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Mandatory Dispute Resolution

"Nicaragua Shall Not Be the Patrimony of Imperialists"

In 1927, a guerilla force commanded by General Augusto Caesar Sandino began carrying out attacks on US Marines and American mining interests in Nicaragua.[1] Sandino's fame and popularity spread quickly throughout Latin America, fueled by his vigorous critique of American imperialism:

> I will not abandon my resistance until the . . . pirate invaders . . . assassins of weak peoples . . . are expelled from my country . . . I will make them realize that their crimes will cost them dear . . . There will be bloody combat . . . Nicaragua shall not be the patrimony of Imperialists. I will fight for my cause as long as my heart beats.[2]

Opposed to Sandino was Anastasio Somoza García, appointed as Nicaragua's Director of the National Guard at the urging of the United States. Somoza would go on to found a family dynasty that ruled Nicaragua with US support for forty-three years (1936–1979).[3] Commenting on "the special nature of the House of Somoza" the day the leftist *Frente Sandinista de Liberación Nacional* (FSLN) took Managua in 1979, the editors of the *New York Times* lamented that not only "have the Somozas owned a lordly share of the country's riches, but bribes and kickbacks have been their price of doing business."[4]

When the United States pulled its marines out of Nicaragua in 1933, negotiations commenced between the US-backed government and Sandino's guerillas. The peace process was upended, however, by an act of treachery that would become a culture-defining landmark of

[1] See Sergio Ramirez and Lyman Baker, 'The Kid from Niquinohomo' (1989) 16 *Latin Am. Perspectives* 48, 66–72.
[2] 'Nicaragua: Defy!', Time, 16 January 1928, https://web.archive.org/web/20101121012549/http:/www.time.com/time/magazine/article/0,9171,731362,00.html.
[3] Editorial, 'Somoza's Bitter Legacy', NY Times, 19 July 1979, A18.
[4] Ibid.

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Nicaragua's history. On February 21, 1934, during a ceasefire and immediately following a round of peace talks, Somoza's National Guard detained Sandino, his brother, and two of his generals outside the Presidential Palace. They summarily executed Sandino and his associates the same day. Two years later, Somoza orchestrated a *coup d'état* that launched his family's forty-three-year dynastic fiefdom.

The National Guard remained loyal to the Somoza *ancien régime* long after the Sandinistas deposed Anastasio Somoza, the third Somoza despot. With US support and guidance, former members of the National Guard and other opponents of the Sandinistas created the *contra* force, a paramilitary organization based in Honduras that engaged in more than 1,300 terror attacks on civilians and civilian infrastructure in Nicaragua between 1979 and 1990.[5] In addition to supporting the *contras*, in 1983 and 1984 US operatives mined various Nicaraguan harbors and conducted attacks on shipping in Nicaraguan territorial waters.[6]

In a case of David-and-Goliath proportions, Nicaragua filed suit against the United States at the International Court of Justice (ICJ).[7] Nicaragua alleged that the United States breached its obligation under Article 2(4) of the UN Charter "to refrain from the threat or use of force against the territorial integrity or political independence of Nicaragua."[8] Nicaragua also alleged that the United States violated general and customary international law by engaging in or supporting a wide range of unlawful interventions, including armed attacks inside Nicaragua, the mining of harbors, aerial trespass, and efforts to coerce and intimidate the Government of Nicaragua.[9] On the merits, a majority of the ICJ found that the United States, "by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted . . . in breach of its obligation under customary international

[5] Gary LaFree, Laura Dugan and Erin Miller, *Putting Terrorism in Context: Lessons from the Global Terrorism Database*, 1st ed. (New York: Routledge, 2015), p. 56 (noting that *contra* forces "carried out more than 1300 terrorist attacks").

[6] David Rogers, 'U.S. Role in Mining Nicaraguan Harbours Reportedly Is Larger than First Thought', Wall Street Journal, 6 April 1984; Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua/US), Merits, Judgment, 1986 ICJ Rep. 14 (27 June), para. 80 [hereinafter Nicaragua Merits Case].

[7] Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua/US), Application Instituting Proceedings, 1984 ICJ General List No. 70 [hereinafter Nicaragua Application].

[8] Ibid., para. 15.

[9] Nicaragua Application, paras. 20–25.

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law not to intervene in the affairs of another state."[10] A majority likewise found the United States in breach of customary international law prohibiting the use of force against another state by virtue of mining and maritime operations directed against Nicaragua.[11] Separate majorities concluded that the United States had violated customary and treaty law for having conducted overflights and for having imposed a general trade embargo on Nicaragua in violation of a 1956 Treaty of Friendship, Commerce and Navigation between the two states.[12] The ICJ therefore ordered the United States "to cease and to refrain from all such acts as may constitute breaches of the foregoing [customary international law and treaty] obligations" and to pay Nicaragua reparations for the injury caused.[13] Adjusted for inflation, the original USD 12 billion reparation award would have been more than USD 31 billion in 2023.[14]

Several years before specific reparations were ordered, however, the United States disputed the ICJ's jurisdiction to hear the case.[15] The ensuing debate over jurisdiction is especially significant, as it vividly reveals the rival conceptions of international law that have dueled throughout this book; that is, the absolutist and voluntarist understanding, on the one hand, and the constitutional view that gives pride of place to sovereign equality and equitable principles, on the other.

This chapter draws on the *Nicaragua Jurisdiction Case* to make three arguments concerning the jurisdiction of international courts. The first is that the foundational principles of mandatory cooperation – the duty of states to resolve disputes peacefully, sovereign equality, and the duty of states to exercise sovereign powers equitably – entail that states have a duty to resort to arbitration or adjudication if good faith negotiation, mediation, or conciliation fail to resolve an impasse.[16] The second argument builds on the preceding one to explain why the role of consent

[10] Nicaragua Merits Case, para. 292.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ben Norton, 'U.S. legally owes Nicaragua reparations, but still refuses to honor 1986 Int'l Court of Justice ruling', Geopolitical Economy, 28 June 2023.
[15] Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua/US), Jurisdiction and Admissibility, 1984 ICJ General List No. 70 [hereinafter Nicaragua Jurisdiction Case].
[16] For ease of exposition, in this chapter we will generally refer to "arbitration or adjudication" as simply adjudication, and intend it to refer to impartial third-party dispute resolution mechanisms available at international law where the decision-maker has authority to make a binding judgment and order a remedy after giving the parties a fair opportunity to be heard.

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within the *Nicaragua Jurisdiction Case* was attenuated in favor of compulsory jurisdiction. The third argument defends the duty to seek adjudication as an equitable constraint on state sovereignty.

In the final section of the chapter, we enlist UK constitutionalism as a comparator to reply to realist objections to international adjudication based on the possibility of states withholding their consent to the jurisdiction of particular courts. We also address the United States' use of its Security Council veto to avoid the reparations ordered by the ICJ.[17] Article 94(1) of the UN Charter stipulates that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party," while Article 94(2) provides recourse to the Security Council for states to enforce ICJ judgments.[18] Publicists noted quickly that the United States' use of its veto in this context was in sharp tension with the legal principle that prohibits parties from being judge and party of the same cause.[19] We concede that the veto held by the permanent five members of the Security Council (P5) strains international legal order, and this strain is especially pronounced when it is used to avoid a remedy flowing from an ICJ judgment. Nonetheless, we claim that this abuse of power does not denude a relevant ICJ judgment of either its legal status or its value as the international community's authoritative judicial condemnation of a violation of international law.

