

INTERNATIONAL LAW & INTERNATIONAL ORDER*

Daniel Patrick Moynihan**

It is just a quarter-century since I first came to Syracuse University to teach at the Maxwell School. Sobered by the discovery that elections can be lost as well as won, I settled down and promptly finished my doctoral dissertation in the field of international law and organization.

In time, along with Harlan Cleveland, then Dean at Maxwell, I left to join the Kennedy Administration. He became Assistant Secretary of State for International Affairs and, generous as always, he saw to it that I had a small hand in such matters, beginning an involvement that has been more or less continuous since that time, and concerning which I would like to share some thoughts today.

I.

It will be no news to graduates of the Syracuse University College of Law that there is something called international law. You publish a superb journal in the field, have a joint degree program with the Maxwell School in international relations, and have a faculty distinguished not least by its international legal scholars.

All is as it should be in academe. What has gone wrong has gone wrong in government, where increasingly, or so it seems to me, we are not only forsaking our centuries old commitment to the idea of law in the conduct of nations, but also by some mysterious collective amnesia, we are even losing the memory that there once was such a commitment.

Looking at my notes, as you might say, I find that I first spoke to this matter in 1974, on the occasion of the observance of the 50th

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anniversary of the death of Woodrow Wilson, at the Woodrow Wilson International Center for Scholars in Washington, D.C.¹ I asked: "Was Woodrow Wilson right?" And I argued that his vision of a world in which the recklessness and amorality of sovereign nations was tempered by some submission to law, and the procedures of law, surely was sound; surely was in the American interest.² "What," I asked, "was the alternative, Wordsworth's formulation? 'the good old rule . . . the simple plan, That they should take, who have the power, And they should keep who can'."³ It seemed to me that we were losing our understanding of the realism of Wilson's thought.

The next year I became our Permanent Representative to the United Nations (U.N.) and learned first hand how much we had abandoned our earlier convictions. As I later recounted in a small book,⁴ one of my first experiences at the United Nations was the receipt by the General Assembly of an Advisory Opinion requested of the International Court of Justice on the question of whether Spanish Morocco, as it was then called, was entitled to independence.⁵ The African members of the U.N. had feared that Spain might not be willing to give up its colony, and looked to the Court for support. The Court in turn ringingly asserted the right of the people of that colony to freedom and independence.⁶ But, by the time the opinion was delivered, Spain had granted independence to the territory.⁷ Whereupon, with full United States support, the stillborn nation was partitioned between Morocco and Mauritania.⁸

It seemed never to occur to us that we had a national interest in upholding the integrity of the International Court of Justice. If

1. February 4, 1974.

2. Throughout the First World War, Woodrow Wilson believed that neither of the major forces really wanted to crush the other, hence he worked for a "community of power." His belief in the ability of nations to act rationally was embodied in his call for "peace without victory." See 4 R. BAKER, *WOODROW WILSON: LIFE & LETTERS* 428 (1968).

3. See William Wordsworth's poem, "Rob Roy's Grave", which tells the tale of Scotland's version of Robin Hood, reprinted in 1 WILLIAM WORDSWORTH: *THE POEMS* 653 (J. Hayden ed. 1981).

4. See D. MOYNIHAN, *A DANGEROUS PLACE* (1975).

5. See *Western Sahara*, 1975 I.C.J. 12 (Advisory Opinion of Oct. 16) [hereinafter cited as *Western Sahara*].

6. *Id.* at 68-69.

7. Spain granted independence to what is now referred to as the Western Sahara in May of 1975. See MOYNIHAN, *supra* note 4, at 246.

8. The territory relinquished by Spain failed to become a self-governing nation, and hence was consumed by its neighbors, Morocco and Mauritania. See MOYNIHAN, *supra* note 4, at 247.

from time to time you read of the war going on in that part of the world—Algeria did not accept the partition—remember where it began.

