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LECTURE

THE BRENDAN BROWN LECTURE* THE UNITED STATES AND THE WORLD COURT IN THE POST-"COLD WAR" ERA

*Richard B. Bilder***

In the wake of the decision of the International Court of Justice against the United States about five years ago in the *Nicaragua* case,¹ the Reagan Administration adopted a critical stance towards the Court—an attitude which the Bush Administration has thus far maintained.² I would like to discuss whether, in the post-"cold war" world in which we are now living, a continuation of this policy makes sense and is in the national interest.

* This Article is adapted from a lecture delivered on October 12, 1990, at the Columbus School of Law, The Catholic University of America, as part of the Brendan Brown Lecture Series. The Lecture Series honors Dr. Brendan Brown, the sixth dean of the Columbus School of Law (1942-54).

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The lecture is reprinted with minor changes made to accommodate the different form. Footnotes were added where the Law Review staff deemed them essential.

For more comprehensive discussion by the author of various topics discussed in this lecture, see Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DISPUTE RESOLUTION 1 (1986); Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISPUTE RESOLUTION 131 (1987); Bilder, *International Third Party Dispute Settlement*, 17 DEN. J. INT'L L. & POL. 471 (1989); Bilder, *Judicial Procedures Relating to the Use of Force*, 31 VA. J. INT'L L. (forthcoming 1991).

1. Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14 (Judgment of June 27).

2. See, e.g., *U.S. Decision to Withdraw from the International Court of Justice: Hearings Before the Subcomm. on Human Rights and International Organizations of the Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 1 (1985); U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL. 67 (Jan. 1986) (Department Statement, Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985); U.S. Dep't of State, *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ*, 85 DEP'T ST. BULL. 64 (Mar. 1985) (Department Statement, Jan. 18, 1985), reprinted in 24 I.L.M. 246 (1985); Sofaer, *Adjudication in the International Court of Justice: Progress Through Realism*, 44 REC. A.B. CITY N.Y. 462 (June 1989).

I. BACKGROUND: THE INTERNATIONAL COURT OF JUSTICE

Let me first briefly describe the International Court of Justice—or “World Court”—and how it works. The World Court, established by the United Nations Charter as an organ of the United Nations, is governed by a special treaty called the “Statute of the Court,” which is annexed to the United Nations Charter and to which all members of the United Nations are parties.³ The Court consists of fifteen judges from different countries, elected by the United Nations General Assembly and Security Council for staggered terms of nine years each. The Court sits in a building called the Peace Palace in The Hague, the Netherlands. The judges are, of course, supposed to act impartially and decide cases according to the rules of international law.

While the Court has some authority to give advisory opinions, its primary function is to decide disputes between states. The catch is that the Court, like all international arbitral or judicial bodies, can hear and decide disputes only when the states involved consent to its jurisdiction; unlike the mandatory jurisdiction which national courts exercise, the World Court has no automatic compulsory jurisdiction. Before the World Court can hear and decide a case, it must specifically find that all states before it have agreed to the Court’s exercise of jurisdiction.⁴

States may consent to the World Court’s jurisdiction in several ways. First, they may reach a special agreement providing for the Court to decide a particular dispute, as the United States and Canada did in the *Gulf of Maine* maritime boundary case.⁵ Second, they may agree in advance, through a “compromissory clause” in a particular treaty, to let the Court decide disputes involving that treaty; the United States persuaded the Court to assert jurisdiction over Iran in the *Tehran Hostages* case on this basis.⁶ Finally, under the provisions of the “optional clause” of article 36(2) of the Court’s statute, any state that wishes to do so may, by filing a declaration in advance, give the Court “compulsory jurisdiction” to decide its disputes with any other nation that also has made such a declaration.⁷ Such parallel declarations were involved in the *Nicaragua* case.

3. Statute of the International Court of Justice, June 26, 1945, art. 1, 59 Stat. 1055, T.S. No. 993.

4. *Id.* art. 36(2).

5. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12).

6. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24).

7. Statute of the International Court of Justice, June 26, 1945, art. 36(2), 59 Stat. 1055, 1060, T.S. No. 993.

The United States pioneered the idea of international adjudication as early as the Jay Treaty of 1794 with the United Kingdom, which established several arbitral tribunals.⁸ Nevertheless, the United States has, over the years, shown a remarkable ambivalence towards international adjudication. As Professor Tom Franck noted, United States policy has veered between "messianism," fired by a Utopian belief that the United States could lead states into accepting the world rule of law, and "chauvinism," reflecting the United States' countertendency towards "realpolitik" and its distrustful and skeptical view of other states and international involvement.⁹ Thus, in 1946, under President Harry S. Truman, the United States filed a declaration accepting the court's compulsory jurisdiction under the "optional clause," but did so with very broad reservations which some regarded as virtually nullifying our acceptance.¹⁰ Prior to the *Nicaragua* case, the United States was involved as both plaintiff and defendant in several other cases before the Court. The most important of these cases was the United States' suit against Iran in the 1980 *Tehran Hostages* case, in which the court ruled for the United States.

II. THE NICARAGUA CASE

Let me now briefly describe the history of the *Nicaragua* case. In April 1984, Nicaragua brought a case against the United States in the World Court charging that United States' support of the *contras*, as well as a number of other acts including the mining of Nicaraguan harbors, violated United States' international legal obligations under the United Nations and Organization of American States charters, a bilateral commercial treaty between the United States and Nicaragua, and customary international law. Nicaragua claimed that the court had jurisdiction over the case both because the United States and Nicaragua had filed declarations accepting the court's jurisdiction under the "optional clause," and because a United States-Nicaragua commercial treaty still in force had a "compromissory clause" vesting the court with jurisdiction over disputes involving the treaty. The United States argued that the court lacked jurisdiction for a variety of reasons, including (1) the fact that, several days before Nicaragua filed the suit, the

8. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 108.

9. See Franck & Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 3 (L.F. Damrosch ed. 1987).

10. Declaration by the President of the U.S. Aug. 14, 1946 respecting recognition by the U.S. of the compulsory jurisdiction of the Int'l Court of Justice, Aug. 26, 1946, 61 Stat. 1218, T.I.A.S. No. 1598.

United States had amended its article 36(2) declaration to exclude specifically "Central American" issues, (2) the legal invalidity of Nicaragua's declaration granting article 36(2) jurisdiction, and (3) the existence of certain reservations to the United States' declaration that the United States believed excluded the Court's taking the case. Interestingly, the United States also argued that a dispute involving an ongoing military conflict was not "justiciable" by the Court because the United Nations Charter vested authority over such questions exclusively in the Security Council, and because the case involved issues such as claims of self-defense and evidentiary questions that were inherently beyond the capacity of an international court to resolve. Despite the United States' arguments, the Court held, by a substantial majority, that it had jurisdiction and that the matter was admissible and appropriate for judicial consideration.¹¹

The United States State Department strongly protested the Court's jurisdictional decision. The Reagan Administration was so outraged that it announced that the United States would not participate further in the case and, in particular, that it would not appear in the proceedings on the merits.¹² Among other things, the United States charged that the Court's decision was clearly incorrect and lacked legal basis, that the decision exceeded the Court's appropriate authority, and that the Court was politically influenced and biased. Moreover, the Reagan Administration indicated that, as a consequence of the case, it was reviewing the 1946 United States Truman Declaration accepting the compulsory jurisdiction of the Court under article 36(2) of the Court's statute. As a result of this review, on October 7, 1985, the State Department announced that the United States had terminated its Declaration submitting to the compulsory jurisdiction of the court under article 36(2).¹³

Despite the United States' nonappearance in the final phase of the case, the court, pursuant to its Statute, proceeded to a hearing on the merits. On June 27, 1986, the Court issued its judgment on the merits, finding that United States support of the *contras*, as well as certain other actions against

11. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 442 (Judgment of Nov. 26 concerning Jurisdiction of the Court and Admissibility of the Application).