Between Authority and Power

Established to build on and replace the Permanent Court of International Justice (PCIJ) of the League of Nations, the ICJ was founded in 1945 as the judicial organ of the United Nations.[20] All Member States of the United Nations are parties to the Statute of the ICJ, which is annexed to

[17] When the Court ruled that it had jurisdiction and that the case was admissible, the United States refused to take part in the hearing on the merits and later used its veto in the UN Security Council to obstruct Nicaragua's attempts to obtain the remedy ordered by the ICJ. Keith Highet, 'Between a Rock and a Hard Place: The United States, The International Court, and the *Nicaragua* Case' (1987) 21 *Int'l Law.* 1083, 1092–1095.

[18] Article 94(2) stipulates that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

[19] See, e.g., Highet, 'Between a Rock and a Hard Place', p. 1094.

[20] UN Charter, art. 92.

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the UN Charter.[21] The ICJ derives compulsory jurisdiction over legal disputes from unilateral declarations of states-parties made pursuant to Article 36 of its Statute. Article 36(2) provides:

> The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.[22]

In addition, Article 36(5) provides:

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.[23]

On August 26, 1946, the United States made a declaration, pursuant to Article 36(2), recognizing the jurisdiction of the Court subject to certain reservations, the most significant of which stated that the declaration would "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."[24] In other words, the United States accepted the ICJ's jurisdiction for five years, and thereafter indefinitely, but subject to withdrawal on six months' notice. On April 6, 1984, however, just three days before the Court received Nicaragua's application to commence proceedings, US Secretary of State George Shultz preemptively notified the UN Secretary-General that the 1946 declaration "shall not apply to disputes with any Central American State or arising out of or related to

[21] Ibid., arts. 92, 93.
[22] Statute of the ICJ, 18 April 1946, art. 36(2) [hereinafter ICJ Statute]. As discussed below, the ICJ may also acquire jurisdiction through a special agreement between two or more parties to bring a case to the ICJ, or through states agreeing within a treaty to submit disputes over the treaty's interpretation and application to the ICJ.
[23] Ibid., art. 36(5).
[24] Nicaragua Jurisdiction Case, para. 13.

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events in Central America."[25] This narrowing of the ICJ's jurisdiction over the United States purported to "take effect immediately and ... remain in force for two years."[26]

The 1984 notification would prove controversial, but before the Court could consider its possible legal effect, it had to consider whether both Nicaragua and the United States were otherwise subject to the Court's jurisdiction. Under Article 36(2), the ICJ can have compulsory jurisdiction over an international dispute only if a reciprocity condition is met: the parties concerned must be states "accepting the same obligation" to submit to the ICJ's jurisdiction.[27] So, for Nicaragua to rely on the US declaration of 1946, Nicaragua had to show that it too was subject to the Court's compulsory jurisdiction.

To this end, Nicaragua relied on Article 36(5), which allows a declaration accepting the PCIJ's jurisdiction to serve as a declaration accepting the ICJ's jurisdiction. Nicaragua cited a 1929 declaration from its authorized representative to the League of Nations, stating: "On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice."[28] However, Nicaragua apparently never deposited its declaration with the Secretary-General of the League of Nations in Geneva, as required under the Statute of the PCIJ.[29]

This meant that Nicaragua had never become a party to the Statute of the PCIJ, and therefore had never been subject to the PCIJ's jurisdiction. Nonetheless, Nicaragua argued that its 1929 declaration sufficed to confer jurisdiction on the ICJ via Article 36(5). Recall that Article 36(5) stipulates that declarations accepting the jurisdiction of the PCIJ must be "still in force" to activate the ICJ's compulsory jurisdiction. Accordingly, Nicaragua had to argue that although its 1929 declaration ultimately failed to bring it under the jurisdiction of the PCIJ, the declaration nonetheless was "still in force" within the meaning of Article 36(5) so as to give the ICJ compulsory jurisdiction over Nicaragua.

While an eleven-judge majority of the Court sided with Nicaragua, the five judges who dissented on this point – Judges Jennings, Ago, Oda,

[25] Ibid.
[26] Ibid.
[27] ICJ Statute, art. 36(2).
[28] Nicaragua Jurisdiction Case, para. 15.
[29] Ibid. Unlike in the case of the United Nations and the ICJ, the League of Nations and the PCIJ were established separately, with the consequence that Members of the League of Nations were not automatically states parties to the Statute of the PCIJ.

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Mosler, and Schwebel – arguably had the more persuasive doctrinal arguments. Four of the five held that the ICJ had other grounds for jurisdiction. Judge Schwebel, however, wrote a lengthy dissent, denying jurisdiction across the board and cogently laying bare the relative frailty of the majority's legal arguments. Judge Schwebel rightly pointed out that under international law the plain and ordinary meaning of "in force" denotes that a treaty or norm is binding on the parties to which it applies. Accordingly, following the plain and ordinary meaning, a declaration would "still be in force" only if the party that made the declaration is still bound by the declaration's terms.[30] As Nicaragua never deposited its 1929 declaration with the Secretary-General of the League of Nations, the declaration was plainly not "in force" in this conventional sense.

Nicaragua admitted that its failure to deposit its ratification meant that it was never a party to the Statute or Protocol of the PCIJ, and therefore was never bound by its 1929 declaration to submit to the PCIJ's jurisdiction. Nicaragua insisted, however, that because its declaration "had not expired," it remained "'in force.'"[31] The majority agreed that Nicaragua's declaration was still "in force" because "it was valid for an unlimited period" with "a certain potential effect which could be maintained indefinitely."[32] This "potential effect" was the declaration's potential to make Nicaragua a party to the Statute of the PCIJ upon ratification and delivery to the Secretary-General of the League of Nations. Importantly, this potential effect could have ended at any time had Nicaragua put a temporal limit on its declaration. At the expiry of such a hypothetical limit, the declaration would have been invalid and not "in force," whether expiration took place prior to or after the deposit of ratification. By separating a narrow understanding of validity from the question of whether the declaration bound Nicaragua to the Statute and Protocol of the PCIJ, the majority explained how in principle a non-deposited and nonbinding declaration could be "in force" within the meaning of Article 36(5), and thereby serve as a foundation for the ICJ's jurisdiction over Nicaragua.

The majority and minority writers also offered contrasting interpretations of the underlying purpose of Article 36(5). For Judge Schwebel, the core purpose of Article 36(5) was to allow the ICJ to assume the compulsory jurisdiction of the PCIJ as it existed at the time the ICJ

[30] Nicaragua Jurisdiction Case (Schwebel, J., dissenting op.), paras. 14–16.
[31] Ibid. para. 15.
[32] Nicaragua Jurisdiction Case, para. 27.

