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Collective Self-Defense: *Nicaragua v. United States*

I. INTRODUCTION

On April 9, 1984, the Republic of Nicaragua's ambassador to the Netherlands instituted an action against the United States with the International Court of Justice (ICJ)¹ in the Hague, Netherlands. Nicaragua alleged numerous violations by the United States, of both general international and treaty law.² The most significant allegations were the following: first, mining of Nicaraguan harbors; second, attacking oil installations; third, exerting various forms of economic pressure on Nicaragua³ and fourth, supporting armed bands of Nicaraguan rebels opposed to the existing Sandinista government.⁴

1. Communique of the International Court of Justice, Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) No. 86/8, June 27, 1986 [hereinafter Communique 86/8]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 70, para. 1 (Judgment on Merits of June 27) [hereinafter *Nicar. v. U.S.*].

2. *Nicar. v. U.S.*, *supra* note 1, para. 15.

3. *Id.* para. 21. In addition to the mining of ports, there were ten unlawful acts which Nicaragua charged the United States with:

(i.) 8 September 1983: an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down;

(ii.) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;

(iii.) 2 October 1983: an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel;

(iv.) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;

(v.) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;

(vi.) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;

(vii.) 24/25 February 1984: an incident at El Bluff listed under this date appears to be the mine explosion already mentioned . . . ;

(viii.) 7 March 1984: an attack was made on [an] oil and storage facility at San Juan del Sur by speedboats and helicopters;

(ix.) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;

(x.) 9 April 1984: a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.

Id. para. 81.

4. The "Sandinistas" are a coalition of the National Liberation Front and other leftist guerilla groups in Nicaragua which together overthrew the former Somoza regime. *See infra* text accompanying notes 14-16.

The United States' initial response to the complaint was that the ICJ lacked subject matter jurisdiction to hear the merits of this particular dispute.⁵ Following the court's assertion of jurisdiction on November 26, 1984,⁶ the United States refused to appear before the court to defend itself on the merits.⁷ Notwithstanding the United States' absence, the court addressed the merits of the case, and on June 27, 1986, issued its decision. The court found that the United States had violated several tenets of customary international law by its activities in and against Nicaragua.⁸

At the heart of the United States' defense of its actions, as portrayed to the United States public and the international community, is the general international legal theory of "collective self-defense."⁹ Specifically, the United States defended its actions by maintaining that Nicaragua's Sandinista regime was channeling arms through Nicaraguan harbors and territory in an effort to overthrow the existing government of El Salvador.¹⁰ Thus, the United States argued that under a nation's inherent right of collective self-defense, Nicaragua's conduct permitted the United States to undertake "necessary actions" to support El Salvador. However, there are specific prerequisites to reliance on the doctrine of collective self-defense, as well as limits to its application.¹¹

This Note is primarily concerned with the potential impact of the

5. See *infra* notes 31-38 and accompanying text.

6. *Nicar. v. U.S.*, *supra* note 1, para. 9.

7. *Id.* para. 11.

8. Communiqué 86/8, *supra* note 1, para. 2-7. One prominent violation was that the United States breached its obligations under customary international law not to intervene in the internal affairs of another state when it lent military support to the Nicaraguan contras. The United States was also charged with laying mines in Nicaraguan ports during 1984. *Id.* para. 6; see also *supra* note 3 and accompanying text.

9. This theory has manifested itself in many areas of international jurisprudence and is also embodied in Article 51 of the United Nations Charter. U.N. CHARTER art. 51.

10. N.Y. Times, Apr. 10, 1984, at A1, col. 6. While the United States did not appear before the court to defend on the merits, this newspaper article concludes that the United States' activities, specifically the mining of Nicaraguan harbors, was justified as a form of defense for El Salvador and its allies. *Id.* In fact, in their Counter-Memorial on jurisdiction and admissibility, the United States asserted that they were acting "pursuant to the inherent right of individual and collective self-defense." *Nicar. v. U.S.*, *supra* note 1, para. 126. In support of their claim that circumstances in El Salvador triggered their right to intervene in Nicaragua, the United States pointed to El Salvador's Declaration of Intervention filed on August 15, 1984. Therein, El Salvador officially declared that it was under an "armed attack" by Nicaragua. *Id.* paras. 235-36. Moreover, El Salvador formally requested assistance by the United States. *Id.* para. 233. As discussed below, this is a crucial prerequisite to successfully invoking collective self-defense. See *infra* notes 78-86 and accompanying text.

