Nicaraguan intervention?[281] This theory justifying U.S. actions would be analogous to the theory of collective self-defense,[282] the main

difference being that the Court would not need to find a Nicaraguan "armed attack." The Court specifically refused to decide whether El Salvador would have a right, analogous to individual self-defense, to respond to Nicaraguan intervention and limited itself to the issue before it: the U.S. right to collective self-defense.[283]

In this relatively unknown area of the law, the Court spoke definitively; a State may not use force in response to wrongful intervention when the intervention does not rise to the level of an "armed attack."[284] This rule is true both under customary international law and the treaty law of the U.N. Charter.[285] The United States never, publicly or before the Court on the jurisdiction proceedings, claimed its actions were justified by Nicaragua's wrongful intervention. It always gave collective self-defense as the legal basis for its policies.[286] The Court treated the failure of the United States to make a claim of justification under the wrongful intervention theory as evidence that, in the belief and practice of States, it does not exist.[287]

4. Intervention in the Internal Affairs of Another State.

The facts before the Court were unclear regarding the ultimate purpose of the United States in supporting contra forces. Nicaragua claimed the United States intended "[t]he actual overthrow of the existing lawful government of Nicaragua... [and t]he substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands."[288] The United States, in various policy statements, contended it was merely attempting to modify Nicaraguan behavior.[289] To the Court, however, U.S. intentions were largely irrelevant since the contra objective was the overthrow of the

Nicaraguan government and not "only to check Nicaraguan interference in El Salvador."[290] The Court apparently imputed the contra purpose to the United States by holding: "[I]n international law, if one State [the United States], with a view to the coercion of another State [Nicaragua], supports and assists armed bands in that State [Nicaragua] whose purpose is to overthrow the government of that State [Nicaragua], that amounts to an intervention in the internal affairs of the other, whether or not the political objective of the State [the United States] giving such support and assistance is equally far-reaching."[291] Thus, the Court found U.S. "financial support, training, supply of weapons, intelligence and logistical support" to violate the principle of nonintervention as found in customary international law.[292]

The Court could find no justification in international law, including the previously considered U.S. counter-measures in response to Nicaraguan intervention, that would justify U.S. actions.[293] The Court indicated the victim States could take such counter-measures by holding:

> The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[294]

The Court did not consider the legality of so-called "humanitarian assistance" to the contras (as authorized by the U.S. Congress beginning on October 1,1984) due to the limited facts on how the humanitarian assistance was administered.[295] The Court did reiterate the law concerning humanitarian aid: humanitarian aid is that which does not discriminate "as to nationality, race, religious beliefs, class or political opinions."[296] Such aid is not considered unlawful intervention.[297] The U.S. Congress defined

"humanitarian assistance" differently from the international law definition and, by implication, such U.S. aid, although entitled "humanitarian," would be unlawful since it was not available to all parties.[298] Any sharing of intelligence information which was authorized by Congress would, according to the Court, also violate the principle of non-intervention.[299]

Nicaragua alleged that certain economic measures taken by the United States against Nicaragua--namely, cutting off economic aid, reducing sugar quotas and imposing a trade embargo--amounted to unlawful intervention.[300] The Court disagreed.[301] Such economic reprisals are not unlawful intervention under customary international law, although they may constitute violations of treaty law.[302] One scholar called this holding "one of major importance as a statement of the present customary law duty of nonintervention."[303]

Finally, concerning intervention, the Court, in a holding with "important implication regarding the admissibility of countermeasures by third states,"[304] held that a request for assistance by a group in opposition to the government cannot justify intervention.[305] To hold otherwise would rob the principle of non-intervention of all meaning. The result would "permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition."[306]

5. Humanitarian Law.

Nicaragua claimed violations of humanitarian law except regard to specific contra acts[307] and with the U.S. failure to warn neutral shipping of the mining of Nicaraguan harbors.[308] Nicaragua alleged the contras had engaged in "kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity."[309] Nicaragua alleged that such

acts were imputable to the United States but, as previously noted, the Court held otherwise.[310] The Court, however, did apply humanitarian law to certain U.S. acts vis-a-vis Nicaragua: specifically, distribution of the CIA-authored Psychological Operations Manual[311] and the mining of the harbors.[312]

In judging the U.S. actions, the Court did not specifically apply the four Geneva Conventions of 12 August 1949;[313] apparently the Court wished to avoid the multilateral treaty reservation thicket again.[314] Instead, it applied the "fundamental general principles of humanitarian law."[315] The Court cited the Geneva Conventions for the proposition that Conventions were not the only body of law regulating armed conflict, but customary law was also applicable.[316] Common Article 3, which specifically applies to non-international armed conflicts, represents the "minimum" rules applicable to any conflict, regardless of its characterization.[317] The Court found Common Article 3 to be an expression of customary international law and, thus, applicable to the dispute.[318]

While the Court recognized that contra acts would be of a non-international character and U.S. acts would be of an international character, the characterization of the dispute was irrelevant as Common Article 3 represented the minimum rules in either type of dispute.[319] The minimum rules are:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, coulour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.[320]

The Court stated the United States had a duty under international law to "respect" and "ensure respect" for common Article 3.[321] The Court held that certain provisions in the Manual, specifically, advising the contras to "neutralize" civilian targets, violated Article 3's prohibition against both murder and executing sentences without using a regularly constituted judicial system.[322] By encouraging the contras to violate those proscriptions, the United States violated its duty to "respect" and to "ensure respect" for the general principles of international humanitarian law.

The United States, according to the holding of the Court, also violated humanitarian law by not warning shipping about mines it laid in Nicaraguan waters. The Court found the President of the United States had authorized a program of mining Nicaraguan harbors and, therefore, the Court attributed the actual laying of the mines to the United States.[323] The Court found the United States failed to warn neutral shipping about the mines.[324] Subsequently, a number of ships struck mines and were damaged.[325] The Court noted that during wartime, belligerents had a duty, under the Hague Convention No. VIII, to "notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Government through the diplomatic channels."[326] This obligation, while codified in

treaty, is rooted in customary international law[327] and based on the longstanding right of innocent passage through territorial waters for entering and leaving ports.[328] Neutrals have a similar duty to warn.[329] As will be examined later, the laying of mines in peacetime is a violation of international law, however, the failure to warn vessels who have access rights through those waters is a separate violation based on humanitarian law considerations.[330] The Court found that by this failure to warn, the United States violated customary international law; only Judge Oda dissented.[331]

6. Pinciples of Sovereignty.

The Court applied a final principle of customary international law in its majority opinion: the principle of sovereignty. As in other areas when analyzing the relationship between treaty law and customary law, the Court found Article 2(1) of the U.N. Charter and other applicable treaties to declare customary international law.[332] The Court noted that, under customary international law, the air above a State's territory and the State's territorial sea are the exclusive dominion of the State's sovereignty;[333] the Chicago Convention on Civil Aviation[334] and the Geneva Convention on the Territorial Sea[335] declare these principles respectively.[336] The United Nations Convention on the Law of the Sea also affirmed the latter principle.[337]

The Court found that the U.S. mining of Nicaraguan inland and territorial waters violated the principle of sovereignty as found in customary international law.[338] The United States, as do other States, has an obligation to respect the sovereignty of other nations.[339] As a corrollary to sovereignty, the Court observed, the mining interferred with the long recognized right of innocent passage into and out of a State's ports.[340] U.S. mining of Nicaraguan ports infringed on Nicaraguan sovereignty by affecting

rights of navigation and commerce.[341] Therefore, the mining, in and of itself, violated international law as did the previous noted failure to warn shipping of the mines.[342]

7. The 1956 Treaty of Friendship, Commerce and Navigation.

Finally, the Court turned to the one bilateral treaty upon which Nicaragua based claims against the United States: the 1956 United States-Nicaragua Friendship, Navigation, and Commerce Treaty.[343] The Treaty did not raise substantial or controversial issues of jurisdiction; neither the Vandenberg Reservation nor Nicaragua's Declaration under Article 36(2) applied. Rather, the Court based jurisdiction upon the Treaty's compromissory clause and Article 36(1) of the ICJ Statute.[344] The latter states: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[345] As previously noted, Article XXIV(2) of the Treaty provided for submitting any dispute that arose under the Treaty to the ICJ for resolution.[346] Thus, the questionable validity of the Nicaragua's Declaration accepting the Court's compulsory jurisdiction was irrelevant to the claims under the 1956 Treaty.

Article XXI of the 1956 Treaty complicated the treaty's application. It stated:

> [T]he present Treaty shall not preclude the application of measures:
>
> ....
>
> (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace or security, or necessary to protect its essential security interests.[347]

The obvious question was: did Article XXI(c) and (d) preclude application of the Treaty to the present dispute? The ICJ was, according to Article XXI, the proper party to answer that question.[348] The Court applied an objective test to determine whether "essential security interests" were involved which precluded Treaty coverage. The Party's subjective belief that the measures involve "essential security interests" was irrelevant.[349]

In applying Article XXI(1)(c), which removed "traffic in arms" from the Treaty's coverage, the Court simply found the exception not applicable; it would apply to only those claims of supplying contra forces and the Court found such actions did not violate the Treaty.[350] Article XXI(1)(d) was, however, relevant to those acts imputable to the United States:[351] the mining of Nicaraguan ports, the various attacks on ports and the U.S. trade embargo.[352] The Court held, based on the evidence before the Court, that those acts were not essential to protect U.S. security interests.[353] This finding contradicted President Reagan's findings in his Executive Order of May 1, 1985: "The policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States."[354] Apparently the Court could find no change in Nicaraguan behavior which suddenly made it a threat to U.S. national security in 1985.[355] Neither Article XXI(1)(c) nor (d), therefore, prevented the Court from applying the FCN Treaty to adjudication of the dispute.

Although this aspect of the Court's decision was based on a lack of evidence, U.S. participation during the proceedings on the merits probably would not have altered the outcome. The Court emphasized the high burden that the Treaty language imposed before Article XXI(1)(c) or (d) applied. The measures taken by a Party had to be "necessary" and not merely "useful" before the exceptions precluded Treaty coverage.[356] The term "essential security

interest" also embodies a high burden and one which must satisfy the Article's objective test.[357] One has difficulty imagining any plausible set of facts to support mining of ports and attacks on installations as objectively "necessary" to protect "essential" U.S. security interests.

Professor James P. Rowles, a highly regarded international legal scholar, notes that the Court could have restrictively, and probably more correctly, interpreted clauses (c) and (d).[358] Under this restrictive interpretation, the clauses would never exclude international law violations from the Treaty's coverage.[359] Article 103 of the U.N. Charter supports this interpretation:[360] In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[361] Professor Rowles stated in other words, that one should interpret treaties, whenever possible, in harmony with U.N. Charter obligations.

Nicaragua had two different types of claims under the Treaty. First, it claimed that the customary international law doctrine of pacta sunt servanda[362] obligated the United States to honor the FCN Treaty; this obligation was independent of any treaty obligations themselves.[363] Second, Nicaragua claimed specific violations of the Treaty. It claimed the United States violated Article I of the 1956 Treaty, the obligation to provide "equitable treatment" to each States's nationals, by "killing, wounding or kidnapping citizens of Nicaragua."[364] Nicaragua also claimed the United States violated the freedom of navigation and commerce guarantees of Article XIX of the 1956 Treaty by mining its inland harbors and by imposing the May 1, 1985, trade embargo.[365] In reaching this finding, the Court contrasted the terms of Article XXI, which provided for freedom of navigation and commerce and "liberty...to come with their cargoes to all ports, places and waters,"[366] with

the terms of President Reagan's Executive Order: "I hereby prohibit vessels of Nicaraguan registry from entering into United States ports."[367] Based on a plain reading of the Treaty, the Court's conclusion is not surprising.

With respect to the first category of claims, the Court noted that not every unfriendly act defeats the Treaty's nature and object in violation of pacta sunt servanda.[368] The Court found, however, that certain U.S. actions were of such a magnitude as to undermine the Treaty's purpose of "strengthening the bonds of peace and friendship."[369] These acts included the mining of Nicaragua's harbors and the direct attacks on its ports.[370] The economic measures, such as the ninty percent reduction in sugar quotas and terminating economic aid, did not violate pacta sunt servanda.[371]

In considering the second category of FCN Treaty claims, the Court dismissed those based on "equitable treatment" violations.[372] The Court had previously refused to impute the acts of the contra forces to the United States, as the United States did not exercise sufficient control over the contras to make them U.S agents.[373] Since the contras, not the United States, were responsible for the "killing, wounding or kidnapping" of Nicaraguans, the United States did not violate the provisions of Article I.[374]

Obviously the United States poorly prepared its legal position for the trade embargo; it did not terminate the FCN Treaty until the very day it imposed the trade embargo.[375] Unfortunately for the U.S. position, the termination provision of the FCN Treaty required one year's notice before termination.[376] The Court rightfully held the United States could not violate the terms of the FCN Treaty during the one year notice period.[377] The United States imposed the trade embargo and and terminated the FCN Treaty over a year after Nicaragua began legal proceedings in the ICJ.[378] No apparent legal reason can justify the failure of the United

States to terminate the FCN Treaty earlier, especially since the United States had been complained of Nicaraguan policies for the previous four years.

8. Other Possible Justifications for U.S. Actions.

Although the United States claimed only collective self-defense as jusitification for its actions, the Court, under its Article 53 responsiblities, examined other possible justifications.[379] The Court looked at the following findings of fact that the U.S. Congress made on July 29, 1985, for possible justifications for U.S. actions:

> (A) the Government of National Reconstruction of Nicaragua formally accepted the June 23, 1979 resolution as a basis for resolving the Nicaraguan conflict in its 'Plan to Achieve Peace' which was submitted to the Organization of American States on July 12, 1979;
> (B) the June 23, 1979, resolution and its acceptance by the Government of National Reconstruction of Nicaragua was the formal basis for the removal of the Somoza regime and the installation of the Government of National Reconstruction
> (C) the Government of National Reconstruction, now known as the Government of Nicaragua and controlled by the Frente Sandinista (the FSLN), has flagrantly violated the provisions of the June 23, 1979 resolution, the rights of the Nicaraguan people, and the security of the nations in the region, in that it--
>
> (i) no longer includes the democratic members of the Government of National Reconstruction in the political process;
> (ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, Honduras, and El Salvador;
> (iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch committees and the enactment of laws that violate human rights and grant undue executive power;
> (iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States;

(v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization;
(vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention; and
(vii) has built up an army beyond the needs of immediate self-defense, at the expense of the needs of the Nicaraguan people and about which the nations of the region have expressed deepest concern.[380]

a. Nicaraguan Commitments to the Organization of American States.

The first of these other possible justifications was: Did Nicaragua break binding commitments to the OAS and, if so, could the United States enforce those commitments?[381] The Court recognized that a State could bind itself internationally on a matter solely of domestic concern and jurisdiction, such as its form of government and whether, and when, to hold free elections.[382] The question was, had Nicaragua done so? The Court indicated that the OAS Charter was not an overly restrictive agreement concerning those types of domestic concerns.[383] While member States agreed to strive for representative democracy, they also agreed to a certain, counter-balancing degree of political autonomy.[384] Thus, the OAS Charter did not bind a member State to "commitment as to the use of particular political mechanisms."[385]

Shortly after assuming power in 1979, the Nicaraguan Government--the Junta of the Government of National Reconstruction--made various statements to the OAS that included goals of democratic government and respect for human rights.[386] The Court found, however, these statements did not rise to the level of

legally binding commitment; they were "essentially political pledge[s], made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries."[387] Further, the Court held that, assuming, arguendo, the pledges were binding, the OAS, not the United States, should enforce those commitments.[388] And the United States could not enforce those commitments by a means forbidden to the OAS: unlawful force and intervention.[389]

b. Ideological Intervention.

Despite the U.S. Congress's view that Nicaragua was evolving into a totalitarian and communist form of government, the Court held that the United States could not justify its actions because of the type of government in Nicaragua.[390] The principle of sovereignty, under customary international law, means that each State is free to determine its own form of government and pursue to its own social, cultural, and economic objectives.[391] In short, the Court found no basis for ideological intervention in international law; each State is free to determine its own domestic course, as well as its own foreign policies and alliances, free from outside interference.[392]

c. Humanitarian Intervention.

The Court observed that the United States condemned Nicaragua for various human rights violations.[393] The United States could not, according to the Court, intervene or use force against Nicaragua based on these allegations.[394] The Court seemed to slam the door shut against any emerging concept of humanitarian intervention for human rights violations.[395] Although the Court conceded Nicaragua could not "with impunity violate human rights,"

the only mechanism for insuring compliance with human rights conventions were in the conventions themselves.[396] The Court made no finding concerning the existence or non-existence of human rights violations in Nicaragua; it merely noted that Nicaragua was a party to various human rights conventions and a commission had reported on the state of human rights in Nicaragua.[397] Given those conditions, the OAS was in a good position to act upon the allegations of human rights violations.[398] In any event, the means to enforce respect for human rights must be compatible with its humanitarian objective.[399] The Court, therefore, held: "[T]he protection of human rights...cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras."[400] From the perspective of the ICJ, the emerging concept of humanitarian intervention has not evolved into customary international law.

d. Militarization of Nicaragua.

