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INTERNATIONAL LAW IN THE REAGAN YEARS: HOW MUCH OF AN OUTLIER?

by
JOHN KING GAMBLE, JR.*

INTRODUCTION

Academics with an interest in international law tend to believe that policy makers pay far too little attention to that law. If we academics had our druthers, secretaries of state would have Article 36 of the Statute of the International Court of Justice prominently displayed on their office walls. Presidents' state of the union addresses would be replete with references to international law, showing both an understanding of, and respect for, the law. This is an unrealistic goal, at least with most administrations in most periods of American history. Presidents and secretaries of state often feel that international law is an annoyance that hobbles their pursuit of the national interest. No doubt adherence to international law is not a *prime* concern of most presidents.

But is there reason to believe that the attitude and behavior of the Reagan administration towards international law have been unusually hostile? That fundamental question will be addressed in several ways. First, one component of President Reagan's foreign policy, aid for the Nicaraguan *Contras*, will be discussed in some detail. That particular policy has produced perhaps the most sharply drawn, sustained conflict with international law. Second, a much briefer account will be provided about two other Reagan administration encounters with international law. Finally, an attempt will be made to provide some historical perspective to the 1981-1988 period.

Any discussion of presidential inclination towards international law must not confuse the wisdom and legality. For example, many scholars of international law and international organizations questioned the wisdom of the United States decision to withdraw from UNESCO. Many felt that it would have been preferable to work from within to try to reform the organization. Secretary of State Schultz's letter to Director-General M'Bow reads:

The purpose of this letter is to notify you within the terms of Article Two Paragraph Six of the Constitution that my Government will withdraw from the United Nations Educational, Scientific and Cultural Organiza-

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tion effective December 31, 1984.¹

There can be no doubt that the U.S. withdrawal adhered to the letter and spirit of applicable treaty law. Perhaps the action was unwise. Did it violate international law? Absolutely not.

A recurring problem with attempts to assess the international legal propriety of policies is the importance of the national interest involved. When evaluating the role of international law, it may be unrealistic and confusing to lump all foreign policy behavior together. Clearly, if a country finds itself facing an international crisis, international law's role will be diminished doubly. Changes in national behavior towards conformity with international law will be resisted in such crises because the stakes are too high. Further, when confronted with a crisis, the most that can be expected is a careful balancing of the expedient against the legal, with the former giving way only a little to the latter. Striking that balance requires time, and time often is the scarcest commodity during a crisis.

The problems attendant with expecting international law to play a role in political crises have been dealt with fairly extensively in the literature.² Professor Henkin's contribution is cited often.³ Although Henkin clearly believes his approach should apply at both the crisis and regular levels, his analysis and examples point mostly toward sub-crisis behavior. Scheinman and Wilkinson and their collaborators also find a very small role for international law in crisis situations. For example, in discussing the 1948 Berlin Blockade, international law:

. . . serve[d] as a means to probe the other side's commitment [as a substitute for force], and by obscuring the underlying political confrontation in the jargon of the law, they blanket the volatility which characterizes the Berlin situation.⁴

The 1962 Cuban Missile Crisis is often cited in explaining the role [or lack of it] for international law. Gerberding is harsh in his conclusions, believing that the crisis produced "some brilliant statesmanship which was motivated by . . . political and strategic considerations, not by amorphous and largely irrelevant international legal norms."⁵ The individual elements of Gerberding's analysis paint a different picture. Legal considerations bore heavily on the descriptor "quarantine" rather than "blockade."⁶ Gerberding makes much of the fact that the legality of the actions

¹ Letter, dated 28 December 1983, from Secretary of State George P. Schultz, 84 DEP'T ST. BULL. 41 (Feb., 1984).

² Although now dated, L. SCHEINMAN & D. WILKINSON, INTERNATIONAL LAW AND POLITICAL CRISIS: AN ANALYTIC CASEBOOK (1968), is one of the best examples.

³ L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1968).

⁴ Scheinman, *The Berlin Blockade*, in SCHEINMAN & WILKINSON, *supra* note 2, at 40.

⁵ Gerberding, *International Law and the Cuban Missile Crisis*, in SCHEINMAN & WILKINSON, *supra* note 2, at 210.

⁶ *Id.* at 181.

was “worked out, . . . carefully worked out, after the basic decisions were made.”⁷ Probably international law’s role was minimal. But it did make some contribution and, after all, this was perhaps the most acute superpower crisis of the post-World War II era!

FRONTAL ATTACK: AID TO THE NICARAGUAN CONTRAS AND THE INTERNATIONAL COURT OF JUSTICE

No doubt the most conspicuous clashes between Reagan administration policy and international law center around U.S. aid to the Nicaraguan *contras*. The nature and extent of U.S. violations of international law became clearer and much less refutable because the International Court of Justice dealt with the matter. So far there have been four pronouncements from the Court:

- (1) Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Request for the Indication of Provisional Measures, Decision [hereinafter *Provisional Decision*] dated 10 May 1984,⁸ Order [hereinafter *Provisional Order*] dated 14 May 1984.⁹
- (2) Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Declaration of Intervention of the Republic of El Salvador [hereinafter *Salvadoran Declaration*], dated 4 October 1984.¹⁰
- (3) Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Jurisdiction of the Court and Admissibility of the Application [hereinafter *Jurisdiction*], dated 26 November 1984.¹¹
- (4) Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Judgment on the Merits [hereinafter *Merits*], dated 27 June 1986.¹²

⁷ *Id.* at 201.

