normative shift within the broader, evolving meaning of sovereignty or a deeper, more existential shift that follows and builds on earlier trends, RtoP's normative weight has the potential to shape state conduct and the international community's role in civilian protection. In fact, for now its inchoate legal status may offer states greater ability to build support for collective assistance and collective action.[104]

THE *NICARAGUA* CASE: A RESPONSE TO JUDGE SCHWEBEL

*By Paul S. Reichler**

Judge Stephen Schwebel has every right to attack the International Court of Justice's judgment in the *Nicaragua* case and to defend his dissenting opinion. But he goes too far when he accuses Nicaragua of perpetrating a "fraud on the Court."[1] A response is appropriate, especially from counsel cited by Judge Schwebel for "proposing, developing, and arguing Nicaragua's case."[2]

Judge Schwebel's editorial raises concerns not only for Nicaragua, but also for its counsel. As officers of the Court, we have an ethical obligation not to submit, or to allow a client to submit, false evidence. Judge Schwebel's editorial is susceptible of being read as implying that Nicaragua's counsel failed properly to exercise this obligation.

Did Nicaragua perpetrate a fraud on the Court, as Judge Schwebel claims, by putting into the record false evidence? How does Judge Schwebel support this allegation?

His central thesis is that Nicaragua lied to the Court in declaring that it was not engaged in the trafficking of arms to Salvadoran rebels fighting a civil war against the government of that country. The issue was an important one because, as Judge Schwebel states, "Nicaragua readily demonstrated that the United States had mined Nicaraguan waters and given critical support to the *contras*,"[3] who were fighting to overthrow the Nicaraguan government. These U.S. actions were indisputable violations of international law unless the United States could demonstrate that it was acting in "self-defense" against an "armed attack." That was how the United States publicly defended its actions: by arguing that it acted in "collective self-defense" of the government of El Salvador, in response to Nicaragua's alleged support for the Salvadoran rebels—which the United States attempted to portray as an "armed attack" against that state.

Rule? (Mar. 7, 2011), *at* http://turtlebay.foreignpolicy.com/posts/2011/03/07/the_uns_tough_stand_on_qaddafi_exception_or_rule. Compare Lynch's "The council's action constituted one of those rare 'moments of clarity' . . . when the council advances, or reinforces, a set of new moral standards[,]" paraphrasing Edward Luck, the United Nations' special adviser for the responsibility to protect, with another paraphrase of Luck that "the forceful response to Libya 'is quite remarkable [compared to the response to the 1994 Rwandan genocide], but not easily replicated in the future' "). *See also id.* ("Mauritius, speaking on behalf of the African Union, cautioned that the move to isolate Qaddafi's government should not be seen as a precedent").

[104] Burke-White, *supra* note 19, at 35 (cautioning that "[m]oving too fast [toward legal codification of RtoP] risks undermining th[e] consensus [that is emerging] as some states [could] step back from forward-leaning rhetorical positions to avoid legal codification").

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[1] *See* Stephen M. Schwebel, Editorial Comment: *Celebrating a Fraud on the Court*, 106 AJIL 102 (2012).

[2] *Id.* at 102 n.2 (citing Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT'L L.J. 15, 22–24 (2001)). My co-counsel in the case included Ian Brownlie, Abram Chayes, and Alain Pellet.

[3] Schwebel, *supra* note 1, at 102.

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As Exhibit A of Nicaragua's "fraud on the Court," Judge Schwebel cites the affidavit of Nicaragua's foreign minister attesting that his "government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador."[4] Judge Schwebel says the Court "essentially accepted the truth of the affidavit of the Nicaraguan foreign minister."[5]

Judge Schwebel's criticism is unfounded. In fact, the Court decided to give *no weight at all* to this affidavit or to any other self-serving statements by senior officials of either party:

> A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. . . . [W]hile in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve.[6]

