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Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States): The International Court of Justice's Jurisdictional Dilemma

I. INTRODUCTION

In 1984, the United States entered Nicaraguan territorial waters and mined its harbors.¹ Nicaragua, angered by this and other intervention² by the United States, sought international judicial relief by filing a complaint against the United States with the International Court of Justice (ICJ) in the Hague, the Netherlands.³ The United States challenged Nicaragua's complaint by arguing that the ICJ lacked jurisdiction to hear the case.⁴

In the ensuing months, the United States charged the ICJ with involvement in political disputes that were outside of its statutory purview. Nicaragua, on the other hand, claimed the United States' charges were "a direct assault on the international legal order."⁵ Although the ICJ ultimately decided that it had jurisdiction, the

1. The mining operations in Nicaragua were backed by the CIA. The Reagan Administration justified the covert operations by arguing that the Communist government in Nicaragua, the Sandinistas, were exporting terrorism and violence into Central America. N.Y. Times, Apr. 12, 1984, at A1, col. 6 & A12, col. 1. Proponents of the CIA action specifically pointed to the Nicaraguan government's support of leftist guerillas in El Salvador. The mining of the harbors was justified, they said, as a form of self-defense for El Salvador and its allies. *Id.* Apr. 10, 1984, at A1, col. 6. A White House statement said: "[T]here is no doubt that the Soviet Union and Cuba want to see Communism spread further in Central America." *Id.* Apr. 12, 1984, at A12, col. 2.

Congress was not persuaded. Feeling the covert activities were beyond the scope of the Administration's power, an outcry was heard from the House and Senate. Funds to support the mining were cut off. *Id.* Apr. 11 & 12, 1984, at A1, col. 6.

Additionally, the Soviet Union made a formal protest to the United States claiming a Soviet tanker had been damaged. Britain and France objected to the mining on the grounds that it interfered with international shipping. *Id.* Apr. 9, 1984, at A1 col. 3.

2. In addition to the mining, the United States backed insurgents in Nicaragua, foes of the Nicaraguan government. Rebels backed by the United States damaged Nicaraguan radio stations during air missions. The Reagan Administration's goal in using military pressure was to replace or modify the Sandinista government. *Id.* Apr. 11, 1984, at A8, cols. 4 & 5.

3. Communique of the International Court of Justice, 84/18, May 10, 1984 [hereinafter cited as Communique 84/18].

4. *Id.*

5. N.Y. Times, Apr. 10, 1984, A1, col. 6.

United States boycotted the court proceedings and stated it would not abide by the ICJ's final decision.⁶

This Note will focus upon the issue of whether or not the ICJ was correct in determining that it had jurisdiction to hear the dispute between the United States and Nicaragua.⁷ One basis of ICJ jurisdiction is Article 36, paragraph 2, of the Statute of the ICJ, known as the Optional Clause. This clause gives the ICJ compulsory personal jurisdiction if all of the litigants before the ICJ have signed the clause⁸ and if the dispute is within the subject matter jurisdiction of the ICJ.⁹ Another way the ICJ may obtain jurisdiction is through a treaty clause between the two parties.¹⁰ These two means of acquiring jurisdiction will be examined by analyzing the ICJ's actual determination of jurisdiction and considering whether proper jurisdiction did exist in this international dispute. Furthermore, because the ICJ indicated interim measures in the case, before it determined it had jurisdiction on the merits,¹¹ this Note will also focus upon the ancillary question of whether the ICJ correctly imposed interim remedial measures.

II. BACKGROUND INFORMATION

A. Facts

With a need for a forum to settle its dispute with the United States, Nicaragua instituted proceedings at the ICJ on April 9, 1984.¹² Nicaragua argued that the United States violated Nicaragua's sovereignty by using military force in Nicaragua and by meddling in Nica-

6. NEWSWEEK, Jan. 28, 1985, at 45.

7. The ICJ is the successor to the Permanent Court of International Justice. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 707-08 (3d ed. 1983). Both of these institutions are also referred to as the World Court. *Id.* at 708. The Permanent Court was established by the League of Nations in 1920 and in 1946 the United Nations replaced it with the ICJ. *Id.* The Statute of the International Court of Justice, which is part of the United Nations Charter, is the framework under which the court functions. Statute of the International Court of Justice, art. 1. See also D.J. HARRIS, *supra*, at 708. The ICJ is headquartered in the Hague, the Netherlands. Statute of the International Court of Justice, art. 22. The justices of the ICJ are selected by the United Nations Security Council. There are 15 members, each chosen from a country represented on the Security Council. D.J. HARRIS, *supra*, at 708.

8. Statute of the International Court of Justice, art. 36, ¶ 2. For a discussion of this section, see *infra* note 16.

9. *Id.* For a discussion of subject matter jurisdiction under the Optional Clause, see *infra* note 18.

10. *Id.* ¶ 1.

11. Communique 84/18, *supra* note 3, at 1.

12. Communique of the International Court of Justice, 84/10, Apr. 9, 1984 [hereinafter cited as Communique 84/10].

ragua's internal affairs.¹³ Nicaragua supported its claim by citing the United States' efforts to intimidate the Nicaraguan government by mining its territorial waters and by participating in covert military incursions into Nicaragua.¹⁴ Not only did Nicaragua request that the ICJ adjudicate its claim against the United States, but it also requested that the ICJ indicate provisional interim measures requiring the United States to cease its covert and overt military operations against the Sandinista regime of Nicaragua until the claim on the merits was settled.¹⁵

Based on the Optional Clause, Nicaragua asserted that the ICJ had compulsory jurisdiction to hear the dispute.¹⁶ Since both the

13. *Id.* The Reagan Administration countered Nicaragua's filing by saying it was an attempt to divert attention from the real issue—bringing peace to the region. The Administration supported this allegation by pointing to Nicaragua's lack of support for the Cantadora discussions. These discussions involved Panama, Columbia, Mexico, and Venezuela. The focus of the discussions was to end aggression and foreign military support in Central America. The State Department said Nicaragua was diverting attention from its failure to participate in the Cantadora proceedings by "staging propoganda spectaculars in other fora." N.Y. Times, Apr. 9, 1984, at A4, col. 1. The State Department concluded that the United States "serve[s] notice that [the United States does] not intend to cooperate with this plan or permit the court to be misused in [this] manner." *Id.*

14. See Communique 84/10, *supra* note 12. Nicaragua specifically alleged that the United States violated general and customary international law by "armed attacks against Nicaragua by air, land, and sea; . . . aerial trespass into Nicaragua airspace; [and] efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua." *Id.* at 2.

15. *Id.* at 1. The preliminary measures that Nicaragua asked the ICJ to follow were:

That the United States should immediately cease and desist from providing, directly or indirectly, any support . . . to any nation, group, organization, movement or individual engaged or planning to engage in military . . . activities in or against Nicaragua. [And] the United States should immediately cease and desist from any military . . . activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua.

Id. at 1. Nicaragua requested provisional measures because the urgency of the situation warranted immediate relief. Nicaragua claimed it could not wait. *Id.*

16. Communique 84/18, *supra* note 3, at 3, 4. Article 36, ¶ 2, of the Statute of the International Court of Justice states that "[t]he states parties to the present Statute may at any time declare that they recognize as compulsory . . . the jurisdiction of the Court" In other words, a state agreeing to compulsory jurisdiction may use the ICJ as a means to settle a dispute of international origin that it has with any other state that has agreed to the compulsory jurisdiction of the ICJ. D.J. HARRIS, *supra* note 7, at 712. At the present time, 47 countries have ratified the Optional Clause. 1982-1983 I.C.J.Y.B. 56 (1983). Although ¶ 1 of Article 36 states that all members to the United Nations are parties to the Statute of the ICJ, individual nations must ratify the Optional Clause in order for them to invoke the Clause against another state or have the Clause invoked against them by another state. See *Treatment in Hungary of Aircraft of the United States of America (U.S. v. Hung.)*, 1954 I.C.J. 99 (Order of July 12) (ICJ refused to extend compulsory jurisdiction over Hungary merely because Hungary was a United Nations member. The court held that compulsory jurisdiction would only exist if Hungary had signed the Optional Clause). Three non-member nations, Switzerland,

United States and Nicaragua had signed the Optional Clause, Nicaragua claimed that the first requirement of the Optional Clause, signatures of both parties, was met.¹⁷ Nicaragua further argued that the second requirement of the Optional Clause, subject matter jurisdiction, was also satisfied because the United States violated certain multinational treaties and international law.¹⁸

Alternatively, Nicaragua contended that if jurisdiction failed under the Optional Clause, the ICJ had jurisdiction based upon the Treaty of Friendship, Commerce & Navigation between the United States and Nicaragua.¹⁹ Nicaragua argued the compromissory clause in that treaty gave the ICJ jurisdiction to hear the dispute.²⁰

The United States asserted the ICJ lacked jurisdiction under the Optional Clause.²¹ The United States contended that Nicaragua had never formally signed the Optional Clause, precluding its use in this case.²² The United States also disputed that the ICJ had subject matter jurisdiction because of certain United States Optional Clause ex-

Liechtenstein, and San Marino, have signed the Optional Clause as allowed by Article 36, ¶ 2. 1982-1983 I.C.J.Y.B. 42.

