

The Spiritual Sources of Legal Creativity

The Inaugural Father Miguel D'Escoto Lecture
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Fordham University School of Law
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Table of Contents

Introduction:

Kevin M. Cahill, M.D. 4

Lecture:

Richard A. Falk

Spiritual Sources of Legal Creativity 8

Responses:

Martin S. Flaherty 18

Nassir Abdulaziz Al-Nasser 23

Contributors and Acknowledgments 25

About the IIHA and CIHC 26

IIHA Book Series and Occasional Papers 27

Introduction Kevin M. Cahill, M.D.

This Inaugural Miguel D'Escoto Lecture celebrates an important anniversary in international law, and the remarkable man who was the moving force behind a landmark case affirming the rights of small nations in a world of proxy wars and illegal boycotts.

For over 50 years, Miguel D'Escoto was more than a friend; our paths did not merely cross—they were intertwined. He was my patient when he became ill as a Maryknoll missionary in Chile. The Irish immigrant ethos of my own background was, as he noted, simpatico with the rebel soul of a man whose country had been constantly invaded to 'protect the stability of the Americas'.

I will mention but a few of our shared efforts; with Miguel, there were no rigid borders that prevented a priest from serving his flock, or involving his doctor in complex actions that grew from mutual dreams to right wrongs. In the mid 1970s, Miguel met the Secretary General of the United Nations, and the President of its General Assembly in my medical office; it was only natural for him to immediately conceive a bold plan where Eduardo Frei, the former President of Chile, then under house arrest, would be invited to a conference that he asked I convene with my United Nations contacts. He correctly assumed that the Chilean government would not risk the embarrassment of refusal.

When President Frei came to New York, he lived in our apartment, and Miguel's 'diplomatic' efforts paid off. He remained a free man. Orbis Books, the Maryknoll press founded by Miguel, published the proceedings of that meeting.

I headed the health services in Managua after the 1972 earthquake destroyed much of that city, with 25,000 people dead and many more injured. It was a period of both disaster relief and revolutionary involvement. For six weeks, I lived in a tent with the Nicaraguan President, Anastasio Somoza Debayle, but my links with Miguel allowed me to also meet those who were trying to build a more just nation. I knew the priests, the poets and novelists, the courageous laymen plotting the overthrow of a corrupt regime; they were writing a new constitution, and testifying about those efforts in the US Congress and on the air-

ways. The Ortegas and Tomas Borge and thousands of armed rebels fought the Nicaraguan National Guard in the hills while the 'Group of Twelve', as Miguel and his colleagues were known, worked with the equally important weapons of pen and paper, often in our apartment in New York City, to create a new nation.

When the Sandinista Government became a reality in 1979 Miguel, still a Maryknoll priest, became the Foreign Minister. Maryknoll remained faithful to Miguel—and he to them—when, with the other priests in the Nicaraguan government, Miguel was ordered by the Vatican to resign or be defrocked. He and the others did not resign, believing in a theology with a 'preferential option for the poor'. Many years later, Pope Francis restored Miguel's full priestly powers.

Miguel and I shared many visits and projects over the next decade, reflecting the strengths and essential partnership in our relationship. I cared for him during many times of crisis. Once, when he went on a hunger strike, in a barrio of Managua, surrounded by hundreds of clergy, writers and composers, I stayed in daily telephone contact. When his health deteriorated, I monitored the changes by examining his lab results, and comparing them to those of the IRA prisoners who had starved to death in Long Kesh Prison in Northern Ireland. At a critical point, I decided to fly down. In almost classic Miguel fashion, he greeted me by saying, "I knew you would come when the time was right". He ended his fast, and, with careful monitoring, a progressive diet and supplements, recovered fully.

In the less hectic years after the electoral loss of the Sandinista government, we continued our frequent intellectual and spiritual retreats in Managua, focusing on those timeless, universal concerns that had always been the foundation of our unique relationship. When my wife died, Miguel was denied a visa to participate in a Memorial Service we held in New York. He sent his reflections by post, noting that Kate "stood out in (his) mind as the quintessential searcher for the Real, with a capital R. She always knew that pride and pretense were dead end streets to be shunned because they do not lead us to God. Kate's love of Truth made her disdain all of that which falsely leads us to believe ourselves better than others because of race, creed, nationality, personal wealth or talents. I always perceived in her a fusion of great

tenderness with great strength” I think his own words describe Miguel as well.

