

## REVIEW ESSAY

# Discussion of T. H. Cheng's Monograph *When International Law Works, and in Particular a Defence of the Nicaragua Judgment of the ICJ*

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Tai-Heng Cheng, *When International Law Works: Realistic Idealism after 9/11 and the Global Recession*, Oxford, Oxford University Press, 2011, 320pp., ISBN 9780195370171, £40.00.

In this monograph Professor Tai-Heng Cheng purports to set up a global perspective on the role of international law in international relations, and in particular on the conditions and ways through which it can be effective. The perspective is the one of the 'rational' decision-maker, in the best vein of the New Haven school, whose theoretical framework the author espouses completely and thoroughly. The book is a valuable contribution to international legal theory; it is not written in abstract and hollow words, but on the basis of a practical enquiry based on many examples. By adopting this perspective, it provides the reader with many interesting insights. In particular, it is enriching for the European reader, who is not used to this genuinely 'US–American' perspective. The various chapters of the book are as follows: 'Confronting Anxieties about International Law'; 'The Politics of Theorizing'; 'Legalism and Morality'; 'Judges'; 'Arbitrators'; 'Regulators'; 'Legal Advisors'; 'Officials'; and 'Law beyond Cases'. The purpose of these lines is not to give a full account of that book. Nor is it to portray the numerous thought-provoking and fruitful aspects of the developments contained therein; nor, by the way, is it to criticize some points on which the 'Europeans' will easily disagree with the author, as on what is permitted to the US officials in Guantánamo (p. 227 ff.). The point is rather to spell out some cardinal aspects, which seem to the present author to be weaknesses of the general approach or inadequacies of particular points. The critical approach, which will here be put forward, should not lead the reader to believe that the book presently criticized is devoid of merit. On the contrary, the author of these lines would not have ventured into the exercise of writing an essay on it if he had believed that such was the case.

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One of the basic tenets of the New Haven school is that law is not about rules, but about rational decision-making in an open system. The decision-maker is not just interpreting and applying rules, seeking to find out to what extent these rules constrain his decision. He does not feel 'bound' in such a narrow fashion. In particular, international law would not be obeyed, if the decision-maker believed that the application of a given 'rule' were compromising the interests of his state, unless, that is, there were particular reasons to bow to the rule in a given exceptional situation (for example, for fear of reprisals). All the attention of the research then shifts to how the decision-maker takes decisions involving an application of international law, or alternatively to how he ought to take decisions in that field. Hence, the law is constantly in flux. It is embedded in a continuous and interactive process of various decision-makers, based on certain societal values, by which the law emerges always in context, and it is consequently necessarily limited to a particular set of quite unique facts. There is no hard and fast 'rule' to be followed, from which the law could be taken lock, stock, and barrel, ready-made for consumption. This dynamic, process-oriented scheme, has appealed to many lawyers, also European (such as R. Higgins), who have found in it something at once refreshing and apparently realistic. The old-fashioned 'rule-oriented' approach could by contrast seem rooted in a sort of benevolent fiction of rule-abiding states, at once relaxing for the spirit as well as aloof from realities. Clearly, in a decision-centred approach, not only legal certainty (which is in any case weak in international law, generally speaking), but also all the directive power of the law quite completely disappears. The law as a living thing (in contrast to the law in books) is shaped by the decision-maker exclusively in the particular situation. The decision-maker takes the normative contents of some provisions as simple rational criteria, which he has to weigh up in a complex process of taking account of all the relevant circumstances and of all the scope- or goal-values at stake in the particular case. This general balancing-up through a rational process of discourse, exchange, and choice leads him to a result by which he upholds a certain solution as the best possible of all in the concrete circumstances. Thus, at the most basic level, the decision-maker takes a decision quite largely as if the 'law' (taken as norms) did not exist: I sit down and reflect about what is best to do, by putting all the arguments in a matrix and weighing them up. If the legal norm did not exist, I would proceed exactly in the same way as is described. Moreover, the 'criteria' which are taken from the legal norms could exist also without the norm bearing them, since they encapsulate rational aspects flowing from the existence of other subjects and their interests. These aspects of the problem would remain in any case; I would take account of them in any constrained or unconstrained system of decision-making. Therefore, such a system posits at the end of the day that there is no true 'normative guidance' as a normative constraint, since that would mean that the decision-maker could be obliged to take a decision he considers inadequate in a certain subject matter or context – something he would not do. The consequence is that this 'rule approach' is not describing reality and must be abandoned. A realistic approach, in contrast, holds that international law is in the decision itself, shaped in context: that corresponds to what actually happens. All in all, realism is the great concern in this theory. Its price is manifestly the loss of all real legal constraint and

legal previsibility through the idea of rules that direct the behaviour of the subjects. It has finally to be emphasized that the decision-maker envisaged by New Haven is essentially the one of the state. Or at least, the decision-makers that count are those acting for states. They have the interests of their state in mind when they take rational decisions.