⁸ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), *Request for the Indication of Provisional Measures*, 1984 I.C.J. 169-207 (Order of 10 May 1984).

⁹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), 1984 I.C.J. 209-10 (Order of 14 May 1984).

¹⁰ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), *Declaration of Intervention of the Republic of El Salvador*, 1984 I.C.J. 215-44 (Order of 4 October 1984).

¹¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), *Jurisdiction of the Court and Admissibility of the Application*, 1984 I.C.J. 392-637 (dated 26 November 1984).

¹² Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), *Judgment on the Merits*, 1986 I.C.J. 14-546 (dated 27 June 1986).

There might be yet another element of the proceedings when the Court determine damages.¹³ These decisions are lengthy and complex. No doubt they will occupy many international legal scholars for years, perhaps decades to come. The *Merits* decision of June 1986 contains seven separate opinions and three dissenting opinions in addition to the 130 page judgment on the merits.¹⁴ It is, however, necessary to provide a brief summary of each decision.

Provisional decision

The first phase of the case dealt with Nicaragua's request for provisional measures to bring relief from illegal U.S. activities consisting of:

recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express Charter and treaty obligations to Nicaragua.

Even before the proceedings began, the United States tried to deny the Court's jurisdiction. The first such attempt, a letter to UN Secretary-General Perez de Cuellar modifying the terms under which the U.S. accepted the Optional Clause of the ICJ Charter,¹⁶ will be discussed later.

Throughout this phase, the Court walked a delicate line. It found that it need not "satisfy itself that it has jurisdiction on the merits of the case" in order to reach a decision on provisional measures.¹⁷ The U.S. argued strenuously against such measures believing they "could irreparably prejudice the interests of a number of states and seriously interfere with the negotiations being conducted pursuant to the Contadora process."¹⁸ The U.S. argument was not accepted. The Court held unanimously that:

The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines.¹⁹

Another part of the decision, a far more general prohibition of many kinds of illegal activities, fell just short of unanimity.²⁰

¹³ Leigh, *Judicial Decision*, 81 AM. J. INT'L L. 206 (1987).

¹⁴ *Merits*, *supra* note 12.

¹⁵ *Provisional Decision*, *supra* note 8, at 5.

¹⁶ Letter dated 6 April 1984 from Secretary of State Schultz to UN Secretary-General Perez de Cuellar, reprinted in 23 INT'L LEGAL MATERIALS 670 (1984).

¹⁷ *Provisional Decision*, *supra* note 8, at 14.

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 22.

²⁰ *Id.*

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Salvadoran Declaration

The second phase of Court actions concerns the appeal by El Salvador that it be permitted to participate in the proceedings. El Salvador's agent to the International Court of Justice stated in a letter dated 15 August 1984:

The Government of Nicaragua, in a malicious and improper fashion, has assured the Court that El Salvador does not consider itself the object of armed attack from Nicaragua. In view of these false allegations, the Republic of El Salvador has no alternative but to participate in the proceedings resulting from Nicaragua's Application of 9 April 1984.²¹

The Court was unconvinced and "decided by a vote of nine to six" not to hold a hearing on the Declaration of Intervention of the Republic of El Salvador."²² By a vote of fourteen to one [Schwebel], the Court held that the declaration was "inadmissible inasmuch as it relates to the current phase of the proceedings brought by Nicaragua against the United States."²³

Jurisdiction

The next chapter in this saga concerned the crucial questions of jurisdiction and admissibility. This stage of proceedings is always critical, but, in this instance, since the U.S. was to decline to participate in the *Merits* phase, it assumed added significance. The strongest argument against jurisdiction centered around whether Nicaragua had accepted the compulsory jurisdiction of the Court under Article 36. Beginning in September, 1929, Nicaragua took definitive steps to indicate it wished to be bound by the compulsory jurisdiction of the Permanent Court of International Justice.²⁴ On 24 September 1929, it declared, "[o]n behalf of the Republic of Nicaragua, I recognize as compulsory the jurisdiction of the Permanent Court of International Justice."²⁵ The intent was clear, but no instrument of ratification was ever received by the League of Nations in Geneva.²⁶ In the face of strenuous objection from the United States, the Court found:

the constant acquiescence of Nicaragua in affirmations, to be found in the United Nations and other publications, of its position as bound by the optional clause, constitutes a valid manifestation of its intent to recognize the jurisdiction of the Court.²⁷

²¹ Letter pursuant to *Salvadoran Declaration*, *supra* note 10, reprinted in 24 INT'L LEGAL MATERIALS 38 (1985).

²² *Id.* at 44.

²³ *Id.*

²⁴ *Jurisdiction*, *supra* note 11, at 399.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 441.

When it came to discussing admissibility, the U.S. advanced many arguments, some of which will be dealt with in the subsequent section. The most formidable point made by the U.S. concerned the idea that “indispensable parties” must be permitted to join in the proceedings. The U.S. did not prevail:

There is no doubt that in appropriate circumstances the Court will decline . . . to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings ‘would . . . be affected by a decision. . . . Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions. . . . There is no trace, either in the Statute or in the practice of international tribunals, of an ‘indispensable parties’ rule of the kind argued for by the United States.²⁸

The final judgment on *Jurisdiction* was made relative to four separate points:

- * Jurisdiction under Article 36 [eleven votes to five];
- * Jurisdiction under the 1956 Treaty of Friendship, Commerce and Navigation [fourteen votes to two];
- * Jurisdiction to entertain the case [fifteen votes to one];
- * the Application is admissible [unanimously].²⁹

The United States had raised a number of arguments which held sway with some judges, but it lost all the major battles and the war itself.