During his tenure as the 63rd President of the United Nations General Assembly I served as his Chief Advisor on Humanitarian and Health Issues. We met several times per week to review projects and manuscripts, to share ideas and perspectives, both realizing the rare potential to demonstrate moral and ethical facets of complex political problems. At his request, I traveled to Gaza after the Israeli invasion in 2009, and he published my report on the hellish scenes encountered as the UN Document issued on Humanitarian Day, August 15, 2009.

After Miguel's death, I offered a brief *Eulogy* that was translated into Spanish and distributed by his family and the Nicaraguan Government.

Thoughts on the Death of Father Miguel—Written on a Sleepless Night, under a Full Moon, Waiting for Dawn.

The world has lost a saint, something we can ill afford. Yet we must draw strength and determination from his great gifts of wisdom and spirituality which enriched us all.

The poor have lost a *compañero* who was in unique solidarity with them, and translated their hopes and dreams for a more just and equitable political system.

Artists everywhere have lost a devoted champion for all creativity. His sensitive eye found beauty in the colorful paintings of Latin America; in Nicaragua, especially, there will be great sorrow in the absence of a modern Maecenas for the community of potters and weavers, poets and novelists, musicians and dancers, gardeners and those who believed in the preservation of trees and Mother Earth.

Religious life has lost a great thinker, one who had the courage to challenge the rigid dogmatism that distorted the lessons of Christ. He helped liberate the soul even of a Church that rejected him for too long.

Somehow, I don't feel a loss for the bonds of love that grew ever stronger over the past half century will continue to sustain me. I knew

Miguel in a very special way, as his physician and close confidant; in fact, he always said I was the 'family doctor' and did indeed care for generations from his mother to his beautiful nieces, and the extended group of adopted children, friends, and even animals of every sort.

Lecture Professor Richard Falk

Professor Richard Falk was a member of the legal team that brought the Nicaraguan Government's case against the United State of America to the International Court of Justice in The Hague in 1986. In this inaugural Memorial Lecture he offers his insights on Father D'Escoto's spiritual sources of legal creativity.

The Spiritual Sources of Legal Creativity

It is a humbling honor to speak at this gathering of remembrance dedicated to a truly great human being who inspired and touched the lives and activities of so many of us in this room. Kevin Cahill is among those here who had such an intimate and sustained friendship with Father Miguel. Kevin is also a person with his own abundant inspirational gifts, and I remain deeply grateful to him for originally bringing me into contact with Miguel.

Others here today could assuredly speak more knowingly about the person. I will only offer this personal observation: Miguel exhibited a remarkable quality of moral radiance that was immediately apparent to all those fortunate enough to cross his path. The only person in my experience who possessed a comparable depth of ethical being was Nelson Mandela with whom I had a single and brief, yet memorable, encounter.

The title given to my remarks is something I admit imposing upon myself, and now at this moment of delivery strikes me now as far too ambitious. I chose such a theme because it does reflect the most enduring and empowering dimension of my association with Miguel, and seemed appropriate to reflect upon in the venerable academic venue of the Fordham School of Law.

My point of departure is this: if we believe, which many do not, that justice is the proper end of law, then we must struggle to overcome the calculative or transactional mentality that dominates our legal culture, restricting our attitudes and endeavors involving law to the domain of the feasible. I am fully aware that I am endorsing an unconventional outlook by elevating the moral imagination and what I would call 'utopian realism'. This kind of formulation disregards the conventional

understanding of law as essentially offering a suite of techniques for problem-solving that presupposes a view of politics as 'the art of the possible'.

It is this kind of ethical radicalism that made the life of Father Miguel so exemplary, and in the best sense, 'revolutionary', for all those whose lives he affected whether in ministering to the poor or challenging the high and mighty, whether acting in a pastoral capacity or as a man of the world. It is important to appreciate that Miguel was both an ardent Nicaraguan nationalist and a passionate citizen of the world, what I call a 'citizen pilgrim', embarked on a pilgrimage to a global future that embodies peace with justice.

Let me preface this inquiry into the spiritual sources of legal creativity with a general remark that pertains particularly to international law. I may be almost alone among law professors in believing that international law is the field of law that is most relevant to the ultimate survival of the human species. The sad reality is that international law continues to struggle for survival as a field of study, being often denigrated, evaded, and violated by the most powerful governments on the planet whenever law is seen as blocking a preferred policy and there are always many apologists among the ranks of legal experts and diplomats ready to offer a comforting rationalization.

