

of legal restraints on the use of force and acceptance of the International Court of Justice as an appropriate body to adjudicate legal disputes.

REMARKS BY ANTHONY D'AMATO\*

At the outset I have to take exception with a point made by Judge Abraham Sofaer. Judge Sofaer observed that the United States had tried on many occasions, but never succeeded, in bringing any other states before the World Court under the Court's compulsory jurisdiction. While this observation is technically true, the reason the United States did not succeed was self-imposed. By having the Connally Amendment as part of our acceptance of the Court's compulsory jurisdiction, we opened up the invocation of that amendment by any other state that we might want to bring before the Court. And indeed, history tells us that on those many occasions that Judge Sofaer refers to, we discovered that the opposing state would simply invoke the Connally Amendment and defeat jurisdiction. So it is somewhat misleading to say that we tried but never succeeded in bringing other states before the Court, without adding that the reason we didn't succeed was our own innovation to ICJ jurisdiction—the Connally Amendment.

In listening to the preceding speakers, I wondered what international legal life would be like without a World Court. Certainly international law would survive. Grotius and Pufendorf and Vattel seemed to be able to turn out thick volumes on international law in the days when there was no World Court. The notion of centralized judicial lawmaking has worn itself into the fabric of 20th-century international law, however. We find in discussions at the American Society of International Law that people often treat the rule of law and the World Court as interchangeable concepts. Our Society seems to be committed to the idea of judicial decisionmaking. It's hard to find anyone in this organization who is not favorably disposed toward the World Court at the Hague.

Yet, favorable dispositions can be trumped by real cases. The World Court seems to have gone out of its way to dissipate a lot of its political capital, and it has done so not in minor cases but in cases that were well argued and in which the judges had ample time for reflection and considered judgment. The *Corfu Channel Case* was an early, questionable decision. All could have been recouped in the *South-West Africa Case (Merits)*, and yet the Court squandered the opportunity. The *Nicaragua Case (Jurisdiction)* occasioned the totally unprincipled denial, without a hearing, of El Salvador's bid for intervention. The Court we are trying to save has the unfortunate recurring habit of shooting itself in the foot. Yet, remaining on the colloquial level, one might retort: "Well, it's the only World Court we've got."

But then we have to inquire what the world would be like without the World Court, because it's the only world we've got. Let me suggest two jurisprudential windows on how to think about this problem, the realist window and the conceptual window. My concern will be largely with how the vistas they offer are superimposed on one another.

When we look at international law through the conceptualist window, I believe we have to think of it the way my teacher Louis Henkin often stressed: we think of "the law" as if an imaginary court were making an imaginary decision with respect to the facts that we have in mind. In other words, we don't just look up "rules" and see what they say and how they seem to fit certain real-world facts; rather, in our minds

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we go through a miniadjudicative process, sensing how a hypothetical judge would rule on these facts.

Take a current example: Qadhafi's drawing of a "line of death" across the Gulf of Sidra. We don't ask, in the abstract, whether Qadhafi is acting illegally in drawing a line; he can draw anything he wants to draw. Rather, we imagine an incident: a ship of another nation is fired upon by Libya when it crosses Qadhafi's line. What would a hypothetical World Court say to that? The answer is clear: Libya has violated international law. The other nation would be entitled to damages and to an injunction.

This example seems terribly ordinary, and yet it disposed of some collateral issues rather nicely. For instance, it doesn't matter what other country we have in mind. If it is the United States, then the United States should have as strong a legal case as any other state would have and should win on the facts as I have recounted them and on the application of the international law of the high seas to those facts. Moreover, it's important that we have a court in mind, and not, for instance, an international arbitral body. An arbitration panel might hold that Libya is entitled to half of the area that it attempted to rope off with its "line of death." But a court would not try to reach an accommodation on these facts; a court is not an arbitral tribunal.

It's not necessary, looking through this conceptual window, that there exists a real World Court in order for us to go through the mental exercise. But the presence of the World Court at the Peace Palace at The Hague tends to recur in our thoughts and make them somehow more concrete, more manageable, more practical. We are not just hypothesizing a court, because there is a real-world example of our mental court. I think this fact tends to make international law discourse more practical, more realistic, more like the "law" that practitioners are accustomed to in their domestic legal systems, and hence more effective in communication with other lawyers including those on the opposite side of any given dispute. The idea of real adjudication shapes the way we think conceptually about international law.