President Reagan publically complained of the level and sources of armaments in Nicaragua and implyed these armaments exceed Nicaragua's legitimate self-defense needs.[401] The President asked: "If Nicaragua can get material support from communist states and terrorist regimes and prop up a hated communist dictatorship, should not the forces fighting for liberation, now numbering over 20,000, be entitled to more effective help in their help in their struggle for freedom?"[402] Does the President concerns about the militarization of Nicaragua justify the U.S. actions? In a brief discussion, the Court answered that question. It held that a State may not intervene or use force because of the militarization of another State.[403] The level of armaments a State chooses is strictly within the province of that State.[404] Customary international law imposes absolutely no restriction or

limit on the extent of a State's armament.[405] The Court emphasized this principle was "valid for all States without exception."[406] The United States could not justify its actions by the findings of the U.S. Congress that Nicaragua "has built up an army beyond the needs of immediate self-defense."[407]

REMEDIES

Having found the United States violated various norms of customary international law and treaty obligations, the Court turned to the question of remedies for these violations.[408] In its prayer for relief in the Memorial on the merits, Nicaragua asked for the following:

> Second: the Court is requested to state in clear terms the obligations which the United States bears to bring to an end the aforesaid breaches of international law.
>
> Third: the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in this Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.
>
> Fourth: without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,200,000 United States dollars, which sum constitutes the minimum valuation of the direct damages, with the exception of damages for killing nationals of Nicaragua, resulting form the violations of international law indicated in the substance of this Memorial.[409]

1. Jurisdiction.

The Court observed that since it had jurisdiction to hear the dispute on the merits, it also had jurisdiction to fashion remedies.[410] The U.S. Declaration accepted the Court's jurisdiction with regard to reparations and Nicaragua's declaration

was similarly unrestricted; thus, the Court had jurisdiction to determine reparations under the Article 36(2)-based claims. The Court also found it had jurisciction to determine reparations for violations of the 1956 FCN Treaty.[412] Article XXIV(2) of the Treaty gave the Court jurisdiction of the Treaty's application, which the Court interpreted to include reparations.[413]

2. Reparations

The Court denied Nicaragua's request for an interim award for reparations in the amount of 370.2 million U.S. dollars.[414] Nicaragua had presented some evidence, in the form of testimony from its Minister of Finance, to substantiate this amount.[415] The Court did not decide it had the authority to make an interim award; the Statutes of the ICJ neither permit nor prohibit such awards.[416] The Court held, even assuming it did have the power to make the award, it should make interim awards only in "exceptional circumstances."[417] Nicaragua did not establish the extraordinary circumstances necessary to justify an interim award.[418]

The Court preferred to call upon the Parties to settle between themselves the amount of the reparations.[419] If the Parties could not agree on the amount of reparations, the Court would then have further proceedings to determine the amount of the reparations.[420] Despite its withdrawal from participation on the merits, the United States would be free to join any ICJ proceedings on the matter of reparations, although it would be unable to re-litigate any previous ICJ finding.[421] In sum, while that finding the United State was obligated to make reparations for injuries caused by breaches of customary international law[422] and breaches of the obligations imposed by the 1956 FCN Treaty,[423] the Court decided that "the form and amount of such repartion, failing agreement between the Parties, will be settled by the Court, and reserve[d] for this purpose the subsequent procedure in the case."[424]

3. Cease and Refrain Order

The Court decided, "The United States is under a duty immediately to cease and refrain from all such acts as may constitute breaches of ... [its] legal obligations."[425] The Court reiterated the provisions of its May 10, 1984, interim order:

> The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activites which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdition of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.[426]

The Court conveniently side-stepped whether the United States had complied with that order; it noted, however, Nicaraguan complaints of alleged U.S. violations of the order.[427] The Court seemed to anticipate that the United States would ignore the Court's rulings and justify its actions by claiming collective self-defense. The Court said:

> It is incumbent on each party to take the Court's indication seriously into account and not to direct its conduct solely by reference to what it believes to be its rights. Particularly this is so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.[428]

Finally, the Court, in an unanimous voice,[429] called on the parties to peacefully resolve their differences and specifically endorsed the ongoing Contadora process for a solution to the dispute.[430] The Court declared the duty to seek a peaceful solution to problems that endanger world peace to be a principle of customary international law. Article 33 of the U.N. Charter

enshrines this principle, as well as the peaceful means available to resolve disputes.[431] This principle is really a corollary of the principles barring intervention and the use of force. It illustrates how relatively rapidly a principle can evolve into the law of nations; not so very long ago, after all, States considered war a legitimate instrument of foreign policy.

ANALYSIS

1. U.S. Withdrawal

On January 18, 1985, the United States withdrew from participation in ICJ proceedings.[432] Nonparticipation in an ICJ case is, unfortunately, not unusual; indeed, since 1945 respondent States have refused to participate in nine different cases.[433] In only one, however, has a State withdrawn after earlier participation.[434] In that instance, the Corfu Channel case, Albania withdrew from the proceedings on damages after participating on the merits.[435] For the first time the Court had the opportunity to apply Article 53 of the Statute. It did so and proceeded without Albanian presence.[436] The Paramilitary Activities case was slightly different from Corfu Channel; the United States withdrew from the merits after earlier litigating the jurisdictional issues something no State had ever done before.[437]

In a statement accompanying its notice of withdrawal, the United States gave the following reasons for its decision:

> The United States has consistently taken the position that the proceedings initiated by Nicaragua in the International Court of Justice are a misuse of the Court for political purposes and that the Court lacks jurisdiction and competence over such a case. The Court's decision ... finding it has jurisdiction, is contrary to law and fact.
>
> ....

> The conflict in Central America ... is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be soved only political and diplomatic means--not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and self-defense and is patently unsuited for such a role....
>
> ....
>
> Few if any other countries in the world would have appeared at all in a case such as this which they considered to be improperly brought....
>
> ....
>
> ... [M]uch of the evidence that would establish Nicaragua's aggression against its neighbors is of a highly sensitive intelligence character. [The United States] 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....
>
> ... The right of a state to defend itself or to participate in collective self-defense against aggression is an inherent sovereign right that cannot be compromised by an inappropriate proceeding before the World Court.
>
> ... The decision ... represents ... a risky venture into treacherous political waters.... [The United States has] seen in the United Nations, in the last decade or more, how international organizations have become more and more politicized against the interests of the Western democracies. It would be a tragedy if these trends were to infect the International Court of Justice.[438]

The U.S. statement is quoted at length because it represents the same rationale the United States used to terminate its Declaration of compulsory jurisdiction under Article 36(2). The implications of that decision are substantial.

Was the U.S. decision not to participate on the merits a correct decision? From a legal perspective the answer is no. Nothing could be gained legally from not participating on the merits, from not presenting evidence, and from not refuting the opposing party's allegations.

The United States expressed concern that litigating the case before the ICJ would compromise intelligence sources. Although some of the U.S. evidence of Nicaraguan aggression would, no doubt,

be, as the United States claimed, highly classified, some unclassified evidence must exist.[439] For example, the United States has declassified a number of defector reports to Cuban involvement in Nicaragua.[440] Two recently published books have outlined evidence supported of the U.S. position. One is by Robert F. Turner, a former Assistent Secretary of State.[441] The other is by Professor John Norton Moore who represented the United States before the Court.[442] And Ambassador Vernon A. Walters, the U.S. Permanent Representative to the United Nations, cites the following plethora of evidence:

> The principle target of Sandinista aggression has been El Salvador. Nicaragua has since 1979 provided massive support to the guerrillas seeking to overthrow that country's government....
>
> The evidence of this activity is real, varied, and massive. Documents captured in El Salvador establish the key Nicaraguan role in unifying, supplying, and sustaining the FMLN [Farabundo Marti National Liberation Front]. That role was crucial in 1980-81, as shown in the documents published by the United States in February 1981. Documents captured from FMLN commander Nidia Diaz in April 1985 made clear that the nature of Nicaragua's support for the rebels had remained substantial. Aerial photography, released by the United States, shows the very airfield from which many of those supplies were flown.
>
> Guerilla commanders captured or defecting from 1981 to the present day have, one after another, described in compelling detail the dependence of the Salvadoran guerrillas on Nicaraguan-supplied weapons and supplies, on safehaven in that country, on communications and command services from Nicaragua, and on training conducted in or facilitated by Nicaragua....
>
> Weapons captured from, or remaining in, guerrilla hands have been traced through official U.S. shipping and production records from Vietnam though Nicaragua to the rebels. The elaborate smuggling network developed by the Sandinistas is attested to by such irrefutable physical evidence as the large trailor truck crammed with weapons and ammunition captured by Honduran authorities en route from Nicaragua to El Salvador in 1981. This pattern continues. Several months ago a Lada automobile on the same...route crashed and was found to contain weapons, ammunition, demolitions and cryptographic equipment....

> Honduras has been the target of attempted subversion. Twice, in 1983 and 1984, the Sandinistas sought to infiltrate groups into Honduras to initiate a guerrilla war against the government of that country. A large number of these guerrillas were captured and attested to Nicaragua's role....In 1985, members of the Nicaraguan intelligence services were captured inside Honduras and confessed their involvement in conveying arms to subversive groups in Honduras.[443]

Obviously, however, without access to such evidence, one cannot judge the validity of the U.S. concern for intelligence security. While the United States cannot be expected to reveal sensitive intelligence sources, the United States could have presented much of its position with unclassified evidence as described above.

While the Court was unwilling to dismiss the case because of U.S. concerns for intelligence sources, the Court used several techniques which would have aided a U.S. presentation of evidence. The Court appeared to have relaxed the rules of evidence and permitted, at times, witnesses to testify in conclusory terms.[444] Thus, evidence was admitted which, under more stringent evidentiary rules, would be excluded as hearsay or lacking foundation. Also, the Court looked to the evidence presented by Nicaragua and found that some of it actually supported the U.S. position.[445] While Article 53 of the ICJ Statute provides some protection to the absent parties, it is not a substitute for actual participation and presentation of evidence. The United States should have, and could have, presented evidence before the Court on the proceedings on the merits.

The United States, in its statement explaining its withdrawal, condemned the so-called political nature of the Court and, thereby, implied that the ICJ decision on jurisdiction and admissibility was a result of political rather than legal considerations.[446] The U.S. argument raised the ugly spectre of being held hostage to an

unholy alliance of radical third world and communist jurists; proceeding on the merits against such odds would be similar to Don Quixote jousting the proverbial windmills. Is that argument valid? Is the ICJ a hostile political environment in which the United States has no hopes of prevailing?

The answers to those questions are not definitive and certainly are, to a large measure, flavored by the political orientation of the beholder. This paper suggests, however, the problem is not as great as the U.S. perception of it. First, the political background of the judges, while heterogeneous, is not one-sided. The nationality of the judges who participated in the judgment on jurisdiction and admissibility and on the merits was well-balanced.[447]

A second indication of the Court's political neutrality is the decision it rendered in the Iranian Hostage case.[448] The vote in that decision ranged from twelve-to-three to a unanimous vote in favor of the United States on the various holdings.[449] The critical vote, requiring Iran to take all measures to release the American hostages, was unanimous,[450] while the holding with the most number of judges in dissent, still only three, concerned Iran's responsiblity for reparations.[451] The ICJ rendered an overwhelming favorable decision to the United States less than four years before Nicaragua filed its Application. The Iranian Hostage case result shows, therefore, that the Court is not politically hostile to the United States.[452]

Third, the U.S. argument that the ICJ is overly politicized ignores the political insulation, admittedly limited, of the Court's judges in their status and election. The Statute of the ICJ provides various protections to the Judges to maintain their independence; no judge may act as an Agent on a case;[453] no judge may act on a case in which that judge has had previous dealings;[454] only the unanimous verdict of the rest of the Court can dismiss a

judge;[455] the General Assembly, not any particular State, fixes the judges' salaries, which are tax free;[456] the General Assembly cannot decrease any judge's salary during his or her term of office;[457] they have diplomatic privileges and immunities while on official business;[458] and, no judge may exercise another professional occupation or administrative or political function.[459]

Some scholars have characterized the election of the judges as a political process.[460] The election methods are, however, somewhat insulated. The national groups of the Permanent Court of Arbitration[461] nominate candidates for the Court.[462] States do not, therefore, directly nominate ICJ candidates. States play only an indirect role in the nominating process, as they appoint the national groups in the Permanent Court of Arbitration.[463] The General Assembly and Security Council then separately vote on the candidates;[464] a majority in both U.N. organs is needed for election.[465] The veto powers of the permanent members of the Security Council do not apply to the election of judges.[466] Certainly, the system of nominations and elections is not perfect, and a number of scholars have criticized the political tone of the elections, especially subjecting a judge to an election every nine years.[467] Ideological factions of the United Nations, however, do not control the ICJ's composition in the same manner that ideological factions are represented in the General Assembly.

Article 9 of the ICJ Statute requires "that in the body as a whole the representation of the main forms of civilization and of the principle legal systems of the world should be assured."[468] The U.S. complaint about two judges are from the Warsaw Pact,[469] or about judges on the ICJ coming from States that do not accept the compulsory jurisdiction of the Court is irrelevant: Article 9 requires such representation. The ICJ should have diverse representation and potential candidates should not be excluded simply because they are nationals of States that have not made

Article 36(2) declarations. The Court's composition for both of the judgments in the Paramilitary Activities case merely reflects the dictates of Article 9 and not necessarily a forum hostile to the United States.

Finally, one can look to the ICJ's reasoning and vote count as evidence that its decision was legally, and not politically, grounded. In both of the Paramilitary Activities judgments, only the technical considerations of jurisdiction were close, and, even then, the closest vote was eleven-to-five.[470] That vote was on the issue of whether Nicaragua's declaration of jurisdiction was valid.[471] The issue was not one of universal implications and Nicaragua could easily have mooted the controversy by making an Article 36(2) declaration prior to filing its Application or by an Article 36(2) declaration after the issue was raised and re-filing its Application. On those issues not based on Article 36(2) jurisdiction, the vote was an overwhelming fourteen-to-two in favor of jurisdiction.[472] The overall vote for jurisdiction was an equally forceful fifteen-to-one in favor of jurisdiction.[473]

The vote was similar on the substantive issues: for example, twelve-to-three on unlawful intervention;[474] twelve-to-three rejecting collective self-defense;[475] fourteen-to-one on reparations under the FCN Treaty;[476] fourteen-to-one on violations of humanitarian law.[477] Only Judge Schwebel, a former U.S. Department of State legal advisor,[478] consistently dissented. Even he voted with the majority against the U.S. position on admissibilty[479] and the duty to warn shipping of mines.[480] The vote tally, therefore, did not show the Court's majority to be divided along political lines.

The Court's majority opinion indicates the Court carefully considered the U.S. legal arguments and considered possible U.S. legal arguments after the U.S. withdrawal. Professor Herbert Briggs of Cornell University and a member of the Board of Editors

of the American Society of International Law, called the Paramilitary Activities case "convincing evidence of the high judicial quality of the Court and its members."[481] He described the opinion on the merits as "carefully weighed and balanced."[482] Professor Briggs was not alone in his praise of the opinion, Professor Richard Falk of Princeton University stated: "Its quality of legal reasoning is admirable; the process by which it reaches conclusions is developed with enviable clarity."[483] He concludes that "the majority judges lean over backwards to give the United States every reasonable benefit of doubt"[484] and "the Judgement is exemplary in striking a balance between fairness to a sovereign state accused of serious violations of international law and a diligent effort to interpret the relevant rules and principles in a constructive manner."[485] Professor Falk is critical of Judge Schwebel, the principle defender of the United States on the bench. Falk stated that Schwebel's dissent "strains so hard and relies on such one-sided and partisan source material ... without ever confronting the contradiction between what the United States demands of Nicaragua and its own foreign policy in relation to the foreign insurgencies."[486]

Although reasonable men could disagree on portions of the holding and opinion, the opinions, as a whole, are legally reasoned and, certainly far from being inherently unreasonable. The majority's opinions are forwarded on legal reasoning, not political rhetoric.

2. Termination of the U.S. Declaration.

The termination of the U.S. Declaration under Article 36(2) has widespread implications. Although the U.S. will still participate in the Court for minimally required dispute resolution under the ICJ Statute--disputes in which both parties agree to

submit the matter to the ICJ, and when ICJ resolution is required by treaty[487]--the U.S. will no longer be subject to the expansive jurisdictional reach of Article 36(2). Did the United States make the right decision in terminating its Declaration, and what are the implications of its decision?

