REMARKS BY JOHN R. STEVENSON

It is indeed a privilege to have the opportunity to introduce John J. McCloy, one of the most honored and broad-gauged international lawyers of our times. To some, the law is both a vocation and an avocation. But to others, such as Mr. McCloy, law is perceived as the best base for a versatile and useful career in many activities, especially public service.

Mr. McCloy began his career as a lawyer and partner in the firm of Cravath, Swaine and Moore, where he served until 1940; he has returned to the law as senior partner of Milbank, Tweed, Hadley & McCloy. He initially left the law to join Henry L. Stimson as Assistant Secretary of War in the bipartisan World War II cabinet, from 1941–45. From 1949–59 he was U.S. Military Governor and U.S. High Commissioner in Germany. He has served as adviser on disarmament and foreign affairs to many presidents.

He was named president of the International Bank for Reconstruction and Development—the World Bank—in 1947. Later, 1955–60, he was Chairman of the Chase Manhattan Bank.

In addition, he has provided creative and responsible leadership for a host of nonprofit organizations: as Chairman of the Board of the Ford Foundation and trustee of the Rockefeller Foundation, as Honorary Chairman of the Board of the Council on Foreign Relations, as trustee of Amherst and Deerfield Colleges, and—closer to home—Chairman of the Society's Committee on the 75th Anniversary Fund.

John McCloy was 90 years old on March 31, 1985 and is still going strong. His age gives him a very special relationship with President Reagan who very much welcomes a senior adviser with more seniority than he has. Mr. McCloy's career exemplifies as no words could the manner in which a career in the law can be combined with outstanding public service.

He has asked me to indicate that he will not give a scholarly dissertation at this luncheon, but instead will recount a most interesting personal experience in public service. We look forward to hearing about this episode, but more important, we are grateful to have with us John McCloy, one of the giants of our age.

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The Society deeply regrets that it is not possible to reproduce Mr. McCloy's speech. His remarks were completely extemporaneous, and the arranged tape recording failed to function.

SHOULD THE UNITED STATES RECONSIDER ITS ACCEPTANCE OF WORLD COURT JURISDICTION?

The panel convened at 3:00 p.m., April 25, 1985, Arthur W. Rovine* presiding.

REMARKS BY DAVIS R. ROBINSON**

In analyzing whether the United States should reconsider its acceptance of compulsory jurisdiction of the International Court of Justice (the Court), it is important to understand the history of the U.S. acceptance.

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**Legal Adviser, U.S. Department of State. Mr. Robinson spoke in his personal capacity; his remarks are not necessarily shared by the Department of State of the U.S. Government.

The compulsory jurisdiction of the Court is not mandatory. There was a major debate at the San Francisco Conference on the U.N. Charter as to whether nations should be required to accept the Court's jurisdiction when they joined the Organization. After considerable controversy, acceptance of compulsory jurisdiction was made an option and not required for members. Thus, it is only by specific consent of nations involved that the compulsory jurisdiction of the Court is ever implicated.

Compulsory jurisdiction is only one avenue for appearing before the Court. The Court's jurisdiction can be activated by special agreement of the parties to submit a particular matter to the Court or by treaty. Indeed, the Court's jurisdiction in the *Iran Hostages* case was based on treaty provisions by which the parties agreed to submit certain matters to the Court and in the *Gulf of Maine* case on a special agreement or compromis by which the United States and Canada submitted a particularly defined dispute to adjudication by a chamber of the Court.

The nature of the Court's jurisdictional bases illustrates the principle that, in contrast to national legal systems which can mandate various modes of jurisdiction over parties, international law only allows jurisdiction on the basis of the consent of parties to a dispute. Under this reciprocity principle, where one party has not consented to jurisdiction, international law allows the other to use lack of consent as a defense to jurisdiction.