11. U.N. CHARTER art. 51.

ICJ's decision on the court's credibility. Specifically, this Note addresses the court's highly ambitious application of the collective self-defense doctrine in light of the doctrine's origin and purpose in the international legal arena. In addition, this Note points out several potential problems with the court's first application of the doctrine in the hope that future applications will be sound and follow precedent.¹²

II. BACKGROUND

The current differences between Nicaragua and the United States began in July, 1979 when the present Nicaraguan government, the *Frente Sandanista de Liberacion Nacional* (FSCN)¹³ overthrew President Anastasio Somoza Debayle. This change in the government, coupled with the United States' suspicion that the Soviet Union supported the Sandinistas, raised fears that the close diplomatic and economic ties the United States enjoyed with countries in Central America were in jeopardy.¹⁴ In response to these fears, the Carter Administration sought to transform the leftist Sandinista regime into a democracy by offering economic assistance as an incentive.¹⁵ However, during the Reagan Administration, relations have become increasingly strained,¹⁶ and the United States now openly supports the anti-Sandinista guerrillas, or as they are more commonly known, the "contras".¹⁷ One of President Reagan's stated concerns is that Nicaragua is providing aid to leftist guerrillas in El Salvador by funneling Soviet arms through its ports and across its territory, thus threatening the El Salvadoran government, and United States security interests in the region.¹⁸

In early 1984, national press releases indicated that the United

12. For one instance of the court's problematic analysis, see *infra* notes 84-85 and accompanying text.

13. Note, *Nicaragua v. United States: The Power of the International Court of Justice to Indicate Interim Measures in Political Disputes*, 4 DICK. INT'L L.J. 65, 66 (1985) [hereinafter Note, *Interim Measures*]; see also *Nicar. v. U.S.*, *supra* note 1, para. 18.

14. See generally L. LANGLEY, *CENTRAL AMERICA: THE REAL STAKES* 3-16 (1985); *TROUBLE IN OUR BACKYARD* (M. Diskin ed. 1983); Note, *Interim Measures*, *supra* note 13, at 66.

15. Note, *Interim Measures*, *supra* note 13, at 65.

16. *Id.*

17. *Id.* at 66.

18. *Id.*

States had precipitated the mining of Nicaraguan harbors¹⁹ through the Central Intelligence Agency.²⁰ These activities, presumably aimed at preventing the flow of arms through Nicaragua, motivated Nicaragua to file its action with the ICJ on April 9, 1984. As noted above, the United States contested the subject matter jurisdiction of the court.²¹ Notwithstanding this objection, on May 10, 1984, the court granted Nicaragua's request for an indication of interim measures of protection.²² Specifically, based on Nicaragua's charges, the court temporarily enjoined the United States from continuing any military or paramilitary activities in the Central American region.²³

On November 26, 1984, the court determined that it had jurisdiction to hear the case.²⁴ The court's conclusion relied on the Statute of the International Court of Justice (ICJ Statute),²⁵ and the United States' statement of jurisdiction to the United Nations.²⁶ In response, the United States' agent to the court wrote a letter stating that "the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."²⁷

The United States did not file a pleading as ordered by the President of the Court.²⁸ Consequently, in light of the absence of the United States, Nicaragua urged the court to decide the merits of the case pursuant to Article 53 of the ICJ Statute.²⁹ Article 53 states that "[w]henever one of the parties does not appear before the Court, or

19. See, e.g., N.Y. Times, Apr. 18, 1984, at A1, col. 3; Note, *Interim Measures*, *supra* note 13, at 66 n.10.

20. Note, *Interim Measures*, *supra* note 13, at 66.

21. Note, *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.): The International Court of Justice's Jurisdictional Dilemma*, 7 LOY. L.A. INT'L & COMP. L.J. 379 (1984) [hereinafter Note, *Jurisdictional Dilemma*]. This Note addressed the jurisdictional issues with respect to Nicaragua's request for interim measures of protection.

22. *Nicar. v. U.S.*, *supra* note 1, para. 3.

23. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)* 1984 I.C.J. 169 (Interim Protection Order of May 10), *reprinted in* 23 INT'L LEGAL MAT. 468 (1984) [hereinafter Interim Order]; Note, *Interim Measures*, *supra* note 13, at 66, 67.

24. Communique of the International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* No. 84/39, June 27, 1986 [hereinafter Communique 84/39].

25. Statute of the International Court of Justice art. 36, para. 2 [hereinafter ICJ Statute]; Communique 84/39, *supra* note 24, Judgment of Court, para. 1. The ICJ Statute is part of the United Nations Charter, and sets forth the rules under which the court functions as a tribunal.

26. 1972-1973 I.C.J.Y.B. 81 (1973) [hereinafter Statement of Acceptance].

27. *Nicar. v. U.S.*, *supra* note 1, para. 10.

28. *Id.* para. 11.

29. *Id.* para. 28.

fails to defend its case, the other party may call upon the Court to decide in favor of its claim."³⁰ The court acceded to Nicaragua's request and proceeded to reach the merits of the case.

III. PRELIMINARY CHOICE OF LAW AND JURISDICTIONAL ISSUES.

The formerly adjudicated jurisdictional issue played a prominent role in the court's analysis of the merits of this dispute.³¹ Specifically, an important choice of law issue was resolved by referring to the United States' statement of consent to the court's jurisdiction. Briefly, the choice of law arguments were as follows.