Nicaragua's "main witness" (as Judge Schwebel acknowledges) was not its foreign minister, but a former Central Intelligence Agency (CIA) analyst who was responsible for monitoring and evaluating U.S. intelligence relating to suspected arms trafficking from Nicaragua to El Salvador in the critical period from March 1981 to April 1983, when the United States launched and escalated its military and paramilitary activities against Nicaragua.[7] This witness testified that, despite sustained and concentrated efforts utilizing the most sophisticated technical equipment available to the United States, *no evidence was found of any such arms trafficking by Nicaragua*.[8]

The witness further testified that, given the intensity of the U.S. intelligence-gathering effort, it was not possible for Nicaragua to have trafficked arms to El Salvador without being detected.[9] And he confirmed that neither the United States nor the *contra* forces deployed along Nicaragua's northern border with Honduras (through which any arms shipments to El Salvador would have had to pass) had ever detected or intercepted a single shipment emanating from Nicaragua.[10]

Judge Schwebel says that the witness "accepted" that "it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan government was involved in the supply of arms to the Salvadoran insurgency."[11] The words quoted by Judge Schwebel are from his *question* to the

[4] *Id.* at 102–03 (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 147 (June 27)).

[5] *Id.* at 103.

[6] 1986 ICJ REP., para. 70.

[7] Schwebel, *supra* note 1, at 103; *1986* ICJ REP., para. 134.

[8] Verbatim Record, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), ICJ Doc. CR 1985/17, at 55 ("*Q.:* In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities? *A.:* In any significant manner over this long period of time I do not believe they could have done so. *Q.:* And there was in fact no such detection during the period that you served in the Central Intelligence Agency? *A.:* No.").

[9] *Id.* ("*Q.:* In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador—with or without the Government's knowledge or consent—could these shipments have been accomplished without detection by United States intelligence capabilities? *A.:* If you say in significant quantities over any reasonable period of time, no I do not believe so.").

[10] *Id.* ("*Q.:* And there was in fact no such detection during your period of service with the Agency? *A.:* No.").

[11] Schwebel, *supra* note 1, at 103.

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witness.[12] The witness responded not with "fact," but rather his "opinion," that some arms had been shipped from Nicaraguan territory to rebels in El Salvador in either late December 1980 or early January 1981, but *not thereafter.*[13] This is exactly what the Court found:

> [Prior to] the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.[14]

The dates are significant. In January 1981, the incoming administration of President Ronald Reagan sent a message to the Nicaraguan government: refrain from sending arms to El Salvador, and we will have normal relations; send them at your peril. I was the one who delivered this message, and Nicaragua took it seriously, fearful that President Reagan would carry out the pledge in his party's political platform to oust the Sandinista government. Nicaragua assured the United States there would be no arms trafficking to El Salvador. Nevertheless, ten months later—during which, as the CIA intelligence analyst testified, Nicaragua shipped no arms to El Salvador—President Reagan authorized the creation of the *contras*, with full U.S. military backing, to attack Nicaragua.

By 1984, they were wreaking havoc in the Nicaraguan countryside, assassinating community leaders, blowing up oil depots and pipelines, and mining harbors to cut off Nicaragua's commerce. Although Nicaragua resisted these attacks, it did not retaliate against El Salvador. Instead, it decided to file suit against the United States. As I have previously written, prior to going to the ICJ, Nicaragua was advised by its counsel not to bring the case if it were then engaged in, or intended to engage in, the trafficking of arms to El Salvador (or anywhere else).[15] We explained to our clients what it appeared they already knew: that it would be impossible to ship arms beyond Nicaragua's borders without detection by the United States, and that the United States would use any evidence of arms trafficking it collected to destroy Nicaragua's credibility with the Court (and the international community generally) and to eliminate any sympathy Nicaragua otherwise might have gained as the victim of U.S. aggression.[16]

Our clients assured us they had come to the same conclusion, that the lawsuit was an essential part of their strategy to resist U.S. military pressure and preserve Nicaragua's sovereignty, and that they would take no actions that might undermine Nicaragua's prospects for success, including providing arms or other material support to Salvadoran or other rebel forces.[17] We

[12] 1986 ICJ REP., para 135 (quoting Verbatim Record, *supra* note 8, at 65).