Merits

The final [*Merits*] phase of the case was somewhat anticlimatic, since the U.S. refused to participate. It is ironic that in spite of its absence from the proceedings, the U.S. position was upheld on one important issue, i.e., the applicability of the Vandenberg Reservation, so that neither the UN nor the O.A.S. Charters could be used against the United States:

At the same time, it conclude[d] that in the particular circumstances of this case, it is impossible to say that a ruling on the alleged breach by the United States of Article 18 of the Organization of American States Charter would not affect El Salvador. . . . Accordingly, the Court, which under Article 53 of the Statute has to be ‘satisfied’ that it has jurisdiction

²⁸ *Id.* at 431.

²⁹ *Id.* at 442.

to decide each of the claims it is asked to uphold, concluded that the jurisdiction conferred upon it by the United States declaration of acceptance of jurisdiction under Article 36, paragraph 2, of the Statute does not permit the Court to entertain these claims. It should however be recalled that, as will be explained further below, the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.³⁰

As the last sentence of the previous statement indicates, the U.S. succeeded in avoiding jurisdiction under two important multilateral treaties, but the matter of jurisdiction under bilateral treaties and customary law remained and would prove decisive. The Court was meticulous in examining the issue of the wider applicability of the U.S. multilateral treaty reservation. It was careful to try to understand the United States' view, which had been expressed during the *Jurisdiction* phase:

Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law. . . . The Court . . . finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self defense and it is hard to see how this can be other than a customary nature, even if its present content has been confirmed and influenced by the Charter.³¹

Ultimately the Court decided that it had jurisdiction "based upon customary international law."³² Subsequently the Court reaffirmed its jurisdiction based on the 1956 bilateral Treaty of Friendship, Commerce and Navigation.³³ Together, customary law and the 1956 treaty provided sufficient grounds for the Court to decide the merits of the case. That the Court did with diligence and thoroughness noting *inter alia*:

1. when, where and by whom mines were struck;³⁴
2. CIA reports to the Senate Select Committee on Intelligence;³⁵
3. U.S. presidential news conferences;³⁶

³⁰ *Merits*, *supra* note 12, at 38.

³¹ *Id.* at 93-94.

³² *Id.* at 97.

³³ *Id.* at 115.

³⁴ *Id.* at 45-46.

³⁵ *Id.* at 47.

³⁶ *Id.* at 49.

4. Congressional appropriations for the *contras*.³⁷

In conclusion the Court found:

The financial support given by the Government of the United States to the military and paramilitary activities of the *contras* in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have, moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support.³⁸

The battle was essentially over at this point, and a judgment favorable to Nicaragua was inevitable.

The principal decision by the Court contains a number of twelve to three opinions with Judges Oda (Japan), Jennings (U.K.) and Schwebel (U.S.A.) usually in the minority. First, the Court rejected the U.S. assertions of collective self defense.³⁹ Second, the "training, arming, equipping, financing, and supplying the *contra* forces" by the United States was found to be a "breach of its obligation under customary international law not to intervene in the affairs of another State."⁴⁰ Third, the enumerated attacks on Nicaraguan territory were a breach of the customary law standard "not to use force against another State."⁴¹ Fourth, the U.S. must "make reparation . . . for all injury caused to Nicaragua" by the aforementioned violations of customary international law.⁴²

Several other portions of the decision were made on fourteen to one votes. All judges save Schwebel found the U.S. in violation of the 1956 bilateral treaty.⁴³ Judge Oda was the only dissenter on the finding that the U.S. violated customary international law by failing to publicize the "existence and locations" of the mines.⁴⁴ Sadly, but not unexpectedly, the only point on which the Court was unanimous was the obligation of both parties "to seek a solution to their disputes by peaceful means in accordance with international law."⁴⁵

This very quick "tour" of the *Merits* phase does not do justice to the importance and complexity of the decisions reached. The main judgment, along with separate opinions by Judges Nagenda Singh, Lachs, Ruda, Elias, Ago, Sette-Camara, and Ni, and dissenting opinions by Judges Oda, Jennings, and Schwebel,

³⁷ *Id.* at 57-58.

³⁸ *Id.* at 61.

³⁹ *Id.* at 146.

⁴⁰ *Id.*

⁴¹ *Id.* at 147.

⁴² *Id.* at 149.

⁴³ *Id.* at 147.

⁴⁴ *Id.* at 148.

⁴⁵ *Id.* at 149.

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will be standard fare in many textbooks long after Nicaragua and the U.S. have resumed peaceful relations. The unusual use of customary international law by the Court will occupy scholars for decades.