17. Communique 84/18, *supra* note 3, at 4.

18. Communique 84/10, *supra* note 12, at 2. Although all parties to a dispute may have signed the Optional Clause, the ICJ may still lack jurisdiction due to subject matter limitations. Statute of the I.C.J., art. 6. Article 36, ¶ 2, lists four specific types of questions which may be referred to the court by states parties:

- 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.

19. Communique of the International Court of Justice, 84/39, Nov. 26, 1984, at 9 [hereinafter cited as Communique 84/39].

20. *Id.* There are other methods besides the Optional Clause to give the ICJ jurisdiction. The most common method is through a compromissory clause in a multinational or bilateral treaty. 1 ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 333-34 (1965), *quoted in* D.J. HARRIS, *supra* note 7, at 713. Here, the parties agreed to submit disputes to the ICJ that arise under the treaty. *Id.* See Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 14-15 (Jurisdiction of the Court, Judgment) (ICJ using a compromissory clause to seize jurisdiction). This case is discussed *infra* at note 49. The treaty may encompass many subjects, but the parties may limit the number of treaty terms subject to the ICJ's jurisdiction. 1 ROSENNE, *supra*, at 333-34, *quoted in* D.J. HARRIS, *supra* note 7, at 713.

The ICJ can also acquire jurisdiction by special agreement. *Id.* A special agreement entails the reference of a dispute between two nations to the ICJ after the dispute has arisen. *Id.* The states involved must accede to the court's jurisdiction or the ICJ will deny jurisdiction. *Id.* See also Corfu Channel Case (U.K. v. Alb.), 1948 I.C.J. 15 (Judgment on Preliminary Objection) (parties agreed to the ICJ's jurisdiction after the dispute arose).

21. Communique 84/18, *supra* note 3, at 4.

22. *Id.*

ceptions for multinational treaties and Central American disputes.²³

Lastly, although the United States did not pursue this argument when the case was heard on the merits, it did indicate during the preliminary phase of the case that the dispute was a matter of United States domestic affairs. Therefore, it was outside the jurisdiction of the ICJ.²⁴

B. The ICJ's Decision

With these arguments before it, the ICJ had to determine if it had jurisdiction to impose interim remedial measures upon the United States. Furthermore, it had to determine if it had jurisdiction to adjudicate the case on the merits.

1. Interim measures

Article 41 of the Statute of the ICJ gives the court the authority to provide interim measures if they are needed to protect the rights of either party.²⁵ The ICJ held that in this case, however, it should not order interim measures unless Nicaragua was able to present a *prima facie* basis upon which the jurisdiction of the court might be founded.²⁶

Article 36, paragraph 6, of the Statute of the ICJ allows the court to have the final word on whether it has jurisdiction over a particular dispute regarding interim measures or a decision on the merits.²⁷

23. Communiqué 84/39, *supra* note 19, at 7, 8. States accepting the Optional Clause may limit the ICJ's jurisdiction by reserving or excepting issues from the ICJ in its acceptance of the Optional Clause. Statute of the ICJ, art. 36, ¶ 3. If a state does condition its acceptance of the Optional Clause, other states who are parties to the Optional Clause have reciprocity of the exception when facing the conditioning party before the ICJ. *Id.* For an in-depth discussion of various states' exceptions to the Optional Clause and the practical effect of such exceptions, see generally Owen, *Compulsory Jurisdiction of the International Court of Justice: A Study of its Acceptance by Nations*, 3 GA. L. REV. 704 (1969); Coquia, *The Problem of Jurisdiction of the International Court of Justice*, 52 PHIL. L.J. 154, 156 (1977) (discussing problems with such reservations).

24. See Communiqué 84/39, *supra* note 19, Annex (Schwebel, J., dissenting). Article 36, ¶ 2(a-d), would clearly exclude a state's internal matters.

25. Statute of the ICJ, art. 41, ¶ 1. Interim measures are similar to Rule 65 of the Fed. R. Civ. P. Rule 65 allows a party to obtain a preliminary injunction or a temporary restraining order to prevent the adverse party from taking action that might hurt one of the litigants. The order stays the parties' positions until the final outcome of the case is decided. Like a temporary restraining order or a preliminary injunction, ordering interim measures does not necessarily implicate any party of wrongdoing. It simply preserves the rights of all parties until the ICJ can adjudicate the claim on the merits.

26. See Communiqué 84/18, *supra* note 3.

27. Statute of the ICJ, art. 36, ¶ 6.

Based upon the broad language of this Article, the ICJ determined that Nicaragua's claim provided a sufficient jurisdictional basis for the court to order interim measures.²⁸

To support its decision, the court ruled that it did not have "to determine the validity or invalidity" of the United States' jurisdictional argument to find a basis for provisional measures under the Optional Clause.²⁹ The ICJ further held that Nicaragua could rely on the United States' 1946 acceptance of the Optional Clause as a basis for compulsory jurisdiction when coupled with Nicaragua's acceptance.³⁰ The court also held that for purposes of provisional measures it did not have to determine whether or not the United States' multinational treaty or Central America exceptions excluded compulsory jurisdiction.³¹

The ICJ determined that the Optional Clauses, which were agreed to by each party, "appear[ed] to afford a basis on which the jurisdiction of the Court might be founded."³² Nevertheless, the ICJ held that when the case was presented on the merits, the United States could argue the jurisdictional issue first, and at that time, the ICJ would make a final decision as to whether it had jurisdiction.³³ Based upon this holding, the court used its power under Article 41 of the Statute of the ICJ and ordered provisional measures.³⁴

2. Final decision

On November 26, 1984, the ICJ determined it had jurisdiction to adjudicate the case on the merits.³⁵ Specifically, in a vote of eleven to five, the ICJ found jurisdiction on the basis of Article 36, paragraphs 2 and 5 of the Statute of the ICJ.³⁶ The court also held by a vote of fourteen to two that it had jurisdiction to hear the claim "insofar as [the claim] relates to a dispute concerning the interpretation . . . of

28. Communiqué 84/18, *supra* note 3, at 5.

29. *Id.*

30. *Id.* The United States' acceptance of the Optional Clause is not in dispute. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 6. The ICJ emphasized that "its decision in no way prejudices the question of its jurisdiction to deal with the merits of the case and leaves unaffected the right of the . . . [United States' or Nicaraguan government] to submit arguments in respect of such jurisdiction or such merits." *Id.*

34. *Id.* In essence, the court ordered the United States to cease its military activities in Nicaragua and ordered both parties to refrain from provoking one another until the ICJ could settle the dispute on the merits. *Id.* at 1, 2.

35. Communiqué 84/39, *supra* note 19, at 1.

36. *Id.*

the Treaty of Friendship, Commerce and Navigation . . . on the basis of Article XXIV of the Treaty."³⁷ Therefore, by a final vote of fifteen to one, the ICJ conclusively determined Nicaragua presented valid claims over which the ICJ had jurisdiction.³⁸

III. ANALYSIS

When determining jurisdiction in connection with interim measures, the ICJ held that it did not have to decide if it would ultimately have jurisdiction on the merits.³⁹ Nevertheless, the ICJ did have to analyze the issue of jurisdiction fully before it could adjudicate the claim on the merits.⁴⁰

A. Jurisdiction for Interim Measures

Before the ICJ determined there was jurisdiction to hear the case, the court determined that there was jurisdiction to order interim measures.⁴¹ Whether the ICJ has the power to order provisional measures before it determines whether it has jurisdiction to hear the case, in general, has been in constant dispute. Although Article 41 of the Statute of the ICJ provides for interim measures, it neither "specifies . . . the stage of the proceedings at which the power to provide for interim relief may be exercised, the considerations that should guide the exercise of the power, nor the manner in which the power to indicate interim measures may be implemented."⁴² Despite the uncertainty of Article 41, the ICJ is willing to provide interim measures if the applicant makes a *prima facie* showing of jurisdiction even if jurisdiction is contested by the respondent.⁴³

1. Standard to be imposed

In *Anglo-Iranian Oil Company*,⁴⁴ Britain sought interim protec-

37. *Id.*

38. *Id.* at 2. The ICJ also unanimously held that if there were jurisdiction, then Nicaragua's application was admissible. *Id.*

39. Communique 84/18, *supra* note 3, at 5.

40. See Communique 84/39, *supra* note 19.

41. See *supra* text accompanying notes 25-34.

42. Note, *International Law—The International Court of Justice Has Preliminary Jurisdiction to Indicate Interim Measures of Protection: The Nuclear Test Cases*, 7 INT'L L. & POL. 163, 164 (1974) [hereinafter cited as 7 INT'L L. & POL.].

43. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258, 260 (1974) (citing 1 ROSENNE, *supra* note 20, at 427) (argues that there can be no proceedings until jurisdiction is proven).