Our point here is not the age-old criticism of decisionism, as opposed to legal norms and legal certainty. It goes deeper. Rules are made by a majority of states in order to bind the policy of those same states taken individually in a certain way. In this superficial sense, they are 'democratic' constructs, a word taken here to connote the idea that the legislator is the one who represents the majority will, in a way taking seriously the equality of states. From that assumption flow also the criteria for the binding character of these rules, namely consent (for agreements) and general practice and *opinio juris* (for customary international law). The roles of the single state or subject, and that of a specific community of states acting as legislator (the parties to a treaty, the states of the international society in general custom, the states bound by a regional customary rule, etc.), are clearly separated and delineated. This is not the case in the New Haven approach. Here, each decision-maker taken *uti singuli* is the ultimate arbiter of the fate of international law, not only as a law-applier (which is anyway a true proposition, in view of the sovereignty of states) but also as a legislator. The doctrine of decision-making propounded by this school leads ultimately to the recognition of a quality of legislator for each decision-maker. He is not just a subject applying the law and interpreting it, as in the 'rule' approach; quite on the contrary, he has become a partial legislator of international law, in competition with many other decision-makers acting as legislators. The New Haven approach thus first and foremost leads to a splitting-up of the concept of international legislator, translated from a series of 'state communities', global or partial, to the single subject. It upholds and buttresses a concept of radical decentralization of international legislation. Contrary to the modern tendency to integrate the 'international community' by some common form of legislation (called international law taken to be more than the sum of the external relations law of every single state) and of implementation, the position taken by Professor Cheng goes here to the roots: the single decision-maker becomes the sovereign. Unilateralism consequently reaches a peak: we are not just confronted with decentralized interpretation and application of international law; it is rather a matter of single-unit legislation, performed by each state and decision-maker as such. By this token, majority rule is evacuated. The different drummer has free reign; and, in theory, each one could become a different drummer; anarchy is perfect. The focal point here is, then: who is the legislator? Who weighs up some interests and alternatives, and provides the society with some authoritative answers? The New Haven approach transfers that function from a collective body to a single subject. Majority rule is thus completely lost. It is not, however, a defined body-public imposing some legal rules on its subjects (as normally in the legal context); it is, to the contrary, the subject imposing on the others its own vision of what the law is or what it should be, by creating a rule in context. International law can be subjectively reinvented by each decision-maker, since it possesses legislative powers. The rule is not one of the majority, this must be stressed

again – thus also the contempt of the classical New Haven school for the United Nations and its ‘decision-making’ or its values, dominated as they are by the Group of 77, quite alien to the US way of thinking.

If that situation truly portrayed the ‘reality’, we would have to accept it. The fiction of the ‘community’ as legislator in international affairs, in the way previously defined, would have to be dropped as a masquerade yielding to scientific truth. However, a simple glance at this reality shows that the New Haven approach does not reflect it faithfully, even if it contains an element of truth. It is already highly enlightening that most of the states of the world and most legal authors continue to follow a rule-based approach; but, clearly, that is not decisive. The main point is that the theory of ‘decision-making’ in an open system, as that described by New Haven and in the present book, fits only to a great power. It describes essentially the reality of the great powers, the way they see things, the way they behave, and the way they shape decisions. For the great number of smaller states, the described decision-making in an open system is not a possible option. They live in a tenuous universe of relative constraints. And they cherish the rule approach, since they perceive in it a better guarantee of their interests and of their well-being than a decisionism which is bound to favour the stronger states. It is not by accident that Switzerland, the national state of the author of these lines, has consistently held that support for international law as a set of rules is one of the basic tenets of its foreign policy, since the law (as rules) is the best protection of the weaker states. Apart from this political vision, it is evident that the ‘decision-maker’ in such states does not feel an international legislator in the way New Haven posits. He may have some leeway for more robust decision-making here and there, but he does not approach the matter generally in the way described by the New Haven approach. The basic rule of the author of the book, namely that ‘international law will not be respected if it is not in the interest of the state’, is thus true at best, with some caveats, for the great power but not for the smaller states. Thus, the New Haven approach may accurately describe a small section of the life of international law, namely the potent gravitation of the sovereign state in the proximity of great powers. Conversely, it does not describe the way matters are approached by the overwhelming majority of states in the world, which have to take account of ‘legislation’ external to them, and not just shaped by themselves in their own decision-making processes. In sum, it takes the (small) part for the whole; it is realistic, which it purports to be, only in a small sector of reality. This can be seen in a series of positions taken by New Haven and also in the present book: for example, the quite permissive interpretation of the ‘rules’ on the use of force in international relations. This is important for a great power, but not at all attractive for smaller States, whence the restrictive rules in the UN Charter and customary international law as interpreted by the ICJ. But a New Haven approach can easily subvert these ‘rules’ as set by the majority. It can do so by a decision-making in context, fitting the particular interests of the great power performing it and being a legislator for itself. This self-judged ‘international law’ is then imposed on others by way of projection of the foreign policy. In the eyes of the present commentator, if international law were all but this, it would be better to abolish it as a discourse and as a reality, since it would just serve to cloak decisions under the mantle of an

appealing label, an exercise in power, hypocrisy, and bad faith. However, the acid test is easy to administer: would the United States (and New Haven) accept bowing to the same decision-making freedom of all the other 193 states of the world? Or would they accept that the same rules, as they interpret them, be applied against them, for example, the liberal use of force conceptions once turned against themselves? The fact is rather that the US does not even accept having applied against it the *narrowly* interpreted rules on the use of force. As we will see in the discussion of the *Nicaragua* judgment of the ICJ, Professor Cheng indeed spares nothing in this decision of the Court, which he criticizes in an almost obsessive way. This is another way of seeing the difference of freedom in decision-making, between the Greater and the Smaller.