Nicaragua and the United States joined the United Nations agreement on October 24, 1945.³² Article 36, paragraph 2 of the ICJ Statute (Optional Clause) states that, "[t]he states parties to the present Statute may at any time declare that they recognize as compulsory . . . the jurisdiction of the Court . . ."³³ The United States deposited its acceptance of jurisdiction on August 26, 1946. However, in its recognition of the Court's jurisdiction under the Optional Clause, the United States expressly excluded its application to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction."³⁴

The United States argued that since Nicaragua sought to enforce obligations of the United States arising under several multilateral treaties,³⁵ the court lacked jurisdiction to decide the case because El Salvador, Honduras and Costa Rica would be "affected," and were

30. ICJ Statute, *supra* note 25, art. 53. The court states, without any authority, that interpretations of this provision have held that in the absence of one of the parties the court must "satisfy itself" that the claims of the applicant are "well founded in fact and law." *Nicar. v. U.S.*, *supra* note 1, para. 28. Thus, the court will never automatically declare judgment in favor of the appearing party.

31. For a thorough discussion of the precise jurisdictional issues decided, see Note, *Jurisdictional Dilemma*, *supra* note 21, 379-82.

32. U.N. CHARTER; R. RUSSELL, *THE UNITED NATIONS AND UNITED STATES SECURITY POLICY* 476 (1968).

33. ICJ Statute, *supra* note 25, art. 36, para. 2.

34. *Nicar. v. U.S.*, *supra* note 1, para. 42; Statement of Acceptance, *supra* note 26.

35. The multilateral treaties discussed . . . at the stage of the proceedings devoted to jurisdiction were four in number: The Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on the Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928.

Nicar. v. U.S., *supra* note 1, para. 47.

not parties to the action.³⁶ The court did not pass on this issue at the jurisdictional phase, stating that "it was not found possible for the reservation [regarding multilateral treaties] to be definitively dealt with at the jurisdictional stage of the proceedings."³⁷ However, in its decision on the merits, the court concluded that the reservation did apply to any claims Nicaragua had which were dependent on obligations arising under those treaties. Moreover, they stated that "El Salvador, a party to the United Nations Charter and to the Charter of the Organization of American States, is a State which would be 'affected' by the decision which the Court would have to take [sic] on the claims by Nicaragua"³⁸

In reaching this decision, the court also concluded that "the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and OAS Charter as multilateral treaty law, *and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.*"³⁹ Initially, this seems to support the United States' position. However, the effect of this conclusion is illusory. As discussed below, the court left itself considerable room with which to decide the case based entirely on the doctrine of collective self-defense.⁴⁰ Ironically, the very law that the court excluded, i.e., the doctrine of collective self-defense as embodied in the U.N. and OAS charters, was precisely the law that resulted in the judgment against the United States.⁴¹

36. *Id.* para. 48.

37. *Id.* para. 43. The court explained its refusal to make a determination as to the application of the reservation by noting that it would be required to give a "definitive interpretation of the term 'affected'" *Id.* The court held that this determination would require investigation into "matters of substance relating to the merits of the case." *Id.* Since only preliminary matters may be heard by the ICJ at the jurisdictional phase of a case, the court postponed a decision on this issue.

38. *Id.* para. 56.

39. *Id.* (emphasis added). Article 38 of the ICJ Statute reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations; . . .

ICJ Statute, *supra* note 25, art. 38, para. 1. Under this article, it is plain that the court has an extremely wide range of sources from which it may derive international laws.

40. See *infra* text accompanying notes 68-72.

41. *Id.* Given that the court so limited the applicable law in the absence of an appearance by the U.S., clearly to the benefit of the U.S., the court may be seen as trying to appease an absent United States by going as far as possible in protecting its interests. See Note, *Jurisdictional Dilemma*, *supra* note 21, at 408. On the other hand, the decision to exclude these trea-

IV. COLLECTIVE SELF-DEFENSE

A. *Development of the Theory*

Since the Roosevelt Corollary to the Monroe Doctrine, the United States has essentially policed the Americas. "Enunciated in 1904, [the Roosevelt Corollary] set forth the 'right' of the United States to exercise an 'international police power' in the [western] hemisphere."⁴² However, near the close of World War II, Latin American countries began to grow uneasy at the prospect of the United States as a superpower.⁴³ Specifically, they feared that the 'United States' numerous global commitments would take precedence over the regional interests it had formerly protected.⁴⁴ Moreover, they feared the plans for the formation of the United Nations as a world security organization since it would be run predominantly by the world's most powerful countries.⁴⁵ Finally, for conservative regimes in the area, there was a fear that the Soviets could exert influence in the region through their participation in the United Nations.⁴⁶

Due to the fears of the Latin American countries discussed above, regional pressure was exerted against the United States. In February of 1945, as a result of this pressure, the United States was persuaded to accept a "Resolution Concerning Reciprocal Assistance and American Solidarity," which became known as the Treaty of Chapultepec.⁴⁷ Since this treaty effectively created a collective security system for the region, the United States found itself faced with a conflict of interests. On the one hand, it had rights and obligations under the United Nations treaty to protect global interests. On the other hand, it had rights and obligations under the Treaty of Chapultepec to promote and protect regional interests. Thus, the Central American nations, aligned with the United States under the Treaty of Chapultepec, feared that in the case of an emergency the United States would subordinate its regional obligations in favor of protecting its global interests as a superpower.⁴⁸

ties is relatively insignificant in that the court derives identical laws under customary international law. See *infra* text accompanying notes 63-75.