12. See U.S. Dep't of State, *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ*, 85 DEP'T ST. BULL. 64 (Mar. 1985) (Department Statement, Jan. 18, 1985), reprinted in 24 I.L.M. 246 (1985).

13. See U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL. 67 (Jan. 1986) (Department Statement, Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985).

Nicaragua, such as the mining of its harbors, violated international law.¹⁴ The Court withheld, for further determination, the amount of damages to be awarded.

Under the United Nations Charter and Statute of the Court, the United States appeared obligated to comply with the judgment. Nevertheless, the Reagan Administration, vetoing a Security Council resolution calling upon it to comply, indicated that it did not intend to recognize the decision.¹⁵

Currently, the status of the case is more or less unchanged. Nicaragua's claim for more than two billion dollars in damages is still pending before the court, but Nicaragua has asked for a postponement of further proceedings in this respect. The United States has reportedly put considerable pressure on the new Chamorro Administration in Nicaragua to completely withdraw the case from the court, but President Chamorro risks substantial internal political criticism if she decides to do so.¹⁶ My guess is that, ultimately, the United States and Nicaragua will achieve some kind of settlement in which, as part of an overall bargain that may include substantial economic assistance, Nicaragua will withdraw the case. Such a solution would draw on the precedent of the United States-Iran experience in which the United States, as part of the settlement reflected in the Algiers Accords, withdrew the *Tehran Hostages* case, removing from Iran the obloquy of failing to comply with the Court's judgment.¹⁷

Neither the Reagan nor, as yet, the Bush Administration has indicated any interest in a possible United States reacceptance of the compulsory jurisdiction of the Court under article 36(2) even, as many international lawyers have urged, with broad reservations that would seem amply to protect United States interests.

III. THE RECENT WORK OF THE WORLD COURT

One of the most interesting developments in the last several years is that, despite dire United States predictions that the *Nicaragua* decision would broadly discredit the World Court and so discourage states from submitting cases as to virtually end its usefulness, the Court has never been busier. The

14. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 146-50 (Judgment of June 24).

15. *United Nations Security Council: Excerpts from Verbatim Discussing I.C.J. Judgment in Nicaragua v. United States*, 25 I.L.M. 1337, 1352, U.N. Doc. 5/18250 (1986); see *World Court Supports Nicaragua After U.S. Rejected Judges' Role*, N.Y. Times, June 28, 1986, at A1, col. 2; *U.S. Voters Rebuke on Aid to Contras*, N.Y. Times, Aug. 1, 1986, at A3, col. 1.

16. *U.S. Urges Nicaragua to Forgive Legal Claim*, N.Y. Times, Sept. 30, 1990, at A18, col. 1.

17. *Declaration of the Government of the Democratic and Popular Republic of Algeria*, 20 I.L.M. 224, 227 (1981).

court now has some eight cases on its calendar and recently finished dealing with several other cases and advisory opinions, including the right of the United States to close the Palestine Liberation Organization's office in New York.¹⁸ The cases now pending include a dispute between Norway and Denmark concerning ocean boundaries in the Northern Ocean between Greenland and Jan Mayen Island,¹⁹ a dispute between Honduras and El Salvador concerning boundaries in the Gulf of Fonseca (in which the Court has just allowed Nicaragua to intervene),²⁰ a dispute between Nauru and Australia concerning the exploitation and removal of resources from the island while under Australian administration,²¹ a recently filed and important territorial dispute between Libya and Chad,²² a dispute between Guinea-Bissau and Senegal concerning an arbitral award,²³ and a case filed by Iran against the United States for the downing of IranAir Flight 655 in the Persian Gulf by the U.S.S. Vincennes during the Iran-Iraq war.²⁴