But now comes a challenge to our thinking: we open the window labeled "realism." We start thinking about what the actual judges sitting on the World Court at The Hague today would decide if presented with the question. And as soon as we plug in these realistic factors, we might come out with an entirely different result. To take an extreme but instructive case: suppose we imagine the Gulf of Sidra case to come up, and a realist attorney observes: "Oh, I know those judges. They are favorably disposed toward Libya as a matter of their own politics. Moreover, some of them take marching orders from their governments back home. So we're not going to get the sort of academic judgment from the World Court that one might expect if one were oblivious to political realities. Instead, we're going to see the Court tilt toward Libya regardless of the legal points that are made in the briefs and in oral argument."

Now, I'm not saying that this is what will happen. I'm only trying to illustrate a position about the superimposition of realism upon conceptualism. The more we think about how the real World Court would decide a hypothetical case, and the less we have in mind an abstract World Court, the more our very judgments about the law tend to get biased toward a political as opposed to a legal position. Realism, after all, is political and not abstract. So we see a kind of mental corruption setting in as we think more realistically about how an actual Court might deal with our hypothetical case.

Yet some observers, among whom may perhaps be the policy-oriented school of jurisprudence led by Lasswell and McDougal, might reply that international law is, after all, grounded in the international political arena, and hence a dose of realism is what is needed if we are to understand what international norms really are. But my

reply is that this is what we have already done through our “conceptual” window. A conceptual view is not the same as an ivory-tower view; rather, a good international lawyer will give you an opinion about how international law applies to a claim-conflict situation between states by basing that opinion on an appreciation of the real political factors that go into making up international norms. That lawyer will hypothesize an International Court which looks at the same factors, one that is thoroughly “realistic” in its assessment of customary international law. Customary law is, after all, the resultant of real international conflicts of claims; it is not an ivory-tower law superimposed upon states but rather a law that grows out of their interactions. Customary law is a norm, to be sure, but a norm that fairly characterizes the political solutions that states have reached with one another.

But if we for the moment postulate a view of the World Court as a real political body whose judges are subject to “pressures from home,” we see that such a picture diverges both from my conceptual window and from the policy-oriented school. The latter, it is true, would be torn between two alternative real worlds: the first, the real world of the judges of the World Court as an actor in the international arena, and second, the parallel world of nation-states in their political interactions. I’m not sure that the policy-oriented school has given us a way to choose between these alternate realities. Perhaps it is a failing of the conceptual foundations of that school.

Yet if we put the policy-oriented school to one side, we are still presented with an intellectual problem in sorting out our own mental conceptions of an international legal norm—the problem of the world court vs. the World Court. To the extent that the latter version, existing in a particular time and place and subject to political pressures, diverges from the former (which exists only in our minds), we are faced with a recurring dilemma in articulating legal norms. Somehow we have to choose between imagining what a hypothetical court would decide and predicting what the World Court at The Hague would decide.

It is unfortunate that this gap exists. The extent of the gap is indeed a measure of our lack of confidence in the present World Court to come up with a wholly impartial judicial answer to highly emotional and political questions regarding important conflicts among states.

Judge Sofaer has told us that we have to accept the Court as presently constituted as the way the Court is and to recognize that that is the problem. I agree, but that is a prescription for paralysis.

What we should do, as the American Society of International Law, is to figure out what we want the World Court to be. What kind of legal decisionmaking body do we want? What is our model for international adjudication? If we could write on a clean slate, knowing what we know now (which presumably is a lot more than they knew in 1920 when the Permanent Court of International Justice was established), how would we draft a Statute for our ideal Court? In particular, how would we choose its judges? How would we insulate them from political pressures? How would we build in guarantees of judicial objectivity?