42. M. ZACHER, *INTERNATIONAL CONFLICTS AND COLLECTIVE SECURITY*, 1946-77, 89 (1979). For a general discussion of the subpart, see *id.*

43. *Id.* at 92.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

In seeking to harmonize this potential conflict of interest, the United States was forced to seek a way of reconciling the forces of the inter-American organization with those of the United Nations.⁴⁹ This reconciliation manifested itself in the codification of the doctrine of collective self-defense in Article 51 of the United Nations Charter, or what is sometimes referred to as the "Vandenberg Resolution."⁵⁰ Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁵¹

This resolution attempted to remove the possibility that a permanent member of the U.N. Security Council could, by using its veto power, prevent justified regional responses to aggression.⁵² The resolution, by recognizing that a state has an inherent right to protect itself from outside aggression, gave tacit approval to the justifiable exercise of force if the United Nations refused to act. Moreover, it provided a basis upon which the United States could build a security organization in the Western Hemisphere consistent with its growing international commitments, both within and without the newly formed United Nations.⁵³

In 1948, three years after the Treaty of Chapultepec, all the American countries followed the trend to develop regional organizations for the maintenance of peace and established the Organization of American States (OAS).⁵⁴ The OAS Charter included a regional security arrangement, and embodied some of the foreign policies that had developed in prior years. Most notably, the charter reflected its

49. *Id.*

50. *Id.*

51. U.N. CHARTER art. 51.

52. M. ZACHER, *supra* note 42, at 92. This principle seems to reflect an inherent right under principles of natural law to protect oneself from outside aggression. *But see infra* note 73 and accompanying text.

53. M. ZACHER, *supra* note 42, at 92.

54. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. no. 2361, 119 U.N.T.S. 3; M. ZACHER, *supra* note 42, at 93.

members', "recognition of the sovereignty and independence of all states, opposition to aggression, the peaceful settlement of disputes, [and] the principles of collective security and continental solidarity" ⁵⁵

To the United States, the OAS arrangement was more important in repelling the extra-regional Communist threat than it was to preventing any regional threat.⁵⁶ The Latin American countries considered the primary significance to be the United States' expression of a "good neighbor" relationship between all American nations. This relationship was expected to shield Latin American countries from "Yankee imperialism."⁵⁷ Notwithstanding these differences in expectations, most of the member nations shared a common interest in their opposition to membership by any communist or communist-supported government.⁵⁸ Thus, the OAS was partially established, at least as far as the United States was concerned, to impede the influx of communism into the hemisphere.

The Inter-American Treaty of Reciprocal Assistance (Rio Treaty)⁵⁹ was another regional treaty consistent with the United Nations Charter on the issue of collective self-defense.⁶⁰ Thus, as does Article 51 of the U.N. Charter, the Rio Treaty distinguishes between armed attacks and other acts of aggression. The Rio Treaty states that when an armed attack occurs within the region, each member may "determine the immediate measures which it may individually take to meet the attack."⁶¹ Further:

[i]n situations where an American state is threatened by an act of aggression other than an armed attack, an outside conflict, or "any other act or situation" endangering the peace of the hemisphere, the Organ is also to meet without delay to agree on measures to assist the victim of aggression or maintain the security of the continent.⁶²

This is the present state of the doctrine of collective self-defense

55. M. ZACHER, *supra* note 42, at 93.

56. R. RUSSELL, *supra* note 32, at 15. The organization gave the United States the much needed leverage required to justify its continued efforts to repel communist influences in the area.

57. *Id.*

58. *Id.* at 179.

59. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. no. 1838, 21 U.N.T.S. 77.

60. M. ZACHER, *supra* note 42, at 94.

61. *Id.*

62. *Id.*

as it pertains to the United States' regional interests, as well as its interests under the United Nations Charter.