44. (U.K. v. Iran), 1951 I.C.J. 89 (Order of July 5).

tion from the ICJ after Iran breached a concession agreement by nationalizing its oil fields.⁴⁵ Iran, asserting the domestic jurisdiction exception, claimed the ICJ had no jurisdiction to hear the case.⁴⁶ A majority of the court ordered interim measures, however, holding that "it cannot be accepted *a priori* that a claim based on such a complaint [breach of a concession agreement] falls completely outside the scope of international jurisdiction."⁴⁷

This has been dubbed the "possibility" test because "as long as there is some possibility that the complaint would fall within the jurisdiction of the Court an indication may be provided."⁴⁸ This test was affirmed in *Fisheries Jurisdiction*,⁴⁹ where the court held that interim measures will be ordered if a showing by an applicant provides "*prima facie* [facts as] . . . a possible basis on which the jurisdiction of the Court might be founded."⁵⁰ Specifically, a majority in *Fisheries Jurisdiction* found a possible basis for jurisdiction based on notes of agreement exchanged between the parties warranting the imposition of interim measures.⁵¹

Nevertheless, certain justices on the ICJ were not satisfied with the possibility test. In *Anglo-Iranian Oil*, they criticized the possibility test saying that, "[i]f there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection . . . [T]he Court ought not to indicate interim measures unless its competence . . . appears . . . to be reasonably probable."⁵² Thus, the possibility test was limited and a new standard emerged in *Nuclear Test*.⁵³

A majority of the court in *Nuclear Test* abandoned the words

45. *Id.*

46. *Id.* at 2.

47. *Id.* at 93. See Merrills, *Interim Measures of Protection and the Substantive Jurisdiction of the International Court*, 36 CAMBRIDGE L.J. 86, 91 (1977).

48. Goldsworthy, *supra* note 43, at 262.

49. (U.K. v. Ice.), 1972 I.C.J. 12 (Interim Protection, Order of Aug. 17). There, Britain was challenging Iceland's extension of territorial waters for fishing rights. Britain claimed that notes exchanged between the two countries limited Iceland's fishing rights and any violation of the agreement would be submitted to the ICJ. *Id.*

50. *Id.* at 16, *quoted in* Goldsworthy, *supra* note 43, at 262. In *Fisheries Jurisdiction*, the majority held that the ICJ should not order interim measures "if the absence of jurisdiction on the merits is manifest." 1972 I.C.J. 12, at 15.

51. *Id.* at 17-18. See Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259, 282-84, 294-96 (1972-1973) (discussing opposition to the majority's holding and the impact of the holding).

52. 1951 I.C.J. 89, 97 (Winiarski, J., & Badawi Pasha, J., dissenting). For a discussion of the dissent, see Mendelson, *supra* note 51, at 280-81.

53. (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection, Order of June 22).

“possible basis” and held interim measures should not be indicated unless the applicant makes a *prima facie* factual showing in order to afford a basis upon which the jurisdiction of the court might be founded.⁵⁴ A clear basis, rather than a possible basis, of jurisdiction must now be shown. After a majority in *Nuclear Test* found a *prima facie* showing of jurisdiction based on a multinational treaty between the parties, the ICJ imposed interim measures.⁵⁵

Nevertheless, there was still dissatisfaction among some members of the ICJ with this narrower jurisdiction test.⁵⁶ A dissent in *Nuclear Test* states, “[t]he Court should above all have *satisfied itself* that it really had jurisdiction, and not have contented itself with a *mere probability*.”⁵⁷

Given the lack of a definite stand by the ICJ on the question of jurisdiction in these cases, a new test, the current standard emerged. This test is actually a combination of certain criteria in *Anglo-Iranian Oil* and the standard in *Nuclear Test*. Rather than focus on the strength of jurisdiction presented by the proponent, the ICJ now looks at the purpose of interim measures.⁵⁸ In *Anglo-Iranian Oil*, the majority stated that the object of interim measures is “to preserve the respective rights of the Parties pending the decision of the Court.”⁵⁹ One writer has therefore concluded “[t]he test is not whether adequate compensation can ultimately be provided but whether ‘irreparable’ prejudice would be occasioned to the rights of the applicant if interim protection is refused.”⁶⁰ If the rights of the applicant are in danger, the applicant need only demonstrate a *prima facie* claim of

54. 1973 I.C.J. 99, 102, *quoted in* Goldsworthy, *supra* note 43, at 262.

55. 1973 I.C.J. at 106. In *Nuclear Test*, applicants sought a prohibition against France from conducting nuclear tests in the Pacific. *Id.*

56. (*N.Z. v. Fr.*), 1973 I.C.J. 135, 148 (Interim Protection, Order of June 22) (Forster, J., dissenting), 149-51 (Gros, J., dissenting) (decided same day as 1973 I.C.J. 99).

57. *Id.* (Forster, J., dissenting) (emphasis in original). The dissenters found a *prima facie* basis for jurisdiction in Fisheries Jurisdiction. D.J. HARRIS, *supra* note 7, at 735 n.2. For a discussion of the *Nuclear Test* dissent, see Merrills, *supra* note 47, at 87-89, 95.

58. Goldsworthy, *supra* note 43, at 269-70. See D.J. HARRIS, *supra* note 7, at 733, where he states:

The main problem which has arisen in respect of the Court's power to indicate interim measures has been to identify the circumstances in which they can be indicated before the Court's jurisdiction has been established to hear the merits of the case. The difficulty has been to find a rule that properly takes account both of the fact that the Court may ultimately decide that it lacks jurisdiction to hear the case and of the fact that the parties' rights may be irreparably damaged before a decision as to jurisdiction is taken. The Court's judgment weighs the second of these more heavily than does the opinion of the two dissenting judges [in the *Anglo-Iranian Oil* case].

59. 1951 I.C.J. 89, 93, *cited in* Goldsworthy, *supra* note 43, at 268.

60. Goldsworthy, *supra* note 43, at 269.

jurisdiction, which shifts "the burden of proof [that the ICJ has no jurisdiction] on the party opposing the granting of interim measures."⁶¹ Most commentators agree that the ICJ can indicate interim measures before jurisdiction is decided on the merits.⁶²

2. Application of the standard

Applying these standards to the present case, the ICJ appeared to be correct by imposing interim measures on the United States. Nicaragua might have suffered irreparable damage had the ICJ not ordered the United States to remove the mines from Nicaragua's harbors because Nicaragua's commerce could have been severely affected. Conversely, it appears that the United States was not damaged by removing the mines. Thus, it seems that the "respective rights of the parties pending the decision of the court" were preserved through interim measures.

Furthermore, Nicaragua made a *prima facie* showing of jurisdiction at the interim phase of the trial as required by *Nuclear Test*. Since both the United States and Nicaragua had arguably accepted and signed the Optional Clause, ostensibly there was a basis for jurisdiction as was found in *Nuclear Test* with the treaty and in *Fisheries Jurisdiction* with the exchange of notes. Finally, since the signing of the Optional Clause gives the court compulsory jurisdiction, jurisdiction seems to be reasonably provable even under the stricter standard enunciated by the *Nuclear Test* dissent.

Although the United States' Central America exception might have obviated jurisdiction on the merits, a legal commentator has stated:

[T]he Court has jurisdiction to entertain a request for interim measures on the basis of the finding that the subject of the dispute falls within Article 36(2), regardless, at any stage, of any reservations. . . . [T]he Court need be concerned only with the formal possibility of jurisdiction—whether the dispute fell within Article 36(2), regardless of any controversy surrounding the legality [of

61. 7 INT'L L. & POL., *supra* note 42, at 164. In *The Interhandel*, *infra* note 130 and accompanying text, the ICJ rejected Switzerland's application for interim measures since no damage would be done to Switzerland before a final determination on the merits was made. (*Switz. v. U.S.*), 1957 I.C.J. 105, 111-12, *cited in* Mendelson, *supra* note 51, at 274-75.

62. Mendelson, *supra* note 51, 302-03 (discussing Hudson, *The Thirtieth Year of the World Court*, 46 AM. J. INT'L L. 1, 22 (1952) (supporting the ICJ in *Anglo-Iranian Oil* for fear that the dissenting position would seriously cripple the court). *But see* Mendelson, *supra* note 51, at 303-04 (discussing 1 ROSENNE, *supra* note 20, at 424 (finding interim measures are inappropriate if an applicant contests jurisdiction)).

reservations].⁶³

Therefore, it appears irrelevant for the purposes of assessing the propriety of interim measures that the United States excepted Central America from its Optional Clause. Even though interim measures were indicated, the United States could still argue the issue of jurisdiction on the merits.⁶⁴ Although a party may disregard interim measures because they are not binding in law,⁶⁵ the United States indicated that it had already removed the mines from Nicaragua's harbors.⁶⁶

In summary, the ICJ acted within the bounds of its authority by providing interim measures necessary to prevent irreparable harm to Nicaragua by United States' actions. The Statute of the ICJ allows such action by the court. Moreover, neither the rights of the United States nor Nicaragua were harmed as a result of these interim measures.

B. Jurisdiction on the Merits: Compulsory Jurisdiction under the Optional Clause

Nicaragua offered two bases for jurisdiction: the Optional Clause of the Statute of the ICJ and the compromissory clause of the United States-Nicaragua Treaty of Friendship, Commerce & Navigation. To prove that jurisdiction existed under the Optional Clause, Nicaragua had to show that both it and the United States had signed the Optional Clause.⁶⁷ Alternatively, jurisdiction existed under the Treaty of Friendship, Commerce & Navigation if Nicaragua showed that the

63. Goldsworthy, *supra* note 43, at 264-65. Judge Lauterpacht of the ICJ, however, held reservations to the Optional Clause must be treated as valid for the purpose of interim measures if such reservations would obviously exclude the ICJ's jurisdiction. Mendelson, *supra* note 51, at 276-77 (quoting *The Interhandel*, 1957 I.C.J. 105, 118 (Lauterpacht, J., concurring)).