Another interesting development is that many of the cases recently before the court have been submitted, as permitted by the Court's rules, to special panels of five judges agreed upon by the parties. The 1984 United States-Canada *Gulf of Maine* case,²⁵ the 1985 Burkina Faso-Mali *Frontier Dispute* case,²⁶ the 1987 United States-Italy *Elettronica Sicula* case,²⁷ and the recent 1988 Norway-Denmark *Jan Mayen* case are examples.²⁸ Certainly, the panel concept, which the United States strongly favors, has proved popular. Arguably, any such device that makes states more willing to submit cases to the Court is beneficial. On the other hand, if most states choose only to use

18. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12 (Advisory Opinion of Apr. 26) (brought before the World Court by the United Nations General Assembly on Mar. 2, 1988).

19. Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1988 I.C.J. 66 (Order of Oct. 14) (brought before the World Court by Denmark on Aug. 16, 1988).

20. Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1990 I.C.J. 92 (Judgment of Sept. 13) (submitted by joint notification dated Dec. 11, 1986).

21. Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1989 I.C.J. 12 (Order of July 18) (brought before the World Court by Nauru on May 19, 1989).

22. *Libya, Chad Seek Ruling*, Fin. Times, Sept. 4, 1990, at 1.

23. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1990 I.C.J. 64 (Order of Mar. 2) (brought before the Court by Guinea-Bissau on Aug. 23, 1989).

24. Aerial Incident of 3 July 1988 (Iran v. U.S.), 1990 I.C.J. 86 (Order of June 12) (brought before the I.C.J. by Iran on May 17, 1989).

25. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12).

26. Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554 (Judgment of Dec. 22).

27. Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (Judgment of July 20).

28. Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1988 I.C.J. 66 (Order of Oct. 14) (brought before the World Court by Denmark on Aug. 16, 1988).

such specially selected panels, the World Court could become a series of *ad hoc* arbitral tribunals sitting at a common seat, rather than remaining a "World Court." To the extent the use of panels may tend to erode the concept and integrity of the court as a global institution, or encourage the idea that international judges are inherently biased, there could be reason for serious concern.

IV. THE FUTURE ROLE OF THE WORLD COURT

I would like, however, to raise some broader questions. Does it really make much difference what attitude the United States Administration takes towards the Court? Is the World Court, or more generally, international adjudication, really important to the viability of the international legal order? In terms of our national interest, should we really care whether the Court is widely used or whether it is strengthened or weakened and, if so, why?

A. Arguments for a Limited Role

Many people argue that the court plays only a relatively limited role in international affairs and that its importance to the United States or international law should not be exaggerated. Consequently, in their view, the United States can gain nothing from supporting the court that would be worth the risks involved—risks that are all too real, as *Nicaragua* shows. Four of the arguments they make in support of their position are discussed below:

First, as indicated in article 33 of the United Nations Charter, resort to the World Court or other types of international adjudication is only one of many ways of dealing with disputes; other ways include negotiation, inquiry, mediation, conciliation, or resort to regional agencies or the United Nations. The predominant, best, and most effective way of trying to settle differences is through negotiation directly between or among the states concerned—and that is the way most disputes are, in fact, settled.

Second, adjudication is often not even a very good way of settling disputes because it has many potential disadvantages, both for the parties and for the international community. For example, adjudication is unpredictable and involves the risk of losing; it may result in a superficial or illusory settlement; it can be inflexible; it is complex and costly; it may not be impartial; and it may not be enforceable. Indeed, sometimes adjudication can make matters worse rather than better. Consequently, it is not surprising that, while nations often pay lip service to the ideal of judicial settlement, in practice they

have entrusted few significant disputes to the International Court or to other international tribunals.