B. Collective Self-Defense as a Matter of Customary International Law

Despite the court's decision that the multilateral treaty reservation barred it from addressing Nicaragua's contention that the United States violated the letter and spirit of the United Nations Charter and the OAS treaties,⁶³ the court concluded that "it [could] and must take [these conventions] into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed."⁶⁴

Nicaragua's claims in this action arise under Article 2, paragraph 4 of the U.N. Charter. This Article states that, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁶⁵ Since the U.N. Charter could not be used as a basis for a finding against the United States due to the multilateral treaty reservation, the court looked to whether the mandate of Article 2 had an independent basis in customary international law.⁶⁶

The court began its inquiry by examining the United States' past conduct in the international arena. Attention was drawn to the United States' support of the resolution of the Sixth International Conference of American States condemning aggression, as well as ratification of the Montevideo Convention on Rights and Duties of States.⁶⁷ Article 11 of the Montevideo Convention imposed the obligation not to recognize territory acquired by force.⁶⁸ Additionally, the court recognized that the United States had accepted the prohibition of the use of force in the Conference on Security and Co-operation in Europe.⁶⁹ There, the participating nations agreed to refrain

63. See *supra* text accompanying notes 31-41.

64. *Nicar. v. U.S.*, *supra* note 1, para. 183. It is unclear why the court felt compelled to resort to the U.N. Charter to discern principles of customary international law in light of the fact that under Article 38 of the ICJ Statute, it has wide authority to develop these principles in other ways. See *supra* note 39. This tactic is even more troubling given that the U.N. Charter was excluded under the multilateral treaty reservation.

65. U.N. CHARTER art. 2, para. 4.

66. *Nicar. v. U.S.*, *supra* note 1, para. 187.

67. *Id.* para. 189.

68. *Id.*

69. *Id.*

from the threat or use of force. The court concluded that "[a]cceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations."⁷⁰ The court found this to be tantamount to an acceptance of a principle of customary international law on the issue.⁷¹ Under this theory the court was able to hold the United States responsible for a violation of this principle apart from any reference to the U.N. Charter.

The court continued:

[a] further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.⁷²

While recognizing the principle of non-intervention by use of force as a fundamental matter of customary international law, the court recognized certain exceptions—specifically the right of collective self-defense. The court first examined whether this right existed apart from its codification in the U.N. Charter. Again, its analysis began with the language of Article 51 of the U.N. Charter, the substantive content of which was held inapplicable. The court stated that the Charter recognized an "inherent right"⁷³ which all states possess

70. *Id.* The court's reasoning on this point is strained since according to the language quoted by the court, the nations present at this conference merely agreed to refrain from the threat or use of force. *Id.* The court interprets this as a "prohibition" of the threat or use of force.

71. *Id.*

72. *Id.* para. 190. The court's argument on this issue is that since the U.S. has shown its interest in refraining from the threat or use of force in other areas of international relations, this interest must be a customary principle of international law. While this is a weak inference, it is proper in light of the court's broad authority to discern general principles of international law under Article 38 of the ICJ Statute. *See supra* note 39.

73. U.N. CHARTER art. 51. Hans Kelsen criticizes this interpretation of Article 51 of the U.N. Charter by quoting Article 51 and then stating:

This provision presupposes the existence of the right of self-defence as established, not by positive international law, but by natural law, for it speaks of an "inherent" right. This is a theoretical opinion of the legislator which has no legal importance. The effect of Article 51 would not change if the term 'inherent' were dropped. In declaring that nothing in the Charter shall impair the inherent right of self-defence, the Charter confers such right upon the Members, whether positive general international law establishes it or not.

HANS KELSEN, THE LAW OF THE UNITED NATIONS 791-92 (1950). Kelsen also sets forth a definition of self-defense under natural or customary international law. He states:

in the event of an armed attack.⁷⁴ Thus, the court concluded that the Charter itself recognized the existence of the right of collective self-defense, independent of the Charter, in customary international law.⁷⁵

The court's apparent error in immediately turning to the body of law it had just held to be inapplicable, *i.e.*, the U.N. Charter, may be more a matter of form than substance. Specifically, the court had rejected the U.N. Charter as applicable to decide the "merits" of the dispute. However, in turning to the Charter as a possible reflection of customary international law, arguably the court did not infringe upon matters the United States sought to protect by invoking the multilateral treaty reservation.⁷⁶ Nonetheless, the court appears to be walking a fine analytical line on an important element of the case.⁷⁷

C. *Application of Collective Self-Defense in this Case*

In setting the parameters for the application of the doctrine of collective self-defense, the court began by stating that under the doc-

The right of self-defence, according to the natural-law doctrine, is the right of an individual, or a state, to defend his person, property or honour against a real or imminent attack. It is a right of the attacked or threatened individual or state, *and of no other individual or state*. Article 51 confers the right to use force not only upon the attacked state but also upon other states which unite with the attacked state in order to assist it in its defence. This is probably the meaning of the term "collective self-defence . . ." Collective defence exists if two or more states organise their defence against attack from third states *by concluding a treaty obliging or authorising the contracting parties to assist one another* in case one of them is attacked by a third state.

Id. (emphasis added).

