

NICARAGUA AND INTERNATIONAL LAW: THE "ACADEMIC" AND THE "REAL",
by Anthony D'Amato, 79 American Journal of International Law 657 (1985) (Code A85d)

The decision of the United States to withdraw from the International Court of Justice proceedings in Nicaragua v. United States had an unexpected consequence: candor. A month after the announced withdrawal, Secretary of State Shultz suggested, and President Reagan later confirmed in a press conference, [FN1] that the goal of U.S. policy was to overthrow the Sandinista Government of Nicaragua. Of course, this is precisely what Nicaragua all along had alleged to be the U.S. goal. But while the case was actively pending, the United States could not concede that goal without serious risk of undermining its litigating position.

When the United States was still participating in the case, it argued strenuously to the Court that Nicaragua was engaged in an armed attack against its neighbors, carried out not only by supporting armed groups engaged in military and paramilitary activities in and against El Salvador (and on a smaller scale against Costa Rica, Honduras and Guatemala), but also by direct armed incursions across its border into Honduras and Costa Rica. Any military activity by the United States in response was within the exercise of its "inherent right of self-defense." [FN2]

*658 Moreover, as Davis R. Robinson, Legal Adviser to the Department of State, summarized in the previous issue of the Journal, the self-defense nature of the U.S. position in turn meant that "[t]his is a classic case arising under chapter VII of the United Nations Charter." [FN3] As such, the case was a political question for resolution by the Security Council and not suitable for adjudication by the International Court of Justice. Professor Louis B. Sohn, who assisted in the drafting of the UN Charter and is considered a leading scholar of the United Nations, argued the political question position for the United States in the Nicaragua case. He surely knew that if the Court had accepted his argument and held that Nicaragua's Application was nonjusticiable, the United States would use its veto power in the Security Council to paralyze any UN action in the case.

In its Judgment on jurisdiction, the Court unanimously rejected the nonjusticiability argument. It pointed out that Article 24 of the Charter gives to the Security Council "primary responsibility for the maintenance of international peace and security," but that "primary" does not mean "exclusive." [FN4] It also reminded the United States that the Court was capable of dealing with the "legal" aspects of a case embedded necessarily within a "political" context, as the United States had successfully argued was the Court's proper role in the Iranian Hostages case. [FN5]

But the real props were knocked out of the U.S. litigation stance by President Reagan's statement that until the Sandinista Government says "uncle," the goal of U.S. policy is directly that of removing the "present structure" of that Government. [FN6] The President's candor was matched by an unnamed senior State Department official directly involved with the Nicaragua program, as reported by Joel Brinkley in the New York Times. [FN7] According to this official, arms interdiction never was the goal of aid to the contras. That would have been, he said, "a fool's errand." [FN8] In short, the entire notion of collective self-defense, of aiding Nicaragua's neighbors against armed aggression by Nicaragua and of supporting the contras in Nicaragua so as to stop Nicaragua from exporting its revolution to other

countries has melted away as a legal rationale for U.S. policy.

Is there any legal rationale left? What is the purpose of a "legal rationale" anyway? These are profound questions raised by the recent events of the Nicaragua case, and will undoubtedly occupy many students of international law for many years. At the risk of being absurdly premature, and with a plea in self-defense that my purpose is to stimulate *659 debate, let me proceed briefly to attempt to do injustice to these two questions.

THE LEGAL BASIS FOR THE U.S. POSITION

There is only one basis in general customary international law to support the actual position of the United States with respect to Nicaragua. It is not to be found in positivist state-based conceptions of international law such as intervention in Nicaragua's internal affairs, sovereignty, territorial integrity or political independence. [FN9] Nor is it to be found in Professor Michael Reisman's proffered test of maintaining minimum world order. Professor Reisman would use that test to justify military intervention in support of the "right of peoples to determine their own political destinies," [FN10] but I see no evidence--much as I would wish to see some-- to show that democratically elected governments contribute more to international stability and order than, say, Communist bloc countries. Professor Reisman's attempt to tie self-determination to world public order has no empirical basis; internal forms of government do not necessarily correlate with foreign military adventurism. Instead, if any support for the U.S. position exists, it is to be found in the law of human rights, which both predated and postdated the statist conceptions of border impermeability reflected in Article 2(4) of the UN Charter. [FN11]