A major supporter of the creation of the United Nations, the United States was the third nation to deposit its declaration accepting compulsory jurisdiction. Pursuant to its acceptance, the United States has been involved in nine cases before the Court—more than any other nation. For the most part, however, the U.S. experience before the Court has not been a happy one; most cases involving the United States have been dismissed and not adjudicated on the merits.

Now, 40 years later, only 44 of 159 U.N. members have accepted the compulsory jurisdiction of the Court. Of these 44, many have included reservations in their acceptances of jurisdiction which sharply limit the Court's authority to hear cases involving them. In reality, only approximately 20 nations have committed themselves to substantial acceptances of the Court's compulsory jurisdiction. Of the five permanent U.N. Security Council members, only two have accepted jurisdiction: the United States and the United Kingdom. And the United Kingdom's acceptance does not have the six-month termination provision, at issue in the *Nicaragua* case, in the U.S. acceptance. Indeed, of the 16 judges who heard *Nicaragua*, 11 are from nations which have not accepted the compulsory jurisdiction of the Court.

In short, the international acceptance of the Court's compulsory jurisdiction has not met the expectations which many Americans had in 1945; it was then hoped that, consistent with the Anglo-American tradition, more and more disputes would be resolved by judicial means.

Why have so many nations failed to accept the Court's compulsory jurisdiction? First, many newly emerging nations have not accepted the Court's compulsory jurisdiction because they do not share Anglo-American legal traditions and will only go to court when they have specifically consented to do so with respect to a particular dispute. In contrast to the United States, many societies believe that judicial means are not the best mechanism for dispute resolution.

The U.S. declaration accepting compulsory jurisdiction, with its reservations, is 40 years old—the oldest of any outstanding declaration submitted under article 36(2) of the U.N. Charter. Many nations have revised their declarations accepting the Court's compulsory jurisdiction many times, including the United Kingdom (six times), India

(four times), and Israel (twice). The time has come and indeed is long overdue for U.S. acceptance to be reexamined.

While there have been many efforts made in the U.S. Government to review the U.S. acceptance over the years, this review has never gotten off the ground because of political symbolism. In this regard it should be understood that the United States, as a nation, still very much believes in the rule of law as the fundamental principle guiding conduct among nations.

History indicates that U.S. acceptance of compulsory jurisdiction has not further encouraged resort to that jurisdiction by other nations as a means of resolving international disputes. The United States is in an anomalous situation because of the Connally Reservation attached to its acceptance. Under this reservation, the United States can be sued in the Court, but cannot sue any nation which does not want to be sued. In the *Aerial Incidents* case, the United States sued Bulgaria, which asserted that the Court had no jurisdiction under the Connally Reservation because shooting down an airplane over Bulgaria was within the domestic jurisdiction of Bulgaria, as determined by Bulgaria. The United States originally disagreed and argued that the reservation only could be asserted in good faith; whether it would apply must be reviewed by the Court. After considerable controversy, however, the United States reversed position and withdrew its suit, taking the position that the reservation was self-judging, *i.e.*, that no jurisdiction existed over any nation which asserted the reservation—even where such an assertion might be viewed as groundless. Thus, any nation which asserts the reservation can effectively avoid litigation before the Court.

In the *Nicaragua* case, the United States made the conscious decision not to assert the Connally Reservation as a defense. Had the United States asserted the reservation, the Court, I believe, would have relished the opportunity to determine whether the reservation was valid or invalid. This would have caused even greater international and domestic problems than those which already existed and would have undermined the other strong arguments the United States made in the case (which the Court later wrongly rejected).

In short, if the United States sues another party, as in the *Aerial Incidents* and *Norwegian Loan* cases, the Court, on the basis of reciprocity, will not inquire into a defendant nation's assertion of the reservation as a defense to jurisdiction and will dismiss the case. On the other hand, if the United States attempts to assert the reservation as a defense to jurisdiction, the Court could rule it invalid. This reality hardly seems to make sense and evidences the need to reexamine our acceptance.