64. Communiqué 84/18, *supra* note 3, at 6.

65. D.J. HARRIS, *supra* note 7, at 735. The respondents in *Anglo-Iranian Oil, Fisheries Jurisdiction*, and *Nuclear Test* failed to comply with interim measures, as did Iran in *Tehran*, *infra* note 180. *Id. But cf.* Goldsworthy, *supra* note 43, at 274 (arguing interim measures are binding).

66. N.Y. Times, May 11, 1984, at A8, col. 1. Although the United States said that it would abide by the court's interim measure decision, it also said that the decision is not inconsistent with the existing policy of the United States. One measure that the ICJ ordered was for the United States to remove the mines from the Nicaraguan harbors. However, this had already been done after the covert mining became known to the public, partially due to the outcry from Congress. The House was no longer financing the operation. *See supra* note 1. Furthermore, the ICJ was not very explicit on how the United States should cease its military operations in Nicaragua. N.Y. Times, *supra*, col. 1.

67. *See supra* notes 16 & 18.

compromissory clause of that treaty gave the court jurisdiction.⁶⁸ In either instance, Nicaragua had to also show that the court had subject matter jurisdiction, i.e., it was an international matter.

1. Personal and subject matter jurisdiction

For the ICJ to have jurisdiction over this dispute under the Optional Clause, both the United States and Nicaragua must have signed the Clause.⁶⁹ Nicaragua first had to prove that its acceptance of the Optional Clause was valid.⁷⁰ Nicaragua argued that it had accepted the Optional Clause by its declaration before the Permanent Court of International Justice in 1929.⁷¹ In support of this claim, Nicaragua argued that any valid declaration of acceptance of the Optional Clause before the Permanent Court was a valid acceptance under Article 36, paragraph 5, of the Statute of the ICJ,⁷² which provided that any acceptance of the Optional Clause *still in force* under the rules of the Permanent Court are still valid under the statute of the ICJ.⁷³

On the other hand, the United States argued that the first requirement of Article 36 was not met because Nicaragua never ratified the Optional Clause.⁷⁴ Since Nicaragua never actually ratified the Protocol of Signature as required by the Permanent Court, the United States contended that Nicaragua's signature was invalid.⁷⁵ Therefore, it was not binding upon the ICJ because it was never in force.⁷⁶

In rejecting the United States' argument, a majority of the ICJ reasoned that, although Nicaragua had not ratified the Protocol of Signature, Nicaragua's declaration was not necessarily void.⁷⁷ Nicaragua could have cured the signature defect by depositing its instru-

68. See *supra* note 20.

69. Statute of the ICJ, art. 36, ¶ 2.

70. Communique 84/39, *supra* note 19, at 5-8.

71. *Id.* Countries that have accepted compulsory jurisdiction under the ICJ's predecessor, the Permanent Court of International Justice, have been deemed to have accepted the compulsory jurisdiction of the ICJ if their declarations are still considered valid. Statute of the ICJ, art. 36, ¶ 5. See also *supra* note 7.

72. Communique 84/39, *supra* note 19, at 5-8.

73. Statute of the ICJ, art. 36, ¶ 5.

74. Communique 84/18, *supra* note 3, at 4.

75. *Id.*

76. *Id.* The United States claim was correct: "According to a telegram dated 29 November 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Permanent Court of International Justice . . . [and] the instrument of ratification was to follow[.] . . . the instrument of ratification was [never] received by the League of Nations." 1982-1983 I.C.J.Y.B. 79 n.1.

77. Communique 84/39, *supra* note 19, at 5-8.

ment of ratification with the Permanent Court.⁷⁸ Thus, a majority agreed that Nicaragua's declaration had the "potential effect" of becoming valid for many years even though Nicaragua never ratified the Protocol of Signature.⁷⁹ Since the declaration was unconditional, the majority further stated that it was valid for an unlimited period.⁸⁰ The court then concluded:

[T]he Court takes the view that the primary concern of those who drafted [the ICJ's] Statute was to maintain the greatest possible continuity between [the ICJ] and the Permanent Court and that their aim was to ensure . . . [the ICJ] should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. . . . Nicaragua may therefore be deemed to have given its consent to the transfer [of its declaration into an effective one before the ICJ] when it signed and ratified the [United Nations] Charter, thus accepting [compulsory jurisdiction].⁸¹

The majority's decision is consistent with past decisions of the ICJ and Article 38 of the Statute of the ICJ, which states that the ICJ shall apply "judicial decisions" when adjudicating claims.⁸² In *The Interhandel*,⁸³ the court allowed Switzerland to invoke the Optional Clause against the United States even though Switzerland signed the Optional Clause *after* the dispute was filed.⁸⁴ By analogy, Nicaragua should be able to cure a similar defect in its Optional Clause even though the dispute has already been filed.

Furthermore, relying on *Interhandel* and *Right of Passage Over*

78. *Id.*

79. *Id.*

80. *Id.* at 6. The majority further supported its holding by stating that the words of Article 36, ¶ 5, which made declarations still in force under the Permanent Court effective under the ICJ, denoted an intention of widening that paragraph's and that article's scope. They concluded the English phrase in paragraph 5 which states "Declarations . . . which are still in force" does not expressly exclude a valid declaration which is not binding. The French version of paragraph 5 would also support this conclusion according to the majority. *Id.*

81. *Id.*

82. Statute of the ICJ, art. 38, ¶ 1(d). However:

[J]udicial decisions of the International Court itself . . . are considered as a subsidiary means for the determination of the rules of international law. The judicial decisions are considered on a subsidiary source . . . because, in accordance with the Continental system of civil law, they have no binding force except between the parties and in respect of that particular case.

Rankin, *Jurisdiction of the International Court of Justice and the Rule of Law*, 32 N.Y. ST. B. BULL. 257, 267 (1960) (citing Statute of the ICJ, art. 59).

83. (*Switz. v. U.S.*), 1959 I.C.J. 6 (Judgment of Mar. 21). See *infra* note 130 and accompanying text for a discussion of *The Interhandel*.

84. *Id.* at 23.

Indian Territory,⁸⁵ in which the ICJ rejected an opportunity to nullify a defective Optional Clause claim of jurisdiction, commentators have concluded that rather than strictly follow procedural rules and cripple the operation of compulsory jurisdiction,⁸⁶ the ICJ is more willing to assert jurisdiction.

In the Nicaragua case, however, Judge Sir Robert Jennings of the ICJ, agreeing with the United States, stated in a dissent that Nicaragua's declaration cannot be "still in force" as required by Article 36, paragraph 5, because the declaration was never in force.⁸⁷ Judge Schwebel of the ICJ further stated that the plain meaning of paragraph 5 supports the United States' argument because the drafting history of paragraph 5 defines "still in force" as declarations that have bound states to the compulsory jurisdiction of the Permanent Court.⁸⁸ Given that this binding effect is achieved only by actually ratifying the Optional Clause, Judge Schwebel argued that the ICJ lacked jurisdiction because Nicaragua did not ratify the Protocol of Signature.⁸⁹

The dissent's reasoning, however, ignores *Interhandel*. Therefore, in accordance with equitable principles, the ICJ should allow Nicaragua to sign the Optional Clause even if it is done after the filing of the dispute. Consequently, the ICJ correctly held that Nicaragua had indeed accepted the Optional Clause.

Even if the majority is correct in its determination that Nicaragua had ratified the Optional Clause, Article 36, paragraph 2, also requires subject matter jurisdiction if compulsory jurisdiction is to exist.⁹⁰

Nicaragua argued that subject matter jurisdiction existed because the United States' military intervention into Nicaragua violated obligations under four multinational treaties:

85. (Port. v. India), 1957 I.C.J. 125 (Preliminary Objections, Judgment of Nov. 26). See *infra* note 120 for a discussion of the case.

86. See, e.g., Briggs, *Interhandel: The Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States*, 53 AM. J. INT'L L. 547, 554 (1959).

87. Communiqué 84/39, *supra* note 19, Annex at 4.

88. *Id.* But see note 80.

89. Communiqué 84/39, *supra* note 19, Annex at 4. The majority also reasoned that because the ICJ yearbook listed Nicaragua as a signatory for the last 40 years, Nicaragua's declaration was valid. The majority reasoned Article 38, ¶ 1(d) of the Statute of the ICJ allows the court to use "highly qualified publicists" to support its decision. *Id.* at 6. However, the dissent argued the yearbook was not the work of a highly qualified publicist. Therefore, it was wrong in principle to use the yearbook as a means to support jurisdiction. *Id.* Annex at 5 (Schwebel, J., dissenting). Furthermore, the dissent also points out that the yearbook contained a warning that Nicaragua's acceptance may be invalid. *Id.* See *supra* note 76.

