not "paid."[17] The ICRC would no doubt agree with Kissinger's conclusion:

> A program which sought to establish some principles of war limitation in advance of hostilities would seem to make fewer demands on rationality than one which attempted to improvise the rules of war in the confusion of battle.[18]

It is true that Kissinger is not attempting to lay any stress upon the conclusion of agreements among nations about limited war, and of course he places no reliance on promises, whether in treaties or otherwise, emanating from the Soviet Union.[19] He is concerned to show the self-interest which would induce both sides to recognize the value of limited war. He faces the difficult task of convincing people, particularly military people, that they must change their fundamental conceptions of war. In this respect his problem is not greatly different, it is believed, from that which has been suggested concerning the need for breaking away from the traditional dichotomy in international law between peace and war.[20] The rules governing the treatment of prisoners of war, which is one of the accomplishments to which the ICRC has so greatly contributed, rest on self-interest, although the movement for their adoption had a humanitarian motivation. It is true that for this purpose it was necessary to have various detailed provisions partly for the guidance of protecting Powers. But the observance of the conventions—and they have been observed by and large in spite of some violations—results from the fact that they have been drafted realistically by military people, with the urging indeed of humanitarians, but always with an eye to practical self-interest. Kissinger, in effect, argues that an intelligent appreciation of self-interest might well lead to a continued limitation of a war and to a cautious type of military tactics which would obviate the possibility of the limited war developing into the nuclear holocaust.

It is not the purpose here to review the details of Kissinger's book or the details of the rules proposed by the ICRC. What is suggested is that these very different but concurrent studies both reject the idea that it is impossible to achieve some limitation of warfare. The realists would be acting unrealistically if they fail to appreciate the contribution which the moralists and legalists can make to an essentially common objective.

PHILIP C. JESSUP

THE HONDURAS-NICARAGUA BOUNDARY DISPUTE

Students of American Constitutional law, who are familiar with the numerous boundary disputes between the States of the United States and with the principles laid down by the Supreme Court for their solution, will follow with particular interest the long-standing dispute between Honduras and Nicaragua which now happily has been submitted to the

[17] ICRC, *op. cit.* 22.
[18] Kissinger, *op. cit.* 230.
[19] *Cf. ibid.* 232.
[20] See the articles cited *supra*, note 7.

International Court of Justice for solution. In the suits between the States of the Union the questions at issue have been of relatively easy solution, most of the cases dealing with rivers as boundaries. Only in the case of the suit brought by Rhode Island against Massachusetts was an original colonial boundary involved, offering a parallel to the numerous Latin American controversies.

Due to vast areas of unexplored land the Latin American states had trouble with their boundary lines from the first days of their independence. The Spanish administrative divisions had of necessity to be described in terms of uncertain geographical boundary markers. When the independence of Central America was declared in 1821 the boundaries of the United Provinces followed those of the Captaincy-General of Guatemala under the Vice-Royalty of New Spain. Then, when the five Provinces went their separate ways as independent "republics" in 1838, the existing boundary lines were retained, including certain doubtful areas which had never been definitely marked off, the rule of *uti possidetis,* the test of effective possession, conflicting at times with the rule of *uti possidetis juris,* the right to possess, independent of the actual fact of possession.

On May 1, 1957, the Council of the Organization of American States met in special session to consider a cablegram addressed by the Honduran Minister of Foreign Affairs to the Chairman of the Council, Ambassador Lobo, denouncing Nicaragua as an aggressor for having invaded with military forces Honduran territory, crossing the boundary line of the River Coco or Segovia fixed by the award of the King of Spain made on December 23, 1906.[1]

On May 2, in the presence of renewed complaints of aggression, asserted this time by Nicaragua as well as Honduras, the Council met again in special session and adopted a resolution convoking the Organ of Consultation provided for by the Inter-American Treaty of Reciprocal Assistance and constituting itself as provisional Organ of Consultation. At the same time the resolution authorized the chairman to appoint a committee to investigate on the spot the facts of the situation, and it appealed to the two governments to abstain from any act that might aggravate the situation between their countries.[2] On the same day the Chairman of the Council appointed a Committee of Investigation consisting of representatives of Argentina, Bolivia, Mexico, Panama and the United States, the representative of Panama being elected Chairman. The committee left for Panama next day, and from there by United States military plane, first to Tegucigalpa and then to Managua. At both capitals the committee presented to the governments a draft agreement for the cessation of fighting; and upon signature of the two governments the agreement entered into force at the same hour, 7:30 p.m., on May 5, the day after the arrival of the committee. The promptness with which the agreement

[1] Acta de la Sesión Extraordinaria celebrada el 1° de Mayo de 1957 (Pan American Union Doc. C-a-242).

