REMARKS BY JOHN R. STEVENSON

I had the privilege of appearing twice before the International Court of Justice (ICJ or World Court), once as the State Department Legal Adviser, and once as Special Counsel for the United States. While the subject matter of the panel is very broad, our primary concern is with the U.S. relationship to the World Court, and more particularly the U.S. termination of its acceptance of the Court's compulsory jurisdiction. In that connection, I serve as chairman of the Society's study panel on the International Court of Justice, which was asked not to recommend a policy position with respect to the U.S. role in the Court, but rather to study the various issues involved with a view to providing the raw material for those who might be interested in, or have the responsibility for, formulating a policy view.

The only point I should like to make before asking our panelists to begin is to stress that this is an area where we, as lawyers, have an obligation to clarify the real issues before the American people and policymakers. Accordingly, I will limit my introductory remarks to what I consider three of the most misunderstood aspects of the issues before us tonight.

The first is the charge, often repeated in editorials in our most respected newspapers, that the United States has decided to leave or withdraw from the International Court of Justice. This reveals a very great misunderstanding of what the United States has really done in this matter, namely, to withdraw its acceptance of the compulsory jurisdiction of the Court, as expressly permitted by the Court's Statute, and not to withdraw from the Court as such. In fact, it would not be possible to withdraw from the Court itself without withdrawing from the United Nations. Whether or not it was desirable to terminate or modify the U.S. acceptance of the Court's compulsory jurisdiction is, of course, a matter on which there can be understandable differences of views. This is quite a different question, however, from withdrawing completely from the Court.

The second misunderstanding was the general feeling that those who did not agree with the decision by the United States to withdraw from the Nicaragua case necessarily opposed termination or modification of the U.S. acceptance of the Court's mandatory jurisdiction. In my view, these are two quite separate issues linked by the fact that if the United States had not accepted the Court's compulsory jurisdiction, the Nicaragua case might have arisen in a somewhat different context, although there still might have been a basis for the Court's jurisdiction. There are, of course, practical reasons why many international lawyers would have preferred to see the United States continue with the Nicaragua case, including the possibility of putting Nicaragua to its proof, permitting El Salvador to present its case and, thereby, avoiding criticism that the United States had not complied with the U.N. Charter, and the probability of the consideration on the merits of a number of issues which were not discussed in the Court's
jurisdictional decision. Obviously, many people favor both the U.S. action in withdrawing from the
Nicaragua case and terminating its compulsory jurisdiction. I always opposed both. On the other hand,
these are clearly separate issues, and there are a number of persons who, while on balance disagreeing
with the U.S. action, favor a reconsideration of the acceptance by the United States of the Court's
compulsory jurisdiction. I am one of this group.

Finally, some have argued that the World Court is simply another U.N. political body, with the judges
representing certain political regimes, rather than serving as independent jurists. Certainly the question
of confidence in the Court is a critical one, and there is legitimate concern that a judge from the U.S.S.R.,
for example, could pass on U.S. actions in Nicaragua while there is no opportunity for a judge from the
United States to pass on Soviet actions in Afghanistan. Certainly we are all aware that the Soviet Union
has never appeared before the Court, to say nothing of accepting the Court's compulsory jurisdiction.
On the other hand, it is important to point out that in the Nicaragua case, on the jurisdictional question,
four of the judges in addition to the U.S. judge, each of whom I know personally and respect, agreed
with the United States that the World Court did not have jurisdiction. Moreover, one of the most
constructive developments in dealing with the issue of obtaining more confidence in the Court, in
addition to obtaining the genuine consent of the parties to issues which are put before the Court, is the
possibility of having disputes adjudicated by small panels of judges, judges who are clearly respected by
all the parties, rather than by the full Court.

REMARKS BY LORI F. DAMROSCH [FNa1]

I am here in my capacity as the Rapporteur of the Society's Study Panel on the International Court of
Justice, formed last year to study the issues bearing on U.S. policy toward the Court. The reason for
formation of this panel is very clear: The United States is at a turning point in its relationship to the
Court. At the Society's Annual Meeting in April 1984, in the week that the notice had been filed
attempting to modify the U.S. acceptance of jurisdiction of the Court on the eve of the filing of the
Nicaraguan complaint, the Society went on record in support of judicial settlement of international
disputes. In the following year there were significant developments in the Nicaragua case, including the
interim measures order and the ruling on jurisdiction and admissibility that rejected the U.S.
preliminary objections. In January 1985 the U.S. Government stated that it would no longer participate
in the Nicaragua case and would be reviewing its overall policy toward the Court.

At this time last year, the Society took the decision to form the study panel. Because of space and
budgetary constraints, we could not include all the Society's members who have expertise in the subject
of the International Court of Justice, but we did draw together a number of experts, most of whom had
participated in World Court proceedings, including several former State Department Legal Advisers and
several former agents and counsel before the Court. We commissioned 17 substantive papers which
were discussed at three working sessions held in October and November 1985 and February 1986.

