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DECEMBER 1——DECEMBER 2, 2011

RITZ-CARLTON HOTEL
SALONS I AND II
1150 22ND STREET, NW
WASHINGTON, DC
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**Use of Force Decisions of the International Court of Justice: Triumph or Tragedy?**

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Panel IV:

Use of Force Decisions of the International Court of Justice: Triumph or Tragedy

Moderator:
The Honorable Edwin D. Williamson
Jus ad Bellum Before the International Court of Justice

by

John Norton Moore

A Presentation to the Symposium
"The Nicaragua Case 25 Years Later"
The Hague Academy of International Law

(This paper is forthcoming in the LEIDEN JOURNAL OF INTERNATIONAL LAW, 2012)
Jus ad Bellum

Before the International Court of Justice

by

John Norton Moore

I.

INTRODUCTION

A core fundament of international law is that nations may not use force as a modality of change. That is, while nations are free to interact and seek change through peaceful means they may not use force for change. This principle, introduced centrally into international law by the Kellogg-Briand Treaty of 1928, subsequently became a cornerstone of the United Nations Charter when adopted in 1945. It is widely known as the prohibition against aggression, or within international law circles the normative principle of *jus ad bellum*. This principle of minimum order is a crucial starting point of a cooperative international order.

Correctly understood, modern *jus ad bellum* is not a blanket prohibition against use of force, but rather it permits defense against aggression, actions lawfully authorized by the United Nations, actions undertaken with sovereign consent, and certain other regional and humanitarian actions. Of particular importance, for *jus ad bellum* as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, it treats aggression and defense equally, by failing to effectively differentiate between them, or even worse it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own immune system against itself, thus encouraging aggression. Moreover, international institutions effectively ignoring aggression while condemning defense —

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1 John Norton Moore is the Walter L. Brown Professor of Law and Director of the Center for National Security Law at the University of Virginia. Formerly he served as Counselor on International Law to the United States Department of State, United States Ambassador to the Third United Nations Conference on the Law of the Sea, Chairman of the National Security Council Interagency Task Force on the Law of the Sea, and Chairman of the Board of the United States Institute of Peace. Of relevance to the Nicaragua case, he served as Deputy Agent for the United States during the jurisdictional phase of the case and argued several of the *admissibility* grounds before the Court. This paper is forthcoming in the *Leiden Journal of International Law*, 2012. The author would like to thank Zachary Gutterman and Joel Sanderson who worked as student assistants on this project.

thus supporting an inverse of the critically important principle banning use of force as a modality of change – will themselves inevitably be harmed as they, in turn, undermine the rule of law. Elsewhere I have referred to an approach to jus ad bellum which effectively fails to differentiate between aggression and defense as a “minimalist” interpretation of the Charter. This mindset, along with its “realist” opposite of simply rejecting the relevance of jus ad bellum and, more broadly, rejecting international law itself, do a disservice to the Charter framework and to our aspirations for a more peaceful world.

This paper, through a brief examination of principal jus ad bellum decisions of the International Court of Justice, will examine whether those decisions have strengthened the important law of the Charter or whether, sadly, they have too frequently adopted a minimalist approach undermining the Charter and encouraging aggression, particularly aggression in the “secret warfare” spectrum. First, however, this paper will briefly review underlying theory as to how a normative principle can deter aggression, the Charter normative framework, and principal forms of aggression in the contemporary international system.

The International Court of Justice is one of the world’s most historic and visible efforts to promote peace, as is evident in the name of its beautiful building here in The Hague, “The Peace Palace,” and the motivation of Andrew Carnegie in making this building possible. It is particularly incumbent upon us, if we believe in the Court as an institution capable of making a difference in inhibiting war and aggression, that we support the Court through careful analysis of its work and suggestions for improvement where warranted. The opposite approach of “My Court Right or Wrong,” in the long run neither respects nor serves the Court. It is in that spirit, as a supporter of international law and the Court, that this paper is written.

II.

DETERRING AGGRESSION

Understanding of the causes of war and aggression is still in its infancy\(^3\) Nevertheless, in the last century newer data about “the democratic peace,” effects of high levels of bilateral trade, the importance of deterrence, and other more complete information about war and aggression have greatly enhanced our understanding.\(^4\) One of the more important newer theories in understanding war, termed “incentive theory,” focuses on the incentives of regime elite decision makers from personal belief systems, key advisors or influential groups, form of government and the international system as a whole.\(^5\) In classic international relations theory we are asking here about incentives affecting elite decision makers and militating for or against war; incentives from “image one” (the individual, including key advisors and influential interest groups), “image two” (form of government), and “image three” (effect of external incentives from the international milieu, including the effect of international law).\(^6\) But whether we are using incentive theory or other contemporary theories in our understanding of war and aggression, it is clear that any

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\(^3\) The first useful data base for the study of war, the Correlates of War Project, was only completed in the 1970s.

\(^4\) See generally John Norton Moore, Solving the War Puzzle (2003); Bruce Russett, Grasping the Democratic Peace (1994).

\(^5\) See Moore, supra note 4.

\(^6\) See, e.g., Kenneth Waltz, Man, the State and War (1954)
normative system has its effect through influencing perspectives/subjectivities of, and/or costs for, regime elite decision makers as they contemplate aggression.

To achieve a deterrent effect against aggression a normative system must condemn aggression. But it must also differentiate between aggression and defense. For the totality of incentives against aggression, including the totality of defensive responses from the international milieu, are also a core deterrent against aggression. Thus, if the normative system effectively de-legitimates and imposes costs on defensive action as much as it de-legitimates and imposes costs on aggression then it will have undermined the overall normative response against aggression. And if it de-legitimates defensive action while ignoring aggression it will have effectively thrown its weight on the side of aggression. At minimum, a system treating aggression and defense without effective differentiation simply turns the normative system into a cipher, as a potential aggressor knows that the defenders will bear at least equal cost from the normative system. It is the differential effect between treatment by the legal system of aggression (prohibited) and defense (permitted) which generates the deterrence against aggression from the legal system.

For the most part, aggression through regular army invasion, as in Hitler’s invasion of Poland starting World War II, will be quickly understood as aggression, despite propaganda efforts to initially persuade the world otherwise. The problem comes when the aggression is in the form of secret warfare (conventionally called “indirect aggression”), terrorism, clandestine laying of mines, or other covert uses of force which are not immediately understood as to their provenance. The problem is then compounded in court because of proof problems and the difficulty (indeed usually impossibility without revealing sensitive sources and methods) in relying on the intelligence sources that reveal the secret aggression. Moreover, generally the defensive responders are engaging in actions which they openly acknowledge, directly or indirectly, while the aggressors are simply lying to the world. This, in turn, plays into judicial practices weighting admissions against interest while giving lesser weight to sources of evidence consistent with a party’s interest. As will be seen in the next section these problems are compounded in the contemporary international system where secret warfare and other forms of covert aggression are the norm rather than armies openly on the march.7

III.

FORMS OF AGGRESSION

There are five principal forms of aggressive attack in the contemporary system.8 All are in violation of the United Nations Charter and contemporary international law. These are:

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7 For an interesting article addressing some of these issues in maintaining an effective right of defense against contemporary forms of covert aggression, see Theresa Reinold, State Weakness, Irregular Warfare, and the Right to Self-Defense Post -9/11, 105 AM. J. INT’L L. 244 (2011) (particularly exploring “the immediacy requirement of an armed attack, the attribution standard for imputing the acts of irregulars to a state, and the twin requirements of necessity and proportionality.”) (at 246). The author also notes “... the conservative pronouncements of the International Court of Justice (ICJ) on self-defense have further muddled already murky waters.” (at 245).
8 There may also be other forms not directly utilizing bombs and bullets, for example a major cyber-attack intentionally resulting in substantial loss of life or destruction of economic values.
• *Full scale invasion.* Examples – Hitler’s 1939 invasion of Poland, North Korea’s 1950 invasion of South Korea, North Vietnam’s 1975 Post Paris Accords invasion of South Vietnam, Saddam Hussein’s 1990 invasion of Kuwait, and the 2003 invasion of Iraq by the United States and the United Kingdom (among a coalition of other states)\(^9\);

• *Secret warfare;* traditionally known in international law as “indirect aggression.” The covert creation, funding, training, and arming of an insurgency directed at overthrow of the government of another state. Examples – North Vietnam’s opening of the Ho Chi Minh Trail with an attack against South Vietnam in the 1959-73 Phase I Vietnam War, and the Sandinistas’ 1978-80’s Secret War Against El-Salvador, Honduras, Guatemala and Costa Rica (with the core attack directed against El-Salvador).

• *Creation of a parallel state within a state.* The covert creation in a weak or failed state of a political party providing governmental services and a parallel army/militia (both in competition with the weak government) for the purpose of eventual takeover of the government either through the political process or military action or for the purpose of waging secret warfare against neighboring states, or both. Examples – Iranian and Syrian support for Hamas in Palestine (with parallel attacks against Israel), and Iranian and Syrian support for Hezbollah in Lebanon (with parallel attacks against Israel);

• *Terrorism.* Covert support for violence directed against governments or civilian populations for the purpose of terror and other harm against the targeted government or population. Examples – *Today,* particularly Al Qaeda against the United States and western nations; Iran in Iraq, Afghanistan, and elsewhere; and a range of terrorist groups in attacks against Israel. *Previously,* almost too numerous to list, such as members of the Soviet sponsored Warsaw Pact in supporting violent movements in Western Europe; Cuba in supporting violent movements in Latin and Central America; North Korea (the DRK) in covert attacks against South Korea and Japanese citizens; Libya in covert attacks against civil aviation, western democracies and African nations; a range of radical political/drug cartel groups in Colombia and more broadly Latin America in attacks against governmental and civilian interests in Colombia, Mexico and elsewhere in Latin America; and a range of radical Palestinian groups in covert attacks against Israel and Israeli interests worldwide;

• *Indiscriminate Mining of International Waterways.* Naval mines can be a lawful modality of warfare in settings of armed hostilities, provided their use is in compliance with Hague VIII and other applicable *jus in bello* rules. But indiscriminate mining of straits used for international navigation and other international waterways used by neutral shipping is in violation of the Charter and is an illegal use of force. Examples include covert mining of international waterways intentionally interfering with neutral rights and navigational freedoms, as Albania in the 1946 *Corfu Channel* affair, Libya in the 1984 mining of the Red Sea approaches to the Suez Canal,\(^10\) and Iran in the 1980–87 mining of navigational channels used by neutral shipping in the Persian Gulf.

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\(^9\) I believe that the evidence today suggests that the 2003 invasion of Iraq by the United States and the United Kingdom was not consistent with the Charter. I have also taken the view that it was a strategic blunder by the George W. Bush Administration. Once the action was taken, however, the strategic question was dramatically transformed into one concerning credibility, self-determination for the people of Iraq, humanitarian considerations, and other important reasons supporting the need for a successful outcome.

Of particular importance it should be noted that in the contemporary world covert aggression in a mixture of one or more of the last four categories of aggression is the predominant form of aggression _de jure_. Aggressive smaller regimes typically understand that they are no match for the conventional militaries of major powers and, as such, they utilize "asymmetric warfare," which typically involves concealment of their role and an effort to deny attribution. In turn, such covert actions blend in with a background of ongoing global violence and are politically less likely to generate a collective military response on behalf of those attacked. As such, these forms of covert attack present a particularly difficult problem for democratic nation responders. Indeed, for this reason Muammar al-Gaddafi lectured his war college in Libya that had Saddam Hussein simply engaged in secret warfare against Kuwait, rather than a highly visible tank attack, Kuwait might be part of Iraq today.

In addition to generally opting for covert modes of aggression, contemporary aggressors have also understood that law is important and, as such, they can leverage the ambiguity of covert attack to seek to turn the law against the defenders. Today this is widely discussed as a component of "lawfare."11 For a healthy international legal system, efforts of an aggressor to turn the law against the defender should rebound against the aggressor. Law, and certainly _jus ad bellum_, in no way favors the aggressor – rather it is antithetical to aggression. Sadly, however, as can be seen simply by the number of aggressors filing actions in the International Court of Justice against defensive actions, "lawfare" on the part of aggressors is alive and well.12 One of the costs to the system which such "lawfare" generates is not only undermining deterrence against aggression, but also undermining support for international law itself and important legal institutions such as the International Court of Justice. One direct cost of the _Nicaragua_ decision, of course, has been the United States removal of its Article 36(2) acceptance of jurisdiction of the Court. The decision may well have also played a role in encouraging Iran to file its action against the United States in the upside down _Iran Platforms Case_.

IV.

The Charter _Jus ad Bellum_ Framework

As a point of reference it is useful in any assessment of use of force decisions to review the lawful bases of use of force (_jus ad bellum_) under the United Nations Charter. Where there is

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12 This is in no way an argument for the "Realist-Rejectionist Model" which rails against international law as a tool of weaker states seeking to tie down major powers. To the contrary, a system of international law, and particularly of prohibitions against use of force as a modality of major change, as is the core of current _jus ad bellum_, is of fundamental importance to all nations, big and small. On balance, the rule of law is powerfully supportive of widely adhered goals in the interests of all nations and "lawfare," broadly conceived, should be a core modality of response against aggression and other outrages. Recently, for example, I have urged greater use of civil litigation as a tool against covert state supported terrorism. See J.N. Moore, "Civil Litigation Against Terrorism," Chapter 8 in _LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR_ 197-234 (John Norton Moore & Robert F. Turner, eds. 2010).
a broad division of views it will be noted. There are five bases for lawful use of force under the Charter framework. These are:

1. Consent of a widely recognized government. The Government represents the state and its sovereignty and normally consent by a widely recognized government suffices as a basis for lawful use of force on the territory of the consenting state;\(^\text{13}\)

2. Pursuant to a valid decision of the United Nations. This basis encompasses action authorized by the Security Council acting lawfully (i.e., not in a manner ultra vires as specified in Article 24(2) of the Charter) under Chapter VII (Articles 39, 42 & 48), or action authorized by the General Assembly (Articles 11 & 12) in settings “while the Security Council is [not] exercising in respect of any dispute or situation the functions assigned to it in the ... Charter ... unless the Security Council so requests” and which is not “enforcement” action (“enforcement action” is generally understood as action directed against a government and thus General Assembly authorization normally would relate to consensual settings such as peace keeping operations). It should be noted that when the Security Council seeks to authorize use of force the authorizing resolution will normally use the language “acting under Chapter VII” (clearly triggering Article 39) and language specifically authorizing “all necessary means,” which is understood as authorizing use of force, as well as lesser measures. Contemporary United Nations practice, as opposed to an earlier time including actions under the “Uniting for Peace Resolution,” rarely will authorize use of force through the General Assembly, in part because of the substantial expense involved even with peace keeping actions;

3. Individual or Collective Defense. Individual and collective defense in response to aggression were lawful bases for use of force under the 1928 Kellogg-Briand Pact (Pact of Paris)\(^\text{14}\) which is the most important pre-Charter international instrument outlawing force as a modality of major change in international relations. That is, the Kellogg-Briand Pact “renounce[d] recourse to war for the solution of international controversies and ... as an instrument of national policy in ... [parties] relations with one another.” The United Nations Charter built on Kellogg-Briand and broadened its prohibition (in Article 2(4)) to include a ban on aggression below the threshold of “war” and also banned “the threat” of aggressive use of force, as well as the actual aggressive use of force. The Charter, however, in its early draft paralleling Kellogg-Briand, and thus saying nothing about defensive use of force, and ultimately in the addition of Article 51 added at the request of Latin American nations seeking to enshrine their defensive rights under the Inter-American regional security system, was not intended to limit the pre-existing right of individual and collective defense. A careful review of the Travaux Préparatoires of the Charter shows only that in Commission I, Committee 1, which dealt with the general purposes and principles of the UN Charter, the final Dumbarton Oaks Charter Proposal merely incorporated an Australian proposal for Article 2(4) adding the language “against the territorial integrity or political independence of any member or state” with the


declared purpose of spelling out "the most typical form of aggression . . ." concerning forceful change of frontiers or of a state's independence. The discussion also fully dealt with *jus ad bellum* issues by reference to "aggression," not "armed attack." Indeed, "aggression" has conventionally remained to this day the rubric under which countless international law scholars seek to define unlawful use of force and the parameters of *jus ad bellum*. Because, however, the English language version of Article 51, added to the Charter in Committee 4 of Commission III dealing with Chapter VIII and regional uses of force, uses the language "if an armed attack occurs," and because arguably some statements of the U.S. Delegation in the Committee III discussion surrounding what became Article 51 can be interpreted as banning "anticipatory defense" (even under the pre-Charter strict standards for any such use of force), a minimalist interpretation of the Charter has urged that the "armed attack" language in Article 51 both limited the right of defense and banned anticipatory defense. Increasingly, however, scholars have accepted that the proper rubric for determining *jus ad bellum* is not "armed attack," which is never defined in the Charter, but rather the traditional "aggression" which is the phrase used in the equally authentic French language version of Article 51. Moreover, today there is

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15 For the Australian Proposal, see U.N. Doc. 2 G/14 (1) May 5, 1945, in 3 UNCSO, at 543, and for the Australian explanation of this proposal see H.V. Evatt, *The United Nations* 18, 19 (1948) (". . . as the result of the above words (territorial integrity and political independence) . . . the most typical form of aggression would place the aggressor clearly in the wrong at the bar of the United Nations.") and 1 UNCSO. Docs. 174 (further explanation by the Deputy Prime Minister of Australia, Francis G. Gorden, stating "The application of this principle should ensure that no question relating to a change of frontiers or an abrogation of a state's independence could be decided other than by peaceful negotiations. It should be made clear that if any state were to follow up a claim of extended frontiers by using force, or the threat of force, the claimant would be breaking a specific and solemn obligation under the Charter.").

16 Critically, this prohibition also applies to *de facto* as well as *de jure* boundaries, as was evident, for example, during the Korean and Falkland/Malvinas wars. Any other interpretation would expose the world to countless wars over disputed islands and land and ocean boundaries.

17 Reasons supporting that the Charter did not limit the traditional right of individual and collective defense despite the English language version of Article 51 include:

- The discussion in Committee 4 of Commission III concerning what became Article 51, as well as the statements of the U.S. Delegation arguably addressing anticipatory defense, were focused on the rights of regional arrangements, not on the use of force in general;
- The discussions in Commission I, Committee I, which dealt with the general purposes and principles of the UN Charter, including norms concerning use of force, show that the right of defense remains unimpaired. This discussion in Committee I of Commission I, focused on the broadest and most important questions of purposes and principles of the Charter, would seem to trump that in Committee 4 of Commission III, which was focused on rules for "regional arrangements" in Chapter VIII of the Charter;
- The broader U.S. view on use of force (rooted in no inhibition on the traditional right of defense) was still being asserted, and accepted, on June 5 in Committee I(1) despite the earlier May 14 apparently limiting discussion and language in Committee III (4). If there was an intent to limit the right of defense generally by the "armed attack" language in the English language version of Article 51 surely there would have been a discussion about such restrictions in Commission I, which was the Commission charged globally with the general *jus ad bellum* provisions of the Charter;
- There was no discussion reflecting an intent to write this discussion concerning regional arrangements broadly into use of force norms when a procedural committee simply moved Article 51 to Chapter VII from Chapter VIII;
- There is no definition given in the Charter of "armed attack" as would be expected were this an important restriction on the traditional right of individual and collective defense;
- The equally authentic French language version of the Charter uses the traditional term "aggression" in Article 51, rather than "armed attack;" and
widespread acceptance of the right of anticipatory defense (not "preemption," provided it meets the traditional strict "innimence of attack" standard of the pre-Charter right of anticipatory defense. Most importantly, for an analysis of jus ad bellum law under the Charter, while there is at least an arguable basis in the travaux and the English language version of Article 51 for minimalist to argue that anticipatory defense is no longer lawful, there is absolutely nothing in the language or the travaux of the Charter which suggests that the right of defense does not apply against the covert aggression spectrum, including terrorist aggression directed from non-state actors, and indiscriminate mining of international waterways. Nor is there any requirement in the Charter of a public or written request from a victim of aggression to trigger a right of participation in collective defense. Indeed, this latter restriction would seem counter to the core of contemporary regional defense arrangements such as the Rio and NATO Treaties, which by their terms declare that an attack against one member is an attack against all members. Actions in defense are required to be reported to the Security Council, though there is no Charter requirement of continuous reporting. Failure to report, sadly too frequent, is to miss one of the most important opportunities to alert the world to an aggressive attack;

4. Lawful action pursuant to a regional arrangement. Such action, under Chapter VIII of the Charter, by the strict language of the Charter itself is lawful if it is "consistent with the Purposes and Principles of the United Nations" (Article 52), and is either not an "enforcement action," or, if an "enforcement action" is authorized by the Security Council (Article 53), and, by an implicit purpose of regional arrangements, the action is in relation only to a member state of the regional arrangement (Article 52 and Chapter VIII — implicit). That is, the old Warsaw Pact was not authorized to take any action concerning NATO nations under this basis and the Arab League is not authorized to take any action concerning Israel under this basis. Principal contemporary regional arrangements would certainly include the Arab League, NATO, the Rio Treaty and the Organization of Eastern Caribbean States (OECS — the English speaking countries of the Eastern Caribbean). Given the clarity under both the language and the travaux of the Charter for this fourth basis for lawful use of force, it remains puzzling why minimalist interpretations of the Charter never mention this basis; and

5. Use of force under the threshold of Article 2(4). Article 2(4), drafted by Commission I charged with the general global rules concerning jus ad bellum, provides that "All 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." This is the core

- There is no evidence that the cryptic discussion in Commission III by members of the U.S. Delegation; a discussion arguably supporting a limitation on the right of anticipatory defense, was accepted as a proper interpretation by any other delegation. Indeed, statements of the U.S. Delegation could not bind other delegations.