90. See *supra* note 18.

- (1) Article 2(4) of the United Nations Charter;
- (2) Articles 18 & 20 of the Charter of the Organization of American States;
- (3) Article 8 of the Convention on Rights and Duties of States;
- (4) Article 1, Third, of the Convention Concerning the Duties and Rights of States in the Event of Civil Strife.⁹¹

Normally, the violation of multinational treaties would give the ICJ unequivocal subject matter jurisdiction.⁹² However, parties who have signed the Optional Clause can except certain issues from the ICJ's jurisdiction.⁹³ The United States has three such exceptions to its Optional Clause: a multinational treaty exception, a Central America exception, and a domestic law exception.⁹⁴

2. Multinational treaty exception

The United States contended that the terms of the Optional Clause limited the ICJ's subject matter jurisdiction to disputes over multinational treaties only when all parties to the disputed multinational treaty were before the court.⁹⁵ Because all of the parties to the four disputed treaties were not before the court, the United States argued that there was no jurisdiction.⁹⁶

A majority rejected this argument reasoning that, although the United States correctly argued the other parties to the treaties could be affected by the court's holding, these other "parties" could intervene if they so desired.⁹⁷ Therefore, a majority stated that those parties "are not defenceless [sic] against any consequences that may arise out of adjudication by the Court."⁹⁸ Furthermore, although other parties may be affected by the court's decision, the court held that this would not deny the ICJ subject matter jurisdiction in the present dispute.⁹⁹ Lastly, the majority rejected the multinational treaty argument apparently because the other treaty parties were not easily

91. Communique 84/10, *supra* note 12.

92. Statute of the ICJ, art. 36, ¶ 2(a).

93. *Id.* ¶ 3. See also Owen, *supra* note 23.

94. See *infra* text accompanying notes 95-166.

95. Communique 84/39, *supra* note 19, at 8. Clause c of the Optional Clause of the United States also states that the United States may waive this requirement. 1982-1983 I.C.J.Y.B. 88-89.

96. Communique 84/39, *supra* note 19, at 8. Other Central American countries were parties to the multinational treaties in question. *Id.*

97. *Id.* See FED. R. CIV. P. 19(g) (similar rule in the United States federal courts).

98. Communique 84/39, *supra* note 19, at 8.

99. *Id.*

identifiable.¹⁰⁰

In dissent, Judge Schwebel argued that the majority's decision rejects the rules of the ICJ which allows such exceptions.¹⁰¹ As former Judge Lauterpacht of the ICJ stated:

In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court. This the Governments . . . are fully entitled to do.¹⁰²

By determining that other countries are free to intervene in a dispute before the ICJ, the majority avoided commenting on the latitude a government has to exclude issues as described by Judge Lauterpacht.

Additionally, the dissent rejected the majority's claim that other parties to the treaties were not identifiable.¹⁰³ The dissent found the other treaty parties could easily be identified and thus the case should not proceed without them.¹⁰⁴ Therefore, the majority erred in failing to recognize the United States' multinational treaty exception, an exception within a government's right and granted by the Statute of the ICJ.¹⁰⁵

3. The Central America exception

Next, the United States relied upon a more recent exception it had made to the Optional Clause. Anticipating Nicaragua's complaint, the United States, pursuant to Article 36, paragraph 3, of the Statute of the ICJ, excluded Central America from the ICJ's jurisdiction on April 6, 1984.¹⁰⁶ The majority, however, held this exclusion inapplicable in the Nicaragua case,¹⁰⁷ but also held that if the exclusion was valid, the ICJ would lack jurisdiction to hear the dispute.¹⁰⁸ In reaching this conclusion, the majority relied upon the United States' declaration of acceptance of the Optional Clause in 1946 which states in part that the declaration is valid "until the expiration

100. *Id.* at Annex 5 (Schwebel, J., dissenting).

101. *Id.*

102. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 46 (Judgment of July 6) (Lauterpacht, J., concurring). See *infra* notes 156-61 and accompanying text for a discussion of *Norwegian Loans*.

103. Communique 84/39, *supra* note 19, Annex 5 (Schwebel, J., dissenting).

104. *Id.*

105. See *supra* text accompanying note 102.

106. Section Council Acts on Nicaraguan Case Before the World Court, 1984 A.B.A. SEC. INT'L L. & PRAC. 13, No. 3, 1.

107. Communique 84/39, *supra* note 19, at 7.

108. *Id.*

of *six months* after notice may be given to terminate this resolution."¹⁰⁹ The majority argued that the United States, by its own choice, amended its Optional Clause to require six-month notification before termination.¹¹⁰ Had the United States not so conditioned its declaration, the majority reasoned that the United States could have terminated it at any time.¹¹¹ Instead, the United States chose notification before termination and thus was not free to disregard its own provisions.¹¹² A majority then concluded that the Central America exclusion was invalid and inoperative as to this case,¹¹³ because the Central America exclusion had not been in force for six months prior to Nicaragua's complaint.¹¹⁴

Judge Jennings in a dissent argued that the Central America exception was valid because "the recent practice [of the court] shows that States have the right to withdraw or alter their optional clause declaration with immediate effect."¹¹⁵ Furthermore, Judge Oda of the ICJ and Judge Schwebel argued that the Central America exclusion was valid because of the rule of reciprocity: if Nicaragua had accepted the Optional Clause, it did so without a provision requiring a six-month notification to terminate.¹¹⁶ Nicaragua could, therefore, terminate or modify its Optional Clause at any time with immediate effect.¹¹⁷ Under the rule of reciprocity, the United States could invoke the terms of Nicaragua's Optional Clause against Nicaragua.¹¹⁸ Therefore, Judges Oda and Schwebel concluded that the United States' Central America exception had an immediate effect against

109. 1982-1983 I.C.J.Y.B. 89 (emphasis added).

110. Communique 84/39, *supra* note 19, at 4.

111. *Id.* at 7.

112. *Id.* at 8.

113. *Id.*

114. *Id.*

115. *Id.* Annex at 4 (Jennings, J., concurring and dissenting).

116. *Id.* Annex at 3 (Oda, J., concurring and dissenting), Annex at 5 (Schwebel, J., dissenting).

117. *Id.*

118. *Id.* See *supra* note 23 for the rule on reciprocity. A majority rejected this argument, arguing that the rule of reciprocity is:

concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions at their creation, duration or extinction. Reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration . . . Nicaragua can invoke the six months' notice against [the] United States . . . because it is an undertaking which is an integral part of the instrument that contains it.

Id. at 8.

Nicaragua.¹¹⁹

The holding of the dissent is closer to the rule established by the ICJ. In *Right of Passage Over Indian Territory*,¹²⁰ India argued it could invoke an exception in Portugal's Optional Clause to deny the ICJ jurisdiction over their dispute.¹²¹ India claimed that the exception gave Portugal the right to withdraw a dispute before the ICJ immediately upon notification,¹²² as well as after it had been filed.¹²³

The court rejected this argument, however, holding that Portugal's reservation was not retroactively applicable, but effective only to disputes brought before the ICJ after notification.¹²⁴ The court further held that "[i]t is a rule of law generally accepted . . . that, once the Court has been validly seised [sic] of a dispute, unilateral action by the respondent State in terminating its Declaration . . . cannot divest the Court of jurisdiction."¹²⁵ The ICJ relied upon this language and its earlier holding in *Nottenbohm*,¹²⁶ stating: "An extrinsic fact, such as the *subsequent* lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the court of the jurisdiction already established."¹²⁷ This holding clearly established the rule that the ICJ will look to the date of the party's notification of withdrawal to the ICJ as the effective date that the exception will take effect.¹²⁸ Since Portugal filed the dispute with the ICJ before

119. *Id.* Annex at 3 (Oda, J., concurring and dissenting), Annex at 5 (Schwebel, J., dissenting).

120. (Port. v. India), 1957 I.C.J. 125 (Preliminary Objections, Judgment of Nov. 26).

121. *Id.* at 141-42. In that case, Portugal was trying to secure a right-of-way over Indian territory to a Portugese enclave totally surrounded by India. *Id.*

122. *Id.* at 142.

123. *Id.* The third clause of the Portugese declaration provides that the "Portugese Government reserves the right to exclude from the scope of [its] declaration [of compulsory jurisdiction] . . . any given category or categories of disputes . . . with effect from the moment of such declaration." *Id.* at 141.

124. 1957 I.C.J. 125, 142. See also *supra* note 23 on how India could invoke the Portugese reservation.

125. *Id.* at 142. See Lauterpacht, *International Court of Justice: Case Concerning Rights of Passage Over Indian Territory*, 7 INT'L & COMP. L.Q. 593, 597-98 (1958) (discussing whether the ICJ should have invalidated India's claim and what effects the decision will have on India's Optional Clause).

126. (Liechtenstein v. Guat.), 1953 I.C.J. 123 (Preliminary Objections, Judgment of Nov. 18) (emphasis added). "[T]he declaration of the respondent government, Guatemala, expired in a month or so after the applicant government, Liechtenstein, had seized the Court. Seizen of the Court is the formal institution of proceedings before it." D.J. HARRIS, *supra* note 7, at 22 n.83 (quoting 1953 I.C.J. 123).

127. 1957 I.C.J. 125, 142 (quoting 1953 I.C.J. 123).