In 1979 I spoke to the subject at the Council on Foreign Relations in New York City.⁹ I argued that:

Increasingly the United States responds to such violations of the Charter, and by extension of the regime of traditional international law on which the Charter was based, not at all in terms of law and legal obligations, but rather in terms of an almost normless and narrow *realpolitik*.¹⁰

Then came the hostage crisis, and we needed the Court. But seemingly we had forgotten its very existence. On November 20, 1979, sixteen days after the seizure of the United States Embassy in Teheran, I went to the floor of the Senate to urge the United States, forthwith, to take this gross violation of international law to the International Court of Justice.¹¹ There could be no doubt, I stated, that the Court would side with the United States, as it did, unanimously, and issue a provisional order requiring the government of Iran to restore our Embassy, and our consulates, to our proper possession.¹²

Nine days later the Administration did apply to the Court, and such a provisional order was issued — unanimously in a matter of days.¹³ But, added the Court, neither party was to do anything to aggravate matters pending the final decision.¹⁴ Did we wait for that decision, after which our actions would have had behind them the full force of international law? No. We went ahead with our raid.¹⁵ And so the Soviet member of the Court had the pleasure of dissenting from the otherwise unanimous final decision supporting

9. Senator Moynihan's speech to the Council on Foreign Relations took place on February 14, 1979.

10. *Id.*

11. See 125 CONG. REC. S33401 (daily ed. Nov. 20, 1979) [Statement of Senator Moynihan].

12. *Id.*

13. Western Sahara, *supra* note 5, at 6.

14. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1979 I.C.J. 7, 21 (Provisional Order of Dec. 15).

15. On the night of April 24, 1980, approximately 90 specially trained U.S. Troops flew into Iran in an attempt to rescue the 53 American hostages being held in Teheran. President Carter ordered that the mission be aborted after equipment failed in three of the eight helicopters being used. Upon take off from the remote desert area where they had landed, one of the five operational helicopters collided with a C-130 transport plane, killing eight soldiers and wounding several others. The surviving members of the rescue team were safely evacuated from Iran on the five remaining planes. N.Y. Times, Apr. 25, 1980, at A1, col. 6.

our claims, which was handed down a few weeks later.¹⁶ He was able to say that the United States, in effect, was in contempt of court.¹⁷ And were we not? And did we not lose thereby the opportunity to gather the support of the world for what it was we might have done?

II.

With what pain, then, one watched the conduct of the United States Government when the government of Nicaragua took the United States to the International Court, claiming its rights had been violated.¹⁸ I am no admirer of the government of Nicaragua. But I profoundly admire and support the centuries old commitment of the United States to the rule of law in the conduct of nations. That others do not share this commitment speaks to their qualities, not ours.

I would have hoped that in response to the Nicaraguans the United States would have welcomed the opportunity to meet that Leninist regime in Court; that we might have invited its Central American neighbors to join us. We have a very great deal to talk about concerning Nicaragua's conduct toward its neighbors. Instead, with a combination of ignorance and arrogance, the United States first announced that we would no longer accept the jurisdiction of the Court,¹⁹ although we were clearly obliged to do so;²⁰ next, the United States asserted that Nicaragua had not previously accepted the jurisdiction of the Court,²¹ although by our own testimony it had already done so.²²

16. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3, 51 (Judgment of May 24) (J. Morozov dissenting).

17. *Id.*

18. N.Y. Times, Apr. 10, 1984, at A1, col. 6.

19. On April 8, 1984, the Reagan Administration announced that the United States would not accept the Court's jurisdiction over Central American disputes for the next two years. N.Y. Times, Apr. 9, 1984, at A1, col. 2.

20. By becoming a member of the United Nations, the United States became *ipso facto* a party to the Statute of the International Court of Justice. See U.N. CHARTER art. 93. Under article 36 of the U.N. Charter, a state may declare its recognition of the compulsory jurisdiction of the Court in disputes concerning, *inter alia*, "the existence of any fact which, if established, would constitute a breach of an international obligation." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE article 36, para. 2, subsection c. The United States made such a declaration on August 14, 1946. See *infra* note 23 and accompanying text.

21. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 169, 175-78 (Provisional Order of May 10) [hereinafter cited as *Nicaragua v. U.S.*].