In designing the issues for study by the panel we took as one approach the identification of the
concerns that the U.S. Government had cited as the basis for its decision to withdraw from participation
in the Nicaragua case. We asked our authors to address to what extent these concerns were valid, to
what extent they concerned long-term U.S. policy as opposed to the reaction to a particular case, and to what extent they could be mitigated either by the Court itself or by states through multilateral or unilateral action. The papers will be published in a book to appear this winter. So instead of trying to summarize 17 careful and well-documented papers, which range in length from 25 to 75 pages, I will give an overview of the issues addressed.

First, we looked at some of the concerns that the United States has raised concerning the operation of compulsory jurisdiction under the optional clause. The United States has alleged that the system of compulsory jurisdiction has not fulfilled expectations, because only a minority of states have accepted compulsory jurisdiction, and of those states, most have included reservations or limitations that undercut the scope of jurisdiction. Further, some important groupings of states, such as the Soviet bloc, do not participate in compulsory jurisdiction in any way. The United States has also expressed concerns about the objectivity of some of the judges on the Court and of the Court as a whole.

Several papers touched on different aspects of these issues. Leo Gross prepared a paper that comprehensively reviewed the patterns of acceptance of compulsory jurisdiction over the entire period of the Court's existence and noted a variety of trends in those patterns. Edith Brown Weiss studied the problem of reciprocity and analyzed the voting records of the judges to see whether there was a basis for concern about bloc voting or systematic bias in the Court's decisions. Monroe Leigh wrote a paper on factors bearing on states' attitudes toward the Court and the confidence that states have in the Court; he also examined proposals for greater use of chambers of the Court, as has been done in the U.S.-Canadian Gulf of Maine case, and is expected to be done in the U.S.-Italian Raytheon dispute. Thomas Franck's paper reviewed the divergent--indeed schizophrenic--trends of messianism and chauvinism that have been seen in U.S. attitudes toward the Court.

In the next category of issues, we looked at the suitability of the Court for resolving certain kinds of disputes, including disputes involving the use of force, other disputes of a highly political character, and disputes that are under consideration by the Security Council or by other international bodies, such as the Organization of American States or the Contadora group. Four papers examined this problem from different points of view. Edward Gordon addressed the problem of "legal disputes" under article 36(2) of the Charter, asking to what extent the concept of "legal disputes" implied the exclusion of "political" disputes. Domingo Acevedo wrote on disputes under consideration by the Security Council or regional bodies, especially disputes involving the use of force. Eugene Rostow's paper considered the relationship of the jurisdiction of the Court to Security Council jurisdiction, especially where the national security interests of permanent members of the Security Council were involved, or where self-defense rights under article 51 of the Charter were implicated. Oscar Schachter's paper reviewed the cases in which the Court has ruled on use-of-force issues or has rendered judgment in circumstances of international conflict. Among these four papers, there was quite a range of views.

A third category of issues looked at the Court's ability to discharge the functions of a judicial institution. Concerning provisional measures, the United States had felt that it was inappropriate for provisional measures to be entered in the Nicaragua case. Bernard Oxman reviewed these problems in a paper on the jurisprudence of provisional measures, in which he considered the relationship of those problems to
the scope of the Court's jurisdiction. A paper on the Court's fact-finding capabilities, written by Keith Highet, looked at some of the concerns that have been raised by the United States about the perceived inability of the Court to deal with the facts in the Nicaragua case, because they were fast moving, elusive, controversial, or not readily susceptible to ascertainment through traditional judicial means. My own paper considered the Court's ability to deal with disputes involving more than one party, including the related issues of the Court's refusal to allow El Salvador to intervene at the jurisdictional phase of the proceedings, and the Court's insistence on proceeding to the merits even in the absence of allegedly indispensable parties. My paper also discussed the Vandenberg Reservation concerning disputes under multilateral treaties. Jonathan Charney's paper addressed the problem of defaults, and the larger problem of compliance with or defiance of the Court's judgments. Richard Bilder assessed the advantages and disadvantages of ICJ adjudication as opposed to other forms of international dispute resolution.

Finally, we looked at U.S. experiences with the Court and specific problems of the U.S. relationship to the Court under U.S. treaties and constitutional law. A paper by Anthony D'Amato and Mary Ellen O'Connell reviewed all the cases in which the United States has participated since its acceptance of the jurisdiction of the Court. Goler Butcher's paper supplemented that review with a close analysis of the Advisory Opinion cases in which the United States participated. Fred Morrison examined the question of acceptance by treaty, rather than by the optional clause. Acceptance by a compromissory clause in a treaty has some advantages for state policy, including increased certainty as to the potential parties, the scope of the issues, and the applicable law. Yet acceptance by treaty does not solve all the problems that the United States fears, because the Court in the Nicaragua case did find a separate treaty basis for jurisdiction in the Treaty of Friendship, Commerce and Navigation. Finally, Michael Glennon's paper focused on the constitutional issues involved in changing the terms of U.S. acceptance.

THE UNITED STATES AND THE WORLD COURT
by Abraham D. Sofaer [FN2]

I welcome this opportunity to discuss the background to the President's decision of October 7, 1985, terminating our acceptance of the compulsory jurisdiction of the International Court of Justice. This decision took effect on April 6, 1986, a few days 205 ago. I will discuss what the President's decision means in practical terms before turning to some of the reasons for it.