And yet viewed from a perspective other than war/peace and security, international law in relation to trade and investment has basically served to protect the interests of the rich and powerful, while shackling the poor and vulnerable. In other words, international law has this dual face: it bends to the geopolitical will of the militarily powerful while often cruelly imposing accountability on the weak. At the founding of the UN a Mexican diplomat caustically observed that 'we have created an organization that regulates the mice while the tigers roam freely'. And so it is.

It is against this background that Miguel D'Escoto's spiritual wisdom creates a contrast with business as usual in the world of 'real politik'. Even for most global reformers, the criterion for constructive action is a realistic appreciation of achievable limits, what I would identify as horizons of feasibility. We are living increasingly in a world in which there

are growing gaps between what is feasible and what is necessary, what I identify as horizons of necessity. Adapting to climate change in the Age of Trump underscores this menacing gap between feasibility and necessity. As a diplomat Father Miguel was almost unconcerned with feasibility as conventionally understood if it stood in the way of necessity or desirability. He was deeply sensitive to the imperatives of necessity, and even more so to the moral and spiritual imperatives of doing what is right under a particular set of circumstances, and for this reason alone he was most responsive to what I identify here as horizons of spirituality.

He was motivated by a belief, undoubtedly reflecting his religious faith, in the potency of right reason, and on this basis conceived of international law as a crucial vehicle for realizing such a vision, embracing with moral enthusiasm a kind of 'politics of impossibility' in which considerations of justice outweighed calculations of feasibility or the obstacles associated with geopolitics. It is with an awareness of the trials and tribulation of Nicaragua and its long-suffering population that Father Miguel turned to law as an imaginative means of empowerment.

Let me illustrate by reference to the historic case that Nicaragua brought against the United States in the early 1980s at the International Court of Justice in The Hague. It was a daring legal flight of moral fancy to suppose that tiny and beleaguered Nicaragua could shift its struggle from the bloody battlefields of US armed intervention and a mercenary insurgency against the Sandinista Government of which he was then Foreign Minister to the lofty legal terrain that itself had been originally crafted to reflect the values and interests of dominant states, the geopolitical players on the global stage. But more than this it was a brilliant leap of political imagination to envision the soft power of law neutralizing the hard power of high tech weaponry in a high stakes ideological struggle being waged in the midst of the Cold War.

Such an attempt to shift the balance of forces in an ongoing conflict by recourse to international law and the World Court had never before been made in any serious way. It was a David and Goliath challenge that the World Court as the highest judicial institution in the UN System had yet to face in a war/peace context, and it turned out to be a test of the integrity of the institution.

Let me recall the situation in Nicaragua briefly. The United States was supporting a right-wing insurgency, the counterrevolutionary remnant of the Somoza dictatorship, a single family that had cruelly and corruptly ruled Nicaragua between 1936 and 1974 on behalf of corporate America (the era of 'banana republics'), leaving the country in impoverished ruins when the Somoza dynasty finally collapsed. The Somoza-oriented insurgents were known as the Contras, and were called 'freedom fighters' by their American sponsors and paymaster because they were opposing the Sandinista Government that had won a war of national liberation in 1979, but was accused by its detractors of leftist tendencies and Soviet sympathies, which was the right-wing ideological way of obscuring the true affinity of the Sandinista leadership with the teachings of Liberation Theology rather than with the secular dogmatics of Marxism.

It was a way of depriving the people of Nicaragua of their inalienable right of self-determination. The United States Government via the CIA was training and equipping the Contras, and quite overtly committing acts of war by mining and blockading Managua, Nicaragua's main harbor and its lifeline to the world. It was these interventionary undertakings that flouted the authority of international law and the UN Charter. Father Miguel's addressed the UN General Assembly in his capacity as Nicaragua's acting Foreign Minister, vividly describing the conflict with some well chosen provocative words: "It is obvious that the war to which Nicaragua is being subjected is a US war, and the so called Contras are merely hired hands serving the diabolical objectives of the Reagan Administration". Later in the same speech he condemned the US Government for recently appropriating an additional \$100 million "to finance genocide against our people". [Address to UNGA, Nov. 3, 1986]

I quote this robust language partly to show that Father Miguel's spiritual nature did not always mean a gentle demeanor or denote the absence of a fighting spirit. As here, when deemed appropriate to the situation, Miguel readily relied on undiplomatic candor to get his point across. He was also insistent on using such occasions to talk truth to power and to lay blame and responsibility for the torment of the Nicaraguan people where it belonged, however impolitic it was to do so.