In the view of the present author, there are a series of other more specific and technical shortcomings in the book. Only some examples will be given here. Some chapters are excessively long and superficial. In the one on the 'Politics of Theorizing', the main point to be made is that behind theoretical conceptions lie political beliefs. This is a quite trite utterance, well known, and absolutely *à la mode*, which obviously does not mean that it is untrue. However, to go to lengths (pp. 24–72) to buttress just this point seems somewhat disproportional. The chapter suffers, moreover, from a haphazard and superficial juxtaposition of schools of thought and authors (one has the impression that these are just taken because the author stumbled upon them here or there). The qualification of the authors as 'positivist' or otherwise is often imprecise (to treat H. Lauterpacht as a positivist is more than dubious), and reveals only something about the position of the author himself: every rule-based lawyer is a formalist and a positivist. This is hardly a proper understanding of the European legal schools. It is also more than a pity (indeed a professional fault) that the author, because of obvious language barriers, has taken account only of English legal (and mainly US) writing. This peculiar universe of references just reinforces the parochialism and closeness of the argument. It explains spectral mistakes, as the one described above about the labels to be put on several European authors. No single French, German, or Italian written text (not to speak of those in other languages) is taken into account. For the present writer, it is more than doubtful if it is possible to write on 'international' law on the basis of so narrow a background. Here again, the part will all too easily be misleadingly taken for the whole. The present author is not English-speaking, yet he has learned this language: why could a small effort towards other languages (and hence also towards other ways of thought) not be asked of US colleagues? There is further a point of regret in that some technical errors have remained undiscovered. Thus, for example, the author more than once speaks of 'Optional Protocol' litigation at the ICJ, meaning the optional-clause system (e.g. pp. 124, 151). However, we are not here dealing with, for example, the Vienna Convention on Consular Relations and its Protocol giving competence to the Court under Article 36, paragraph 1, of the Statute. We are rather dealing with the unilateral optional declarations under Article 36, paragraph 2, of the Statute. In the first case, one is confronted with compromissory clauses of conventional nature, and in the second with unilateral legal acts deposited with the Secretary-General of the UN. The legal basis is different in both situations and the law relating to them is not the

same. Another example again concerns the ICJ: it is written that ‘when the ICJ is called to render an advisory opinion, there is no explicit dispute resolution function. Indeed, the Statute of the ICJ states that an advisory opinion is not binding upon the parties’ (p. 123). Not only is there nowhere such a provision in the Statute, but moreover there are legally speaking no ‘parties’ in an advisory procedure. Such legal imprecision is unfortunate and perfectly avoidable.

Time has come to direct ourselves to the *Nicaragua* judgments of the ICJ (the one on *Competence and Admissibility* of 1984 and the one on the *Merits* of 1986).<sup>1</sup> Professor Cheng disagrees with almost every point in the Court’s approach and handling of that dispute, accusing the judges of having broken a chain of case law which is objective and balanced, to espouse a selective, biased, and political judgment in this dispute opposing Nicaragua and the United States. The present author disagrees in turn with almost all of the arguments advanced by Professor Cheng, and thus wishes to rebut them one by one. The *Nicaragua* judgments are certainly not perfect; they have their weaknesses and shortcomings, as every human endeavour and undertaking; but they are not marred, in the eyes of the present author, by the defaults levied against them in the present book. The vividness of the criticism, differing from the more placid account on other subject matters of the book, is a witness of the subjective feelings of Professor Cheng, who must have some personal and manifestly ideological difficulties with these judgments. As far as I am concerned, I would just like to state the following, so that no misunderstanding can accrue on this basis. My family, on the side of my mother, coming from Greece, escaped, at literally the last second, being killed by the Communists, in the civil war of 1946–49. It is thus understandable that for this, but also for other reasons, I have hardly any sympathy for the communists and in general for the far-left side of the political spectrum. It would therefore be difficult to tax me as an apologist for the Sandinista regime in Nicaragua. However, I am indeed deeply committed to the international rule of law pitted against international anarchy and the power of the strongest in the best Darwinist vein. So much for background information.

The handling of the *Nicaragua* case by Professor Cheng is to be found on pp. 141–62 of the book. I will proceed by quoting or summarizing the position of the author of the book, and then proceed to oppose my own arguments to those of Professor Cheng. I may be forgiven for speaking very openly and without always taking pains to honour diplomatic circumlocutions. There is no animosity in my argument, but I wish to make it crystal clear.