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was established. Having never accepted the PCIJ's jurisdiction, Nicaragua fell outside the scope of Article 36(5), Judge Schwebel argued. In contrast, the majority held that the purpose of Article 36(5) was not limited to transferring compulsory jurisdiction from the PCIJ to the ICJ. According to the majority, the provision's wider object was to ensure continuing "progress" toward "the cause of compulsory jurisdiction."[33]

In support of their divergent views, the majority and dissent both cited the ICJ's judgment in the *Case Concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*.[34] In that case, Israel sought to establish the ICJ's jurisdiction over Bulgaria based on a ratified 1921 declaration that made Bulgaria a party to the Statute of the PCIJ. Bulgaria argued that Article 36(5) did not apply to its declaration, because Bulgaria did not become a UN member and a party to the ICJ's Statute until 1955, long after the PCIJ ceased to exist. The Court sided with Bulgaria, holding that a declaration in force vis-à-vis the defunct PCIJ could not be revived to apply to the ICJ. In the course of its judgment, however, the Court signaled that the purpose of Article 36(5) was to maintain to the extent possible seamless continuity between the PCIJ and its successor: "the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of the [ICJ] should frustrate progress already achieved."[35] Reflecting on these findings from *Aerial Incident*, the Court in the *Nicaragua Jurisdiction Case* agreed unanimously that a core purpose of Article 36(5) was to ensure that the ICJ's creation would "not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction."[36]

Noting that Nicaragua was represented at the San Francisco Conference and signed and ratified the UN Charter, the majority argued that Nicaragua's 1929 declaration had become legally binding through Article 36(5). In support of this argument, the majority quoted *Aerial Incident*: "Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and

[33] Ibid., paras. 33, 35.
[34] Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment, 1959 ICJ Rep. 127 (26 May) (hereinafter Aerial Incident).
[35] Nicaragua Jurisdiction Case, para. 32; Nicaragua Jurisdiction Case (dissenting op., Schwebel, J.), para. 29 (citing Aerial Incident, p. 145).
[36] Nicaragua Jurisdiction Case, para. 33.

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thereby accepted the Statute in which Article 36, paragraph 5, appears."[37] According to the majority, Nicaragua's ratification of the Statute of the ICJ had "exactly the same effects as the ratification of the Protocol of the [PCIJ] would have had, that is to say, in the case of Nicaragua, the step from potential commitment to effective commitment."[38] By ratifying the Statute of the ICJ, Nicaragua "effectively" consented to convert its 1929 declaration into a legally binding acceptance of the ICJ's compulsory jurisdiction, the majority concluded.

Judge Schwebel offered a narrower interpretation of the *Aerial Incident* dictum concerning participants in the San Francisco Conference. He noted that the dictum followed these findings:

> Article 36, paragraph 5, considered in its application to States signatories of the Statute, effects a simple operation: it transforms *their acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction of the International Court of Justice* . . . Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations; in so doing, *it maintained an existing obligation* while modifying its subject-matter.[39]

In short, Article 36(5) was concerned solely with maintaining states' preexisting commitments to accept compulsory jurisdiction, facilitating "the transfer to the new Court of the compulsory jurisdiction of the old," rather than extending the ICJ's jurisdiction to states like Nicaragua that had never formally embraced the PCIJ's jurisdiction.[40]

The divergent conclusions reached by the majority and Judge Schwebel reflect different visions of the role that compulsory jurisdiction plays within the international legal system. For Judge Schwebel, compulsory jurisdiction is an artifact of state consent and, as such, apt to be read down if a state fails to express its consent in clear conformity with formal requirements. In contrast, the majority envisions compulsory jurisdiction as an ideal of legality underlying the creation and practices of both the PCIJ and the ICJ. As such, for the majority compulsory jurisdiction serves as a constitutional principle that should guide interpretation of the enabling statutes of international courts, with ambiguities resolved in favor of compulsory jurisdiction, and with infringements on compulsory jurisdiction requiring express and unequivocal statutory language.

[37] Ibid., at para. 35 (citing Aerial Incident, p. 142).
[38] Ibid.
[39] Nicaragua Jurisdiction Case (dissenting op., Schwebel, J.), para. 27 (citing Aerial Incident, pp. 137, 138) (emphasis added by Judge Schwebel).
[40] Ibid. (citing Aerial Incident, pp. 142, 143) (emphasis added by Judge Schwebel).

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This constitutional interpretive principle helps to explain why, for the majority, it was significant that the drafters of Article 36(5) declined to use the term "binding."[41] It also clarifies why the majority presumed that "the highly experienced drafters" of the Statute of the ICJ would have used "a very different formula from the one which they in fact adopted" if they had a "restrictive intention" with respect to Article 36(5) – especially given the drafters' "overall concern" to aim at "the maximum, and not some merely quasi optimum preservation" of compulsory jurisdiction.[42]

A similar difference in approach marks the majority and dissenting opinions' handling of Secretary Schultz's 1984 notification that purported to remove the United States from the ICJ's compulsory jurisdiction vis-à-vis Nicaragua. As noted, the United States' 1946 declaration permitted the United States to withdraw from the ICJ's compulsory jurisdiction only after six months' notice.[43] Having never given notice to terminate – in conformity with the six-month notice period or otherwise – the 1946 declaration remained in effect. Therefore, according to the declaration's plain terms, the United States remained subject to the ICJ's compulsory jurisdiction vis-à-vis other states "accepting the same obligation."[44] However, the 1984 notification purported to suspend for two years the effect of the 1946 declaration in relation to "disputes with any Central American State or arising out of or related to events in Central America."[45] If legally valid, the 1984 notification would have denied the ICJ jurisdiction to hear the case Nicaragua filed three days later.[46]

The majority affirmed the conventional understanding that declarations "even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration."[47] In applying this general principle to the facts before it, the majority acknowledged that the United States retained the right to modify or terminate the 1946 declaration. Nevertheless, the majority held that the United States "assumed an

[41] Ibid., para. 30.
[42] Ibid., para. 34 (citing Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) Judgment, Preliminary Objections, 1964 ICJ Rep. 6, 32 (24 July)).
[43] Nicaragua Jurisdiction Case, para. 13.
[44] ICJ Statute, art. 36(2).
[45] Ibid.
[46] Nicaragua Jurisdiction Case, para. 54 (citing Nottebohm Case, Preliminary Objection, Judgment, 1953 ICJ Rep. 111, 122 (18 November)).
[47] Ibid., para. 60.

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inescapable obligation towards other States" under the 1946 declaration "by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice."[48]

Judge Schwebel's central argument for giving effect to the 1984 notification turned on the principle of reciprocity and the idea that the United States could not properly be held to a six-month time constraint that did not also apply to Nicaragua. Whereas the majority concluded that Nicaragua could terminate its declaration on such reasonable notice as good faith might allow, and that such notice would have to be greater than three days, Judge Schwebel asserted that Nicaragua had the right to terminate its declaration on immediate notice. He pointed out that states-parties were entitled to withdraw from the UN Charter on immediate notice, and that other states had withdrawn from indefinitely accepting the ICJ's jurisdiction without a period of reasonable notice.[49] For the dissenting judge, this raised the question of whether the United States should not also be entitled to modify or terminate its declaration on immediate notice, under a principle of reciprocity that is "closely tied to considerations of mutuality and of the sovereign equality of States before the law and before the Court."[50] Judge Schwebel thus relied on an argument of principle that the parties would not be treated as legal equals if Nicaragua were permitted to engage the Court while possessing an entitlement to immediate termination not enjoyed by the United States. In his view, the United States had a "reciprocal right" to modify or suspend its 1946 declaration on immediate notice, which it did with the 1984 notification, thereby leaving the ICJ without jurisdiction to consider Nicaragua's claims.[51] The majority, on the other hand, held that reciprocity "is concerned with the scope and substance of commitments entered into, including reservations, and not with formal conditions of their creation, duration or extinction."[52] Accordingly, for the majority, "reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration."[53]

Once again, the majority treats compulsory jurisdiction as a preeminent constitutional ideal against which state declarations and principles such as reciprocity must be interpreted. The minority judge, by

[48] Ibid., para. 61.
[49] Ibid., paras. 100–106.
[50] Ibid., para. 110.
[51] Ibid., para. 115.
[52] Ibid., para. 62.
[53] Ibid.

