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Political Asylum and Other Concerns: Some Reflections on the World, Yesterday and Today

Keywords

Asylum, International Court of Justice, United Nations

MYERS S. McDOUGAL DISTINGUISHED LECTURE

Political Asylum and Other Concerns: Some Reflections on the World, Yesterday and Today

LEONARD V.B. SUTTON*

I. INTRODUCTION

Dean Beaney, Professor Nanda, other distinguished guests, students, and friends. It is a distinct honor to give the fourteenth annual Myers S. McDougal lecture at the University of Denver College of Law. Professor McDougal's outstanding contributions to the teaching and study of international law are well known and too numerous to mention.¹ On a personal note, I had the privilege long ago not only to meet Professor McDougal but also to correspond with him about two individual chapters he and I were furnishing for a book published in 1970, edited by Luis Kutner, entitled *The Human Right to Individual Freedom*.²

II. PREFACE

We are living in a very historic and challenging time in 1989 and 1990. Visualize 1917 when communism swept across Russia wiping out the long-held laws, traditions, and customs of Imperial rule. The 1918 Treaty of Brest-Litovsk³ seemed to insure that the Russian Revolution

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1. Professor Richard Falk of Princeton University, in the tenth lecture in this series, ably described some of Professor McDougal's work. See Falk, *Accountability, Asylum, and Sanctuary: Challenging Our Political and Legal Imagination*, 16 DEN. J. INT'L L. & POL'Y 199 (1988).

2. See generally THE HUMAN RIGHT TO INDIVIDUAL FREEDOM (L. Kutner ed. 1970).

3. See V. VALENTIN, THE GERMAN PEOPLE 567 (1946).

would turn what has become the Union of Socialist Soviet Republics into a difficult neighbor and state; one which would, and did, seek to impose its imperialistic designs and international communism world-wide.

Now, almost seventy-three years later, we see the totalitarian society envisioned by Marx and Engels, created by Lenin, and built into a reign of terror by Stalin, changing drastically within. The communist system in Russia has failed because it was not only economically unworkable but also because of the denial of freedom and other basic human rights to its citizens. The Gorbachev era of pragmatism, *glasnost*, and *perestroika* has resulted in dramatic changes in both Russia and Eastern Europe. It may also have helped to bring on, to some extent, the recent changes and moves towards democratic societies in Nicaragua and South Africa, as well as other political changes elsewhere in the world.

The failure of Russian Communism brings into focus the need for states everywhere to begin anew the search to outlaw war and to make the United Nations and its auxiliary organs (e.g., the International Court of Justice) more effective and useful.

In spite of the fall of the Berlin Wall and the freedom granted Eastern Europe, there is one factor which may determine whether the world's rapidly evolving political changes will result in greater cooperation between the U.S.S.R. and other states in matters of world-wide concern. That factor is whether the Western World will allow President Gorbachev to deal, in his own way, with the question of freedom for the Baltic Republics. I predict Gorbachev may find a practical solution if he is not pushed too aggressively by the outside world. We should note that he has apparently never said he will dismantle the U.S.S.R., agree to re-align the German/Polish border, or grant complete independence to Lithuania, Latvia, Estonia, the Ukraine, Moldavia, Georgia, or Azerbaijan. Obviously, if the Gorbachev government grants freedom to one of the above areas, similar concessions may have to be granted to the others. We can all foresee the severe and perhaps unacceptable consequences to the Russian Empire if this occurs.

Caution, which has been followed by the Bush Administration to date, may be the only way to proceed in the areas of disarmament and diplomacy. Success in these negotiations may eventually help to achieve greater peace and observances of human rights.

We should remember that the United Nations, in June 1945, succeeded the League of Nations. On a personal note, I have been involved in studying world organizations since 1933. In September 1935 I was privileged to be sitting in the League of Nations press box at the Geneva sessions as a student reporter. I was present the day sanctions were voted against Italy for its invasion of Ethiopia.⁴ I witnessed Italy's Ambassador walk out after the vote and only afterward fully realized its effect. In

4. This was approximately September 5, 1935.

1945, while stationed in Oakland with the U.S. Army, I was privileged to attend, as an observer, three important sessions of the founding of the United Nations and to report on them to my General (over the years, I have also attended several sessions of the U.N. in New York City).