Kelsen suggests that only the attacked or threatened state has a natural right of self-defense under customary international law. He defines collective self-defense as the product of treaties between nations, seemingly rejecting the idea that the doctrine exists as a separate tenet of customary international law. Therefore, since the court found the United Nations Charter and the OAS Charter inapplicable due to the United States' multilateral treaty reservation, arguably, the court should not have found any right of collective self-defense in this case. This is probably the thrust of Judge Oda's dissent wherein he criticizes the court for not exploring the doctrine more closely. *See infra* text accompanying note 120.

Finally, quite ironically, the court ignored the right of collective defense set forth in the Treaty of Chapultepec, the Rio Treaty and the OAS Charter presumably because of the United States' multilateral treaty reservation. *See* text accompanying notes 43-62.

74. The court noted that the requirement of an armed attack applied not only to collective self-defense, but also to individual self-defense. *Nicar. v. U.S.*, *supra* note 1, para. 193.

75. *Id.*

76. *See supra* text accompanying notes 43-53.

77. It should be noted that this is the same tactic employed by the court to determine that the United States' conduct, as alleged by Nicaragua, violated customary international law. *See supra* note 64 and accompanying text. However, for a discussion of the doctrine of collective self-defense and its development apart from the U.N. Charter, *see generally* M. ZACHER, *supra* note 42.

trine of individual self-defense, the state invoking the doctrine must be the victim of an armed attack.⁷⁸ In the case of collective self-defense, the state allegedly being defended must be the victim of an armed attack.⁷⁹ Thus, the court unequivocally stated that in order to find that the United States lawfully exercised the right, it must find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.⁸⁰ The essential question, then, is what constitutes an armed attack.

In defining an armed attack, the court looked to Article 3, paragraph (g) of the Definition of Aggression which was annexed to General Assembly Resolution 3314 (XXIX),⁸¹ The court felt Article 3, paragraph (g) reflected customary international law.⁸² The court stated:

it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to . . ." an actual armed attack conducted by regular forces, "or its substantial involvement therein."⁸³

Unfortunately, this definition of an armed attack provides little or no guidance in understanding the type of action constituting an armed attack. The court merely states that an armed attack occurs when the use of armed force against another state is of such gravity that it amounts to an armed attack. This is a tautology which simply begs the question under consideration: what constitutes an armed attack?

Notwithstanding the court's failure to articulate a meaningful definition, they nevertheless expressly rejected the idea that "assistance to rebels in the form of the provision of weapons or logistical or other support," constituted an armed attack.⁸⁴ The court indicated

78. See *supra* note 74.

79. *Nicar. v. U.S.*, *supra* note 1, para. 195.

80. *Id.* para. 229.

81. *Id.* para. 195.

82. *Id.*

83. *Id.* On this issue in particular, the court must articulate a more meaningful standard to be applied in all cases. This is crucial since this is the first case in which the court has addressed the issue of collective self-defense. See *infra* text accompanying notes 120-22. Finally, this will provide a means of reaching consistent decisions, which in turn will lead to increased credibility of the court by the nations subscribing to its jurisdiction.

84. *Nicar. v. U.S.*, *supra* note 1, para. 195.

that in order for them to find that an armed attack warranting intervention had occurred, not only must the attacked state declare that they are under attack, but they must also request the help of the intervening state.⁸⁵ The court expressly rejected the notion that the intervening state can, on its own assessment, exercise its right of collective self-defense.⁸⁶

1. The United States' Justification for Exercising Collective Self-Defense

The United States asserted its right to exercise collective self-defense on behalf of El Salvador at the jurisdictional stage of the court proceedings in its "Counter-Memorial on jurisdiction and admissibility."⁸⁷ At this stage of the proceeding, the United States justified its intervention in Nicaragua as a response to requests from El Salvador, Honduras and Costa Rica for assistance in repelling Nicaraguan aggression.⁸⁸ The United States clearly stated that Nicaragua "promoted and supported guerrilla violence in neighboring countries," particularly in El Salvador.⁸⁹

Furthermore, United States Secretary of State, George P. Schultz, filed an affidavit with the court wherein he declared:

The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.⁹⁰

Nicaragua emphatically denied that it was passing arms on to the El Salvadoran rebels. Notwithstanding this denial, the court found it

85. *Id.*

86. *Id.*

87. *Id.* para. 126.

88. *Id.* The court noted two problems with these requests which the court felt rendered them insufficient: first, they were not made until this action had been commenced, and second, the court felt that the requests may have been made at the suggestion of the United States. *Id.* para. 165.

89. *Id.* para. 128.