18 See, e.g., Report of the High-Level Panel on Threat, Challenge, and Change, A More Secure World: One Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2004). "Preemption," a new doctrine enunciated by the George W. Bush Administration, if it asserts a right beyond the imminence of threat standard embodied in the right of "anticipatory defense," is both illegal, and, I would urge, bad policy. During a conversation between the author and the then Legal Adviser to the National Security Council in the Bush Administration the Legal Adviser took the position that the Bush "preemption" doctrine was not intended to go beyond the recognized right of "anticipatory defense."
prohibition in the UN Charter on use of force and the discussion in Committee 1 of Commission I makes it clear that this is the provision understood by the framers as governing the prohibition against aggression under the Charter. Thus, if a limited action such as protection of nationals or humanitarian intervention is neither inconsistent with the “Purposes of the United Nations” nor seeks to alter frontiers or remove political independence of a state it is not prohibited by the language of Article 2(4). The core actions under this basis are, of course, protection of nationals and humanitarian intervention. There is a robust long-term and continuing debate as to the lawfulness of both protection of nationals and humanitarian intervention and I will not engage those debates at this point. It should be noted, however, that many states have officially recognized the right of protection of nationals under certain extreme threats to their nationals and, in the contemporary world, at least the United Kingdom recognizes the lawfulness of humanitarian intervention under appropriate conditions.

Uses of force as a modality of major change in the international system which do not fall under one of these five lawful bases are illegal aggression. This is so whether the aggression takes place through open invasion of tank armies across international boundaries, secret warfare, covert mining of internationally privileged straits, or terrorism, whether committed by state actors or non-state actors. The international law is so clear on the illegality of these actions that it needs no citation here.

The use of force, to be lawful, must fall under one of these five bases. But, in addition, *jus ad bellum* also requires that the action meet standards of “necessity” and “proportionality.” Neither of these requirements is textually spelled out in the Charter, indicating yet again that lawful use of force cannot be simply assessed by “logic chopping” of the text of the Charter. But these requirements are generally understood to also apply to *jus ad bellum*, and in a slightly different modality to *jus in bello* law as well. Because of their general nature as basic principles these concepts are particularly subject to minimalist application in use of force decisions.

Necessity as a general proposition in *jus ad bellum* is best understood as a prohibition against use of force except in protection of major values. And proportionality as a general proposition in *jus ad bellum* is best understood as a requirement that responding coercion must be limited in intensity and magnitude to what is reasonably necessary to promptly secure the permissible objectives of defense. Emphatically, proportionality in *jus ad bellum* is not simply *tit-for-tat* application of equivalent force, such as ten tanks to respond to an attack from ten tanks, or *tit-for-tat* measurement of damages. Indeed, military doctrine calls for application of overwhelming

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19 Note that both protection of nationals and humanitarian intervention can also be textually argued under the Charter to be rooted in the right of individual and collective defense.

20 I, and many other scholars, have long recognized not only the lawfulness of protection of nationals but also that of humanitarian intervention. For a classic debate on humanitarian intervention, the Ian Brownlie/Richard Lillich exchange, see Chapters 10 and 11 in *Law & Civil War in the Modern World* (John Norton Moore, ed.) (1974), and see the modern reprint of this book published in 2010 with a new introduction by the editor. And for my own long-standing support for humanitarian intervention see John Norton Moore, Chapter 1 in *Law & Civil War in the Modern World* (J. N. Moore ed.) (1974). Humanitarian intervention is not the same as the “right of protection,” which is limited to United Nations authorized use of force, as in the recent action in Libya.
force and history shows that failure to do so frequently results in much higher casualties on all sides. As McDougal and Feliciano write in their seminal work on use of force law:

[T]he requirements of necessity and proportionality ... can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in a particular context. What remains to be stressed is that reasonableness in a particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operation and functional significance for community goals in given instances of coercion.  

V.

Principal Use of Force Decisions
of the International Court of Justice

This section will examine, in turn, the decisions of the International Court of Justice in the 1949 Corfu Channel Case, the 1986 Nicaragua Case, the 2003 Iranian Platforms Case, the 2004 Israeli Wall Case, and the 2005 Congo Case.

The Corfu Channel Case

In 1946 the People’s Republic of Albania arranged for, or knew of, the covert laying of a naval minefield of anchored automatic mines in the North Corfu Channel, a strait used for international navigation. No notice was given of the minefield, under either Hague Convention XIII of 1907, or otherwise. Two British destroyers, the Saumarez and the Volage, struck mines while transiting the strait on October 22, 1946. Subsequently, on November 12 and 13, 1946, the British Navy swept the remaining mines from the Channel. The United Kingdom then brought this action against Albania in the ICI. Albania urged that it had not been proved that Albania laid the mines or knew of them, and countered that the United Kingdom violated its sovereignty by passing through its territorial sea and sweeping mines in its territorial sea with no previous notification or consent by the Government of Albania. The International Court of Justice

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21 Examples of failure to effectively respond with adequate force or effective strategy necessary promptly to secure the permissible objectives of defense, with resulting higher casualties, include the limited defensive responses from the United States in the Vietnam War and Israel in the Second Lebanon War.

22 MYRES S. MCDouGAL & FLORENTINO FELICIANO, LAW & MINIMUM WORLD PUBLIC ORDER 242 (1961).

23 Without greater knowledge of the complex factual context of the Congo Case, this analysis will only partially address the 2005 Case Concerning Armed Activities on the Territory of the Congo. Certainly that decision is correct, however, that consent by a widely recognized government is a lawful basis for use of force on the territory of the consenting state. And it is correct in accepting in its analysis that certain guerrilla or insurgent cross-border attacks against a state which are directly or indirectly supported by the state from which the attacks originate can create a right of defense in response against that state. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. para. 146 (Dec. 19).

concluded "... that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government." On the subject of straits in law of the sea for which the case is frequently cited, the Court held that "Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace." The Court, however, also held that the United Kingdom had violated the right of innocent passage through Albanian territorial waters when it subsequently conducted the mine sweeping operation in the Corfu Channel. The Corfu Channel decision has been well received. It was an unremarkable case in which the victim of an illegal use of force (the clandestine mining of an international strait through which shipping of every nation had a right to pass) brought the action before the Court and the Court held that the mining, or at least failure to give notice of the mining, was an illegal action by Albania for which it was liable to pay compensation. But in a hint of minimalism concerning use of force the Court also held that the subsequent mine sweeping operation by Britain in the Corfu Channel "violated the sovereignty of... Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." Even more troubling, the vote holding Albania responsible for the clandestine and illegal mining of a strait used for international navigation was eleven to five and the vote declaring that the United Kingdom in sweeping the mines had violated Albanian sovereignty was unanimous.

The Corfu Channel decision, on balance, has been constructive in development of the rule of law concerning state responsibility and the definition of straits used for international navigation, and it was certainly correct in holding Albania responsible for its illegal use of force in mining such a strait. But the implications of its holding that the sweeping of the mines by the United Kingdom violated international law are troubling on jus ad bellum grounds. Clandestine automatic contact mines laid in peacetime to restrict passage through a strait used for international navigation are just as much a use of force as if Albanian shore batteries were to fire on passing ship traffic. But there is no discussion of use of force by the Court, but rather a softer state responsibility ground is relied on as the basis for decision. More importantly, the implication of the second holding against the United Kingdom is that it is illegal to sweep naval mines blocking a strait used for navigation, even when it was illegal to mine the strait. One wonders whether the Court understood the implications of its parallel holding undermining the defensive right. For the implication is simply that if a state illegally mines a strait used for international navigation in peacetime in flagrant disregard of community freedoms in use of the strait for international navigation that the options for other states are simply to accept the status quo, thus losing their critical navigational rights, or to respond by sweeping the mines and be condemned equally with the mining state. This, in effect, undermines the law against such illegal mining by removing the defensive right. One also wonders whether the Court would have

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25 Id. at 22.
26 Id. at 22.
27 Id. at 28 (The Court also set out the modern test as to whether a strait is a "strait used for international navigation.").
28 Id. at 36.
reached this same "even-handed" conclusion had Albanian batteries fired on the British ships and the British ships had, in defense, fired back? Or if Albania declared that it would fire its shore batteries on transiting ships would that mean under the implications of the Court's ruling that there could be no legal challenge through attempted transit because the necessary counter-battery fire would be equally illegal with the Albanian action? As such, when the use of force dimensions of the Corfu Channel decision are fully analyzed there is at least a tilt against exercise of a lawful defensive right, despite the generally constructive nature of the decision.

The Nicaragua Case

"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."

Miguel d'Escoto Brockman, Foreign Minister of Nicaragua
Affidavit filed before the International Court of Justice, April 21, 1984

"You don't understand revolutionary truth. What is true is what serves the ends of the revolution."

Nicaraguan Minister of Social Welfare Lea Guido de López
to United States Officials

In 1979 the corrupt regime of Anastasio Somoza in Nicaragua was overthrown by a revolution which at its inception was broad-based and popular. Relatively quickly, however, effective military and political control became concentrated in the FSLN (the Sandinistas), a radical faction which had been heavily supported by Fidel Castro. Despite efforts by Washington to have good relations with the new government the nine commandants of the FSLN (drawn three each from three previously feuding Marxist-Leninist factions brought together by Fidel Castro in a 1978 Havana meeting) began to set aside democratic institutions and assert tight control over civil society, adopted a foreign policy aligned with Cuba, began a major military build-up, and, most seriously, began a secret war against neighboring states, particularly

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29 There is a concern counsel before courts (not just the International Court of Justice) frequently have about judicial decision; that is a fear that judges will seek to have a politically correct outcome and “split-the-difference,” rather than fully and neutrally applying the law. I have elsewhere referred to this tendency as “the even-handed cop-out.” There may be some of this at work in the Corfu Channel decision. The difference between the eleven to five (concerning Albanian responsibility) and unanimous (concerning United Kingdom responsibility) votes on the core holdings of state responsibility, however, may even suggest some partisan leanings or more considerable minimalist leanings with respect to use of force decisions.

30 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27, 1986). As a reminder, the author of this paper served as a Deputy Agent of the United States at the jurisdictional phase of this case. Unfortunately, the United States did not participate at the merits phase of the case. I will not here discuss the jurisdictional issues other than to note that it is hornbook international law that the United Nations Charter use of force requirements would trump any inconsistent provisions of treaty or customary international law. It is thus logically difficult to follow the Court in its conclusion that it can decide the case based on the customary law of use of force without applying the Charter. For since the Charter governs the case if there is any inconsistency with customary law, how can the customary law be applied without at least implicitly interpreting the Charter use of force norms?

31 Quoted in L.E. Harrison, We Tried to Accept the Sandinista Revolution, WASHINGTON POST, June 30, 1983, at 27. Both of these quotes were borrowed from ROBERT F. TURNER, NICARAGUA v. UNITED STATES: A LOOK AT THE FACTS (1987), at ix.
El Salvador, but including Costa Rica, Guatemala and Honduras as well.\textsuperscript{32} The insurgency in El Salvador, covertly supported by the Sandinistas, was not a small scale or narrowly based secret campaign. Rather it was a major covert armed aggression seriously intended to overthrow the government of El Salvador and it was undertaken with a broad-base of support from the Sandinistas which included financial backing, organizational support, arms, explosives and ammunition, insurgent training, military planning, covert transport, logistics, intelligence and cryptographic support, communication support, and strong worldwide political support. At their height the insurgents fielded forces at least one-sixth the size of the entire Salvadorian Army. They caused thousands of casualties in El Salvador and over a billion dollars in direct war damage to the Salvadorian economy. Indeed, this FMLN insurgency claimed to have inflicted more than 18,000 casualties in El Salvador and in the first half of 1985 it was causing an estimated 400 casualties per week.\textsuperscript{33} As was stated by Miguel Bolanos Hunter, a former knowledgeable figure within the Sandinista government:

\textquote{the Sandinistas give total help, advice and direction on how to manage the war and internal politics. The guerillas are trained in Managua, the Sandinistas help the air force, army and navy get arms through. Some arms come from Cuba via Nicaragua. They use the houses of Nicaraguan officers for safe houses and command posts. There is a heavy influx of communications giving orders. You can say the whole guerilla effort is managed by Nicaragua.}\textsuperscript{34}

A small sample of the evidence concerning the Sandinista aggression against neighboring countries, as set out both in my book \textit{The Secret War in Central America: Sandinista Assault on World Order} (prepared from unclassified sources), and Robert F. Turner’s book \textit{Nicaragua v. United States: A Look at the Facts} (prepared using classified material), is as follows:

- A May 13, 1983 Report of the Democratically controlled House Permanent Select Committee on Intelligence which had been critical of Reagan Administration policy reported that: \textquote{[t]he insurgents are well-trained, well-equipped with modern weapons and supplies and rely on the use of sites in Nicaragua for command and control and for logistical support. The intelligence supporting these judgments provided to the Committee is convincing. There is further

\textsuperscript{32} On the background of the Nicaraguan Revolution and the takeover by the Sandinistas see generally JOHN NORTON MOORE, THE SECRET WAR IN CENTRAL AMERICA—SANIDINISTA ASSAULT ON WORLD ORDER (1987).

\textsuperscript{33} On the details of the Sandinista secret war against El Salvador and neighboring states, see generally JOHN NORTON MOORE, THE SECRET WAR IN CENTRAL AMERICA—SANIDINISTA ASSAULT ON WORLD ORDER (1987); ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS (1987) (this latter study was compiled from classified information available to the United States Government in preparation for possible use before the International Court of Justice in the Nicaragua Case. After the United States pulled out of the case the study was declassified and published. The author, Robert F. Turner, had previously served as Counsel to the President’s Intelligence Oversight Board.) \textit{See also} Robert F. Turner, Peace and the World Court: A Comment on the Paramilitary Activities Case, 20 VAND. J. TRANSNAT’L L. 53, 55 (1987) (“the Court’s decision on the legal issues is so flawed that one hardly knows where to begin a critique.”).

\textsuperscript{34} THE HERITAGE FOUNDATION, BACKGROUNDER NO. 294 INSIDE COMMUNIST NICARAGUA: THE MIGUEL BOLANOS HUNTER TRANSCRIPTS, at 12 (Sept. 30, 1983) (Note that this publicly available evidence of the Sandinista armed aggression, like much other such evidence, was available over two years prior to the decision of the Court in the Nicaragua Case.).
persuasive evidence that the Sandinista government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further providing the insurgents bases of operations in Nicaragua.\textsuperscript{35}

- Congress as a whole noted in the Intelligence Authorization Act of 1984 that: "[b]y providing military support (including arms, training, logistical, command and control and communication facilities) to groups seeking to overthrow the Government of El Salvador and other Central American governments, the Government of National Reconstruction of Nicaragua has violated Article 18 of the Charter of the Organization of American States,"\textsuperscript{36}

- President Duarte of El Salvador said in a press conference of July 27, 1984: "[w]hat I have said, from the Salvadoran standpoint, is that we have a problem of aggression by a nation called Nicaragua against El Salvador, that these gentlemen are sending in weapons, training people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night.,\textsuperscript{37}

- The Foreign Minister of Honduras said before the United Nations Security Council in April of 1984 that my “country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population;\textsuperscript{38}

- On April 11, 1984 the\textit{ New York Times} reported from Managua that "[w]estern European and Latin American diplomats here say the Nicaraguan Government is continuing to send military equipment to the Salvadoran insurgents and to operate training camps for them inside Nicaragua;\textsuperscript{39}

- Robert F. Turner writes, based on a review of the classified cables: “Nicaragua has supported the Marxist guerrillas in El Salvador,\textit{ inter alia}, by providing arms, equipment, money, training, command-and-control assistance, and a headquarters and radio station on Nicaraguan soil. It is important to keep in mind that United States support for the use of military force against the Sandinista regime did not begin until well over a year after Nicaragua launched a major campaign to overthrow the governments of neighboring states. The facts on this point are clear and beyond serious question . . . .\textsuperscript{40}

- Turner also notes: "[a]lthough for political reasons Nicaragua generally denies its role in assisting armed revolutionary movements seeking to overthrow

\textsuperscript{35} U.S. Congress, House Permanent Select Committee on Intelligence, on the Amendment to the Intelligence Authorization Act for Fiscal Year 1983, Part 1, 98\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 5 (May 13, 1983), H.R. Rep. No. 122.


\textsuperscript{37} Press Conference of President Duarte, Radio Cadena YKSL in San Salvador (July 27 1984),\textit{ reprinted in FBIS Latin America} 4 (July 30, 1984). President Duarte repeatedly confirmed the Nicaraguan aggression against El Salvador.


\textsuperscript{40} Robert F. Turner, “Nicaragua v. United States: A Look at the Facts” (pre-publication manuscript of March 5, 1986, on file at the Center for National Security Law at 231) (1986).
democratically-elected governments in neighboring states, support for “national liberation movements” has been a consistent element of FSLN strategy from its inception.\footnote{ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS 43 (1987),} 

- Turner further notes: “[a]ccording to Romero [former FPL Central Committee member Napoleon Romero Garcia], the FPL [insurgency in El Salvador] has a monthly operating budget of between U.S. $65,000 and $100,000. About $15,000 to $20,000 of this is raised inside El Salvador, and between $50,000 and $80,000 is received each month from the FPL National Finance Commission in Nicaragua;\footnote{id. at 68.} 

- And Turner notes: “[a]t least four training camps inside Nicaragua, used extensively for training Salvadoran insurgents, have been identified: (1) the base of Ostional in the southern province of Rivas; (2) a converted National Guard camp in northwestern Nicaragua close to the Rio Tamarindo; (3) the camp of Tamagas, which specializes in teaching sabotage techniques, about 20 kilometers outside Managua; and (4) a new camp (which opened in 1984) near Santa Julia on Nicaragua’s Coseguina Peninsula. . . . At any given time, as many as a few hundred Salvadoran insurgents are reported to be receiving training in these camps.\footnote{id. 69-70.} 

After reviewing the options, and determined not to turn the Central American conflict into a decades long Vietnam experience, the United States decided against responding toward Cuba, which was also assisting the insurgency, or either maintaining a static defense inside El Salvador, or conducting a full scale invasion of Nicaragua. Rather, the United States chose to respond to the Nicaraguan aggression by doing back to Nicaragua, on a more restricted scale, what Nicaragua was doing in its secret attack against neighboring countries. Thus, the United States assisted in organizing, training, financing and arming a “contra” insurgency against the Sandinista regime in Managua. The motivation for this response was clearly defensive and every effort had been made previously to peacefully end the FSLN secret aggression against neighboring states.\footnote{These efforts at peacefully ending the Sandinista aggression against neighboring states included, among other efforts, working to continue and expand economic assistance in exchange for the ending of Sandinista aggression, joining the 1982 multilateral San Jose Declaration outlining conditions for peace, and supporting the “Contadora” talks aimed at mediating a regional settlement. SEE JOHN NORTON MOORE, THE SECRET WAR IN CENTRAL AMERICA at 36-38 (1987).} As the effort progressed the Congress even removed overthrow of the Sandinista regime as a permissible goal of the contra policy, in sharp contrast with the continuing objective of the Sandinista effort directed against El Salvador and neighboring states.

The core case for a lawful United States response in collective defense to assist El Salvador against the Sandinista armed aggression is simple and obvious. The United States was bound by Article 3 of the Rio Defense Treaty with El Salvador to come to the assistance of El Salvador against the armed attack made on El Salvador by the Sandinistas. Further, the Rio Treaty provides that an attack against El Salvador was to be treated as though it were an attack against the United States. The Sandinista attack also generated a right of collective defense even though it was in the form of covert “indirect aggression” as opposed to a regular army invasion.
Some examples of authoritative support for this right of defense against "indirect aggression," as previously set out in my book on *The Secret War in Central America*, include:

- Article 3(g) of the United Nations Definition of Aggression specifically recognizes that aggression can include indirect aggression. It characterizes as aggression "[t]he 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 the acts listed above [invasion, military occupation, use of weapons, etc.] or its substantial involvement therein";

- Professor Hans Kelsen writes: "Since the Charter of the UN does not define the term armed attack used in Article 51, the members of the UN exercising this right of individual or collective ... defense, may interpret armed attack to mean not only an action in which a state uses its own armed forces but also a revolutionary movement which takes place in one state but which is initiated or supported by another state.";

- Professors Thomas and Thomas, experts on the OAS system, write: "[t]he force which should comprise 'armed attack' ... would include not only a direct use of force whereby a state operates through regular military units, but also an indirect use of force whereby a state operates through irregular groups or terrorists who are citizens but political dissidents of the victim nation. ... The victim state may exercise its right of individual self-defense against the aggressor state ..." They further add: "the OAS has labeled assistance by a state to a revolutionary group in another state for purposes of subversion as being aggression ...";

- Professor Oscar Schachter, a former Legal Adviser to UNITAR, writes: "it would not only be illegal for a state to finance insurgent movements or to allow its territory to be used for organizing and training armed opposition movements, but such tactics would open that state to an armed defensive action by or on behalf of the victim of the indirect aggression."

- During the Greek emergency in 1947 the United States regarded Albanian, Bulgarian and Yugoslav assistance to insurgents in Greece as an armed attack.

- During the Algerian War, France regarded assistance to Algerian insurgents from a Tunisian rebel base at Sakiet-Sidi-Youssef as an armed attack justifying a defensive response against the base.