Returning to the League of Nations, we should recall that before the founding of the League in 1920, the world had previously had a Permanent Court of International Justice ("PCIJ"). It was created by the Hague Conference of 1899, organized in 1900, and began operating in 1902.⁵ The purpose of the court was to help states resolve primarily legal and political disputes, and to serve the cause of world peace.

On May 17, 1920, the Council of the League of Nations, with the powers conferred on it by statute, adopted a Resolution recreating the above mentioned court. It also provided that non-member states could utilize the court under certain conditions.⁶ The Resolution was ratified thereafter by a majority of the member states and became effective in September 1921. This Court was available until 1946 when the Charter of the United Nations created its own International Court of Justice ("ICJ").

The need for and effective use of the ICJ is more evident today than in earlier times due to the present threat of nuclear disaster and the possibility of nuclear proliferation to small, hostile states. Additionally, the evolution of a "one world" society makes the ICJ indispensable.

The development of international courts, over almost a century, reflects an attempt by the nations of the world to devise a workable system to assist states in resolving disputes by using courts instead of war or force.

Today, our planet has evolved into one world with mutual dependence among all states. Most industrialized states realize that their survival depends, now more than ever before, on global cooperation to solve common problems. They finally agree that we must prevent world-wide pollution and try even harder to solve the racial, ethnic, sexual, political, health, and economic problems which infect so much of our world. We need only to read the daily newspapers to personally witness these continuing tragedies all around us.⁷

From our vantage point we can see why states have created a system

5. G. ELIAN, *THE INTERNATIONAL COURT OF JUSTICE* 15-18 (1971).

6. M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE QUESTION OF AMERICAN PARTICIPATION* 364-65 (1925).

7. The frictions and problems of industrialized societies seem insignificant when compared to those in other countries. No one person, government, or organization, even the United Nations, seems able to stop environmental pollution world-wide or stop deforestation. Nor do any such entities seem able to help stabilize or reduce the violence and in some cases the oppression in areas such as the Middle East, Iran, Afghanistan, Kashmir, Burma, Cambodia, Sri Lanka, Ethiopia, Sudan, Chad, Northern Ireland, Columbia, and Peru. Nor, at least up to this time, has the Western world been able to encourage and help China, North Korea, and Libya to evolve into more humane societies.

of diplomatic immunity and in some areas a recognized right of political asylum. In the modern world, however, we apparently seldom, if ever, see a legal "right" of sanctuary.

The processes of diplomatic immunity and political asylum for the protection of individuals have remained even after development of the PCIJ and the ICJ, which are for use *only* between states. The U.N. and the Council of Europe with its headquarters in Strasbourg, have been instrumental in developing courts specifically designed to protect the individual.⁸ These have been working fairly well to date.

III. DIPLOMATIC IMMUNITY

Very few of the wide ranging and difficult international problems facing humanity and its governments today can be discussed in a single lecture. One of particular interest to many lawyers and judges, however, is how states function to meet the practical needs of their representatives stationed abroad. The present solution to this problem is termed "diplomatic immunity."

This subject seems to be well understood in the international context.⁹ It ranks among one of the most well established principles of international law. In large measure its principles are now codified in conventional law.

The basic premise behind Diplomatic Immunity is that governments have agreed to certain recognized rules and standards so that their representatives in foreign lands can function efficiently and not be interfered with or arrested.¹⁰ In today's world, it is generally recognized that if diplomats and their families commit felonies in the host country they may be punished by the host's system of justice. Recent changes have occurred in the U.S. to try to regulate, to some degree, misdemeanor offenses such as parking tickets and uninsured motorist problems committed by foreign diplomats and their families.¹¹

Article 22 of the 1961 Vienna Convention on Diplomatic Relations¹² declares that the premises of a diplomatic mission "shall be inviolable." Similarly, article 29 pronounces the inviolability of a diplomatic agent.

More recently, the International Court of Justice unambiguously stated, in a case involving the U.S. Diplomatic and Consular Staff in Tehran,¹³ that "there is no more fundamental prerequisite for the conduct

8. See, e.g., U.N. CHARTER, art. 2(7).

9. See II C. BASSIOUNI & V. NANDA, INTERNATIONAL CRIMINAL LAW 97 (1973). The chapter is entitled, "Immunities and Exceptions."