1. The *Nicaragua* case ‘illustrates how deviating from legalism undermines the legitimacy of the international legal system and its effectiveness’ (pp. 133, 141). This is a sort of general thread or tenet of the author, to be buttressed in the later detailed analysis of the judgment. We may take this argument as an interesting one, not so much because it shows what the Court has done, but because it reflects something

1 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14.



about the ideology of Professor Cheng. The Court is solid and legalistic in so many other cases; and then, at once, it jumps out of its general tenor, and suddenly becomes ideological and biased in one single case, and this happens to be the *Nicaragua* case, where precisely a facet of the most 'political' US foreign policy is condemned. The point is not so much that the US is condemned: thus, the US was also defeated in the *Eletronica Sicula* case in 1989, but that case was not bearing on heavily political matters.<sup>2</sup> In this latter context, the Court is thus not necessarily biased. In short, the Court is legalistic as long as it does not touch on basic political interests of the US. If it does, it has necessarily (obviously that part of the reality is beneath the level of conscience) fallen out of its usual legalistic track. The US policy cannot be bad – a conclusion New Haven does not reach too infrequently, and it is not the single exception which Prof. Cheng mentions more than once in his book that will prove the rule.

Condemning a state for having, inter alia, mined the port of another state in times of peace is not 'ideological'; it flows from the law applicable. We have to put a side our ideological preferences for state A or B. The Court rightly approaches the matter under the prism of the equality of states. Hence, if there were a wrong if state A committed certain acts against state B, there would also be a wrong if state B committed them against state A. I very much doubt that under such conditions the US and its people would have considered lawful the mining of its ports, with all the concomitant danger for innocent persons. I wonder how Professor Cheng would have argued if Nicaragua had mined the port at New York, and the Court had condemned it for that. Would he have found that utterance a perfectly normal one? For any other state than the US and its allies, would he have accepted that the court acted 'legally' by censuring such behaviour; but not if the actor is the US? Or would the US people have considered lawful the publication and distribution of a brochure for psychological warfare to some insurgents within the US, which openly called for them to perform terrorist acts? The general policy of the US against terrorists does not lead one to believe that. The Court has thus not been 'un-legalist' by condemning such action; it has precisely been legalist: it applied the rules existing for all the states according to the way the vast majority of them interpret these rules. It is perhaps difficult to understand that in the New Haven perspective, where everything turns on the individual decision-maker.

Can the position of Professor Cheng thus perhaps be explained by his own blinded eye and bias? This partiality – so it appears to me – can easily be explained by the fact that he is not independent in judgement, as a citizen of (or a person espousing) the state condemned. You cannot be judge and party at once. There is as such nothing bad about being partial in such cases, because you defend 'your people'. The Court was not in this position. It was independent and impartial, in the sense that it did not have any national bias. Moreover, large majorities delivered its 1984 and 1986 judgments, including all the Western judges with the exception of the US and UK ones. You may agree with the Court or not; but it is all too easy to label something

<sup>2</sup> *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, [1989] ICJ Rep. 15.

as ideological and biased as soon as you do not agree, and as legalist and fine as long as you do agree. This corresponds to some sort of narcissistic projection, not to a serious analysis of the law.

2. The Provisional Measures Order was flawed. First, the Court ought to have addressed the arguments of the US that the present dispute was part of a large complex of interrelated political, social, economic, and security matters in the Central American Region. And the Court ought to have stated the reasons for deciding in favour of Nicaragua (on one point unanimously, on the other with only one dissent, by the US Judge). Article 56 of the Statute states that judgments shall be motivated (arguably an Order is not a Judgment, but that is a too literal reading of Article 56) (p. 145–6).

None of these arguments possesses even the faintest and remotest justification. First, the Court does not address the merits in the provisional measures stage, which is an urgency procedure concerned only with the preservation of the object of the dispute (or the rights the claimant puts to fore) and the non-aggravation of the latter. The object of dispute of the provisional measures is thus distinct from the object in dispute on the merits. Nor is the Court at this early stage in a position to express arguments on the merits, since it does not possess the necessary elements. The memorials and pleadings on the merit issues have not yet taken place. If the Court attempted to take a position on the merits, without possessing the proper information, that would indeed have to be branded an abuse of procedure. It has to be stressed that the jurisprudence of the Court bears testimony to such a handling of issues at the provisional measures stage, and this since the times of the PCIJ. The Court thus just followed, in this case, its age-old line of case law. In this light, it is difficult indeed to label the present order non-legalist. In addition, the argument that the Court would have to express on the ‘wider context’ of the dispute seems particularly contrived, since the Court has always – rightly – rejected such arguments. Just a handful of years before the order in the Nicaragua case, the Court had rejected, on the merits stage, exactly the same argument made by Iran against the US in the *Tehran Hostages* case of 1980.<sup>3</sup> The Court is not divested of its competence on a certain issue simply because a legal dispute is part of a larger context; if it were so, the Court’s jurisdiction could in almost every case be stymied, since the legal dispute brought to the Court is always part of a larger political context. In 1980, the US benefited from this rejection; I guess Professor Cheng would have found the Court very legalistic at that juncture. By the same token, this ‘context’ argument could have been rejected also in this order by a simple reference to the 1980 precedent and the consolidated case law of the Court. The Court, however, refrained from doing so, even if that course would have been easy. It refrained from taking that course in order to maintain its (legalistic) line of jurisprudence concerning the arguments that may, and those that may not, be considered at the provisional stage. The present argument indeed pertains to the merits; thus, the Court did not address it in the order on provisional measures. Finally, the reference to Article 56 is more than astonishing. The orders