If we take human rights seriously, we cannot insulate a government's actions toward its own citizens by an artificial sovereign boundary. Professor Reisman was correct in likening the UN Charter to a "Wild West" town in the 19th century when a sheriff arrives announcing that he will enforce the law and that citizens no longer need carry weapons or resort to personal force to protect their rights. [FN12] However, if it later becomes clear that the sheriff is utterly incapable of maintaining order, Professor Reisman concludes that "even the best of citizens" will no longer refrain from the techniques of self-help that prevailed before the sheriff's arrival. Professor Oscar Schachter took sharp issue with Reisman's position. He replied that "a community might allow the citizen a gun to defend himself and his household, but it would not follow that he could legitimately use the weapon to impose behavior (however good) on another household." [FN13] We do not have to imagine the Wild West to refute Professor Schachter; recent news accounts and congressional testimony regarding severe child abuse make it clearly realistic to consider forcibly breaking into a neighbor's house or apartment to stop a parent from thrashing a helpless child to within an inch of its life. Certainly, the state now takes the position that parents may not brutalize their own children. This same concern with the rights of helpless children in domestic law has its analogue in concern for the rights of citizens helpless against torture and murder by their own government. Governments have a monopoly of armed power in their states, and the horrible 20th-century examples of genocide attest vividly to the necessity of foreign intervention to prevent brutal governments from getting away with mass murder.

The three paradigmatic cases justifying humanitarian intervention are genocide, slavery and widespread

torture. [FN14] At the other extreme are violations of human rights that have no basis in customary or conventional international law for justifying intervention because the evil they represent is minor in comparison to the evil of military intervention (and the loss of life that usually accompanies military intervention). For example, if a state expels a minority group, the refugees' human rights have certainly been violated (and other states inherit an immigration burden), but there is no present basis in customary law to change the government's expulsion policy by means of an armed attack. Yet, although both ends of the human rights spectrum are clear, how can we deal with cases in the middle?

The simple answer is that students of international law can only look at state practice and draw conclusions from it. The danger of resorting to military intervention with its attendant risk of touching off a war erects a clear presumption against any transboundary use of force. Only the grossest abuses of human rights by a government against its own citizens would overcome the burden against external interference. Yet customary law can change, and state practice may add a fourth paradigmatic case to the list. The U.S. intervention in Grenada, which toppled a new government that had just machine-gunned its way into power, and the present policy to remove the Sandinista regime in Nicaragua may be steps along the way toward a new rule of customary international law. Historically, it is not so new; the Grenada intervention, as I suggested at the time it occurred, [FN15] was the reincarnation of Wilsonianism.

What Woodrow Wilson and Ronald Reagan have in common is the conviction that it is better no intervene sooner, rather than later, in an effort to prevent a nondemocratic government from seizing the reins of power and then perpetuating itself by its monopoly of armed power against its own citizenry. Whether one agrees with this philosophy or not, it is indeed grounded in human rights. An undemocratic government, *661 according to all empirical evidence of the last several centuries, is far more likely to commit basic human rights violations against its citizens than a democratic government. I argued above that there was no correlation between democratic government and minimum world public order, but I doubt that anyone could dispute the very strong correlation between democratic government and respect for the fundamental human rights of the citizenry. One has only to look at the egregious cases of genocide (Stalinist Russia, Nazi Germany, Cambodia, the "disappeared" persons of dictatorial Argentina) for the obvious evidence. Philosophically, the proposition is logically compelling. As John Locke, Thomas Jefferson and Jeremy Bentham demonstrated, a government that depends upon the consent of the governed--exercised not just once but in periodic intervals, with free opposition parties--is extremely unlikely to brutalize its own citizens. To be sure, Aristotle long ago pointed out the danger that popular governments may become tyrannical, and "eternal vigilance" is a constant price that citizens have to pay in democracies. Nevertheless, the proposition is unassailable, both logically and empirically, that democratic governments are far less likely to tyrannize and brutalize their own citizens than are unaccountable governments.

Whether the Sandinista Government of Nicaragua is on its way toward becoming a totalitarian government capable of tyrannizing its own citizens is certainly hard to tell at present. Its violations of the human rights of its own Miskito Indian citizens count heavily against it, but the atrocities committed by the contras against Nicaraguan citizens indicate that the opposition in Nicaragua may not present a moral alternative. Yet this is the question that is really at issue. How enlightened it would have been for

the International Court of Justice to hear argument addressed to this question, rather than to the spurious ones that filled the voluminous documents presented to the Court by both parties!