[2] Acta de la Sesión Extraordinaria celebrada en la tarde del Jueves 2 de Mayo de 1957 (Pan American Union Doc. C-a-244).

was signed suggested that the skirmishing along the border was more of a perfunctory demonstration of claims than a determination to decide the issue by armed force.

The next step was to secure an agreement providing for the mutual withdrawal of troops along the disputed frontier, which was accomplished on May 10, the two drafts being prepared by the committee and signed by the respective governments at midnight and at 3:30 a.m., becoming effective at noon. The Committee of Investigation thereupon returned to Washington and submitted its report to the Council of the Organization of American States acting provisionally as Organ of Consultation.[3]

The report of the committee set forth in detail the successive steps in securing the two agreements from the governments in controversy, and it was promptly adopted by the Council, which thereupon proceeded to appoint the same members to constitute an *ad hoc* committee to try to work out, within a limit of thirty days, a procedure for the settlement of the controversy acceptable to both parties. The *ad hoc* committee held numerous sessions, but without being able to bring about a settlement by direct negotiation, with the result that the Council appointed two of the members of the committee to put before the two governments alternative proposals for the settlement of the dispute: an arbitral tribunal; a single arbiter; the International Court of Justice at The Hague—all three procedures being contemplated in the Pact of Bogotá of 1948, which both parties had ratified, Nicaragua's reservation covering the very issue before the Council.

On June 28, the Chairman of the Committee, Ambassador Arias of Panama, announced to the Council that the parties had chosen to submit the dispute to the International Court of Justice. Some weeks later, on July 21, the Ministers of Foreign Affairs of the two governments signed at the Pan American Union an agreement on the procedure to be followed in presenting to the International Court of Justice "their disagreement concerning the arbitral award handed down by His Majesty the King of Spain on December 23, 1906."[4] A maximum period of ten months from September 15 is fixed within which Honduras will submit a written application instituting the proceedings before the Court. Article 4 of the agreement provides that

> The decision, after being duly pronounced and announced to the Parties, shall settle the disagreement once and for all and without appeal, and shall be carried out immediately.

Then, as if to express publicly the regret of the two governments at the skirmishing along the disputed boundary line, Article 6 concludes by saying:

[3] Situation between Honduras and Nicaragua: Report of the Investigating Committee (Pan American Union Doc. C-1-341) (English)).

[4] Agreement between the Ministries of Foreign Affairs of Honduras and Nicaragua on the Procedure to be Followed in Presenting to the International Court of Justice their Disagreement concerning the Arbitral Award Handed Down by His Majesty the King of Spain on December 23, 1906 (Pan American Union Doc. C/INF-337 (English)).

> In implementing the provisions of this Agreement, the Government of Honduras and the Government of Nicaragua are mindful of the noble spirit of Point 6 of the decision approved on July 5, 1957 by the Council acting provisionally as Organ of Consultation in which it is pointed out that Honduras and Nicaragua are linked in a very special way by geographic and historic ties within the Central American community.

—a graceful apology to the Council for giving it so much trouble over what was after all a family affair.

The submission of the case to the International Court of Justice calls for a decision on the specific question of the validity of the arbitral award of the King of Spain. In the interpretation of this award account will have to be taken of the Bonilla-Gámez Treaty signed at Tegucigalpa by the two countries on October 7, 1894, in which provision was made for a Mixed Commission on Boundaries and rules were laid down for the guidance of the commission, among which was the rule:

> 3. It will be understood that each Republic is owner of the territory which, at the time of Independence, constituted the provinces of Honduras and Nicaragua.