Jurisdiction of the Court. The ICJ has limited jurisdiction, based on its Statute and on the consent of states. Under article 36(1) of the Court's Statute, the ICJ has jurisdiction when states sign a special agreement referring a dispute to it or are parties to a treaty providing for ICJ dispute resolution. The President's action does not affect this basis for jurisdiction. Indeed, we have just agreed with Italy to submit an important dispute, involving millions of dollars, to the Court for adjudication. We also are party to some 60 treaties providing for adjudication of disputes by the ICJ.

The second basis for ICJ jurisdiction exists when a state accepts the Court's compulsory jurisdiction under article 36(2) of the Statute--the so-called optional clause. Historically, acceptance of compulsory jurisdiction has been less important as a basis for the Court's work than specific agreement between the
parties to a dispute.

A state accepts compulsory jurisdiction by depositing with the Secretary-General of the United Nations a declaration to the effect that it agrees to be sued by any state depositing a similar declaration. In return, the filing state may bring suit under compulsory jurisdiction against any other state filing such a declaration. Generally, a state has no way of knowing in advance by whom or on what issue a suit may be filed. A declaration covers any issue of international law, except to the extent that the state excludes specific disputes or categories of disputes. A state faced with a suit under compulsory jurisdiction may invoke any exclusion in its opponent's declaration to seek to defeat jurisdiction. It also may raise nonjurisdictional objections to the Court's taking the case. If the parties disagree over the scope of a declaration or its exclusions, the Court itself decides the issue.

Under the Court's Statute, a state is free to accept or to decline the Court's compulsory jurisdiction. A state accepting the Court's compulsory jurisdiction likewise is free to terminate or modify its acceptance whenever the state concerned believes that doing so would serve its interests. The President's action terminating our 1946 declaration, thus, is entirely consistent with our international legal obligations.

The President's action also is consistent with his domestic legal authority. Declarations under article 36(2) of the Statute are not treaties under either international law or the Constitution. Nevertheless, in 1946 the executive branch considered that congressional approval of the declaration was necessary for several reasons. Any such declaration necessarily entails an open-ended exposure to suit, including potential financial liability. In addition, Congress traditionally had been reluctant to allow the President to enter into compulsory third-party dispute settlement arrangements, as demonstrated by the fate of repeated executive efforts to have the United States accept the jurisdiction of the ICJ's predecessor, the Permanent Court of International Justice.

The termination of the 1946 declaration, on the other hand, does not expose the United States to new commitments or obligations. On the contrary, it reduces or eliminates that exposure. Furthermore, by its terms, the declaration authorizes termination on six months' notice, and our October 7 note is consistent with that condition. Finally, the Constitution allows the President unilaterally to terminate treaties consistent with their terms, and his authority is even clearer with respect to lesser instruments such as the 1946 declaration.

Reasons for U.S. Review. Our experience in the case instituted against the United States by Nicaragua in April 1984 provided the chief motivation for the administration's review of our acceptance of the Court's compulsory jurisdiction. The principal basis of jurisdiction cited by Nicaragua in bringing that case was the 1946 U.S. declaration accepting compulsory jurisdiction. We believed at the time, and still believe, that Nicaragua itself never had accepted the Court's compulsory jurisdiction validly. More important, Nicaragua sought to bring before the Court political and security disputes that were never previously considered within the Court's mandate. In our view, the Court's decision last November that Nicaragua had, indeed, accepted compulsory jurisdiction and that Nicaragua's claims were justiciable could not be supported as a matter of law. These considerations led the President to decide last January that we would no longer participate in the case.
The Court's decision also caused us to undertake a thorough evaluation of our 1946 declaration and its place in the system of compulsory jurisdiction established by article 36(2) of the Court's Statute. That we were evaluating these questions was well known. The issues at stake were considered and debated in government and private groups interested in this question. All the relevant points were carefully considered.

We recognized, first of all, that the hopes originally placed in compulsory jurisdiction by the architects of the Court's Statute have never been realized and will not be realized in the foreseeable future. We had hoped that widespread acceptance of compulsory jurisdiction and its successful employment in actual cases would increase confidence in judicial settlement of international disputes and, thus, eventually lead to its universal acceptance.

Experience has dashed these hopes. Only 47 of the 162 states entitled to accept the Court's compulsory jurisdiction now do so. This number represents a proportion of states that is substantially lower than in the late 1940s. The United Kingdom is the only other permanent member of the U.N. Security Council that accepts compulsory jurisdiction in any form. Neither the Soviet Union nor any other Soviet-bloc state has ever accepted compulsory jurisdiction. Many of our closest friends and allies--such as France, Italy and the Federal Republic of Germany--do not accept compulsory jurisdiction. Moreover, a substantial number of the states accepting compulsory jurisdiction have attached reservations that deprive it of much of its meaning. The United Kingdom, for example, retains the power to decline to accept the Court's jurisdiction in any dispute at any time before a case is actually filed.