10. See also Falk, *supra* note 1, at 199-208.

11. J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 946-47 (3d ed. 1988).

12. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

13. United States Diplomatic and Consular Staff in Tehran, 1979 I.C.J. 7.

of relations between States than the inviolability of diplomatic envoys and embassies.”¹⁴

Over two hundred years ago, these principles were recognized in one of the earliest cases in U.S. history. The U.S. Supreme Court held that “[t]he person of a public minister is sacred and inviolable. Whoever offers any violence to him . . . is guilty of a crime against the whole world.”¹⁵ The states of Latin America asserted at one time a regional custom under which a right to grant asylum in the diplomatic premises would exist. The existence of such a right was tested in the 1950 *Asylum Case* (Columbia v. Peru).¹⁶ In this case the ICJ held that the Columbian government had failed to prove the existence of such a regional custom of diplomatic asylum. In response to the Court’s decision, a new convention on asylum was adopted by the Tenth Inter-American Conference at Caracas in 1954.¹⁷

IV. POLITICAL ASYLUM AND INTERNATIONAL TERRORISM

“Political Asylum” is defined as the granting of protection to a refugee from extradition by another state or states. Petition is made by the refugee to the courts or executive branch of the receiving state for what amounts to a form of sanctuary.

Most recently, President Bush “. . . issue[d an] executive order [promising] to guarantee that Chinese students who fear for their safety if they return home may remain in the United States.”¹⁸

On a personal note, in 1971 I was the Chief Counsel for a Cuban refugee with an American residency green card who was detained in what was then British Honduras. Guatemala was seeking to extradite him on a trumped up bank fraud charge. I drafted a lengthy “Petition for Political Asylum” soon after arriving in Belize. I filed it both with the Trial Court there and with the then British Governor General’s office. With the help of local counsel, the courts, and my trips to the United Nations in New York, the British Foreign Office in London, and other contacts, I was eventually successful in obtaining my client’s full release after a year of incarceration in a Belize jail. He is now an American citizen and a very successful Florida businessman.

Political asylum is used quite often in international law to protect basic human rights and is a necessary part of international law in a turbulent world.

International terrorism — whether political, religious, or, at times, state supported — is well known to all of us. It seems to be an endless problem. We have the IRA in Northern Ireland, the now resolved U.S.

14. See *id.* at 19.

15. *Republica v. De Longchamps*, 1 U.S. 111, 116 (1784).

16. *Asylum Case* (Columbia v. Peru), 1950 I.C.J. 266.

17. See IV M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 436 (1968).

18. *Bush to Allow Chinese Sanctuary*, *Den. Post*, Apr. 7, 1990, at 7A, col. 4.

hostage crises in Tehran, the present hostages in Beirut, the Libyan¹⁹ and Iranian Governments' support of terrorist groups and the Columbian drug dealers, among others.

The Western World seems to be a particular target of this malaise. Each government must try to resolve the violence and problems which affect it as best it can; however, several multilateral treaties and agreements have been executed between or among states to try to cope with terrorism. It seems obvious that neither diplomatic immunity, political asylum, nor any kind of protection should be granted to perpetrators and their accomplices in this nefarious business.

When one thinks of what might be done to discourage international terrorism and how the United States seeks foreign cooperation, two fairly recent events come to mind. The first is the U.S. Congress' adoption of a foreign criminal "long arm statute."²⁰ Using this statute, prosecutors can seek extradition of persons charged with harming U.S. nationals outside our borders, or of those who commit drug offenses contrary to our laws. The well known murder case of an American by foreign terrorists on the steamship Achille Lauro and the more recent fatal bombing of a Pan-Am flight from Frankfurt to the United States are examples of situations in which the new statute might be used.

Time will tell whether we are successful in attempting to extradite some of those arrested in other countries for these and similar crimes. One difficulty the United States faces in seeking extradition in such cases is that we have both federal and state death penalty laws, which our system believes to be necessary. Conversely, countries such as Germany (where an alleged illegal bomber was arrested) do not allow capital punishment. Courts in countries without a death penalty object to extraditions if the accused could suffer the death penalty.²¹

It should be pointed out that the U.S. has not always been entirely circumspect about forcing foreign nationals (many of whom have never been in the U.S.) to our shores and before our courts. Federal courts have long condoned what they call "abductions" (but which to some others appear to be out-right "kidnapping" punishable by our laws) to bring such persons before our courts to be tried.²² The most recent example of this type of operation is the abduction of Panamanian dictator Manuel Noriega.²³

The question naturally arises whether the United States or any coun-

19. See Goldberg, *The Shoot-Out at the Libyan Self-Styled Peoples Bureau: A Case of State Supported International Terrorism*, 30 S.D.L. REV. 1 (1984).