Article III of the treaty provided that in the event that the Mixed Commission should be unable to agree upon certain points of the boundary, they should be submitted to arbitration, the neutral member of the arbitral tribunal to be a member of the diplomatic corps accredited to Guatemala, and if no member of the diplomatic corps should be available, then, among other possible arbiters, the Government of Spain. A ten-year limit was fixed within which the treaty was not to be modified or the question settled by any other method.

On the basis of the Bonilla-Gámez Treaty the Mixed Commission met and fixed the boundary from the Pacific Coast up to Portillo de Teotecacinte, but disagreed in respect to the rest of the boundary from that site to the Atlantic. In view of the disagreement, the arbitrators from the respective countries met at Guatemala City on October 2, 1904, and, in accordance with Article V of the treaty, designated the King of Spain as the sole arbiter. The designation was approved by both governments and representatives were appointed to present their respective cases to the King of Spain. The award of the King of Spain was given on December 23, 1906, fixing the mouth of the Rio Coco or Segovia as the beginning of the boundary on the Atlantic, adjacent to Cape Gracias a Dios, and thence following the Rio Coco to the Poteca or Bodega tributary and thence upstream to the River Guineo or Namasli and from that junction to the Portillo Teotecacinte.[5]

The succeeding history of the controversy is long and involved, marked in 1912 by an assertion by Nicaragua of the nullity of the award; in 1918 by mediation of the United States; and in 1920 by a meeting of the Presidents of the two countries at Amapala and an agreement the following year to submit the question of the validity of the award to the decision of the

[5] The text of the award in English may be found in 100 British and Foreign State Papers 1096.

Chief Justice of the United States; in 1931 by the Irías-Ulloa Protocol; and in 1937 by a new mediation commission. None of the proposed measures, however, led to a settlement.[6] Then the controversy, after remaining more or less quiescent for some fifteen years, came to a head last February 21, when the Government of Honduras created the Department of "Gracias a Dios" with the Rio Coco or Segovia as the boundary. A month later Nicaragua occupied part of the disputed area, contesting the territorial claim of Honduras, and that government in turn promptly denounced the occupation as aggression and appealed to the provisions of the Treaty of Reciprocal Assistance.

The principal issue in the case will be whether the award of the King of Spain was within the terms of the Bonilla-Gámez Treaty. An arbitral award, however final and definitive the parties may pledge it to be, must obviously be within the terms of reference, both in respect to the procedure to be followed by the arbitrator and in respect to the factual basis of the decision. It will be the task of the International Court of Justice to determine whether the alleged deviations of the award from the terms of reference are sufficient to nullify it, and, as a minor issue, whether the express or tacit consent of a government in the process of executing a treaty can set aside the terms of the treaty itself. A broad review of the issues may be found in the Minutes (*Actas*) of the Council of the Organization of American States on the occasion of the extraordinary session held in answer to the petition of the Government of Honduras on May 1, 1957, at which the note of the Foreign Minister of Honduras was read denouncing Nicaragua as an aggressor "for having invaded Honduran territory with military forces, crossing the dividing line of the Coco or Segovia River fixed by the award of the King of Spain on December 23, 1906," followed by the reply of the Nicaraguan representative on the Council surveying the authorities on international law which justify the rejection of an arbitral award in excess of the terms of submission and setting forth the principal grounds of nullity (*vicios de nulidad*) of the award.[7]

It is of interest to observe that the agreement signed by the two governments on July 21 setting forth the procedure to be followed in presenting the controversy to the International Court of Justice is accompanied by separate statements on the position of the respective Ministers of Foreign Affairs in resorting to the Court, Honduras "basing its stand on the fact that the Arbitral Award is in force and unassailable," and maintaining that the failure of Nicaragua to comply with the arbitral decision constituted, under Article 36 of the Statute of the Court, a breach of an international obligation; and Nicaragua presenting grounds for impugning the validity of the award and maintaining that its boundaries with Honduras "continue in the same legal status as before the issuance of the above-mentioned Arbitral Award."

C. G. Fenwick

[6] A survey of the development of the controversy, with references to documents, may be found in Ireland, Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean 128 ff. (1938).

[7] Acta de la Sesión Extraordinaria, cited in note 1 above.