Compulsory jurisdiction cases have not been the principal part of the Court's overall jurisprudence. Of some 50 contentious cases between 1946 and the end of 1983, 22 were based on the Court's compulsory jurisdiction, of which only 5 resulted in final judgment on the merits. The last case decided under the Court's compulsory jurisdiction, the Temple of Preah Vihear affair, was completed in 1962. In the remaining 17 cases, objections to the Court's jurisdiction were sustained in 13; 4 were dismissed on other grounds.

Another consideration we weighed is the fact that, although we have tried seven times, we have never been able to bring a state before the Court successfully. We have been barred from achieving this result not only by the fact that few other states accept compulsory jurisdiction but also by the principle of reciprocity as applied to our 1946 declaration. That principle allows a respondent state to invoke any reservation in the applicant state's declaration to seek to defeat the Court's jurisdiction. Thus, respondent states may invoke reservations in our 1946 declaration against us. The so-called Connally reservation in our 1946 declaration provides that the United States does not accept compulsory jurisdiction over any dispute involving matters essentially within the domestic jurisdiction of the United States, as determined by the United States. In other words, we reserve to ourselves the power to determine whether the Court has jurisdiction over us in a particular case. Any state we sue may avail itself of that power on a reciprocal basis to defeat jurisdiction.
This is, in fact, precisely what happened when we tried to sue Bulgaria in 1957 on claims arising out of the loss of American lives and property when Bulgaria shot down an unarmed civilian airliner that had strayed into its airspace. Bulgaria claimed that the Court had no jurisdiction because the matter in dispute was within Bulgarian domestic jurisdiction as determined by Bulgaria. Even though we had pledged never to invoke our Connally reservation in bad faith to cover a manifestly international dispute, we were compelled to acknowledge that its invocation in any case would be binding as a matter of law. Hence, Bulgaria's reciprocal invocation of the Connally reservation forced us to discontinue the case.

On a more general level, other countries, the international legal community, and, indeed, the executive branch have severely criticized the "self-judging" nature of the Connally reservation. Some commentators even argue that the Connally reservation made the 1946 declaration a legal nullity because of its wholly unilateral and potentially limitless character. Certainly, that reservation has undercut the example the United States attempted to set for other countries by its acceptance of compulsory jurisdiction.

For these reasons we have never been able to bring another state before the Court on the basis of our acceptance of compulsory jurisdiction successfully. On the other hand, we have been sued under it three times; by France in the Rights of Nationals of the United States in Morocco case in 1950-52; by Switzerland in the Interhandel case in 1957-59; and, finally by Nicaragua in 1985.

The terms of our acceptance of compulsory jurisdiction contain an additional weakness. Nothing in it prevents another state from depositing an acceptance of compulsory jurisdiction solely for the purpose of bringing suit against the United States and, thereafter, withdrawing its acceptance to avoid being sued by anyone in any other matter. Students of the Court long have recognized that this "sitting duck" or "hit-and-run" problem is one of the principal disadvantages to the system of compulsory jurisdiction under article 36(2). It places the minority of states that have accepted compulsory jurisdiction at the mercy of the majority that have not.

The Court's composition also is a source of institutional weakness. At present, 9 of 15 judges come from states that do not accept compulsory jurisdiction; most of these states have never used the Court at all. Judges are elected by the General Assembly and Security Council, frequently after intense electioneering. One reasonably may expect at least some judges to be sensitive to the impact of their decisions on their standing with the U.N. majority. Whereas in 1945 the United Nations had 51 members, most of which were aligned with the United States and shared its views regarding world order, there are now 160 members. A great many of these cannot be counted on to share our view of the original constitutional conception of the U.N. Charter, particularly with regard to the special position of the permanent members of the Security Council in the maintenance of international peace and security. This same majority often opposes the United States on important international questions.

The Nicaragua Case. None of the weaknesses deriving from the Court's composition and our 1946 declaration is new. We have hitherto endured them on the assumption that the respect states owed to the Court and the Court's own scrupulous adherence to its judicial role would insulate us from abuses of the Court's process for political or propaganda ends. The Nicaragua case showed that it would be
unrealistic to continue to rely on that assumption.

Several aspects of the Court's decisions in the Nicaragua case were disturbing. First, the Court departed from its traditionally cautious approach to finding jurisdiction. It disregarded fundamental defects in Nicaragua's claim to have accepted compulsory *jurisdiction. This question involves more than a legal technicality. It goes to the heart of the Court's jurisdiction, which is the consent of states. International law—in particular, the Court's own Statute—establishes precise rules that states must follow in order to manifest that consent. The purpose of such technical rules is to ensure that a state's consent is genuine and that all other states are given objective notice of this consent. Nicaragua never complied with those rules, and the historical evidence makes clear that its failure to do so was deliberate and designed to ensure that Nicaragua could never be sued successfully under article 36(2). A majority of the Court, on the other hand, was prepared to discover an exception to those rules that allowed Nicaragua to bring suit, an exception that is inconsistent with the Court's prior jurisprudence on the subject. The result-oriented illogic of the majority's position was vigorously exposed in the opinions of the dissenting judges.