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contrast, adopts a more voluntarist understanding of compulsory jurisdiction. He privileges a conception of state sovereignty under which states have maximum leeway to accept or not the compulsory jurisdiction of the ICJ, including an entitlement to opt out of its jurisdiction just days before an adverse state files suit. For Judge Schwebel, the 1984 notification as well as considerations of reciprocity, mutuality, and sovereign equality must be read through a voluntarist lens. Nonetheless, despite the substantial differences separating the contending judgments, they also reflect shared presuppositions and points of reference. We briefly set these out now, since having the common ground in view lays some of the foundation for the arguments that follow regarding the mandatory nature of using peaceful means to resolve disputes at international law.

The common ground that unites the majority and dissent in the *Nicaragua Case* is their shared understanding that legal principles attenuate the requirement for state consent to the jurisdiction of international courts and tribunals. First, the judges all affirmed or presupposed that the parties' relations between themselves and to the Court were informed by principles of sovereign equality, mutuality, reciprocity, and formal legal equality. While they disputed the content and application of some of these principles, none suggested that legal principles could be supplanted by pleadings of self-interest or a notion of might makes right. By the same token, the judges all recognized that relevantly similar past judgments carried persuasive authority with respect to the case before them. They all acknowledged that fresh consent was not necessary for a state to be subject to the compulsory jurisdiction of the ICJ; prior consent to the PCIJ, via Article 36(5), was adequate. Similarly, they all acknowledged that consent signaled decades ago through declarations under Articles 36(2) or 36(5) did not need to be reasserted for the ICJ's compulsory jurisdiction to remain intact. They likewise agreed that, in principle, exercises of past state sovereignty could fetter future state sovereignty (e.g., notice periods established for terminating a declaration). This marked a departure from the principle of plenary authority that governs legislative lawmaking in most states, under which a present legislature cannot fetter or constrain the lawmaking power of a future legislature. The judges on both sides also accepted that once a state files an application to initiate a proceeding, parties to the proceeding cannot modify their declarations of acceptance to avoid the ICJ's jurisdiction.

Lastly, the judges agreed that both parties had an "obligation to seek a solution to their disputes by peaceful means in accordance with

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international law."[54] In the next section we deploy this and other foundational premises of mandatory cooperation to argue that if states in a dispute reach an irresoluble impasse, they have a general duty at international law to submit their dispute to adjudication. We argue that this duty is independent of treaty-specific duties to seek adjudication that are sometimes triggered if a dispute arising within a treaty framework proves intractable.[55] The duty therefore applies even when states have not specifically committed to international adjudication or arbitration by treaty or through unilateral declarations.

The Duty Seek Adjudication

As discussed in preceding chapters, states have a duty under Article 2(3) of the UN Charter to "settle their disputes by peaceful means."[56] Article 33(1) of the Charter makes the obligation concrete where "the continuance of [a dispute] is likely to endanger the maintenance of international peace and security."[57] In these circumstances, the Charter requires parties in conflict to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[58] Relatedly, the Charter prohibits states from resolving disputes by force or the threat of force unless they are acting in self-defense or authorized by the Security Council.[59] Citing with approval Article 33(1), the Court in the *Nicaragua Merits Case* added that the injunction to resolve disputes by peaceful means has the status of customary international law, with the implication that it legally binds all states.[60] If follows that states are under a legal obligation to use peaceful means to settle conflicts even if they have never formally consented to the norm, and indeed even if they oppose it. The duty to use peaceful means to resolve disputes is international law's doctrinal expression of one of mandatory cooperation's central prescriptions.

[54] Nicaragua Merits Case, p. 149, para. 292.
[55] E.g., UN Convention on the Law of the Sea art. 125(1), UN Doc. A/CONF. 62/122 (1982), Part XI, § 5 (obligating states parties to submit disputes to the Seabed Disputes Chamber).
[56] UN Charter, art. 2(3).
[57] Ibid., art. 33(1).
[58] Ibid. In Chapter 1 we characterize these as procedural obligations, and throughout the book point to various contexts in which parties are found to owe each other a duty to consult and negotiate with one another in good faith.
[59] UN Charter, arts. 2(4), 51; ch. VII.
[60] Nicaragua Merits Case, p. 145, para. 290.

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The *Nicaragua Case* also illuminates international law's embrace of sovereign equality as a deep-seated principle and organizing idea of mandatory cooperation. The first substantive principle articulated in the UN Charter is that the UN system "is based on the principle of the sovereign equality of all its Members."[61] From the standpoint of sovereign equality, differences between states in terms of their geographic size, population, wealth, or military strength are irrelevant. All states enjoy equal authority to govern within their territory and to represent their people internationally, and all states are to be treated as legal equals in their interactions with one another.[62] Mirroring and informing the content of the sovereign equality of states, the Charter likewise affirms that peoples enjoy equal rights and self-determination.[63] From these constitutional principles of international legal order – where sovereign equality is understood to entail rights to equal self-determination – it follows that no state is entitled to dictate terms to another state or its people. An imperial entitlement of this kind would imply that the subordinate state and its people would not be self-determining equals; by hypothesis, their international rights or internal governance would be subject to the will of one or more ascendant states.

The difficulty from the standpoint of international legality is not simply that, as a matter of fact, the strong would dominate the weak. The graver concern is that the strong would be *legally* empowered to dominate the weak, contrary to international law's understanding of sovereign equality as the legal equality of states that represent peoples equal in rights and self-determination. Recall from Chapter 1 Vattel's claim that "a small Republic is no less a sovereign State than the most powerful Kingdom."[64] Vattel's quip that "a dwarf" is as much a person as "a giant" offers an apt image of the contest between legal equals that in

[61] UN Charter, art. 2(1).

[62] UN General Assembly, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', UN Doc. A/RES/25/2625 (24 October 1970) (affirming that all states are "judicially equal" and that each "enjoys the rights inherent in full sovereignty").

[63] UN Charter, art. 1(2); see also Declaration on the Occasion of the Fiftieth Anniversary of the United Nations ¶ 1, GA Res. 50/6, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/50/49 (1995) (declaring that states "reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination").

[64] Emmerich de Vattel, *The Law of Nations, Or The Principles Of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns* (Charles G. Fenwick trans., Dobbs Ferry, New York: Oceana Publications, 1964) (1758), Preliminaries, § 18.

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1984 would see the "dwarf" Nicaragua challenge the "giant" United States under the aegis of sovereign equality.