3 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3, at 19–20.



of the Court are always motivated in a less tight way than judgments, since they are only provisional and express exclusively on issues relevant during the proceedings (from the seisin to the merits judgment, if any) at the Court. The style of giving the reasons is indeed different, the Court's reasoning being encapsulated in a series of 'whereas'/'*attendu que*'. This has been so since the first Order on provisional measures by the PCIJ, in the *Denunciation of the Treaty of 2 November 1865 between China and Belgium* (1927).<sup>4</sup> It is, moreover, extremely strange to proffer the argument that the Court has not been legalistic in not motivating the order as if it had been a judgment (contrary to its consolidated practice), but to claim, on the other hand, legalism for their own argument, which (mis)reads the wording of Article 56 of the Statute by putting it upside down, namely by including orders, when the provision covers only judgments. A thorough reasoning is not altogether necessary at the provisional stage: this is an urgency procedure to protect provisionally certain rights and positions; the Court must only show that the conditions for such an order are present, namely, for example, the danger of irreparable harm to the rights flowing from the object of the dispute. Other forms of reasoning are unnecessary at this stage, and for that reason the Court does not pursue them. This course of action is unimpeachable. The Court did exactly the same, in 1979, when it issued an order benefiting to the US in the *Tehran Hostages* case.<sup>5</sup> I hardly believe that Professor Cheng would have found that order insufficiently motivated – but perhaps Iran had that feeling. Such an exposition of the law does not turn on objective application of rules; it is coloured by friend and foe, according to C. Schmitt the main criterion of 'political' thinking.

3. A slight criticism is voiced on the fact that El Salvador was denied an oral hearing (written pieces had been deposited) when a decision was taken on its motion to intervene (p. 147). Professor Cheng admits that the motion of intervention did not possess a proper object in the jurisdictional phase, since it related to the merits stage (and could be presented again there). The criticism concentrates on the absence of an oral hearing. The decision on that point was taken by a majority, and it can indeed be argued that an oral hearing should have been granted. However, the Court being in possession of all the arguments, and the object of the intervention being at that stage manifestly inadequate, an oral hearing would have served no proper purpose on substance, apart from burdening and delaying the proceedings between the parties to the dispute (and the time schedule for the hearing of the parties, already settled, was tight). Moreover, such intervention, in view of its object, was fraught with the danger of impacting upon the merits. From the legal point of view, the question is to be looked at as follows.<sup>6</sup> Article 84, paragraph 2, of the Rules of Court (1978) states, in this context: 'If, within the time-limit fixed under Art. 83 of these Rules, an objection is filed . . . to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding'. The US did not object; neither did Nicaragua object, but drew the attention of the Court

4 PCIJ, Series A, No. 8, at 6 ff.

5 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Order of 15 December 1979, [1979] ICJ Rep. 6, at 7–21.

6 See C. Chinkin, 'Article 63', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), at 1593–4.

to certain deficiencies within the declaration of intervention. On a formal reading, since Nicaragua did not object to the declaration, El Salvador did not have a right to an oral hearing under Article 84, paragraph 2, of the Rules, but could respond in writing to the adverse comments by Nicaragua. However, there is a good argument that indeed Nicaragua has, in substance (if not in form), objected to El Salvador's claim, and that therefore a hearing should have been granted. Such a course would perhaps have been more in accordance with judicial propriety, as several judges noted. In sum, this criticism of Professor Cheng on this point may be warranted. The Court avoided that hearing essentially on account of the clear inadequacy of the declaration of intervention at the present phase of the jurisdictional proceedings, of its possession of all the necessary elements to decide, and of the tight time limits in the principal case. It is a matter of argument to what extent these justifications were sufficient for a somewhat formal interpretation of Nicaragua's reply to El Salvador's declaration on intervention. All in all, it is often better to 'err' on the side of excessive attention paid to procedural rights of the participants than to 'err' by denying such participation rights.

4. The Court could not uphold the compulsory jurisdiction under Article 36, paragraph 2, of the Statute, since Nicaragua had not been a party to the optional system at the PCIJ, and hence could not be one at the ICJ (p. 149). By holding to the contrary, the Court departed from legalism.

The Court was faced with a declaration accepting the jurisdiction of the PCIJ under Article 36, paragraph 2, of the Statute. The history of that declaration was, to say the least, an unusual one. In 1935 the Senate of Nicaragua, and then the Chamber of Deputies, had approved the optional declaration proposed by their government: it had been formulated as early as 1929. A telegram had been sent by the Nicaraguan minister of foreign affairs to the League of Nations, notifying the League of Nicaragua's ratification of the declaration. The telegram stated that the instrument of ratification would be sent to Geneva, but in fact it never was received. It seems to have been sent by a seaborne courier during the Second World War, and was probably lost in transit.<sup>7</sup> The question was whether the 1929 declaration, which unquestionably had not acquired full binding force, might nevertheless benefit, as an imperfect legal act, from the transfer from the PCIJ to the ICJ under Article 36, paragraph 5, of the Statute. If it did, the simple deposit of a Nicaraguan instrument of ratification might perfect the 1929 Declaration and establish the Court's jurisdiction over the present case.<sup>8</sup> The essential legal question was thus whether Article 36, paragraph 5, of the Statute presupposed an optional declaration that was formally perfected and in force, or whether an unperfected legal act could also benefit from the transference to the new Court and there be completed by means of the necessary formalities. In sum, the question was not, as stated by Professor Cheng and by Judge Jennings, whether something non-existent at the PCIJ could become something

7 *Nicaragua* case, Admissibility and Jurisdiction, *supra* note 1, at 399–400.