Furthermore, the Court engaged in unprecedented procedural actions—such as rejecting without even a hearing El Salvador's application to intervene as of right—that betrayed a predisposition to find that it had jurisdiction and that Nicaragua's claims were justiciable, regardless of the overwhelming legal case to the contrary. In the particular case of the Salvadoran intervention, the Court ignored article 63 of the Statute, which deprives the Court of discretion to reject such interventions. The Court sought to cover itself by holding out the possibility of accepting the Salvadoran intervention at the merits stage, at which point Salvadoran objections to the Court's jurisdiction and the justiciability of Nicaraguan's claims would be too late.

Even more disturbing, for the first time in its history, the Court sought to assert jurisdiction over a controversy concerning claims related to an ongoing use of armed force. This action concerns every state. It is inconsistent with the structure of the U.N. system. The only prior case involving use-of-force issues—the Corfu Channel case—went to the Court after the disputed actions had ceased and the Security Council had determined that the matter was suitable for judicial consideration. In the Nicaragua case, the Court rejected without a soundly reasoned explanation our arguments that claims of the sort made by Nicaragua were intended by the U.N. Charter exclusively for resolution by political mechanisms—in particular, the Security Council and the Contadora process—and that claims to the exercise of the inherent right of individual and collective self-defense were excluded by article 51 of the Charter from review by the Court.

I cannot predict whether the Court's approach to these fundamental Charter issues in the jurisdictional phase of the Nicaragua case will be followed in the Court's judgment on the merits. Nevertheless, the record gives us little reason for confidence. It shows a Court majority apparently prepared to act in ways profoundly inconsistent with the structure of the Charter and the Court's place in that structure. The Charter gives to the Security Council—not the Court—the responsibility for evaluating and resolving claims concerning the use of armed force and claims of self-defense under article 51. With regard to the situation in Central America, the Security Council exercised its responsibility by endorsing the
Contadora process as the appropriate mechanism for resolving the interlocking political, security, economic and other concerns of the region.

Implications for U.S. National Security. The fact that the ICJ indicated it would hear and decide claims about the ongoing use of force made acceptance of the Court's compulsory jurisdiction an issue of strategic significance. Despite our deep reluctance to do so and the many domestic constraints that apply, we must be able to use force in our self-defense and in the defense of our friends and allies. We are a law-abiding nation, and when we submit ourselves to adjudication of a subject, we regard ourselves as obliged to abide by the result. For the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense, therefore, is effectively to surrender to that body the power to pass on our efforts to guarantee the safety and security of this nation and of its allies.

This development particularly concerned us as a matter of principle and for reasons bearing directly on the capacity of the ICJ to reach sound, correct decisions on use-of-force issues and to enforce principles it eventually may articulate on our Communist adversaries. The Court has no expertise in finding facts about ongoing hostilities or any other activities occurring in areas such as Central America. Based on my years as a trial judge and considerable experience with complicated cases, I doubt that the 16 judges sitting in the Nicaragua case may resolve the evidentiary problems presented reliably. The ICJ is similar to an appellate court, more at home with abstract legal questions than with competing factual claims. Moreover, the Court's rejection of El Salvador's application to intervene deprived it of that nation's indispensable contribution to a true picture of the situation in Central America, a contribution that goes to the heart of our legal position.

Even if the Court were inclined to allow participation by all necessary parties, it has no power to compel that participation. We have, for example, no doubt that Cuba, and quite probably the Soviet Union, help Nicaragua's efforts to subvert the democratic regime in El Salvador as well as to undertake unlawful acts against Costa Rica and Honduras. But, in view of their consistent refusal to submit to the Court's jurisdiction in any other matter, neither Cuba nor the Soviet Union can be expected to join in the proceedings, and the Court cannot compel them to do so. These facts render even more questionable the capacity of the Court to determine the facts concerning Nicaragua's aggressive acts.

The Court's lack of jurisdiction over Soviet-bloc nations, especially the Soviet Union, also has long-term significance for the strategic acceptability of ICJ review of self-defense issues. The Soviets have long advanced the view--by the Brezhnev doctrine and otherwise, and by their actions in places like Czechoslovakia and Afghanistan--that force is acceptable in order to keep a nation in the Socialist orbit or to promote a Socialist revolution, but have not hesitated to condemn responsive uses of force as violating the U.N. Charter.

We reject this view. We believe that, when a nation asserts a right to use force illegally and acts on that assertion, other affected nations have the right to counter such illegal activities. The United States cannot rely on the ICJ to decide such questions properly and fairly. Indeed, no state can do so. If we acquiesce in this claimed authority, we would be bound by the Court's decisions that limited our ability to confront
Soviet expansionism, even though the Soviets could and would do as they pleased. That most of the Court's judges come from nations that do not submit to its jurisdiction, including Soviet-bloc nations and other states that routinely support that bloc, is of special concern on these fundamental issues.