This brief summary is sufficient background for a discussion of the matter of the U.S. posture towards international law as manifested in various responses to this case. One would expect any government, when participating in adversarial proceedings before the International Court of Justice, to adopt a number of arguments and tactics to try to advance its cause. Some of these may show a nonchalance or even a disrespect for international law. For example, the U.S. contention that its Vandenberg reservation applied to all treaties stretches the point considerably.⁴⁶ Many academics have argued that the U.S. decision to withdraw acceptance of the Optional Clause was unwise, but the legal right to do so is unquestionable, provided adequate notice is given. Thus, the focus of this section will be those actions taken and attitudes expressed by the United States that seem to be beyond the pale of usual U.S. respect for international law and the institution of the Court. Three things seem to stand out -- each will be discussed in turn.

Attempt to modify the "Optional Clause"

Nicaragua filed its application with the International Court of Justice on April 9, 1984.⁴⁷ Three days earlier, surely because of receiving advanced warning that the Government of Nicaragua was applying to the ICJ, Secretary of State Schultz, in a letter to Secretary-General Perez de Cuellar, attempted to modify U.S. acceptance of the Optional Clause:

the aforesaid Declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree. . . . Notwithstanding the terms of the aforesaid Declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process.⁴⁸

This is nice law if you can get it, but the U.S. could not. The Court's opinion about this immediate, selective, two-year suspension of the Optional Clause could hardly have been clearer:

The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six month's notice which, freely and by its own choice, it had appended to

⁴⁶ Briggs, *The International Court of Justice Lives Up To Its Name*, 81 AM. J. INT'L L. 80 (1987).

⁴⁷ Leigh, *Judicial Decisions*, 79 AM. J. INT'L L. 442 (1985).

⁴⁸ Schultz letter, *supra* note 16.

its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it *vis-a-vis* other States parties to the Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless, assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.⁴⁹

The Reagan administration would argue, not without some justification, that the six month requirement unacceptably hobbles its pursuit of the national interest. If this were the perception, especially in light of a deteriorating Central American situation, the U.S. should have withdrawn acceptance of the Optional Clause earlier. In fact, one could argue that a principal task of the State Department should be to provide timely advice so that U.S. foreign policy goals can be pursued within a framework of acceptable standards of international law. In Professor Franck's words, the U.S. cannot "dismiss" the Court's action "as mere window dressing for a hanging party."⁵⁰ Concocting such an argument may be an acceptable legal tactic, but it is naive to expect the Court to buy it "particularly in view of the rather ostentatiously self-imposed 6-month notice requirement which sought to demonstrate U.S. resolve never to employ so unworthy an evasion."⁵¹

Refusal to participate in the Merits phase after participating fully in the Jurisdiction/Admissibility phase

Unfortunately, many recent ICJ decisions have been reached without the participation of one of the parties. This occurred in the *Fisheries Jurisdiction* case,⁵² in the *Nuclear Tests* case,⁵³ in the *Aegean Sea Continental Shelf* case,⁵⁴ and in the *Iran Hostages* case.⁵⁵ In all of these, the decision not to appear applied to all phases of the case making them fundamentally different from *Nicaragua v. United States* where the U.S. participated in the *Jurisdiction* phase and withdrew for the *Merits* portion.

The Court must follow its own Statute when dealing with the nonappearance of a party:

1. Whenever one of the parties does not appear before the Court, or

⁴⁹ *Jurisdiction*, *supra* note 11, at 419.

⁵⁰ Franck, *Icy Day at the ICJ*, 79 AM. J. INT'L L. 383 (1985).

⁵¹ *Id.*

⁵² 1974 I.C.J. 3.

⁵³ 1974 I.C.J. 253.

⁵⁴ 1978 I.C.J. 3.

⁵⁵ Case Concerning U.S. Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3.

fails to defend its case, the other party may call upon the Court to decide in favor 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.⁵⁶

The United States' position seems to be that half an appearance is better than none.⁵⁷ There are good reasons to believe otherwise. Given the fact that the U.S. was still bound by the Optional Clause, it would have seemed more respectful of international law if the U.S. had refused participation in all phases of the case. As it stands now, the U.S. action has a distinct "I'll play as long as I can win" air about it. The difficulty is compounded by the asymmetry created when one party does not participate. Judge Jennings described the problem in this way:

the United States can hardly complain about the inevitable consequences of its failure to plead during the substantive phase of the case. It is true that a great volume of material about the facts was provided to the Court by the United States during the earlier phases of the case. Yet a party which fails at the material stage to appear and expound and explain even the material that it has already provided inevitably prejudices the appreciation and assessment of the facts of the case.⁵⁸

To anyone trying to assess the U.S. withdrawal in legal terms, there is precious little to go on in terms of official government statements. The State Department did prepare "Observations" about the *Jurisdiction* phase, but these say nothing about the legal bases of the U.S. withdrawal.⁵⁹ The U.S. even went so far as to suggest that withdrawing served the cause of law:

On January 18 of this year we announced that the United States would no longer participate in the proceedings instituted against it by Nicaragua in the International Court of Justice. Neither the rule of law nor the search for peace in Central America would have been served by further United States participation. The objectives of the ICJ to which we subscribe -- the peaceful adjudication of international disputes -- were being subverted by the effort of Nicaragua and its Cuban and Soviet sponsors to use the Court as a political weapon.⁶⁰

The point is that the U.S., like almost all countries, must interpret international

⁵⁶ I.C.J. Statute, Art. 53.

⁵⁷ See *Observations on the International Court of Justice's Nov. 26, 1984, Judgment*, reprinted in 79 AM. J. INT'L L. 423-30 (1985) [hereinafter *Observations*].