For starters, we should rethink the nature of a World Court. Should it be a creature of the nation-states? Do we really want a World Court where only states can be parties? Let me suggest, to be controversial, that the time-slice when the Court was created was highly artificial in that it was dominated by 19th-century positivistic conceptions of what international law was. Both before the 19th century and certainly now, the nation-state did not dominate the relations among nations. In the early days, there were many other entities that fell far short of nation-states or that were of an entirely different type (for instance, “universal” entities such as the Holy See). Today,



States for that action. I feel that the Court will, in the future, say what it believes about the use of force, but the United States does not consider the Court to be the appropriate body to trust with the final decision regarding the right of the United States to use force in self-defense.

Professor DAMROSCH: I was struck listening to Judge Sofaer by how much of his argument turned on the peculiar circumstances of ongoing hostilities and actual or potential prejudice to the right of self-defense. Many members of the concerned community would, no doubt, agree with him on the issue of ongoing armed hostilities and with some sort of limited reservation that would exclude that category of dispute where the United States feels that the Court is least capable, but would leave in the vast range of commercial disputes, boundary disputes and so forth. I would like to know why the administration did not take this route when all the policy logic of what Judge Sofaer said points in that direction.

In his comments, Judge Sofaer pointed out that while the constitutional authority of the Executive to terminate the 1946 declaration was clear, the authority of the Executive to modify the declaration was subject to serious doubts. However, the administration should have taken the positive step of involving the Senate to take the initiative in formulating a new declaration after the decision to terminate had been made. In my view, had the Executive proposed to the Senate a course of action consistent with the policy considerations as laid out by Judge Sofaer, many members of the Senate would have agreed with the President and supported that view.

Judge SOFAER: That approach was considered, but the President concluded that the United States was better off with nothing than with the present declaration. This view was communicated to the Senate, and the Senate did nothing. Several resolutions and several amendments were offered, but nothing was passed.

ROBERT J. RADWAY:\* I would like to ask Professor D'Amato to comment further on his view that it might be possible to separate or encapsulate judges in order to remove them from the influence of their home governments. It would be necessary first to see a general strengthening of the rule of law in a very large number of countries.

Professor D'AMATO: It would be difficult to determine when such a general strengthening of the legal order had occurred so that the ideal system I outlined could be attempted. I frankly admit that I do not have a solution or method for turning ideologically biased judges into unbiased ones. It is a question, however, that a state-based approach to the Court fails even to raise. I feel it is necessary to start thinking in these terms now, and that we should not wait to see whether enough law has jelled before addressing such an approach to solving the Court's problems.

JOHN DUGARD:\*\* Professor D'Amato suggested that judges in the International Court of Justice tend to follow the views of their governments. In the 1966 *South West Africa* case, Judge Winiarski of Poland voted in favor of South Africa's position, and it is clear that this vote was not the result of an order from Poland. On any court there are unpredictable as well as predictable judges and results, and it is an overstatement to suggest that the ICJ is as biased as some panelists have implied.

Professor D'AMATO: I would agree that there are exceptions, and I applaud them. I do not wish to minimize them in any way. In the United States, our tradition discourages any attempt to influence the decisions of judges and encourages the govern-

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ment to avoid interfering with them. Some countries, however, do not have this tradition, and we have to be realistic about that.

Apart from that observation, I think that a different kind of realism is necessary in thinking about law. Law is not the same as mathematics. In mathematics, if you're doing a proof and an exception pops up, you know the entire proof is incorrect. In deductive systems, there is no room for aberrations. But in law, a decidedly inductive system, the fact that a judge on the Court once voted clearly against his home country's views does not mean that we should reject our premises and start the proof over again. I think it is an overstatement to overstress one instance. I'm not saying that the judges on the Court are biased; but I am saying that we don't realistically expect them to become *persona non grata* in their home countries because they've voted their consciences on the Court.

Professor DUGARD: In the 1971 *Namibia* Advisory Opinion, South Africa referred to the Court's advisory opinion as legally untenable and has accused the Court of bias. Substantially similar allegations have been made here tonight. I would like to ask Judge Sofaer whether the United States has considered the impact of its actions on the future credibility of the Court. Has not the U.S. decision on compulsory jurisdiction and its criticism of the impartiality of the Court undermined the Court's opinion in the *Namibia* case and vindicated the South African position? In the future, as a result of the U.S. action, fewer disputes will possibly be taken to the Court and, for those which are, it will now be much easier for the losing party to turn its back on the Court's decision and accuse the Court of bias. Generally, the United States has done the cause of international adjudication a disservice by its actions and utterances.