8 On the other hand, if Nicaragua deposited a new declaration, without retroactive effect, the Court would not have had jurisdiction in the case, because the United States of America had in the meantime withdrawn its optional declaration.

existent at the ICJ (which it could not). It was rather whether an imperfect declaration could be now completed by a legal act (ratification) to make it perfect, and, for this purpose, whether *this* provisionally imperfect legal act passed from the PCIJ to the ICJ. Nicaragua indeed needed the old imperfect act, since the deposit of a new optional declaration would have come after the denunciation of the declaration by the US, and therefore could not have triggered the jurisdiction of the Court *ratione temporis*.

The Court took the view that Article 36, paragraph 5 should be given a wide and teleological interpretation. The essential concern of those who drafted the Statute was to maintain the greatest possible continuity between the PCIJ and the ICJ. The point was to avoid loss – of whatever nature – resulting from the transfer of judicial activity from the old Court to the new.<sup>9</sup> The interpretation that was most consistent with this conception and with this objective was the one that preserved even the potential<sup>10</sup> (or unperfected) effects of the 1929 declaration, i.e. its capacity to be subsequently perfected through the necessary formalities. This interpretation is certainly not self-evident; but it is absolutely congruent with the intention of the drafters of Article 36, paragraphs 5 and 37, of the Statute, where the main point is to ‘avoid any loss’ by the passage from the PCIJ to the ICJ.<sup>11</sup> This is not a departure from legalism, but a teleological interpretation of a provision of the Statute. It was shared by a large majority of judges and corresponded to the intentions of the drafters of the Statute.

5. Judge Jennings is right to say that the Court should not have applied the six-month notice for denunciation of the optional declaration by the US, since that would be unfair. It is unfair in regard to the states that have committed to no obligation under the optional system, when compared with the many who have not; and unfair because Nicaragua could withdraw at will from its own declaration, since it contained no six-month limitation (lack of reciprocity). There is much ‘to commend in the candor of Judge Jennings’ reasoning’ (pp. 150–1).

Let us enter into this point with a general comment. The USA’s optional declaration contained a stipulation entitling the USA to withdraw it on six months’ notice. The optional declaration of the applicant, Nicaragua, contained no such clause. The USA sought to argue that, absent any restrictive wording, Nicaragua could withdraw its declaration with immediate effect. Consequently, by the operation of reciprocity, the USA claimed the benefit of the same right to withdraw its own declaration with immediate effect, so that the letter of Secretary of State G. Schultz, withdrawing the USA’s optional declaration three days before Nicaragua brought the proceedings, should be considered decisive. This reasoning was defective in several ways. The first was that it confused a condition as to the duration of the optional declaration

9 *Nicaragua* case, Admissibility and Jurisdiction, *supra* note 1, at 407–8. This interpretation is analysed minutely, and with approval, by D. W. Greig, ‘Nicaragua and the United States: Confrontation over the Jurisdiction of the International Court’, (1991) 62 BYIL 119, at 123 et seq.

10 *Nicaragua* case, Admissibility and Jurisdiction, *supra* note 1, at 404.

11 And the Court had already given this interpretation to Art. 37, which is the twin of Art. 36, para. 5: see the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment of 24 July 1964, [1964] ICJ Rep. 6, at 29 et seq.

with a material (subject matter) reservation. The second was that it presupposed that an optional declaration containing no provision as to the length of a notice of withdrawal could take effect immediately. The Court had no difficulty in showing that this was not the case, and that the rule as to a 'reasonable period of time' applied.<sup>12</sup> Even applying reciprocity, the USA should consequently have allowed a reasonable time to elapse from the moment of withdrawal, and three days was obviously not long enough. Third, the USA's argument ran counter to the fact that reciprocity is applicable only from the moment the Court is seised, and between parties to a concrete case. There is no 'pre-seisin' reciprocity. At the pre-seisin stage reciprocity would, in any event, have to be multilateral and inchoate, and not an *inter partes* reciprocity, which is the only kind admitted by the Statute. A state could pick and choose in all other optional declarations (with no link to the case to be brought to the Court) the conditions most favourable for it, in order to manipulate or to withdraw from its own declaration so as to stymie the jurisdiction of the Court. The compulsory jurisdiction of the ICJ would thus become a parody, with no compulsory element at all. Fourth, the USA was projecting a 'reservation' into the Nicaraguan declaration (a reservation which was not actually there), and was claiming to rely on it against a state (Nicaragua) which had not accepted the Court's jurisdiction in terms narrower than its own. The Court stated, by way of reminder, that:

It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions. . . . Reciprocity enables a State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends'.<sup>13</sup>

In the face of this situation, which legally is very clear indeed, it is difficult not to be greatly astonished – if I may use this lenient term – that three of the judges considered the USA's argument to be well founded.<sup>14</sup>