The U.S. decision to terminate its Declaration appears grounded upon an "equal application of the laws" concept. An accompanying press statement gave the following reasons for terminating the U.S. Declaration:

> When President Truman signed the U.S. declaration accepting the World Court's optional compulsory jurisdiction on August 14, 1946, this country expected that other states would soon act similarly. The essential underpinning of the U.N. system, of which the World Court is a part, is the principle of universality. Unfortunately, few other states have followed our example. Fewer than one-third of the world's states have accepted the Court's compulsory jurisdiction, and the Soviet Union and its allies have never been among them. Nor, in our judgment, has Nicaragua. Of the five Permanent Members of the U.N. Security Council only the U.S. and the United Kingdom have submitted to the Court's compulsory jurisdiction.
>
> Our experience with compulsory jurisdiction has been deeply disappointing. We have never been able to use our acceptance of compulsory jurisdiction to bring other states before the Court, but have ourselves been sued three times. In 1946 we accepted the risks of our submitting to the Court's compulsory jurisdiction because we believed that the respect owed to the Court by other states and the Court's own appreciation of the need to adhere scrupulously to its proper judicial role, would prevent the Court's process from being abused for political ends. Those assumptions have now been proved wrong. As a result, the President has concluded that continuation of our acceptance of the Court's compulsory jurisdiction would be contrary to our commitment to the principle of the equal application of the law and would endanger our vital national interests.[488]

Of those States that accept the Court's compulsory jurisdiction, many have various and sundry reservations similar to the U.S. Vandenberg and Connally reservations. Five nations have self-judging reservations.[489] The U.S. contention that it set a

good example for the rest of the world to emulate is not accurate. The former U.S. Declaration with its many reservations is far from a good example for the rest of the world. The self-judging provisions especially defeat the original dream of the framers of the United Nations Charter.[490]

The press statement implied that the United States was somehow disadvantaged by its declaration vis-a-vis other non-Article 36(2) States. Such an implication ignores, of course, Article 36(2), which permits declarations to be conditioned upon reciprocity, as was the U.S. Declaration.[491] Such a declaration would not disadvantage the United States nor prevent equal application of the laws. The United States complained it had been sued three times under Article 36(2) and had not sued anyone. That statement is hardly an argument that the laws are not equally applied. The condition of reciprocity adequately protects a State from being sued by one that has not accepted the risks of compulsory jurisdiction, and it insures, rather than prohibits, equal application of the laws.

Professor Anthony D'Amato criticized this particular aspect of the U.S. press statement. He stated:

> An even more misleading item in the State Department's press release was the statement, "We have never been able to use our acceptance of compulsory jurisdiction to bring other states before the Court, but have ourselves been sued three times." In fact, on several occasions since 1946 the United States considered bringing actions against other states in the World Court but eventually decided not to do so out of fear that those states would invoke the Connally reservation reciprocally. In no sense, however, was the United States disabled from suing.[492]

The press statement also re-hashed the various complaints the United States had on the process and outcomes of the Paramilitary Activities case. While danger exists that anti-U.S. States will unfairly use legitimate international organs, such as the General Assembly and the ICJ, for propaganda purposes and will deny the

United States and other democracies a fair forum for international legal litigation, the Paramilitary Activities case, when viewed on the whole, was reasonably based upon legal principles. As discussed above, the Court based the decision rationally on the facts before it and upon well accepted legal doctrine; the near unanimity of the Court's vote gave strength and weight to the decision. Some day the case may come when the ICJ's decision-making process degenerates into a propaganda circus. Then the United States will be justified, and should, terminate its Article 36(2) declaration; but the Paramilitary Activities case was not such a charade.

Since the United States cannot justify its termination, either by a concern for "equal application of the laws," or on the basis that the ICJ has an anti-U.S. bias, the United States should not have terminated its Article 36(2) declaration. A world leader--one that wishes to serve as a free, democratic and moral role-model for other States--should do no less than accept the Court's compulsory jurisdiction and thereby espouse the rule of law in resolving international disputes.

3. Ignoring the Court's Holding.

The United States has yet to comply with the Court's rulings and has indicated it will not obey the Court.[493] The failure of the United States to comply with the Court's ruling raises two questions: Is U.S. non-compliance justified; and what are the implications of U.S. non-compliance?

a. Is U.S. Non-Compliance Justified?

Some legal scholars, such as Professor John Norton Moore and Professor Michael Reisman, have argued that the United States is justified in ignoring the ICJ's ruling in the Paramilitary Activities case.[494] This reasoning is based on the customary international law doctrine of exces de pouvoir. Under that doctrine, a State is justified in non-compliance when the international tribunal grossly exceeds its jurisdiction or exceeds beyond the matters submitted to it by the parties.[495]

Professor Moore cites exces de pouvoir and argues that the ICJ exceeded its jurisdiction in the Paramilitary Activities case.[496] He notes that the doctrine is based on the sovereignty of individual States and their consent to the jurisdiction of the Court.[497] He quotes Lauterpacht:

> The right of States to refuse to submit disputes with other States to judicial settlement is, subject to obligations expressly undertaken, undoubted. They are entitled to regard any deliberate extension of jurisdiction on the part of courts, in excess of the power expressly conferred upon them as a breach of trust and abuse of powers, justifying a refusal to recognize the validity of the decision. So long as the jurisdiction of international courts is optional, the confidence of States, not only in the impartiality of these tribunals as between the disputants, but also in regard to the use of the powers conferred upon them, is one of the essential conditions of effective judicial settlement.[498]

Professor Moore argues that this customary international law right is not abrogated by the treaty law and, specifically, Article 36 of the U.N. Charter that grants the Court the right to determine its own jurisdiction.[499] He claims the treaty law does not overrule exces de pouvoir but merely codifies another customary international law giving a tribunal the authority to initially determine its jurisdiction.[500] This initial authority is subject to exces de pouvoir, as is Article 36:

> It is sometime suggested that there is a conflict between the rule that a tribunal has jurisdiction to decide its

> jurisdiction and the rule that an award given in excess of jurisdiction is void....The rule that a tribunal has jurisdiction to decide its jurisdiction...does not mean its decision is conclusive. There is no conflict between the two rules; the first rule has to be read as subject to the second.[501]

As evidence that the Court exceeded its jurisdiction, Professor Moore cites, of course, similar arguments to the ones Judge Schwebel made in his dissent: that Nicaragua never effectively accepted the Court's compulsory jurisdiction; that the Vandenberg reservation precluded jurisdiction; and, that the FCN Treaty precluded the subject matter of the claims from the terms of the Treaty.[502]

What prevents every losing party from crying exces de pouvoir? Professor Moore concedes the standard is high:

> The departure from the terms of submission should be clear to justify the disregarding of the decision. Claims of nullity should not captiously be raised. Writers who have given special study to the problem of nullity are agreed that the violation of the compromis should be so manifest as to be readily established.[503]

Was the jurisdictional error, if any, in the Paramilitary Activities case "so manifest as to be readily established?" Both Professor Moore and Professor Reisman suggest it was and Moore supports his belief with obscure quotes from a dissenting judge.[504] Judge Oda called the Court's opinion on a number of jurisdictional holdings "untenable" and "astonishing."[505] Judge Oda's opinion, however, is scant little evidence for invoking exces de pouvoir. Judge Oda was in a distinct minority and, as previously noted, the Court's opinion, based on its reasoning and vote tally, was reasonable and certainly far from "manifest" error. One may also note that Judge Oda did vote with the majority, against the United States, on jurisdiction based upon the FCN Treaty. Thus, one may conclude as Professor D'Amato of

Northwestern University School of Law stated: "[A]lthough I do not agree with all of the Court's reasoning [in the jurisdictional phase of the Paramilitary Activities case] ... and although I concede that the Court gave its own jurisdiction a liberal interpretation, I see no evidence that the Court ignored the clear meaning of words."[506]

In making their argument in favor of exces de pouvoir, both Professor Moore and Professor Reisman ignore the dictates of Article 94(1) of the U.N Charter. It states: "Each 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."[507] Even if Article 36(6) of the ICJ Statute does not overrule exces de pouvoir, as Moore suggests, surely Article 94(1) places a duty upon the United States to comply with the Court's holding. The plain reading of Article 94(1) leaves no room for exces de pouvoir. Neither Moore nor Reisman addresses the problem of Article 94(1). Nevertheless, Article 94(1) requires U.S. compliance.[508]

B. What Are the Implications of U.S. Non-Compliance?

Probably the most obvious implication of the U.S. refusal to obey the Court is the future of the ICJ in world dispute resolution. The Court was never a fully successful experiment; it failed to meet even the minimal dreams and aspirations of its architects. The Paramilitary Activities case may be its death knoll for all but the limited circumstances where both parties voluntarily submit a dispute to the Court. Except in those rare cases, any losing party would have valid reason to follow the U.S. precedent and ignore the Court. They would almost be foolish to comply. The recent Application filed by Nicaragua against Honduras is a case on point.[509] Despite the unconditional Honduran

Declaration of the Court's compulsory jurisdiction, the Honduran government has already rejected the Court's jurisdiction.[510]

Thus, one can ask if the Court's jurisdiction can ever be compulsory. The answer, after the Paramilitary Activities case is an emphatic no. U.S. non-compliance is precedent-setting. The United States is not a renegade nation like Iran in the Iranian Hostage case[511] or Albania in the Corfu Channel case.[512] The U.S. is a world respected leader; its actions will be imitated and used as justifications for future non-compliance by other nations.

CONCLUSION

The Paramilitary Activities case is a benchmark case in international law. It embodies the ICJ's most thorough and recent pronouncements on concepts vital to world peace and stability: the use of force, intervention, sovereignty, and collective self-defense. The near unanimity of the Court on these areas gives the Court's opinion strength and impact beyond its immediate application to the present dispute. It is an example of a David defeating Goliath as a small third world State successfully challenged the world's strongest superpower.[513] Legal scholars will, in the future, study the opinion,[514] and States will cite it for justification for various actions involving force and intervention. The U.S. response to the litigation is also important. Its unprecented withdrawal from the litigation on the merits, its termination of its Article 26(2) Declaration, and its refusal to comply with the Court have wide-spread implications for world order.

While the resolution of the legal issues on jurisdiction and admissibility were not as important as resolution of the substantive issues, the former stands for the willingness of the Court to tackle difficult issues, even ones with strong political

overtones, and not avoid such issues behind a hedge of non-admissibility or a lack of jurisdiction. In the future, one can expect the Court to seek, when possible, a more expansive interpretation of its jurisdiction.

From a strategic legal point of view, the United States made a number of errors, the sum total of which indicates that United States policymakers failed to substantially consider, or plan for, the international legal implications while formulating policy toward Nicaragua. Some of these errors include: withdrawing from the case on the merits, and thereby losing the opportunity to present evidence of Nicaraguan aggression; failing to accurately and publically document requests for aid from El Salvador, Costa Rica, and Honduras, thereby weakening the claim to collective self-defense; and, failing to report the use of collective self-defense to the Security Council as required by Article 51. The cumulative effect of these errors weakened the U.S. claim to collective self-defense; as a result, the United States was in a poor legal posture to defend itself on the merits before the ICJ.

While the adjudication process was not as complete and thorough as if the United States had chosen to fully litigate the case, the process was fair. The ICJ's legal reasoning is well founded. Its application of that law to the facts, as found by the Court based on the evidence presented to it, was also reasonable. The Court's decision-making process, though not perfect, is not, as some suggest, a farce and forum for anti-U.S. propaganda.

U.S. actions since the ICJ decision are ill-considered. Ignoring the Court's decision not only lessens world respect for the United States as a leader and believer in the rule of law, but it also is a violation of international law. Article 94(1) of the U.N. Charter requires the United States to comply with the holding. The United States is without excuse for its non-compliance. The antiquated customary international law doctrine of

exces de pouvoir is not an excuse to disobey the Court. Article 36(6) of the ICJ Statute, in conjunction with Article 94(1) of the U.N. Charter, gives the Court the authority to determine its jurisdiction and requires States to comply with those decisions. Even if exces de pouvoir survives the developments of treaty law, the Court's ruling on jurisdiction and admissiblity was reasonable, justifiable, and certainly not so inherently erroneous to justify the stringent burden for invoking exces de pouvoir.

The implications of U.S. non-compliance are substantial. In future cases involving other States, the losing State will have an excuse not to comply with the ICJ's ruling. The Court's only true authority is its moral suasion; it has lost that moral platform with the needless U.S. criticism of the Court.

If the rule of law is to play any role in world order and if international law is to be relevant to world decision-makers, the United States should re-consider its attitudes toward the Court. The United States should act in conformity with the Court's holding and should re-declare its acceptance of the Court's complusory jurisdiction. Nothing less is expected of a world leader--a leader that wishes to lead on a moral and legal level, a leader that espouses the rule of law over the rule of unlawful force.

ENDNOTES

[1]The International Court of Justice (hereinafter referred to as the ICJ, the Court or the World Court) is the principle judicicial body of the United Nations. U.N. Charter, art. 92. The ICJ is the successor to the Permanent Court of International Justice (hereinafter the PCIJ) that was founded by the League of Nations in 1920. 1984-1985 I.C.J.Y.B. 7 (1985). The PCIJ ended in 1946 shortly after the United Nations founded the ICJ. Id.

In the aftermath of World War Two, the nations of the world sent representatives to San Francisco to devise a replacement for the unsuccessful League of Nations. They created the ICJ on June 26, 1946 with the signing of the U.N. Charter and the Statute of the International Court of Justice (hereinafter the ICJ Statute). Id. The latter is annexed to the U.N. Charter under Article 92 of the Charter and forms an integral part of the Charter. U.N. Charter, art. 92. The Articles of the PCIJ were, with a few modifications, the model for the ICJ Statute. See 1946-1947 I.C.J.Y.B. 102-03 (1947) (listing the modified articles).

The basic texts of the ICJ are the U.N. Charter, specifically articles 7(1), 36(3), and 92-96, the ICJ Statute and the Rules of the Court. See Rules of the International Court of Justice, reprinted in 73 Am. J. Int'l L. 748 (1979) (hereinafter cited as ICJ Rules). Under Article 30(1) of the U.N. Charter, the Court may "frame rules for carrying out its functions" and "lay down rules of procedure." U.N. Charter, art. 30, para. 1.

The Court consists of fifteen members. No two judges may be nationals of the same State. ICJ Statute, art. 3, para. 1. According to the ICJ Statute, the judges are to be "elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." Id. at art. 2. The General Assembly and the

Security Council jointly elect the judges to a nine year term. Id. at art. 10, para. 1 and art. 13, para. 1. The judges may be re-elected. Id. at art. 13, para. 1.

See generally J. Gamble & D. Fischer, The International Court of Justice: An Analysis of a Failure (1976); S. Rosenne, Procedure in the International Court (1983) (a commentary on the 1978 Rules of Court); T. Elias, The International Court of Justice and some Contemporary Problems (1983) (the author is currently a judge on the ICJ and a past President of the Court); J. Elkind, Non-Appearance before the International Court of Justice: Functional and Comparative Analysis (1984); J. Sweeney, C. Oliver & N. Leech, Cases and Materials on The International Legal System, 54-71 (2nd ed. 1981); L. Sohn, United Nations in Action (1968); L. Sohn, United Nations Law (2nd ed. 1967); G. Schwarzenberger, International Law as Applied by International Courts and Tribunals (Vol. I, 3rd ed. 1957; Vol. II, 1968; Vol. III, 1976); M. Hudson, The Permanent Court of International Justice, 1920-42 (1943) (a fascinating, although dated, history of the early court); S. Rosenne, The World Court: What It Is and How It Works (3rd ed. 1973).

[2]Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14 (27 June 1986), reprinted in 25 I.L.M. 1023 (1986) (hereinafter cited as 1986 Judgment on the Merits).

[3]Id. at 146-49.

[4]Id. at 146.

[5]Id.

[6]Military Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 215, 395 (26 November 1984), reprinted in 24 I.L.M. 59 (1985) (hereinafter cited as 1984 Judgment on Jurisdiction and Admissibility and referred collectively with 1986 Judgment on the Merits, supra note 2, as the Paramilitary Activities case).

[7]Id; The Statute of the International Court of Justice, art. 36 (hereinafter cited as ICJ Statute).

[8]Id.

[9]Id.

[10]Id. at 396.

[11]Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (hereinafter cited as Interim Protective Order).

[12] Article 41 states: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." ICJ Statute, supra note 7, art. 41, para. 1.

[13]Interim Protective Order, supra note 11, at 174-75.

[14]Id. at 175; see U.S. Declaration of Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9, reprinted in Multilateral Treaties Deposited with the Secretary-General: Status as of Dec. 31, 1982, at 23-24, UN Doc. ST/LEG/SER.E/2 (1983) (hereinafter cited as U.S. Declaration).

[15]Dep't of Army, Pamphlet No. 550-88, Nicaragua: A Country Study, p. 1 (Sept. 1981) (hereinafter cited DA Pam 550-88).

[16]The Sandinista National Liberation Front (Frente Sandinista de Liberacion Nacional) (hereinafter FSLN) was the primary opposition to the Somoza government. Id. at xxi. They derived their name from Augusto Cesar Sandino who fought a guerrilla war against the U.S. Marines and Nicaraguan government forces. Depalo,

The Military Situation in Nicaragua, 66 Mil. Rev. 29, 33 (1986) (hereinafter cited as Depalo). Sandino agreed to a ceasefire in 1933 when the Marines left Nicaragua. The Nicaraguan National Guard killed Sandino in 1934 and turned Sandino into a national hero and martyr. Id. See S. Christian, Nicaragua: Revolution in the Family (1985).

