CORRESPONDENCE

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TO THE EDITOR IN CHIEF:

August 17, 1989

I hope you will permit me to publish some observations on certain comments made since the International Court of Justice gave judgment on the merits in the case of *Nicaragua v. U.S.A.* This Judgment, needless to say, has been subjected to detailed analysis and has occasioned such studies as the ASIL publication *The International Court of Justice at a Crossroads* (reviewed *infra* at p. 293).[1] In particular, a curious spotlight has been trained on the votes of judges from, to use the jargon of the press, "Soviet bloc countries." In the context the claim was made:

> There is concern that a judge from the U.S.S.R. (or since at the present time the Soviet judge who sat in the *Nicaragua* case has resigned, a judge or judges from countries sympathetic to the Soviet Union that likewise do not accept compulsory jurisdiction) might, for example, pass on United States action in Nicaragua while there is no opportunity for a United States judge to pass on Soviet action in Afghanistan. The U.S.S.R. and other Eastern European countries have not consented to any adjudication by the International Court of Justice, much less to its compulsory jurisdiction.[2]

One cannot but regret this approach to the issue, the more so in that five other judges, who voted in favor of the Judgment, came from states which have not accepted the compulsory jurisdiction of the Court. May I recall that the judge in question was three times nominated for election by the national group of the United States, which obviously did not see any obstacle in his becoming a Member of the Court. Judges of his nationality have been on both Courts for almost 60 years. As I stated in my separate opinion, the attitude of the country of origin of a judge has little in common with his voting, and the history of the Permanent Court of International Justice counted among its most distinguished judges a citizen of a fascist country which during his term of office became allied with Hitler Germany. Many judges were nationals of states ruled by dictators, totalitarian regimes or military leaders. I refrain from particular comment on this fact, because I think it is completely irrelevant: why should any judge, whatever his origin, be barred from giving expression to *his* views?

Poland happens to be the country of my origin, but I have no title to speak on its behalf, nor should I, in principle, do so. Nevertheless, I have a clear interest in the presentation of certain facts and the exposure of certain

[1] THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (L. F. Damrosch ed. 1987).
[2] Stevenson, *Conclusion*, in *id.* at 459, 461.

misconceptions, in particular the assertion that Poland has "not consented to any adjudication by the International Court of Justice."

Regarding Poland's attitude to the international judiciary, it is interesting to note that while in the interwar period it did not formally accept the compulsory jurisdiction of the Permanent Court of International Justice—since its Declaration of January 24, 1931, remained unratified—it was, strangely enough, the Court's most frequent "client," participating in 20 proceedings. This was the result of Poland's having accepted the jurisdiction of the Court in other international instruments. This is almost forgotten, yet it proves that compulsory jurisdiction is not the only way to the Court. As for postwar Poland, while it has not made a Declaration accepting the compulsory jurisdiction of the Court, it has submitted itself to the jurisdiction of the ICJ by becoming a party to several statutes or constitutions of international organizations and by accepting that jurisdiction in ten multilateral treaties concluded after 1945 without reservations—while it is true that reservations were made to other treaties. Moreover, Poland has remained a party to several treaties accepting the jurisdiction of the Permanent Court of International Justice. These facts speak for themselves; thus, the claim made in the *Conclusion* of the book mentioned above is in obvious conflict with reality. A very special illustration of Poland's positive attitude can be recalled, not in my own words, but by quoting former officials of another state directly involved.

They described it as "a remarkable Polish initiative."

> In October 1958, Mr. Diefenbaker in his first major statement before the General Assembly strongly urged member-states to make greater use of the International Court of Justice. Manfred Lachs, at the time legal adviser to the Polish Ministry of Foreign Affairs and subsequently a judge of the International Court, listened carefully to that speech. The communist members of the United Nations mistrusted the Court, and none had ever sought recourse to it. Nevertheless, Lachs . . . persuaded the Polish government to respond to Diefenbaker's appeal and to invite the Canadian government to submit the case of the Polish Treasures to the Court. This seemed like an ideal solution, for Premier Duplessis, in whose hands the Treasures were actually lodged, had always insisted that he would release them on the orders of a competent court. Once the Polish government was persuaded, Lachs approached the Canadian government . . .. Sad to say, in spite of the strong support of the Department of External Affairs, which saw in this initiative an ideal way to terminate an embarrassing and intractable international problem, and incidentally a magnificent way to promote Mr. Diefenbaker's proposal, the Prime Minister declined to respond and the initiative died.[3]

Needless to say, if the dispute in question had been brought before the Court, it would have represented not only a breakthrough in terms of the solution of a dispute between Poland and Canada, but also an important precedent for other countries. If there was a certain reluctance towards the use of the Court, who tried to overcome it (a "Warsaw Pact country") and who refused (a "NATO country")? The initiative reflected my attitude towards international adjudication as Legal Adviser 30 years ago and much

[3] Dobell & Willmot, *John Holmes*, 33 INT'L J. 104, 105–06 (1977–78).

earlier, one I held long before my election to the Court. This was only one of several episodes in which my positive approach was manifested. That is the truth.

I hope that these clarifications will put an end to a campaign of misconceptions and distortions which have bedeviled the issues involved. Readers of the 1987 publication (referred to earlier) who study the statistical tables appended to it will, I am sure, soon discover not only that such figures lend little credibility to fears that some judges may imbalance the Court's decisions by voting on predetermined lines according to the political alignment of their countries of origin, but also that prediction based upon guesswork is no proper guide (*cf.* particularly p. 131; moreover there is an error on p. 130, one of my votes being wrongly described. I maintained the view that Iran had an obligation to make reparations). The case in question proves it beyond any doubt. During my service on the Court I voted in favor of 19 of 20 judgments delivered by it. A record that has not been surpassed.

MANFRED LACHS

TO THE EDITOR IN CHIEF:

June 29, 1989

I am writing in reference to the recent Contemporary Practice entry, "Peaceful Settlement of Disputes: United States-Chile: Invocation of Disputes Treaty" (83 *AJIL* 352 (1989)). Although I am reluctant to engage in a point-by-point discussion of the entry, I must correct several errors for the record.

The Republic of Chile has, for over 10 years, cooperated fully with the United States' efforts to prosecute the killers of Ambassador Orlando Letelier and Ms. Ronni Moffitt, and continues to cooperate today. In contrast, one of the United States' first actions in this affair was to assert jurisdiction over Chile in the civil suit *Letelier v. Republic of Chile* (488 F.Supp. 665 (D.D.C. 1980)), despite Chile's objections and in contravention of international law.

Chile has consistently maintained that the U.S. assertion of civil jurisdiction over Chile in the *Letelier* case was illegal and in violation of Chile's sovereignty. It has been Chile's longstanding position that the jurisdictional issue must be resolved by international adjudication. To that end, Chile has repeatedly proposed that the United States and Chile submit the issue to an international forum to determine whether the United States' assertion of jurisdiction in the civil suit was indeed illegal.

Yet the Contemporary Practice entry makes absolutely no mention of the jurisdictional dispute or of Chile's efforts to submit it to international adjudication. Rather, the entry declares that "having exhausted diplomatic means to obtain the cooperation of the Government of Chile," the United States invoked the so-called Bryan Treaty.

This omission is very unfortunate, particularly since Chile has proposed international adjudication by diplomatic note no less than eight times. In fact, Chile advanced such a proposal *before* the district court made its jurisdictional finding and therefore well before the court found the damages upon which the United States' espousal claim is primarily based. Given Chile's efforts to resolve the fundamental jurisdictional question, it is truly