- The record of U.S. Senate consideration of the NATO Treaty, based on Article 51 of the Charter and parallel to the earlier Rio Treaty in its defensive right, points out that "armed

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49 *Id.* at 42.
50 Oscar Schachter, *In Defense of International Rules on Use of Force*, 53 CHICAGO L. REV. 113, at 137 (1986). Professor Schachter also writes: "[i]t seems reasonable ... to allow an attack victim to retaliate with force beyond the immediate area of attack when it has good reason to expect further attack from the same source." *Id.* at 132.
attack” may include serious external assistance to insurgents and is not limited to open invasion.\textsuperscript{53}; and

- During the 1964 Venezuelan emergency, the Ministers of Foreign Affairs of the Organization of American States adopted the view that serious indirect aggression could justify the use of force in defense under the United Nations and OAS Charters “in either individual or collective form.”\textsuperscript{54}

Sadly, the United States neglected to report its response to the Security Council under Article 51 in any substantial way — that is, effectively presenting evidence of the aggression by the Sandinistas against neighboring states — though the contra response was publicly discussed in the United States and around the world.\textsuperscript{55} The political vacuum of publicly available information about Nicaragua’s aggression then created an erroneous widespread belief that President Reagan was simply engaged in an effort to remove an unwelcome Marxist-Leninist Government from this hemisphere. Into this political vacuum, Nicaragua, as the aggressor, astoundingly filed an action in the International Court of Justice against the United States for the contra operation, including the small-scale mining of the harbors of Nicaragua which was part of the contra effort.\textsuperscript{56} The Sandinista narrative to the Court was simply that President Ronald Reagan had begun a covert all out war against Nicaragua. Nothing was said about the extensive efforts of the Reagan Administration to have good relations with the new Sandinista Government, nor the ongoing secret war being waged by the Sandinista’s against neighboring states, which was the reason for the contra response.\textsuperscript{57} Taken by surprise in the midst of preparation of an important presentation to the International Court of Justice in the Gulf of Maine case the United States wrongly sought to revoke its jurisdiction through a letter not effectively taking account of the time-period required for revocation. Running from the case, rather than embracing it as an opportunity to bring the facts of Nicaragua’s aggression to the world, further added to a climate, including before the Court, that the United States had something to hide. A third mistake then made by the United States was to withdraw from the merits phase of the case, thus giving the

\textsuperscript{53}North Atlantic Treaty: hearings Before the Senate Comm. on Foreign Relations, pt. 1, 81\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 58 (1949). See also Senate Comm. on Foreign Relations, North Atlantic Treaty, S. Exec. Rep. No. 8, 81\textsuperscript{st} Cong. 1\textsuperscript{st} Sess. 13 (1949).


\textsuperscript{55}As a consultant to the President’s Intelligence Oversight Board (the PIOB) I had access to the substantial evidence of the secret aggression being waged by the Sandinistas against neighboring states and concluded, after reviewing the facts, that the United States had a lawful right of defense in response, and an obligation to assist El Salvador in resisting the armed aggression. Accordingly, I went with Robert F. Turner, then Counsel to the PIOB, to see the Acting Legal Adviser to the Department of State to urge United States reporting of the defensive response to the Security Council as required under Article 51. We thought agreement had been reached to report but unfortunately no significant report was ever made to the Security Council.

\textsuperscript{56}The Sandinistas were quite good at waging “lawfare” against the United States, which they subsequently did also in relation to certain accusations against the contras.

\textsuperscript{57}For the continued reiteration of this narrative by the agent of Nicaragua before the Court on the occasion of the 10\textsuperscript{th} anniversary of the Nicaragua Judgment see “Notes by the Agent of Nicaragua on the Occasion of the 10\textsuperscript{th} Anniversary of the Judgment of the Court in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)” (presented at the Institute of Social Studies in June 1996 to a class of students of Professor Nico Schruver and handed out to participants in the Symposium “The Nicaragua Case 25 Years Later,” 27 June 2011), at 2. This was again the theme of the attorney’s for Nicaragua on the occasion of the June 2011 Symposium at the Hague Academy of International Law.
Sandinistas a free ride before the Court.\textsuperscript{58} None of these considerable errors of the United States in handling the \textit{Nicaragua Case}, however, justified the shockingly skewed judgment of the Court.

It is remarkable that an aggressor should file an action in the International Court of Justice against the defender.\textsuperscript{59} Once such an action is filed by an aggressor, of course, it is not at all remarkable that the presentation by the aggressor to the Court will amount to a fraud on the Court. It is beyond remarkable, however, that the Court should then hold the defender accountable while ignoring the armed aggression and the fraud on the Court.\textsuperscript{60} The Court managed this result in the \textit{Nicaragua Case} through first, severely restricting the flow of information and evidence on which the Court could judge, second, accepting a Sandinista characterization of their actions against El Salvador as simply providing modest weapons transfers or logistic support – likely sometime in the past,\textsuperscript{61} third, ignoring available evidence showing the covert armed aggression against El Salvador, fourth, defining “armed attack” so narrowly as to effectively remove the right of defense against secret warfare, and finally, declaring a new rule with no textual basis in the Charter and applying it with no credible examination of the factual predicate, that “. . . there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to be attacked.”\textsuperscript{62}

Examining each of these failures in turn, the Court most egregiously narrowed the available evidence by first denying the request of El Salvador, the directly attacked victim state, to intervene in the case and second, refusing the suggestion of Judge Schwebel for the Court to

\textsuperscript{58} As a Deputy Agent of the United States in the Nicaragua case I strongly urged the United States to continue on to the merits phase. Indeed, as part of this effort a confidential panel of the American Society of International Law was put together to advise about the decision to go forward or not. The panel overwhelmingly advised going forward to the merits phase and revealing to the world the secret war being waged by the Sandinistas against neighboring countries. I also personally urged the then head of the CIA, Bill Casey, to support this approach. Ultimately, however, this advice was not taken by the U.S. Government.

\textsuperscript{59} It also raises a question about the functioning of the Court that apparently a meeting was arranged at United Nations headquarters in New York with a Judge of the International Court of Justice prior to Nicaragua’s decision to file the case, to ask whether the Court would render an impartial judgment in a case brought by Nicaragua against the United States or rather whether the Court would simply favor the United States. The case was then filed by Nicaragua after receiving assurances from the Judge that the composition of the Court was such that Nicaragua could count on an impartial judgment on the merits. See Paul S. Reichler, \textit{Holding America to its Own Best Standards: Abe Chavez and Nicaragua in the World Court}, 42 HARVARD INTERNATIONAL L.J. 15 (2001).

\textsuperscript{60} This paper does not address the jurisdictional issues but, as I have previously written, in my judgment the Court lacked jurisdiction and reached rather remarkably to find jurisdiction in the case. For a discussion of the jurisdictional issues see \textit{John Norton Moore, The Secret War in Central America} 83-90 (1987). At the Symposium on “The \textit{Nicaragua Case} 25 Years Later,” held at the Hague Academy of International Law on June 27, 2011, Professor James Crawford severely criticized the jurisdictional holdings of the Court and Professor Philippe Sands took the position that jurisdiction based on the bilateral United States/Nicaragua Treaty of Friendship, Commerce and Navigation should not have survived the failure to engage in negotiations as a prerequisite for jurisdiction.

\textsuperscript{61} The Court does not find that Nicaragua “was responsible for any flow of arms” and it also concludes that “the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale . . . .” Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986 I.C.J. 14, 76 (June 27, 1986).

\textsuperscript{62} \textit{Id.} at 105.
enable an independent investigation in the region. This initial failure is particularly disappointing given the requirement in Article 53 of the Statute of the Court that “[w]henever one of the parties does not appear . . . [t]he Court must . . . satisfy itself, not only that it has jurisdiction . . . but also that the claim is well founded in fact and law.”

Second, the Court simply accepted the Sandinistas’ narrative to the Court that any involvement they had with the insurgency in El Salvador was, at most, simply a modest transfer of weapons and some logistical support at some time in the past to what was simply one faction in a “civil war” in El Salvador. As the affidavit to the Court of Miguel d’Escoto Brockman, the Foreign Minister of Nicaragua, illustrates, Nicaragua sought to have the Court believe that the issue is merely one of the Sandinista Government “engaged . . . in provision of arms or other supplies to either of the factions engaged in a civil war in El Salvador.” This narrative cleverly seeks to distract attention from the broad range of support for the armed insurgency in El Salvador and to characterize it as simply about “arms and supplies” and “factions . . . engaged in a civil war in El Salvador” rather than the reality of an armed aggression against El Salvador. Interestingly, the Court also gave a title to the case which narrowly reflected the Sandinista argument “Case Concerning Military and Paramilitary Activities in and Against Nicaragua,” not, for example, Case Concerning Military and Paramilitary Activities in Central America,” which, at least, would have picked up El Salvador and neighboring Central American states subject to the Sandinista aggression.

Third, the Court ignored the abundant evidence available at the time, of which it could have taken judicial notice, of the armed aggression from the Sandinistas against neighboring states. Indeed, the contemporaneous book that I put together about the Sandinista assault on world order, containing a substantial compilation of information about the armed aggression, was compiled completely from open sources available to the Court. Fourth, the Court defined “armed attack” so narrowly as to preclude a lawful defensive response to secret war” aggression when it concluded that “armed attack” does not include “assistance to rebels in the form of the provision of weapons or logistical or other support.” Interestingly, while the Court says that it is applying customary international law, as opposed to the Charter, it focuses on the “armed attack” language set out in Article 51 of the Charter rather than focusing on what has certainly been regarded as the core test of illegal use of force in the history of international law, that of “aggression.” Perhaps the Court chose this route because there is such a visible and available basis for defense against “indirect aggression.” As Judge Schwebel noted in his dissent which shredded the majority opinion on both legal and factual grounds: “[i]n short the Court appears to offer – quite gratuitously – a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of

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63 Article 53, Statute of the International Court of Justice (emphasis added).
64 This absence of a more complete and balanced factual review caused other factual problems for the Court as well. These included failure of the Court to note the notice actually given of the small-scale mining of the harbors of Nicaragua, including ignoring the uncontroverted evidence to this effect before the Court from multiple sources. See John Norton Moore, The Nicaragua Case and the Deterioration of World Order, 81 Am. J. Int’l L. 151, 153-54 (1987).
65 The even more bland, but clearly neutral, title suggested to the Court by the United States was Case Concerning an Application of Nicaragua Against the United States of America.
survival.\textsuperscript{68} The implications of the Court’s narrowing of the definition of aggression sufficient to justify a lawful defensive response in the secret warfare spectrum is, precisely as Judge Schwebel noted, effectively to remove the right of defense against secret warfare or “indirect aggression,” thus encouraging this particularly dangerous form of aggression and undermining the Charter structure. Judge Greenwood is correct when he notes in his analysis of the use of force decisions of the ICJ that any distinction between armed attacks and other “less grave” uses of force has “no basis in state practice.”\textsuperscript{69}

Finally, as to the Court’s announced new rule, nowhere found in the text of the Charter or previous customary international law of use of force, that “... there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to have been attacked,” this “rule” is of dubious legal ancestry and, even more egregiously, is not factually accurate as applied to El Salvador. First, the portion of the rule requiring a “request” from the attacked State is arguably not consistent with language in existing collective security agreements, such as the Rio Treaty applicable to the United States and El Salvador, which declare that aggression against one is aggression against all.\textsuperscript{70} Further, there may be defensive responses which for political reasons would be better handled without public “request” for assistance. In addition, this asserted “rule” has subsequently been used by the Court in the Iran Platforms Case to simply narrow the context of aggression and exclude all of the Iranian attacks against ships of thirty other nations and to focus instead only on attacks against ships of the United States, thus hugely distorting the true nature of the Iranian aggression against neutral shipping in the Gulf. And, of course, there is nothing in the text of Article 51 of the Charter which imposes such a “rule.” Surely the real rule here is that, in fact, a government must have requested assistance in collective defense against attack, or the states concerned were in a collective security agreement manifesting prior agreement that an attack against one is an attack against all. One contemporary example is the invocation of the NATO Treaty by America’s NATO partners in the aftermath of the 9/11 attacks against the United States – an invocation of collective assistance immediately made by other NATO members absent any “request” from the United States. The second part of this new “rule” announced by the Court in the Nicaragua Case that “the State in question should have declared itself to have been attacked,” is also constructed out of whole cloth. There is no such textual requirement in Article 51 or elsewhere in the Charter, nor in customary international law. And once again, particularly in responding to covert “secret warfare” attacks, there may be valid political reasons why a state does not want to declare itself attacked and would prefer a lower key covert response. With respect to the neglect in the Nicaragua Case of the factual predicate of this asserted “rule,” it simply does not apply, as a rudimentary factual inquiry would have revealed. For the Government of El Salvador was working in collective defense with the United States against the

\textsuperscript{68} Id. at 340 (dissenting opinion of Judge Schwebel).
\textsuperscript{69} Christopher Greenwood, The International Court of Justice and the Use of Force, in Fifty Years of The International Court of Justice: Essays in Honour of Sir Robert Jennings 373, 380-81 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).
\textsuperscript{70} The Court skips over this language of the Rio Treaty to instead rely on other language in the Rio Treaty which says “[o]n the request of the State or States directly attacked ....” It then writes this language broadly into the customary law of the use of force even though under the Court’s jurisdictional posture it cannot directly apply the Rio Treaty. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 105-06 (June 27, 1986).
Sandinista aggression, El Salvador had declared itself attacked, and it had requested United States assistance in response. Moreover, under Article 3 of the Rio Treaty, applicable to the defense relationship between the United States and El Salvador, the attack against El Salvador created a legal obligation for the United States to assist against the attack. Further, the Rio Treaty provides that an attack against El Salvador was to be treated as though it were an attack against the United States itself. Most egregiously, however, the Court simply seeks to explain away as being unsure of applicable dates the clear statements to the Court of both the United States and El Salvador (contained respectively in the U.S. jurisdictional stage Counter-Memorial and El Salvador's Declaration of Intervention) that El Salvador had been attacked and had requested United States assistance in collective defense. 71 If the Court had lingering doubts about either of these factual predicates, or dates of request, one would have thought perhaps a letter addressed to El Salvador asking if it felt that it had been attacked and had asked the United States to work with it in collective defense in response, might have been appropriate. But there was no such letter forthcoming from the Court. 72

In many other ways, as well, the decision of the majority in the Nicaragua Case shows inadequate understanding of the requirements of effective war fighting against covert attack. For example, the Court seems to suggest that El Salvador could have been adequately defended simply by El Salvador and the United States “put[ting] an end to the traffic [in arms and ammunition] . . .” 73 presumably not then needing to respond against the territory of the attacking state. But this is a classic “minimalist” argument in interpreting the Charter; that is curtailing the right of defense against the attacking state in settings of “indirect aggression” simply to the territory of the attacked state or against infiltration routes. The result of such a disastrous rule would be to encourage secret warfare and to make such warfare nearly impossible to defeat. The Court simply does not seem to understand the difficulty in obtaining adequate intelligence and effectively combating a covert attack by a response limited to the territory of the attacked state or limited to efforts to curtail infiltration. 74

Of particular note, the decision of the Court in the Nicaragua Case failed to condemn, even in passing, the clearly illegal attacks from Nicaragua against neighboring states. The Court specifically found “that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up until the early months of 1981.” At minimum, in view of this finding one

71 Id. at 87-88.
72 Whatever the status of this rule today, in the aftermath of the Nicaragua decision it would be better practice to obtain a public written request setting out the attack and request for collective assistance. This was done in relation to United States assistance to Kuwait in the Gulf War.
74 For many different views, pro and con, of the decision of the Court in the Nicaragua Case see the articles collected in the special section of the American Journal of International Law, Appraisals of the ICJ’s Decision: Nicaragua v. United States (Merits), 81 AM. J. INT’L L. 77 (1987), including an article by myself. I would agree with the observation of John Lawrence Hargrove in this collection of views on the decision when he says: “The most important single consequence of Nicaragua v. United States of America may well turn out to be its impact on the vitality of the law of the United Nations Charter governing force and self-defense. Will the case make it more likely, or less, that the law will become an increasingly effective working part of the international system? In this overridingly important respect, I am afraid the whole episode must be reckoned a misfortune of some magnitude.” John Lawrence Hargrove, The Nicaragua Judgment and the Future of the Law of Force and Self-Defense, 81 AM. J. INT’L L. 77, 135 (1987).
would have expected the Court to condemn this illegal support from Nicaragua. But the Court remains silent on the Sandinista’s covert aggression while condemning the defensive response.

The dissenting opinion of Judge Oda focuses primarily on issues of jurisdiction and admissibility and Judge Oda believes that based on these preliminary matters the Court should not have reached the merits. Judge Oda importantly takes on the Court for incomplete fact-finding. In this connection, he notes that “the materials available through official publications of the United States Government suggest completely opposite facts [than those found by the Court].” And he concludes on this point “[t]he Court should . . . have been wary of over-facile ‘satisfaction’ as to the facts, and perhaps should not have ventured to deliver a Judgment on the basis of such unreliable sources of evidence.”

Judge Oda also states that “if it was necessary for the Court to take up the concept of collective self-defense – and I do not agree that it was – this concept should have been more extensively probed by the Court in its first Judgment to broach the subject.” In this connection he notes an important textual point concerning the difference between the equally authentic English and French versions of Article 51 of the Charter. While the English version uses the apparently redundant language of “individual or collective self-defence” (emphasis added), the French version drops the “self” and simply says more clearly “au droit naturel de legitime defense, individuelle ou collective.” I have for years taught in my classes that the version of Article 51 which better captures the concept of defense as intended by the framers of the Charter was the French version, both in its appropriate use of “agression armee”, the basic concept used by international lawyers to denote illegal use of force, rather than the confusing English language version use of the new and undefined term “armed attack,” as well as the dropping of the unnecessary and confusing “self” before the reference to defense in the French version of the phrase “individual or collective defense.”

The dissenting opinion of Judge Sir Robert Jennings properly expresses “regret over the United States decision not to appear.” Judge Jennings then dissents with respect to the Court’s decision to decide the case on the basis of customary international law when the Court’s jurisdiction was excluded in application of the United Nations Charter. Among other points he makes in dissent here, he notes that the dispute itself concerned “the use of force, and collective self-defence” under the Nations Charter – as the governing law of the case. As such, the Court had no jurisdiction under the United States multilateral jurisdiction exception.

Although Judge Jennings does not fully address the question of what is an “armed attack” for purposes of the right of defense, he both makes the point that the Court ignores the equally

75 Dissenting Opinion of Judge Oda at 213-53.
76 Dissenting Opinion of Judge Oda at 240-45, quote from 241.
77 Dissenting Opinion of Judge Oda at 245.
78 Dissenting Opinion of Judge Oda at 258.
79 See Dissenting Opinion of Judge Oda at 256.
80 Dissenting Opinion of Judge Sir Robert Jennings at 518. Based on an erroneous assumption that no notice was given to international shipping of the small-scale mining of Nicaragua’s harbors Judge Jennings did conclude on this basis that the mine-laying was unlawful. Id. at 536. This erroneous factual assumption is both a cost of the United States failing to appear and inadequate fact-finding by the Court of a fact clearly publicly on the record (that multiple notices had been given to international shipping of the mining).
81 Dissenting Opinion of Sir Robert Jennings at 534.
82 Dissenting Opinion of Judge Sir Robert Jennings at 534.
authentic French text of Article 51 which speaks of “d’une aggression armée”, rather than “armed attack”, and he condemns the majority for going much too far in declaring that the provision of arms coupled with logistical or other support is not an armed attack. Clearly Judge Jennings would look to overall involvement in determining whether an armed attack/aggression has occurred. And he correctly notes a central policy weakness of the “minimalist” interpretation by the Court of when an armed attack/aggression has taken place justifying a right of defense. Thus, he writes:

[The Court’s “minimalist” interpretation] looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. . . . [I]t seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.

Judge Jennings also criticizes the majority’s new requirement for lawful collective defense that an attacked state must first have “declared” itself to have been attacked and then have made a formal request for assistance. He writes: “It may be doubted whether it is helpful to suggest that the attacked State must in some more or less formal way have “declared” itself the victim of an attack and then have, as an additional ‘requirement’, made a formal request to a particular third State for assistance.” In this connection he correctly points out, as ignored by the majority, that collective defense under a collective defense agreement in which the parties agree in advance that an attack against one is an attack against all is not simply “an idea of vicarious defence by champions . . . .” but rather is “an organized system of collective security by which the security of each member is made really and truly to have become involved with the security of the others, thus providing a true basis for a system of collective self-defense.” Obviously in settings with such genuine collective security provisions the parties themselves have already previously declared — indeed formally even in treaty form — that an attack against one is an attack against all.

On the facts, Judge Jennings nails the majority on one of its principal failings of playing into the hands of the Sandinista strategy in seeking to have the Court believe any involvement on their part in the insurgency in El Salvador was simply a prior small-scale arms transfer, if anything. Thus Judge Jennings writes: “I remain somewhat doubtful whether the Nicaraguan involvement with Salvadorian rebels has not involved some forms of ‘other support’ besides the possible provision, whether officially or unofficially, of weapons. There seems to have been perhaps overmuch concentration on the question of the supply, or transit, of arms; as if that were of itself crucial, which it is not.”

83 Dissenting Opinion of Judge Sir Robert Jennings at 543.
84 Dissenting Opinion of Judge Sir Robert Jennings at 544.
85 Dissenting Opinion of Judge Sir Robert Jennings at 544.
86 Dissenting Opinion of Judge Sir Robert Jennings at 545.
87 Dissenting Opinion of Judge Sir Robert Jennings at 545-46.
88 Dissenting Opinion of Judge Sir Robert Jennings at 544.
The dissenting opinion of Judge Schwebel is a classic. His 268 page opinion is certainly one of the most effective dissents ever written. It literally tears the majority opinion apart on both the facts and the law. Thus, Judge Schwebel begins with 25 pages of “Factual Premises” which powerfully reveal the Sandinista aggression against neighboring states and the United States defensive response. He concludes clearly and powerfully that Nicaragua was the aggressor and that the United States was acting lawfully in defense against Nicaragua. Anyone doubting the case for lawful defense should simply review this compendium of the facts compiled by Judge Schwebel and obviously available to the majority.