Without going into the details of the case, it was possible for Nicaragua to lodge such a complaint against the United States because US Government had earlier agreed to accept the authority of the ICJ if the other side in an international conflict was also had been similarly committed. With this awareness, Father Miguel in his role as Foreign Minister (1979–90) realized two things: that the sovereign rights of Nicaragua being overridden in a manner in flagrant violation of international law and that the World Court was supposed to provide countries with a nonviolent option of resolving international legal disputes, seen as an important contribution to maintaining world peace that the US had itself strongly championed throughout most of the 20th century.

It may not seem so unusual for a small country to take advantage of a potential judicial remedy, but in fact it had never happened—no small state had ever gone to the World Court to protect itself against such military intervention, and to do so on behalf of a progressive government in the Third World in the midst of the Cold War seemed to many at the time like a waste of time and money that Nicaragua could ill afford.

It is here where one begins to grasp this potentially revolutionary idea of relying upon the spiritual sources of legal creativity. Father Miguel was convinced that what the United States Government was doing was legally and morally wrong, and that it was an opportune time for the mice to fight back against the predator tiger. It was an apt occasion to act by reference to horizons of spirituality.

Yet this did not mean that Miguel would ignore the pragmatic dimensions of effectiveness. Nicaragua managed to persuade Harvard law professor, Abram Chayes, to act on their behalf as head legal counsel. This was a brilliant tactical move that I applauded at the time (even though it meant that as Nicaragua's second choice I lost out). Aside from being a first-class international lawyer with a high global profile, Chayes had previously served as John F. Kennedy's Legal Advisor and close confidant at the time of the Cuban Missile Crisis. The symbolism could not have been more pointed, underlining the fact that Chayes was committed to upholding international law rather than being a combatant in the ideological sideshow carried on throughout the Cold War. Not surprisingly, the Wall Street Journal audaciously described Chayes as 'a traitor' for accepting such a role.

I had the opportunity to work with Chayes and Father Miguel in the American Irish Historical Society headquarters here in Manhattan that was operating under the benign tutelage of none other than Dr. Kevin Cahill. We worked hard for several days as a team developing the arguments both as to the authority of the ICJ to adjudicate, what we lawyers call 'jurisdiction', to be decided in a separate preliminary decision, as well as on the substance of Nicaragua's allegations, which constituted the second phase of the litigation. What was so impressive to me then, and even now, almost 40 years later, is that this effort to combine a somewhat utopian motivated legal undertaking with a practical mastery of the technical dimensions of the case illustrated for me the extraordinary blending of spiritually grounded, yet worldly wisdom with the down to earth skills of legal craft.

The outcome of the Nicaragua narrative is too complicated to describe properly, but in short—counsel for Nicaragua persuaded the Court that it had jurisdictional authority, at which point the United States petulantly, yet not unexpectedly, withdrew from the proceedings correctly realizing that if it could not prevail at this jurisdictional phase it had virtually no chance to have its legal arguments accepted at the merits phase of the case. Further, the US Government was displeased with the ICJ that it seized the occasion to renounce its earlier formal acceptance of what is technically referred to as 'compulsory jurisdiction', which meant that no state could commence such an action against the USG in the future, and that the US was itself permanently foreclosed from proceeding against a state against which it had legal grievances unless that state gave its consent.

This retreat from adjudicating international legal disputes has been an unintended and unfortunate lasting effect of the Nicaragua case. The American stance of viewing international law as only viable when it supports its geopolitical tactics has sent a damaging message to the world. It has definitely weakened the role and potential of the ICJ and of international judicial authority generally. In one sense, the US withdrawal was understandable for those who are driven to shape foreign policy by feasibility calculations rather than by certain abiding values such as, here, adhering to the rule of law.

It hardly required a legal genius in the State Department to anticipate that if the Court upheld its legal authority to pronounce upon the controversy, then it would almost certainly rule in favor of Nicaragua on the substantive issues. Despite some technical issues involving the selection of the applicable legal authority, given the sweeping prohibitions of international law and the UN Charter against uses of force except in situations of self-defense against a prior armed attack, the pro-Nicaragua outcome was entirely predictable.