In sum, the arguments of Professor Cheng and Jennings are in our eyes entirely flawed. First, it seems astonishing that under the flag of 'legalism' the Court is encouraged to simply ignore a black-letter condition for the denunciation of the optional declaration of the US. The US has freely chosen to insert this limitation; it should thus honour its own pledge. When a Court just ignores what is written down in black and white, it can easily be accused to manipulate and depart from legalism; but if it does the opposite, it is indeed a great deal harder to accuse it of the same misdeed. Second, there is absolutely no unfairness: the only unfairness is the attempt of the US to withdraw three days before the case was brought to the Court, by playing fast and loose with the optional-clause system. Why is there no unfairness? Let us look to the branches of the argument as presented above. The comparison of states within the optional system and states without is not only unwarranted, but

<sup>12</sup> *Nicaragua* case, Admissibility and Jurisdiction, *supra* note 1, at 420, para. 63.

<sup>13</sup> *Ibid.*, at 419, para. 62.

<sup>14</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 471, at 511 (Judge Oda, Separate Opinion); [1984] ICJ Rep. 533, at 545 et seq. (Judge Jennings, Separate Opinion); and [1984] ICJ Rep. 558, at 616 et seq. (Judge Schwebel, Dissenting Opinion).

also unheard of. It would be tantamount to comparing the situation of someone bound by a contract and another one not bound by a contract, saying that it is unfair to hold the first to its contractual obligations since the second is not bound by the same. According to the logic of Judge Jennings, states that are parties to the optional system would have to be allowed to do anything they wished, including disregarding engagements they had solemnly entered into, simply because other states, not parties to the system, are entirely free in relation to the Court and thus have more extensive 'rights' to do as they like, to submit or refuse to submit to the Court's jurisdiction by special agreement, and so on. This would seem to project reciprocity not just onto all states parties to the system of the optional clause, but onto all the states of the world. This was an unprecedented proposal. I really wonder how it is possible to sell such arguments under the flag of 'fairness'. Finally, the statement that the unfairness stems from the fact that Nicaragua could on its account withdraw at will and with immediate effect, whereas the US could not, is not only unwarranted, but frankly an utterly unfair argument. Indeed, the Court says exactly the opposite (as seen above<sup>15</sup>): it affirms that Nicaragua could not, itself, denounce with immediate effect. Nicaragua could not rely on the fact that its declaration contains no time clause, since in the case of absence of any time clause in the declaration, the rule of a 'reasonable time' applies, precisely in order to maintain the usefulness of the optional-clause system. If anyone could just denounce at will at any moment and with immediate effect, there would not be any *compulsory* jurisdiction any more. You are certainly not obliged to take part in the system; but if you do, you must commit to something and not reserve to yourself an attitude which defeats any usefulness of the system. In the eyes of the Court, the potential evil of denunciation with immediate effect was eliminated by a levelling-up process: *neither* Nicaragua *nor* the USA could withdraw its declaration with immediate effect. This interpretation is, from every point of view, sounder and more solidly based than an interpretation which allows withdrawals with immediate effect. However, even if one does not agree with this, it remains that according to the Court Nicaragua and the US were put on the same footing: neither could withdraw with immediate effect; the unfairness due to inequality disappeared. It is hard to understand why some authors, such as Professor Cheng, just ignore this passage of the Court's reasoning and continue to criticize it on account of an argument silencing what the Court actually said. I am afraid, thus, that – in my eyes – there is hardly any candour in the interpretation propounded by Judge Jennings and by Professor Cheng, but rather, indeed, I have to frankly say it, a service to a preconceived cause.

6. On the merits, there are various criticisms of departure from legalism. Some of them may be picked up here: (i) the Court gave a wrong interpretation when it stated that an armed attack in the sense of Article 51 of the UN Charter does not include the provision of weapons, or logistical and other support to an armed group (p. 152); (ii) the Court did not take account of the facts, for example the assistance of the Sandinista government to rebel groups in other countries (pp. 153–4);

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15 *Nicaragua* case, Admissibility and Jurisdiction, *supra* note 1, at 420, para. 63.

(iii) the Court found that ‘the United States was responsible for the armed attacks of the contras because it exercised “effective control” over the contras’ (p. 160).

On point (i): the Court indeed uttered the current mainstream interpretation, backed by the vast majority of states. If the Court had given up this general opinion only in the present context, it could well have been accused of a departure from ‘legalism’. Moreover, the US, as a state that constantly and in many parts of the world supplies weapons to varied armed groups fighting for causes it favours, thus intervening in internal affairs, should be highly keen to maintain and hail the interpretation of the Court. If the other interpretation was chosen, i.e. the one favoured by Professor Cheng, more than a dozen states would have the right of self-defence (by using force) against the US. This includes military operations on its territory, the mining of its ports, bombarding, armed invasion, etc., limited only by the principles of necessity and proportionality. Would the US public and Professor Cheng agree to such a result? I doubt it very much. If I am right, the interpretation of the Court is sound also in their eyes. The contrary position would then simply be self-interested, for the outcome of a particular situation in Central America. The law does not rest on such ad hoc interests, which turn as quickly as the wind.