[13] *Id.* The exact exchange is as follows:

> *Q.:* I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980 or early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency. Is that the conclusion I can draw from your remarks?
>
> *A.:* I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion.

Verbatim Record, *supra* note 8, at 65; *see also* testimony quoted *supra* notes 8–10.

[14] 1986 ICJ REP., para. 160.

[15] *See* Reichler, *supra* note 2, at 26.

[16] *See id.*

[17] *See id.*

believed them, and the evidence proves we were right to do so. The Court's judgment was firmly grounded in that evidence.

The Court was especially impressed by the failure of the United States or any of its surrogates to physically intercept, or produce any direct evidence of, even a *single* shipment of arms from Nicaragua to the rebels in El Salvador.

> [I]f this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed; it could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua. . . . If, on the other hand, thisevidence does not exist, that . . . implies that the arms traffic is so insignificant and casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, *a fortiori*, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. The two conclusions mutually support each other.[18]

Judge Schwebel invokes the discovery—in 1993, seven years *after* the judgment—of a secret weapons cache belonging to the Salvadoran rebels.[19] Subsequently, a number of other hidden arms caches were found in various Nicaraguan locations.[20] These discoveries are said to show that Nicaragua supplied weapons to the rebels in El Salvador, contrary to what it told the ICJ in 1984–86.[21]

But this is a non sequitur. The presence of arms in Nicaragua in 1993 does not constitute evidence that the government of Nicaragua was trafficking them to El Salvador seven or more years earlier.

First, the hidden arms belonged to the Salvadoran guerrillas.[22] There is no evidence that the Nicaraguan government owned or controlled them, much less that it authorized or facilitated their transfer out of the country. The Salvadorans would have had good reason to hide them from a government that was not itself shipping arms across its borders.

Second, there is no evidence as to *when* the arms were hidden; they could have been placed there any time during the seven years between the 1986 judgment and their 1993 discovery. As we know, the United States ignored the judgment, and continued until 1990 illegally to arm, train, and direct the *contras* in their efforts to overthrow the government of Nicaragua. Even if, hypothetically, Nicaragua began to ship arms to El Salvador after the judgment—in response to U.S. defiance of it—the truthfulness of Nicaragua's pleadings to the Court and the integrity of the judgment itself would be unaffected.

Third, the arms were discovered *in* Nicaragua, not *en route* to El Salvador.[23] There is no evidence that they were, or were intended to be, shipped there, let alone by the Nicaraguan government. By contrast, there were good reasons to keep them in Nicaragua. For much of the 1980s, especially between 1984 and 1986 while the case was in progress, and subsequently until at least 1990, there was real fear of a U.S. military invasion—which the United States stoked as part of its psychological warfare against the Nicaraguan government. Arms were cached all

[18] 1986 ICJ REP., para. 156.
[19] *See* Schwebel, *supra* note 1, at 103.
[20] *See id.* at 103–05.
[21] *See id.*
[22] *See id.*
[23] *See id.*

over Nicaragua, not to "liberate" El Salvador, but to defend against a U.S. attack and to support a guerrilla war in the event the United States succeeded in installing a *contra* government in Managua.

In sum, the evidence on which Judge Schwebel relies is only to the effect that arms were *present* in Nicaragua some years after the judgment. It is not proof that Nicaragua trafficked in arms, let alone during the period when Nicaragua told the Court it was not engaged in such activities.

Judge Schwebel refers to the treatment of this matter in a book by Shabtai Rosenne, without mentioning that Rosenne had assisted the U.S. legal team in the *Nicaragua* case at the jurisdictional phase—a fact of possible interest to Schwebel's (and Rosenne's) readers.[24] But in the end, a square peg cannot be made to fit into a round hole, regardless of who does the hammering.

The 1993 article in the *Washington Post* cited by Judge Schwebel also fails to support his thesis. Its attribution of responsibility to the Nicaraguan government is based on unnamed "investigators and diplomats."[25] There is good reason that courts, including U.S. courts, do not treat newspaper articles or other anonymously sourced statements of "fact" as evidence.