What was rather intriguing from a jurisprudential point of view was that despite its much-hyped boycott of the proceedings and accompanying denunciation of the jurisdictional finding, the US in the end quietly complied with the principal finding in The Hague, namely, that the naval blockade of Nicaragua's harbors was unlawful. As would be expected, the USG never acknowledged that it was complying, nor did Nicaragua dance in the streets of Managua, but the cause/effect relationship between the judicial decision and compliant behavior was clear to any close observer.

There was then some reality to the expression 'the force of law', and the USG, even during the Reagan presidency, did not want to stand before the world as openly defying the law, even international law. Such an assessment may have reflected the fact that the US Government was in the midst of a struggle to win the legitimacy war begun waged against the Soviet Union, which partly hinged on the relative reputation of these two dueling superpowers in relation to respect for international law and human rights, signature issues of 'the free world'.

For me this Nicaraguan experience was a compelling example of Father Miguel's achievements that followed directly from his deep commitment to the horizons of spirituality and decency. It was far from the only instance. Let me mention two others very quickly. One of my other connections with Father Miguel was to serve as one of his Special Advisors during his year as President of the UN General Assembly throughout its 63rd session, 2008–2009. As continues to be the case, life could become difficult for any leading UN official who openly opposed Israel. Father Miguel was deeply aware of the Palestinian ordeal and unabashedly supportive of my contested role as Special Rapporteur for Occupied Palestine on behalf of the Human Rights Council

in Geneva. When I was detained in an Israeli prison and then expelled from Israel at the end of 2008, Father Miguel wanted to organize a press conference in NYC to give me an opportunity to explain what had happened and defend my position. I declined his initiative, perhaps unadvisedly, as I didn't want to place Miguel in the line of fire sure to follow.

At the end of 2008 Israel launched a massive attack against Gaza, known as Cast Lead, and Father Miguel sought to have the General Assembly condemn the attack and call for an immediate cease fire and Israeli withdrawal. It was a difficult moment for Father Miguel, feeling certain that this was the legally and morally the right thing to do. Yet as events proceeded and diplomatic positions were disclosed, Miguel was forced to recognize that the logic of geopolitics worked differently, in fact so starkly differently that even the diplomat representing the Palestinian Authority at the UN intervened to support a milder reaction than what Miguel deemed appropriate.

Unlike his Nicaraguan experience, here the backers of feasibility prevailed, but in a manner that Father Miguel could never reconcile himself to accept. I met many diplomats at UN Headquarters here in New York who said that no one had ever occupied a high position at the UN with Father Miguel's manifest quality as someone so passionately dedicated to righteous principle. Pondering this, it occurred to me that one possible exception was Dag Hammarskjöld, an early outstanding UN Secretary General, who died in a plane crash, apparently assassinated in 1961 for his principled, yet geopolitically inconvenient, dedication to peace and justice. From his private writings we know that Hammarskjöld's UN efforts also sprung from wellsprings of spirituality.

Most General Assembly presidents take the post as an honorific feather in their cap, the symbolic culmination of a public sector career, and spend the year presiding over numerous tedious meetings and hosting an endless series of afternoon receptions, but never make any effort to influence, much less enhance, the role of the General Assembly or otherwise strengthen the UN as an institution of potential global governance. Miguel, in contrast worked tirelessly to make the UN more effective, more respectful of law, more democratic, and above all, more sensitive to claims reflective of global justice. Miguel took full advantage

of his term as president of the General Assembly to provide venues within the Organization that offered humane alternatives to neoliberal economic globalization. He sponsored and organized meetings at the UN designed to overcome current patterns of economic injustice, making use of the presence in New York City of such non-mainstream economists as Jeffrey Sachs and Joseph Stiglitz. Here again Father Miguel demonstrated his grounded spirituality by once more combining the visionary with the practical.

I had the opportunity to work with Father Miguel on several proposals to raise the profile and role of the General Assembly as the most representative and democratic organ of the UN. This initiative was rather strategic and partly meant to counter the US-led campaign to concentrate UN authority in Security Council so that Third World aspirations and demands could be effectively thwarted, and the primacy of geopolitics reestablished after the assault mounted in the 1970s by the then ascendant Nonaligned Movement.