20. See 18 U.S.C. § 3184 (1988).

21. Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 993 (S.D. Fla. 1990). See also Note, *The Omnibus Diplomatic Security and Anti-Terrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice*, 21 CORNELL INT'L L. J. 127, 132 (1988).

22. *People v. Pagan*, 377 N.Y.S. 2d 420 (1975).

23. See, e.g., Rubin, *Is Noriega Worth Subverting U.S. Law*, *Christ. Sci. Mon.*, Mar. 19, 1990, at 18, col. 1.

try has or, should have, a legal right to unilaterally "abduct" foreigners from other countries in order to bring them to "justice." I submit that no government has an inherent right to kidnap people, and that other ways should be devised to accomplish the desired end, (i.e., through multilateral and mutually beneficial treaties or agreements).

In the case of General Noriega, one newspaper reported that he was charged with several criminal violations under our federal statutes.²⁴ Since he is a Panamanian national and former Panamanian official, and he was seized in Panama and forcibly brought to the United States, we can assume these issues will be decided in the federal court in Florida where he is to be tried. In view of prior federal court rulings, the predictable result of the abduction defense is foreseeable.

Referring for a moment to my earlier remarks on diplomatic immunity, it appears that the problem faced by the United States in obtaining custody of Noriega in Panama has another interesting dimension. He claims he chose not to surrender willingly during or after the U.S. military invasion of his country because there was no formal declaration of war against Panama. It is interesting to note that one of Noriega's defenses is that he is a "prisoner of war."²⁵ This is because he was captured as a result of the American military invasion. The U.S. invasion at the time was criticized by an overwhelming majority of the U.N. General Assembly and objected to by Columbia and Peru as being in violation of the O.A.S. Treaty prohibiting such action.²⁶ The conduct of the United States may be a substantive defense for Noriega since it apparently violated both conventional and customary international law. It also demonstrates, once again, that major powers, when it suits their objectives, may apply the old adage that "might makes right." Another defense Noriega might raise is whether the United States action against Panama was a violation of the new United States-Panama Canal Treaty and the Charter of the O.A.S.²⁷

24. See *Noriega Expected in Court Today*, Den. Post, Jan. 4, 1990, at 11A, col. 1. These charges included accepting \$46 million in bribes from drug traffickers; allowing Panama to be used as a drug relay station; using political power to protect drug traffickers; laundering drug money in Panamanian banks; and three counts relating to marijuana.

25. *Noriega's Surrender*, Newsweek, Jan. 15, 1990, at 15.

26. See Nanda, *The Validity of the United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494 (1990). The U.N. General Assembly is quoted as stating, the invasion was "a flagrant violation of international law and of the independence, sovereignty, and territorial integrity of states." U.N. Doc. A/RES/44/240, 29 Dec. 1989. See also N.Y. Times, Dec. 23, 1989, at A9, col. 5.

27. Professor Ved Nanda, in his article, quotes the O.A.S. charter, article 18 which reads:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Nanda, *supra* note 26, at 495.

The undeclared invasion resulted in the reported deaths of 23 U.S. military personnel and of an estimated 300 Panamanian civilians.²⁸ As a result, the U.S. government is faced with an estimated cost of hundreds of millions of dollars, not only to repair the damage from the invasion but to help the Panamanian economy back on its feet.²⁹ The cost of repair is due not only to the U.S. military invasion but also to a deteriorating economy which is the result of our long-time trade embargo.

Even though there exists a "long enjoyed practice by states of humanitarian intervention or the protection of a state's nationals and sometimes others . . . ,"³⁰ it seems that the United States government's reliance on this principal is very weak. News accounts prior to the attack reported that one U.S. national had been killed and that there was at least one other violent episode involving an American citizen. Those "provocations" (if these were sufficient) become *de minimis* in light of the fact that the U.S. government had previously executed treaties stating that it would not take any military action against Panama. It then becomes a question of degree as to how bad a situation would have to be before the use of the humanitarian intervention doctrine becomes legal.

Even if the above doctrine applies in this situation (which I do not believe it does), the question remains whether the invasion was legal under the U.N. Charter, other treaties, and international law. An additional question exists regarding the position of a person such as Noriega who properly seeks and obtains, in his own country, political asylum in a third country's diplomatic embassy. Does an invading government (specifically the United States) have any legal right to act as the U.S. did to force a wanted person to abandon his sanctuary? And, is forcing him out of his sanctuary a rejection of the recognized law of political asylum?