Thus, since the court was established in 1946, it has handed down only about fifty judgments in contentious cases and less than twenty advisory opinions, or less than two decisions or opinions per year. And many of these cases have been of relatively limited importance. Often, when the court has sought to assert jurisdiction over a significant matter that one party to the dispute has not wished the Court to deal with, the defendant state has refused to appear or to comply with any judgment rendered. This refusal to accept the court's jurisdiction occurred in several recent cases including the United Kingdom-Iceland *Fisheries Jurisdiction* case,²⁹ the *Tehran Hostages* case,³⁰ and the 1984 *Nicaragua* case.³¹ Thus, if nations really do not want the Court to settle their dispute, they will make it very difficult for the Court successfully to do so.

Moreover, nations are particularly loath to commit themselves in advance to the compulsory jurisdiction of the court under the "optional clause." At present, only about fifty states, or less than one-third of the world's nations, are bound by declarations under article 36(2), and many of these nations are bound only with broad reservations. Among the great powers, only the United Kingdom still has such a declaration in effect. It should be noted, however, that states are more prepared to agree to "compromissory clauses" within the confines of particular treaties; well over 200 treaties presently contain such clauses, of which more than sixty are applicable to the United States.³²

Third, we should not fall into the error of thinking that we cannot have real international law and an effective international legal order unless, as in a national legal system, we also have courts exercising compulsory jurisdiction. For one thing, the international political system is very different from national political systems, and it is simply not the case that every functioning legal system must work the same way. As indicated, there are many ways of settling disputes, and arguably, the international legal order can effectively deal with such differences without compelling states to submit to the com-

29. *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (Judgment of July 25).

30. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (Judgment of May 24).

31. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Judgment of Nov. 26 concerning Jurisdiction of the Court and Admissibility of the Application).

32. See, e.g., Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987); Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58, 79 (L.F. Damrosch ed. 1987).

pulsory jurisdiction of international courts. Further, even in national legal systems, it is becoming increasingly clear that courts play a different and less important role than we traditionally thought; indeed, one of the principal functions of courts is probably to spur negotiated settlement.

Finally, in the presence of nationalism and sovereignty, and in the absence of broadly shared global values, there is a possibility of bias; the risks of entrusting national interests to foreign judges are more than many countries may be willing to accept. Consequently, for now, the idea of general compulsory adjudication inevitably is more aspiration than reality.

B. Arguments for a Broader Role

A strong case, however, can be made for greater United States support for the World Court. First, while adjudication may not be the best way of resolving every, or even most, international disputes, it has a number of potential advantages. For example, adjudication is dispositive and ideally, at least, puts an end to the dispute; it is impersonal, permitting the parties to "pass the buck" of responsibility for unfavorable outcomes to the tribunal; it is usually principled, impartial, and orderly; it can "depoliticize" a dispute and "buy time" for the parties; and it can provide broadly useful social rules and reinforce the legal system. Simply by being available, the World Court and other tribunals can help avoid, or induce the settlement of, disputes. Thus, even if states rarely choose to invoke "compromissory clauses" or the "optional clause," that does not mean such commitments are useless. On the contrary, the possibility of allowing either party to resort to impartial settlement will often give more incentive to negotiated settlement and mean that that parties' bargaining will be more likely to occur in the shadow of the law.

Second, there are a number of situations in which adjudication, by the World Court or otherwise, seems likely to perform a particularly useful function. In practice, most disputes do not involve issues of significant national interest; while each party may prefer to win, each can afford to lose. Moreover, by agreeing to settlement by the World Court, disputing nations can achieve at least one important objective—they can get rid of the dispute. The World Court may be especially helpful in the following types of disputes:

- (1) disputes in which governments are indifferent to the outcome, but for internal political or other reasons are unable to concede or even compromise the issue in negotiations—for example, minor boundary or territorial disputes; in this case, the countries can "pass the buck" to courts, and, if they lose, say: "Don't blame me—blame the judge!";

- (2) disputes involving difficult factual or technical questions in which the parties may be prepared to compromise but, because of the complexity of the situation, cannot easily and without impartial help evolve a basis for doing so;
- (3) some particularly politically awkward or volatile disputes in which resort to the court may allow parties to buy time in hopes that things might "cool off."