I hope that distinguished groups, such as the American Society of International Law, will weigh carefully the national security implications of accepting the Court as a forum for resolving use-of-force questions. For example, would the Court be the proper forum for resolving the disputes that gave rise to such actions as the Berlin airlift, the Cuban missile crisis and, most recently, our diversion of the Achille Lauro terrorists?

At the same time, however, at stake on each occasion were interests of a fundamentally political nature, going to our nation's security. Such matters cannot be left for resolution by judicial means, let alone by a court such as the ICJ; rather, they are the *210 ultimate responsibilities assigned by our Constitution to the President and Congress. We did not consider such issues to be subject to review by the ICJ at the time we accepted the Court's compulsory jurisdiction, and we do not consider them to be encompassed by that acceptance now. The Court's apparent willingness to construe our declaration otherwise left us with no prudent alternative but to terminate that aspect of our use of its facilities.

We carefully considered modifying our 1946 declaration as an alternative to its termination, but we concluded that modification would not meet our concerns. No limiting language that we could draft would prevent the Court from asserting jurisdiction if it wanted to take a particular case, as the Court's treatment of our multilateral treaty reservation in the Nicaragua case demonstrates. That reservation excludes disputes arising under a multilateral treaty unless all treaty partners affected by the Court's decision are before the Court. Despite Nicaragua's own written and oral pleadings before the Court—which expressly implicated El Salvador, Honduras and Costa Rica in the alleged violations of the Charters of the United Nations and the Organization of American States, and prayed for a termination of U.S. assistance to them-- and despite statements received directly from those countries, a majority of the Court refused to recognize that those countries would be affected by its decision and refused to give effect to the reservation. Furthermore, merely having filed a declaration is enough for the Court to indicate provisional measures against the filing party, whether or not the Court later found it had jurisdiction under the declaration. Finally, the 1946 declaration expressly provides only for its termination, and we would not wish to have the legality or effectiveness of any lesser step open to question.

Conclusion. Looked at from the standpoint of the reality of compulsory jurisdiction today, the decision to terminate our 1946 acceptance was a regrettable but necessary measure taken in order to safeguard U.S. interests. It does not signify a lessening of our traditionally strong support for the Court in the exercise of its proper functions, much less a diminution of our commitment to international law. We remain prepared to use the Court for the resolution of international disputes whenever possible and appropriate.

We recognize that this nation has a special obligation to support the ICJ and all other institutions that advance the rule of law in a world full of terror and disorder. Our belief in this obligation is what led us
to set an example by accepting the Court's compulsory jurisdiction in 1946 and by continuing that acceptance long after it became clear that the world would not follow suit and that our acceptance failed to advance our interests in any tangible manner.

Yet, the President also is responsible to the American people and to Congress to avoid potential threats to our national security. The ICJ's decisions in the Nicaragua case created real and important additional considerations that made the continued acceptance of compulsory jurisdiction unwise, despite its symbolic significance. We hope that, in the long run, this action, coupled with our submission of disputes under article 36(1), will strengthen the Court in the performance of its proper role in the international system established by the U.N. Charter and the Court's own Statute.

REMARKS BY OSCAR SCHACHTER [FNa3]

In my view, the United States was gravely mistaken in withdrawing from the Nicaragua case when the Court ruled against it on the jurisdiction issues. That withdrawal not only prevented the United States from presenting its own case fully to the Court, *211 but it raised the more profound and disturbing question of its commitment to abide by the legal principles on the use of force.

To be sure, the United States has continued to maintain that it adheres to the Charter principles. The administration has not followed the advice of some of its more militant supporters that it declare openly that it will use force in its interest regardless of international law. It has on the whole sought to justify its use of force on legal grounds. And, of course, it has criticized the Soviet Union and radical Third World states for their unlawful use of armed force. At least in these respects it recognizes the value of legal restraints on the use of force, and it has hesitated to assert that violations by others have nullified the principle.

However, the position taken in respect to the Nicaragua case comes dangerously close to a rejection of the binding character of the principles on force. It does so because among the various arguments on jurisdiction and admissibility is the contention that the inherent right of a state to self-defense is a matter for determination by that state alone. Judge Sofaer, in his Senate testimony on the U.S. withdrawal, said that for the United States to recognize that the ICJ has authority to adjudicate a U.S. claim of self-defense is "to surrender to the Court the right to pass on efforts to protect American security." He did not go on to make the further point that if each state is entirely free to determine for itself whether and to what extent it may use force in self-defense, the legal restraint on force virtually vanishes. A state certainly has a right to decide in the first instance that self-defense is necessary to meet an attack or an imminent threat of attack. But it makes a sham of law to allow an entity claiming a legal right to have the last word on the lawfulness of its exercise.

The position in international law in this regard is not substantially different from the criminal law on self-defense. A threatened or attacked victim has the right to use reasonably proportionate force in self-defense, but such use is subject to legal limits and evaluation. To deny this is tantamount to allowing each individual to decide for himself when he may have recourse to force. International law rejects this just as criminal law does. Supporters of the administration position seek to meet this point by referring
to the authority of the Security Council under article 51. That article requires that the Security Council be informed of self-defense measures. It goes on to say that such measures may continue until the Council has taken action necessary to maintain peace and security. The conclusion is then drawn that the Security Council alone has been delegated the responsibility to evaluate and resolve claims of self-defense under article 51.