[17]DA Pam 550-88, supra note 15, at xxi.

[18]Depalo, supra note 16, at 29.

[19]See DA Pam 550-88, supra note 15, at 55-57.

[20]1986 Judgment on the Merits, supra note 2, at 403. In the first eighteen months after Somoza fell, the United States sent $108 million in direct aid. Id. at 402. The United States suspended payments of economic support in January, 1981 because of Nicaraguan support for the rebels in El Salvador. Id. at 406.

[21]Id.

[22]Id.

[23]See Amnesty International, Nicaragua: The Human Rights Record (1986).

[24]Depalo, supra note 16, at 33-34.

[25]Id. at 33-34.

[26]Id.

[27]Id.

[28]Id.

[29]1986 Judgment on the Merits, supra note 2, at 21.

[30]Delpalo, supra note 16, at 35.

[31]Id.

[32]1985 Supplemental Appropriations Act, Pub. L. 99-88, Ch. 5 and Sec. 101-06, 99 Stat. 293, 322-29 (Aug. 15, 1985).

[33]Wash. Post, Feb. 19, 1986, at A1, col 5.

[34]1986 Judgment on the Merits, supra note 2, at 357.

[35]Id.

[36]Id. at 513.

[37]Id. at 48-53.

[38]Id. at 22.

[39]Id. at 138.

[40]Id. at 396; see generally Anand, Compulsory Jurisdiction of the International Court of Justice (1961).

[41]ICJ Statute, supra note 7, art. 36.

[42]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 398-99.

[43]Id. at 398; U.S. Declaration, supra note 14.

[44]Id.

[45]Id. at 399.

[46]Id. at 398-99.

[47]Id. at 399.

[48]Id. at 399-400.

[49]Id.

[50]Id. at 400.

[51]Id. at 399-400.

[52]Id. at 400.

[53]Id. at 401.

[54]Id. at 442 and 401.

[55]Id. at 402.

[56]Id.

[57]Id. at 412.

[58]Id. at 401 and 409.

[59]Id. at 410.

[60]Arbital Award made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, digested in 55 Am. J. Int'l L. 478 (1961). In 1904, Nicaragua and Honduras asked the King of Spain to arbitrate a border dispute between the two States. The King made his decision on Dec. 23, 1906. Nicaragua, however, refused to comply with the decision on the grounds that the King gave no reasons for his award, that he had no authority to make the

award and that the award was unclear. After a half century, the Organization of American States suggested the Parties submit the dispute to the ICJ, which they did. The Court upheld the validity of the King of Spain's arbital award and ordered Nicaragua to obey the award. The case shows the difficulties which arise when one party to an arbitration attacks the arbital award.

[61] Id. at 410-11.

[62] Id. The issue concerning the validity of the Nicaraguan Declaration became moot when the Parties agreed to submit the case to the ICJ. Id. at 414. See note 60 supra.

[63] Id.

[64] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 395. The United States contended that Nicaragua should not be permitted to supplement its original Application and, in effect, amend its Application. Id. at 426. Nicaragua never refuted the U.S. position, however, the Court summarily dismissed the U.S. argument. Id. at 426-27. It noted that the rules of the Court merely required that the Party allege jurisdiction in the Application "as far as possible" and that Parties may bring additional grounds for jurisdiction to the Court's attention at a later time. Id. at 427.

[65] Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024, (hereinafter cited as the 1956 Treaty or the FCN Treaty). The 1956 Treaty was signed in Managua on Jan. 21, 1956 and effective on 24 May 1958.

[66] Id. at Article XXIV(2).

[67] ICJ Statute, supra note 7, at art. 36(1).

[68] In its Memorial Nicaragua specified that the United States

violated the following provisions of the Treaty:

> Article I: providing that each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of national and companies of the other party.
>
> ....
>
> Article XIV: forbidding the imposition of restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the terrritories of the other party.
>
> ....
>
> Article XVII: forbidding any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either pary.
>
> ....
>
> Article XIX: providing for freedom of commerce and navigation, and for vessels of either party to have liberty "to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation",[sic] and to be accorded national treatment and most-favored-nation treatment within those ports, places and waters.
>
> Article XX: providing for freedom of transit through the territories of each party.

1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 428 (paraphrasing the 1956 Treaty).

[69] 1956 Treaty, supra note 65, at Article XXIV(2).

[70] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 427.

[71] Id. at 428.

[72] The Court focused specifically on the purpose behind the Treaty as embodied in its Preamble (peace and freedom) and in Article XIX (freedom and commerce and navigation). Id.

[73] Id.

[74] Id.

[75] Id.

[76]The Court cited language of a Permanent Court of International Justice case that stated the Court should not be "hampered by a mere defect in form." Id. at 426, (citing Certain German Interests in Polish Upper Silesia, Jurisdiction, 1925 P.C.I.J.(ser.A) No. 6, at 14).

[77]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 442.

[78]Id. at 429.

[79]Id.

[80]Id. at 430. The United States specifically referred to Honduras who, Nicaragua alleged, was used as a staging area, and those Central American States who were using self-defense under Article 51 of the U.N. Charter to protect themselves. Id.

[81]Id. at 431. The United States relied primarily on Article 24 of the U.N. charter that gives the Security Council "primary responsibility for the maintenance of international peace and security." Id. and U.N. Charter art. 24, para. 1.

[82]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 432. The United States argued that the Security Council had already considered Nicaragua's claims and Nicaragua did not prevail in the Security Council. Thus, Nicaragua was, in effect, appealing an adverse decision from the Security Council to the ICJ. Id. at 432.

Ironically, a similar issue had been addressed in case of the United States Diplomatic and Consular Staff In Tehran, (U.S. v. Iran) 1980 I.C.J. 18 (hereinafter cited as the Iranian Hostage case), the United States took the opposite position.

[83]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 436.

Professor D'Amato, of Northwestern University School of Law, has questioned why nations are concerned about exempting disputes

involving armed conflict from ICJ adjudication. He noted:

> One may well ask why nations are so concerned about excepting cases regarding armed hostilities from adjudication. Are not such cases ideal occasions for settling conflicts in court instead of on the battlefield? Moreover, when matters have reached the point of military action, how much is there to fear from a court of law? Yet nations sometimes fall prey to a strange psychology, an extreme example of which is the proviso in the United Kingdom Declaration of February 28, 1940, excepting cases originating in events of the Second World War. One wonders, with bombs dropping on London, what made lawyers and government officials in their underground shelters so frightened by the prospect of a ruling on the legality of a war-related case by a court of law sitting at the Hague.

D'Amato, The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court, 80 Am. J. Int'l L. 331, 334 (1986). As a solution Professor D'Amato suggests a reservation in the United States's Article 36(2) Declaration that permits the Court to declare rights and duties in disputes involving armed conflicts but precludes the ICJ from rendering an enforceable judgment. Id. at 335.

[84] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 438.

[85] Id. at 442. Even Judge Schwebel, who was consistently in the dissent in the 1984 Judgment on Jurisdiction and Admissibility and the 1986 Judgment on the Merits, voted in favor of admissibility.

[86] Id. at 431 (citing Monetary Gold Removed from Rome in 1943, 1954 I.C.J. 3, 32). The Court called the case "the limit of the power of the Court to refuse to exercise its jurisdiction." 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 431.

[87] 1984 Judgement on Jurisdiction and Admissibility, supra note 6, at 431.

[88] Id. at 432.

[89] Id. at 433.

[90] Id.

[91] Id. at 435. The Court cited the Corfu Channel case as one such example as well as the seven cases involving aerial armed attack which the United States brought before the Court during the 1950's.

The Aerial Incident case involving Bulgaria was never fully adjudicated because Bulgaria invoked the Connally Amendment reservation as a shield against the applicant United States. The case arose from an incident when when an Israeli El Al airliner drifted into Bulgarian airspace. Bulgaria shot down the airliner killing all the passengers including six U.S. nationals. Bulgaria was able to invoke the Connally reservation on the basis of reciprocity. It claimed the defense of its territory, the security and disposition of its air defense were within its domestic jurisdiction. Gross, Bulgaria Invokes the Connally Amendment, 56 Am. J. Int'l L. 357, 358 (1967). Other Aerial Incident cases were not adjudicated because of the lack of acceptance of compulsory jurisdiction under Article 36(2) of the ICJ Statute by the respondent State.

In the Aerial Incident of 10 March 1953 (U.S. v. Czech.), 1956 I.C.J. 6, digested in 51 Am. J. Int'l L. 11 (1957), the United States began proceedings against Czechoslovakia for overflights by MIG fighters in the U.S. zone of occupation in Germany. Czechoslovakia did not consent to the Court's jurisdiction and the ICJ removed the case from the List of the Court.

In the Aerial Incident of 7 October 1952 (U.S. v. USSR) 1956 I.C.J. 9, digested in 51 Am. J. Int'l L. 12 (1957), the Aerial Incident of 4 September 1954 (U.S. v. USSR), 1958 I.C.J. 158, and the Aerial Incident of 7 November 1954 (U.S. v. USSR), 1959 I.C.J. 276, the United States began separate proceedings against the Soviet Union after each aerial incident. The first case arose from an encounter between Soviet fighters and U.S. military plane near

Hokkaido, Japan. The second case arose over international airspace in the Sea of Japan between Soviet fighters and a U.S. Navy aircraft. The third case arose when the USSR shot down a U.S. aircraft in Japanese territorial airspace. Like Czechoslovakia, the USSR never consented to the Court's jurisdiction and the ICJ removed each case without deciding any issues.

See generally Lissitzyn, Some Legal Implications of the U-2 and RB-47 Incidents, 56 Am. J. Int'l L. 135 (1962) (an account concerning two aerial incidents where the U.S. did not begin proceedings in the ICJ).

The Aerial Incident of 27 July 1955 (Isr. v. Bulgaria) 1959 I.C.J. 127, digested in 35 Am. J. Int'l L. 923 (1959) arose when Israel began proceedings in the ICJ against Bulgaria for the downing of the Israeli airliner and the loss of the passengers aboard. Unlike other communist countries, Bulgaria had accepted the compulsory jurisdiction of the Permanent Court of International Justice. Israel claimed the ICJ had jurisdiction under Article 36(5) of the ICJ Statute, which deems declarations for the PCIJ to apply to the ICJ. The Court ruled against jurisdiction. It held that Article 36(5) applied to only the original members of the United Nations. Bulgaria did not join until 1955, therefore, its Declaration had lapsed.

The United Kingdom (as did the United States in the previously discussed case) instituted proceedings against Bulgaria for the same incident espousing the claims of its nationals aboard the Israeli airliner. After the adverse decision against Israel, the United Kingdom requested removal of the case from the List of Court. See Phelps, Aerial Intrusions by Civil and Military Aircraft in Time of Peace, 107 Mil. L. Rev. 255, 279-87 (1985).

[92] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 437.

[93] Id.

[94]Id. at 438-41.

[95]Id. at 440.

[96]U.S. Declaration, supra note 14.

[97]Some scholars have argued that the Vandenberg Resevation is outmoded since most disputes will involve multilateral conventions. Professor D'Amato stated: "The Vandenberg reservation literally mandates that in all such cases [involving the U.N. Charter] where the United States is sued, the plaintiff must implead all the member states of the United Nations." D'Amato, The United States Should Accept, by a New Declaration, the General Compulsary Jurisdiction of the World Court, 80 Am. J. Int'l L. 331, 333 (1986).

[98]See generally J. Sweeney, C. Oliver, & N. Leech, Cases and Materials on the International Legal System 54-71 (2nd ed., 1981) (discussing the optional clause and the U.S. Declaration).

[99]See 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 601. The United States told the Court it did not intend to characterize the dispute as a matter within the domestic jurisdiction of the United States. Id. at 422. The United States, however, reserved the right to do so later in the proceedings. Id. The issue appears to be far removed from an essentially domestic character and to have characterized it as such would have rendered meaningless the U.S. Declaration.

[100]Id. at 601 (Schwebel dissenting) citing Case of Certain Norwegian Loans (Fr. v. Nor.) 1957 I.C.J. 9, 101-02 (Lauterpacht dissenting).

[101]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 602.

[102]Id.

[103]Id.

[104]See infra note 489.

[105]The concept of stare decisis does not apply in ICJ practice. Article 59 of the ICJ Statute states: "The decision of the Court has no binding force except between the parties and in respect of that particular case." ICJ Statute, supra note 7, art. 59. Most of the judges on the ICJ are from civil law backgrounds and, as a result, are not from a legal system that uses stare decisis. The decisions of the Court are evidence of law. Departure from a prior decision is unusual and the Court seems to be giving more weight to its earlier decisions. Dep't of Army, Pamphlet N. 27-9, The Law of Peace, para. 1-7(b)(3) (Sept. 1979). See Article 38 of the ICJ Statute stating:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> ....
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ICJ Statute, supra note 7, art. 38, para. 1.

[106]The treaties were: the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26 December 1933, and the Havanna Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 422. Nicaragua later cited the 1956 FCN Treaty as a further basis for its claims in its Counter-Memorial. Id. at 426.

[107]Id. at 422. Two interpretations are possible under the language of the Vandenberg Reservation: (1) that all "affected" parties must be before the ICJ; and, (2) that all parties to the treaty must be before the ICJ when the treaty is "affected." The former interpretation prevailed. Id. at 424.

Not all of Nicaragua's claims were based on the multilateral treaties; the Vandenberg Reservation would not bar those claims based on customary international law or upon bilateral treaties. Id. at 424-25.

[108] Id. Indeed El Salvador filed a Declaration of Intervention which the ICJ subsequently denied. Declaration of Intervention of the Republic of El Salvador in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), reprinted in 24 I.L.M. 38 (1985) [El Salvador's Declaration was supplemented by a letter of Sept. 10, 1984, reprinted in 24 I.L.M. 48 (1985)]; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 215 (Order of Oct. 4, 1984), reprinted in 24 I.L.M. 43 (1985).

The Court noted El Salvador was unsuccessful intervening during the jurisdictional aspects of the case but was free to seek intervention during the merits. 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 425.

[109] See id. at 424-26.

[11076] Id. at 425.

[111] Id. at 425-26.

The Court did address and resolve the Vandenberg Reservation issue on the merits. See 1986 Judgment on the Merits, supra note 2, at 29-38.

For the first time, the Court interpreted its rule on preliminary objections which the ICJ first enacted in 1972 under its Article 30 rule-making power. Id. at 29. Under earlier practice the Court would join such objections until the merits of the case. This practice was time consuming and wasteful of judicial resources as indicated by the Barcelona Traction case. There, the Court did not resolve Belgium's standing to promote the claims of its citizens against Spain for the nationalization of a

Canadian corporation. See Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3.

The Court has since determined, under Article 79 of the Rules for Court, to rule on objections and not join the objections until the merits unless the objection in "not preliminary." 1986 Judgment on the Merits, supra note 2, at 30-31.

[112]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 605 and 607.

[113]See id. at 442. Judge Ruda interpreted the Vandenberg Reservation to mean that the United States will accept jurisdiction of the Court in the multilateral treaty situation when the other parties to the treaty have also accepted the Court's compulsory jurisdiction. Id. at 456. Judge Ruda opined: "The United States wishes to avoid a situation under a multilateral treaty, in which it would be obligated to apply the treaty in a certain way because of the Court's decision and the other parties would remain jurisdictionally free to apply it in another form." Id. at 456. He cites the legislative history of the Reservation and the following Senate debate:

> Mr. Vandenberg: Mr. Dulles ... has raised the question whether the language of the resolution might not involve us in accepting jurisdiction in a multilateral dispute in which some one or more nations had not accepted jurisdiction. It is my understanding that it is the opinion of the Senator from Utah that if we confronted such a situation we would not be bound to submit to compulsory jurisdiction in a multilateral case if all of the other nations involved in the multilateral situation had not themselves accepted compulsory jurisdiction. Is that so?
>
> Mr. Thomas: That is surely my understanding. I think reciprocity is complete. All parties to the case must stand on exactly the same foundation except that we have waived a right.

Id. at 456.

[114]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 442. The vote was eleven-to-five in favor of Article 36(2) and (5) jurisdiction. Judges Mosler, Oda, Ago, Schwebel and Sir Robert Jennings dissented. Id.

[115]Id. The vote was fourteen-to-two in favor of jurisdiction under the 1956 FCN Treaty. Judges Ruda and Schwebel dissented. Id.

[116]Id. Except for Judge Schwebel, all the Judges believed the ICJ had jurisdiction to hear at least some aspects of the case. Id.

[117]Id.

[118]Id.

[119]Id.

[120]See 1986 Judgment on the Merits, supra note 2.

[121] U.S. Department of State, Statement on Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reprinted in 24 I.L.M. 246 (1985); see also U.S. Department of State, Observations on the International Court of Justice's Judgment on Jurisdiction and Admissibility in the Case of Nicaragua v. United States of America, reprinted in 24 I.L.M. 249 (1985).

[122]1986 Judgment on the Merits, supra note 2, at 23.

Article 53 states:

> 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.

ICJ Statute, supra note 7, at art. 53, para. 1 and 2.