The *Nicaragua* case presented serious jurisdictional issues. Notwithstanding the Court's 11–5, 14–2, 15–1 and 16–0 rulings that it has jurisdiction over the case, the case is not the type of case that the Court should decide and is beyond its competence. And it was clear beyond a shadow of a doubt that Nicaragua itself had never accepted the compulsory jurisdiction of the Court. As the January 18, 1985 U.S. statement on the case indicates, the U.S. Government does not accept the Court's decision that it has jurisdiction over the case. This erroneous decision will compel the United States to clarify and reconsider its acceptance of the Court's jurisdiction; important premises on which the U.S. acceptance of jurisdiction was based now appear in doubt in this type of case. The United States might, for example, make explicit what the United States has, from the outset, considered implicit: Cases concerning the legality of the ongoing use of armed force are not proper for adjudication by the Court. The U.S. clarification has not yet been issued. As a general matter, however, the U.S. position is that the dispute with Nicaragua is subject to Chapter VII of the U.N. Charter, not

Chapter VI, and thus is not supposed to come before the Court. In this regard, the Court has infringed its own constitution and exceeded its power.

The *Nicaragua* case has raised the ante over what the United States should do concerning acceptance of compulsory jurisdiction. Possibly, the United States should do something similar to the United Kingdom's termination clause, which is automatic on notice and provides that no nation which has accepted the Court's jurisdiction can bring suit against the United Kingdom within 12 months of the acceptance.

Any clarification the United States makes regarding its acceptance of the Court's jurisdiction can be misinterpreted by the Court. In light of this risk and other considerations, any clarification should in my view only be considered as a first step. There should also be a total review of the U.S. acceptance. There is a question whether the United States should withdraw its acceptance of the Court's compulsory jurisdiction entirely. There is a real risk that reservations can be interpreted incorrectly—as happened to the Vandenberg Reservation in the *Nicaragua* case, where the Court construed the reservation so as to defeat its purpose.

Compulsory jurisdiction is not the Court's future, in my view. Few nations have accepted it and, of those, fewer still have done so meaningfully. Instead, the Court should be moving toward submission of particular disputes to the Court by special consent of the parties, as in the *Gulf of Maine* case. It was the Carter Administration, not the Reagan Administration, which negotiated and signed a U.S.-Canada treaty calling for submission of *Gulf of Maine* to a five-member chamber of the Court rather than to the full Court. If one wishes to question the precedential value of decisions of a select chamber, so be it. This approach is consistent with the U.S. policy of getting as many disputes as possible adjudicated by whatever means are available.

There is also no reason to assume the U.S. decision on compulsory jurisdiction will significantly impact on other nations' acceptance of the Court's compulsory jurisdiction. In more than 40 years' experience, few nations have agreed to accept compulsory jurisdiction; there is no reason to believe this will change. However, it will make a difference to encourage nations to submit cases to the Court, or a chamber by specific agreement, to take advantage of the Court's capabilities. Indeed, the Asian-African Legal Consultative Committee recently approved of the chamber mechanism as the ideal course, not compulsory jurisdiction.

The United States is committed to the rule of law in international affairs. The law applies whether nations are in court or not. In this regard, the Soviets have not accepted the compulsory jurisdiction of the Court or of any other international tribunal or authority, yet international law nevertheless governs Soviet behavior. While the United States cannot take the Soviet Union to the Court for its actions, international law still applies.

A recent draft resolution of the Executive Council of the American Society of International Law affirms its strongly held conviction that international adjudication and the application of rules of international law are appropriate mechanisms for resolving international disputes. The United States agrees that in appropriate cases, nations should use the Court to resolve disputes. With luck, the *Gulf of Maine* case will become a positive force for international adjudication. The tragedy of the *Nicaragua* case is not that it has put the United States on trial, but that instead it has put the Court on trial. Thus, the important question in my view is what can be done to avoid the Court's self-destruction.