In Panama, after Noriega fled for protection to the Embassy of the Papal Nuncio, the United States military surrounded that embassy with a fleet of armored vehicles, tanks, and armed soldiers, stopping, questioning, and apparently searching persons entering or leaving the embassy. The U.S. Military also played blaring rock-and-roll music twenty-four hours a day to try to break the refugee's resolve and sanity and to force him to surrender. This conduct was well beyond the norms of present recognized international law.

Article 20 states in pertinent part that the territory of a member state "may not be the object, even temporarily, of military occupation" or any other use of force. Article 21 provides, "[t]he American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof."

28. *A Standoff in Panama*, NEWSWEEK, Jan. 8, 1990, at 28.

29. *Panama Death Toll Eludes Officials*, Den. Post, Jan. 10, 1990, at 4A, col. 1.

30. See McDougal, *Law and Peace*, 18 DEN. J. INT'L L. & POL'Y 21 (1989). In this scholarly article, Professor Myers S. McDougal discussed humanitarian intervention. He also thoroughly analyzed today's need for a community of international, governmental, and other groups which would assist humanity to transcend national boundaries to make this a more peaceful, humane, and workable world.

By comparison, the actions of the communist government in Budapest in 1956 in the case of Cardinal Mindszenty were quite inapposite. Mindszenty took refuge in the United States embassy to escape the wrath of the communist government after the Soviet Union and some of its Warsaw Pact allies invaded Hungary.³¹ Our government protected him there for fifteen years until a negotiated release allowed him to fly safely to freedom in Rome where he died four years later.³² I do not recall any conduct on the part of the government of Hungary against Mindszenty or our embassy in 1956 or later, comparable to our actions in 1990 against the Papal Nuncio and his embassy in Panama.

A second case for comparison involved the Chinese government following the Chinese army's assault of June 1989 in Tiananmen Square. At that time the prominent Chinese astrophysicist Fang Lizhi, who disapproved of the use of force by his government and favored a continued loosening of political restrictions in China, fled with his wife to the United States Embassy in Beijing for safety.³³ There was no direct harassment of these two refugees reported in news accounts, but there was at least one incident when a few Chinese soldiers fired into a nearby non-embassy owned apartment building. Also, there were the "to be expected" searches and restrictions at the embassy entrance gate. News reports up to now, however, indicate that the Chinese government has not sought to force the refugees out by any such extraordinary methods as those used by the United States Government against General Noriega in Panama. Each of us can draw our own conclusions as to the legality under international law, as well as the morality, of the comparisons recited above.

V. SANCTUARY

Another concern of many people today is the purported right of sanctuary, usually meaning church or church related protection.

Sanctuary was an ancient right of protection against secular power. It was given to certain individuals by some ancient cities and later by some religious orders using their churches for that purpose.³⁴ Today "sanctuary" is defined in Webster's New Universal Dictionary as:

1. A holding place; a building or place set aside for worship of a god or gods;
2. A place of refuge or protection; originally fugitives from justice were immune from arrest in churches or other sacred places.
3. Refuge or protection; immunity from punishment or the law, as by taking refuge in a church, etc.³⁵

31. See Whitemen, *supra* note 17, at 463-64.

32. *Noriega's Move Puzzle for Church*, Chi. Tribune, Dec. 29, 1989, at 10, col. C.

33. Kyodo News Service, Jan. 2, 1990.

34. See Carro, *Sanctuary: The Resurgence of an Age Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747 (1986).

35. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1603 (2d ed. 1979).

Sanctuary continued and was recognized in some nations of the Western world until the sixteenth century.³⁶ A period of steep decline began in England under King Henry VIII.³⁷ By 1624 the few remaining English general church sanctuaries were abolished. Canon law apparently also abandoned its recognition of sanctuary long ago. In recent times there has been no mention of sanctuary in the newly revised 1983 Code of Canon Law. The Code dropped its previous statement that a "church enjoys the right of asylum so that weak criminals who flee to it are not to be removed from it except in case of necessity, without the assent of the ordinary or the rector of the church."³⁸

One recent article points out that the right of sanctuary historically only applied to various types of wrongdoers such as persons accused of crimes or debtors.³⁹ Political refugees were not included. Also, persons in England who were in a sanctuary could not stay permanently and were soon forced out one way or another.