A further animating principle of mandatory cooperation that supports a context-sensitive duty to seek adjudication is the obligation of states to exercise their sovereign powers equitably, which is to say, with "due regard" for the interests of other states and foreign nationals.[65] As discussed in previous chapters, due regard for foreign interests does not require putting them ahead of national interests, but it generally does require "reasonable, appropriate, optimal regard."[66] An exercise of sovereign power that fails to show due regard for the interests of other states or foreign nationals is akin to an abuse of right, where the right holder exercises a right in a way that causes needless or disproportionate harm to others.[67] And so, in the *Lake Lanoux Arbitration* that pitted upstream France against downstream Spain,[68] the Tribunal held that France, in its exercise of sovereign authority over waterways within its territory, "is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interest of the other riparian State with its own."[69]

Bringing the threads together, core doctrines of customary international law prohibit the use of force to resolve disputes while also requiring states to use peaceful means to resolve them. Sovereign equality demands that states be regarded as legal equals authorized to represent peoples equal in rights and self-determination. For states and their peoples to enjoy sovereign equality so understood, other states cannot be entitled to dictate terms or otherwise use unilateral force against them, as international law provides. Instead, states must resolve disputes through peaceful means, as international law provides, and they must be prepared to exercise their sovereign powers equitably for the sake of a just resolution.

Ideally, states will settle their disputes though good faith negotiation, mediation, or conciliation. If rivalrous parties reach an intractable

[65] See, e.g., Chagos Marine Protected Area Arbitration (Mauritius/UK), Case No. 2011–03, Award, para. 534 (Perm. Ct. Arb. 2015).
[66] Jonathan B. Wiener, 'Disregard and Due Regard' (2021) 29 *NYU Envt'l L.J.* 437, 461.
[67] Robert Kolb, *Good Faith in International Law* (London: Bloomsbury Publishing, 2017), pp. 142–145 (discussing international "abuse of right" as including "manifest disproportion of interests" and "arbitrary action").
[68] See above Chapter 2.
[69] Lake Lanoux Arbitration (Fr. v. Sp.), 24 ILR 101, 139 (1957).

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impasse, however, then the duty to use exclusively peaceful means to resolve disputes must be understood to include mandatory adjudication. To allow stronger parties in these circumstances to avoid adjudication altogether would infringe sovereign equality and raise serious questions about the legitimacy of the international legal order. Moreover, having the shadow of mandatory adjudication in the background of negotiations will tend to give the parties' negotiations salutary contact with legal standards and precedents, since both parties would know that if they fail to settle, a judge or arbitrator will decide the matter. This account of mandatory adjudication resonates with the views of two theorists who loom large in the literature on international dispute resolution: Thomas Hobbes and Immanuel Kant.

In *The Doctrine of Right*, Kant claims not only that individuals have a duty to leave the state of nature to enter a civil or rightful condition (i.e., a state, preferably a constitutional republic) but also that an individual in the state of nature "may impel the other by force to leave this state and enter into a rightful condition."[70] Kant's justification for the use of force in this context focuses on the lack of a judiciary in the state of nature. While admitting that the state of nature need not be a dystopia of relentless war, he insists that "it would still be a state *devoid of justice (status iustitia vacuus)*, in which, when rights are *in dispute (ius controversum*), there would be no judge competent to render a verdict having rightful force."[71] In a civil condition, the judge's verdict has rightful force because the judge enjoys the standing of a public authority who is authorized to apply law to facts to resolve disputes. Private individuals in both the state of nature and civil society have no such standing. If they resort to force rather than legal institutions to settle disputes, they simply impose their will on others. So, for Kant, using force to bring someone into a civil condition is legitimate because the actor who seeks to remain outside the law, breaching their duty to enter a rightful condition, purports to reserve to themselves an entitlement to set unilaterally the terms of their relations with others.

Kant's uncompromising insistence on the necessity of legal order lends principled support for the ICJ's judgment in the *Nicaragua Jurisdiction Case*. If the ICJ did not exercise jurisdiction, the United States might

[70] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans., New York: Cambridge University Press, 1991) (1797), p. 124; see also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), chs. 6 and 7.

[71] Ibid. p. 124 (emphasis in original).

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continue to assert the prerogative to intervene in Nicaragua unilaterally, frustrating the establishment of a rightful condition between the two states. On a Kantian approach, therefore, the commanding necessity to establish legal order would arguably justify the majority's strained interpretation of the ICJ Statute, as well as its willingness to discount Nicaragua's failure to ratify its 1929 declaration and its rejection of the United States' eleventh-hour stratagem to evade the Court's compulsory jurisdiction.

Hobbes also gives adjudication an exalted place in his legal and political theory. Before setting out the state of nature and developing a solution in *Leviathan*, Hobbes offers an account of "right reason" (i.e., public reason or authoritative reason) that is itself a compressed version of the extended argument he will later give for a legal order designed to ensure peace. When there is a controversy, Hobbes says, "the parties must by their own accord set up for right reason the reason of some arbitrator or judge to whose sentence they will both stand, or their controversy must either come to blows or be undecided."[72] Hobbes subsequently insists that it is a "law of nature" (a legal principle knowable through reason) that parties in a dispute must "*submit their right to the judgment of an arbitrator*," and that a failure to do so results in them being "as far from peace as ever."[73] The arbitrator, in turn, must "*deal equally between them* ... The observance of this law ... is called EQUITY."[74] Hobbes likewise subscribes to the venerable principle *nemo iudex in causa sua,* "*no man is a fit arbitrator in his own cause*."[75] For Kant, this principle is simply a presupposition of public adjudication; adjudication must be impartial to avoid collapsing into unilateralism. Hobbes, however, offers a complementary but different justification for *nemo iudex* and impartial adjudication generally.

Hobbes' rationale for adjudication is not that the strong will unjustly dominate the weak without it, but that equity allows each party equal benefit, and so "if one be admitted to be judge, the other is to be admitted also; and so the controversy, that is, the cause of war, remains, against the law of nature."[76] Taking Hobbes' argument in stages, his initial claim is that if one party were made judge, the other party would no longer enjoy

[72] Thomas Hobbes, *Leviathan with Selected Variants from the Latin Edition of 1668* (Edwin Curley ed., Canada: Hackett Publishing Co., 1994), p. 23.
[73] Ibid., p. 98 (emphasis in original).
[74] Ibid., p. 97 (emphasis in original).
[75] Ibid. (emphasis in original).
[76] Ibid.

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equality before the law, in violation of the principle of equity. Formal equality could be restored by making both parties judges, but doing so would return them to the state of nature, where all are entitled to judge for themselves how best to pursue their self-preservation. Thus, for Hobbes, as for international law, the duty to seek adjudication is tied closely to the idea that the status of disputants as legal equals – equals under law in civil society and not the state of nature – depends on the availability of adjudication. Whereas for Kant adjudication makes equal freedom possible, for Hobbes adjudication makes legal equality possible. In international law, the principles of equal freedom and legal equality are the double helix of sovereign equality's DNA. Inextricably linked, they are both necessary and together sufficient to explain the equal independence of sovereign states made possible by an international legal order structured by mandatory cooperation, part of which includes the duty to seek adjudication in the event of an irresolvable impasse.