REMARKS BY ANTHONY D'AMATO*

My views on the details of modifying U.S. acceptance of the Court's compulsory jurisdiction are fully set forth in volume 79 of the *American Journal of International Law*. Thus, I will speak more broadly today, focusing on different ways to think about the entire question of U.S. acceptance of compulsory jurisdiction over questions of international law.

In his remarks, Mr. Robinson takes a narrow view of the U.N. Charter, suggesting that compulsory jurisdiction is optional rather than mandatory. There is a different and broader approach to this issue. The Charter was intended to establish peace and avoid, if possible, armed hostilities. It is true that the Security Council was intended to be the linchpin of the U.N. system. However, as soon as it became apparent that the Council would be blocked by big power vetoes, the United Nations adopted more ingenious measures, including the Uniting for Peace Resolution—the most cherished contribution of the United States in the United Nations' early days.

If we could take such creative steps then, why are we now taking such a narrow view of the Court? After all, in contrast to its predecessor under the League of Nations, the Court is a U.N. organ, and there was commitment to settlement of disputes by legal means. When hostilities are introduced into a dispute, this is all the more reason for a court to resolve at least the legal issues involved in a nonhostile matter.

Nobody is saying that the Court can settle armed conflicts. But, as the United States argued in the *Iran* case, even when disputes are embedded in a political context, the legal issues in the dispute can be resolved by the Court. Since this is exactly what the *Nicaragua* case presents, I do not understand the U.S. claims of nonjusticiability before the Court in that case, especially in light of the 16–0 vote of the Court. Since the legal aspects of the Nicaragua dispute are justiciable, U.S. reliance on the political question doctrine is a token of its narrow view of the Court's role in the U.N. system.

The U.S. response to the Court's decision also indicates that this country is not looking forward at what kind of nation the United States is to become and what role the Court should play in international affairs. But concern for the future compels a very affirmative or "aggressive" approach to the Court. In the years to come, U.S. national security interests will be involved with promotion of human rights in other nations, freedom of speech, open markets and a world where individual rights are taken seriously. To shape such a world where military force is largely useless, the United States needs a Court with compulsory jurisdiction to deal with disputes that formerly were resolved by military means.

The United States has far more to gain than to lose by application of humanitarian rules of international law in cases before the Court; the United States does well under such standards. Our citizens and corporations are likely to find that their rights are violated far more abroad than the rights of foreigners and foreign corporations are violated in the United States; the United States has a progressive Constitution with rules to protect individual rights. To the extent that the United States will benefit from a world that respects emerging rules of human rights and the free market, the United States must support a strong commitment to the rule of law, particularly the rule of compulsory jurisdiction.

Because only 45 nations have accepted the Court's compulsory jurisdiction is no reason for the United States to pull out. Through its continued acceptance, the United States has tried to set an example for others to follow. I do not put much stock

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in jurisdiction by consent, which is tantamount to no jurisdiction at all. Jurisdiction by consent says simply that the law is available if both parties want it, yet the rule of law, as we know it, must have room to work even when one party to a dispute rejects its application. Absent compulsory jurisdiction, there may be a *Gulf of Maine* type of case once in a while, but these will not occur very often and will not be the kind of serious cases the framers of the U.N. Charter contemplated. In this regard, the framers plainly expected the Court to play a role in fulfilling the U.N. peacekeeping function.

It is not the nonjusticiability issue that most bothers the United States in the *Nicaragua* case. Speaking as a "scientist" of international law rather then as a propagandist, what is wrong with *Nicaragua* are the rules of international law Nicaragua invokes. I refer to the rules of nonintervention, political independence and territorial integrity in article 2(4) of the U.N. Charter. The heart of the U.S. problem with the decision is that the United States is violating these rules and Nicaragua is calling the United States on the carpet. Under these traditional rules, which call for "hands off" states, the United States finds itself in trouble and goes through rationalizations to get out of the situation, including the jurisdiction and nonjusticiability arguments, which will haunt us in the future.