Many of the cases most recently brought before the World Court are of these types. For example, more than six of the cases brought to the Court since 1984—about two-thirds of all cases brought in this period—involve complex issues of maritime or territorial boundaries—questions on which the Court generally has done a good job.

Third, for many people throughout the world, international adjudication and the World Court symbolize civilized and ordered behavior and the rule of law in international affairs. Whatever the practical importance of the Court may be in fact, most people *think* the Court is significant; people tend to judge both the United States' commitment to international law and the respect that international law seems to deserve by the respect that the United States shows the Court. Thus, if the United States thinks its national interest will be furthered by wider global respect for international law and wants to be viewed as a supporter of international law, it may have difficulty doing so if it is, at the same time, refusing to support—or belittling or "trashing"—the Court.

What does this add up to? Realistically speaking, the World Court is likely to play only a limited role in international dispute settlement for some time to come. States are simply not yet prepared to take the risks of accepting binding third-party dispute settlement in all disputes affecting their vital interests. States have many other ways of dealing with disputes. Certainly, in the wake of *Nicaragua*, it would be unrealistic to expect the United States to take any dramatic initiative in this regard.

Even if the World Court is not a panacea for problems of world order, it can be a very useful tool in our toolbox of international dispute settlement techniques. The United States should keep the Court available and in good shape for use by the United States or others when needed. Moreover, it is important to keep the symbolic impact of the United States' support, or lack of support, for the Court in mind—both on how the international community views the Court itself, and on how the international community views the United States' attitude towards international law. Consequently, the United States seemingly has little to gain from weakening or trying to humiliate the Court, or from not using it when such use would otherwise serve the United States' national interest.

*C. Current Negotiations Among the Permanent Members
of the Security Council*

In this connection, let me mention one recent and important development. In 1987, President Gorbachev proposed a variety of measures to strengthen the role of international law and institutions in maintaining international peace and security, including agreements among the United States, Soviet Union, United Kingdom, France, and China—the Permanent Members of the Security Council—to expand the World Court's compulsory jurisdiction.³³ The Soviet Union subsequently demonstrated its seriousness in this respect by recognizing the compulsory jurisdiction of the Court in six human rights treaties to which it was party. The United States responded to this initiative and, since July 1987, the two governments have been conducting talks regarding cooperation to extend the Court's jurisdiction.

On September 23, 1989, as one of the outcomes of talks between Secretary of State James Baker and Foreign Minister Edvard Shevardnadze, the two governments issued a joint statement on this subject.³⁴ The statement indicated that the two governments have agreed that "it is desirable to enhance the role of the Court in the resolution of international disputes in a manner consistent with national security and other essential interests,"³⁵ that they jointly developed proposals for this purpose, and that the Permanent Members of the Security Council should lead the way in seeking to carry out this policy.

According to the statement, the proposals center around three general ideas:

- (1) relying on existing treaties to identify disputes to which they apply;
- (2) providing the opportunity to select a chamber chosen from among the members of the full Court to adjudicate the dispute; and
- (3) excluding from the jurisdiction of the Court certain categories of issues that are widely recognized to be highly sensitive to states and inappropriate for resolution by judicial action in the absence of express consent of the states involved.³⁶

The United States and the Soviet Union have initiated consultations regarding these ideas with the other Permanent Members of the Security

33. Gorbachev, *The Realities and Guarantees of a Secure World*, Pravda, Sept. 17, 1987, at 1, col. 1.

34. U.S. DEP'T OF STATE, FACT SHEET, INTERNATIONAL COURT OF JUSTICE INITIATIVE (Sept. 23, 1989) (on file at the Catholic University Law Review).