As to the issues of fact (point ii), it is necessary to stress that the Court proceedings are not based on an inquisitorial system (as in Continental criminal law), but only on a private-law-type litigation system, where it is for the parties to bring to the Court the evidence they wish to rely upon (*da mihi facta, dabo tibi jus*).<sup>16</sup> The Court thus does not decide on material ‘truth’, but on the sole basis of the evidence submitted to it. The Court will add to the evidence submitted by the parties only notorious facts, and possibly (but rarely) expert knowledge it seeks from Court-appointed experts. This not only stems from the fact that the procedure takes place between sovereign states placed on a footing of equality (adversarial proceedings). It also stems from the fact that only the litigating states possess the relevant information. The Court has no proper means, neither logistically nor financially, to conduct its own inquiries. In the present case, if the Court was not in possession of all the information the US deemed to be essential, the fault falls on itself, since it decided, after the jurisdictional phase, not to appear any more at the Court. This is an option, which was open to it. But it is unfair to complain after the fact of the consequences to be ascribed only to its own deliberate choice. On the contrary, the US should then assume in full these consequences, legal and other, of its debatable course of conduct, which, as already stated, was at once possible and open to it.

As to point (iii), the Court says exactly the opposite of what Professor Cheng affirms. Moreover, the restrictive criterion of ‘effective control’ (which he criticizes) operated completely to the benefit of the US, and this was so since the Court held to the contrary of what he erroneously states. If the reader is not convinced by my bare and barren statement, I shall quote from the Court:

The Court *does not consider* that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an

<sup>16</sup> See R. Kolb, ‘General Principles of Procedural Law’, in Zimmermann et al., *supra* note 6, 891.



extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*. . .<sup>17</sup>

In the *dispositif*, or operative part, one does not find any single point dealing with any attribution of the *Contras* acts to the US. I do therefore not know how exactly to take Professor Cheng's point. Either it stems from a lack of having read carefully and in full the judgment; this would be problematic for a lawyer and a commentator. Or, alternatively, it stems from a voluntary miscarriage of the facts in order to be able to further criticize the judgment, which would be open dishonesty. I cannot believe that the latter is true. Conversely, the comments of Professor Cheng on the problems triggered by the strict adherence of the ICJ to a reading of Article 51 of the Charter, which supposes the existence of an armed attack by a state, are not considered here. There are good arguments in this context on both sides, that of the Court and that of its critics. Hence this is a point of law on which reasonable men, as the Anglo-Saxons put it, may reasonably differ.

Concluding, it must be said that Professor Cheng's book remains absolutely stimulating reading, especially since it is coloured in a certain way and departs from European mainstream positions. I felt obliged to forcefully defend the Nicaragua judgments, on which I feel as strongly as Professor Cheng, but in the exact opposite way he does. For me, the Court has proven in these cases to be the guardian of international legality, whether there is a strong or a weak state in front of it. Any of the acts for which the US has been condemned in that case would probably have been accepted as a sound exposition of the law if they had concerned other states than the US, or simply if they had concerned a state labelled A, placed behind the famous veil of ignorance. The whole world (but the US) has seen in these judgments a proof of the independence and the courage of the ICJ.<sup>18</sup> The judgments may not have been carried out, as Professor Cheng notices, but that is not all too grave. The responsibility for not having honoured its commitments when ratifying the UN Charter rests on the US; the Court, for its part, has done its duty and this will remain on the record. It has not bowed to arrogance and to power. The contrary conduct would have been by far more self-destructive to the Court. It would have given the image of a subservient and over-cautious (if not frightened) body, not living up to its responsibilities as soon as a great power asserts itself with insistence in a given case. Once more: I am not concerned with R. Reagan and his policies; nor would I be with those of any other, for example Brezhnev and his policies, or those of my country, Switzerland, or those ones of my mother's country, Greece, or those of my father's country, Austria, or those of China. The general rules of international law

<sup>17</sup> *Nicaragua* case, Merits, *supra* note 1, at 65, para. 116, italics added.

<sup>18</sup> That a court of justice shows true independence and courage especially when it goes into cases concerning the powerful and does not confine itself to the judging of the smaller subjects is a trite but general truth. Journalists often stress that, e.g. recently again for the Brazilian Supreme Court in the Mensalao corruption scandal, where the journalist (of a moderate right-wing Swiss newspaper) writes: 'Das Oberste Gericht hat Mut und Unabhängigkeit bewiesen und eindrücklich demonstriert, dass das Gesetz für alle gilt' ['The Supreme Court has shown courage and independence; it impressively demonstrated that the law is applicable to all']; *Neue Zürcher Zeitung*, 19 December 2012, no. 296, 21. This is the way the *Nicaragua* judgment on the merits was perceived by a large part of the world.

have to remain the same for all states. For me, in a litigation, there are only states A and states B. That is the reason I so often moved the argument of reciprocity, asking rhetorically what would have been the position of the US and Professor Cheng if the rule proposed as being sounder by this author had been applied reciprocally against the US. In sum, the *Nicaragua* judgments remain somewhat bold (but not at all excessive) on the jurisdictional plane and to a significant degree sound on the merits. That this is viewed somewhat differently by some US citizens (or by those living there) may be understood.