What are the rules of international law the United States wants? They are for the most part the rules we are beginning to get, although they do not resemble article 2(4) of the Charter. These are rules of revolutionary significance which are fundamentally changing international law. They are the rules focusing on human-rights-based norms, which are developing in the teeth of state-based claims of boundary invulnerability.

The basic concept, established by the Nuremburg Tribunal, is that a nation state cannot commit genocide against its own citizens. These developing rules stand in stark contrast to the traditional rule that no nation can intervene in the affairs of a state. For example, in the case of South Africa, if the South African Government were to begin genocide against its black population, no reputable international lawyer would contend that article 2(4) would be violated if other nations, including the United States, sent troops to prevent such actions. Stopping genocide is more important than article 2(4). Another example was pointed out in volume 78 of the *American Journal of International Law* in a debate between Professors Reisman and Schachter. Imagine a Wild West town where the law is enforced by self-help, with the use of guns. Suddenly, a sheriff arrives and tells citizens to lay down their guns and stop fighting; he will enforce the law. Six months later, however, it becomes apparent that the sheriff cannot do this. The citizens put their guns back on and go back to frontier-style justice, enforcing the law themselves. Professor Reisman likens the sheriff to the U.N. Charter, which told nations to put down their guns; the Security Council would take care of them. Since the Council has proven ineffective, however, nations have gone back to self-enforcement regimes.

In contrast, Professor Schachter points out that, even in the Wild West, nobody would think of going into another's home and imposing his standards of behavior on individuals in that house. In other words, he believes that even in a lawless world, there is a recognition that one nation cannot go into another country and force its behavioral norms on that nation. I believe Professor Schachter's view is wrong. A domestic analogy is child abuse. If a parent is thrashing a child within an inch of its life, should one stand by and watch? Would one really argue that the laws of trespass forbid intervention? I think not. As human beings, we would try to save the child notwithstanding the laws of trespass. In any event, one can call the police and support

the role of the state in offering its protection. The same is true if a country is murdering, committing genocide, enslaving, or committing widespread torture against its own citizens. In such situations, intervention is appropriate. To take a more problematic case, a rule of customary international law may be developing to allow intervention where a nation sets up a totalitarian regime by armed force and prevents its citizens from enjoying basic freedoms.

There is a dawning notion of human rights intervention in customary international law which runs counter to the rules of territorial integrity invoked in *Nicaragua*. Witness Grenada, where a new government machine-gunned its way to power. The United States reacted to stop its acts of aggression and establishment of a regime inconsistent with its citizens' interests. The U.S. action was a human rights intervention. While a harder case, this situation also includes a human right deserving protection—the right to freedom against a hostile government. The Grenada situation did not go before the Court. If it had, article 2(4) and the norms of territorial integrity embodied therein would have been asserted against the United States.

Nicaragua did get before the Court, and the United States and its lawyers were faced with a dilemma: how to argue these new norms of intervention—that human rights are more important than states' rights and that people count more than entities—in light of the Charter's prohibitions and 19th-century norms of state autonomy. It would have been exciting, although risky, if the United States had argued the merits of these new human rights norms as I have suggested.

In an article in volume 64 of the *American Journal of International Law*, Professor Franck pointed out that the actual practice of states is running contrary to article 2(4) of the Charter. In essence, the world is accommodating itself to the human rights norms and is paying less and less attention to 19th-century states rights' norms. It would have been fascinating to see this type of clash in the Court rather than the rationalization put forth by the United States in the *Nicaragua* case.

I invite you to think about *Nicaragua* and the Court's jurisdiction in the broader context. While the evolution of international law is a slow process, we are beginning to see that the 20th century stands for a new way of looking at international law—that international law does not solely comprise the rights of states vis-à-vis each other. The law of nations stands for something better understood in the 17th century than today—immutable principles which concern individuals rather than states. States are only "good" insofar as they espouse such claims and handle them efficiently but are not good in and of themselves. In sum, the 19th-century positivistic notions of international law are beginning to lose ground against a more moral, humane and profound commitment to the newly emerging notions of human rights.