Apart from the specific question of Nicaragua, the real test of the Reagan administration will be whether it is willing to apply its interventionist philosophy, as did Wilson, to right-wing as well as left-wing governments. [FN16] There is surely no difference between human rights violations committed by undemocratic governments of either the right or the left. If we are truly trying to create a world that respects the fundamental rights and dignity of the person and attempts to clear away the debris of Hegelian state-based claims of right, we should expect a new American foreign policy that is as antagonistic to dictators of the right as it is to the Sandinista Government of Nicaragua. [FN17]

***662 "ACADEMIC" AND "REALIST" LEGAL RATIONALES**

If the arguments on both sides that were made in *Nicaragua v. United States* were largely spurious, what is the point of international legal rationalization? It almost appears at times that governments invoke precisely those legal rationales in favor of their positions that they believe academic international lawyers want to hear. They may announce that they are following the X set of rules when the actions they take have a hidden agenda labeled Y; yet X is proclaimed because international legal scholars want to hear X and expect to hear X. By invoking the X set of rationales, governments appease the international legal community, which is one of many pressure groups governments attempt to accommodate by their verbal policies.

Not only do many international legal scholars accept these verbal rationalizations when they are made, but they also proclaim that it is important that governments invoke those rationales. If a government says X when it does Y, these scholars say that the government refrained from invoking Y because that would be tantamount to admitting a violation of international law. Hence, these scholars tell us, the government-invoked rules of international law (meaning set X) remain intact even though a government may have deviated from them in practice (in doing Y). Given this self-referential reinforcement of their own theories by scholars, one can hardly blame governments for going along with the game. One is reminded of La Rochefoucauld's observation, *L'hypocrisie est un hommage que le vice rend à la vertu*.

When the United States intervened in Grenada, an interesting spectacle was played out in the scholarly literature. The Government invoked the X set of rules in favor of its intervention, and academic critics also invoked the X set of rules to show that those rules, properly interpreted, proved instead that the U.S. intervention was illegal. But the real rationale, which in my opinion expressed at the time was a human rights-based reason for intervention (the Y set of rules), [FN18] was not invoked by either side. To be sure, the Reagan administration did invoke Y in its more public, less legal-sounding statements, but these were overlooked both by the academic critics and by State Department attorneys charged with justifying the U.S. action according to the traditionally accepted X set of rules. Similarly, in *Nicaragua v. United States*, parties and critics alike debated the X set of rules until, a month after the United States withdrew from the case, President Reagan told us that the real rationale was Y.

The difference between X and Y is no simple dichotomy between what governments say and what

they do. Rather, there is a profound challenge to the theory of international customary law to take into account the real difference between X and Y. The rules I have called X are those that governments profess and proclaim to be following when they undertake particular actions or restraints in the international arena. These governmental statements typically comport with academic versions of what international *663 law requires. On the other hand, the rules I have called Y are those that actually cohere with the actions or restraints of the acting government. In scientific terms, Y is the "theory" that has a "better fit" with the facts than does X. As Wittgenstein, following the Skolem-Lowenheim theory, demonstrated, no theory is uniquely determined by a given set of facts or experiments, but theories that can be called "explanatory" must be consistent with all the data. The reason that governments typically do not proclaim the Y theory is that academics expect them to proclaim the X theory and would charge that the Y theory would be a governmental admission of violation of international law. But these are simply academic, or at best strategic, considerations; in fact, unbiased reasonable observers would agree that the operative theory is Y.

The insistence on what governments say, and an unwillingness to face up to the difficult task of inferring what they should have said from the facts of what they did, reached an apotheosis of sorts in an article by Dr. Michael Akehurst on customary international law. [FN19] The article, which has been widely cited, comes close to urging us to ignore totally what governments do and instead rely exclusively on what they say. Governmental statements, and not their actions (and the rules inferable from them), constitute what Dr. Akehurst calls custom. I have attempted to criticize the specifics of his approach elsewhere; [FN20] here I mention it as a prominent illustration of the academic impulse to keep X as the set of rules regardless of what goes on in the real world. If Dr. Akehurst and the many who follow him have their way, their books will never be out of date because they proclaim and set forth unchanging legal principles to which governments, regardless of what they actually do, pay lip service.

Instead, I would argue that customary law grows and changes over time as a result of the interactions of states in the international arena (the facts) and the rules we may infer from those interactions as the theory that best fits what the states did (even if it was not, or was only partly, what they said they were doing). It is surely harder to do this kind of international law research than to follow Dr. Akehurst and simply take governmental statements at face value. For what I am suggesting requires research into the history of governmental interactions, the facts that occurred, the settlements that were reached, the agreements that were entered into. At the same time, the researcher should be highly skeptical about the negotiating positions taken by the governments involved, their unilateral proclamations, the briefs they file in a court or arbitral tribunal, the opinions of their attorneys general or their foreign offices. The researcher should also be skeptical of protests by one government to another; the filing of a protest does not mean that the protesting government means or believes what it says. [FN21] And skepticism is also a good antidote to the all-too- easy tendency *664 to view General Assembly resolutions, or Security Council condemnations of state actions, as expressive of international rules of law. [FN22] Sometimes a Security Council condemnation that is not followed by any forcible action on the part of the Council is another way of saying to the ostensibly offending state, "We have to condemn you verbally, but don't worry, we're not going to do anything about it." [FN23] In such cases, the lack of action by the Security Council may be a more eloquent way of approving the Y set of rules than its verbal recommendation reciting the X set.