128. Briggs, *supra* note 86, at 584.

India requested withdrawal, India's withdrawal was ineffective.¹²⁹

In *Interhandel*,¹³⁰ the court was faced with a dispute between Switzerland and the United States that raised similar issues. Switzerland accepted the Optional Clause on July 28, 1948.¹³¹ This was *after* Switzerland's dispute with the United States arose.¹³² The United States' Optional Clause restricts the ICJ's jurisdiction to disputes filed after the United States accepted the Optional Clause.¹³³ Therefore, under the rule of reciprocity, the United States argued that since Switzerland could invoke the United States' reservation against the United States to disputes filed after the United States accepted the Optional Clause, the United States could invoke its own reservation against Switzerland.¹³⁴ Switzerland, however, unlike the United States, did not limit its Optional Clause to disputes filed after Switzerland's acceptance date.¹³⁵

The court held that the United States could not rely "upon a restriction which . . . Switzerland has not included in its own Declaration."¹³⁶ Thus, the United States could not invoke a rule in its own Optional Clause that would be inoperative unless Switzerland invoked it. "[T]he Court sweeps away the . . . United States['] Objection . . . [that] if accepted by the Court, would seriously have crippled the operation of the system of compulsory jurisdiction."¹³⁷

In both *Passage* and *Nottenbohm*, notification of withdrawal was subsequent to the date the dispute was filed and withdrawal was therefore ineffective.¹³⁸ By analogy, the United States' exception appears to be effective, as the dissent argued, because it came prior to the filing of the dispute with Nicaragua. Although the United States had a six-month notification requirement, Nicaragua did not. Thus,

129. *Id.*

130. (*Switz. v. U.S.*), 1959 I.C.J. 6 (Judgment of Mar. 21). Switzerland was seeking restitution against the United States for Swiss assets taken by the United States Government during World War II. The United States argued that the assets of the Swiss company, *Interhandel*, which were located in the United States during the war were primarily German owned. Since Germany was an enemy at the time, seizure was justified. *Id.* at 20.

131. 1982-1983 I.C.J.Y.B. 42.

132. 1959 I.C.J. 6, 22-23 (emphasis added).

133. 1982-1983 I.C.J.Y.B. 88-89.

134. 1959 I.C.J. 6, 22-23. See *supra* note 23 for the rule of reciprocity.

135. *Id.* The United States' acceptance of the Optional Clause in 1946 excluded disputes prior to the United States' acceptance. 1982-1983 I.C.J.Y.B. 88-89.

136. 1959 I.C.J. at 23.

137. Briggs, *supra* note 86, at 554.

138. See *supra* text accompanying notes 120-27.

the rule of reciprocity should have been applied.¹³⁹

Unlike *Interhandel*, the United States did not attempt to invoke an inoperative exception in its own Optional Clause against Nicaragua. Rather, it invoked the terms of Nicaragua's Optional Clause against Nicaragua which is clearly allowable under the rule of reciprocity.¹⁴⁰ Works of leading commentators and past decisions of the court would support the United States' argument.¹⁴¹ The majority was therefore incorrect in holding that the United States' Central America exception was invalid.

Nevertheless, policy reasons might dictate that the United States should not be able to except controversial issues. The United States should not review its acceptance of the Optional Clause "on an *ad hoc* basis after a live issue has arisen and the jurisdiction of the Court is about to be invoked against the United States."¹⁴² The Central America exception was:

unwarranted under the circumstances and in conflict with what has been the consistent commitment of the United States to support the role of the ICJ. . . . [T]he United States cannot unilaterally select the cases it will permit the ICJ to consider against it without undermining the effectiveness of the ICJ as a forum for the potential resolution of international disputes. . . . [I]n the future the United States Government [should] refrain from unnecessarily diminishing United States acceptance of the jurisdiction of the International Court of Justice.¹⁴³

If every country were allowed to behave as the United States did in making exceptions in response to critical issues, the ICJ would be emasculated. As stated above, however, the United States made its Central America exception within legal parameters. Although the policy reasons against the United States' action are strong, the ICJ should have recognized this exception's legality, thus ensuring the ICJ's credibility as a neutral tribunal.

139. Communique 84/39, *supra* note 19, Annex at 3 (Oda, J., dissenting), Annex at 5 (Schwebel, J., dissenting).

140. See *supra* note 23 for the rule of reciprocity. See also Certain Norwegian Loans, *infra* text accompanying notes 156-58 for an effective use of reciprocity.

141. See *supra* text accompanying note 102. See also Briggs, *supra* note 84; and Merrills, *supra* note 47.

142. Section Council Acts, *supra* note 106, at 2.

143. *Id.* at 1-2.

4. The domestic law exclusion

The United States did not explicitly argue that the dispute fell within the domestic jurisdiction of the United States, but it did allude to such jurisdiction in the preliminary phase of the case.¹⁴⁴ The United States did not pursue this argument. Article 2, paragraph 7, of the United Nations Charter provides that nothing shall authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." The Statute of the ICJ is part of the United Nations Charter.¹⁴⁵ Additionally, the United States made an exception to its Optional Clause,¹⁴⁶ known as Provision B. Provision B states compulsory jurisdiction will not be extended to the ICJ in disputes "essentially within the domestic jurisdiction of the United States . . . as determined by the United States of America."¹⁴⁷ Such reservations are known as self-judging reservations.¹⁴⁸

a. domestic law argument only valid under optional clause

In *United States Diplomatic & Consular Staff in Tehran*,¹⁴⁹ Iran argued that its dispute with the United States over the detention of diplomats was an internal matter for Iran.¹⁵⁰ However, the ICJ found jurisdiction based upon a treaty and not upon the Optional Clause.¹⁵¹

The *Tehran* case, however, is distinguishable from the Nicaragua-United States case. In *Tehran*, a treaty other than the Optional Clause gave the ICJ jurisdiction to hear the case, thus bypassing any internal argument exception. Although Nicaragua also based its jurisdictional claim on the Treaty of Friendship, Commerce & Navi-

144. Communiqué 84/18, *supra* note 3, at Annex, where Judge Schwebel states:

The United States was accordingly justified invoking before the Court what it saw as wrongful acts of Nicaragua against other Central American states not because it can speak for Costa Rica, Honduras and El Salvador but because the alleged violation by Nicaragua of their security is a violation of the United States.

Id.

145. Statute of the ICJ, art. 1.

146. 1982-1983 I.C.J.Y.B. 88-89.

147. *Id.* at 88 (emphasis added).

148. See *infra* text accompanying notes 156-58.

149. (U.S. v. Iran), 1979 I.C.J. 7 (Provisional Measures, Order of Dec. 15).

150. *Id.* Iran argued that: "the deep-rootedness and the essential character of the Islamic revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, any examination of the numerous repercussions thereof is a matter essentially and directly within the national sovereignty of Iran." *Id.* at 11.

151. *Id.* at 13.

gation,¹⁵² the treaty is distinguishable from the treaty between the United States and Iran because the United States was able to cite a specific treaty provision which Iran had violated, something Nicaragua did not do.¹⁵³

b. self-judging internal law reservation held valid

The ICJ has had several opportunities in the past to consider treaty reservations that allow countries to determine what is domestic or internal law.¹⁵⁴ This reservation, in effect, allowed a country to interpret and invoke the domestic law exception to the ICJ's jurisdiction.¹⁵⁵ In *Certain Norwegian Loans*,¹⁵⁶ the court was faced with a reservation in France's Optional Clause similar to that of the United States' reservation.¹⁵⁷ In that case, Norway invoked the French reservation against France in a dispute between Norway and France before the ICJ.¹⁵⁸ Norway effectively removed the ICJ's jurisdiction by invoking France's domestic law exception against France itself. The United States' self-judging reservation is similar to France's self-judging reservation in *Certain Norwegian Loans*, because these reservations enable a party to determine what is domestic jurisdiction and, alternatively, what is international law.¹⁵⁹

In *Certain Norwegian Loans*, a majority held that there was no jurisdiction to hear the case because "Norway . . . is entitled to except from compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction."¹⁶⁰ In the present case, it appears that the United States' reservation could have been invoked. In *Certain Norwegian Loans*, however, the court did

152. See *infra* text accompanying notes 180-88 for a discussion of *Tehran* and the Treaty of Friendship, Commerce & Navigation.

153. *Id.* See also *Right of Passage Over Indian Territory*, *supra* text accompanying notes 120-25, where India unsuccessfully argued that international law was invalid because the dispute was over land and solely within Indian territory. 1957 I.C.J. 125, 149-50.

154. See *infra* text accompanying notes 155-68.

155. *Id.*

156. (*Fr. v. Nor.*), 1957 I.C.J. 9 (Judgment of July 6). The case was brought by France on behalf of French holders of Norwegian bonds. *Id.*

157. The French reservation states: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the [French government]". *Id.* at 21.

158. *Id.* Although Norway did not have such a reservation in its Optional Clause, if the French reservation is valid, Norway may invoke it against France. *Id.* at 27. See *supra* note 23 for the rule on reciprocity.