35. *Id.*

36. *Id.*

Council "to develop a common approach to the jurisdiction of the Court among the Five that can be embodied in an agreement open to all other countries."³⁷ The discussions have remained confidential and their exact content and status are unknown. It is understood, however, that the discussions contemplate a framework agreement, based on article 36(1) rather than article 36(2) of the Court's statute, with an annex separately listing the specific agreements, or possibly categories of disputes, that the parties consent to make subject to the Court's jurisdiction. Reportedly, it is contemplated that the agreement would initially provide for the Court's jurisdiction over disputes involving certain agreements relating to terrorism and the control of narcotics.

The conclusion of such an agreement among the Permanent Members, particularly if open to and joined in by other states, could influence international dispute settlement and the work of the Court for years to come. According to a new report, however, the discussions recently ran "into difficulties, with Britain and other critics contending that the initiative might reduce the role of international law rather than enhance it."³⁸ Nonetheless, the negotiations are continuing.

While there is something to be said for any move by the United States and other great powers to agree to submit even limited categories of disputes to the Court, the usefulness of this current initiative remains questionable. In particular, concerns exist regarding the agreement's apparently deliberate bypassing of the accepted article 36(2) procedures, its stress on the use of special chambers rather than the entire court, the likelihood that the agreement will provide for broad and self-judging exclusions of "use-of-force" and other cases from the Court's jurisdiction, and the agreement's consequent potential for weakening, rather than strengthening, the Court and the concept of international adjudication.

One can only hope that Congress and the public will urge the Administration to take another look at these negotiations to ensure that they advance our national interests. In doing so, the Administration should take at least the following considerations into account.

37. *Id.*; see, e.g., *Soviets Urge Stronger Role for World Court*, N.Y. Times, Oct. 8, 1989, § 1 (International), at 4; *Tentative Agreement Reached to Let World Court Settle Terrorism Cases*, Wash. Post, Aug. 8, 1989, at A14, col. 1; *2 Big Powers Back World Court Role*, N.Y. Times, Aug. 7, 1989, at A5, col. 1; *Moscow Permits World Court Role*, N.Y. Times, Nov. 3, 1988, at A11, col. 1; *U.S. Asking Soviets to Let World Court Settle Some Disputes*, N.Y. Times, Oct. 6, 1988, at A1, col. 1.

38. *World Court Plan Meets Difficulties*, N.Y. Times, June 24, 1990, § 1 (International), at 9.

First, the Administration should consider the great importance to the United States' national interest of supporting and strengthening international law and institutions, including the Court. Second, because the current United States position regarding the Court is influenced strongly by a single unique experience, the *Nicaragua* case—with the passage of time, the officials particularly involved in that case, and the political context in which it arose, it may be time to reevaluate the *Nicaragua* case's real significance and implications. Third, United States-Soviet relations are at a cusp of history in which unique and undreamed of possibilities for the development of international law and institutions have emerged. There are strong indications that the Soviet Union may now be prepared to take the risk of accepting broad World Court justification over many types of disputes; if so, it would be tragic for the United States to be the nation to prevent or impede such a development. Finally, the Administration should consider the remarkable development during the current Persian Gulf situation of a new and heightened appreciation, by the United States and many other world powers, of the importance of international law and institutions, and of the stake of all nations in their preservation and development.

V. CONCLUSION

In his address to a Joint Session of Congress on September 11, 1990, President George Bush noted:

A hundred generations have searched for this elusive path to peace, while a thousand wars raged across the span of human endeavor. Today that new world is struggling to be born, a world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak.

...

... America and the world must support the rule of law. And we will.³⁹

For the United States to resume its traditional support of the World Court and the concept of international adjudication would be an important step towards implementing the President's promise.

39. *Text of President Bush's Address to Joint Session of Congress*, N.Y. Times, Sept. 12, 1990, at A10.