Judge SOFAER: I hope that the government's decision will not be read as broadly as you suggest. The United States continues to take disputes to the Court. The U.S. Government feels that there are wide areas of activity where it is entirely appropriate for the Court to rule.

STEPHEN KLITZMAN:\* I would like to raise some questions about the Court's compulsory jurisdiction in the context of the Genocide Convention, recently ratified by the U.S. Senate. The Senate attached two reservations, five understandings and one declaration. The effect of the first reservation was to modify the application of article 9 of the convention by requiring the specific consent of the United States before it could be brought as a party before the ICJ. Some Senators commented that the U.S. reservation may cause some U.S. allies to refuse to recognize the U.S. ratification as valid since some countries, such as the United Kingdom and the Netherlands, have refused to accept any reservation which seeks to deny the Court's compulsory jurisdiction in this area. Also, the point was raised that the U.S. reservation weakens the ability of the United States to bring claims against an adversary in areas such as Cambodia or Afghanistan because under the principle of reciprocity, any adversary could object to such claims with reference to the U.S. reservation. Finally, some Senators said that a future administration should seek to remove this reservation.

Professor SCHACHTER: I agree that the reservation requiring the specific consent of the United States to any case brought against it in the Court would preclude the United States effectively from bringing a case against any other party. It is a deplorable reservation, and efforts should be made in the future to remove it. It may help if the United Kingdom and other countries object to it, thereby underlining its unfortunate effect. The similarity of the reservation to the Soviet reservation that was

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so sharply criticized by Western countries is symptomatic. We should note that the reservation would not completely prevent action against or by the United States, since it would not affect the right to bring charges of genocide under article 8 before "any competent organ of the United Nations." Nor would it preclude the United States from consenting to a case against it in the Court. Such consent is unlikely in the present atmosphere, but there may come a time when the United States would not resist the scrutiny of charges brought against it and even welcome the opportunity to present its case to an international tribunal.

Professor D'AMATO: I regard the reservation as gutting the Genocide Convention. After the United States had refused to sign the convention for nearly 40 years, it finally did so and took out the one section with any bite. I hope, however, that this does not signify an attitude that the United States should start pulling out of world institutions, and I hope that there were more specific reasons for this reservation on the Genocide Convention beyond a feeling that the United States should withdraw from world institutions.

Judge SOFAER: The reservation was added by certain Senators who wished to protect the United States from frivolous claims. For example, some might claim that birth control was some form of racial discrimination. The Senate wished to protect the United States from this type of unfounded claim.

JAMES P. ROWLES:\* I would like to ask Judge Sofaer if the United States is prepared to comply with its obligations under article 94, paragraph 1 of the U.N. Charter should the ICJ render an adverse decision in the pending *Nicaragua* case. And, if it were adverse, what sort of consultation would the U.S. Government have with this and other bodies before rendering its decision on compliance?

Judge SOFAER: I will take the opportunity presented by the latter part of the question to announce plans to establish an Advisory Committee to The Legal Adviser on Public International Law. Jack Stevenson will be the chairman of that committee. The administration is looking forward to having quite a bit of communication with representatives of the American Society of International Law and members of all bodies that participate in formulating the U.S. position on public international law. I will answer the first part of the question by reference to the handling of the Marcos money, property and papers. When the issue arose, the administration was confronted with a very difficult political decision in dealing with a former ally, one for whom the President had very warm personal regard. A meeting in the National Security Council Situation Room was called and the President, after consultation with his advisers, decided that the United States would handle the problem in every aspect in accordance with U.S., Philippine and international law. This decision has been complied with to the fullest extent. The government has surrendered all documents; any decision which could not be made by the administration for one reason or another was submitted to the federal courts. I believe that the United States will follow the same policy, in good faith, with respect to any issue that confronts the country. There may be a difference of view with respect to what the law requires. Counsel for Nicaragua has observed that the Court's decision is enforceable only through the Security Council. This is a clear principle. The issue is whether the United States will exercise its veto. Finally, it is my view that the issue of what the ICJ will do in the present case is

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