On the law Judge Schwebel also addresses a core deficiency of the majority; that is their “minimalist” interpretation of armed attack/aggression in settings, such as this, of secret warfare or “indirect aggression.” In this connection, Schwebel notes that the Court’s conclusion as to the scope of armed attack in settings of “indirect aggression” is simply inconsistent with the General Assembly’s Definition of Aggression, among other important sources of law. His analysis of the problem of “indirect aggression,” including the history of the General Assembly Definition of Aggression, is one of the most complete and brilliant to deal with the subject anywhere. He is clearly correct both as to the law and the pernicious policy consequences of a “minimalist” interpretation of “indirect aggression.” 89

Subsequent events have dramatically demonstrated the upside-down nature of the Nicaragua Case. Some of these subsequent events are summarized in a Postscript in Rosenne’s The World Court – What It Is and How It Works, as follows:

POSTSCRIPT

An explosion in a car repair shop in Managua, on 23 May 1993 led to the discovery of a weapons cache containing, among other things, a number of surface-to-air missiles, large quantities of ammunition and military weapons, and plastic and other explosives. Many documents were also found, including 300 passports of different nationalities. This was established as belonging to the Salvadoran guerillas, material assistance to whom had been denied before the Court by Nicaragua. As part of the agreements of 1987 and later for the establishment of a firm and lasting peace in Central America and particularly for the settlement of hostilities in El Salvador, the Salvadoran guerillas had undertaken to declare and surrender all these arms and war material to the United Nations Observer Mission in El Salvador (ONUSAL) for destruction. The cache, which had not been declared, both demonstrated the violation of the agreements by the Salvadoran guerillas and Nicaragua’s involvement in aiding and abetting them. This cannot be reconciled with statements made in Court on behalf of Nicaragua.

The revelations that followed this explosion led to a grave crisis of confidence between the Secretary-General of the United Nations and the Salvadorian guerillas, who later acknowledged their deception of the Secretary-

89 See Dissenting Opinion of Judge Schwebel at paras 154-182.
General and ONUSAL and apologized to the Secretary-General. This incident gave rise to prolonged correspondence duly reported to the Security Council, which adopted two resolutions on the matter.

To a very large extent these revelations brought to light a situation closely resembling that which had been described by the State Department in the brochure noted on p. 116, above, ["Revolution Beyond our Borders: Sandinista Intervention in Central America"] and confirmed facts elucidated by Judge Schwebel in his questioning from the Bench.

This is not the first time that an international tribunal has been misled by one of the parties in its appreciation of the facts. It remains to be seen how far these later revelations, following on an accidental explosion in Managua, will affect the different assessments that have been made of this case and its value as a precedent, especially where the unwilling respondent withdrew from further participation in the proceedings before the merits were reached.90

As for the Sandinista bringing of this action, and subsequent victory in Court, the case has become the preeminent example of upside down "lawfare;" that is, the legal system being used by an aggressor to restrict the effective right of defense. There has also been no accountability for the erroneous statement made to the Court in a sworn affidavit by Miguel d'Escoto Brockmann, the Foreign Minister of Nicaragua, that "my government... has not been engaged, in the provision of arms or other supplies..." to the FMLN insurgency in El Salvador. Subsequent discoveries demonstrate that FMLN insurgency held large quantities of arms in Nicaragua, a fact which the FMLN acknowledged in 1993, proving that Nicaragua lied about providing material support to the FMLN.91 Ultimately, when in 1990 the Sandinistas were unexpectedly defeated in elections, a new Government of Nicaragua then requested, on September 12, 1991, that the Court discontinue the proceedings in the case. On September 25, 1991, the United States informed the Court that it "welcomes the Nicaraguan request for discontinuance of the proceedings."92 Most importantly for the future, though the Sandinista

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92 Letter from the Legal Adviser of the U.S. Department of State to the Court, Sept. 25, 1991. It has been reported that despite Nicaragua's officially informing the Court that it renounced "all further right of action based on the case" that the now returned to office Ortega Government has considered a referendum in Nicaragua asking whether the new Government should again sue the United States in the International Court of Justice asking for twenty-seven billion dollars in reparations in implementation of the merits decision of the Court. Such a suit, of course, would contradict a specific statement made by Nicaragua to the Court. More importantly, should any such suit be brought the United States should take the occasion to present the now voluminous evidence as to the Sandinista fraud on the Court. Indeed, the United States should embrace any new engagement with the Court and should use any such opportunity to set the factual record straight and to demonstrate that the judgment is void as procured by a fraud on the Court. In any such contingency the United States should also consider a counter claim asking for triple reparations for the damage done to the United States — and to the Court — as a result of the egregious fraud on the Court perpetrated by Nicaraguan officials when they swore to the Court that their Government was not arming and assisting the aggression against El Salvador.
aggressors won in Court against the United States, the principal losers were the Court itself and the international legal system.\textsuperscript{93}

\textbf{The Iran Platforms Case}\textsuperscript{94}

As a stalemate dragged on in the Iran-Iraq War, begun by Iraq in 1980-81\textsuperscript{95}, Iran began clandestine mining of the international waterways in the Arabian/Persian Gulf in areas where neutral shipping of the world must transit for oil export from Kuwait, Saudi Arabia and the Gulf Emirates. Iran also began missile attacks against neutral shipping in the Gulf, sometimes using its offshore oil platforms in the Gulf as spotting and intelligence centers for such attacks. The motivation for these attacks by Iran on neutral shipping in the Gulf was apparently to drive up the cost of shipping (including insurance and added risk cost for crew) for nations friendly to Iraq during the Iran-Iraq War. It is estimated that during the course of the Iran-Iraq War from 1980-1987 Iran conducted more than 200 such attacks, with approximately 158 of these attacks against neutral shipping transiting international waterways in the Gulf. These attacks were against ships of 31 nations and resulted in 63 deaths. One summary of the serious physical damage to Gulf shipping from these attacks, quite apart from the tragic loss of life, was two ships sunk, totaling 40,000 gross tons and fifteen ships damaged as constructive total loss totaling 480,000 gross tons, for a total loss of 520,000 gross tons.\textsuperscript{96} The result was, of course, a massive interference with transportation of oil so vital for the world economy.

In response, the United States and the United Kingdom reflagged certain Kuwaiti tankers as American and British flag vessels and begin to provide naval escorts for the tankers. On October 16, 1987, the Kuwaiti tanker \textit{Sea Isle City}, reflagged as a United States vessel, was hit by an Iranian fired missile. Three days later, in response, the United States attacked several offshore Iranian oil platforms used for spotting attacks against neutral shipping. Subsequently, on April 14, 1988, the United States warship the \textit{Samuel B. Roberts} struck a mine in international

\textsuperscript{93} During the discussion of the \textit{Nicaragua} decision at the June 27, 2011, Hague Academy of International Law panel on the 25\textsuperscript{th} Anniversary of the decision supporters of the decision trumpeted the case as one of “truth to power,” urging that a smaller aggrieved state had taken on a super-power and won. Truth to power is an appealing slogan cutting to the nature of the rule of law and the judicial neutrality we all support. But to the contrary, the decision is the opposite of “truth to power,” both factually and legally. Factually, the principal risk from the Sandinista aggression was not to the United States but to its neighboring Central American states of El Salvador and Costa Rica. These states had far smaller armies than Nicaragua which, under the Sandinistas, was loading up with Warsaw Pact main battle tanks, Hind attack helicopters so prominent in the Soviet invasion of Afghanistan, and river-crossing amphibious tanks. Quite across the board the Sandinistas were engaged in an unprecedented military buildup for a Central American country. Indeed, Costa Rica, in comparison, had no army at all. And legally there is, of course, no principal of the Charter that gives small states the right to engage in aggression. Rather, this core normative principle applies to states, big and small. The reality, rather than “truth to power,” then, was that the Court was failing to condemn a serious and continuing armed aggression against neighboring smaller states from the Sandinistas, while condemning the collective defense response for the purpose of assisting the smaller victim states.

\textsuperscript{94} Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov 6).

\textsuperscript{95} The attack against Iran was likely Saddam Hussein's first aggression.

waters near Bahrain. Four days later the United States, in response, struck and destroyed two other Iranian offshore oil platforms used as spotting centers for attacks on neutral shipping. In both cases the United States provided prior warning to enable Iranians on the platforms to leave before the destruction of the platforms. The attacks were obviously and specifically in response to Iranian attacks against neutral shipping in the Gulf, including United States ships. Indeed, on October 19, the United States had promptly reported its defensive efforts against the ongoing Iranian attacks to the United Nations Security Council pursuant to Article 51. The United States report described the missile attack on the Sea Isle City as “the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce.” It went on to add: “[t]hese actions [by Iran] are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation.” With respect to the second attack on the Iran oil platforms the United States again reported to the Security Council. Its report on April 18, 1988 stated:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised their inherent right of self-defense under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf. The actions taken are necessary and proportionate to the threat posed by such hostile Iranian action.

At approximately 1010 Eastern Daylight Time on 14 April the USS Samuel B. Roberts was struck by a mine approximately 60 miles east of Bahrain, in international waters. Ten US sailors were injured, one seriously, and the ship was damaged. The mine which struck the Roberts was one of at least four mines laid in this area. The United States has subsequently identified the mines by type, and we have conclusive evidence that these mines were manufactured recently in Iran. The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels. This is but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf.

On balance, the United States response to such a serious ongoing threat, not only to US shipping interests, but to world shipping and the world economy, was constrained and was clearly both necessary (protecting essential interests in freedom of crucial oil shipments in one of the most economically vital international waterways on earth) and proportional (resulting in only modest destruction of targets being used by the Iranians to facilitate their attacks on neutral shipping in the Gulf).

98 Reporting to the Security Council under Article 51 of the Charter is of fundamental importance in informing the world of aggression and the determination to end the aggression through an exercise of the right of defense. It is one of the best “bully pulpits” available to detail the aggression, and to miss the opportunity is always a mistake. The United States got it right in the Iran attack on neutral shipping in the Gulf setting and wrong, in not reporting effectively, in the secret war in Central America.
Rather than end its illegal attacks on neutral shipping Iran instead launched “lawfare” against the United States and brought an action in the International Court of Justice under the 1955 Treaty of Amity between the United States and Iran complaining of the United States defensive response.\textsuperscript{100} The Court, remarkably, first hugely narrowed the issue to only a few attacks against United States shipping, effectively ignoring the massive pattern of Iranian attacks against neutral shipping. Never mind, either, the loss of 63 lives from these sustained Iranian attacks in the Gulf. The sleight of hand used by the Court here was simply taken from the creativity of the Court in the Nicaragua decision as the Court declares that since the United States has not been invited by other nations to defend their interests, the Court can only consider attacks against these US flag vessels and not the ongoing massive Iranian challenge to neutral shipping in the Gulf. The Court then dismissed the evidence of the Iranian mining and missile attacks against US shipping and concluded that even all of the United States evidence taken cumulatively does not “constitute an armed attack on the United States.”\textsuperscript{101} Of particular note, the Court used the open statements of the United States as to its defensive attacks as admissions against interest while Iran simply denied its missile and mine attacks to the Court and, as such, makes no admissions against interest. The Court even ignored the evidence showing that Iraq was caught red-handed in the act of laying mines in international waters in the vicinity of Bahrain’s deep-water shipping channel. It dismissed this evidence with the observation: “[t]here is no evidence that the mine laying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was aimed specifically at the United States; was laid with the specific intention of harming that ship, or other United States vessels.”\textsuperscript{102} Even were the Court correct in its factual analysis here that Iran had not intended attacks on United States shipping, the clear implication of the Court’s decision is that indiscriminate attacks against neutral shipping in an international waterway would not permit a right of defense.\textsuperscript{103} Judge Buergenthal in a separate opinion makes the obvious point that “the manner in which the Court analyses the evidence … is seriously flawed.”\textsuperscript{104} In this connection, Judge Buergenthal particularly notes that the evidentiary approach used by the Court focuses exclusively on whether the U.S. actions were narrowly in response to an armed attack on the United States and that this approach “… takes no account of the facts as they might reasonably have been assessed by the United States before it decided to act, given the context of the Iraq-Iran armed conflict and Iran’s consistent denial that it was not responsible for any military actions against neutral shipping.”\textsuperscript{105} Among numerous other deficiencies in the Court’s factual analyses, Judge Buergenthal criticizes the Court’s fact-finding with respect to whether the Sea Isle City was the victim of an attack by Iran and whether the USS Samuel B. Roberts struck a mine laid by Iran.\textsuperscript{106}

\textsuperscript{100} One can only speculate here as to the effect of the Nicaragua decision in encouraging an aggressor to take to the
Court against a defensive response.
\textsuperscript{102} Id.
\textsuperscript{103} Professor Michael Matheson has an excellent analysis of this point, as well as pointing out that “[i]n fact there
was ample evidence that both the mine and missile attacks were indeed designed to destroy or at least to threaten US
vessels.” Michael Matheson, “Resort to Force” at 9 (unpublished paper June 2011), to be published as Chapter 10 in
M. MATHESON, INTERNATIONAL CIVIL TRIBUNALS AND ARMED CONFLICT: LITIGATION ON STATE RESPONSIBILITY
FOR THE USE OF ARMED FORCE IN CONTEMPORARY CONFLICTS, Brill, forthcoming.
\textsuperscript{105} Id. at 286.
\textsuperscript{106} Id. at 287-88.
Finally, in addition to failing to find that the evidence supports any Iranian attacks on US shipping, the Court applies an overly cabined assessment of necessity and proportionality in the responsive attacks against the offshore Iranian oil platforms to condemn the United States defensive response. The tests used have little reality in connection with military operations or the policy requirements of necessity and proportionality. Thus, the Court declares the first attack on the Iranian platforms as not meeting the test of “necessity” because “there is no evidence that the United States complained to Iran of the military activities of the platforms . . . [and] the United States forces attacked the R-4 platform as a ‘target of opportunity.’” But surely necessity is not measured by whether a belligerent has previously complained about a particular target, nor whether a target is the primary target of an attack mission or a secondary “target of opportunity.” This latter designation is simply a micro-level component of targeting rules of engagement for a particular mission and in no way suggests that a “target of opportunity” is not an necessary and appropriate target. The Court then goes on to declare the second attack on Iranian platforms as non-proportionate because the United States response destroyed several Iranian frigates and other naval vessels and aircraft in response “to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk . . . .” Narrowing proportionality even further, the Court declares that not even the part of the attack directed at the oil platforms alone “can be regarded, in the circumstances of this case, as a proportionate use of force in self-defense.” This is a classic failure to understand the purpose of the proportionality test which relates to force necessary promptly to end an armed attack and to achieve the lawful defensive objectives. Proportionality is emphatically not a test based on weighing targets damaged in an attack versus targets damaged in the defensive response. Nor is proportionality under jus ad bellum assessed in a micro-climate of tit-for-tat, but rather in relation to the response necessary promptly to end the aggressive attack.

The Israeli Wall Case\textsuperscript{108}

\textsuperscript{107} Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov 6). Id. at 198 (necessity) and 198-99 (proportionality). Having personally argued the “prudential admissibility” arguments to the Court in the jurisdictional phase of the Nicaragua Case I was intrigued that Iran sought to argue against the United States counter-claim in the Iran Platforms Case in part based on such an “admissibility” argument. Interestingly, in the Nicaragua case the Court failed to respond to my admissibility arguments, instead responding to the easier “mandatory admissibility” argument made to the Court by my distinguished co-counsel Professor Louis Sohn; responding as though this was the only admissibility argument made by the United States. Professor Sohn had argued that “admissibility” simply precluded the Court from considering use of force matters, as opposed to a variety of prudential reasons for the Court itself to decide not to exercise jurisdiction, as was the burden of my argument. One permanent effect of the arguments I made to the Court in the Nicaragua Case seems to have been to raise these “prudential admissibility” arguments to greater prominence in subsequent actions before the Court, by counsel and the Court itself. That is a slight consolation for my being ignored in the actual opinion of the Court in the Nicaragua Case. For the Iranian “prudential admissibility” arguments made to the Court in the Iran Platforms Case see Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 171 (Nov 6).

The Palestinian-Israeli conflict has been termed a struggle of “right against right.” One element of the conflict which is clearly wrong, however, is the continuing use of terrorism against Israel and the extremist refusal of some actors on the Palestinian side (and among their state supporters of terror attacks – particularly Iran) to deny the existence of Israel and to seek to destroy the State of Israel through use of force. This continuing support for terrorism has not only been an affront to the Charter but has also been an abomination for the Palestinian people who have been forced by this misguided strategy to endure suffering and privation for more than half a century. Elsewhere I have dealt at length with the detailed historic background of this dispute and I will not reexamine those issues here. Further, I will not here engage in a full analysis of the Israeli “wall,” but rather will limit the discussion solely to the preposterous announcement by the Court implicitly, but unmistakably, declaring that there is no right of defense against non-state actors.

In 2002, in response to an ongoing wave of terrorist attacks, Israel began construction of a 72-mile fence cordonning off the West Bank. Approximately ninety-four percent of this “wall” is chain-link fence, but certain urban areas include concrete barriers to preclude sniper fire. The United Nations General Assembly and the Court chose to refer to this combined feature as the Israeli “Wall.” From September 2002 to August 2003, in selected areas where the wall is now complete, 73 terror attacks were carried out, killing 293 Israelis and wounding 1,950 more. From August 2003 to August 2004, after the wall was completed, there were only 3 attacks in those same areas, with no deaths or injuries. More broadly, the Israeli Ministry of Foreign Affairs reports that in the three years preceding the construction of the fence (2001-2003) 6,065 people were killed or wounded. In the three years following the construction that number had declined to 1,985, an over 67% reduction in casualties. Despite considerable controversy about the precise path of the wall, a controversy also played out before Israeli domestic courts, the wall was clearly rooted in the right of defense against these ongoing terror attacks. Indeed, the terror attacks against Israel are no small issue. Between 2001 and 2007 approximately 8,341 Israelis were killed or wounded in Palestinian terror attacks. Approximately 68% of these, or 5,676, were civilians. Putting this casualty count in relation to the population of Israel means that approximately 1 in every 780 Israelis were killed or wounded in Palestinian terror attacks between 2001 and 2007.

Although the United Nations General Assembly made no effort to stop the virtually continuous terror attacks against Israel prior to or subsequent to the construction of the wall, it sought an advisory opinion from the International Court of Justice as to the legality of the wall. Clearly revealing the tilt of the General Assembly in the Palestinian-Israeli dispute generally, the Resolution requesting the advisory opinion repeatedly condemns Israel and expresses “grave

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114 The contemporary unambiguous tilt of the United Nations General Assembly against Israel in the Palestinian-Israeli conflict is itself an affront to the Charter and, sadly, hopelessly removes the United Nations from its mandated role in contributing to resolution of this extremely serious and tragic ongoing conflict.
concern” “at the commencement and continuation of construction by Israel . . . of . . . [the] wall . . . .” 115 Not once does the Resolution address the continuous terror attacks directed against Israel which motivated the construction of the wall.

Clearly an important issue in construction of the wall is whether Israel has a right to construct the wall in defense against the ongoing terror attacks. But the Court evades this issue with an extraordinary slight-of-hand. After setting out the full text of Article 51 of the Charter the Court simply declares: “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign state.” 116 The Court then concludes: “Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.” 117 This, of course, is an implicit declaration that there is no right of defense against aggression perpetrated by non-state actors, which is palpably the reality of these attacks motivating the wall. Remarkably, the Court takes this position immediately after quoting verbatim the language of Article 51 of the Charter which patently has no such limitation. Equally remarkably, the Court cites no authority for this new restrictive reading of the Charter, nor seems to understand the stupendous implications of this new doctrine in a world where terrorism from non-state actors is widely viewed as the core threat to world order. Nor does the Court reflect that such a pronouncement has no chance of international acceptance by victims of terror attacks and that it is squarely at odds with a pattern of Security Council Resolutions in response to the 9/11 attacks. 118 The Court also simply ducks the issue of whether these non-state actors attacking Israel are covertly assisted by certain state actors in their ongoing terror attacks, particularly Syria and Iran.

The Congo Case 119

The Congo Case involved a history of alleged irregular rebel attacks against Uganda from the territory of the Democratic Republic of the Congo and responses from Uganda on the territory of the Congo. In this setting, the Court excused certain actions of Uganda said to be pursuant to an agreement with the Congo but held Uganda responsible for certain other of its responses which the Court believed went beyond consent and where the Court was unable to find that the Congo was directly or indirectly involved in the irregular attacks. The Court is certainly correct in the Congo decision that consent by a sovereign state is a valid basis for lawful use of force under jus ad bellum. It is also surely correct in the implication of its analysis that attacks by armed bands or irregulars directly or indirectly supported by a state gives rise to a right of defense against that state. Unfortunately, however, the Court leaves open whether there is any right of defense against attacks from rebel groups operating from the territory of a third state where the third state is not directly or indirectly involved with the attacks. Thus, the Court says:

117 Id. at 194
The Court has found... that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC.... This Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.\textsuperscript{120}

Now if the implication here is simply that it is illegal to target the third state itself, when that state is not involved with insurgent attacks from its territory and is unable to end those attacks, this would seem an appropriate response. But if the implication here more broadly is that there is no right of response on the territory of the third state against rebel groups operating from the territory of that state then the Court is seriously limiting the right of defence under the Charter.\textsuperscript{121}

VI

THE TROUBLING LEGAL CRAFTSMANSHIP
OF THE COURT IN ITS \textit{JUS AD BELLUM} DECISIONS

One of the basic principles of international law; a rule central to the functioning of the International Court of Justice and, more broadly, to that of the international legal system itself, is that unless the parties agree to a decision \textit{ex aequo et bono}, the Court “is to decide in accordance with international law.”\textsuperscript{122} In this connection, Article 38 of the Statute of the Court provides specifically that the Court “shall apply,” as sources of international law:

- “international conventions... establishing rules expressly recognized by the contesting states”;
- “international custom, as evidence of a general practice accepted as law”;
- “the general principles of law recognized by civilized nations”; and
- “... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”\textsuperscript{123}

International courts, and particularly the International Court of Justice, composed of some of the top international law jurists in the world, typically do an excellent job in understanding and applying the law, as rooted in the sources specified in Article 38 of the Statute. But inexplicably


\textsuperscript{121} There is an excellent discussion of this issue in the \textit{Congo} decision by Michael Matheson. \textit{See} Michael Matheson, “Resort to Force” (unpublished paper June 2011), at 14-15, to be published as Chapter 10 in M. MATHESON, \textit{INTERNATIONAL CIVIL TRIBUNALS AND ARMED CONFLICT: LITIGATION ON STATE RESPONSIBILITY FOR THE USE OF ARMED FORCE IN CONTEMPORARY CONFLICTS}, Brill, forthcoming. Professor Matheson, who is one of the top experts in the United States on use of force law, also faults the Court in the \textit{Congo} decision for not providing a “very coherent explanation of its understanding of the requirement of proportionality.” \textit{Id.} at 24.