22. OFFICE OF THE LEGAL ADVISOR, U.S. DEPT. OF STATE, *Pub. No. 9351, TREATIES IN FORCE* 249 (1984) [hereinafter cited as *TREATIES IN FORCE*].

As concerns our obligations, President Harry Truman announced in August, 1946, that the United States "recognizes as compulsory *ipso facto* . . . the jurisdiction of the International Court of Justice in all legal disputes hereafter arising."²³ The declaration included three reservations, and then stated that the undertaking would remain in force "until the expiration of six months after notice may be given to terminate this decision."²⁴ The report of the Foreign Relations Committee on the resolution ratifying Truman's declaration stated: "The provision for six months' notice of termination . . . has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding."²⁵ As for Nicaragua, the current issue of *Treaties in Force*, an official State Department publication, "compiled by the Treaty Affairs Staff, Office of the Legal Advisor", lists Nicaragua among those "countries which have accepted the compulsory jurisdiction of the International Court of Justice. . . ."²⁶

A further argument of the administration was that the Court has no jurisdiction over issues of war and peace,²⁷ that under the U.N. Charter such matters must go to the Security Council.²⁸ So far as I know, no State Department lawyer was imprudent enough to make such an argument to the Court itself. Rather, it was made, undoubtedly, for the benefit of the press.²⁹

23. Declaration Respecting Compulsory Jurisdiction, Aug. 14, 1946, 61 Stat. 1218 (1946), T.I.A.S. No. 1598, 1 U.N.T.S. 3.

24. *Id.* The three reservations hold that this declaration shall not apply to: (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction. *Id.* at 140-41.

25. S. REP. NO. 1835, 79th Cong., 2d Sess. 1,5 (1946); S.J. Res. 176, 79th Cong., 2d Sess. (1946).

26. TREATIES IN FORCE, *supra* note 22, at 249.

27. Allan Gerson, Special Assistant and Counsel of the United States Permanent Mission to the United Nations, presented this argument in a recent letter which appeared in the editorial section of the New York Times. See Gerson, *U.S. Acts Lawfully*, N.Y. Times, May 4, 1984, at A31, col. 4.

28. *Id.*

29. The contention that the International Court of Justice may not exercise jurisdiction over issues relating to the use of force in international relations, was not presented to the Court prior to the release of the May 10 Provisional Order. *Nicaragua v. U.S.*, *supra* note 21, at 169. Nor do relevant State Department and White House documents released before the May 10 order refer to this argument. See Letter from U.S. Department of State

Shortly after the case was filed, Mr. Allan Gerson, Special Assistant and Counsel to our Permanent Representative to the U.N., wrote in *The New York Times* that, "the World Court is not empowered to, and never has, adjudicated an issue involving the lawfulness of resort to force. The United Nations Charter specifically assigns questions of aggression and self-defense to the Security Council. State Department attorneys are now presenting their arguments before the Court."³⁰ There is no way to characterize Mr. Gerson's assertion save ignorance. He does not know the history of our country—even though he helps to represent it in the very institution, created by our country, which embodies our conception of international law. One gathers, for example, that he has never heard of the Convention on the Pacific Settlement of International Disputes adopted at the Hague in 1899.³¹ It is as if the United States Government had suffered a massive stroke and all memory of a vital and fundamental tradition had vanished. The issue is set forth in the clearest possible manner in article 33 of the United Nations Charter.³²

III.

The Court, of course, did hear Nicaragua's request for "provisional measures of interim protection" pending³³—and without prejudging—a later determination of the principal issues raised by Nicaragua, including the question of whether the Court properly has jurisdiction in this case.³⁴ Thereupon, the Court handed down a provisional ruling which *unanimously* called upon the United States to immediately cease and refrain from any action restricting,

to the United Nations (Apr. 6, 1984), *reprinted in* 23 I.L.M. 670 (1984); *see also* United States Policy in Central America, 20 WEEKLY COMP. PRES. DOC. 517, 518 (Apr. 10, 1984) [Statement of President's Principal Deputy Press Secretary].