Apparently, all or most of the refugees coming to the United States in recent years from El Salvador and Nicaragua have been fleeing from either political unrest or war. Those from Guatemala and Haiti have been fleeing from upheavals of one kind or another.⁴⁰ Some allegedly have also come seeking a better economic life.

When one measures their reasons for seeking sanctuary against the qualifications for sanctuary before it was abolished in England centuries ago, it is readily apparent that, then and now, they would not qualify since they do not claim to be criminals or debtors.

Also, when one considers that political refugees were not specifically included in the English sanctuary laws, it seems that even those who can prove "persecution" or "a well-founded fear of persecution" should seek relief in the courts or through the executive branch for political asylum and not under a church's claim of sanctuary.⁴¹

For various reasons most refugees seeking sanctuary in our country have not succeeded. This is not surprising considering that they cannot show a "clear probability of persecution" once they are returned. Our courts have recognized that the ancient law of sanctuary does not exist in the United States.

One authority concluded that leaders of the claim to sanctuary for Central American refugees have admittedly promoted "a myth or fable" in order to change the present foreign policy of the United States towards

36. Carro, *supra* note 34, at 766.

37. *Id.*

38. *Id.* at 767.

39. *See id.*

40. *U.S. Biased on Asylum Amnesty Group Claims*, Den. Post, Mar. 29, 1990, at 6A, col. 1.

41. *See U.S. v. Merkt*, 794 F.2d 950 (5th Cir. 1986); 8 U.S.C. § 1101(a)(42) (1982).

El Salvador and Nicaragua.⁴²

In spite of the federal court rulings and the legal fact that the old English laws of sanctuary were discarded long ago, it is reported that today about 400 churches and synagogues are attempting to grant sanctuary in the United States.⁴³ Their food, housing, and relief assistance to refugees are commendable. Their attempts to protect refugee aliens from being deported according to our laws, however, appear to be of doubtful value in view of the federal government's constitutional and statutory right to regulate and control aliens.

VI. THE INTERNATIONAL COURT OF JUSTICE AND THE CONNALLY AMENDMENT

It is common knowledge that the International Court of Justice is an arm of the United Nations.⁴⁴ Over twenty years ago a debate ensued in the United States Senate when the American Bar Association ("ABA") and other organizations and groups sought to have the Connally Amendment repealed. This amendment was added by the Senate as a condition of the U.S.'s acceptance of the ICJ's compulsory jurisdiction. I was one of those assisting the ABA in the endeavor to repeal the amendment.

The Connally Amendment is still relevant to discussions of the ICJ because, even though it was repealed by the Senate, President Reagan saw fit to re-institute it as an executive act. The President did not want the U.S. to appear before the ICJ when Nicaragua sued the United States for mining its harbors even though no state of official war existed between the two countries.

Here is a brief history of what transpired with the amendment. The first U.S. declaration of adherence stated:

This declaration shall not apply to . . . (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.⁴⁵

It was these underscored words which were stricken once the U.S. government later agreed to accept the Court's compulsory jurisdiction.

If the Connally Amendment were omitted, the relevant parts of the United States' declaration would read:⁴⁶

42. Carro, *supra* note 34, at 769 (quoting the Chairperson of the Cincinnati Coalition for Public Sanctuary).

43. Transcript of "The Today Show," Mar. 23, 1990, interview with a Catholic church worker by Bryant Gumbel (available upon request from the National Broadcasting Company, New York).

44. See U.N. CHARTER, art. 92.

45. DUKE LAW SCHOOL WORLD RULE OF LAW BOOKLET SERIES, QUESTIONS AND ANSWERS ON THE WORLD COURT AND THE UNITED STATES (emphasis added)[hereinafter QUESTIONS AND ANSWERS].

46. *Id.* at 5-6.

A. The United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation;

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.⁴⁷

There are two main effects of the Connally Amendment. First, the United States can prevent adjudication in any case brought against it under this Declaration by stating that, in the opinion of the United States, the matter is essentially within its domestic jurisdiction. Second, because of the principle of reciprocity, any other country can similarly prevent adjudication in any case brought by the United States by stating that, in that country's opinion, the matter is essentially within its domestic jurisdiction.⁴⁸

The difficulty with the first point is that it is not a complete answer to what happens if a case is brought against the U.S., and our government were to say that, in its opinion, the matter "is essentially within its domestic jurisdiction." Under well established principles of international law, the ICJ is the authority which must determine jurisdictional facts, not the United States Government. This is certainly true here since the U.S. expressly gave up the right to self determination when the Connally Amendment's wording was later stricken.