\textsuperscript{122} \textit{See}, e.g., articles 38(1) and 38(2) of the Statute of the International Court of Justice.

\textsuperscript{123} Article 38(1) of the Statute of the International Court of Justice.
the legal craftsmanship of the International Court of Justice has been lacking in *jus ad bellum* decisions.

In contrast, for example, with the careful application of the interpretive provisions of the 1969 Vienna Convention on the Law of Treaties\textsuperscript{124} by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its recent advisory opinion on obligations of sponsoring states with respect to activities in the area,\textsuperscript{125} the stretched ICJ *jus ad bellum* decisions have not been rooted in careful analysis of the text of the governing Charter provisions nor in analysis of the *travaux* of the Charter. There is simply no indication from the real world, either in the text of the Charter or its *travaux*, that governing Charter principles reflect as rules “expressly recognized by the contesting states” any of the following “rules” explicitly or implicitly applied by the Court in its *jus ad bellum* decisions, including:

- That the right of defense does not include the right to sweep mines clandestinely emplaced in an international waterway and targeting neutral shipping (implicit in the *Corfu Channel* decision);
- That there is no right of individual and collective defense against ongoing “less grave” aggression or “indirect aggression” (the *Nicaragua* decision) (also, of course, factually incorrect as an assumption about the seriousness of the multi-faceted covert Sandinista attack against neighboring states);
- That there is no right of individual and collective defense against indiscriminate attacks (implicit in the *Iran Platforms* decision) (also, of course, factually incorrect as an assumption about the attacks not knowingly directed against United States shipping in the Persian Gulf);
- That there is no right of individual and collective defense against attacks from non-state actors (the *Israeli Wall* decision);
- That there is no right of individual and collective defense against insurgent or rebel attacks from the territory of a third state where that third state is simply unwilling or unable to stop the attacks (implicit in the *Congo* decision);
- That there is no right of collective defense until an attacked state has first publicly declared itself to be attacked and has publicly requested assistance (the *Nicaragua* decision) (also, of course, factually incorrect as an assumption about the absence of declaration of an attack and request for assistance from El Salvador against the Sandinista attack);
- That the right of collective defense is not conterminous with the right of individual defense (implicit in the *Nicaragua* decision);
- That necessity in *jus ad bellum* law requires specific prior complaint about the role of a particular potential target of the defensive response (the *Iran Platforms* decision); and
- That proportionality in *jus ad bellum* law is a matter of weighing the damage done in an attack against the damage done in the defensive response (the *Iran Platforms* decision).

\textsuperscript{124} See articles 31-33 of the Vienna Convention on the Law of Treaties (the Vienna Convention).

\textsuperscript{125} “Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area” (interpretive discussion “in general” at paras 57-71).
Nothing in the United Nations Charter, the governing law of *jus ad bellum*, incorporates any of the above purported rules. Indeed, most are even inconsistent with the text of Article 51 of the Charter which expressly declares “no thing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . .”. Further, in no case in which the Court has explicitly or implicitly adopted any of the above rules has it even made an attempt to demonstrate that the rule was an agreed limitation of the pre-charter “inherent right” of defense necessary to comply with this Article 51 requirement. The policy implications of each of these “minimalist” rules is also to effectively undermine the crucial Charter prohibition against aggression by undermining the right of effective defense against such aggression.

On a case by case basis the legal craftsmanship of ICJ *jus ad bellum* decisions is just as troubling. Thus, it is at least puzzling why the Court in the *Corfu Channel* decision did not regard an illegal use of force in the clandestine laying of mines in an international waterway as triggering the use of force norms of the Charter. Instead, the Court talked of other principles such as “elementary considerations of humanity” and “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” Indeed, to this day the *Corfu Channel* decision is routinely cited in international law classrooms as announcing a core principle concerning international environmental law rather than use of force law. No doubt the Court was thrown off here by the fact that the mines were laid in the territorial sea of Albania. This “territorial sea” focus, however, as an exclusive focus, is inconsistent with the Court’s own important parallel holding as to the rights of other nations to transit the strait as an international waterway. One could ask in this connection, would we analyze an aggressive shelling by Albania of neutral shipping going through the strait as simply violating “elementary considerations of humanity,” or Albania “not allowing its territory to be used for acts contrary to the rights of other States,” or would we regard such a setting more appropriately as aggression in violation of the Charter? And how would we analyze the right of neutral shipping through the strait responding to shore batteries with counter-battery fire? Is *Corfu Channel* not a classic setting of *jus ad bellum* as governing law, whether the illegal aggression is through covert mining or shelling by shore batteries?

If *Corfu Channel* is puzzling, the *Nicaragua* decision simply baldly sets aside normal international law craftsmanship. Initially, the Court deals with its jurisdictional inability to apply the United Nations Charter by simply applying customary international law of *jus ad bellum* which it declares to be identical with those of the Charter. But it is hombook international law that the Charter will prevail over any inconsistent customary international law. Indeed, Article 103 of the Charter embodies a legal obligation that the Charter will prevail over any inconsistent international agreement.\(^{126}\) How then can the Court apply customary international law of *jus ad bellum* without simultaneously interpreting the United Nations Charter, which would prevail over the customary international law rule if there were any inconsistency? The Court also fails to consider important applicable regional agreements such as the Rio Treaty, which because of the jurisdictional posture of the case the Court cannot consider, but which also would prevail over any inconsistent customary international law. Clearly if a Court cannot apply governing international law it cannot properly decide a case. Yet the Court proceeds to do just that. On this point the Dissenting Opinion of Judge Sir Robert Jennings nails the majority opinion. Judge Jennings writes:

\(^{126}\) Article 103 of the Charter of the United Nations.
Article 38 of the Court’s own Statute requires it first to apply “international conventions”, “general” as well as “particular” ones, “establishing rules expressly recognized by the contesting States”; and the relevant provisions of the Charter — and indeed also of the Charter of the Organization of American States, and of the Rio Treaty — have at all material times been principal elements of the applicable law governing the conduct, rights and obligations of the Parties. It seems, therefore, eccentric, if not perverse, to attempt to determine the central issues of the present case, after having first abstracted these principal elements of the law applicable to the case, and which still obligate both the parties.\(^{127}\)

He further notes: “[t]here is no escaping the fact that this is a decision of a dispute arising under Article 51.”\(^{128}\)

Adding to its sleight-of-hand in setting aside governing treaty law the Nicaragua decision then largely ignores the substantial body of \textit{jus ad bellum} law supporting a right of defense against “indirect aggression,” that is covert secret aggression supported by a third state for the purpose of overthrowing a government. In this connection, the dissenting opinion by Judge Schwebel unmistakably and correctly sets out this traditional body of \textit{jus ad bellum} law. But the Court simply ignores this body of law despite its obvious relevance to the case.

Continuing its remarkable sleight-of-hand, the Court then seems to adopt a rule that there is no right of defense against ongoing less grave aggression (never mind for this purpose the factual inaccuracy of this characterization in the Nicaragua case). And the Court explicitly announces a new double-barreled \textit{jus ad bellum} rule that for lawful collective defense a requesting state must first publicly announce that it has been attacked and then publicly announce a request for assistance. The Court creates each of these rules out of whole cloth, citing their provenance neither in pre-Charter limitations on the “inherent” right of defense, any previous pattern of state practice or \textit{opinion juris}, any previous rules from any source “expressly recognized by the contesting states,” any “general principles of law recognized by civilized nations,” nor even “teachings of the most highly qualified publicists.” The Court thus both ignores the textual limitation apparent from the Charter Article 51 language of “[n]othing in the present Charter shall impair the inherent right” of defense, as well as the required basis of the new rules in a recognized source of international law. This creation of new \textit{jus ad bellum} rules, said to be rules of customary international law, is even more remarkable in that it is the United Nations Charter which is the governing international law of \textit{jus ad bellum} and the Court jurisdictionally cannot even consider the Charter. How then can it announce new governing rules of \textit{jus ad bellum} even if such rules were consistent with the Article 38 function of the Court? Could it not do so only if these rules were part of the Charter \textit{jus ad bellum} framework which it is jurisdictionally precluded from examining?

Turning to the \textit{Iran Platforms} decision, in its insistence that the evidence show a specific Iranian intent to harm United States shipping, the Court implicitly embraces a rule that there is no right of defense against indiscriminate mining of an international waterway. Although this purported \textit{jus ad bellum} “rule” is a key element in the decision of the Court, once again the Court announces no treaty basis for this new rule, nor any pattern of state practice demonstrating

\(^{127}\) Dissenting Opinion of Judge Sir Robert Jennings at 533.  
\(^{128}\) Dissenting Opinion of Judge Sir Robert Jennings at 535.
implicit state agreement for such a rule, nor any other “source” for such a rule. Nor does the Court seem to notice that its earlier Corfu Channel decision had not required a “specific intent” on the part of Albania that the mines be targeted at British ships.

Compounding its “minimalist” law making with respect to jus ad bellum law, the Court in Iranian Platforms goes on to apply concepts of necessity and proportionality rooted neither in treaty law, state practice nor the teachings of “the most highly qualified publicists. Thus, there is no precedent, nor any “source” of international law, cited by the Court for its assumption that “necessity” requires prior notification concerning the role of a specific defensive target, or that “proportionality” means equivalence between the aggressive attack and the defensive response. Moreover, in both respects the “rule” implicitly applied is simply not previously accepted jus ad bellum law and the widely accepted meanings of both “necessity” and “proportionality” are quite different.129

Perhaps the most shocking failure of legal craftsmanship is in the Israeli Wall decision. For there the Court avoids the essential review of Israel’s right to construct the “wall” rooted in a right of defense against ongoing terrorist attacks by simply stating that “Israel does not claim that the attacks against it are imputable to a foreign state.” The relevance of this statement, in turn, comes from the preceding statement by the Court that “Article 51 of the Charter which, in fact, says nothing whatsoever about an attack “by one State against another State.” Thus, shockingly, here in its “minimalist” quest the Court actually writes in language limiting the text of the Charter itself. Nor does the Court cite any “source” for its implicit rule, nor apparently understand the perverse policy consequences which would follow from such a rule eliminating the right of defense against aggression whenever that aggression is from non-state-sponsored actors.

Further, in its Congo decision the Court disregards, as a possible right of defense by Uganda, that Uganda might have a right of defense against insurgent attacks from territory of the Congo in a setting where the Congo is not involved with the attacks and thus that the attacks would not be attributable to the Congo. Once again, however, the Court neither spells out the jus ad bellum “rule” it is implicitly adopting nor cites any authority for such a rule. Clearly, one of the core problems of implicit assumptions as to jus ad bellum rules is that the Court then never provides any legal basis for the rule. As with the other “minimalist” rules generated by the Court, in fact there seems to be no such basis in the law of the Charter for this rule.

Finally, with the exception of the Corfu Channel Case, where the Court does employ a Committee of Experts of three naval officers drawn from neutral countries to carefully develop the facts for the Court – with an opportunity for the parties to comment – the fact-finding in these jus ad bellum decisions is woefully inadequate. Particularly is this true in the Nicaragua and Iranian Platforms Cases. Surely fact-finding is always of critical importance, and even more so when considering vital use of force decisions.

130 Emphasis added.
VII

ANALYSIS & CONCLUSION

It is more than disappointing, given the origin of the International Court of Justice as a bulwark against war, to find that the Court has undermined the Charter structure against aggression, particularly in the spectrum of terrorism and covert warfare. But sadly that is the reality. Of five principal use of force decisions the Court has twice condemned responsive measures to keep international straits open against illegal covert efforts to mine the straits, it has condemned a defensive response against a full-scale secret warfare attack against neighboring states without condemning the aggressor even in passing, it has waffled as to the right of defense against ongoing attacks from the territory of a third state, and it has preposterously denied the quite obvious, and indispensable, Charter right of defensive response against non-state terrorist attacks. In each case, it has done so without even the slightest basis in the Charter. There is an Annex appended to this paper which summarizes this sad reality, including whether the aggressor or defender filed the action in the Court, whether the aggressor or defender or both were sanctioned by the Court, whether the aggression was denied and the defense admitted, and whether the Court struggled in finding the facts.

Though hardly a valid excuse, the condemnation against two permanent members of the Security Council and Israel might, in part, represent simply a political skew of some of the Judges against major powers and Israel. Likely, however, a core reason for these inverted-use-of-force-decisions is that a majority of the international lawyers on the Court have embraced a “minimalist” interpretation of the Charter; an interpretation mistakenly of the belief that the road to peace is to sanction all use of force. Of critical importance for controlling war and deterring aggression, the actions of the International Court of Justice in these use of force cases have largely ignored the aggressors while sanctioning the defensive response and narrowing the right of defense.\textsuperscript{131} The net effect is to undermine the Charter legal norms against aggression so critical to international cooperation. Tragically, a Court created to stand against aggression has instead through controversial and inverted use of force decisions undermined normative deterrence against aggression. Simultaneously, since victims of aggression will simply not mutely accept aggressive attacks the Court has also undermined its own authority and effectiveness.

So what is the way forward?

First, given the importance of the International Court of Justice it is imperative that the Court begin to sanction aggression rigorously through every part of the aggression continuum, and particularly secret aggression, including “indirect aggression” and terrorism. Simultaneously, and of equal importance, the Court needs to support the right of individual and collective defense against aggression. A deterrent effect of the legal system against aggression depends substantially on the legal system maintaining a robust distinction between aggression

\textsuperscript{131} It is striking also that the Court has rejected a “clean hands” argument in these cases even as a second non-defense ground. For example, in the Iran Platforms Case the Court rejects Iran’s covert mining of a major international waterway as making a difference even under a clean hands “justice and fairness” argument.
(condemned) and defense (supported). The recent inversion of this requisite by the Court, particularly with the Nicaragua and Iran Platform decisions, is disgraceful. These decisions have encouraged covert aggression and cynical "lawfare" by the aggressors, and have harmed the important institutions of the Court and international law itself.

Specifically, the Court should in the future unequivocally support the following as *jus ad bellum* law under the Charter:\(^{132}\):

- **There is a right of individual and collective defense against any continuing aggression, whether large scale or "less grave," and whether overt invasion, covert secret warfare ("indirect aggression"), or terrorism.** Conversely, there is no loss of the right of defense against continuing illegal aggression based on whether the illegal use of force is overt or covert or whether it is large scale or small scale. In each case the limiting factor is simply the principle of proportionality, meaning a level of responsive force necessary to promptly end the illegal use of force. As Michael Matheson has observed, proportionality here includes a defensive response "adequate to protect ... from further attack, including the destruction or neutralization of the forces or infrastructure that the attacking state is using to conduct or facilitate the attacks."\(^{133}\) The only exception to this general standard, as an application of the principle of necessity, would be an isolated (not part of an ongoing pattern) and minor use of force not threatening major values and in which other non-forceful remedies are available. The core point here is that the Charter does not limit the right of defense to open, as opposed to clandestine, aggression nor large scale, as opposed to small scale or "less grave" aggression. To maintain that the Charter is so limited both contradicts the plain language of the Charter and effectively licenses clandestine attack and/or lesser uses of force. Thus, a continuing pattern of terrorist attacks is aggression generating a right of individual and collective defense in response;

- **When illegal military assistance to an armed insurgent group justifies a defensive response against the assisting entity is contextually determined based on the seriousness of the threat to major values and the overall involvement of the assisting entity.** Such a determination is more appropriately thought of as a determination concerning "necessity," rather than some threshold of "armed attack." Michael Matheson has observed in relation to such illegal assistance that:

  ... the law should not preclude the possibility of forcible measures against a state that deliberately provides any form of significant support to an armed group that may be expected to be used for military operations against another state, even if it does not direct those operations. This might include providing the group with arms, logistic support, intelligence or training for the purpose of supporting such operations, or permitting the group to operate from the supporting state's territory." Certainly, full-scale, multi-dimensional secret warfare, as

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\(^{132}\) This discussion of lawful use of force under the United Nations Charter has benefited from the excellent forthcoming article by Professor Michael Matheson, "Resort to Force" (June 2011)(to be published as Chapter 10 in M. MATHESON, INTERNATIONAL CIVIL TRIBUNALS AND ARMED CONFLICT: LITIGATION ON STATE RESPONSIBILITY FOR THE USE OF ARMED FORCE IN CONTEMPORARY CONFLICTS, Brill, forthcoming).

\(^{133}\) Mike Matheson, *supra*, at 8.
exemplified by the Sandinista assault on neighboring states in Central America, engenders a full right of individual and collective defense\textsuperscript{134};

- **The right of individual and collective defense applies as fully to indiscriminate attacks as to attacks aimed at a specific state or entity.** As such, the illegal mining of international waterways generates a right of defense, whether the mining is indiscriminate or aimed at a particular entity or entities. Illegal mining of international waterways, or attacks against neutral shipping in such waterways, generates a full right of defense, including the ability to sweep the mines and use force necessary to promptly end the illegal attacks against shipping. The right of defense under the Charter is not limited to discriminate as opposed to indiscriminate attacks.\textsuperscript{135} To maintain that the Charter is so limited both contradicts the plain language of the Charter and effectively licenses mining of international waterways or other indiscriminate attacks against neutral shipping;

- **There is a right of individual and collective defense against ongoing or continuing aggression from non-state actors.** The Charter makes no distinction limiting the right of defense, whether the aggression is from state actors or non-state actors. To assert such a limitation is to effectively license such attacks. Certainly in a post 9/11 world, and in a world with weapons of mass destruction, it is understood that aggression from non-state actors can be of enormous consequence;

- **There is a right of individual and collective defense against ongoing or continuing aggression from the territory of a third state if the third state is unwilling or unable to end the aggression.** Every state has the responsibility to prevent its territory from being used as a base for aggression against other states. If a state is unwilling or unable to carry out that responsibility there is a right of individual and collective defense on the part of the attacked state against the source of the aggression. The principles of necessity and proportionality, of course, apply as fully here as to any other defensive response. In particular, there should normally be a protest from the attacked state, and an effort to work with the third state if it is felt that they are not supporting the aggression, prior to the attacked state exercising its defensive response directly on the territory of the third state. If, of course, the state whose territory is being used for the irregular or rebel attacks is directly or indirectly involved in supporting those attacks then that state itself may be a lawful target of defense, as is implied in the Congo decision. But even if there is no such involvement, the right of defense may still be exercised against the rebels or irregulars themselves;

- **When there is a right of individual defense there is a corresponding right of collective defense.** There is no distinction between individual and collective defense. There is no textual basis for discrimination against collective defense in the Charter (indeed, Article 51 specifically refers to “individual” and “collective” defense) and to fail to fully support collective defense is to remove the protection accorded smaller states;

- **There is no requirement in the Charter that prior to the exercise of the right of individual and collective defense a state must first publicly declare itself to have been attacked and, in the case of collective defense, have first publicly declared a request for assistance.** While these actions, of course, are the better practice in most settings, there may be exceptional circumstances in which states may wish to respond covertly to a covert attack; for example, to lessen the risk of escalation. And certainly this “requirement”

\textsuperscript{134} Michael Matheson, supra, at 14.
\textsuperscript{135} See, e.g., Michael Matheson, supra, at 8-9.
should not be used to narrow an ongoing indiscriminate attack to a particular damaged target or to deny the right of individual or collective defense itself. Nor should it be applied to collective defense under a collective defense agreement where the parties pledge that an attack against one is an attack against all;

- **Indiscriminate mining of international waterways intentionally targeting neutral shipping is aggression generating a right of individual and collective defense in response.** Shipping is a crucial interest of the world community. Over 90% of world trade moves by ship, whether oil from the Persian Gulf or manufactured goods from China. As such, preservation of navigational freedom is a core economic and political interest. Moreover, the right of ships of all nations to move on international waterways is a right belonging to those nations and is of as much value to them as their warships and physical assets. Intentional targeting\textsuperscript{136} of neutral shipping in international waterways is aggression and generates a full right of individual and collective defense; and

- **There is a right of anticipatory defense in settings of imminent threat.** The Charter was not intended to end the right of anticipatory defense against imminent threats and it has not done so. Imminence of threat relates primarily to immediacy of the threat but it also may take account of seriousness of the threat. As such, threats rooted in high risk of use of weapons of mass destruction, particularly nuclear weapons, may qualify as imminent on a lower showing of immediacy. “Preemption,” however, as a doctrine announced by the George W. Bush Administration, and which seems not to have been rooted in imminence of the threat, is not a basis for lawful use of force.\textsuperscript{137}

Second, the Court needs to endorse a realistic concept of necessity and proportionality in relation to *jus ad bellum* issues. The overly restrictive application of necessity and proportionality in the Iran Platforms decision is shockingly ill-informed about the legal content and purposes of these important principles.