159. See *supra* text accompanying notes 146-47.

160. 1957 I.C.J. 9, 24. See Jennings, *Recent Cases on Automatic Reservations to the Optional Clause*, 7 INT'L & COMP. L.Q. 349 (1958). See also Rankin, *supra* note 82, at 261.

not consider the validity of the French reservation. Neither party in that case challenged the reservation as being inconsistent with Article 36, section 6 of the Statute of the ICJ,¹⁶¹ which gives the ICJ the sole power to determine its jurisdiction—a potential challenge that might have arisen in the present dispute.

c. criticism of self-judging clauses

Aware of the criticism of such reservations, perhaps the United States decided not to pursue the argument. In a strong dissent in *Certain Norwegian Loans*, Judge Lauterpacht stated that the French reservation is invalid because it is:

not only contrary to one of the most fundamental principles of international—and national—jurisprudence according to which it is within the inherent power of a tribunal to interpret the text establishing its jurisdiction . . . [i]t is also contrary to a clear specific provision of the Statute of the Court [Article 36, section 6].¹⁶²

Judge Lauterpacht's view is not without support from one commentator, who considers that "[t]his limitation reserved the right to the United States, rather than the court, to determine whether a matter fell within this country's domestic jurisdiction."¹⁶³ "[T]o put it in terms of contract law, it is an illusory acceptance of the Court's jurisdiction, since it leaves to one of the parties the right to determine the extent and the very existence of its obligation."¹⁶⁴

When a country, rather than a court, has the power to decide whether a matter relates to its domestic jurisdiction, it may be difficult because of the political realities of life for even the most cooperative government to concede jurisdiction. The result is that controversies over which the court has jurisdiction can readily be converted into controversies not within its jurisdiction.¹⁶⁵

161. 1957 I.C.J. at 27.

162. *Id.* at 44. See Mendelson, *supra* note 51, at 276.

163. Rogers, *The United States' "Automatic" Reservations to Optional Clause Jurisdiction of the ICJ*, 7 INT'L & COMP. L.Q. 758, 759 (1958). This article also states that excluding domestic problems from the ICJ's jurisdiction was, of course, important to protect the "safeguards [of] national independence of a country and its internal affairs." Nevertheless, the Statute of the ICJ contains such a limitation in Article 36, ¶ 6, so the United States' reservation was unnecessary. The article was questioning the right of the United States to be the one to determine what is or is not domestic law. *Id.* at 759.

164. Stevenson, *The Case for Withdrawal of the Self-Judging Reservation to the United States' Acceptance of the Optional Compulsory Jurisdiction of the International Court of Justice*, 32 N.Y. ST. B. BULL. 161, 161-62 (1960).

165. Rogers, *supra* note 163, at 760. The ICJ has not yet decided the scope of such self-judging reservations. Rankin, *supra* note 82, at 263. The United States did invoke the reserva-

Judge Lauterpacht stated:

The Court is the guardian of its Statute. It is not within its power to abandon, in deference to a reservation made by a party, a function which by virtue of an express provision of the Statute is an essential safeguard of its compulsory jurisdiction. This is so in particular view of the fact that the principle enshrined in Article 36(6) of the Statute is declaratory of one of the most firmly established principles of international arbitral and judicial practice. That principle is that, in the matter of its jurisdiction, an international tribunal, and not the interested party, has the power of decision whether the dispute before it is covered by the instrument creating its jurisdiction.¹⁶⁶

tion in *Interhandel*, *supra* note 130, but the ICJ dismissed the case on other grounds, so the validity of the reservation was not determined. 1959 I.C.J. 6, 29 (local remedies not exhausted by Switzerland).

166. Stevenson, *supra* note 164, at 162 (quoting Lauterpacht, J., from *Interhandel*, *supra* note 130 at 104). This opinion states that Judge Lauterpacht would not only have found the self-judging reservation invalid, but also the entire Optional Clause accepting compulsory jurisdiction in which the reservation is contained. "[T]he discussion of the reservation . . . serves to point up . . . [that the reservation is] inconsistent with the spirit of the Statute." *Id.* See also Merrills, *supra* note 47 at 91 (discussing Judge Lauterpacht's dissent in *Interhandel*).

Another commentator looked into the legislative history of the United States self-judging reservation. He states the Senate was asked to adopt this reservation because some feared the ICJ might extend its jurisdiction to such domestic disputes as immigration and trade. Opponents to the reservation emphasized that the ICJ would not have jurisdiction over those issues because there was no international law on immigration and trade. Therefore, "the anxiety expressed respecting possible extension of the court's jurisdiction to such traditional domestic matters . . . was wholly unfounded." Rogers, *supra* note 163, at 759-61. The resolution should not have been adopted because "[t]he record of the International Court of Justice makes it clear that this court of distinguished jurists has not engaged or attempted to engage in usurpation of jurisdiction which does not belong to it." *Id.* See also Briggs, *supra* note 86, at 557-59.

Another commentator found that the United States' fears of the court's interference were not well-founded. He pointed to Article 2, paragraph 7, of the United Nations Charter as protecting such intervention. Furthermore, he felt other safeguards, such as excluding specific subject matters, could be implemented to protect the United States' concerns. Rankin, *supra* note 82, at 268, 270-73.

"It is to be hoped that [the United States] will never declare that an issue which another party thereto seeks to adjudicate before the Court concerns a matter which is essentially within the [United States'] domestic jurisdiction, unless evidence of the law of nations as revealed in the acquiescence of States generally sustains its decision." Comment, *The United States Accepts The Optional Clause*, 40 AM. J. INT'L L. 778, 780-81 (1946). Furthermore, "it is not believed that the American Government would at any time be disposed to press for an interpretation in the application [of this reservation] that would be contemptuous of prevailing opinion." *Id.* This article also states that the United States "thereby asserts the right unilaterally [by this reservation], and regardless of the differing view of any other party to a dispute, to decide whether the issue is one [to be] . . . submit[ted] to the Court of International Justice." *Id.* at 780.

Had the United States invoked the self-judging reservation, it appears that the ICJ would have accepted Judge Lauterpacht's view and found not only the reservation itself void, but also the United States' entire Optional Clause invalid.¹⁶⁷ If the ICJ found the United States' Optional Clause invalid, the court could not have used compulsory jurisdiction under the Optional Clause to attain jurisdiction in the present case.

The United States would have been disappointed for two reasons. First, the United States has already found it difficult to get other nations to accept the Optional Clause, partially due to the self-judging clause. Second, if the United States' Optional Clause was found invalid, it could no longer invoke compulsory jurisdiction as a means to settle disputes with other countries before the ICJ. Hence, the United States "could suffer . . . a defeat by the very reservation with which it has hoped to protect itself from interference in its domestic affairs."¹⁶⁸ Therefore, the United States could have probably invoked the self-judging reservation to deny the ICJ compulsory jurisdiction. However, it would not have been advantageous to do so because of the effect on future relations with the ICJ.

2. Jurisdiction and the Treaty of Friendship, Commerce & Navigation

Notwithstanding the United States' three exceptions to the Optional Clause, the ICJ could have found another means to seize jurisdiction. Nicaragua's second basis for asserting jurisdiction was under a compromissory clause in the Treaty of Friendship, Commerce & Navigation between Nicaragua and the United States.¹⁶⁹ Article XXIV, paragraph 2, of the treaty is a compromissory clause giving the ICJ jurisdiction to hear disputes that arise under the treaty if the parties cannot settle their differences through diplomacy.¹⁷⁰ The treaty provides that "[a]ny dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily ad-

167. See Briggs, *supra* note 86, at 559, where the author states that Judges Lauterpacht and Spender of the ICJ would have found the United States' self-judging reservation incompatible with the legal obligations of compulsory jurisdiction. They would have not only found the reservation a nullity, but the entire Optional Clause containing it. *Id.* See also Rankin, *supra* note 82, at 263; Stevenson, *supra* note 164, at 162; and Judge Lauterpacht's dissent in *Interhandel* 1959 I.C.J. 9, 95.

168. Rankin, *supra* note 82, at 263.

169. Communique 84/39, *supra* note 19, at 9.

170. No. 5224, 367 U.N.T.S. 4 (1960).

justed by diplomacy, shall be submitted to the International Court of Justice."¹⁷¹ Thus, Nicaragua argued that if the compromissory clause does give the ICJ jurisdiction, there is no need to prove compulsory jurisdiction under Article 36, paragraph 2.¹⁷²

The United States countered that the compromissory clause was inapplicable.¹⁷³ The United States argued that the clause was only applicable if a dispute or a violation arose under the treaty.¹⁷⁴ Because Nicaragua failed to show any violation of the Friendship, Commerce & Navigation Treaty, the clause was an ineffective means for the ICJ to seize jurisdiction.¹⁷⁵

A majority agreed with Nicaragua¹⁷⁶ and rejected the United States' claim that Nicaragua must first assert a dispute arising under the treaty for the compromissory clause to be effective.¹⁷⁷

"In [the] view of the court, the fact that a state has not expressly referred . . . to a particular [clause] as having been violated by the conduct of [the] other state, does not debar that state from invoking a compromissory clause in that treaty."¹⁷⁸ Therefore, the majority found that the treaty gave the ICJ jurisdiction.¹⁷⁹

A case on point is *United States Diplomatic & Consular Staff in Tehran*.¹⁸⁰ There, American diplomats were taken as hostages. The United States argued that Iran was responsible because the captors were backed by the Iranian government.¹⁸¹ Iran argued that its dispute with the United States was an internal matter.¹⁸² This argument was rejected by the court, but it was not rejected on the basis of reservations to the Optional Clause because Iran was not a party to the Optional Clause.¹⁸³

Instead, the court found jurisdiction rested on a treaty ratified by

171. *Id.* art. XXIV, ¶ 2. See also Communiqué 84/39, *supra* note 19, at 9.