90. *Id.* The court stated that it would treat this evidence with great reserve, as it came from what they termed a "Minister" of one of the party states. It recognized that a national bias necessarily comes into play, especially on controverted issues. *Id.* paras. 70, 128.

had significant evidence to the contrary.⁹¹ Part of this evidence came from Dr. David MacMichael, a witness for Nicaragua who was a full-time employee of the Central Intelligence Agency in Inter-American affairs from March 1981 to April 1983.⁹² On the basis of information available to him in that capacity, he conceded, under examination by the court, that in his opinion the Nicaraguan government was supplying arms to the Salvadoran insurgency in late 1980 through early 1981.⁹³

To further deny that it had any role in arming El Salvadoran rebels, Nicaragua offered the direct testimony of Miguel d'Escoto Brockmann, Nicaragua's foreign minister.⁹⁴ Moreover, Nicaragua maintained that if arms were being transported across their borders, they were not responsible for it nor could they prevent it.⁹⁵ Brockmann had pointed to the logistical problems in preventing the flow of arms due to the rugged and often inaccessible terrain along the Nicaraguan borders. He stated that, "as a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for [Nicaragua] to seal off [its] borders to all unwanted and illegal traffic."⁹⁶ In addition, he stated that the presence of the contras has made the task even more difficult.⁹⁷

The court took into consideration one other piece of evidence in reaching its decision on whether or not Nicaragua was passing arms

91. The court found sufficient evidence to hold that between the end of 1980 and the beginning of 1981, the Nicaraguan government was responsible for arms flow to El Salvador. Communiqué 86/8, *supra* note 1, at 11.

92. *Nicar. v. U.S.*, *supra* note 1, para. 134.

93. *Id.* paras. 135-37.

94. *Id.* para. 147.

95. *Id.* Mr. Brockmann denied that his government was supplying El Salvadoran rebels with arms. He stated:

In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador Since my government came to power on July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them.

Id.

96. *Id.* Dr. MacMichael also testified that even the United States, with its sophisticated detection equipment, has not confirmed arms shipment. *Id.* para. 135.

97. *Id.* This is a strange argument for Nicaragua to make in that it supports an argument by the United States that outside intervention was necessary to control the arms flow that Nicaragua could not do on its own.

to El Salvadoran rebels. This evidence was that in March of 1981, at the United States' urging, Nicaragua took swift steps to prevent a Nicaraguan airstrip from continuing to be used to funnel arms.⁹⁸ The court believed that, "[t]he promptness with which the Nicaraguan authorities closed off this channel [strongly indicated] that it was in fact being used, or had been used for such a purpose."⁹⁹ Thus, in the courts opinion, Nicaragua had admitted the existence of an airstrip that had been designed to handle small aircraft, most likely for purposes of transporting weapons to El Salvador.¹⁰⁰

With respect to El Salvador, the court found that between July of 1979 and the early months of 1981, an intermittent flow of arms had passed through Nicaraguan territory to the armed opposition in El Salvador.¹⁰¹ However, there was no evidence that any such further activity occurred after 1981.¹⁰² Furthermore, the court was not satisfied that this activity was imputable to the Nicaraguan government.¹⁰³ Finally, the court stated that, assuming the activity was attributable to Nicaragua, under customary international law, the provision of arms to the opposition in another country does not constitute an armed attack sufficient to trigger the right of collective self-defense.¹⁰⁴

The court considered many factors in concluding that an armed attack had not occurred. First, it stated that the victim country, "being the most directly aware"¹⁰⁵ of an armed attack against it, is likely to draw attention to the situation.¹⁰⁶ Under this assumption the court found it significant that, notwithstanding several opportunities to do so, El Salvador did not declare itself under an armed attack until just prior to the commencement of this action.¹⁰⁷

Another factor the court felt weighed against the United States' position was the language of Article 51 of the U.N. Charter. Although the court expressly concluded that it was not relying on the

98. *Id.* paras. 136, 151.

99. *Id.* para. 151.

100. The court did not indicate why it felt this evidence was stronger than other evidence before it. However, this seemed to tilt the scales against Nicaragua on this issue.

101. *Id.* paras. 160, 230.

102. *Id.* para. 230.

103. *Id.*

104. The court relied on its previous definition of an armed attack to conclude that "the provision of arms to the opposition in another State [does not constitute] an armed attack on that state." *Id.*; see *supra* notes 83-86 and accompanying text.

105. *Nicar. v. U.S.*, *supra* note 1, para. 232.

106. *Id.*

107. *Id.* para. 233.

law contained therein,¹⁰⁸ it stated that Article 51 expressly requires that notice be given to the United Nations Security Council regarding the action to be taken.¹⁰⁹ Since the United States did not notify the Security Council of its actions, the court believed collective self-defense did not apply. The court stated:

The Court, whose decision has to be made on the basis of customary international law, . . . does not therefore treat the absence of a report . . . as the breach of [a requirement] But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter.¹¹⁰

Moreover, the court concluded that "the condition *sine qua non* required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case."¹¹¹ The court continued: "[a]ccordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld"¹¹²

2. The Court's Reasoning Regarding Collective Self-Defense

There are several problems with the court's reasoning in its application and discussion of collective self-defense. First, the United States was not present at the trial on the merits, and under Article 38 of the ICJ Statute, the court should only have been concerned with satisfying itself that Nicaragua's claim was "well founded in fact and law."¹¹³ Thus, the court seemingly overstepped its bounds to the extent that it concerned itself with possible defenses to the United States' actions. The court reached the collective self-defense issue by relying on the United States' raising of the issue at the jurisdictional phase. However, the court did not adequately explain why this allows it to look beyond merely deciding whether or not Nicaragua's claim was "well founded in fact and law."¹¹⁴ While the final result may not have been different, had the mandate of Article 38 been followed, a

108. *Id.* para. 235.