*Necessity and proportionality related to jus ad bellum mean respectively a limitation of the use of force except in protection of major values (that is excluding a right of military response against minor non-ongoing and isolated events or insignificant actions), and a limitation on responding coercion in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of defense. Necessity in *jus ad bellum* is not a matter of whether a particular lawful target has been the subject of a complaint to the target state, or whether under rules of engagement a target is a primary or secondary target or a target of opportunity. Necessity in *jus ad bellum*, rather, refers to a macro-assessment of the overall context justifying the use of responsive force and is focused on whether the aggression was sufficiently serious as to justify a military response. Similarly, proportionality in *jus ad bellum* is not a matter of whether the responsive use of force is limited in scope and intensity to that of the attack, or whether the damage from the responsive use of force exceeds that from the attack. Rather, it is a macro-assessment of the overall context as to whether the defensive response as a

\textsuperscript{136} “Intentional” here is used in the usual definition of a consequence either desired, or adverted to as a likely occurrence. Thus, mining of an international waterway with the purpose of harming the ships of an opposing belligerent is nevertheless aggression against neutral shipping if the waterway is also used by neutral shipping.

\textsuperscript{137} A new doctrine of “preemption,” not rooted in the standard of imminence of threat as is required for lawful anticipatory defense, needlessly pushes away potential coalition allies, undermines norms against unlawful use of force, and reverses incentives in ways which risk encouraging preemptive attack from states threatened with preemption or even their acquisition of nuclear weapons as a deterrent against such preemption.
whole is reasonably necessary promptly to secure the permissible objectives of defense. As Judge Ago put it:

The requirement of proportionality of the action taken in self-defense . . . concerns the relationship between that action and its purpose, namely . . . that of halting and repelling the attack . . . . It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself.\textsuperscript{138}

Reasonableness in this context is also a matter of reasonable judgment from facts known to the defender at the time and, given an ongoing aggression, the defense should have reasonable latitude in this judgment. The burden of uncertainty here should be borne by the attacker, not the defender, lest proportionality undermine the right of effective defense. Necessity and proportionality in relation to \textit{jus in bello}, of course, do have a more particularized locus in application of the principles of military necessity (relevance and importance to the military objective), discrimination, and avoidance of unnecessary suffering.

Third, the Court needs to more fully utilize its fact gathering and assessment tools. Its failure to appropriately find the facts in the \textit{Nicaragua} and \textit{Iran Platform} Cases was especially bankrupt. The Court has powerful tools, as set out in its Statute, for finding the facts. It should use them. Thus, under Article 49 of the Statute it can "call upon the agents to produce any document or to supply any explanations. . . . [and it can take] [f]ormal note . . . of any refusal." Under Article 50 of the Statute "[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." And under Article 51 it can ask "relevant questions" of witnesses and experts.\textsuperscript{139} Similarly, the Court should be more receptive to permitting victims of aggression to intervene and make presentations to the Court. The decision of the Court in the Nicaragua case to turn down the effort by El Salvador to intervene, and then to make a variety of \textit{ex cathedra} pronouncements about El Salvador, such as that it had never declared itself under attack or invited the United States to assist in its defense, just will not do.\textsuperscript{140} Further, the Court


The \textit{San Remo Manual} on . . . \textit{Armed Conflicts at Sea}, prepared under ICRC auspices, says of a combined requirement of necessity and proportionality that: "[t]he principles of necessity and proportionality . . . require that the conduct of hostilities by a State should not exceed the degree and kind of force . . . required to repel an armed attack against it and to restore its security." \textit{San Remo Manual on International Law Applicable to Armed Conflicts at Sea}, 12 June 1994, at para 4.

\textsuperscript{139} The questioning of Nicaragua's witnesses in the Nicaragua case by Judge Schwebel is an all too rare example of effective use of the Article 51 authority of the Court.

\textsuperscript{140} This is, of course, emphatically not an argument to excuse concerned parties from making a robust case before the Court. Certainly one of the complicating factors in fact determination for the Court in the \textit{Nicaragua} decision is that the United States gave Nicaragua a free ride by withdrawing before the merits phase of the case. I have always
should reexamine its doctrine with respect to "burden of proof" and evidence necessary to reach judgment in these cases.

Finally, in relation to finding the facts in contentious use of force cases the Court should end its practice, at least in the absence of other appropriate fact-finding, of accepting at full value admissions against interest by the parties while discounting other statements by the parties. For in covert aggression settings this means that the Court will simply accept the admissions of the defenders that they are using force while finding no admissions from those engaged in secret warfare, covert mining, or other clandestine aggression. The resulting skew turns the factual setting on its head. Particularly in secret warfare settings where the aggressor is hiding its actions but the defender is openly admitting its defensive response it is not appropriate to simply accept the statements of the defender as to its defensive actions as "statements against interest" while simultaneously ignoring the defender's statements as to the secret warfare attack to which it is responding. If there is doubt as to whether a secret warfare attack has taken place then the Court might consider appointing a special master to examine the question or adopt some other appropriate procedure enabling more complete fact finding. In this connection, perhaps also the Court needs to consider some form of sanctions for lying to the Court. Respect for the Court and its proceedings can only suffer if there is no cost for official lying in presentations to the Court.

A good reminder of the reality that the aggressors will simply lie about their attacks, and seek to make them invisible, is the statement of Hashemi Rafsanjani as then Chair of the Iranian Parliament, who was quoted as saying in relation to the attacks on neutral shipping in the Gulf: "[i]f our ships are hit, the ships of Iraq's partners' will be hit. Of course, we will not claim responsibility for anything, for it is an invisible shot that is being fired." 141

Professor Matheson, in his new forthcoming work, parts of which this presentation has generously drawn upon, has a chapter entitled "Determining the Facts on the Merits" which examines at length fact finding by tribunals in settings of ongoing hostilities. His analysis presents an excellent overview of the fact finding difficulties for international tribunals in these jus ad bellum cases. It also makes some excellent suggestions concerning burden of proof and best practices for such fact finding. I commend it to the reader interested in a more thorough analysis of the fact finding issues and reform of international tribunal fact finding practices. 142

None of the above, of course, means that the Court should not also fully and vigorously apply jus in bello, as well, in use of force decisions. Jus in bello rules are parallel to the jus ad bellum rules discussed here and are also of great importance for international law. The Court should in application of these rules also ensure accuracy and appropriate balance so as not to undermine an effective right of defense by exaggerated jus in bello arguments.

The contemporary failure of the International Court of Justice to effectively apply Charter norms concerning jus ad bellum also suggests a more open and vocal role for foreign offices.

felt that the United States should not only have welcomed the case as a bully pulpit to set the facts of the Sandinistas' aggression before the world, but that we should have also sought the full panoply of attacked states to join us before the Court, including El Salvador, Costa Rica, Guatemala and Honduras. In such a setting the posture of the case, and likely outcome, would have been different.

141 Counter-Memorial of the United States, Oil Platforms (Iran v. U.S.), at ¶1.33.
142 M. Matheson, "Determining the Facts on the Merits," chapter 7 in M. MATHESON, INTERNATIONAL CIVIL TRIBUNALS AND ARMED CONFLICT: LITIGATION ON STATE RESPONSIBILITY FOR THE USE OF ARMED FORCE IN CONTEMPORARY CONFLICTS (a forthcoming book from Brill on use of force decisions of international tribunals).
International law is not made solely by the Court. Rather, it is centrally a matter of explicit or implicit agreement by states. Use of force law is among the most important normative systems in international law. Given the critical importance of that legal structure for ending aggression and achieving a more peaceful world, to permit the Court’s confused pronouncements to continue to influence expectations is a tragic mistake for world order. Thus, foreign offices should respond by individually or collectively affirming the principles above. As a first step the United States Government might hold consultations with its NATO and Rio Treaty partners about individual or collective affirmation of correct interpretation of the Charter on the above points. Indeed, it might even be worthwhile to hold talks on these matters between the permanent members of the Security Council. It has now been a quarter of a century since the most serious errors of the International Court of Justice on *jus ad bellum* as set forth in the Nicaragua decision. The more recent *jus ad bellum* decisions of the Court in the *Iran Platforms* and *Israeli Wall* decisions have compounded the errors. Given the stakes for world order, and for the Court itself, continued silence about these mistakes of the International Court of Justice in dealing with *jus ad bellum* is wrong.

The International Court of Justice is one of the world’s most important international legal institutions. Its very reason for being is a belief that the rule of law can make a difference in reducing violent conflict. The recent record of the Court in *jus ad bellum* decisions stands in sharp contrast to that belief. It is past due for the Court to take a higher road. As I wrote shortly after the decision of the Court in the *Nicaragua Case*:

In the haunting words of Churchill after Munich, the Court and more broadly the global deterrent system “have been tried in the balance and found wanting.” If there is any ray of hope from the *Nicaragua* decision, it may well be that it is so spectacularly wrong that it will contribute to greater understanding of the failure of the global deterrent system in the face of the secret-war challenge.\(^{143}\)

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ANNEX

*Jus ad Bellum Characteristics of Principal International Court of Justice Decisions*

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Chapter One

The International Court of Justice

Sean D. Murphy

A. Overview

The International Court of Justice ("ICJ" or "Court") is a highly respected and authoritative judicial tribunal, lying at the center of the U.N. system, with an influence that extends well beyond the legal relations of the Parties that appear before it. At the same time, important constraints on its jurisdiction preclude the Court from resolving most disputes between States.

1. Essential Information

The core instruments creating the ICJ are the U.N. Charter (especially Article 7(1) and Chapter XIV) and the ICJ Statute. The U.N. Charter provides that the ICJ shall be the "principal judicial organ" of the United Nations and that all UN Member States are ipso facto parties to the ICJ Statute. As such, all 192 Member States of the United Nations are Members of the ICJ Statute and thus capable of appearing before the Court in either contentious...

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2 For information relating to the work of the International Court of Justice, see Yearbook of the International Court of Justice (1947–); International Court of Justice, http://www.icj-cij.org (last visited Feb. 27, 2011).


5 U.N. Charter Arts. 92, 93(1).
cases or advisory proceedings. States that are not U.N. members (such as Switzerland until 2002) are able to adhere to the Court’s Statute if they so choose.\(^6\) Yet the ICJ Statute allows only States to participate in contentious cases,\(^7\) thus precluding contentious cases brought by or against international organizations, non-governmental organizations, transnational corporations, or individuals.

The ICJ Statute is based on the Statute of its predecessor, the Permanent Court of International Justice ("PCIJ"),\(^8\) which was formed in the aftermath of World War I in conjunction with the League of Nations ("the League"). Whereas the "political" League was based in Geneva, the "judicial" PCIJ was placed at a distance in the historically neutral country of the Netherlands, taking up residence in The Hague at the Peace Palace alongside the Permanent Court of Arbitration.\(^9\) Principally operating from 1922 to 1939, the PCIJ issued some twenty-seven advisory opinions and thirty-two judgments on a variety of matters, many concerning disputes arising under the post-World War I peace treaties and boundary disputes.\(^10\)

Important defects in the PCIJ, however, were corrected with the ICJ. For example, membership in the League did not automatically entail membership in the Statute of the PCIJ, which was a disconnect that was thought to have weakened the PCIJ. At the same time, considerable continuity was maintained between the two institutions. In addition to remaining in The Hague, the ICJ operates under a Statute that is almost verbatim the Statute of its predecessor, and hence a variety of procedural decisions of the PCIJ remain of direct importance for the ICJ today. Moreover, as the first global judicial court, the PCIJ began the judicial process of clarifying and codifying core elements of substantive international law and thus generated a stream of "first impression" findings that continue to be cited and built upon today by the ICJ. Together, these two institutions and their jurisprudence are often referred to informally as the "World Court."

The ICJ consists of fifteen highly regarded jurists from across the globe, elected for nine-year, renewable terms by the U.N. General Assembly and U.N. Security Council.\(^11\) To promote a separation between the judges and

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\(^6\) ICJ Statute Art. 35(2).
\(^7\) ICJ Statute Art. 35(1).
\(^8\) Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 379 (hereinafter: PCIJ Statute).
\(^11\) ICJ Statute Arts. 3–4, 13.
governments, candidates are not nominated directly by governments. Instead, potential judges are nominated by "national groups" formed in accordance with the procedures of the Permanent Court of Arbitration. Hence, each State establishes a national group of four persons who are to be of "recognized competence in international law" and of "high moral character." The national group, in turn, decides whether to nominate a person for the ICJ and, if so, whom.\(^\text{13}\)

From the slate of nominees, five judges of the ICJ are elected every three years for nine-year terms,\(^\text{14}\) thus allowing continuity of membership even amidst change. The ICJ Statute provides that persons are to be elected based on their independence, character, and expertise, and not their nationality.\(^\text{15}\) Once elected, judges take no instructions from governments. Further, they are precluded from participating in cases in which they were previously involved, which can have the effect of preventing some judges from sitting in some cases involving their own States. A judge, however, is not prevented from sitting in a case involving the State of his or her nationality simply due to that connection.\(^\text{16}\) The relatively lengthy term of each judge is thought to help further insulate him or her from deciding cases with an eye to reelection. Moreover, the judges are paid international civil servants; they cannot be recalled or dismissed by the governments of their nationalities. In the event of the resignation or death of a judge, the U.N. General Assembly and U.N. Security Council hold a special election to fulfill the remaining term of the vacancy.\(^\text{17}\)

While the judges are independent from governments, nationality and regional representation remain relevant when composing the Court. The Statute provides that no two judges may be of the same nationality and that the judges are to be selected so that the "principal legal systems of the world" are represented.\(^\text{18}\) Though not required by the U.N. Charter or the ICJ Statute, a "gentlemen's agreement" of the U.N. membership has resulted in seats on the Court being allocated so that a specific number of judges are elected from each of the principal regions of the world: three judges from African States; three judges from Asian States; two judges from East European States; two judges from Latin American and Caribbean States; and five judges from

\(^\text{13}\) Id. Art. 2.
\(^\text{14}\) Id. Arts. 4-5; see also Lori Damrosch, "The Election of Thomas Buergenthal to the International Court of Justice," 94 Am. J. Int'l L. 579 (2000).
\(^\text{15}\) ICJ Statute Art. 13.
\(^\text{16}\) Id. Art. 2.
\(^\text{17}\) Id. Arts. 17(2), 31(1).
\(^\text{18}\) Id. Art. 14.
the Western European “and other” States. Further, while the permanent members of the Security Council do not have a “veto” with respect to the election of ICJ judges because only a majority of nine affirmative votes is required from any combination of Council members, the five permanent members are in a position to influence strongly the process. Further, it is generally accepted that having a judge on the Court of the nationality of the five permanent members is valuable in buttressing the authority and credibility of the Court, such that it is no surprise that a judge of each permanent member is represented on the Court.

Perhaps the most striking indication of the continuing relevance of nationality is the ability for a State that has no judge of its nationality sitting on the Court to appoint an ad hoc judge to sit in a contentious case, who can be of the State’s nationality or some other nationality. The presence of such party-appointed adjudicators presumably helps draw States into the Court’s jurisdiction because, in some sense, it allows the perspective of the State to be well represented during the Court’s deliberations. At the same time, given the size of the Court, one or two ad hoc judges are not in a position to dictate the outcome of the Court’s judgment; indeed, the vote of one ad hoc judge in many instances simply offsets that of the other. This element of the Court’s procedure at times has been criticized as diminishing the Court’s overall independence from the Parties who appear before it.

As discussed below, the exact law to be applied by the Court in any particular case may be limited by the scope of the Court’s jurisdiction in that case. As a general matter, however, Article 38(1) of the Statute provides that the Court is to decide disputes “in accordance with international law” by applying four sources: (a) treaties; (b) customary international law; (c) general principles of law; and (d) judicial decisions and the teachings of the “most highly qualified publicists of the various nations.” Article 38(1) has had an influence well beyond the Court itself, as the classic starting point of any international law analysis entails consideration of these four sources.

20 ICJ Statute Art. 10. A judge from each of the permanent members has been on the Court since its inception, with the exception of a gap between 1967 and 1985 when there was no Chinese judge. See Bruno Simma ed., The Charter of the United Nations: A Commentary, op. cit., p. 1161. The ICJ judges of U.S. nationality to date have been: Green Hackworth (1946–61); Philip Jessup (1961–70); Hardy Cross Dillard (1970–79); Richard Baxter (1979–80); Stephen Schwobel (1981–2000); Thomas Buergenthal (2000–10); and Joan Donoghue (2010–present).
21 ICJ Statute Art. 31(1)–(3).
22 Id. Art. 38(1).
2. Jurisdiction

States cannot be sued before the ICJ without their consent. Joining the United Nations and thereby ipso facto becoming a party to the ICJ’s Statute does not automatically expose a State to the Court’s jurisdiction.\textsuperscript{23} Adhering to the ICJ’s Statute simply opens the door for a State to sue or be sued before the Court, but it does not allow the State to go through that door. Instead, some further form of consent to the ICJ’s jurisdiction must exist. This requirement of further state consent is why most of the 192 U.N. Member States have never appeared before the Court in a contentious case and why the Court is regarded as an important, but not dominant, player in the field of international dispute resolution.

There are three means by which a State can express consent to the jurisdiction of the Court. States can accept the Court’s jurisdiction on an ad hoc basis for the adjudication of an existing dispute.\textsuperscript{24} For example, in July 2010, Burkina Faso and Niger jointly submitted a frontier dispute to the Court for the purpose of determining their mutual boundary in a particular sector.\textsuperscript{25} While such a dispute is “contentious” in the sense that there are differing views between the two States as to the relevant facts or law, both States agree \textit{ab initio} to bring the dispute to the Court for resolution.

Alternatively, States can accept the Court’s jurisdiction by concluding a bilateral or multilateral treaty that provides for future jurisdiction over certain issues in the event that a dispute arises.\textsuperscript{26} This form of jurisdiction is limited not just by the need to find a relevant treaty, but also by the terms of jurisdiction set forth in that treaty. The relevant treaty might provide for broad jurisdiction, such as the 1948 American Treaty on Pacific Settlement ("Fact of Bogotá"), which provides in Article XXXI: "Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them...."\textsuperscript{27} For example, Costa Rica invoked this


\textsuperscript{24} ICJ Statute Art. 36(1).


\textsuperscript{26} ICJ Statute Art. 36(1). Treaties pre-dating the existence of the ICJ that provide for jurisdiction of the PCIJ are also regarded, under the ICJ Statute, as triggering ICJ jurisdiction. \textit{Id. Art. 37.}

provision in November 2010 to seize the Court of jurisdiction in a dispute against Nicaragua, which concerned an alleged incursion into and occupation of Costa Rican territory by Nicaragua. 28

But the treaty invoked might provide for much narrower jurisdiction, limited only to the specific subject matter of the treaty itself. For example, the Convention Against Genocide sets forth various obligations of States with respect to preventing and punishing genocide. Article IX provides that disputes between parties arising under the convention shall be submitted to the ICJ at the request of one of the parties. 29 Other types of disputes unrelated to the Convention cannot be submitted to the Court. The effect of such limited jurisdiction is that disputes can sometimes be presented to the Court in a rather skewed fashion. For instance, when Georgia sought to sue Russia for an alleged incursion by Russia into Georgia’s territory in 2008, the only treaty available to which both States were a Party that provided for the Court’s jurisdiction was the Convention on the Elimination of All Forms of Racial Discrimination. 30 Consequently, Georgia’s case was entirely cast in terms of whether Russia’s conduct constituted racial discrimination within the meaning of the Convention, not in terms of whether it constituted an unlawful use of force or intervention in Georgia. 31

Since this form of jurisdiction is predicated on the presence of a treaty obligation accepting the Court’s jurisdiction, it is critical to assess whether a State, in joining a multilateral treaty, filed a reservation limiting or rejecting the provision that provides for the Court’s jurisdiction. Thus, when the United States ratified the Convention Against Genocide in 1988, it included a reservation stating that, before any dispute could be submitted to the Court under Article IX, “the specific consent of the United States is required in each case.” 32 Consequently, when the Federal Republic of Yugoslavia (Serbia & Montenegro) sought to sue the United States under the Convention Against Genocide for acts associated with NATO’s bombing campaign

against Serbia in 1999, the ICJ found that there was no jurisdiction and dismissed the case.33

The third way in which jurisdiction may arise is under the “optional clause” or “compulsory jurisdiction.” Here, the State Parties to the ICJ Statute may make a unilateral declaration that “they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes…” involving issues of law or fact governed by rules of international law.34 Most States have not accepted this “compulsory jurisdiction” of the Court. Of the 192 Member States of the United Nations, only 66 have accepted the Court’s compulsory jurisdiction as of early 2011.35 Moreover, many of those acceptances contain conditions, limitations, or reservations that significantly limit the State’s consent. The only Permanent Member of the Security Council that currently accepts the Court’s compulsory jurisdiction is the United Kingdom and, even there, the acceptance is conditioned by several significant reservations that make it difficult to sue the United Kingdom before the Court.36

Nevertheless, cases are regularly filed before the Court invoking this compulsory jurisdiction. For example, in June 2010, Australia sued Japan claiming that Japan’s continued pursuit of a large-scale whaling program violated Japan’s obligations under the International Convention for the Regulation of Whaling.37 The Convention, however, does not provide for the Court’s jurisdiction. Thus, Australia invoked the declarations accepting the Court’s compulsory jurisdiction made by Australia in 2002 and Japan in 2007, and then called upon the Court to determine if the Convention had been violated.38

Even if the Court finds that it has jurisdiction over a claim, the Court might regard a claim as inadmissible, (although the exact distinction between the two concepts is not always clear). Thus, in certain cases, the Court has relied upon a rule of customary international law known as the “local remedies rule.” Before a State may espouse a claim on behalf of its national, it must show that the national has exhausted all available legal remedies in the courts and administrative agencies of the State against which the claim

36 See id.
is brought; failure to do so will make the claim inadmissible. The rule is
designed to permit a State to remedy a wrong at the national level before it is
transformed into a dispute on the international plane, where it might unnec-
essarily disrupt relations between States. Moreover, it provides the Court
with an opportunity to decline to pass upon a dispute that might place it
in direct conflict with the tendency of some States toward strong constitu-
tional autonomy. Other forms of admissibility issues can arise, such as in the
context of the standing of a State to bring a case or mootness of the issue
presented in the case.