Jurisdiction as Equity

The duty to seek jurisdiction rests on relatively mundane legal premises: the prohibition of the use of force to resolve disputes, the duty to use peaceful means for this purpose, sovereign equality as equal independence and legal equality, and the duty to exercise sovereign powers equitably. Nonetheless, it remains the case that international law is conventionally understood to require states to consent to the jurisdiction of specific courts in order for those courts to have jurisdiction over them. In the *Nicaragua Jurisdiction Case*, for example, the two parties had signaled consent by unilateral declaration.[77] States may also come under the ICJ's jurisdiction by special agreement through which they jointly petition the Court to hear a specific matter. And states can include in treaties jurisdiction clauses that accept that Court's jurisdiction to resolve disputes over the interpretation and application of a treaty.[78] Today there are some 300 treaties with jurisdiction clauses.[79] The justification usually given for the consent requirement is

[77] See, e.g., Case Concerning East Timor (Portugal v. Australia), Judgment, 1995 ICJ Rep. 87, 101, para. 26 (30 June) (affirming that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction").

[78] UN Charter, art. 36(1).

[79] ICJ Frequently Asked Questions: www.icj-cij.org/frequently-asked-questions.

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one that appears on the ICJ's website: "States are sovereign and free to choose how to resolve their disputes."[80]

Of course, states are not entirely "free to choose how to resolve their disputes." As we have seen, generally they cannot use force or the threat of force; instead, they must choose how to resolve disputes from the peaceful means available. Plainly, the ICJ does not contest the requirement that states must cooperate with one another in good faith and use peaceful means when they disagree. Still, giving sovereignty even this much latitude poses a puzzle: if states are entitled to stand on their sovereign rights to choose how to resolve their conflicts, and if this discretion allows them to insist on an alternative to adjudication, such as continued negotiation or nonbinding mediation, then in the event of an impasse is the alleged duty to seek adjudication really a duty at all?

A possible solution to the puzzle draws on mandatory cooperation's principle that sovereign rights must be exercised equitably, a principle that distinguishes sharply between sovereign rights, on the one hand, and the equitable requirement that states use their rights with due regard for other states and foreign nationals, on the other. Just as France in the *Lake Lanoux Arbitration* enjoyed territorial sovereignty over the waters within its territories but nonetheless had to exercise its sovereignty in a manner that took Spanish interests into account, if a genuine and intractable impasse arises in good faith negotiation, mediation, or conciliation, the parties to the controversy are subject to Hobbes' equitable injunction to submit their dispute to an impartial third party. Assuming the parties are not already subject to the jurisdiction of the ICJ, another international court, or an arbitral tribunal, their sovereignty entitles them to decide jointly on a convenient forum. But their sovereignty does not allow them to imperil sovereign equality by avoiding impartial adjudication altogether if best efforts otherwise fail to settle the matter.[81] The distinction between law and equity and its salience in international law can thus explain how states may

[80] Ibid.

[81] For an argument from similar premises in favor of international courts enjoying jurisdiction without prior state consent for disputes arising from nonvoluntary obligations (i.e., customary international law, general principles of law, and *jus cogens*), see Mathias Kumm, 'Towards an International Rule of Law: Why the Jurisdiction of International Courts Does Not in All Circumstances Depend on State Consent' (draft version on file with authors). Kumm's argument is compelling, but our method is to take on board as much of international law's self-understanding as possible, and for now it seems that, along with sovereign equality and mandatory cooperation, international law's self-understanding includes the view that states must consent to be subject to the jurisdiction of particular courts.

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have sovereign rights to determine how to resolve their conflicts, but also be subject to an equitable requirement to exercise those rights in a way that gives due regard to other states and foreign nationals, with the implication that irresolvable impasses must go to impartial adjudication.

Admittedly, in cases such as the *Lake Lanoux Arbitration*, the equitable constraint on sovereign power operates at the object level of determining the appropriate primary rules, with a background institution already in place to resolve the dispute. With the puzzle under consideration – explaining how states can have the right to choose how to resolve disputes while being under a context-sensitive duty to seek adjudication – the assumption is that an adjudicative institution is not yet seized with jurisdiction, and that equity can explain and inform the duty of the parties to seek an impartial third party. Still, in both cases the core equitable justification is the same: under appropriate circumstances, legal rights must be exercised in accordance with equitable constraints to ensure they do not become vehicles of abuse and corrosive to the rationale for having the relevant rights in the first place. Concretely, the right of sovereign states to choose a convenient forum must be reconciled and coordinated with the duty to seek adjudication; from a legal point of view, the former cannot serve as pretext or device to avoid the latter.

A skeptic might consider the equitable requirement to seek adjudication too weak and amorphous to be of significant assistance to parties in real world disputes. The *Nicaragua Jurisdiction Case* shows, however, that where consent is in doubt or there are questions attending formalities required to communicate consent, judges who ultimately rule in favor of compulsory jurisdiction do so because they recognize the value of the constitutional and equitable grounds for compulsory jurisdiction. The debate between the majority and Judge Schwebel revealed that, in practice, a majority bench of the ICJ was prepared to defend the finest of distinctions (e.g., "valid" declarations versus "binding" declarations) to support the cause of compulsory jurisdiction inaugurated with the PCIJ and continued with the ICJ. Statutory text, relevant case law and contrary historical evidence were read down in order to sustain the case for jurisdiction. The principles in favor of jurisdiction thus provided resources for creative gap-filling and statutory interpretation. Plausibly, the majority were comfortable resting jurisdiction on somewhat fragile textual and jurisprudential grounds because they believed (i) the parties had a general duty to seek adjudication that the United States was trying to avoid, (ii) the parties had in substance consented to jurisdiction

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through unilateral declarations, and (iii) the ICJ was an appropriate venue for the matter's adjudication.

Opting Out and Legitimacy

Realist skeptics may yet question the value of international adjudication on the ground that states can opt out or refuse from the outset to accept the jurisdiction of adjudicative regimes. Skeptics might also observe that using the Security Council to enforce remedies ordered by the ICJ against the P5 may prove challenging given their possession of a veto. The *Nicaragua Jurisdiction Case* is again illuminating. Although the ICJ refused to accept the 1984 notification, the United States eventually did withdraw from the ICJ's compulsory jurisdiction in 1986. The withdrawal came shortly after the ICJ released its judgment in the *Nicaragua Jurisdiction Case*, though only after giving six months' notice as prescribed by the 1946 declaration.[82] And as mentioned in the introduction to this chapter, the United States used its veto on the Security Council to avoid paying the sizable awards ordered in favor of Nicaragua. These aspects of contemporary international legal order chafe at the constitutional aspiration of compulsory jurisdiction that motivated architects of the PCIJ and the ICJ. The possibility of states opting out and avoiding remedies also strains the international rule of law. Nonetheless, this institutional frailty does not show that international adjudication lacks legitimacy or fails to count as law.

In liberal democracies, the rule of law ordinarily implies that officials and private citizens alike are subject to the law, including the compulsory jurisdiction of municipal courts.[83] In commonwealth countries, however, Parliament and its Members (when acting in their official capacities) are not subject to significant swaths of the ordinary law. Under the doctrine of parliamentary privilege, Parliament and its Members are immune from suit in relation to activities considered necessary for Parliament to fulfill its constitutional tasks, such as control of "debates and proceedings

[82] Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations (19 September 1985 to 11 October 1985), 1408 UNTS 270.

[83] See, e.g., A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan & Co., 1915), p. 189 (asserting as a tenet of the rule of law that "no man is above the law" and that "every official, from the Prime Minister down to a constable" is subject to "the ordinary law" and "the ordinary tribunals") [hereinafter Dicey, *Introduction*].