The truly operative rules generated by the customary practice of states, which I have labeled the Y set, are the rules that in reality accommodate the most deeply felt interests of the community of states. If concern for human rights is one of those deeply felt interests, that concern will be manifested in the emerging rules of custom even if those new rules are at variance with received wisdom. As Professor Thomas Franck has shown, new rules inferable from the practice of states have gone a long way toward undermining Article 2(4) of the Charter. [FN24] The Grenada and Nicaragua examples, as well as the Israeli raid upon the Iraqi nuclear reactor, add additional evidence to Professor Franck's thesis. The challenge to the international legal scholar is to dig beneath the verbiage, to peel off the ritual invocations of traditional rules in governmental press releases and to articulate the operative emerging rules of customary law. It is an exciting challenge because it is grounded in scientific objectivity and candor.

Footnotes

[FN1]. President's News Conference, N.Y. Times, Feb. 22, 1985, at A10, cols. 1, 3.

[FN2]. Counter-Memorial of the United States of America (Nicar. v. U.S.) 220, para. 517 (submitted by the U.S. Government to the Court Aug. 17, 1984).

[FN3]. Davis R. Robinson, Letter to the Editor in Chief, 79 AJIL 423 (1985).

[FN4]. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP., para. 95 (Judgment of Nov. 26).

[FN5]. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, para. 37 (Judgment of May 24).

[FN6]. News Conference, *supra* note 1.

[FN7]. Brinkley, Vote on Nicaraguan Rebels: Either Way, a Turning Point, N.Y. Times, Mar. 17, 1985, at A1, col. 5.

[FN8]. *Id.* at 6, col. 3.

[FN9]. This is how Nicaragua characterized the legal issues in its complaint. See Application Instituting Proceedings, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (submitted by the Nicaraguan Government to the Court Apr. 9, 1984).

[FN10]. Reisman, Coercion and Self-Determination: Construing Charter Article 2(4), 78 AJIL 642, 643 (1984).

[FN11]. For an expansion of the argument that human rights predated positivist conceptions reflected in the UN Charter, see D'Amato, Judge Bork's Concept of the Law of Nations Is Seriously Mistaken, 79

AJIL 92, 101-04 (1985). For an expansion of the argument that the law of human rights postdates the Charter and stems from the impact of treaties upon customary law, see D'Amato, *The Concept of Human Rights in International Law* [hereinafter cited as *Human Rights*], 82 COLUM. L. REV. 1110 (1982).

[FN12]. Reisman, *supra* note 10, at 643.

[FN13]. Schachter, *The Legality of Pro-Democratic Invasion*, 78 AJIL 645, 646 (1984).

[FN14]. For a defense of this proposition, with citations to other writers, see D'Amato, *Human Rights*, *supra* note 11, at 1128-29.

[FN15]. D'Amato, *Intervention in Grenada: Right or Wrong?*, N.Y. Times, Oct. 30, 1983, at E18, col. 3.

[FN16]. When visiting King Juan Carlos of Spain, President Reagan referred to the "undemocratic governments" in Latin America of Paraguay, Chile, Cuba and Nicaragua, a statement which lumped together authoritarian and totalitarian regimes. CBS-TV Evening News, May 7, 1985.

[FN17]. For an expansion of the argument that the best form of national security for the United States in the foreseeable future is the security that comes from having its citizens travel and trade abroad in countries that are committed to respecting human rights, see D'Amato, *Are Human Rights Good for International Business?*, 1 NW. J. INT'L L. & BUS. 22 (1979).

[FN18]. D'Amato, *supra* note 15.

[FN19]. Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75).

[FN20]. D'Amato, *Human Rights*, *supra* note 11, at 1135-47.

[FN21]. Indeed, protest may have the counterproductive effect of articulating the very norm that the protesting government objects to. See A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 101-02 (1971).

[FN22]. See B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 96-101, 102-05 (1980).

[FN23]. I have previously argued that this may have been the Security Council's attitude when it condemned Israel for its aerial attack upon the Iraqi nuclear reactor. See D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL 584, 586 (1983).

[FN24]. Franck, *Who Killed Article 2(4)?*, 64 AJIL 809 (1970).