Separate from the Court’s jurisdiction over contentious cases between two
States, the Court also has jurisdiction to issue advisory opinions on legal
questions. The advisory jurisdiction of the ICJ may only be invoked by
U.N. organs and by the specialized agencies of the United Nations who have
been authorized to do so. Although advisory opinions are non-binding,
they do have some juridical authority. Among other things, they can legit-
imate certain conduct of States and organizations, and they invariably have
significance for a legal system in which judicial precedents are scarce.

3. Procedural Overview

The key instrument with respect to the procedure of the Court, other than
Chapter III of the ICJ Statute, are the Rules of Court (especially Part III),
which were adopted in 1978 and thereafter amended on occasion. Written
and oral pleadings are submitted to the Court in either English or French,
after which the Court privately deliberates and issues its decision. Conten-
tious cases are often heard in phases, with separate decisions issued on:
(1) requests for provisional (or interim) measures of protection; and (2) requests

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42 See Mahasen Mohammad Aljaghoub, The Advisory Function of the International Court of
43 U.N. Charter Art. 96.
44 For further detail on the Court’s jurisdiction, see Shabtai Rosenne, The Law and Practice of
the International Court, 1920–2004 (The Hague: Martinus Nijhoff, 4th ed. 2006); Gbenga
Oduntan, The Law and Practice of The International Court of Justice (1945–1996): A Cri-
tique of the Contentious and Advisory Jurisdictions (Enugu: Fourth Dimension Publishers,
1999).
45 Rules of Court, http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0 (last vis-
46 ICJ Statute Art. 41.
for intervention by third-party States;47 (3) challenges to the Court's jurisdiction or the admissibility of the claim; (4) the merits of the claim; and (5) the proper damages if liability is found.

A contentious case commences with the filing of an Application to the Court, specifying the nature of the dispute, the basis of the Court's jurisdiction, the alleged violations, and the remedy sought.48 If provisional measures of protection are sought, an expedited hearing and order will take place for disposition of that particular request,49 but normally the case proceeds with greater deliberation. In such an expedited proceeding, and without prejudging the outcome on the merits, the Court will consider whether there appears to be prima facie jurisdiction and a danger of irreparable damage due to ongoing conduct.50 Otherwise, after a meeting of the Parties with the President of the Court, a schedule is set for the filing of a Memorial and Counter-Memorial, which may also be followed by a second round of written pleadings in the form of a Reply and Rejoinder.51 If a Respondent State seeks to challenge the Court's jurisdiction over the dispute, its objection must be filed within three months after the filing of the Memorial.52 Further, if the Respondent wishes to file a counter-claim against the Applicant, it may do so along with its Counter-Memorial, so long as the counter-claim is directly connected with the subject matter of the claim and is within the Court's jurisdiction.53

The written pleadings are not made public until the date of the oral hearing, which is open to the public. At the oral hearing, there is typically a first round of presentations by the Applicant and the Respondent, followed by a second round. The judges of the Court rarely ask questions; when they do, it often occurs at the end of the oral proceeding, with a request that the Parties respond in writing within a short time period. The failure of a Party to appear before the Court for the written or oral proceedings does not prevent the Court from proceeding with the case. The Court, however, must still determine that the claim before it is well founded in fact and law because default judgments are not issued.54

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47 Id. Arts. 62–63.
48 Rules of Court Arts. 38, 41.
49 Id. Arts. 73–74.
51 Rules of Court Arts. 44–45, 49.
52 Id. Art. 79.
53 Id. Art. 80.
54 ICJ Statute Art. 53.
ICJ Statute Article 26 allows the Court to establish a chamber of judges to decide a case, which the Court typically is inclined to do if two States appearing before it request such a chamber and identify the judges they wish appointed to the chamber. Moreover, the chamber can consist of any combination of judges; unlike the PCIJ Statute, there is no requirement that the chamber represent the principal legal systems of the world. For instance, in Gulf of Maine, Canada and the United States informed the Court that they desired a chamber consisting of five ICJ judges identified by the Parties. Some special rules apply in the context of chamber proceedings, but most procedures remain the same and chamber judgments are regarded as judgments of the Court as a whole.

Judgments issued by the ICJ in contentious cases are final, without further appeal, and binding on the parties. At the same time, if the meaning of the judgment is unclear, a Party may request an interpretation from the Court. Further, if an important fact unknown at the time of the proceedings comes to light, a Party may request a revision of the judgment. In addition to the judgment reached by the majority (with the President casting a second vote if necessary to break a tie), each judge may issue a concurring or dissenting opinion or declaration.

Once the judgment is issued, each U.N. Member State "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Yet in crafting the U.N. Charter and the ICJ Statute, States elected not to include any provisions expressly addressing the legal effect of ICJ judgments within national legal systems, such as whether they provide a basis for private rights of action in national courts. Rather, the recourse envisaged by the U.N. Charter is for the victorious party to appeal non-compliance to the U.N. Security Council, "which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." To date, in only one case has the Applicant State,

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55 Id. Art. 26.
54 PCIJ Statute Art. 9.
58 See ICJ Statute Art. 27.
59 Id. Arts. 59–60.
60 Id. Art. 60.
61 Id. Art. 61.
62 Id. Art. 55.
63 Id. Art. 57.
64 U.N. Charter Art. 94(1).
65 Id. Art. 94(2).
Nicaragua, requested that the Security Council take action to enforce the judgment when the Respondent State, the United States, lost on the merits. Exercising its prerogative as a permanent member of the Council, the United States vetoed the proposed resolution.66

In advisory opinion proceedings, all U.N. Member States are invited to make written and oral submissions. Some special rules of the ICJ Statute and Rules of Court apply with respect to advisory proceedings, but the Court is also guided in those proceedings by the procedural rules set for contentious cases.67

B. Review of the Case Law

In addition to the actual texts of the Court’s decisions68 and the pleadings before it made by States,69 various descriptive and analytical digests exist to assist in researching the Court’s decisions,70 as well as analyses in books and periodicals.71 Since the case law of the ICJ is far too extensive to summarize in full in this chapter, the following is a review of some of the most significant decisions of the Court in selected areas of international law.


68 The Court publishes its decisions in volumes entitled Reports of Judgments, Advisory Opinions and Orders (1947–).

69 The Court publishes the pleadings and submissions of States and other materials in Pleadings, Oral Arguments and Documents (1948–).


1. Sources of International Law

a. Customary International Law

In S.S. "Lotus," the PCIJ was asked to decide whether Turkey could exercise national jurisdiction over a French national for negligent conduct that occurred on a French vessel, which resulted in a collision on the high seas that harmed a Turkish vessel and nationals. In determining whether any rule of customary international law prohibited Turkey's exercise of national jurisdiction, the Court considered the nature and scope of state practice on the issue, findings of international and national tribunals, and the writings of publicists. This approach has influenced subsequent judicial analyses of whether a norm of customary international law exists. Further, the Court articulated a particular perspective when assessing the lawfulness of state practice – now commonly referred to as the "Lotus principle" – in which a State's conduct is presumed lawful unless a prohibition against the conduct can be found in international law. According to the Court:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.73

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73 Id. at 18; see also Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) (finding that the purposes of the United Nations "are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action"); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 269 (June 27) ("[(]In international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.") ("State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition."); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ¶ 56 (July 23, 2010), available at www.icj-cij.org/docket/files/141/15987.pdf (proceeding on the basis that, in relation to the legality of a specific act under international law, it is not necessary to demonstrate a permissive rule so long as there is no prohibition).
The relationship of treaties to customary international law was at issue in *North Sea Continental Shelf*, where Denmark and Germany urged the Court to find a customary international law rule requiring the use of an equidistance line for delimitation of the continental shelf between adjacent States when those States could not otherwise agree upon delimitation. Denmark and Germany in part argued that Article 6 of the 1958 Convention on the Continental Shelf had helped generate a rule of customary international law binding upon Germany, even though Germany had not ratified or acceded to the Convention. While accepting that a treaty provision can help create a norm of customary law, the Court rejected the argument in that instance by an analysis that focused on whether the relevant treaty provision had a "fundamentally norm-creating character," the length of time the treaty provision was in force, the number of States adhering to the treaty, state practice since enactment of the treaty by both Parties and non-Parties, and whether that practice evinced a belief that the relevant norm was legally-compelled.

The Court returned to this issue in *Military and Paramilitary Activities*, this time in the context of whether Article 2(4) of the Charter – prohibiting transnational uses of force – had generated not just a treaty obligation upon U.N. Member States, but also an obligation under customary international law. One problem in reaching such a finding was the fact that there had been numerous incidents of transboundary uses of force in the post-Charter era, which arguably defeated any consistent state practice establishing a customary norm. The Court, however, found that the customary norm did exist. In a finding highly relevant for the theory of customary international law, the Court stated:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

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74 *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), 1960 I.C.J., 3 (Feb. 20).
76 *North Sea Continental Shelf*, op. cit., ¶¶ 70–81.
77 *Military and Paramilitary Activities in and Against Nicaragua*, op. cit., ¶ 186.
The Court has recognized, however, that as a customary norm emerges, it is possible for any particular State to opt out of the norm, so long as it unambiguously and persistently objects to the new norm while it is emerging and thereafter. In *Anglo-Norwegian Fisheries*, the Court found that a customary rule limiting the drawing of a baseline across a bay to ten miles had not emerged, but went on to say that, even if such a norm had emerged, Norway would not be bound "inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."

At the same time, the Court has maintained that certain norms of international law are so fundamental in nature that no State may derogate from them, as either a persistent objector or by means of a new treaty obligation. In *Military and Paramilitary Activities*, the Court referred to the view with apparent approval that Article 2(4) of the U.N. Charter "constitutes a conspicuous example of a rule in international law having the character of *jus cogens*," and, in *Armed Activities in the Territory of the Congo*, the Court found that the prohibition on genocide was a norm having *jus cogens* character, though that alone was not a basis for establishing the Court’s jurisdiction over an alleged violation.

b. Treaty Law
The World Court has interpreted many treaties over the course of its existence. In its recent holdings, the Court has helped solidify key legal standards set forth in the Vienna Convention on the Law of Treaties, even in circumstances where that treaty was not directly binding upon the Parties with respect to the treaty at hand. On the important issue of how treaties should be interpreted, the Court stated in *Genocide Convention*, brought by Bosnia-Herzegovina, that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and

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78 *Fisheries Case (U.K. v. Nor.),* 1951 I.C.J. 116, 131 (Dec. 18); *see also Asylum (Colom. v. Peru),* 1950 I.C.J. 266, 277–78 (Nov. 20).
79 *Military and Paramilitary Activities in and Against Nicaragua,* op. cit., § 190.
32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law.\textsuperscript{82}

A particularly interesting case concerning the circumstances under which a State may avoid a treaty obligation is \textit{Gabčíkovo-Nagymaros Project}.\textsuperscript{83} In that case, the Court rejected Hungary's "changed circumstances" (sometimes referred to as \textit{rebus sic stantibus} or \textit{force majeure}) argument that a treaty concluded during the Cold War between two communist governments - Hungary and Czechoslovakia - for the building of a hydroelectric project along the Danube River had been radically transformed by the fall of communism in Eastern Europe, the rise of environmentalism, and the alleged diminishing economic viability of the venture, thereby allowing Hungary to terminate the treaty. According to the Court, the prevailing national political situation and economic systems of the Parties when the treaty was concluded were not closely linked to the object and purpose of the treaty, the economic viability of this particular project had not been radically transformed, and new developments in environmental knowledge or environmental law were foreseeable when the treaty was concluded.\textsuperscript{84}

The Court also rejected Hungary's argument that it was impossible to complete the project as contemplated in the treaty, given that an essential object was to do this through joint exploitation in an environmentally sound manner. According to the Court, the treaty contemplated mechanisms for altering the project through negotiation if there were environmental issues, and any difficulty with joint exploitation was attributable to Hungary's own conduct in trying to withdraw from the project.\textsuperscript{85} As such, the Court accepted the availability of an "impossibility" argument, but only in extreme circumstances.

c. Other Sources

Given the existence of numerous international organizations, the Court at times has been called upon to consider the normative value of resolutions adopted by organs of international organizations. In the \textit{Nuclear Weapons} advisory opinion, the Court was urged by some States to find a prohibition on the use or threat to use nuclear weapons within a series of U.N. General Assembly resolutions. The Court acknowledged that


\textsuperscript{83} \textit{Gabčíkovo-Nagymaros Project} (Hung./Slov.), 1997 I.C.J. 7 (Sep. 25).

\textsuperscript{84} \textit{Id.} ¶ 104.

\textsuperscript{85} \textit{Id.} ¶¶ 102-03.
General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.\(^{86}\)

In that instance, however, the Court viewed the relevant resolutions as not establishing the existence of a norm prohibiting nuclear weapons; the resolutions in question were too equivocal and, when adopted, had garnered substantial numbers of negative votes or abstentions.\(^{87}\) Ultimately, relying upon principles emanating from treaties on the law of war, the Court found that the use of nuclear weapons, as a general matter, would be unlawful, but in certain extreme circumstances involving the very survival of a State, such use might be lawful.\(^{88}\)

2. Subjects of International Law

In the course of its decisions, the Court has made important pronouncements relevant to the various "subjects" of international law, including States, international organizations, and persons. For example, in its advisory opinion on Kosovo’s declaration of independence, the Court was asked to opine on whether that declaration was unlawful, given Kosovo’s status as a province of Serbia, which opposed Kosovo’s independence. To a certain extent, placement of the matter before the Court was viewed as a test as to whether a new State had been formed. Staying within the narrow confines of the question placed before it, the Court did not directly pass upon Kosovo’s statehood, nor upon whether other States might recognize that statehood. Instead, the Court simply concluded that the declaration of independence issued by Kosovo’s leaders violated neither general international law nor the specific regime set up by the Security Council for international administration of Kosovo after the 1998–99 crisis.\(^{89}\)

With respect to international organizations, the Court issued a landmark ruling in its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.\(^{90}\) Coming early in the life of the United

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\(^{86}\) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, op. cit., § 70.

\(^{87}\) *Id.* §§ 71–73.

\(^{88}\) *Id.* §§ 95–97.

\(^{89}\) See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *op. cit.*

Nations, and with implications for all U.N. specialized agencies and arguably all international organizations, the opinion tackles whether the United Nations has sufficient "personality" separate from its Member States so as to allow it to pursue a diplomatic claim. Based upon an analysis of the U.N. Charter, including the powers and status conferred upon its organs, the opinion found that sufficient personality existed to support pursuit of a diplomatic claim both for direct injury to the organization and injury to persons in the employ of the organization because the latter type of claim was not only efficient, but also helped protect the integrity of the United Nations. Moreover, the opinion found that such a claim could be brought not just against a U.N. Member State, but even against a non-U.N. Member State, because "fifty States, representing the vast majority of the members of the international community [in 1945], had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims." That finding, which solidified the legal status of international organizations as subjects of international law, arguably helped pave the way for the human rights movement by vividly demonstrating that States were no longer the sole possessor of rights and obligations on the international plane.

3. **Rules on State Responsibility**

Especially in two of its cases – **Military and Paramilitary Activities** brought by Nicaragua and **Genocide Convention** brought by Bosnia-Herzegovina – the Court has significantly confirmed and clarified the standards for attributing conduct to a State. In **Genocide Convention**, the Court asserted that conduct perpetrated by persons or entities having the status of "organs" of a government under its internal law are acts attributable to that government's State. Persons or entities that are not state organs may nevertheless be equated with state organs "provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument." If the persons or entities are neither a state organ nor acting in complete dependence on the State, their conduct may nevertheless be attributed to the State if it can be shown that they

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91 *Id.* at 185.
93 *Id.* § 392 (quoting Military and Paramilitary Activities in and against Nicaragua, *op. cit.*, § 110).
acted in accordance with that State's instructions or under its "effective control." It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.94

Even if the conduct was not attributable to the State at the time it was undertaken, it can become so if the government thereafter expresses approval of or endorses the conduct.95

Normally, breaches of international law occur as between the two States directly involved in the underlying conduct, such as harm by one State to the national of another. However, in Barcelona Traction, the Court adopted the concept of obligations erga omnes, meaning obligations owed by a State towards the international community as a whole. For those obligations, all States have an interest in whether the obligation is upheld. According to the Court, "[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."96

This concept of erga omnes obligations has not led to widespread advancement of claims by States; indeed, the Court itself seemed to disfavor the idea that all States could pursue claims based on such obligations when it dismissed cases brought by Ethiopia and Liberia against South Africa for abuse of its international mandate in South West Africa.97 Nevertheless, this concept has helped reinforce the idea that certain international obligations are especially important and that the broad community of States has an interest in and can speak to whether those obligations are being transgressed.

4. Privileges and Immunities in National Systems

In Arrest Warrant of 11 April 2000,98 the Court considered the legality of the issuance of a Belgian arrest warrant against the Republic of the Congo's Minister of Foreign Affairs for alleged war crimes and crimes against humanity, pursuant to a Belgian criminal law statute that allowed for "universal

94 Id., § 400 (quoting Military and Paramilitary Activities in and against Nicaragua, op. cit., § 115).
97 See South West Africa, op. cit., § 88 (finding that the concept of actio popularis was "not known to international law as it stands at present").
jurisdiction," or jurisdiction in circumstances where Belgium's direct interests or nationals were not involved. The Court declined to pass upon the permissibility of such a statute and instead focused on the immunity of an incumbent Foreign Minister from criminal jurisdiction. Since no relevant treaties spoke to the matter, the Court's judgment turned upon customary international law, thus creating a precedent of relevance for all other comparable circumstances. The Court found that under customary international law, state officials are entitled to immunity from national jurisdiction when they travel abroad — including from charges of war crimes or crimes against humanity — so as to allow for the effective performance of their functions on behalf of States. At the same time, the Court noted that "[j]urisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility," thus potentially leaving open the door to prosecution after the official leaves office.

On several occasions, the Court has also addressed the protections accorded under the Vienna Conventions on diplomatic and consular immunities, thereby confirming their core provisions. In its 1980 judgment in U.S. Diplomatic and Consular Staff in Tehran, the Court unequivocally condemned the seizure by Iran of U.S. diplomatic and consular staff, ordered their release, and ordered the restoration of the U.S. embassy and consulate premises, property, archives, and documents.

In a series of decisions against the United States, the Court upheld the right of an alien to be notified of the right to contact his or her consulate about the alien's detention. Moreover, the Court maintained that a failure to provide such notification required U.S. courts to review and reconsider convictions of aliens on death row as a remedy, so as to see whether the lack of notification was prejudicial. Although U.S. courts did not uniformly

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99 Three judges issued a separate opinion that the exercise of universal jurisdiction by States is nearing the status of customary law given an international consensus that those who commit international crimes should not have impunity. Id. §§ 51-52 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

100 Id. ¶ 53.

101 Id. ¶ 60.


103 United States Diplomatic and Consular Staff in Tehran, op. cit., ¶ 95.


105 See LaGrand, op. cit., ¶ 125.
provide such review and reconsideration, the Court's decisions prompted the U.S. Government to embark on a widespread campaign to educate state and local police officials in the United States as to the obligation to provide such notification to aliens when they are detained.

5. Injury to Aliens and Human Rights

The Court has firmly established in international law certain procedural rules relating to the protection of foreign nationals or their investments in host States, such as the continuous nationality rule or rules on protection of shareholders in corporations. For example, as previously noted, the Court has reaffirmed the "rule that local remedies must first be exhausted before international proceedings may be instituted." Yet the Court has helped refine the rule, such as by clarifying that there might be exceptional circumstances that relieve the injured party from exhausting local remedies (e.g., where they effectively have been pursued by the bankruptcy trustee of an expropriated subsidiary). The burden of showing that local remedies exist, however, falls upon the host State. Even then,

while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings.

As for substantive law, the Court has addressed traditional standards of protection, such as the national treatment standard and minimum standards of protection, arising under either customary international law or treaty law. Further, more contemporary standards arising under human rights law have featured in several of the Court's decisions. In the advisory opinion on Legal Consequences of the Construction of a Wall, the Court found that the construction of a barrier by Israel that enclosed parts of the West Bank posed

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106 See Medellín v. Texas, 552 U.S. 491, 507–11 (2008) (finding that the treaties pursuant to which the ICJ issued the judgment were not self-executing in U.S. law).
109 Intermhandel, op. cit., at 27.
111 Ahmadou Sadio Diallo, Preliminary Objections, op. cit., ¶ 47.
a serious risk of altering the demographic composition of "occupied Palestinian territory." As such, it both impedes "the exercise by the Palestinian people of its right to self-determination" and constituted a violation of Article 12(1), protecting freedom of movement and choice of residence, and Article 17(1), protecting privacy, family and home, of the International Covenant on Civil and Political Rights ("ICCPR"). Among the important findings of the Court in this advisory opinion was that the ICCPR applies not just to a State's conduct within its own territory, but also "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."  