172. Communiqué 84/39, *supra* note 19, at 9.

173. *Id.* But see Comment, *Alternative Reservation to the Compulsory Jurisdiction of the International Court of Justice*, 72 HARV. L. REV. 749, 757 (1959) (stating treaty interpretations would always be an international dispute; by analogy, the United States could not claim the multinational treaties are part of internal law).

174. Communiqué 84/39, *supra* note 19, at 9.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. (U.S. v. Iran), 1979 I.C.J. 7 (Provisional Measures, Order of Dec. 15).

181. *Id.* at 18.

182. *Id.*

183. *Id.* at 13.

both the United States and Iran.¹⁸⁴ The treaty stated that “[d]isputes arising out of the . . . application . . . of the . . . [treaty] shall lie within the compulsory jurisdiction of the International Court of Justice.”¹⁸⁵ The taking of diplomats as hostages directly violated the treaty. Therefore, based upon the treaty, the ICJ held there was jurisdiction to hear the case.¹⁸⁶ The court further held that a dispute which concerns the “detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law . . . is one by its very nature [t]hat falls within international jurisdiction.”¹⁸⁷

Therefore, by analogy, if Nicaragua could rely on the Treaty of Friendship rather than the Optional Clause for jurisdiction, the United States’ exceptions to the Optional Clause would not bar jurisdiction. In the *Tehran* case, however, the United States was able to cite a direct treaty violation, thereby allowing the ICJ to assert jurisdiction under the compromissory clause. *Fisheries Jurisdiction*,¹⁸⁸ another case reaching the ICJ through a compromissory clause, is another example where one party was able to point to a specific treaty violation for the court to interpret. Nicaragua cannot point to a similar specific treaty violation.

Both Judges Ruda and Schwebel of the ICJ, agreeing with the United States, stated that Nicaragua failed to prove the ICJ’s jurisdiction under the treaty because Nicaragua did not cite specific violations of the treaty.¹⁸⁹ Judge Schwebel further felt Nicaragua was using the treaty as an inapplicable means to obtain ICJ jurisdiction: “[T]his purely commercial treaty has no plausible relationship to the charges of aggression and intervention.”¹⁹⁰ These judges correctly relied upon past decisions of the ICJ as Article 38 of the Statute of the ICJ suggests.¹⁹¹ These past decisions, *Tehran* and *Fisheries*, suggest that a party, as a condition to jurisdiction, must first cite a specific treaty violation before the ICJ will seize jurisdiction through a compromis-

184. *Id.* Vienna Convention on Diplomatic Relations of 1961 & 1963 and Article 1 of the Two Protocols attached to these Conventions.

185. *Id.* (quoting Article 1 of the Vienna Convention).

186. *Id.*

187. *Id.* at 16.

188. 1973 I.C.J. 3. See *supra* note 20 for a discussion of Fisheries Jurisdiction.

189. Communiqué 84/39, *supra* note 19, Annex at 2 (Ruda, J., concurring and dissenting) & Annex at 5 (Schwebel, J., dissenting).

190. *Id.* Annex 5 (Schwebel, J., dissenting).

191. Statute of the ICJ, art. 38, ¶ 1(d).

sory clause.¹⁹²

Even some judges concurring with the majority were skeptical about jurisdiction arising under the treaty. Judge Nagendra Singh found that there was clearly jurisdiction under the treaty, but felt that "Nicaragua will now have to spell out clearly and specifically the violations of the Treaty involving its interpretation and application when the court proceeds to consider the merits of the case."¹⁹³ Judge Oda, in another concurring opinion, held "the scope of the case should be strictly limited to any violation of a specific provision of that Treaty."¹⁹⁴

Nevertheless, the concurring judges ignore the fact that the compromissory clause states "disputes arising under the treaty."¹⁹⁵ By requiring Nicaragua to identify a treaty violation after the ICJ seized jurisdiction will result in a dismissal of the case if Nicaragua fails to do so. Rather than be faced with this time-consuming process, the ICJ should have agreed with the dissent and required Nicaragua to delineate a specific treaty violation in order to invoke jurisdiction. Since Nicaragua did not do so, the majority erred by finding jurisdiction under the compromissory clause.

IV. CONCLUSION

Although the ICJ found the requisite jurisdiction to hear the dispute between the United States and Nicaragua, it appears that it did so erroneously. The United States' multinational treaty reservation in its Optional Clause excluded compulsory jurisdiction. The Central America exception also excluded compulsory jurisdiction by the rule of reciprocity. Furthermore, the Treaty of Friendship, Commerce & Navigation did not afford a basis of jurisdiction because Nicaragua failed to cite a specific violation of that treaty. Therefore, it is irrelevant whether or not Nicaragua had signed the Optional Clause because subject matter jurisdiction is lacking.

It is ironic that the ICJ properly applied interim measures even though jurisdiction to hear the case should have ultimately failed. Therefore, in the future, interim measures should not be indicated unless it is clear that there will be jurisdiction on the merits.

Although the ICJ was incorrect in determining that it had juris-

192. See *supra* text accompanying notes 180-88.

193. Communiqué 84/39, *supra* note 19, Annex at 1 (Nagendra Singh, J., concurring).

194. *Id.* Annex at 3 (Oda, J., concurring and dissenting).

195. See *supra* text accompanying note 171.

diction, the United States should have abided by the decision of the court. It would only create chaos if parties, rather than courts, determined the scope of a court's power. Such a result would only weaken courts of law. European countries found the United States' challenge to jurisdiction in the Nicaragua case simply a means to avoid the law.¹⁹⁶ Other countries might follow suit. To avoid this end, all countries should leave the issue of jurisdiction to the courts.¹⁹⁷

A leading commentator has indicated that the United States should accept the court's jurisdiction more readily:

We do not seek to dominate other nations but we do hope to lead toward peace. Such leadership can only be effective by example and persuasion . . . The United States cannot expect to be believed in its asserted desire for peace and a rule of law to govern nations if it continues to adhere to positions which cripple the influence and opportunity of the court to make its contribution to the rule of law . . . For us to have a special place in history worthy of the position of leadership we now occupy, it is time that we led the way and advanced along the road where justice under law, not as determined by us, but by the courts will determine disputes between nations.¹⁹⁸

Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School, stated:

Government under law is no mere game that we can quit whenever we don't like the rules. By stalking out of the World Court, the Reagan Administration derailed progress toward a world in which nations are governed by something other than the law of the jungle. In treating the Constitution and the laws of the United States with the same cavalier contempt, the President and his advisers do even greater harm.¹⁹⁹

196. L.A. Times, Apr. 26, 1984, at Part I at 8, col. 6. The ICJ has no power to enforce its decisions. This is left to the United Nations Security Council. Since the United States has a veto on the council, it is doubtful that the decision will be enforced. *Id.*

197. The United States has defended its argument that the ICJ has no jurisdiction as "the lesser of two evils." The United States contended that it had to choose between releasing sensitive CIA information to defend itself before the ICJ and allowing Nicaragua to divert attention from the real issue, or showing disrespect toward the court. The United States chose the latter. N.Y. Times, Apr. 9, 1984, col. 2. A former lawyer with the State Department argued that withdrawal by the United States will be regarded as a concession of guilt. *Id.* Apr. 10, 1984, at A4, col. 1. House Speaker Thomas (Tip) O'Neill said the American actions look "legally indefensible." *Id.* Apr. 11, 1984, at A8, col. 1 & 2.

198. Rankin, *supra* note 82, at 272-73.

199. Tribe, *We Are a Nation of Laws With a Scofflaw President*, L.A. Times, Oct. 23, 1985, at Part II, at 5, col. 1. Tribe also states:

The Constitution binds the President and his Administration just as surely as it binds

The United States has subsequently withdrawn from the case claiming that the ICJ's decision is merely political.²⁰⁰ It has indicated that it would not abide by the ICJ's final decision because the United States feels that the ICJ lacks jurisdiction.²⁰¹ This result can only undermine the effectiveness of the ICJ and the integrity of both the ICJ and the United States, since the ICJ has no means to enforce its decision.

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the rest of us. Balzac once described law as a spider web that snags trifling little flies, but surely cannot hold a hawk. Even the most affable of Presidents should not be allowed to make that cynical metaphor into his code of conduct.

200. NEWSWEEK, *supra* note 5, at 45.

201. *Id.* On October 7, 1985, the United States withdrew from World Court compulsory jurisdiction. L.A. Times, Oct. 8, 1985, at Part I, at 1, col. 5. The State Department called it "a noble but unsuccessful 39-year 'experiment' in international law." *Id.* at col. 5. The United States made this decision as a direct result of the Nicaragua dispute. *Id.* Only 45 nations now accept compulsory jurisdiction. *Id.* at col. 6. Responding to the withdrawal of compulsory jurisdiction, Tribe stated:

There is an old riddle that asks, 'What does an 800-pound gorilla do for fun?' The answer, of course, is 'anything he wants.' The United States government is far more powerful than the gorilla, but there is nothing amusing in the fact that the Reagan Administration behaves as if this were an appropriate standard of conduct. Both at home and abroad, the Administration has made clear that it will not be inconvenienced by mere laws; it will do as it likes.

Tribe, *supra* note 199, at col. 1.