In this context, *Nicaragua* is an anomaly. We should not get carried away with claims of nonjusticiability and inadmissibility of evidence; such claims do not go to the heart of the matter which is the emerging content of the rules of international law and how we attempt to articulate them.

Remarks by the Chairman, Arthur W. Rovine

With respect to Mr. Robinson's remarks, I agree that the Court's future lies with jurisdiction by special agreement to go to the full Court or a chamber, and not the compulsory jurisdiction route. I also agree that much of the Court's holding on jurisdiction was outrageous. Its holding on Nicaragua's acceptance of compulsory jurisdiction is subject to serious criticism.

I am disturbed, however, by the U.S. Government's position on nonjusticiability. I was impressed that the United States lost by a 16–0 vote; even the American and West European judges went against the United States.

As Professor D'Amato suggests, the United States should consider Nuremberg as an appropriate analogy on the justiciability issue. One essential meaning of Nuremberg's judicial process is that war-peace issues are justiciable. There were three counts at Nuremberg: crimes against peace, war crimes and crimes against humanity. It is the first with which I am most concerned: crimes against peace—planning, preparation or execution of a war of aggression in violation of treaties. Of course, in contrast to *Nicaragua*, individuals were on trial at Nuremberg, not a government. Before they could be found guilty under Count I, however, the Tribunal had to find that the German state was guilty of a violation of Count I. The Tribunal did exactly that. Thus, the basic assumption underlying Count I was that armed conflict issues are justiciable under international law. In deciding the cases brought under Count I, the Nuremberg Tribunal relied on the rules of international law, including arbitration conventions, the Treaty of Versailles, the Kellogg-Briand Treaty, etc. Counsel for the defendants, who argued many points, did not even argue nonjusticiability.

It is true that Nuremberg was a special tribunal with a special jurisdictional grant. But the central point is that in 1945 the United States thought that issues of war and peace were justiciable and participated in their adjudication. Granted, in contrast to *Nicaragua*, World War II was a traditional war; it is more difficult to prove facts in a guerrilla situation like that existing in Nicaragua. Dealing with facts, however, is the burden of any trial court; while it may be harder to do so in some cases, such difficulty does not render the claim nonjusticiable.

While Nuremberg did not involve the adjudication of an ongoing conflict, Nuremburg nevertheless shows just how poor the rule against adjudication of such conflicts really is. It would not have been reasonable to have required nations invaded by Germany during World War II to wait until the war had ended to bring claims before an international tribunal. Surely a nation need not wait until it is destroyed or occupied to bring a case under international law before such a tribunal. Nuremberg shows that an ongoing-armed-conflict rule makes little sense and that 40 years ago we thought such matters justiciable.

Since we are committed to the rule of law in international affairs, the United States should not turn its back on Nuremberg, but should consider its meaning carefully. Nuremberg is relevant to possible changes the United States may wish to make in its acceptance of the Court's compulsory jurisdiction.

Arguments can be made to the contrary. Nuremberg was a very special situation and did not have a Security Council, like the United Nations does today, with primary responsibility for maintenance of international peace and security. Even under article 2(4) of the Charter, the Council has primary, but not exclusive, peacekeeping responsibility. While article 12 allocates authority between the Council and the Assembly, the Charter nowhere states that the Court must defer consideration of a case and not exercise its rights to hear a dispute when the Council or Assembly is also considering some aspect of it.

Indeed, article 94(2) authorizes the Council to take action to give effect to the Court's decisions if nations refuse to comply with them. Forty years ago, U.S. State Department Legal Adviser Hackworth said the Council would not decide on "measures to be taken" under article 94(2) unless it concluded that failure to respect the Court's decision constituted a threat to the peace under the Charter. Normally failure to comply with a Court ruling would not give rise to a threat to the peace. At the