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in Parliament" as guaranteed by the UK Bill of Rights of 1689.[84] Similarly, public officials who perform their duties in good faith typically enjoy immunity for harms that result from their conduct as officials.[85] In individual states as well as in international legal order, the judiciary lacks comprehensive jurisdiction, notwithstanding that compulsory jurisdiction is the default norm at the national level and usually applies irrespective of a subject's consent.

There is also an important sense in which the sovereign right of states to choose how to resolve their disputes parallels parliamentary sovereignty under the UK constitution. For constitutional theorist A. V. Dicey, the British unwritten constitution consisted of two closely connected legal principles: parliamentary sovereignty and the rule of law. Parliamentary sovereignty, according to Dicey, meant that Parliament has "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[86] Parliament's lawmaking authority is therefore both plenary and supreme. As Mark Walters has argued, however, on Dicey's account Parliament's sovereignty is determined and conditioned by law in three ways: "first, law defines what Parliament is; second, the sovereignty enjoyed by Parliament is itself a legal power; and, third, the sovereignty of Parliament is legislative sovereignty only, i.e., it is not the power to do anything but only the power to make law through legislation."[87] These legal attributes of parliamentary sovereignty, Walters claims, condition how it can be exercised and make it possible for Dicey's second constitutional principle – the rule of law – to complete the United Kingdom's law-giving framework.[88]

Dicey believed that the rule of law required due process and formal legal equality, but perhaps more significantly still, it also required judges to interpret Parliament's legislation "in the spirit of legality" and consistent with "the general spirit of the common law."[89] Today, judges in

[84] See, e.g., Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission) (2001), 54 O.R. (3d) 595 at para. 23.
[85] See, e.g., Pierson v. Ray, 386 US 547 (1967) (establishing the doctrine of qualified immunity for police officers).
[86] Dicey, *Introduction*, p. 37.
[87] Mark D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge: Cambridge University Press, 2020), p. 165.
[88] Ibid., p. 281.
[89] Dicey, *Introduction*, p. 409.

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commonwealth countries interpret statutes and review administrative action using a "principle of legality" that calls on them to interpret legislation, to the extent possible, in a manner consistent with human rights, common law values, and equitable principles.[90] Administrative action that encroaches on rights, values or principles without express statutory warrant may be declared invalid. It is a vexed question whether, ultimately, Parliament is entitled to use unambiguous language to infringe gratuitously legal principle *and* have that plain language applied by the courts.[91] Generally, however, "[p]arliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights," though it must use especially clear language because "Parliament must squarely confront what it is doing and accept the political cost."[92]

The point for present purposes is that in the United Kingdom and commonwealth states without written constitutions, Parliament can effectively avoid judicial review by using express language. Much as states at international law can use their sovereign power to withhold or withdraw consent to avoid the jurisdiction of particular international courts, Parliaments can use their plenary lawmaking power to adopt express language to avoid judicial review of administrative action that infringes on human rights or common law values. In both cases, the use of plenary sovereign power can result in an evasion of accountability before judicial authorities that may strain the rule of law. Yet, in both cases too, judges can take up David Dyzenhaus' recommendation that they adopt the role of a "weatherman" who reports on the repugnancy to the rule of law of both a statute that offends principles of legality and a state policy that breaches the duty to seek adjudication.[93] And in both cases, a failure of

[90] See, e.g., R. v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 131 (HL) (affirming that "[f]undamental rights cannot be overridden by general or ambiguous words") [hereinafter Simms].

[91] See, e.g., T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013), pp. 141–142 (asserting that Dicey's hypothetical statute that calls for the murder of all blue-eyed babies may be "formally valid" but "in substance void" for its violation of the rule of law). David Dyzenhaus interprets Dicey to affirm that a statute that infringes the rule of law or legality may be valid but is nonetheless illegal precisely because it encroaches on the rule of law or legality: David Dyzenhaus, *Constitution of Law*: *Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), pp. 57–58 [hereinafter Dyzenhaus, *Constitution of Law*].

[92] *Simms*, n. 98, p. 131, *per* Lord Hoffmann.

[93] Dyzenhaus, *Constitution of Law*, p. 200.

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legality may be recognized as such only because in other cases legality visibly succeeds. That Nicaragua won both the jurisdiction and merits cases showed that sovereign equality can serve as the basis for a system of adjudication in which the weak can successfully challenge the strong as legal equals.

One final comparison to British constitutionalism offers further grounds for doubting the force of the realist critique. The rule of law for Dicey consisted in judicial review of administrative action. The main institutional tools used by judges conducting review were the prerogative writs. The substance if not the form of these writs is still found in the remedies available in judicial review of administrative action today, which include: *certiorari* (quashing or setting aside administrative decisions), *mandamus* (ordering the performance of a public duty), *quo warranto* (requiring a demonstration of legal authority), *habeas corpus* (requiring the presentation of a detained person and justification of the detention), and prohibition (supervising the jurisdiction of ecclesiastical and administrative decision-makers).[94] The writs originated in the Middle Ages and were generally issued by the king or his delegates (e.g., the Court of King's Bench, the Privy Council, the Lord Chancellor) to address a complaint against an inferior tribunal or an administrative decision-maker. They embodied the king's prerogative power to supervise the diffuse institutions administering justice on the king's behalf.

Consider, for example, the writ of *certiorari*. The writ began in the thirteenth century as a written request issued by the king to obtain judicial records for examination. At the turn of the seventeenth century, *certiorari* was available from both Chancery and the Court of King's Bench. S. A. de Smith notes that the anonymous author of *A Treatise of the Maisters of the Chauncerie* identified *certiorari* as a "writ of grace."[95] When Francis Bacon became Lord Chancellor in 1618, he issued an order that writs of *certiorari*, *habeas corpus*, and prohibition (among others) should not be issued without his approval. His purpose, according to de Smith, was to maintain

[94] Edward Jenks, 'The Prerogative Writs in English Law' (1923) 32 YLJ 523; S. A. de Smith, 'The Prerogative Writs' (1951) 11 *Cambridge L.J.* 40; Paul A. Warchuk, *The Writ of Certiorari and Its Scope, 1600–1800: For the Orderly Administration of Justice* (Cambridge: submitted for the degree of Doctor of Philosophy, 2023). The sketch of the prerogative writs provided in the text is drawn from these sources.

[95] de Smith, 'The Prerogative Writs', p. 43 (citing *A Treatise of the Maisters of the Chauncerie* (written c. 1596–1603), reprinted in Hargrave's *Law Tracts* 292).

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the principle "that writs closely associated with the rights of the Crown should not issue out of Chancery to the subject as of course."[96]

Within less than two decades, applications for *certiorari* were largely made to the Court of King's Bench. The Court began to use *certiorari* not only to examine the final orders and convictions of justices of the peace, but to quash them if warranted.[97] Before a claimant could ask the Court to examine or quash an order or conviction, however, they had to show sufficient cause to acquire the writ of *certiorari*. If successful, the claimant would deliver the writ to the clerk of the peace who held the relevant record, and the clerk would subsequently return the record to King's Bench for examination and disposition. The Court's examination was strictly limited to the written record. In some cases the record failed to include evidence that was readily available. The claimant could request that the clerk of the peace prepare a detailed factual record, but only with the consent of the local justices subject to the writ.