109. *Id.*; U.N. CHARTER art. 51.

110. *Nicar. v. U.S.*, *supra* note 1, para. 235.

111. *Id.* para. 237 (emphasis in original).

112. *Id.* para. 238.

113. *See supra* note 30 and accompanying text.

114. *Id.*

decision on the issue of collective self-defense would not have been made.¹¹⁵

Second, assuming that the court properly reached the collective self-defense issue, the court failed to examine the purpose of the doctrine in applying it to the facts. In this case, application of the doctrine runs counter to its historical development and its intended use. As noted above, the right to exercise the doctrine of collective self-defense under the United Nations Charter evolved from the fear that a veto by a permanent member of the Security Council would prevent regional action against aggression.¹¹⁶ Under customary international law, the doctrine was intended to bestow upon a smaller country the ability to defend itself, in concert with others.¹¹⁷ This was based on an "inherent right" of self-defense.¹¹⁸

In this case, the United States acted unilaterally against one of the countries that collective self-defense was designed to protect. The court overlooked the logical assumption that the United States invoked the doctrine as a pretext to support its policy of opposing the Sandinista regime in Nicaragua, and supporting the present government of El Salvador.

Third, the court held that the multilateral treaty reservation precluded the application of all of the relevant treaty law. However, the court later returned to these treaties both to determine that collective self-defense was a principle of customary international law, and that the United States had not properly invoked the doctrine.¹¹⁹

The court may also be criticized in not exploring the parameters of the doctrine more carefully, especially since this was the court's first case based on the issue. Judge Oda criticizes the court by stating:

[I] regret that the Court has been needlessly precipitate in giving its views on collective self-defence in its first Judgment to broach that subject . . . [E]ven if it was necessary for the court to take up the concept of collective self-defence . . . this concept should have been more extensively probed by the Court in its first Judgment to

115. See *infra* text accompanying notes 120-23.

116. See *supra* notes 49-52 and accompanying text.

117. *Id.* para. 193. But see, *supra* note 73 and accompanying text.

118. *Id.* para. 193. But see, *supra* note 73 and accompanying text.

119. See *supra* notes 72-75, 108-111 and accompanying text. Moreover, the court probably was in error when they found that collective self-defense was a principle of natural or customary international law. See *supra* note 73.

broach the subject.¹²⁰

Notwithstanding the analytical problems outlined above, the court arrived at a correct result. There was substantial evidence that the United States, through the Central Intelligence Agency, had equipped and directed the contras in most of the ten activities charged. Naturally, the court had very little direct evidence in support of the United States' position since it did not appear before the court. However, the court was satisfied that:

the United States of America, 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, against the Republic of Nicaragua
...¹²¹

The court's imprecise reasoning may not be of any consequence in this case, since the proper result was reached. However, it does create, or in fact exacerbate, a credibility problem in the eyes of both subscribing and non-subscribing nations around the world. In addition, in light of Judge Oda's criticism for the court's "precipitate" analysis of collective self-defense, the court may have created bad precedent.

V. CONCLUSION

The International Court of Justice held the United States liable for mining Nicaraguan harbors. In reaching this decision, the court was faced with the United States' multilateral treaty reservation which forced it to disregard essentially all of the relevant treaty law. Thus, the decision had to be based upon principles of customary international law. However, the court's derivation and analysis of these principles was problematic.

The court abandoned its self-defined task of merely satisfying itself that Nicaragua's claims are "well founded in fact and law." Instead, it entertained a potential defense for the United States¹²² on an

120. Communiqué 86/8, *supra* note 1, at 5; *Nicar. v. U.S.*, *supra* note 1, para. 96 (Oda, J., dissenting).

121. Communiqué 86/8, *supra* note 1, at 2 (emphasis in original).

122. In most, if not all courts in the United States, an absent party will have a default judgment entered against it. All the appearing party has to do is make a *prima facie* showing of the elements of the offense as well as on the measure of damages and judgment will be entered accordingly. Thus, the court is never faced with having to entertain hypothetical defenses as the ICJ did here.

important issue not previously addressed by the court. Specifically, it applied the doctrine of collective self-defense, which it supposedly derived from customary international law. However, not only has the court's derived version of the doctrine under customary international law been criticized,¹²³ but the doctrine's application to the facts of this case was imprecise.

Zia Modabber

123. *See supra* note 73 and accompanying text.