What I have tried to describe is this deep bond in the life and work of Father Miguel between the spirituality of his character and motivations and the practicality of his involvement in what the German philosopher, Habermas, calls 'the lifeworld'. I find it indicative of Father Miguel's deep spiritual identity that he suffered a punitive response to his life's work from the institution he loved and dedicated his life to serving, being suspended in 1985 by Pope Paul II from the priesthood because of his involvement in the Nicaraguan Revolution. Miguel was reinstated 29 years later by Pope Francis, who many view as a kindred spirit to Miguel. There is an object lesson here for all of us: in a political crisis the moral imperative of service to people and ideals deserves precedence over blind obedience to even a cherished and hallowed institution. This would undoubtedly almost always pose a difficult and painful choice, but it was one that defined Father Miguel D'Escoto at the core of his being, which he expressed over and over by doing the right thing in a spirit of love and humility, but also in a manner that left no one doubting his firmness, his affinities and commitments, as well as his unwavering and abiding convictions.

As I suggested at the outset, the daring and creativity that Father Miguel brought to the law and to his work at the UN sprung from spiritual roots

that were deeply grounded in both religious tradition and in an unshakable solidarity with those among us who are poor, vulnerable, oppressed, and victimized. For Miguel spirituality did not primarily equate with peace, but rather with justice and an accompanying uncompromising and lifelong struggle on behalf of what was right and righteous in every social context, whether personal or global.

There is no assurance that this way of believing and acting will control every development in the world or even control the ultimate destiny of the human species. Humanity retains the freedom to fail, which could mean extinction in the foreseeable future. The happy ending of the Nicaragua case needs to be balanced against the prolonged and tragic ordeal of the Palestinian people for which there is still no end in sight. Beyond wins and losses, what I think should be clear is that unless many more of us become attentive to the horizons of spirituality and necessity the outlook for the human future is presently bleak. Father Miguel D'Escoto's disavowal of the domain of the feasible is assuredly not the only way to serve humanity, but it is a most inspiring way, and points us all in a direction that is underrepresented in the operations of governments and other public institutions, not to mention during the speculative frenzies on Wall Street and the back rooms of hedge fund offices.

In my language, Father Miguel D'Escoto was one of the great citizen pilgrims of our time. His life was a continuous journey toward what St. Paul called 'a better city, a heavenly city' to manage and shape the totality of life on Planet Earth.

Response Martin S. Flaherty

It is entirely right and fitting that we gather today to honor the memory of Father Miguel D'Escoto. It is especially appropriate that an annual lecture series will at once consider his legacy and how best to pursue his unfinished work and vision.

Honored as I am to participate, I nonetheless approach this occasion with mixed emotions. On one hand, I cannot but help feel that it is my great misfortune never to have met Father Miguel. The reminiscences of those who did know him show why. Yet it is a great honor to finally meet Richard Falk. I teach both here at Fordham, but also at Princeton, where Professor Falk famously taught for many years and where he remains a legend. It could hardly be more appropriate that it took Dr. Kevin Cahill—the founder of this feast—to make this introduction possible.

Professor Falk's typically penetrating insights prompt two brief thoughts about Fr. Miguel's legacy. One concerns the nature of international law generally. The other centers on the ongoing impact of the ICJ *Nicaragua* case against the United States in particular.

International Law/Human Rights Law

Professor Falk rightly points out the Janus-faced quality that international law evinces as much, or even more than domestic law. At its best it holds the promise of the neutral and peaceful resolution of potentially bloody disputes under neutral principles in a way that promotes social justice—in Professor Martti Koskenniemi's phrase, the "gentle civilizer of nations". Yet too often it bows to the power and aggressiveness of the states it is meant to tame. The *Nicaragua* case—and the United States' dogged resistance of the ICJ's jurisdiction and decision—illustrates both facets.

That said, I do think the area of international law in which I have done most of my work more than most attempts to do what is necessary rather than settle for what is feasible. That area is international human rights law. This body of law is completely quixotic yet utterly essential. Two of its core aspects illustrate why.