We know that a state which can exercise the veto in the Council (or is protected by another state's veto) is able to prevent any adverse decision by the Council. But does it follow that such protected states are legally entitled to use force irrespective of the Charter rules? It is astonishing that some American international lawyers now advance the contention that the veto in the Council--a political act to prevent Council action--should have the effect of legitimating a questionable use of force and preventing a party to a dispute from seeking a judicial determination of its rights against a state that had consented to the Court's jurisdiction.

The Court rightly found no basis in the Charter for concluding that the responsibility delegated to the Security Council excludes the Court from passing on a legal claim when jurisdiction has been conferred on it. The Court recognized that its decision on the legal issue cannot preclude the Council from taking action to maintain peace in any way authorized by the Charter. But as the Council is not a judicial body and its decisions are made on political grounds, neither action by the Council nor its nonaction can provide a definitive determination of the legal issue.

*212 Whether the Court was right to find jurisdiction can be debated. Some arcane and complicated issues were involved. It is well to remember that 15 judges (all but Judge Schwebel) found one or more grounds of jurisdiction. Much of the criticism of the Court has cited the fact that four respected judges from Western Europe and Japan, along with Judge Schwebel, disagreed with the 11-member majority on a major issue--namely, whether the Nicaraguan acceptance of jurisdiction made in 1929 and apparently never ratified could be considered to be "in force" in 1945, and therefore rendered effective under article 36(5) of the Statute. On this very narrow point of statutory interpretation (complicated by a different French version), both sides presented plausible arguments. Even if one disagrees with the majority on that issue, it cannot be said that their reasoning was patently unsound or their conclusions arbitrary. To charge that most of the highly respected judges who supported that position were anti-American is absurd. They include judges who were nominated by the United States and nearly all of them received U.S. support when they were elected. Moreover, it is somewhat ironic that the United States emphasized a highly technical point to try to overcome Nicaragua's willingness to accept compulsory jurisdiction when the United States had for so many years urged all states to do just that, and criticized the Soviet bloc and Third World states for not accepting jurisdiction under article 36(2). The technical argument by the United States understandably left the impression in many quarters that its case was too weak on the merits to withstand judicial scrutiny.

Our chairman today, John Stevenson, has suggested a more substantial argument--namely, that the United States could not have envisaged the kind of case brought by Nicaragua as a "legal dispute" within the meaning of article 36(2). One can readily agree that in 1946, Americans did not think they would be accused of unlawful military intervention before the World Court.
But, that is not the relevant issue. It is, rather, whether we can assume that there was an unstated understanding on the part of the U.S. officials concerned that a situation involving use of force was for that reason excluded from the category of "legal dispute." I find it hard to reach that conclusion in the light of the following facts.

In 1946, at the very time the United States accepted compulsory jurisdiction, the international court at Nuremberg was adjudicating issues involving aggression and self-defense. These matters were dealt with as legal issues--and at least in the United States, if not elsewhere, it was widely believed at the time that charges of aggression could and should be passed upon by an international legal tribunal. This view was not just a momentary idealistic sentiment. It was in line with the attitude expressed in earlier decades by the main advocates of U.S. participation in a world court--by men such as Elihu Root, who particularly argued for an international court to deal with aggression, on the same principle as in domestic criminal law. This may have been unduly idealistic, but it shows that cases involving armed force were perceived as appropriate for judicial determination.

It is also pertinent that the United States sought to have the Court pass upon the lawfulness of armed acts by bringing cases against the Soviet Union, Czechoslovakia and Hungary for shooting down American planes. I recall also at the time of one of the periodic crises over Berlin involving threat of force, Richard Nixon proposed that the issues be submitted to the International Court. This was probably disingenuous, but it is evidence that some high officials thought such issues could be dealt with as legal disputes. Moreover, when President Eisenhower proposed to the Senate that the Connally Amendment be dropped, neither he nor his Secretary of State said that the Court could not deal with the legality of uses of force. In fact, the record shows that they thought law did apply to uses of force. They affirmed that in 1956 when they condemned as unlawful the allied military attack against Egypt.

These facts show that it cannot be assumed that the United States regarded disputes involving the use of force as necessarily "nonlegal" and therefore implicitly excluded from the acceptance of compulsory jurisdiction. There were certainly enough situations where the possibility of the Court dealing with acts of force had arisen. If any inference can be drawn, it is that the United States considered the Court as an appropriate forum for many such cases.

These comments do not mean that I myself share the view that the Court should adjudicate complicated conflicts between states. I had reservations about this in the 1950s, and I still believe that it is illusory to place on the Court the burden of coping with a complex conflict of interests. However, it seems to me that there are situations in which a legal issue involving hostilities can be appropriately decided by the Court, and I can conceive of situations in which the United States would serve its interest by agreeing to jurisdiction for those cases.