The ICJ's conclusion that the evidence failed to prove Nicaragua guilty of arms trafficking was hardly surprising. This was not only because the former CIA analyst responsible for reviewing U.S. evidence of Nicaraguan arms trafficking testified that it was nonexistent. It was also a result of the U.S. decision not to appear for the merits phase of the case and not to plead in support of its "collective self-defense" argument. The party alleging self-defense inevitably has the burden of proving it. The United States failed to do so.

During the oral hearings a set of documents prepared by the U.S. Department of State was made available to the Court.[26] Nicaragua had a good argument that the introduction of new evidence in the middle of oral hearings was contrary to the Court's rules.[27] But the Court considered it anyway.[28]

Upon review, the documents turned out to be a collection of self-serving statements by U.S. officials, assorted newspaper articles, and other unsupported allegations against Nicaragua. It was assembled under the partisan title: *"Revolution Beyond Our Borders": Sandinista Intervention in Central America*.[29] At best, the documents said no more than the following: we have evidence of Nicaraguan arms trafficking to El Salvador, but we cannot reveal it to you, and you must simply trust us, because it is confidential and its publication would reveal our intelligence sources and methods. No court could base a judgment on unseen evidence that is withheld by a party that nevertheless asks the court to rely on it.

[24] *See id.* at 103–04 (citing SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 152–53 (5th ed. 1995)).

[25] Douglas Farah, *Managua Blast Rips Lid off Secrets,* WASH. POST, July 14, 1993, at A1.

[26] *See* Verbatim Record, *supra* note 8, at 123; 1986 ICJ REP., para. 73.

[27] *See* Rules of the Court, Arts. 49–52, 56–58; Statute of the Court, Art. 43; 1986 ICJ REP., para. 73 ("The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court . . . .").

[28] *See* 1986 ICJ REP., para. 73.

[29] *See* Verbatim Record, *supra* note 8, at 123; 1986 ICJ REP., para. 73.

Judge Schwebel voted otherwise. No other judge agreed with him that the evidence proved Nicaragua guilty of trafficking arms to El Salvador.[30] There was no foundation for any such conclusion. There was no "fraud on the Court."

The title of Judge Schwebel's editorial, "Celebrating a Fraud on the Court," and his opening paragraph are addressed to last year's seminar in The Hague, held on the twenty-fifth anniversary of the judgment, to assess its impact on the development of international law and the role of the Court over the past quarter century. On that occasion, many points of view about the judgment—pro and con—were expressed. One of the principal speakers was John Norton Moore, counsel to the United States in the case, who very ably criticized the judgment on both the facts and the law. Other speakers included two sitting ICJ judges and a dozen highly respected scholars from prestigious academic institutions in the United States and Europe.[31] The unfounded accusation that this conference "celebrated a fraud" is entirely unwarranted.

[30] *See* Military and Paramilitary Activities in and Against Nicaragua, Diss. Op. Schwebel, J.; *cf. id.*, Diss. Op. Oda, J., paras. 61–64 (questioning incomplete picture of dispute as portrayed by Court, in light of lack of sufficient means for fact-finding).

[31] The speakers included Judges Bruno Simma and Abdulqawi Ahmed Yusuf, along with Payam Akhavan (McGill University), Alan Boyle (University of Edinburgh), James Crawford (University of Cambridge), Lori Damrosch (Columbia University), Pierre-Marie Dupuy (Graduate Institute Geneva), Michael Glennon (Fletcher School of Law and Diplomacy), Alain Pellet (University of Paris Ouest Nanterre La Défense), Philippe Sands (University College London), Nico Schrijver (Leiden University), Brigitte Stern (University of Paris I), and Joe Verhoeven (University of Paris II). Other speakers were Ambassador Carlos Arguello Gómez, the agent of Nicaragua in the case; and the author of this Comment. The event was sponsored by the Leiden University Law School, Netherlands Society of International Law, University College London Institute of Global Law, and the law firm of Foley Hoag LLP (of which the author is a member). The papers are being published in the *Leiden Journal of International Law*, 25 LEIDEN J. INT'L L. 131 (2012).