[123]1986 Judgment on the Merits, supra note 2, at 24; ICJ Statute, supra note 7, at art. 53.

[124]1986 Judgment on the Merits, supra note 2, at 24-25 citing Fisheries Jurisdiction 1974 I.C.J. 181 (date).

[125]1986 Judgment on the Merits, supra note 2, at 25.

This situation was unlike the Iranian Hostage case, supra note 82. Iran failed to make any appearance thereby foregoing any advantages of litigating its contentions before the Court.

[126]The Court expressed regret over the trend toward Respondent States not participating in ICJ litigation. It cited the following recent examples: Fisheries Jurisdiction (U.K. and W. Ger. v. Ice.) 1974 I.C.J. 3 and 175; Nuclear Tests (Austl. and N.Z. v. Fr.), 1974 I.C.J. 253 and 457; Aegean Sea Continentai Shelf (Greece v. Turk.), 1978 I.C.J. 1; and, United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran) 1980 I.C.J. 18.

[127]The United States is the only State to withdraw from a case on the merits after participating on the jurisdictional issues. Albania has withdrawn, after the merits, on the proceedings concerning reparations. See infra notes 434-37 and accompanying text.

[128]1986 Judgment on the Merits, supra note 2, at 23.

[129]Id. at 23-24. Article 36(6) 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." ICJ Statute, supra note 7, at art. 36(6).

Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Id. at art. 59.

Article 60 states, in part: "The judgment is final and without appeal." Id. at art. 60.

[130]1986 Judgment on the Merits, supra note 2, at 25. See generally Highet, Legal Implications of the U.S. Withdrawal from the Nicaragua Case, 79 Am. J. Int'l L. 992 (hereinafter cited as Legal Implications).

[131]Iranian Hostage Case, supra note 82, at 20.

[132]1986 Judgment on the Merits, supra note 2, at 25.

[133]Legal Implications, supra note 130, at 997. In the Anglo-Iranian case the Court refused to apply forum prorogatum. It stated: "The principle of forum prorogatum, if it could be applied to the present case, would have to be based on some conduct or statement of the Goverment of Iran which involves an element of consent regarding the jurisdiction of the Court." Anglo-Iranian Oil Co. (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93, 114 (22 July 1952).

[134]See 1986 Judgment on the Merits, supra note 2, at 26-38.

[135]Id. at 26-27. In the 1984 Judgment on Jurisdiction and Admissibility, the Court rejected the idea that the political organs of the United Nations, i.e. the Security Council, were the only proper forum for resolving the claim. 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 431-36.

[136]1986 Judgment on the Merits, supra note 2, at 27.

[137]See id. at 31-38.

[138]See id. at 27-28.

[139]Id. at 32.

[140]Id. at 33-34.

[141]Id. at 34. Nicaragua cited four multilateral treaties in support of its claims. In the proceedings on the merits it did not rely upon two of the cited treaties: the Montevideo Convention on the Rights and Duties of States of 26 December 1933, and the Havanna Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. Id. Nicaragua believed "the duties and obligations established by these conventions have been subsumed in the Organization of American States Charter." Id.

[142]Id. at 34-35.

[143.1]Id.

[144] Id. at 35-36. The U.N. Charter specifically mentions "individual or collective self-defence if an armed attack occurs." U.N. Charter, art. 51. Although the OAS Charter does not use the term "collective self-defense," it permits "self-defence in accordance with exisiting treaties," which presumably would include the U.N. Charter. Id. at 35; Organization of American States Charter, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 29 U.N.T.S. 3, as amended, Feb. 27, 1967, 21 U.S.T 607, T.I.A.S. No. 6847. The Court apparently felt the two treaties permitted the same actions whether entitled self-defense or collective self-defense.

[145] 1986 Judgment on the Merits, supra note 2, at 34.

[146] The Court reiterated the holding of the 1984 Judgement on Jurisdiction and Admissibility; the United States could give direct military aid to El Salvador. Id. at 36 and 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 430. The Court specifically focused on indirect aid in the form of actions against Nicaragua. 1986 Judgment on the Merits, supra note 2, at 36.

[147] 1986 Judgment on the Merits, supra note 2, at 36.

[148] Id. The Court rejected the argument that if the facts do not support self-defense no right of El Salvador would be "affected" since El Salvador would not have a right to self-defense. Id. The term "affected" is interpreted broadly to mean any effect on the State; it includes favorable and unfavorable effects. Id. at 36-37.

[149] Id. at 38. The vote was eleven-to-four with Judges Ruda, Elias, Sette-Carmara and Ni dissenting. Id. at 146.

[150] Id. at 38.

Article 38(1) of the ICJ Statute states:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59 [which makes the Court's holding binding only upon the parties to the case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidary means for the determination of rules of law.

ICJ Statute, supra note 7, at art. 38, para. 1.

[151] See 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 602-16.

[152] Id. at 425-26.

[153] 1986 Judgment on the Merits, supra note 2, at 42.

[154] ICJ Statute, supra note 7, at art. 50.

[155] 1986 Judgment on the Merits, supra note 2, at 40.

[156] Id.

[157] Id. at 40-41.

[158] Id.

[159] Id. at 41.

[160] Id. at 42.

[161] Id. at 41.

[162] Id. at 43.

[163] Id. The Court stated:

A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. Id.

[164] Id. at 45.

[165] Id.

[166]Id. at 75. The Court tempered Ortega's apparent admission with Nicaragua's consistent and continual official denial of involvement in arms shipments to the rebels in El Salvador.

[167]Id. at 41-42.

[168]Id. at 73-74.

[169]Id. at 74-75.

[170]Id.

[171]Id. at 74-75

[172]The direct examination is a classical example of an attorney asking one question too many:

> Q: In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities?
> A: In any significant manner over this long period of time I do not believe they could have done so.
> Q: And there was in fact no such detection during the period that you served in the Central Intelligence Agency:
> A: No.
> Q: In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador--with or without the Government's knowledge or consent--could these shipments have been accomplished without detection by United States intelligence capabilities?
> A: No.
> Q: Mr. MacMichael, up to this point we have been talking about the period when you wre employed by the CIA--6 March 1981 to 3 April 1983. Now let me ask you without limit of time; did you see any evidence of arms going to the Salvadorian rebels from Nicaragua at any time?
> A: Yes. I did.
> Q: When was that?
> A: Late 1980 to very early 1981.

Id. at 74.

[173]Id. at 81-82.

[174]Id. at 82. See also, id. at 42.

[175]See supra note 172.

[176]Id. at 44.

[177]Id.

[178] Id.

[179] Id. See Highet, Evidence, the Court, and the Nicaragua Case, 81 Am. J. Int'l L. 1, 45-46 (1987); H. Thirlway, Non-Appearance before the International Court of Justice 143-51 (1984).

Judge Schwebel complained that "the practice of the Court demonstrates repeated reliance on irregular communications from States parties to a case and reliance even on documents and statements of a non-appearing State which are not addressed to the Court and which are published after the closure of oral hearings." 1986 Judgment on the Merits, supra note 2, at 318. He argued, however, that the Court should have made greater use of the State Department publication. Id. at 318-20.

[180] See generally, id. at 61-66.

[181] Id. at 61.

[182] Id. at 62.

[183] Id. at 61. The Court found the contras had their genesis when "members of the former Somoza National Guard, together with civilian opponents to the Sandinista regime, withdrew from Nicaragua soon after the regime was installed in Managua, and sought to continue their struggle against it." Id. at 62. The Court did not indicate if creating the contra forces would have made a difference. Instead the Court focused on control of the contra forces. Id.

[184] Id. at 62 and 55.

[185] Id. at 62.

[186] Id. at 62-63.

[187] Id. at 65; see Boyle, Determining U.S. Responsibility for Contra Operations under International Law, 81 Am. J. Int'l L. 86 (1987) (a critical assessment of the Court's conclusions concerning U.S. responsiblity for the contras). Professor Boyle argues that the Court applied the wrong standard to determine if the United States was responsible for the contra acts. The proper standard,

according to Boyle, is in the Army's Field Manual entitled The Law of Land Warfare:

> [A commander is responsible for war crimes] if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

Id. at 89 [citing Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 501 (July 1956)]; see In re Yamashita, 327 U.S. 1 (1946). Boyle concludes that "all U.S. government officials and military officers who exercised any degree of "control" over the contra forces, knew or should have known that the latter were engaging in war crimes and failed to do anything about it are themselves responsible." Boyle, supra at 89.

Boyle's cursory analysis completely ignores the introductory language of para. 501, The Law of Land Warfare, supra. It specifically refers to the cases where a "military commander may be responsible for war crimes committed by subordinate members of the armed forces." Id. The contras are obviously not members of the U.S. Armed Forces. The question then becomes one of contol; did the U.S. exercise sufficient control over the contras that they might be considered the equivilent of "subordinate members of the armed force?" Id. The Court asked exactly that question.

[188] 1986 Judgment on the Merits, supra note 2, at 65.

[189] Id. at 65-66.

[190] Id.

[191] 1986 Judgment on the Merits, supra note 2, at 66.

Newspaper accounts and other press reports were considered for only limited circumstantial purposes. See Highet, Evidence, the Court, and the Nicaragua Case, 81 Am. J. Int'l L. 1, 39-40 (1987). The Court appeared to draw a fine distinction between matters of public knowledge that it would take judicial notice of and mere

press accounts. Often, however, press accounts established matters of matters of public knowledge. For example, the Court found that the joint military manuvers between Honduras and the United States a matter of public knowledge but Nicaragua presented only newspaper accounts to show the public knowledge. 1986 Judgment on the Merits, supra note 2, at 53. The Court appears to be willing to consider press accounts as public knowledge if the State does not deny the press accounts. Highet, supra, at 40.

[192]1986 Judgment on the Merits, supra note 2, at 66.

[193]Id.

[194]Id. A publication advocating such nafarious tactics obviously raises questions concerning Executive Order 12,333 that states:

> 2.11. No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in, assassination.
> 2.12. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.

Exec. Order No. 12,333, 46 Fed. Reg. 59941, 59952 (1982), reprinted in 50 U.S.C. Section 401 at 50 (1982).

The House Intelligence investigated that issue and concluded:

> The Committee believes that the manual has caused embarrassment to the United States and should never have been released in any of its various forms. Specific actions it describes are repugnant to American values.
>
> The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention to the manual. Most CIA officials learned about it from news accounts.
>
> The Committee was told that CIA officers should have reviewed the manual and did not. The entire publication and distribution of the manual was marked within the Agency by confusion about who had authority and responsibility for the manual. The incident of the manual illustrates once again to

> a majority of the Committee that the CIA did not have adequate command and control of the entire Nicaraguan covert action...
>
> CIA officials up the chain of command either never read the manual or were never made aware of it. Negligence, not intent to violate the law, marked the manual's history.
>
> The Committee concluded that there was no intentional violation of Executive Order 12333.

1986 Judgment on the Merits, supra note 2, at 67-68.

[195] 1986 Judgment on the Merits, supra note 2, at 66.

[196] Id. at 68.

[197] Id. at 67.

[198] Id. at 67-68.

[199] Id. at 68-69 and 146-49.

[200] See generally, supra notes 134-52 and accompanying text.

[201] 1986 Judgment on the Merits, supra note 2, at 93. The U.S. argument is rather bizzare in light of the U.N. Charter's own reference to customary international law in Article 51: "the inherent right of individual or collective self-defence." U.N. Charter, art. 51. This inherent right can have context only in a framework of customary international law. 1986 Judgment on the Merits, supra note 2, at 94.

[202] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 424; 1986 Judgment on the Merits, supra note 2, at 93.

[203] 1986 Judgment on the Merits, supra note 2, at 93-94. This holding has always been axiomatic among legal scholars. See id. at 95.

[204] Id. at 96.

[205] Id. at 96-97.

[206] Id. at 98-99.

[207] Id. at 97-98. See D'Amato, Trashing Customary International Law, 81 Am. J. Int'l L. 101 (1987) for a critical appraisal of the Court's use of customary international law. Professor D'Amato

stated:

> A treaty is obviously not equivilant to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself. However, rules in treaties reach beyond the parties because a treaty itself contitutes state practice.
>
> ....
>
> Customary rules ... are not static. They change in content depending on the amplitude of new ... state interests....
>
> The process of change and modification over time introduces a complex element that is missing from the Court's handling of Article 2(4).... Subsequent customary practice ... has profoundly altered the meaning and content of the nonintervention principle found in Article 2(4) in 1945.
>
> ....
>
> The Court's unidimensional approach to Article 2(4) and to other treaties misses all of these considerations. Its lack of understanding, or conscious avoidance, of the theory of the interaction of custom and treaty undermines the authority of its Judgment.

Id. at 103-05.

[208] 1986 Judgment on the Merits, supra note 2, at 97-98. See Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146 (1987).

[209] Id. at 98 and ICJ Statute, supra note 7, art. 38, para. 1(b).

[210] 1986 Judgment on the Merits, supra note 2, at 98.

[211] Id. at 100.

[212] Id. See, e.g., Article 11 of the Montevideo Convention on Rights and Duties of States (Dec. 23, 1933) that prohibits recognizing territory gained by force.

[213] 1986 Judgment on the Merits, supra note 2, at 100. See, e.g., the U.N. resolution entitled Declaration on Principles of International Law Concernig Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U,N, GAOR Supp. 28 at 121, U.N. Doc. A/8028, reprinted in Dep't of Army, Pamphlet No. 27-24, Selected

International Agreements, p. 3-15 (Dec. 1976). The Resolution states:

> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> ....
>
> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

Id.

Professor Morrison, of the University of Minnesota and one of the lawyers who represented the United States before the ICJ, discussed the Court's use of U.N. Resolutions to establish customary international law. He stated:

> The status of General Assembly resolutions has been a subject of academic and political controversy for many years, although few have argued for a direct law-creating effect for them. This decision goes much farther than its predecessors intransforming them from exhortations or "soft law" principles into "hard law" prescriptions, at least in the eyes of the Court.

Morrison, Legal Issues in the Nicaragua Opinion, 81 Am. J. Int'l L. 160, 161 (1987).

[214] 1986 Judgment on the Merits, supra note 2, at 100. The Court cites the Sixth International Conference of American States Resolution Condemning Aggression (Feb. 18, 1928) and the declaration concerning the relations of States from the Conference on Security and Co-operation in Europe (Helsinki, Aug. 1, 1975) as evidence of opinio juris regarding the prohibition on the use of

force in international relations. See Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146, 147 (1987).

[215]1986 Judgment on the Merits, supra note 2, at 100.

[216]U.N. Charter, art. 2, para. 4.

[217]1986 Judgment on the Merits, supra note 2, at 100-01.

Just as municipal law will void certain contracts as contrary to public policy, jus cogens are those norms of international law, which are so basic, that treaties may not preempt them. Dep't of Army, Pamphlet No. 27-9, The Law of Peace, para. 8-15 (Sept. 1979) [hereinafter cited as The Law of Peace]. Article 53 of the Vienna Convention on the Law of Treaties codifies the doctine of jus cogens:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention of the Law of Treaties, open for signature May 23, 1968, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int'l L. 875 (1969).

See Christenson, The World Court and Jus Cogens, 81 Am. J. Int'l L. 93 (1987). Professor Christenson stated:

> At first glance, the reference to the prohibition of the use of force as a jus cogens norm seems to be a minor supporting argument used simply to help justify the Court's decision to recognize the prohibition as an independent rule of customary international law. But a more careful appraisal suggests a different, activist claim by the Court for a more central role in the development of an international public order, whether or not the concept of jus cogens is relied upon as the principle of decision. A compelling need for public order lies near the heart of one the strongest policy reasons for the jus cogens concept. Seen through this prism, the Court's decision makes an underlying claim for a public order

role in finding a way to adjudicate a dispute involving a norm thought by many to be jus cogens, but without needing to make that determination.

Id. at 93-94.

See generally T. Elias, The Modern Law of Treaties 177 (1974); J. Sztucki, Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal (1974); Whiteman, Jus Cogens in International with a Projected List, 7 Ga. J. Int'l & Comp. L. 609 (1977); M. Akehurst, A Modern Introduction to International Law 40-41 (5th ed. 1984); I. Sinclair, The Vienna Convention of the Law of Treaties 129 (1973); A. McNair, The Law of Treaties 213-15 (1961); Schwelb, Some Aspects of International Jus Cogens as Formulated by the International Law Comission, 61 Am. J. Int'l L. 946 (1967).

For a recent criticism of the doctrine of jus cogens see Meron, On a Hierarchy of International Human Rights, 80 Am. J. Int'l L. 1 (1986).

[218] 1986 Judgment on the Merits, supra note 2, at 101-02.

[219] Id. at 102-03. Based on the facts alleged in the dispute, the Court considered self-defense from an armed attack. The Court did not consider self-defense to the threat of an imminent attack, the so-called pre-emptive strike. Id. at 103.

[220] Id.

[221] Id. at 104.

[222] Id. at 121-22; U.N. Charter, art. 51.

[223] Id. at 103.