⁵⁸ Quoted in Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 3 (1987).

⁵⁹ *Observations*, supra note 57.

⁶⁰ Dept. of State Press Release, October 7, 1985, reprinted in 24 INT'L LEGAL MATERIALS 1744 (1985).

law to suit its interests. However, when the U.S. explains its position, it should try to do so in a way and in a forum where it does not have to confront and defy an institution (the ICJ) whose moral suasion in the field of international law far exceeds its own.

Strident rhetoric

There is ample reason to believe that some of the things the United States said and the way it said them exceeded normal bounds of respect for the institution of the ICJ. Professor Briggs terms U.S. behavior as “showing contempt” for the Court.⁶¹ Professor D’Amato describes the way in which the United States “scornfully repudiated the authority of the Court.”⁶² It seems that it is not just U.S. actions, but also its explanations for those actions that cause concern. Mr. Davis Robinson, Legal Advisor to the Department of State, in a letter formally announcing U.S. withdrawal from the case, writes, “the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law.”⁶³ In a letter to the Editor-in-Chief of the *American Journal of International Law*, Robinson decries the fact that the case is “an inherently political problem that is not appropriate for judicial resolution.”⁶⁴

Thomas Franck and others told us years ago that the idea of a clear dichotomy between political and legal disputes is false.⁶⁵ Nevertheless, the U.S. rediscovered the issue and, in effect, increased the very politization about which it complained.

Often it seems that the United States has forgotten it is (or was) operating in a legal forum where one would hope more civility exists. The U.S. impunes the integrity of the Court judges -- “of the 16 judges now claiming to sit in judgment on the United States, 11 are from countries that do not accept the Court’s compulsory jurisdiction.”⁶⁶ The U.S. did not stop here -- later it singled out specific judges on the Court:

We will not risk US national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations.⁶⁷

Technically, neither of these U.S. statements is inaccurate, but both are better suited for other fora. In fact, they sound more like Security Council debates or testimony

⁶¹ Briggs, *supra* note 46, at 86.

⁶² D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 106 (1987).

⁶³ *U.S. Withdrawal from Proceedings Initiated by Nicaragua*, 79 AM. J. INT’L L. 439 (1985) [hereinafter *U.S. Withdrawal*].

⁶⁴ Letter from D. Robinson to AJIL, *reprinted in* 79 AM. J. INT’L L. 423 (1985).

⁶⁵ T. Franck, *The Structure of Impartiality* 190-91 (1968).

⁶⁶ *U.S. Withdrawal*, *supra* note 63, at 440.

⁶⁷ *Id.*

before Congressional Committees.

“GLANCING BLOWS” -- OTHER ACTIVITIES DURING THE REAGAN YEARS

It has already been noted that the Nicaraguan Case was perhaps the most direct confrontation between the Reagan administration and international law. The importance of the case stems at once from the salience of the issues; the legal stature of the International Court of Justice; and the length and specificity of the proceedings. But there were other occasions when the Reagan administration paid inadequate attention to international legal principles. Several of these will be discussed briefly.

Invasion of Grenada

Grenada, a small state some 1,600 miles from the United States, gained its independence from the United Kingdom in 1974. In October 1983, a coup and countercoup led the United States to perceive a grave danger to 1,100 U.S. nationals living in Grenada.⁶⁸ On October 23, 1983, the U.S. along with Jamaica, Barbados, Dominica, St. Lucia, Antigua, and St. Vincent invaded and secured the island within one week's time.⁶⁹ A great deal has been written about the legality of this action.⁷⁰

The official U.S. explanation dealt relatively little with the legal aspects of the decision to invade. President Reagan's remarks of October 25, 1983 included the following:

On Sunday, October 23, the United States received an urgent, formal request from the five member nations of OECS to assist in a joint effort to restore order and democracy on the island of Grenada. . . . We have taken this decisive action for three reasons: First, and of overriding importance, to protect innocent lives, including up to 1,000 Americans, whose personal safety is of course my paramount concern. Second, to forestall further chaos. And third, to assist in restoration of conditions of law and order and of governmental institutions on the Island of Grenada.⁷¹

Subsequently, Secretary of State Schultz, at a news conference, reiterated the rationale behind the decision. He cited the need to protect American citizens and the fact that the United States had received “an urgent request from the countries closest to the area.”⁷²

⁶⁸ Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 132 (1984).

⁶⁹ *Id.*

⁷⁰ See particularly *The United States Action in Grenada*, 78 AM. J. INT'L L. 131-75 (1984) [hereinafter *U.S. Action*].

⁷¹ 83 DEP'T ST. BULL. 67 (Dec., 1983).

⁷² *Id.* at 69.