One is the very highest level of not just human rights law, but international law as well—*jus cogens* or peremptory norms. *Jus cogens* holds some legal strictures above all others, including the prohibition of torture and cruel, inhuman and degrading treatment, slavery, and extra judicial murder, among others. The Vienna Convention on the Law of Treaties puts it this way: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". These prohibitions, in other words, first rest on the same basis as customary international law; that is, they command a near consensus of state consent through state conduct or public commitment. Yet, unlike ordinary custom, *jus cogens* derives further legitimacy simply because its precepts are right, just, essential to the human condition. In this sense, it is one of the few areas of international law where natural law still arguably has purchase.

On this basis, *jus cogens* human rights standards transcend both custom and international agreements. If, for example, the nations along the Atlantic rim sought to restore the slave trade by an affirmative, deliberate, carefully negotiated treaty with precise provision in clear text, *jus cogens* would dictate that such an instrument would be void *ab initio*. In this way, even solemn agreements among states that they would have deemed feasible cannot overcome this category of essential human rights law.

Human rights law is not feasible yet necessary in another regard. Most international law is driven by reciprocity. Trade law benefits both sides. And if one state breaks a tariff agreement, the other side can retaliate by raising its tariffs in the same way. The laws of war as well: "You treat our prisoners of war well; we'll treat your prisoners of war well". This is why most international law is both made and how it is enforced. Reciprocity goes a long way to explain the influential international law scholar Louis Henkin's famous observation that, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time".

International human rights law departs from that principle. It is a reaction to the Holocaust, and it is kept alive by the movement against colonial imperialism. It says that, “even though I as a sovereign nation commit to abiding by certain human rights norms to persons within my borders, that really doesn’t implicate any sort of reciprocal benefits that I would get from another nation, at least directly, abiding by human rights within its borders”.

Yet this branch of the law flourished, at least on the books and to an extent in practice since World War II. Indeed, the efflorescence of binding international human rights standards over the past 70 years has arguably been the most revolutionary development in international law since the emergence of the Westphalian system itself. To again quote Henkin, human rights is still the very necessary ‘idea of our time’. It is also the area of law that has flourished here at Fordham, Princeton, and in various US educational institutions, despite lacking the very practical principle that drives most of the rest of international law.

Nicaragua v. United States

As for the *Nicaragua* case itself, that endeavor still resonates in countless ways.

Perhaps most obviously, the boldness of the ICJ, Professors Falk and Chayes, and, not least, Father Miguel, laid the foundation for later tribunals, such as the ad hoc tribunals for the former Yugoslavia and Rwanda, the International Criminal Court (ICC), various hybrid tribunals, such as those in Sierra Leone and Cambodia, and even the ICJ itself, when it returned to related issues in the *Bosnia* case, even though that particular decision might not have been the best it could have been.

Another consequence of the *Nicaragua* case was that it showed to the rest of the world that the United States and the US legal community is not necessarily the Executive Branch, that the United States is not a monolith. Consider a recent echo. Human rights advocates from other countries, otherwise dismayed by the Trump Administration, have uniformly expressed admiration of US lawyers running to airports during the first attempted implementation of the anti-Muslim ban to take the cases and defend the rights of those who were being barred. That kind of necessary, and sometimes even feasible, action is something

that can be traced back to the efforts of the lawyers, including the US lawyers, brought *Nicaragua v. United States*.

Of the many doctrinal consequences to the *Nicaragua* case, let me finish by exploring one that is not always appreciated. It goes to the derivation of customary international law.

For various reasons, *Nicaragua* could not rely directly on the UN Charter. It had to rely instead on custom to make the case that what the United States was doing constituted acts of aggression, violations of *jus ad bellum*.

In a very technical—but very important—way, the ICJ decision made it much easier to establish and derive principles of customary international law against aggression and for human rights. How? The Court declared that UN General Assembly resolutions, which are technically not binding, could serve as a source to satisfy the two main requirements needed to establish a customary international law principle.

First is general practice: The more nations adopt a certain practice, the better the argument that it has achieved the status of customary international law. Prior to the decision it was very difficult demonstrate general practice by relying on General Assembly resolutions. The *Nicaragua* changed that, in effect stating that one could determine the number of nations against certain types of human rights violations by looking at their votes on documents such as the Universal Declaration of Human Rights.