[224] United Nations General Assembly Definition on Aggression, Dec. 14, 1974 (Adopted by consenus without a vote by the UN General Assembly), reprinted in 8 I.L.M. 712 (1974), 74 Dep't St. Bull. 498 (May, 1974) and Dep't of Air Force, Pamphlet No. 110-20, Selected International Agreements, p. 5-78 (July 1981). The resolution had no binding effect as treaty law as it did not constitute an international agreement. The Court held, however, it declared

customary international law. 1986 Judgment on the Merits, supra note 2, at 104. The Definition of Agression has an exception to the general rule:

> Nothing in this definition ... could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principle of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Definition of Aggression, supra, art. 7. The Court makes no mention of this exception and whether it applied to the contra forces.

[225] Id. at 103.

[226] Id.

[227] Id. at 118-23.

[228] Id.

[229] Id. at 118 and 92. These maneuvers were joint military maneuvers with Honduran forces and conducted near the Nicaraguan border. They also included naval maneuvers off the Nicaraguan coast and parachute exercises. The United States publically announced the maneuvers. Id.

[230] Id. at 119.

[231] Id. at 118-19. The Declaration is evidence of the consensus of U.N. members on the meaning of the U.N. Charter. It does not amend the Charter and is not in itself binding. Declaration on Principles of International Law Concernig Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U,N, GAOR Supp. 28 at 121, U.N. Doc. A/8028, reprinted in Dep't of Army, Pamphlet No. 27-24, Selected International Agreements, p. 3-15 (Dec. 1976).

See O'Connell, International Law 1313-15 (2nd. 1970).

[232]1986 Judgment on the Merits, supra note 2, at 118 [citing Nicaragua's Application to the International Court of Justice, paras. 26(a) and (c)].

[233]Id. at 119.

[234]Counter-Memorial submitted by the United States of America (The Questions of the Jurisdiction of the Court to Entertain the Dispute and of the Admissibility of Nicaragua's Application), at 77-82; 1984 Judgment on Jurisdiction and Admissibility, supra note 6.

[235]Id. at 119. This finding was apparently based on the testimony of former CIA employee David MacMichael. See id. at 73-75.

[236]Id. at 119.

[237]Id. at 175-76.

[238]Id. at 122.

[239]Id.

[240]Id. at 119-20.

[241]Id. at 120.

[242]Id.

[243]Id.

[244]Id.

[245]Id. The representative did state Honduras's neutral position and its support for the Contadora peace process. Id.

[246]Id. at 120.

[247]Professor Franck criticizes the Court for this conclusion. He wrote:

> While accepting the Nicaraguan position that no intentional aid was being given to rebels in El Salvador, the Court went on to speculate the even if such help were being provided, no right of collective self-defense would accrue to the United States.
>
> ....
>
> ...[T]he Court was able to conclude that "under international law in force today--whether customary international law or that of the United Nations system--States

> do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'."... "[O]nly when the wrongful act provoking the response was an armed attack," i.e., something reaching the threshold of the dispatch of armed bands "on a significant scale," may the United States go to the aid of an El Salvador by giving aid to an insurgency in a Nicaragua. This seemingly rigid barrior is slightly dented by a vague assertion that there may, in undefined circumstances, be "some right analogous to the right of collective self-defense" against a level of intervention falling sort of an actual "armed attack."
>
> The consequence of this substantive rule appears to be that fire may be fought with water, but not with fire. It is a proposition that leaves victimized states little option but to confine countermeasures to their own territory, were, it appears, they may secure the aid of friendly states in dealing with insurgents.

Franck, Some Observations on the ICJ's Procedural and Substantive Innovations, 81 Am. J. Int'l L. 116, 119-20 (1987) (footnotes omitted).

Professor Farer, while less critical of the Court, acknowledged the difficulty of knowing what is or is not an "armed attack:"

> On the one hand, the Court concludes that there are circumstances were aid to rebels can be deemed an "armed attack" with all the atttendant legal consequences. On the other, it categorically rejects the claim that a state crosses the armed attack threshold merely by arming the rebels....
>
> Infiltation into South Vietnam of Vietcong units from the North would seem to have satisfied the Court's standards, as does our relationship with the Nicaraguan contras. Nicaraguan assistance to the rebels in El Salvador, even if one accepts the most extravagent U.S. government claims conerning its dimensions, does not.

Farer, Drawing the Right Line, 81 Am. J. Int'l L. 112, 113 (1987).

[248] Id.

[249] Id. at 120-21.

[250] Id.

[251] Id. at 121. In the El Salvadorian Declaration Intervention, Nicaraguan head of state, Daniel Ortega, is quoted as stating: "he [President Ortega] could meet with President Duarte [of El Salvador], but that would not impede the fact of continuing support to the Salvadorian guerillas." Declaration of Intervention of the Republic of El Salvador, International Court of Justice: Case Concerning Military and Paramiltary Activities in and against Nicaragua (Nicar. v. U.S.), reprinted in 24 I.L.M. 38, 41 (1985).

[252] 1986 Judgment on the Merits, supra note 2, at 121.

[253] Id.

[254] Id.

[255] Id.

[256] Id. at 120.

[257] See id. at 121-22.

[258] U.N. Charter, art. 51.

[259] 1986 Judgment on the Merits, supra note 2, at 121.

[260] Id.

[261] Id.

[262] Id. at 121-22.

[263] Id. at 122-23.

[264] Id. at 122. The Court did not need to discuss this doctrine since the United States had not satisfied the sine qua non for collective self-defense. Id. See supra notes 219-23 and accompanying text.

[265] Id.

[266] Id. at 122-23.

[267] Id. at 122.

[268] Id. See id. at 48-50. Nicaragua alleged the following attacks:

> (i) 8 September 1983: an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down;

(ii) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;
(iii) 2 October 1983: an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel;
(iv) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;
(v) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;
(vi) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;
(vii) 24/25 February 1984: an incident at El Bluff listed under this date appears to be the mine explosion already mentioned [when two Nicaraguan fishing boats hit mines]....
(viii) 7 March 1984: an attack was made on oil and storage facility [sic.] at San Juan del Sur by speedboats and helicopters;
(ix) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;
(x) 9 April 1984: a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE [contra] attack on San Juan del Norte.

Id. at 48. With the exception of items i, iii, and vii, the Court found that Nicaragua had established the allegations. Id. at 50. The Court summarized the established allegations as follows:

> A "mother ship" was supplied (apparently leased) by the CIA.... Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by "UCLAs" [CIA jargon for "unilaterally controlled latino assets]. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report, the pilots were United States civilians under contract to the CIA.... [A]gents of the United States participated in the planning, direction, support and execution of the operations. The exectuion was the task rather of the "UCLAs," while United States nationals participated in the planning, direction and support.

Id. at 50-51.

[269]See id. at 362-69.

[270]Id. at 364.

[271]Id. at 363.

[272]Id.

[273]Id.

[274]Id. at 364 (citing 1980 II Y.B. Int'l L. Commission 69).

[275]1986 Judgment on the Merits, supra note 2, at 367.

[276]Id. at 367-68.

[277]Id. at 367.

[278]Id. at 368-69.

[279]Id. at 368. (citing Judge Ago in 1980 II Y.B. Int'l L. Commision 69).

[280]1986 Judgment on the Merits, supra note 2, at 110.

[281]Id.

[282]Id.

[283]Id.

[284]Id.

[285]Id.

[286]See id. at 70-71 and 106. The Court recognized that the United States sometimes justified its actions upon Nicaragua's domestic policies, its level of armaments and its foreign policy, but the Court called these justifications as "statements of international policy, and not an assertion of rules of existing international law. Id. at 109.

[287]Id. at 110-11. The Court noted that the absence of any U.S. claim for legal justification based upon this theory was an indiction of opinio juris. Id. at 111. In discussing this requirement in customary international law, the Court stated:

> [T]he Court has to emphasize that, as was observed in the North Sea Continenal Shelf cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settle practice", [sic.] but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such

> action or other States in a position to react to it, must have behaved so that their conduct isevidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.

Id. at 108-09 (citations omitted).

See Franck, Some Observations of the ICJ's Procedual and Substantive Innovations, 81 Am. J. Int'l L. 116, 118-19 (1987) and D'Amato, Trashing Customary International Law, 81 Am. J. Int'l L. 101, 102-03 (1987) (Professor D'Amato, of Northwestern University, is highly critical of the Court's misuse of opinio juris); and Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146, 148-51 (1987).

[288] Id. at 123.

[289] Id. at 123-24.

[290] Id. at 124.

[291] Id.

[292] Id. The Court apparently believed financial support per se could not be the equivilent of force, although it might equate to intervention.

[293] Id. at 127.

[294] Id. The victim State could apparently ask a third State for assistance but the third State would have to send the assistance directly to the victim State. 1986 Judgment on the Merits, supra note 2, at 110, and Franck, Some Observations on the ICJ's Procedural and Substantive Innovations, 81 Am. J. Int'l L. 116, 120 and 120 n.23 (1987).

[295] Id. at 124-25.

[296] Id. at 125 (citing declaration made at the Twentieth Conference of the Red Cross).

[297] 1986 Judgment on the Merits, supra note 2, at 124.

[298] Id. at 125.

[299] Id.

[300] Id. at 125-26.

[301] Id. at 126.

[302] Id. at 125.

[303] Rowles, Nicaragua versus the United States: Issues of Law and Policy, 20 Intl Law. 1245, 1276 (1986) (hereinafter cited as Rowles).

[304] Id. at 1279.

[305] 1986 Judgment on the Merits, supra note 2, at 126.

[306] Id. See supra note 242.

[307] 1986 Judgment on the Merits, supra note 2, at 122-13.

[308] Id. at 129.

[309] Id. at 64.

[310] Id. at 64-65 and 113.

[311] Id. at 64-70 and 113.

[312] Id. at 129.

[313] Id. at 113.

[314] Id. The Court observed that it did not earlier decide whether any of Nicaragua's claims "arose" under the Geneva Conventions, for purposes of the Vandenberg Reservation, as Nicaragua made no reference to the Conventions in its Application to the Court. The Court recognized that by applying, sua sponte, the Conventions to the dispute the Vandenberg Reservation would still apply to preclude the Court's jurisdiction. Id.

[315] Id.

[316] Id. at 113-14. Article 63 of the Geneva convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, reprinted in Dep't of Army, Pamphlet No. 27-1, Treaties Governing Law Warfare, at 24 (Dec. 1956) (entered into force by the United States on Feb. 2, 1956) (hereinafter cited as

Geneva Convention I), states:

> [Denunication of the Convention] shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Id. at art. 63. Identical provisions are in Article 62 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85, reprinted in Army Pamphlet No. 27-1, supra, at 48 (entered into force by the United States on Feb. 2, 1956) (hereinafter cited as Geneva Convention II), Article 142 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, reprinted in Army Pamphlet No. 27-1, supra, at 67, (entered into force by the United States on Feb. 2, 1956) (hereinafter cited as Geneva Convention III) and Article 158 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T. 287, reprinted in Army Pamphlet No. 27-1, supra, at 135 (entered into force by the United States on Feb. 2, 1956) (hereinafter cited as Geneva Convention IV).

[317] 1986 Judgment on the Merits, supra note 2, at 114.

[318] Id.

[319] Id.

[320] Geneva Conventions I, II, III, and IV, supra note 316, at arts. 3.

[321] 1986 Judgment on the Merits, supra note 2, at 114.

[322] Id. at 130. The Court was not single minded on this point. For example, Judge Roberto Ago wrote in his separate

opinion:

> I find that the Court has devoted a disproportionately lengthy passage and attached undue importance ... to the--apparently limited--dissemination among the contra forces of the CIA-published manual on Operaciones sicologicas en guerra de guerrillas. Even apart from the fact--recognized by the Judgment--that the opposing sides in a civil war like the one unhappily raging in Nicaragua need no outside encouragement to engage in activities which may be anti-humanitarian, I have difficulty in seeing precisely how the responsiblity deriving from such "encouragement," the reality and efficiacy of which remain moreover to be proved, would take shape in general international law.

Id. at 191. n.1. And Judge Nagendra Singh wrote:

> May I also add that I agree with the view that the CIA Manual entitled Operaciones sicologicas en guerra de guerrillas cannot be a breach of humanitarian law as such, but only an encouragement provoking such breaches, which aspect the Court has endeavored to bring out correctly.... Furthermore, I would also emphasize the assertion that the said manual was condemned by the Permanent Select Committee on Intelligence of the House of Representatives, an attempt was made to recall copies, and the contras were asked to ignore it [apparently referring to the manual and not the recall], all of which does reflect the healthy concern of the Respondent, which has a great legal tradition of respect for the judicial process and human rights.
>
> Nevertheless, that such a manual did appear and was attributable to the Respondent through the CIA, although compiled at a low level, was all the more regrettable because of the aforesaid traditional respect of the United States for the rule of law, nationally and internationally.

Id. at 156.

[323] Id. at 48. The Court had an adequate factual basis for this finding, much of it coming from official U.S. sources:

> It was announced in the United States Senate on 10 April 1984 that the Director of the CIA had informed the Senate Select Committee on Intelligence that President Reagan had approved a CIA plan for the mining of Nicaraguan ports; press reports state that the plan was approved in December 1983, but according to a member of that Committee, such approval was given in February 1984. On 10 April 1984, the United States

> Senate voted that "it is the sense of the Congress that no funds ... shall be obligated or expended for the purpose of planning, directing, executing or supporting the mining of the ports of territorial waters of Nicaragua.

Id. at 47. That Nicaragua was able to use this type of evidence from official sources illustrates the difference between an open and closed society. The latter is at a substantial advantage in its ability to gather evidence. Nicaragua merely had to go to official sources for much of the evidence it presented to the Court. The United States, if it had litigated the merits, would have not had similar access to Nicaraguan governmental sources.

[324] Id.

[325] Id. at 46-47.

[326] Id. at 112 (citing Hague Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, art. 3, 36 Stat. 2332, T.I.A.S. No. 541, reprinted in 2 Am. J. Int'l L. 138 (1908).

[327] 1986 Judgment on the Merits, supra note 2, at 112.

[328] Id. at 111. For example, Article 14 of the United Nations Convention on the Law of the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force the United States on Sept. 10, 1964), reprinted in Dep't of Air Force, Pamphlet No. 110-20, Selected International Agreements, at 6-50 (July 1981), states:

> 1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
>
> 2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

Id. at art. 14.

[329] 1986 Judgment on the Merits, supra note 2, at 112.

[330] 1986 Judgment on the Merits, supra note 2, at 112.

[331]Id. at 147-48.

[332]Id. at 111.

[333]Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, reprinted in Dep't of Air Force, Pamphlet No. 110-20, Selected International Agreements, p. 6-3 (July 1981). Article I of the Chicago Convention declared that every State has "complete and exclusive sovereignty over the airspace of its territory." Id. at art. 1. Under the Convention, "the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. Id. at art. 2. Although the Convention applied to civil aircraft, the Convention expressly prohibited "state aircraft" from flying "over the territory of another State or land thereon without authorization." Id. at art. 3, para. c. The Convention defined "state aircraft" to be "[a]ircraft used in military, customs and police services." Id. at art. 3, para. a.

[334]Convention of the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force by the United States on Sept. 10, 1964) .

[335]See Phelps, Aerial Intrusions by Civil and Military Aircraft in Time of Peace, 107 Mil. L. Rev. 255 (1985). Professor Phelps, in a brilliant article, discusses the history of civil and military intrusion in a State's airspace and the response that a State may make under international law. The overflown State may, according to Phelp's analysis, use force against a military aerial intruder once the State has warned the intruder and given the intruder sufficient opportunity to turn back. Id. at 255. The overflown State may use force against the civilian intruder only in circumstances of self-defense under Article 51 of the U.N. Charter. Id.

See generally Lissitzen, Some Legal Implications of the U-2 and RB-47 Incidents, 55 Am. J. Int'l L. 135 (1962); D. Johnson, Rights in Airspace (1965); P. Keenan, A. Lester & P. Martin, Shawcross and Beaumont on Air Law (3rd ed. 1966); Lissitzyn, The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int'l L. 559 (1953); and, W. Wagner, International Air Transportation as Affected by State Sovereignty (1970).

[336] 1986 Judgment on the Merits, supra note 2, at 111.

[337] Id.

[338] Id.

[339] Id.

[340] Id.

[341] Id. at 111-12; see supra text accompanying note 328.

[342] See supra note 331 and accompanying text.

[343] See generally id. at 135-42.

[344] Id.

[345] ICJ Statute, supra note 7, art. 36, para. 1.

[346] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 427. Article XXIV(2) of the 1956 Treaty states: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means." Although the United States claimed Nicaragua did not satisfy the requirement of attempting to have the dispute "satisfactorily adjusted by diplomacy," the Court held otherwise in a fourteen-to-one decision. 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 427-29 (citing 1956 Treaty) and 442.

[347] 1986 Judgment on the Merits, supra note 2, at 115-16

[348] Id. at 116.

[349] Id.

[350] 1986 Judgment on the Merits, supra note 2, at 140-40

[351] Id. at 118.

[352] Id. at 140-41.

[353] Id.

[354] Id. at 70.

[355] Id. at 141.