The international legal academic community came down firmly against the legality of the invasion. In a note prepared for the *American Journal of International Law*, nine law professors said *inter alia*:

Throughout the 20th century, the U.S. Government has routinely concocted evanescent threats to the lives and property of U.S. nationals as pretexts to justify armed interventions into sister American states. . . . Both the OAS and UN Charters unequivocally condemn the U.S. invasion of Grenada as a gross violation of the most fundamental principles of international law . . . International law-lessness in Grenada will return to haunt the future of American foreign policy around the world.⁷³

Although distinctly a minority viewpoint, Professor John Norton Moore justified the legality of the invasion. Moore points out that the OECS regional peacekeeping force “was undertaken at the request of the Governor-General of Grenada acting at that time as its only constitutional representative.”⁷⁴ Subsequently, Professor Moore defends the action on grounds of humanitarian intervention,⁷⁵ and even goes so far as to state that “[t]he Grenada mission by the OECS countries and Barbados, Jamaica and the United States is a paradigm of a lawful regional peacekeeping action under Article 52.”⁷⁶

The 1982 UN Convention on the Law of the Sea

One could argue that it is misleading to assess proper consideration of international law in crisis situations. If armed conflict is imminent, the law probably has already failed. The negotiations and subsequent U.S. attitude towards the 1982 UN Convention on the Law of the Sea⁷⁷ provide an excellent example of the Reagan administration’s approach to international law in an important area, but definitely at the sub-crisis level.

At present the 1982 Convention has 42 parties,⁷⁸ considerably short of the 60 necessary for entry into force.⁷⁹ All told, the treaty achieved 157 signatures, one of the most heavily subscribed in history.⁸⁰ But the U.S. remains one of the few states that has not signed.⁸¹ No one would question the right of the United States to

⁷³ *U.S. Action*, *supra* note 70, at 174. The following signed: Francis Boyle, Abram Chayes, Isaak Dore, Richard Falk, Martin Feinrider, C. Clyde Ferguson, J. David Fine, Keith Nunes, Burns Weston.

⁷⁴ Moore, *Grenada and the International Double Standard*, 78 AM. J. INT’L L. 153 (1984).

⁷⁵ *Id.* at 154.

⁷⁶ *Id.* at 156.

⁷⁷ *UN Convention on the Law of the Sea*, done 10 Dec. 1982, UN Doc. A/CONF.62/122, reprinted in 21 INT’L LEGAL MATERIALS 1261-1354 (1982) [hereinafter *1982 Convention*].

⁷⁸ Current information kindly provided by the Treaty Section, UN Office of Legal Affairs.

⁷⁹ *1982 Convention*, *supra* note 77, art. 308, at 1327.

⁸⁰ Gamble, *Status of the 1982 UN Convention on the Law of the Sea*, 10 MARINE POL’Y REP. 2 (1988).

⁸¹ *Id.*

associate itself with whatever treaties it chooses. Of course, that ignores the wisdom of a decision to negotiate for over a decade with more than 150 other countries and then to withdraw at the eleventh hour. The U.S. policy may have been unwise, but it was not illegal.

Since the signing of the 1982 Convention, the United States has been at loggerheads with most of the world, especially the developing countries. The U.S. believes that it may follow those portions of the treaty that reflect customary international law, while ignoring other provisions, presumably not reflective of custom, with which it disagrees.⁸² Most of the problems the United States has with the treaty concern the provisions for the "Area," the seabed beyond national jurisdiction.⁸³ The U.S. position holds that:

Deep seabed mining is a lawful use of the high seas which any state has a right to carry out subject to reasonable regard to the interests of other states. The United States continues to enjoy the right to carry out seabed mining. This right will not be affected by the U.S. decision not to sign the LOS convention.⁸⁴

Most of those who participated in the negotiations totally rejected the U.S. "pick and choose" approach. One of the more forceful reactions to the U.S. position was made by Ambassador Tommy T.B. Koh (Singapore), President of the Conference that produced the 1982 treaty:

The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit practice through straits used for international navigation and the regime of archipelagic sea lanes passage are two examples of many new concepts in the Convention. . . . Many are of the view that article 137 (seabed mining provisions) of the Convention has become as much a part of customary international law as the freedom of navigation.⁸⁵

The U.S. position received very limited support from others, e.g., the United Kingdom,⁸⁶ but the general perception was that the U.S. was exhibiting callous, self-serving disrespect for law, i.e., following international law, or even hiding behind it, when the situation suited, and ignoring the law otherwise. While this action may not be in the same category with mining of Nicaraguan harbors, it seems symptomatic of a deliberate disregard of international law.

⁸² Gamble & Frankowska, *The 1982 Convention and the Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L.R. 491, 504 (1984).

⁸³ *1982 Convention*, *supra* note 77, pt. XI, art. 133-91, at 1293-1308.

⁸⁴ U.S. Mission to the United Nations, Press Release, 163, Dec. 3, 1982 (statement by Ambassador Adelman).

⁸⁵ UN Dept. of Public Information, Press Release, SEA/MD/14, at 2 (10 Dec. 1982) (T.T.B. Koh).

⁸⁶ UN Doc. A/CONF.62/PV.189, at 78-81 (1983) (Statement by Powell-Jones, Head of UK Delegation).

The Issue of UN Financing

The Reagan administration, often at the urging of the Congress, has failed to meet its entire financial obligation to the United Nations. The United States has used three distinct kinds of cuts:

- (1) specific (or surgical) cuts aimed at particular programs;
- (2) contingent withholdings that will only take effect if certain circumstances develop; and
- (3) nonspecific, noncontingent across-the-board cuts (the Gramm-Rudman-Hollings withholdings).⁸⁷

This is one of those areas where one may agree with the motivation and the goals involved. For example, the "Kassebaum amendment," requiring a reduction in the total amount of U.S. contribution from one quarter to one fifth, must have struck many as appropriate.⁸⁸ But the source and nature of U.S. legal obligation could hardly be clearer. Article 17 of the UN Charter states that the General Assembly "shall consider and approve the budget" and dues will be "apportioned by the General Assembly." Thus it is clear that the U.S. is, or at least was, in violation of a treaty obligation, the same obligation that in past decades the U.S. demanded others meet!