For purposes of comparison with international adjudication, there are three particularly important features of the seventeenth-century *certiorari* process: first, the availability of *certiorari* from Chancery by grace and not by right; second, the requirement to show cause to obtain the writ from the King's Bench; and third, the need to secure the consent of the challenged justices to have the record amended for examination. Together these features disclose a practice of judicial review conducted at the sufferance of the sovereign. In any given case, the affected individual could be denied from the outset the opportunity to have their record examined and an adverse decision quashed. The position of individuals vis-à-vis judicial review in the seventeenth century was thus in an important sense analogous to the position of weaker states seeking a forum for international adjudication. In both cases, the availability of a judicial forum depends on the consent of a public authority. While in the case of judicial review the relevant public authority is the subject's own judiciary and not another state, the prerogative writs were discretionary writs of grace that could be refused without notice or reasons. Whereas the majority in the *Nicaragua Jurisdiction Case* found that states must give reasonable notice to withdraw from the compulsory jurisdiction of the ICJ, seventeenth-century British courts were under no obligation to give notice or reasons for declining an application for a prerogative writ, since they were exercising the king's

[96] Ibid.

[97] *Berries Case* (1637), in Henry Rolle, *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley* vol. 1 (London: printed for A. Crooke et al., 1668), pp. 734–744.

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prerogative. The position of an individual seeking judicial review was in this way more precarious than Nicaragua's when it instituted proceedings at the ICJ against the United States.

Over time, the fragility of the individual's standing to apply for judicial review lessened as the practice became more established and customary. By the end of the nineteenth century, Dicey was able to identify judicial review as the central institution of the rule of law, and the rule of law as one of the two fundamental principles of the UK constitution. It is impossible to know whether the practice of international adjudication will follow a similar trajectory. The lesson we can glean from the history of the prerogative writs is that legal institutions do not necessarily spring into existence fully developed. They can take considerable time to catch up to their underlying presuppositions, and progress is unlikely to be linear. Nonetheless, relatively inchoate legal institutions such as international adjudication have value notwithstanding their deficiencies because they contribute to the transparency and accountability of public authorities. They also provide stable venues for dispute resolution and the salutary development of law as a culture of justification.[98]

Much the same can be said in reply to the objection that the Security Council veto of the P5 members makes a mockery of international adjudication. At the founding of the United Nations at the San Francisco Conference in 1945, the Big Five countries presented the veto power as a non-negotiable feature of the draft Charter.[99] Other states reluctantly accepted the P5's privileged position based on the pragmatic calculation that their own sovereign equality and national security could be better preserved in practice if they entrusted international peace and security to the Security Council's "legalized hegemony."[100] The motivation of the critique of the veto is that the P5 can always use it to avoid a judicial remedy, and on its face the veto is an affront to sovereign equality given that it is held by five states rather than all. We need not deny the inequality produced by the veto, however, to recognize that the ICJ offers an independent public forum in which claims of right may be assessed and settled. The United States' use of its veto did nothing to

[98] See Etienne Mureinik, 'Emerging from Emergency: Human Rights in South Africa' (1994) 92 *Mich. L. Rev.* 1977, 1986.

[99] Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* (Cambridge, MA: Westview Press, 2003), p. 223 (recounting how the Big Five defeated an Australian amendment to alter the veto).

[100] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), pp. 170–171.

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diminish the ICJ's authoritative judgment in favor of Nicaragua: the veto blocked enforcement of the judgment but had no effect on its authority as a judicial statement on the international wrongs committed by the United States against Nicaragua. The United States' assiduous efforts to deny the ICJ's jurisdiction – efforts expended while knowing that an adverse judgment could never be enforced – suggest that the United States itself considered the ICJ's proceedings to be significant.

The veto available to the P5 is a particular instance of a wider concern in public law, which is executive compliance with judicial decisions. When Chief Justice Marshall decided in Worcester v. Georgia that Georgia laws purporting to seize Cherokee lands violated federal treaties,[101] President Jackson is famously said to have responded, "John Marshall has made his decision: *now let him enforce it!*"[102] President Jackson and Georgia simply ignored the decision. Courts generally have no direct enforcement mechanism against their executives, and when state interests and judicial orders do not align, they ultimately may have to rely on what Dyzenhaus refers to as "the compulsion of legality."[103] The compulsion of legality arises from the obligation of states "to justify all acts of state as having a legal warrant, the authority of law."[104] This compulsion thus follows from a commitment to the normativity of law, and entails "that jurists proceed as if law's claim to authority can be vindicated."[105] Whether states comply with international judicial decisions out of rational self-interest, a sense of duty, socialization or internalization of human rights norms, or a mix of motives, it bears underscoring that they comply with roughly 65 to 75 percent of the ICJ's decisions.[106] For most states subject to the ICJ's compulsory jurisdiction, the reasons for compliance tend to outweigh the reasons for defiance.

[101] 31 US (6 Pet.) 515 (1832).

[102] Edwin A. Miles, 'After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crisis' (1973) 39 *J. S. Hist.* 519, 519 (emphasis in original).

[103] David Dyzenhaus, 'The Compulsion of Legality', in Victor V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2009), pp. 33, 34.

[104] Ibid.

[105] Ibid., p. 39. Some scholars have explored how a formal or objective compulsion of legality in international law contributes to a "socialization" or "acculturation" of states that is driven by international human rights law, increasing the cost of noncompliance with human rights norms, and thereby creating an internalized or subjective compulsion to comply. See, e.g., Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford: Oxford University Press, 2013).

[106] Karen J. Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 *Eur. J. Int'l Rel.* 33, 58.

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Conclusion

Pitting a hegemonic power of the North against a small and developing state of the South, the *Nicaragua Jurisdiction Case* reveals the ICJ majority's steady commitment to compulsory jurisdiction and sovereign equality. The majority used these ideals as guiding principles to read down formalities usually required to indicate consent and to dismiss the United States' last-minute attempt to withdraw its acceptance of the ICJ's jurisdiction. While the United States was eventually able to avoid the remedy ordered, it could do so only by disregarding a judicial order and breaching its duty to the Court to comply. This breach of duty could neither avoid nor tarnish the ICJ's judgments on jurisdiction and the merits. A tiny country ruled as a dynastic fiefdom by three generations of corrupt despots took the United States to court for waging an illegal campaign of violence against it and won. While the rise of reactionary nationalism in recent years may make the aspiration of international legality seem utopian, the proliferation of international courts since the end of the Cold War and the emergence of a customary duty to resolve disputes through peaceful means offer an important counterweight.

Within mandatory cooperation's framework, the duty to seek adjudication when other peaceful means have been exhausted is explained as an implication of viewing sovereign equality as the legal equality of states tasked by international law to govern and represent peoples that are equal in rights and self-determination. In practice, sovereign equality means that no state can rightfully dominate or dictate terms to another. The duty to seek adjudication adopts the form of a constraint on sovereignty and takes its substance from equity; thus, it is an equitable constraint on exercises of sovereignty. Adjudication serves as an antidote to unilateralism and as a guarantee of legal equality. While international adjudication today cannot lay claim to the kind of universal compulsory jurisdiction enjoyed by its national counterparts, it compares favorably to judicial review of administrative action in its early days, when individuals had to rely on "writs of grace." In summary, as the institutional apex of mandatory cooperation, international adjudication enables states to resolve their disputes as equals under law, and through peaceful means oriented toward justice.

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