[356] Id. at 117 and 141.

[357] Id. at 116 and 141.

[358] Rowles, supra note 303, at 1278 n.123.

[359] Id.

[360] Id.

[361] U.N. Charter, art. 103.

[362] See generally J. Sweeney, C. Oliver & N. Leech, Cases and Materials on the International Legal Materials, at 953-54 (2d ed. 1981).

[363] 1986 Judgment on the Merits, supra note 2, at 135-36.

[364] Id. at 138-39.

[365] Id. at 139-40.

[366] Id. at 140.

[367.2] 1986 Judgment on the Merits, supra note 2, at 140.

[368] Id. at 136-37.

[369] Id. at 138.

[370] Id.

[371] Id.

[372] Id. at 138-39.

[373] Id. at 139 and 64-65.

[374] Id. at 139 and 148.

[375] Id. at 140.

[376] Id.

[377] Id.

[378] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 392; and, 1986 Judgment on the Merits, supra note 2, at 70, 140.

[379]The Court noted:

> The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", [sic] which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the General Assembly Declaration of Intervention" ... by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention", [sic] the definition of which would be discretionary.....[T]he Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law; it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

1986 Judgment on the Merits, supra note 2, at 134.

[380]1986 Judgment on the Merits, supra note 2, at 90-91.

[381]See generally id. at 130-33.

[382]Id. at 131.

[383]Id.

[384]Id.

[385]1986 Judgment on the Merits, supra note 2, at 132.

[386]Id.

[387]1986 Judgment on the Merits, supra note 2, at 132.

[388]Id. at 132-33.

[389]Id. at 133.

[390]Id. See generally Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, 4 Cal. W.L. Rev. 203 (1974) (a definitive treatment of humanitarian intervention under customary international law and the U.N. Charter); F. Teson, Humanitarian Intervention: An Inquiry on Law and Morality (1987); Teson, Le

Peuple, C'est Moi! The World Court and Human Rights, 81 Am. J. Int'l L. 173 (1987).

Professor Teson of the Arizona State University College of Law wrote:

> Another source of concern for those committed to human dignity is the Court's hasty dismissal of the U.S. claim that Nicaragua may be en route to establishing a totalitarian dictatorship. Yet if the political system described as "totalitarian dictatorship" results in a consistent pattern of gross violations of internationally recognized human rights, then that system cannot validly be "chosen" by a state. A state cannot legally "choose" to violate human rights. Above all, the Court is not deciding here a legal issue that may be narrowly dependent on the complex Nicaraguan situation. Ignoring its own well-established guidelines of judicial prudence, the Court instead laid down the principle that establishing a "totalitarian dictatorship" is within a state's "free choices," independently of whether or not a particular instance of "totalitarianism" could withstand the human rights test.

Id. at 177-78 (footnotes omitted).

[391] Id.

[392] Id.

[393] 1986 Judgment on the Merits, supra note 2, at 134 and91.

[394] Id. at 134.

[395] Id.

[396] Id.

[397] 1986 Judgment on the Merits, supra note 2, at 134; see, e.g., id. at 90.

[398] Id.

[399] Id. at 134-35

[400] Id.

[401] 86 Dep't St. Bull. 23, 24 (Feb. 1985) (excerpt from President Reagan's radio address to the nation broadcast Dec. 14, 1985). Referring to the "specter of Nicaragua transformed into an international aggressor nation," Presient Reagan cited the following:

> Some 30,000 Cuban military personnel now lead and advise the Nicaraguan forces down to the Smallest combat unit. The Cubans fly the Soviet assault helicopters that gun down Nicaraguan freedom fighters. Over 7,000 Cubans, Soviets, East Germans, Bulgarians, Libyans, PLO [Palestine Liberation Organization], and other ... terror groups are turning Managua into a breeding ground for subversion.

Id. at 24.

[402] Id.

[403] 1986 Judgment on the Merits, supra note 2, at 135.

[404] Id.

[405] Id.

[406] Id.

[407] Id. at 91.

[408] Id. at 142-43.

[409] Id. at 19-20.

[410] Id. at 142.

[411] Id.

[412] Id.

[413] Id.

[414] Id.

[415] Id.

[416] Id. at 143.

[417] Id.

[418] Id.

The Court stated as its rationale:

> In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind,

assuming that the Court possesses the power to do so, in exceptional circumstances, and were the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so the its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement.

Id. at 143.

[419] Id. at 142-43.

[420] Id. at 143.

[421] Id.

[422] Id. at 149. The vote was twelve-to-three in favor of reparations. Judges Oda, Schwebel and Sir Robert Jennings dissented. Id.

[423] Id. The vote concerning reparations due Nicaragua for breaches of the 1956 FCN Treaty was fourteen-to-one. Only Judge Schwebel dissented. Id.

[424] Id. This issue was settled by a fourteen-to-one vote; again, only Judge Schwebel was in dissent. Id.

[425] Id. The vote was twelve-to-three in favor of Nicaragua on this issue. Judges Oda, Schwebel and Sir Robert Jennings were in dissent. Id.

[426] Id. at 144.

[427] Id. at 143-44.

[428] Id. at 144.

[429] Id. at 149.

[430] Id. at 145. The Court endorsed Resolution 562 (1985) of 10 May 1985 which states in part:

> Recalling resolution 530 (1983), which reaffirms the right of Nicaragua and of all the other countries of the area to live in peace and security, free from outside interference,

Recalling also General Assembly resolution 38/10, which reaffirms the inalienable right of all the peoples to decide on their own form of government and to choose their own economic, political and social system free from all foreign intervention, coercion, or limitation,

Recalling also General Assembly resolution 39/4, which encourages the efforts of the Contadora Group and appeals urgently to all interested States in and outside the region to co-operate fully with the Group through a frank and constructive dialogue, so as to achieve solutions to the differences between them.

Recalling General Assembly resolution 2625 (XXVV), in the annex of which the Assembly proclaims the principle that no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind,

Reaffirming the principle that all members shall fulfil in good faith the obligations assumed by them in accordance with the Charter of the United Nations,

1. Reaffirms the sovereignty and inalienable right of Nicaragua and other States freely to decide their own political, economic and social systems, to develop their internaional relations according to their people's interests free from outside interference, subversion, direct or indirect coercion or threats of any kind;

2. Reaffirms once again its firm support to the Contadora Group and urges it to intensify its efforts; it also expresses its conviction that only with genuine political support from all interested States will those peace efforts prosper;

3. Calls upon all States to refrain from carrying out, supporting or promoting political, economic or military actions of any kind against any State in the region which might impede the peace objectives of the Contadora Gruup;

4. Calls upon the Governments of the United States of America and Nicaragua to resume the dialogue they had been holding in Manzanillo, Mexico, with a view to reaching accords favourable for normalizaing their relations and regional detente.

S.C. Res. 562 (1985) reprinted in 25 I.L.M. 1296 (1986). See Purcell, Demystifying Contadora, 64 Foreign Aff. 74 (1985) (a detailed explanation of the Contadora process).

[431]U.N. Charter, art. 33.

[432]Statement of 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).

[433] The nine cases are: Corfu Channel (U.K. v. Alb.), Assessment of Amount of Compensation, 1949 I.C.J. 244 (Dec. 15, 1949); Anglo-Iranian Oil Co. (U.K. v. Iran), Interim Protection, 1951 I.C.J. 89 (July 5, 1951) and Preliminary Objections, 1952 I.C.J. 93 (July 22, 1952); Nottebohm (Liechtenstein v. Guat.), Preliminary Objection, 1953 I.C.J. 111 (Nov. 18, 1953); Fisheries Jurisdiction (U.K. v. Ice. and W. Ger. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. 3, 49 (Feb. 2, 1973) and Merits, 1974 I.C.J. 3, 175 (July 24 1974); Trial of Pakistani Prisoners of War (Pak. v. India) Interim Protection, 1973 I.C.J 328 (July 13, 1973) (removed from list 1973 I.C.J 347 [Dec. 15, 1973]); Nuclear Tests (Austl. v. Fr. and N.Z. V. Fr.) 1974 I.C.J. 253, 457 (Dec 20, 1974); Aegan Sea Continental Shelf (Greece v. Turk.), Interim Protection, 1976 I.C.J. 3 (Sept. 11, 1976) and Judgment, 1978 I.C.J. 3 (Dec 19, 1978); and, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3 (May 24, 1980).

[434]Legal Implications, supra note 130, at 994.

[435]Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4 (Apr. 9, 1949). This case was in three parts: Corfu Channel Case, Preliminary Objection (U.K. v. Alb.), 1947 I.C.J. 7, 15, reported in 42 Am. J. Int'l L. 690 (1948); Corfu Channel Case, Merits (U.K. v. Alb.), 1947 I.C.J. 4, reported in 43 Am. J. Int'l L. 558 (1949); Corfu Channel Case, Assessment of the Amount of Compensation (U.K. v. Alb.), 1949 I.C.J. 237, reported in 44 Am. J. Int'l L. 579 (1950). The Corfu Channel is within Albanian territorial waters. Allbanian batteries fired on British ships that were passing through the Channel in 1946. Albania, like other communist States except Bulgaria, had not accepted the ICJ's compulsory jurisdiction. It agreed, however, to submit the matter to the

ICJ. The Court upheld the right of innocent passage in the Channel as it connected to open bodies of water. Albania did not participate in the third phase of the proceedings and refused to pay the Court ordered assessment of 844,000 British sterling.

[436] Legal Implications, supra note 130, at 994.

[437] Id.

[438] Department of State, Statement on the U.S. Withdrawal from the Proceedings initiated by Nicaragua in the International Court of Justice (January 18, 1985), reprinted in 24 I.C.M. 246 (1985) (hereinafter cited as Statement of Withdrawal on the Merits).

[439] Id. at 246-48.

[440] 86 Dep't St. Bull. 50 (Feb. 1986) (Secretary of State news conference of Dec. 6, 1985).

[441] R. Turner, Nicaragua v. United States: a Look at the Facts (1987).

[442] J. Moore, Secret War in Central America (1987).

[443] 86 Dep't St. Bull. 58 (Feb. 1986) (statement of Ambassador Vernon A. Walters).

[444] See e.g., supra note 134.

[445] 1986 Judgment on the Merits, supra note 2, at 74. See Highet, Evidence, the Court and the Nicaragua Case, 81 Am. J. Int'l L. 1, 20-28 (1987) (a discussion of the use of witnesses before the ICJ).

[446] Statment of U.S. Withdrawal on the Merits, supra note 438.

[447] The public has often been sceptical of the impartiality of the ICJ. The root of this scepticism was often concern over the nationalities of the judges who sit on the Court. This distrust fueled the Connally Reservation debates in the U.S. Senate. Elkind, supra note 1. As with the current U.S. complaint about "Warsaw Pact" judges, those in favor of the Connally Reservation expressed similar fears. Schweppe, The Connally Amendment Should Not be Withdrawn, A.B.A.J. 732, 732-33 (1960). When the Senate

debated the Connally Amendment, the Texas Bar Association passed the following resolution in support of the Reservation: "[The ICJ is] essentially foreign, not necessarily competent, probably political rather than judicial in its attitudes and decisions, possibly dominated by our enemies and therefore likely disposed to be hostile to the major interests of the United States." Elkind, supra, at 183 (citing Texas Bar Resolution).

These misgivings lead one scholar to study extensively the voting patterns of international court judges when their State was involved in the dispute. Suh, Voting Behavior of National Judges in International Courts, 63 Am. J. Int'l L. 222 (1969). Although the study is now dated, it suggests these concerns over nationality are not entirely groundless. National judges, not even ad hoc judges always vote in favor of their own State, however, they do so 82% of the time. Id. at 227-28. During the time period of the study, seventy judges cast dissenting votes in favor of their government. Id. Eleven of those dissents were, as with some of Judge Schwebel's dissenting votes in the Paramilitary Activities case, sole dissents on what would be an otherwise unanimous court. Id.

An analysis of the nationality of the judges on the ICJ indicates that the Court is well balanced among the western democracies, the Soviet bloc and non-aligned States. Obviously any analysis of this type tends toward superficiality; ICJ judges do not represent States they are individuals. I. Brownlie, Principles of Public International Law 693, n.1 (2nd ed. 1973). Judge Lauterpacht, a strong believer in the impartiality of the judges, would not have approved of this analysis. See Elkind, supra, at 181. With that note of caution, one may proceed. The following judges participated in the judgment on jurisdiction and admissibility:

Judge	Nationality
Elias (President)	Nigeria
Sette-Camara (Vice-President)	Brazil
Lachs	Poland
Morozov	USSR
Nagendra Singh	India
Ruda	Argentina
Mbaye	Senegal
Ago	Italy
El-Khani	Syria
de Lacharriere	France
Bedjaouri	Algeria
Mosler	Fed. Rep. of Germany
Oda	Japan
Schwebel	United States
Sir Robert Jennings	United Kingdom
Colliard (Judge ad hoc)	France

1982-1983 I.C.J.Y.B. 7 (1983) and 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 393.

The national composition of the Court indicates that six judges, almost half of the permanent members, were from industrialized democracies. Judge Colliard is not included in that number as Nicaragua appointed him as judge ad hoc. A party may appoint an ad hoc judge when "the Court includes upon the Bench a judge of the nationality of one of the parties, [in that case], any other party may choose a person to sit as judge." ICJ Statute, supra note 7, art. 31, para. 2. Ad hoc judges generally support that party's view. Brownlie, supra, at 694. They are similar to the national commissioners in ad hoc arbitration bodies. Id. See also S. Rosenne, The Law and Practice of the International Court 939-48 (1965). Only two judges came from the Warsaw Pact, although many consider Syria to be a Soviet client state as well. The remaining six judges were from Brazil, India, Argentina, Senegal, Nigeria, and Algeria, all non-aligned States and some have pro-Western leanings.

The composition of the Court for the decision on the merits changed slightly. Judges Nagendra Singh and de Lacharriere were the President and the Vice-President of the Court respectively.

Judges Ni (China) and Evenson (Norway) replaced Judges Morozov (USSR), El-Khami (Syria) and Mosler (Federal Republic and Germany). 1986 Judgment on the Merits, supra note 2, at 15 and 1984-1985 I.C.J.Y.B. 7 (1985) Even with those changes in the Court's personnel the political balance of the Court was not altered for the Judgment on the Merits. The ideological or national composition of the Court, therefore, was not hostile to the United States in the same manner one can make that argument with regard to the General Assembly of the United Nations.

[448]Iranian Hostage case, supra note 82.

[449]Id. at 44-45.

[450]Id.

[451]Id. at 45.

[452]The issues and the parties were different in the Iranian Hostage case. The case illustrates the the United States can get a favorable decision in the ICJ when the law and the facts are on its side. It also illustrates that the United States is willing to use the ICJ when it is to the U.S. advantage.

One may also note the nationality composition of the Court for the Iranian Hostage case was not substantially different from the composition of the Court for the Paramilitary Activities case. The Court consisted of the following judges for the Iranian Hostage case:

Judge	Nationality
Waldock	United Kingdom
Elias	Nigeria
Forster	Senegal
Gros	France
Lachs	Poland
Morozov	USSR
Singh	India
Ruda	Argentina
Mosler	West Germany
Tarazi	Syria
Oda	Japan
Ago	Italy

Judge	Nationality
El-Erian	Egypt
Sette-Camara	Brazil
Baxter	United States

1979-1980 I.C.J.Y.B. 7 (1980).

[453]ICJ Statute, supra note 7, art. 17, para. 1.

[454]Id. at para. 2.

[455]Id. at art. 18, para. 1.

[456]Id. at art. 32, paras. 5 and 8.

[457]Id. at para. 5.

[458]Id. at art. 19.

[459]Id. at art. 16, para. 1.

[460]Brownlie, supra note 447, at 692.

[461]The Hague Convention for the Pacific Settlement of International Disputes of 1899 established the Permanent Court of Arbitration. It is not a court as such, rather it is a mechanism for creating arbital panels. Brownlie, supra note 447, at 685-86. Between 1900 and 1932, the Court heard twenty cases. Id. at 686. Since 1932, the Court heard only three cases and none since 1940. Id.

[462]ICJ Statute, supra note 7, arts. 4-7.

[463]Brownlie, supra note 447, at 693-94.

[464]ICJ Statute, supra note 7, art. 8.

[465]Id. at art. 10, para. 1.

[466]Id. at para. 2. Article 27(3) states that all Security Council decisions require the "concurring vote of the permanent members." The permanent members of the Security Council are: "The Republic of China, France, The Union of Soviet Socialist Republics, The United Kingdom of Great Britain and Northern Ireland, and the United States of America." U.N. Charter, art. 23, para. 1.

[467]Brownlie, supra note 447, at 694. The judges may be re-elected. ICJ Statute, supra note 7, art. 13, para. 1. See Elkind, supra note 1, at 181 (a discussion of a proprosal to improve the Court by amending the ICJ Statute to provide for fifteen year terms and no re-election).

[468]ICJ Statute, supra note 7, art. 9.