There are at least two mitigating factors that make this a less substantial issue from the point of view of a violation of international law by the Reagan administration. First, often it was the Congress that took the most strident position against full payment of U.S. assessment. In fact, Ambassador Walters suggested in 1986 that our actions might violate Article 17.⁸⁹ Second, on September 14, 1988, President Reagan announced that the U.S. intended to pay all its UN assessments.⁹⁰ While the President's statement represents an important step towards conformity with our Charter obligations, it did not resolve when and how total obligations of more than \$500,000,000 will be met.⁹¹ On balance, this "pay if pleased" tactic shows considerable disregard for international law.

CONCLUSIONS -- REAGAN ADMINISTRATION ACTIONS IN PERSPECTIVE: BLATANT DISREGARD OR BUSINESS AS USUAL

It is at once important and risky to assess the record of the Reagan administra-

⁸⁷ Nelson, *International Law and U.S. Withholding of Payments of International Organizations*, 80 AM. J. INT'L L. 973 (1986).

⁸⁸ *Id.* at 974.

⁸⁹ *Id.* at 973.

⁹⁰ Sciolino, *No Plan Known on How to Meet Debt to U.N.*, N.Y. Times, Sept. 15, 1988, at A17, col. 1.

⁹¹ *Id.*

tion *viz* international law. Especially with the *Nicaragua* case, academics seem like pilots rushing to the site of a plane crash. We have keen interest in the crash, but in our hearts we know there was a great deal of damage and the flight should never have occurred. I have already discussed at some length the legal and tactical errors of the United States when it confronted Nicaragua before the International Court of Justice. John Lawrence Hargrove, Executive Vice President of the American Society of International Law, explained how the Court, itself, compounded the problem:

Thus, in its zeal to meet the exigencies of the *Nicaragua* case, the Court gratuitously cut off the already beleaguered law of force and self-defense from whatever clarity and stability go with the written word of the Charter and the body of treaty law that supports it. . . . The cumulative effect of all the foregoing is that the law of force and self-defense as it emerges from the Court has become highly arbitrary, intricate and technical, but at the same time more uncertain. At the hands of the Court, it has been made to read, in form and logic, more like a somewhat erratically drafted revenue code than a set of great constitutional principles.⁹²

The long-term implications of these cases are likely to be substantial. The United States got caught in a precarious situation that, with a little forethought, could have been avoided. The result is diminished international legal stature for the United States and for the International Court of Justice, and, perhaps, less certain law in the vital area of aggression and self defense.

International law relates to foreign policy in approximately the same way that antiseptics relate to surgery. International law can and should be *part* of most foreign policy decisions. However, situations will arise when it is impossible to pay adequate attention to that law. The patient may still survive and prosper, but recovery will be longer and more difficult. *Nicaragua v. the United States* is an instance where the U.S. had two proven antiseptics available and, whether through inattention, naïveté or arrogance, used neither. Comparable conclusions could be drawn about Grenada and funding for the United Nations.

I suspect that if one surveyed international law scholars and asked about the Reagan record in international law, most would think it one of the worst of any president. At this writing, that administration has been in office for only one and one half years, far too soon for perspective. Further, given the concomitant changes in international law and in the power and scope of the American presidency, are comparisons meaningful? Can we compare Reagan to Wilson, let alone to Jefferson? The unsatisfactory answer to this question is that comparisons are very difficult, but are so important that they must be attempted.

⁹² Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 142-43 (1987).

Recent research by Professor John Raymond and Ms. Barbara Frischholz provides a wealth of information helpful in discerning a context to the relationship between presidents and international law.⁹³ One of their principal conclusions is that secretaries of state have borne the primary responsibility "both for the negotiation of treaties and for the development of policies and practices in the field of customary international law."⁹⁴ One of the clearest examples presented is President Washington's policy of neutrality in the war between Britain and France. The Neutrality Act of 1794 was "based on Jefferson's concept of the international law on the subject."⁹⁵

This raises the disquieting possibility that presidential actions towards international law may be set largely by their choice for secretary of state. Since it is unrealistic to assume that background in international law is among the top selection criteria used by the president, it may be little more than luck if a given secretary is attuned to the subtleties of international law or seems oblivious to the law.

One gets two main impressions about the period surveyed by Raymond and Frischholz. First, the United States proceeded cautiously when dealing with international law when needed to aid in the resolution of particular problems. Secretary of State Daniel Webster, in 1837, in response to the *Caroline* incident, developed the act of state doctrine.⁹⁶ Immediately after the Civil War, the State Department had to ascertain "the effect, if any, to be given to official acts of an unrecognized government taken within its own borders."⁹⁷ The second impression is that, in the 19th century, the U.S. often was willing to forego short-term expedience for longer-run (and usually more consonant with international law) objectives. An excellent example here is *Schooner Exchange v. McFadden*.⁹⁸ Marshall's opinion that the French vessel was exempt from U.S. jurisdiction shows respect for, and sensitivity to, international law.⁹⁹ Even given the temporal leap of one and three quarters centuries, it seems that U.S. actions in the *Nicaraguan Case* do not demonstrate a comparably positive view of international law.