Second, the *Nicaragua* decision also legitimized the use of GA resolution to establish the second requirement of customary law, the *opinio juris* demand that nations engage or refrain from a practice out of a sense of legal obligation. As many commentators have noted, this hurdle has an element of circularity; odd to seek adherence to a legal norm that one is trying to establish and so by definition does not yet exist. Reliance on General Assembly declaration can help get around this problem. In light of *Nicaragua*, they can more readily be cited as a source of the sense of legal obligation that that *opinio juris* demands. Declaration of the General Assembly could now be cited as the source of that sense.

In these important ways, the case made it much easier for human rights advocates to cite the more democratic branch of the United Nations to help establish legal norms that protect the weak and powerless and those who lack a voice.

To give you a quick, concluding example that stems from my work at both Princeton and Fordham, one of the things I focus on is assaults on human rights lawyers and human rights advocates around the world, which is, unfortunately, spiking these days in light of the rise of populist authoritarianism around the world.

One source to counter this phenomenon is General Assembly resolutions. In particular, the UN Basic Principles on the Role of Lawyers and the UN Basic Principles on the Independence of the Judiciary set out detailed rules to safeguard both groups, without whom attempting either the merely feasible or the urgently necessary would be impossible. Article 16 of the Basic Principles on Lawyers, for example, dictates that: “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”.

Technically, these principles remain non-binding ‘soft law’. But thanks in part to the *Nicaragua* case, one can cite them not just as the sense of the world community, but also as evidence of evolving binding norms on states that violate them.

To bring things back, in a sense, to Father Miguel and to the progress that we have lately seen in Rome, just recently the Sixth Committee of the General Assembly hosted a debate and discussion about access to justice and to international law. The only delegation that referred to these assaults on lawyers and assaults on human rights defenders and the only delegation to cite either set of UN Basic Principles was the Holy See. In that sense, I think the spirituality in the service of both the feasible and necessary that we have heard about today endures.

Response Nassir Abdulaziz Al-Nasser

Father Miguel D’Escoto Brockmann, President of the 63rd Session of the United Nations General Assembly, was definitively a different kind of President, and certainly a controversial UN figure. While serving as President of the General Assembly, he preferred to be called Father rather than ‘Mr. President’, emphasizing thereby his commitment to service and its foundation in spirituality and religious faith. Witnessing the unfolding international financial crisis during his Presidency in 2008–2009, he was convinced that “humanity must replace selfishness and individualism with a spirit of brotherhood and sisterhood”.

For Father Miguel D’Escoto, the principles of the United Nations, as deeply flawed as he felt the Organization was, represented all that he deeply believed in. It embodied his own commitment to universal values, his faith in Christianity’s ability to heal the world and the Charter’s promise to ensure peace and justice. He said, “The values I defend and have defended all my life are the values of Our Lord Jesus, which on fundamentals I find absolutely compatible with the values of my sisters and brothers, be they Muslim, Jewish, Buddhist, Confucian, Hindu or Aymara, as I do all the religions of the world”.

In the midst of conflicts in Central America, Iraq, Afghanistan, Libya—and especially Gaza during his term as General Assembly President—he was a leading voice for the peace and was committed to the eradication of war, hunger, poverty and abuse of the planet. A strong advocate of international law, he recognized that “we have to have more than law. We have to have justice also, and a new international financial architecture, as well as respect for Mother Earth. But there can be no greater damage to international peace and security than the destruction of the international legal order”.

Father Miguel D’Escoto always supported collaboration that transcends the boundaries between countries, between religions and between people. His humility, courage, integrity and hard work will continue to inspire all of those who believe that peace, development and international relations must be guided by something more than material considerations. He showed that the spiritual dimension of our lives enriches everything we do to promote a more humane and just world.

It is something the current fractured leadership of the world could well take to heart. His words, his example and his practice are much needed as we face so many challenges to peace, security and human wellbeing.

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The Institute of International Humanitarian Affairs (IIHA) at Fordham University prepares current and future aid workers with the knowledge and skills needed to respond effectively in times of humanitarian crisis and disaster. Courses are offered on a global scale; we now have over 3,000 alumni from over 140 nations. Our undergraduate program is one of the fastest growing majors at the university.

The Center for International Humanitarian Cooperation (CIHC) was founded in 1992 to promote healing and peace in countries shattered by natural disasters, armed conflicts, and ethnic violence. The Center employs its resources and unique personal contacts to stimulate interest in humanitarian issues and to promote innovative educational programs and training models. Our extensive list of publications and regular symposia address both the basic issues and the emerging challenges of humanitarian assistance.

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