[469]Professor Briggs stated the following concerning Judge Lachs:

> The contemptible attack on "Warsaw Pact" judges on the Court by the White House and the State Department overlooks the Statute of the Court and politicizes the functions of a judge. In fact, moreover, no Soviet judge sat in the case here discussed; and any international court applying international law would be fortunate to have on the bench a judge of the learning, fairness and legal experience exemplified by Judge Manfred Lachs of Poland. Cf. his dignified concurring opinion in this case and his letter of July 10, 1986 to the New York Times.

Briggs, The International Court of Justice Lives up to its Name, 81 Am. J. Int'l L. 78, 85 n. 37 (1987).

[470]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 442.

[471]Id.

[472]Id.

[473]Id.

[474]1986 Judgment on the Merits, supra note 2, at 146.

[475]Id.

[476]Id. at 149.

[477]Id. at 148.

[478]1982-1983 I.C.J.Y.B. 27 (1983) (Judge Schwebel's biographical sketch).

[479]1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 442.

[480]1986 Judgment on the Merits, supra note 2, at 147-48.

[481]Briggs, The International Court of Justice Lives up to its Name, 81 Am. J. Int'l L. 78 (1987).

[482]Id. at 78-79.

[483]Falk, The World Court's Achievement, 81 Am. J. Int'l L. 106 (1987).

[484]Id.

[485]Id.

[486]Id. at 11.

[487]The United States is a party to thirty-five bi-lateral treaties that have incorporated Article 36(1) jurisdiction. 1984-1985 I.C.J.Y.B. 102-18 (1985). Two additional treaties, the Vienna Convention on the Law of Treaties and the Trademark Registration Treaty, are in the U.S. Senate for ratification. Reisman, The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua, 81 Am. J. Int'l L. 166, 169 (1987); Trademark Registration Treaty, S. Exec. Doc. H, 94th Cong., 1st Sess. (1975); Vienna Convention on the Law of Treaties, S. Exec. Doc. L, 1st Sess. (1971). The United is also party to many multilateral treaties with ICJ treaty-based jurisdiction. Reisman, supra, at 169.

Indeed, the United States and Italy recently agreed to submit a case for resolution to the ICJ under United States-Italy Treaty of Friendship, Commerce and Navigation of 1948. In the dispute, the United States is espousing the claims of the Raytheon Company and Machlett Laboratories, Inc. against various Italian government officials. Statement on US-Italy Submission of Raytheon/Machlett Dispute to World Court, reprinted in 24 I.L.M. 1745 (1985).

[488]U.S. Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, reprinted in 24 I.L.M. 1743, 1742-44. (1985).

[489]France allowed its Declaration with the self-judging provisions to lapse and France has not renewed the Declaration. 1984-1985 I.C.J.Y.B. 66, n. 1 (1985). France allowed this lapse to occur after the Certain Norwegian Loans Case (Fr. v. Nor.), 1957 I.C.J. 9, digested in 51 Am. J. Int'l L. 777 (1957). In that case, France espoused the claims of its nationals who were seeking redemption of bonds into gold. Norway took advantage of France's reservation since any party may take advatage of any reservation that the other has made. Norway declared the matter to be within its exclusive domestic jurisdiction and the Court dismissed the case. Norwegian Loans, like the U.S. experience in attempting to bring Bulgaria before the ICJ, illustrates the dangers and difficulties of Connally-type reservations.

Liberia's Declaration exempts "any dispute which the Republic of Liberia considers essentially within its domestic jurisdiction." 1984-1985 I.C.J.Y.B. 82 (1985). Malawi precludes ICJ jurisdiction in "disputes with regard to matters which are essentially within the domestic jurisdiction of the Republic of Malawi as determined by the Government of Malawi." Id. at 84. Mexico's Declaration states: "This Declaration, which does not apply to disputes arising from matters that, in the opinion of the Mexican Government, are within the domestic jurisdiction of the United States of Mexico." Id. at 87. The Philippino Declaration exempts subject matter "which the Republic of the Philippines considers to be essentially within its domestic jurisdiction. Id. at 92. And, finally, Sudan exempts "disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of the Sudan as determined by the Government of the Republic of Sudan." Id. at 95.

A number of reservation have similar effect by permitting the State to amend its declaration and the amendment to have immediate effect. For example, in the Portuguese Declaration, Portugal

"reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes ... and with the effect from the moment of such notification." Id. at 93. Other examples include the United Kingdom, id. at 99, Somalia, id. at 94, and Kenya. Id. at 81. See 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 509 (for a complete list of States with reservations of the right of immediate amendment).

[490]Only a handful of States have unconditonally accepted the Court's compulsory jurisdiction and a reason why may be the self-judging reservations such as the Connally amendment. The U.S. Declaration actually gives States an incentive to avoid the ICJ's compulsory jurisdiction. A State wanting to sue the United States can merely make an Article 36(2) declaration the day before the State files its ICJ application. Before the State files the declaration, the United States cannot sue it. D'Amato, The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court, 80 Am. J. Int'l L. 331, 333-34 (1986) (hereinafter cited as New Declaration).

[491]ICJ Statute, supra note 7, art. art. 36, para. 2; see supra note 14.

[492]New Declaration, supra note 490, at 331-32 (footnotes omitted).

[493]See 86 Dep't St. Bull. 91 (Sept. 1986) (President Reagan's Letter to Congress, June 10, 1986). The President reported to Congress, pursuant to Section 722(j) of the International Security and Development cooperation Act of 1985 (P.L. 99-83) and Section 104 of Chapter V of the supplemental Appropriations Act, 1985 (P.L. 99-88):

> The need for sustaining U.S. support for the Nicaraguan democratic resistance forces is clear. Only in this way can the necessary pressure be applied effectively on the Sandinista leadership to: 1) move it toward serious internal

> and regional negotiations, 2) prevent its consolidating a Marxist-Leninist totalitarian state allied with Cuba and the Soviet bloc, and 3) cease its continuing aggression against the democracies of Central America.

Id. at 91.

[494]See Moore, The Secret War in Central America and the Future of World Order, 80 Am. J. Int'l L. 43 (1986) (hereinafter cited as Secret War; Reisman, Has the International Court Exceeded its Jurisdiction?, 80 Am. J. Int'l L. 128 (1986); Moore, The Nicaragua Case and the Deterioration of World Order, 81 Am. J. Int'l L. 151 (1987). Professor Moore of the University of Virginia represented the United States on the proceedings of concerning jurisdiction and admissibility. He is one of the principle defenders of the U.S. position in international legal literature. He and James Rowles, of Harvard University, have debated the issues raised by the Paramilitary Activities case. See Rowles, "Secret Wars," Self-Defense and the Charter--A Reply to Professor Moore, 80 Am. J. Int'l L. 568 (1986). Rowles did not have the last word. Moore will publish his response in 27 Va. J. Int'l L. __ (1987).

[495]Secret Wars, supra note 494, at 96. See I. Shihata, the Power of International Court to Determine its Own Jurisdiction 68-69 (1965).

[496]Secret Wars, supra note 494, at 96-99.

[497]Id.

[498]Id. at 97-98 [citing H. Lauterpacht, The Function of Law in the International Community 210 (1933)]. Of course, Lauterpacht wrote eleven years before the U.N. Charter and the Statute of the International Court of Justice.

[499]Id. at 96. Moore wrote, "in a case where the Court manifestly overreaches it jurisdiction under Article 36(1)-(5), it lacks jurisdiction regardless of Article 36(6). Id.

[500]Id. at 98.

[501] Id. at 97 [citing I. Simpson & H. Fox, International Arbitration: Law and Practice 252 (1959)].

[502] Secret Wars, supra note 494, at 93-102.

[503] Id. at 97 [citing K. Carlston, The Process of International Arbitration 87 (1946)].

[504] Secret Wars, supra note 494, at 97. The United States used Judge Oda words in its justification to withdraw from the proceedings of the merits. U.S. Withdrawal on the Merits, supra note 438, at 247.

[505] 1984 Judgment on Jurisdiction and Admissibility, supra note 6, at 510 (Judge Oda dissenting). Judge Oda argued that Nicaragua's Declaration, since it did not specifiy its duration, was terminable at will. Therefore, under the conditions of reciprocity, the United States could amend its reservation with immediate effect given to the reservation. Id. at 494-513. Under those circumstances, the U.S. attempt to modifiy its Declaration to preclude the subject matter from the Court's jurisdiction would have succeeded. Thus, in context, Judge Oda stated:

> [T]o my mind it is quite untenable to argue that those declarations without any reference to duration ... can never be terminated or amended because of the lack of a clause concerning the period of validity of the declarations.
>
> ....
>
> I am astonished to find such an argument put forward by the Court. It seems that the Court is unaware of the development of the Optional Clause during the past decades: is it the conclusion of the Court that, since in its view treaty law should be applicable to acceptance of the Optional Clause, declarations which have beeen made on condition that they may be amended or terminated by a notice of the declarant States at any time should be invalid or unacceptable as contrary to treaty law?

Id. at 510. Thus, Judge Oda's words refer to only a narrow portion of the Court's decision, not the entire conclusions of the Court. Indeed, Judge Oda voted with the majority that the Court "has jurisdicion to entertain the case" and that the "Application is

admissible." Id. at 442. Moore, in his article, and the United States, in its press statement, place unwarranted reliance on Judge Oda's words.

[506]New Declaration, supra note 490, at 332.

[507]U.N. Charter, art. 94, para. 1.

[508]Another difficulty in arguing in favor of non-compliance, is that it ignores the political reality of the Court's decision. Just as the public does not like a criminal to escape just on a technicality of the law, the layman is unimpressed with the jurisdictional arguments for non-compliance. Even if the Court did not have jurisdiction, the fact remains: On the substantive issues the Court found the United States in violation of international law with regard to its policies in Central America. In other words to the right thinking person the following argument makes no sense: the Court told us we were wrong, however, it had no authority to tell us we were wrong, therefore, we will not obey the Court. Another reality is that the closest issue was Nicaragua's Declaration under Article 36(2). Despite the Court's attention to the question, the realtiy was that Nicaragua could have easily mooted the issue. If Nicaragua had done so, the jurisdiction issues would have been even more one-sided then they were.

[509]See Application Instituting Proceedings, Border and Transborder Armed Actions (Nicar. v. Hond.) (July 28, 1986), reprinted in 25 I.L.M. 1293 (1986).

[510]Wash. Post, July 31, 1986, at A28, col. 1.

[511]See supra note 125.

[512]See supra note 435.

[513]Parties have challenged U.S. actions in support of contra forces domestic level as well. In Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985) (opinion by Chief Judge Scalia), various plaintiffs including, twelve members of Congress, filed an action

against the President and other federal defendents for claims arising out of U.S. support for the contra forces in Nicaragua. The plaintiffs brought the cause of action was the Alien Tort Statute, 28 U.S.C. Section 1350 (1982). 568 F.Supp. at 597. The District Court dismissed the plaintiffs' action because it was not justiciable. Id. at 598. The Court found that the case "involves significant factual and policy questions for which there are no judicially discoverable and manageable standards, and ... resolution ... would seriously impinge on the powers of the Legislative and Executive branches to establish and carry out foreign policy, as well as provide for national security." Id. at 597-98.

The Court categorized the claims according to the status of the plaintiffs: Nicaraguan, Congressional and Floridian. Id. The Nicaraguan plaintiffs sought damages and injunctive relief for "injuries allegedly caused by U.S. sponsored terrorist raids against various towns and villages in Nicaragua....[In violation of] fundamental human rights established under international law and the U.S. Constitution." Id. at 598.

The Nicaraguan plaintiffs cited the following sources of law for their cause of action:

> American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in Inter-American Commission on Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50 Doc. 6 at 17 (1980);
> Charter of the Orgainization of American States, 2 U.S.T., 2394, as amended, 21 U.S.T. 607;
> Charter of United Nations, 59 Stat. 1021, 3 Bevans 1153;
> Declaration of Principles of International Law Concerning Friendly Relations and Cooperation in Accordance with the Charter of the United Nations, G.A.Res. 2625, 25 U.N. GAOR, Supp. (No. 28), U.N.Doc. A/8028 at 121 (1970);
> Declaration on the Protection of all Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment, G.A.Res. 3452, 30 U.N. GAOR, Supp. (No. 34) U.N.Doc. A/10034 at 91 (1975);

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516;
Inter-American Treaty of Reciprocal Assistance, 62 Stat. 1681, 4 Bevans 559;
Treaty of Friendship, Commerce & Navigation between the United States and Nicaragua, 9 U.S.T. 449;
United Nations General Assembly Resolution 95(1), G.A.Res. 191, U.N.Doc. A/64Add.1 at 188 (1964);
Universal Declaration of Human Rights, U.N.Res. 217A, U.N.Doc. A/1810 at 71 (1948). Sanchez-Espinoza, 568 F.Supp. at 601 n.6.

Second, the Congressional plaintiffs alleged that U.S. activities constituted an undeclared was, thereby, infringing on the Congressional power to declare war under Article I, Section 8, cl.11 of the U.S. Constitution. Id. The congressional plaintiffs also alleged violation of the War Powers Resolution, 50 U.S.C. Sections 1541-48, the "neutrality laws" of 18 U.S.C. Sections 956 et seq., which prohibit preparing for "any military or naval expedition or enterprise ... against the territory or dominion of any foreign prince or state." Id. at Section 960, and the Boland Amendment to the 1983 Department of Defense Appropriations Act, P.L. 97-377, Section 793 (1982). 568 F.2d at 598. The Boland Amendment prohibits the Central Intelligence Agency and the Department of Defense from using appropriated funds to overthrow the Nicaraguan government. Id.

The final group of plaintiffs, who were citizens of Florida, sought injunctive relief from alleged paramilitary training camps in Florida, claiming they constituted a nuisance under Florida law. Id.

Since the Court dismissed the suit based on non-justiciability, it did not decide if the sources cited by the Nicaraguan plaintiffs created a private cause of action. Id. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the Court found a private cause of action to exist under international law against foreing officials. In that case, the plaintiffs prevailed

on appeal under the Alien Tort Statute, claiming that the law of nations prohibited the use of torture. The appellated court also held that private persons could subject foreign officials to judicial scrutiny in the United States under the provisions of the Alien Tort Statute. Id. at 876. The case was remanded to the District Court which awarded the plaintiff $10.4 million in damages. Filartiga v. Pena-Urala, 755 F.Supp. 860 (E.D.N.Y. 1984). See generally, Blum & Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53 (1985) (discussing the problems associated with law suits against foreign officials). The Court of Appeals for the District of Coumbia affirmed the district court's dismissal of the plaintiff's suit in Shanchez-Espinoza but based on soevereign immunity rather than justiciability. The Court of Appeals also addressed whether international law created private causes of action. It held "the law of nations, so-called 'customary international law,' arising from 'the customs and usages of civilized nations,' The Paquete Habana, 175 U.S. 677, 700 (1900) ... does not reach private, non-state conduct." Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985). The Court further held that to the extent the Alien Tort Statute covers state actions, the doctrine of sovereign immunity bars suit against the U.S. public officials for monetary damages. Id. at 207. The Court conceded that nonmonetary relief might be allowable under the Administrative Procedures Act, 5 U.S.C. Section 701(a)(2) (1982), but it held:

> it would be an abuse of our discretion to provide discretionary relief...[when the] military operations that we are asked to terminate has, if the allegations in the complaint are accepted as true, received the attention of the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four foreign states--Nicaragua, Costa Rica, Honduras, and Argintina. Id. at 208.

Although the Sanchez-Espinoza Court declined to label the issue as non-justiciable, the Court refused to exercise discretionary relief for reasons closely akin to the political question prong of the justiciability doctrine.

The Court specifically declined to overrule Filartiga v. Pena-Irala. Id. at 207 n.5. The Court distinguished between foreign sovereign immunity which is based on international comity, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135-37 (1812), and domestic sovereign immunity which is based on a separation of powers. Sanchez-Espinoza, 770 F.2d at 207 n.5. Therefore, the Court concluded "it does not necessarily follow that an Alien Tort Statute suit against the officer of a foreign sovereign would have to be dismissed." Id. See also, Crotty, The Law of Nations in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. Section 1350, 1 B.C. Int'l & Comp. L.J. 71 (1977); Louden, The Domestic Application of International Human Rights Law: Evolving the Species, 5 Hastings Int'l & Comp. L. Rev. 161 (1981); McDougal & Chen, Introduction: Human Rights and Jurisdiction, 9 Hofstra L. Rev. 337 (1981); and, Comment, The Alien Tort Statute: United States Jurisdiction Over Acts of Torture Committed Abroad, 23 Wm. & Mary L. Rev. 103 (1980).

For summaries of Sanchez-Espinoza see, Recent Development, Constitutional Law: Political Question Doctrine and Conduct of Foreign Policy, 25 Harv. Int'l L.J. 433 (1984) and Comment, Challenging the Covert War: The Politics of the Political Question Doctrine, 26 Harv. Int'l L.J. 155 (1985).

[514]The flood of legal writing on the subject has begun and will, no doubt, continue. See 81 Am. J. Int'l L. (1987) (The January, 1987 edition of the Journal focuses on the Paramilitary Activities case with two lead articles and sixteen shorter comments).