Judge Sofaer is quite right in observing that it may be difficult for the Court to obtain the facts necessary to assess Nicaragua's charges and the U.S. affirmative defense. But this difficulty has been greatly compounded by the nonappearance of the United States and by El Salvador's absence in the
merit stage. (The Court was wrong to deny El Salvador's intervention at the jurisdictional stage, but it
did indicate that it would consider intervention in the later stage. El Salvador did not choose to
intervene, even though it was probably in the best position to introduce the facts on the Nicaraguan
support of the guerrillas in El Salvador.)

At this time, we cannot say whether the Court will be able to satisfy itself on whether or not the facts
support Nicaragua's claims. The burden of proof is on Nicaragua; a default judgment is not permitted.
The Court may hear witnesses, and perhaps more importantly, it may take judicial notice of the many
statements and reports by officials of the disputing states. The public record includes such statements on
both sides that can be regarded as admissions against interest and therefore credible evidence. In short,
no a priori judgment can be made that the facts cannot be determined concerning many of the factual
issues raised. The U.S. contention is therefore less than persuasive.

We must not forget that the United States agreed in 1945 when it adhered to the Charter and the
Statute of the Court that "in the event of a dispute as to whether the Court has jurisdiction, the matter
shall be settled by decision of the Court." Can the United States now disregard this clear provision in a
case where 15 of the Court's judges have ruled that the Court has jurisdiction, and where 11 judges
have held that jurisdiction exists in respect of the acceptance under article 36(2)? It is hardly credible to
claim now that such elaborately detailed and considered decisions are so utterly lacking in their reasons
and grounds that the clear language of article 36(6) can be ignored.

Finally, I return to the main point. The United States cannot demand or expect other states to adhere
to the law when it itself rejects the obligations it has assumed in the Charter and the Statute. It cannot
take the position that its own self-serving interpretation of its obligations are final and definitive without
making a mockery of the law. This is not a minor matter to international lawyers, even if it is slighted by
journalists and self-proclaimed political realists. The question goes to the heart of our commitment to a
legal order. We would be derelict in our responsibility if we did not support efforts to bring the United
States once again to its historic position in support 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 [FNa4]

At the outset I have to take exception with a point made by Judge Abraham Sofaer. Judge Soafer
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 Soafer 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 *215 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 *216 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, *217 we have the enormous international law of human rights that focuses upon persons and groups. We need to extend the human rights revolution into the halls of the Peace Palace.

We need to give a lot more thought to the independence of the judges. Perhaps the first question we should ask is: can we imagine any judge voting in such a way as to contradict directly an important
policy of his (or her) home government? I'm not saying that there was never such an instance. But I ask the question whether we are at all comfortable in thinking that a typical judge has the independence of spirit and international-mindedness to vote directly contrary to the policy of his own country. And if our answer is negative, then what procedures and safeguards can we build into the recruitment, selection, and retention of judges that could afford realistic insulation from their home country's political desires?

Can we write a program that includes life tenure, substantial salaries, moving a judge's entire family and relatives and friends (those, of course, who want to go) to The Hague, selection by merit and not by log-rolling nationality criteria, and other utopian ideals? Some people immediately boggle at the millions of dollars it would take to increase judicial salaries and to move family and friends to The Hague, and yet those same people do not blink at the expenditure of trillions of dollars to build and bury intercontinental ballistic missiles.

I want to expand just a little on the idea of merit appointments. World Court judges ought to be learned in international law. Often they are not. Often they have "practiced" international law, which means that they, like many attorneys, have worked on cases involving foreign countries. But truly being steeped in international legal scholarship is something quite different. It involves shaping a frame of mind that Professor McDougal and others have talked about-- developing the ability to see things from the other nation's point of view as well as from your own nation's, and then further refining that mental attitude to synthesize a new, objective point of view that transcends particularistic national myopia.

What I propose, in short, is first figuring out what we want before we either resign ourselves to what we have or lash out in all directions at once in various reform movements. Maybe we want to tinker with the World Court's Statute instead of working to get a new one, but until we have a vision of our own ideal statute we should do neither. I think the American Society of International Law, now that it has finished a study of the existing International Court of Justice, ought to do a further study on what we would want an ideal World Court to be.

DISCUSSION

RICHARD B. BILDER: [FNa6] I noted in Judge Sofaer's statement that much of the government's position in the Nicaragua case seemed to rest on an assumption that there was a certain predisposition on the part of the Court. Beyond that case, is there anything that the State Department has uncovered which would indicate that this is a constant problem, or will be a continuing problem with the Court? In particular, how would you justify your attitude toward the Court's predisposition in the Nicaragua case with the favorable ruling in the Iran Hostages case?

Judge SOFAER: In the Hostages case, once the Court rendered its decision, nothing happened. The United States then attempted to free its hostages, and the next time the Court had an opportunity to comment it went out of its way to criticize the United 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: [FNa7] 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: [FNaa2] 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 government 219 to avoid interfering with them.
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: [FNa8] 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 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: [FN19] 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 make 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 *221 one of the most important questions confronting us today. The Court has its destiny in its hands.

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