If pushed to draw comparisons between early U.S. presidents and Ronald Reagan, the least risky comparison is with Thomas Jefferson. Because Jefferson served long and in many important capacities, there are simply more grounds for comparison. Jefferson's extraordinary intellect made many significant contributions to international law. He believed that the "law of nations is composed of . . . the moral law of our nature, the usages of nations, (and) their special conventions."¹⁰⁰ Sometimes, Jefferson seems to have been a century or more ahead of his

⁹³ Raymond & Frischholz, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 *Am. J. Int'l L.* 802-29 (1982) [hereinafter *Lawyers*].

⁹⁴ *Id.* at 805.

⁹⁵ *Id.* at 806.

⁹⁶ *Id.* at 808.

⁹⁷ *Id.* at 819.

⁹⁸ 11 U.S. (7 Cranch) 116 (1812).

⁹⁹ *Lawyers*, *supra* note 93, at 804.

¹⁰⁰ Wiltse, *Thomas Jefferson and the Law of Nations*, 29 *AM. J. INT'L L.* 66-81 (1935).

time. In 1793, he wrote that extradition can be affected only by treaty, there is no customary law on the subject.¹⁰¹ A year earlier, Jefferson analyzed the distinctions between *de facto* and *de jure* recognition.¹⁰² Secretary of State Jefferson handled this complicated issue more deftly than Presidents Wilson, Harding, Coolidge, Hoover, Truman, Eisenhower, Kennedy, and Johnson did when confronted with the realities of the Soviet Union and the People's Republic of China.

However, the picture emerging of Thomas Jefferson and international law is not all positive. Jefferson developed a theory to justify American expansion into uninhabited territories, but then changed that theory to justify, *ex post facto*, taking lands from the Indians.¹⁰³ In an 1807 letter, Jefferson explained territorial expansion.

If we claim that country at all, it must be on Astor's settlement near the mouth of the Columbia, and the principle of the *jus gentium* of America, that when a civilized nation takes possession of the mouth of a river in a new country, that possession is considered as including all its waters.¹⁰⁴

It is tempting to speculate how international legal academics, if any had existed in 1807, would have dealt with wider applicability of the "Jefferson principle." The point is that Jefferson's statements and actions often displayed less than reverence for international law.

These brief remarks do not constitute a thorough analysis of whether the Reagan administration exceeded the usual limits set by international law. Books could be written, and perhaps will be, comparing the Reagan record with more recent history, e.g., Presidents Johnson and Nixon and Viet Nam. No doubt there is a tendency for academics to play their time-honored role as critic, not appreciating the problems of managing relations with 160 other states. These criticisms of the Reagan administration should not be written off as mere potshots from ivory towers. We should not have expected President Reagan to begin important foreign policy addresses by quoting the UN Charter (or the ICJ Statute). But Mr. Reagan's pronouncements are almost completely devoid of any mention of international law. Other post-war presidents spoke much more about international law. The 1984 State of the Union Address is typical. There are vague references to building a "meaningful peace, . . . to protect our loved ones and this shining star of faith."¹⁰⁵ The President discussed American exploration for resources within our 200-mile Exclusive Economic Zone¹⁰⁶ with absolutely no mention of the fact that the 1982 UN Con-

¹⁰¹ *Id.* at 72.

¹⁰² *Id.* at 73.

¹⁰³ *Id.* at 70.

¹⁰⁴ Official Papers of Thomas Jefferson, letter of July 4, 1807 (sic), reprinted in Wiltse, *supra* note 100, at 69.

¹⁰⁵ *State of the Union, Jan. 25, 1984*, 50 VITAL SPEECHES OF THE DAY at 259 (1984).

¹⁰⁶ *Id.* at 260.

vention on the Law of the Sea, which he campaigned against, hammered out the details that made such zones possible. In discussing Grenada, the president said not one word about the legality of the operation. Instead he played on the emotions of the audience by relating a story about a sergeant in the 2nd Ranger Battalion.¹⁰⁷

Secretary Schultz's decision of November, 1988 to deny a visa to PLO Chairman Arafat continued this attitude towards international law. Mr. Schultz's explanation was that Arafat "knows of, condones and lends support to" terrorism.¹⁰⁸ One is hard pressed to find a clearer treaty violation, in this case the 1947 UN Headquarters Agreement.

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of representatives of members or officials of the United Nations, or of specialized agencies or representatives of nongovernmental organizations recognized by the United Nations for the purpose of consultation. . . . (Section 13) . . . When visas are required . . . they shall be granted without charge and as promptly as possible.¹⁰⁹

The obvious conclusion is that, while the Reagan administration may not be "off the chart," it probably falls at the low end of the continuum in terms of respect for, and attention to, international law. The Reagan years were characterized by a systemic self righteousness, an attitude that seems to say "we know we are right, just and peaceloving, so don't complicate matters with reference to minutiae of international law." That approach ignores the fact that we must co-exist with 165 other states, most of whom are unwilling *a priori* to concede the moral high ground to the United States.

¹⁰⁷ *Id.* at 261.

¹⁰⁸ Pear, *U.S. Won't Oppose Geneva Session*, N.Y. Times, Nov. 29, 1988, at A3, col. 4.

¹⁰⁹ *What the Host Must Not Do*, N.Y. Times, Nov. 29, 1988, at A3, col. 3.