The ICJ itself held in the case of *France v. Norway*, that an instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable instrument of which a court of law can take cognizance.⁴⁹

Arthur Larson, who compiled the Duke University pamphlet cited above, lists numerous domestic issues involving the United States that could have both a national and international effect, but which clearly would remain solely under domestic jurisdiction.

After the filing of the suit against the U.S. by Nicaragua, the United

47. Declaration of the United States of America Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with art. 36, ¶ L, of the Statute of the International Court of Justice, August 1946, T.I.A.S. No. 1598, 61 Stat. 1218, 1 U.N.T.S. 9.

48. See Case of Certain Norwegian Loans (*France v. Norway*) 1957 I.C.J. 9.

49. *Id.* at 48.

States announced, "it will not accept the forum's jurisdiction in Central American disputes for two years."⁵⁰ The reason given was that the United States was financing and waging an undeclared war against Nicaragua and also was financing and supplying the Contras when it mined Nicaragua's harbors to interfere with its shipping and movement of goods and equipment.

As the lawsuit progressed, the U.S. Administration formulated a resolution that it, ". . . will formally cease to recognize the authority of the World Court except in non-political cases . . ." ⁵¹ Washington officials were also quoted as saying the U.S. would, "continue to deal with the Court on 'mutually submitted' disputes involving legal or border problems with other nations."⁵²

The United States did not defend itself in this suit, and consequently, the Court held that the U.S.'s activities constituted illegal intervention.⁵³ The Court further ruled that the United States is under an obligation to make reparations to Nicaragua for damages caused by U.S. activities.⁵⁴

There were many organizations and people who objected to the United States' position. For example, the Boston Bar Association passed a resolution condemning our government for not abiding by its agreement to accept compulsory jurisdiction of the ICJ.⁵⁵

There are other fairly recent instances of the United States choosing to act unilaterally and militarily against other countries, whenever the administration in power deemed it to be in its best interests. The military invasion of Grenada and the bombing of Libya are two examples. Each of us can judge for ourselves what opinion the world will hold of us and our government when it acts alone, as it did in Panama in December 1989. I submit that one of the best courses to pursue for a more peaceful world, obviously, is mutual cooperation of states to strengthen world organizations as much as possible, no matter how difficult the road may be. We, as people who live in representative democracies, must acknowledge that it is very difficult for our governments to try to reason and deal with the Castros, the Khadafys, the Khomeinis, and other dictatorial governments in order to solve world problems.

VII. CONCLUSION

The challenges are vast indeed. Dramatic current political, social,

50. *U.S. Rejects World Court in Latin Role*, Den. Post, Apr. 9, 1984, at 1A, col. 3.

51. *U.S. to Cease Recognizing Authority of World Court in Political Matters*, Den. Post, Oct. 7, 1985, at 8A, col. 1.

52. *Id.*

53. *World Court Brands U.S. Contras' Support as Violation of Law*, Den. Post, June 28, 1986, at 3A, col. 1.

54. *Id.*

55. *See Resolution of the Boston Bar Association*, Feb. 20, 1985.

and territorial changes have been occurring almost daily since the Fall of 1989. Many of these changes demonstrate humanity's often thwarted but constant search for political as well as economic freedom, justice, and human dignity. Perhaps new governments — with the assistance of freed citizens voting and working in harmony — can move our planet along the road to a better world environment for humanity everywhere. We know the road ahead is still fraught with pitfalls and dangers. Yet lawyers, judges, public representatives, and government bureaucrats can do much to alleviate injustice and to move the process along.

At this time, I suggest we need to continue to widen and more effectively work in several areas:

1. *Diplomatic Immunity*. This is one of the most important fields of cooperation and should be used continuously to help governments function better externally.

2. *Political Sanctuary*. This should be granted whenever possible to relieve the suffering and distress of many politically threatened people.

3. *Hostage Taking*. This practice is reprehensible to all decent people. Many countries are actively participating in attempts to stop this practice and to obtain the release of those now being held. These efforts should be continued. The international legal cooperation which at times leads to the extradition of terrorists, bombers, and drug growers and dealers should also continue.