30. Gerson, *U.S. Acts Lawfully*, N.Y. Times, May 4, 1984, at A31, col. 4.

31. Convention for the Pacific Settlement of International Disputes, *done* July 29, 1899, 32 Stat. 1779 (1900), T.S. No. 392, 187 PARRY'S T.S. 410 (effective Sept. 4, 1900).

32. Article 33 provides:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

U.N. CHARTER art. 33, paras. 1 & 2.

33. *Nicaragua v. U.S.*, *supra* note 21, at 169.

34. *Id.* at 169, 209.

blocking, or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines.³⁵ Included was a series of provisional orders enjoining the United States and Nicaragua to take measures to prevent a further increase in tension.³⁶ All but one of them were decided by unanimous vote:³⁷ which is to say that not only judges of British, French, West German, Italian and Japanese nationality voted in this manner, but so did the judge of United States nationality. Indeed, something like the honor of this nation was preserved by Stephen M. Schwebel, the American judge who joined a unanimous Court on all but one of its interim findings.³⁸

All honor as well to the American Society of International Law, which on April 12, 1984, adopted a resolution deploring the attempt by the United States Government to "withdraw from the jurisdiction of the International Court of Justice 'disputes with any Central American state.'"³⁹ This was only the second "political" resolution

35. *Id.* at 187.

36. *Id.*

37. Provision 2 of the International Court of Justice's May 10 Provisional Order passed by a vote of 14 to 1. It provides:

The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.

Id. at 187.

Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosier, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharriere, Mbaye, Bedjaoui, President Elias and Vice-President Sette-Camara supported this provision. Judge Schwebel of the United States opposed it. *Id.*

38. *See supra* note 37.

39. The resolution provides:

Although the American Society of International Law ordinarily does not take positions on matters of policy, the Society has previously departed from this practice to support the acceptance by the United States of the jurisdiction of the International Court of Justice. The Society was founded to "foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." It now reaffirms that international adjudication, and the application of international law, constitute appropriate procedures for resolving justiciable international disputes. The Society therefore deplores, and strongly favors rescission of the recent action of the United States Government in attempting to withdraw from the jurisdiction of the International Court of Justice disputes with any Central American State.

The American Society of International Law Newsletter, May-June, 1984, at 1, col. 1.

adopted in the seventy-eight years of the existence of the Society. How poignant to consider that the other resolution, the first, was adopted in 1946⁴⁰ when the Society in effect urged the then Administration of President Truman not to include, in our declaration accepting the compulsory jurisdiction of the Court, the so-called Connally Amendment which exempted "disputes with regard to matters which are essentially within the jurisdiction of the United States of America as determined by the United States of America...."⁴¹ Consider: twenty-eight years ago the issue was whether we should accept the full jurisdiction of the Court; twenty-eight years later the issue was whether we would accept any jurisdiction at all.

IV.

What is at issue is our understanding that international law is a practical *need*. It is a need as much as domestic law is a practical need. The fact that the law is broken is not evidence of its uselessness, but rather of its necessity. Absent law, there would be no sanction for conduct that injures society. It comes to that.

And the law is there. That is what was so painful in the recent American performance at the Hague. Professor Alfred P. Rubin observed at the time that "every sophisticated analyst of international affairs will conclude that the United States is confirming that what it is doing is illegal." And so we did. Worse, we no longer seem to grasp that the *law is on our side*. We are—when we have our wits about us—a law abiding nation. It is in our interest that others should be. If, for example, the Soviets are not, then that is their problem. If, because the Soviets are not, we cease to be, then that is their victory.

40. *Resolution Concerning the United States and the International Court of Justice, 1946 Proceedings of the American Society of International Law at Its 40th Annual Meeting* 125, 125-28 (1946).

41. S. RES. 196, exception b., 79th Cong., 2d Sess. (1946), reprinted in 40 AM. J. INT'L L. 690, 690-91 (1946). See also Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720 (1946); Goldie, *The Connally Reservation: A Shield for an Adversary*, 9 U.C.L.A. L. REV. 277 (1962).