4. *Environmental and Other Concerns*. Many states are joining in an effort to protect our mutual environment and to place restrictions on the uses and depletions that are destroying it. All governments should be urged and enticed into joining in this necessary effort. All governments should assist actively in human rights causes. We also see some international efforts to deter and prevent money laundering and to open secret bank accounts.

5. *Unrest and Violence*. With the existence of widespread racial, ethnic, and religious violence and hatred, I suggest states should also more actively support the United Nations Charter in trying to abolish violence and war and to help the U.N. enforce the Charter's mandate that territory taken by force cannot be retained. I submit U.N. member states should also consider a Charter amendment to assure a timetable that will reasonably provide for the prompt return of territory conquered by an invader, or taken from affected inhabitants of an area by a defending state. In addition, lawyers on a personal basis should cooperate with non-militant religious leaders as well as fraternal and civic organizations on ethical and public issues to help sustain the fabric of democracy everywhere.

6. *International Court of Justice*. It seems appropriate for lawyers and judges to urge, whenever ethically possible, that all United Nations members must accept compulsory jurisdiction of the ICJ. Further, ways should be sought to obtain some limited power for that Court, in addition to the force of public opinion, to enforce its judgments, decrees, and

orders.

In summary, we should encourage lawyers and judges everywhere to be leaders, as many are, in urging action in appropriate fields and in assisting their respective governments in solving public problems. In addition we should seek better usage of the ICJ. There is a real danger that if we, who see the challenges our societies and the environment face in this period of drastic change, do not grasp the nettle and try to see to it that our societies and governments move ahead rapidly, humanity may lose its current opportunity to make the world safe for democracy, as well as to maintain this as a liveable place for humanity.

In 1968, Denna Frank Fleming, who was then Emeritus Professor of International Relations at Vanderbilt University, recited some pertinent thoughts and made some predictions which seem even more timely today.⁵⁶

He first quoted President Woodrow Wilson's speech in St. Louis regarding what Wilson called the "betrayal" of our government when the Senate failed to ratify the League of Nations Treaty following World War I.

Wilson said he felt as if he now should have, ". . . the boys, who went across the water to fight. . ." called together and tell them what he had said before they went, that World War I was a "war against wars" and he had done his best to fulfill that promise. But now he had failed and because of that failure, "there will come some time . . . another struggle in which not a few hundred thousand fine men from America will have to die but as many millions as are necessary to accomplish the final freedom of the peoples of the world."⁵⁷

Wilson was certainly prophetic as to another major war coming, namely World War II. Fortunately, he was not correct as to the number of American lives lost in that war, for it was not in the millions. He was accurate, however, in predicting that millions of lives would be lost when one thinks of the 60 to 70 million in all who died as a result of that terrible war. Professor Fleming went on to point out that "our people knew in 1918 and 1919 what should be done, but not enough of them insisted on its being done."⁵⁸ This was after the United States Senate refused to ratify the League Treaty. He also stated that, "[w]e do not know what the full outlines of the coming world order will be, but we know that it must come, since life is no longer tolerable without it If this war has done nothing else it has shattered the myth of national sovereignty."⁵⁹ He further stated:

"In these deadly years the alert citizens of every nation have discovered that the nation is not enough, that to live tolerably they must

56. SEE D. FLEMING, *THE UNITED STATES AND THE WORLD COURT, 1920-1966* (1968).

57. *Id.* at 161.

58. *Id.* at 185.

59. *Id.*

have something more — a higher level of protection, to which they must yield a fraction of their sovereignty in order to keep the bulk of it, the precious essentials of ordinary self-government. Thus the United Nations is not something imposed on us, but something we seek and are glad to give loyalty to, a loyalty which will deepen and dignify our national patriotism, such as the latter makes fruitful and productive our local patriotism. We add a level of government to preserve all the others, not to weaken or destroy them.”⁶⁰

Further, he observed that “[n]o voice is raised against the Permanent Court of International Justice.” He quotes from Attorney General Homer H. Cummings saying in 1934 that “. . . in the fullness of time the World Court is destined to become the most useful, the most majestic tribunal in all the history of the human race A strong, working organization of the nations can be postponed again until after a Third World War — if there is then anything left to organize.”⁶¹

All knowledgeable people everywhere surely realize how prophetic the last statement is when they stop to think what would happen in the event of a nuclear holocaust. They should also agree that it is up to them to see to it that it does not happen.

60. *Id.* at 186.

61. *Id.* at 186-87.