In the Ahmadou Sadio Diallo, the Court concluded that an alien's expulsion violated his rights under ICCPR Article 13, but the Court also passed upon human rights standards within a regional human rights treaty, in that instance, Article 12(4) of the African Charter on Human and Peoples' Rights. Both the global and regional standards only allow expulsion pursuant to a decision taken in accordance with the law. Further, the Court found that the alien's arrest and detention prior to expulsion violated ICCPR Article 9 and African Charter Article 6, both of which protect the liberty and security of a person. In doing so, the Court is helping to harmonize global and regional human rights systems.

6. Use of Force

The ICJ has issued several decisions of significance on the topic of transnational uses of force. Perhaps the most famous is Military and Paramilitary Activities, brought by Nicaragua against the United States in the mid-1980s, in which the Court made several important findings with respect to the right of self-defense. Among other things, the Court concluded that certain types of conduct – the laying of mines in Nicaraguan internal or territorial waters or attacks on Nicaraguan ports, oil installations, and a naval base – constitute

113 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 122, 134 (July 9).
114 Id. ¶ 128, 134.
116 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, op. cit., ¶ 111.
118 Ahmadou Sadio Diallo, Judgment, op. cit., ¶¶ 75-85.
a violation of the international prohibition on the use of force as reflected in U.N. Charter Article 2(4).\textsuperscript{119}

While sometimes use of force can be justified in self-defense, contemporary international law as reflected in U.N. Charter Article 51 requires that the State be responding to an "armed attack" that is imputable to the State against which force is being used.\textsuperscript{120} In this case, allegations that Nicaragua was sending armed bands, groups, or irregulars across a border against El Salvador, or providing weapons or logistical support to such groups, did not qualify as an "armed attack" because that conduct did not involve acts of armed force of such gravity that they amounted to an armed attack.\textsuperscript{121} Nor was there sufficient evidence that the support was imputable to Nicaragua. Even if an armed attack by Nicaragua did exist, for the United States to engage in collective self-defense in support of El Salvador or any other State in the region, there must be a contemporaneous request for such assistance from the victim State, which the Court concluded did not exist on the facts of the case.\textsuperscript{122} Furthermore, if truly acting in collective self-defense, a State is obligated under Article 51 to notify the U.N. Security Council that it is doing so, a step not taken by the United States in this case.\textsuperscript{123}

Even if all those hurdles were overcome, the Court stressed that any U.S. act of self-defense must satisfy the requirements of necessity and proportionality. Here, the U.S. conduct was not necessary because El Salvador had already successfully repulsed the rebel offensive at the time the United States acted and was not proportionate because the relevant conduct (e.g., mining of ports and attacks on oil installations) did not correlate to Nicaragua's aid to El Salvador rebels.\textsuperscript{124} The Court returned to the issue of necessity and proportionality in \textit{Oil Platforms} when assessing the legality of U.S. attacks in 1987–88 upon three Iranian offshore oil platforms in the Persian Gulf. While the United States convinced the Court that the relevant provision of the underlying bilateral treaty could not have been violated by the conduct,\textsuperscript{125} the Court proceeded to engage in an extensive analysis of why the U.S. attacks on the oil platforms violated international law on the use of force, including the necessity and proportionality principles.\textsuperscript{126}

\textsuperscript{119} Military and Paramilitary Activities in and Against Nicaragua, \textit{op. cit.}, §§ 228, 237–38.

\textsuperscript{120} \textit{Id.} § 195.

\textsuperscript{121} \textit{Id.} §§ 230–31.

\textsuperscript{122} \textit{Id.} §§ 233–34.

\textsuperscript{123} \textit{Id.} §§ 235–36.

\textsuperscript{124} \textit{Id.} § 237.

\textsuperscript{125} \textit{Oil Platforms} (Iran v. U.S.), 2003 I.C.J. 161, §§ 98–99 (Nov. 6).

7. Land and Maritime Boundary Disputes

One of the most important roles played by the Court has been to authoritatively delimit land and maritime boundaries placed before it by two States. The significance of such decisions lies less in the precedential value of any given decision and more in the pragmatic value of resolving a border dispute that, in many instances, has led or could lead to armed conflict. For example, a disputed area rich in minerals existed along the border of Libya and Chad, including the Aouzou Strip. While Chad maintained that the area was part of its territory, Libya occupied and administered the area. The dispute ultimately led to armed conflict between the two States in 1986–87. Thereafter, the two States agreed to submit the matter to the Court, which in 1994 found that the territory fell within Chad, resulting in a Libyan withdrawal of its forces.127

In the realm of maritime disputes, two early decisions—North Sea Continental Shelf128 and Continental Shelf between Libya and Tunisia129—relied on “equitable principles” to divide a shelf where there was no interruption in the natural prolongation of the coasts. While the Court indicated that such principles required certain approaches, e.g., that a delimitation should not refashion nature or that special circumstances could be taken into account,130 the decisions provided little guidance as to what was meant by “equitable principles” and how they might be applied in other cases. In Gulf of Maine, a chamber of the Court indicated that it was “unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise.”131 In that spirit, some decisions of the Court with respect to relatively smooth coastlines have largely applied an “equidistance line,” the line that connects all points at an equal distance from the baselines of both the nations, while others have taken account of unusual coastlines so as to use a different method, such as an angle-bisector approach.132

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127 See Territorial Dispute (Libya/Chad), 1994 I.C.J. 6 (Feb. 3).
128 North Sea Continental Shelf, op. cit.
129 Continental Shelf (Tunis/Libya), 1982 I.C.J. 18 (Feb. 24).
130 See, e.g., North Sea Continental Shelf, op. cit., § 91.
131 Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit., § 111.
8. Law of the Sea and Environmental Law

Separate from its maritime boundary dispute cases, the Court has addressed important issues on the law of the sea, with its decisions both influencing and being influenced by efforts at treaty codification since the early 1950s. For example, in Corfu Channel in 1949, the Court asserted that "States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent." 133 This finding strongly influenced codification of the concepts of "innocent passage" through the territorial sea and "transit passage" through straits. In Anglo-Norwegian Fisheries in 1951, the Court accepted Norway's method of drawing straight baselines connecting its coastal islands, rocks and reefs, using language that directly influenced the text of the 1958 and 1982 Law of the Sea Conventions. 134

In the 1974 Fisheries Jurisdiction cases brought by the United Kingdom and Germany against Iceland, the Court rejected Iceland's unilateral claim to a preferential fishing zone extending fifty nautical miles from its baselines, but equally rejected the applicant States' contention that no such preferential rights could exist outside the territorial sea. 135 With an eye to the ongoing negotiations of the 1982 Law of the Sea Convention, the Court accepted that the law of the sea was evolving so as to allow preferential fishing rights for coastal States extending beyond their territorial sea, which in turn helped usher in the concept of the exclusive economic zone in the 1982 Convention. Even before entry into force of the convention, the Court would declare that it was "incontestable that... the exclusive economic zone... is shown by the practice of States to have become a part of customary law." 136

Though not actually a case involving environmental law, the Court's decision in Corfu Channel foreshadowed the emergence of the field of international environmental treaties. In Corfu Channel, the Court stated that Albania's obligation to notify others of the presence of mines in Albanian water arose in part from "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 137

136 Continental Shelf (Libya/Malta), 1985 I.C.J. 13, § 34 (June 3).
137 Corfu Channel, op. cit., at 22.
finding was echoed in later "soft law" instruments, which in turn helped spawn treaty regimes on transboundary pollution. The Court also issued an oft-cited statement about the importance of the global environment in the Nuclear Weapons advisory opinion, by recognizing that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

In that opinion, however, the Court declined to apply such norms to the issue of the legality of the possession or use of nuclear weapons, finding that the "most directly relevant applicable law governing the question of which it is seised" was the law on use of force and on war, with its various treaties addressing the use of weaponry and the protection of civilians in time of war.

C. Conclusion

The International Court of Justice (as was the case for its predecessor, the Permanent Court of International Justice) is not at the apex of an appellate system of international courts, nor does it have wide-ranging jurisdiction over all disputes arising among States. Nevertheless, as the judicial wing of the United Nations, the Court stands as the most authoritative Court for the interpretation of general rules of international law, with its decisions regularly cited by other global, regional, and national courts. Further, despite its limited jurisdiction, the Court has addressed numerous important disputes among States and issued advisory opinions that have greatly shaped and influenced the development of international law.

140 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, op. cit., § 29.
141 Id. § 34.
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Book Notes
States had recruited, trained, and armed to overthrow the government of Nicaragua, and creating the climate for negotiations that would lead to peace in Central America. The World Court suit was an essential part of this strategy.

I had the honor of recruiting Abe to lead the small team of distinguished international lawyers that Nicaragua was discreetly forming to mount its historic legal effort against the United States. I went to see him for this purpose in January 1984, three months before suit was filed. We met in his office at Harvard Law School. The dense cloud of cigar smoke, which partially obscured Abe's face and made it visible only in outline, gave an unreal quality to the encounter, and for an instant I wondered whether I was dreaming the whole thing. But there was no missing the voice: powerful, deep-throated, husky, but also welcoming and encouraging. It had not changed in the thirteen years since, as a first-year student, I sat transfixed by him through Federal Civil Procedure. Abe had total command of the classroom. As a teacher, he was authoritative, charismatic, entertaining, and full of life, but never intimidating. He connected with his students, gave them the feeling he was on their side and believed in them, and encouraged them not to be afraid to think outside the box. I had entered law school uncertain that I wanted to practice law. Abe cured me of all my doubts.

Although I had not advised Abe in advance of the reason I wanted to meet with him, he told me right off the bat that he had figured it out. He knew that I had been the lawyer for the government of Nicaragua since 1979, when a popular uprising led by the Frente Sandinista de Liberación Nacional (FSLN) overthrew the dictatorship of General Anastasio Somoza, one of the most brutal and venal of all the tyrants to afflict Latin America. Sadly, General Somoza enjoyed the military, economic, and political support of the United States until almost the very end of his reign of terror, when President Jimmy Carter wisely abandoned him to his well-deserved fate. Abe also knew that my Nicaraguan clients and I had probably read his November 1983 op-ed piece in the New York Times, in which he demolished the Reagan Administration's phony legal justification for its recent invasion of Grenada, condemning it as a violation of the most fundamental principles of international law, and expressed great concern that the Administration might make Nicaragua its next target. Abe was prescient; it was later documented that, at the time Abe's article appeared in the Times, the Central Intelligence Agency (CIA) was covertly using its own operatives to blow up oil storage tanks, pipelines, and port facilities in Nicaragua, and preparing to mine Nicaragua's harbors.

Our discussion of the law that day in Cambridge was very brief. Nicaragua's fundamental legal claim was, for most international lawyers, a slam dunk. U.S. support for counterrevolutionary forces seeking to overthrow Nicaragua's government amounted to an unlawful interference with Nicaragua's political independence and territorial sovereignty, in violation of the U.N. and O.A.S. Charters as well as general international law. All the proof that Nicaragua would need to win its case was already a matter of public record in the United States and was unambiguously set forth in the Congressional Record. Indeed, an act of Congress expressly authorized the provision of funds for military and other assistance to the "Contras." Congressional leaders on both sides of the issue had spoken openly about the purposes of the assistance. Some of the opponents, such as Representative Jim Wright, then Majority Leader and later Speaker of the House of Representatives, had criticized the assistance on the ground that it violated international law.

The focus of my meeting with Abe was on the Sandinistas themselves. "Tell me all about your clients," Abe bellowed, "I want to know who they really are, how they view the United States, the Soviet Union and Cuba, what they're trying to achieve, and whether they're prepared to do what they should both domestically and internationally to achieve normal relations with the U.S." We spent several hours in discussion, with Abe cross-examining me in great depth. At the end, he said silently, pondering what he had heard and comparing it with the research he had obviously performed before my visit and his own intuition, in which, justifiably, he always had great confidence. "O.K.," he finally shouted, "I'm interested in considering this further. What's the next step?" I told him I had been authorized to invite him to Nicaragua to meet the Sandinista leaders, their internal political opponents, and anyone else he cared to talk to in order to make up his mind about accepting this representation. I said his agreement to make the trip would not amount to a commitment to take the case, and he should feel free to turn it down if that was his inclination after his return. "How soon can we go?"

Nicaragua's decision to sue the United States in the World Court was not taken lightly. It was reached after months of secret deliberation and consultation with trusted friends (some of whom counseled against it), and extensive debate among the nine members of the Dirección Nacional (National Directorate, the highest organ of the FSLN). All nine had been political/military leaders of the long struggle against the Somoza dictatorship. At the time they caved to power, they were experienced only in revolutionary theory, conspiracy, guerrilla warfare, and the day-to-day problems of Nicaragua's poor peasants and urban slum-dwellers, who gave them sanctuary during the long struggle against the dictatorship. None was a lawyer, let alone an international lawyer. And none was an expert in international politics or diplomacy, although the life-or-death confrontation with the United States definitely sped up their learning curve.

The bilateral relationship between revolutionary Nicaragua and the United States started awkwardly, to no one's surprise. The Sandinistas were suspicious of the United States, which, after all, had supported the Somoza dictatorship for forty-five years and had created and equipped the infamous Guardia Nacional, the armed forces that served as Somoza's personal gen-
dermore and through which repression of all political opposition was violently carried out. However, the new Nicaraguan leaders knew it would be suicidal to antagonize the United States, and they sensed that the Carter Administration, with its emphasis on human rights and respect for the sovereignty of independent nations, was different from prior U.S. administrations. Moreover, notwithstanding their Marxist training and world-view, most of the nine admired American society, culture, and values.

This schizophrenic attitude toward the United States manifested itself promptly, during the September 1979 visit to Washington of junta leader and future president Daniel Ortega, future vice president Sergio Ramirez, and Miguel d'Escoto, a Roman Catholic priest who served as foreign minister from 1979 to 1990. High tension characterized the beginning of their first meeting with President Carter and Secretary of State Cyrus Vance. Father Miguel, who was born in Hollywood, lived for many years in New York, and typified the Sandinistas' love-hate relationship with the United States, started the meeting by telling the President and Secretary of State that, based on the U.S. role in propelling up the Somoza dynasty: "I don't trust you." Secretary Vance calmly replied: "Mr. Foreign Minister, if I were you, I wouldn't trust us either. But the time has come for us to establish a new relationship, and to earn each other's trust, based on mutual respect. We're willing to do that if you are." With that remark, the ice melted and a constructive dialogue ensued. In fact, the Carter Administration cobbled together a modest package of economic assistance, and Nicaragua's relations with the United States improved steadily over the next fourteen months, until President Carter was defeated in his bid for reelection.

The 1980 Republican Party platform did not bode well for U.S.-Nicaragua relations. It bluntly called for the new U.S. administration to reverse the Sandinista Revolution. The platform, together with Ronald Reagan's renowned anti-Communism and conservative ideology, foretold a policy of harsh confrontation that the Sandinistas both anticipated and feared. As they prepared to deal with this threat, a crisis arose that confirmed the Sandinistas' and the incoming Reagan Administration's worst fears about one another and diminished the already slim chance for an accommodation. The crisis arose in El Salvador, where leftist insurgents had been fighting to overthrow a military government as bad as the Somoza regime in Nicaragua. In December 1980, the Salvadoran army rampaged against the civilian population, murdering, among hundreds of others, a group of American nuns. The following month, the rebels planned a "final offensive," believing they were on the verge of victory. The rebels had supported the Sandinistas and called upon them to reciprocate by supplying arms and equipment essential to what they believed was the final battle in the war. The Sandinistas had, until then, resisted the temptation to support their Salvadoran counterparts, in order to avoid antagonizing the United States. But, at this time, they felt it impossible to abandon them, and supplied them with the war materials they required (which the Sandinistas received from Cuba). The Sandinistas hoped that a rebel victory in El Salvador before the arrival of the Reagan Administration would end their isolation in Central America, create an ally in the coming confrontation with the United States, and make it more difficult for President Reagan to "reverse" their revolution.

The gamble failed. The "final offensive" was put down by the Salvadoran government, with help from the United States, and the Sandinistas were caught red-handed trafficking arms to the Salvadoran rebels. This hardened the new Republican administration's view that the Sandinistas were Cuban-style communists intent on exporting revolution throughout Central America and beyond. Republican criticism of President Carter for having been "duped" by the Sandinistas was so intense that even he, in his final days in office, felt compelled to suspend economic assistance to Nicaragua. The Sandinistas knew they were in for a hard time. Shortly after taking office, the new U.S. administration discreetly sent a strong message to Managua, through a number of different channels. I was one of them. Another was Assistant Secretary of State Thomas Enders, who traveled to Nicaragua to meet with Ortega personally. The message, in essence, was: "Hands off El Salvador. If you support the revolution there, or anywhere else, you will be our enemy, and the consequences will be severe. If you heed this advice, we will try to reach a modus vivendi with you." Tragically for Nicaragua, the first part of the message was true; the second was a lie.

Convinced that the U.S. threat was not idle, the Sandinistas heeded the message. Although the decision caused considerable dissent internally, and between the Sandinistas and the Salvadoran rebels, the Sandinistas ceased their trafficking of arms to the Salvadorans. The termination was later proven at The Hague, primarily by the expert testimony of David MacMichael, a CIA intelligence analyst from March 1981 to April 1983, whose job was to analyze intelligence collected from all sources to determine whether and to what extent the Sandinistas were involved in supplying arms and other war materials to the Salvadoran rebels. MacMichael, under Abe's riveting examination, testified that there was no credible evidence that the Sandinistas were engaged in such activities. Further, he testified that, in view of the extensive surveillance that was employed in an effort to obtain evidence of Sandinista arms-trafficking, he could only conclude from the absence of such evidence that none of this activity was taking place. MacMichael acknowledged that the Sandinistas had sent arms to the Salvadorans in January 1981, in support of the "final offensive," but insisted that they had not done so thereafter. He testified that the White House's continuing claims of Sandinista arms-trafficking were a deliberate deception, intended

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2. Id. at 19-20.
3. Id. at 33, 41.
to win Congressional support for its efforts to forcefully overthrow the Nicaraguan government. MacMichael’s act of conscience cost him dearly. He had great difficulty securing future employment.

While these facts should have made a difference, they did not. Soon after taking office, President Reagan charged CIA Director William Casey to develop a plan to overthrow the Sandinistas government, including “covert operations” of a military and paramilitary nature. The plan involved assistance to and incitement of internal opposition groups within Nicaragua, such as political parties, labor unions, business organizations, and media as well as a massive propaganda campaign to destabilize the regime. Its centerpiece, however, was the recruitment, arming, training and direction of a counterrevolutionary army, composed initially of former members of Somoza’s National Guard who had taken refuge in Honduras. At first, the CIA tried to keep a low profile by bringing in Argentine Army officers to train the Contras. However, as the U.S. involvement and investment increased, the CIA’s role became increasingly apparent, and the Argentine facade was discarded as the CIA took over direct operational control. In November 1981, Contra commandos dynamited two key bridges in northern Nicaragua, preventing thousands of peasant coffee growers from transporting their crop, Nicaragua’s principal export, to market, and dealing a devastating blow to the country’s fragile economy. The war was definitely on.

Throughout 1982, the war intensified. The Contras received sophisticated U.S. weaponry, and their ranks grew to more than 10,000 troops. The frequency, boldness, and destructiveness of their raids across the Honduran border multiplied. While they were unable to seize and hold territory, they spread terror throughout the Nicaraguan countryside and provoked the Sandinistas to adopt a series of drastic security measures. These included a military draft and a state of emergency that placed restrictions on opposition political activity, reduced popular support for the regime, and fed the CIA’s recruitment efforts among disaffected peasants. An operation of this magnitude could not be kept “covert,” and neither the White House nor the CIA tried very hard to keep it so. To the contrary, they bragged that they were supporting “freedom fighters” and that their objective was to make the Sandinistas “cry uncle.”

The Sandinistas bent, but they never broke. They pursued a two-track policy. First, to defend themselves militarily against the CIA and the Contras, who were beginning to pose a serious threat to the regime, they built a huge army and supplied it with arms and ammunition obtained primarily from the Soviet Union and its allies, because they were the only ones willing to supply the quantities of war materials that were needed, and they did so on credit. Simultaneously, the Sandinistas launched an all-out diplomatic offensive to reach a negotiated settlement with the United States and,


through it, an end to U.S. efforts to overthrow the government. On the multilateral level, the Sandinistas gave their full support to the Conadora Group, which initially consisted of Panama, Venezuela, Mexico, and Colombia, later joined by Argentina, Uruguay, Brazil, and Peru. It strove to broker peace within Central America and between Nicaragua and the United States. On the bilateral level, they presented the United States with a package of proposed peace treaties which, in return for normal relations between the two countries, would have committed the Sandinistas to refrain from supporting rebel movements in other Central American countries or otherwise interfering in their neighbors’ affairs, and to respect human rights and implement democratic reforms in Nicaragua. The treaties constituted a positive response to all the demands the United States had made to the Sandinistas.

The Reagan Administration had no interest in either peace initiative. It torpedoed Conadora by ignoring it, and by pressuring Honduras and El Salvador, whose shaky, military-backed regimes were heavily dependent on U.S. support, to resist reaching any agreements that would let Nicaragua off the hook. To the Sandinistas’ proposed peace treaties, which met all outstanding U.S. demands, the White House simply refused to take “Yes” for an answer. No one in the U.S. government would meet with Foreign Minister d’Escoto when he came to Washington to present the treaties; nor would they officially accept copies of the treaties themselves. Exasperated, the foreign minister deposited them with the Washington Post, which ran a front-page headline characterizing them as a major breakthrough in U.S.-Nicaragua relations, and returned to Nicaragua. Neither the news media nor anyone else slowed the Administration in its zeal to isolate and destroy the Nicaraguan revolution. The anti-Sandinista propaganda was so intense that few dared to try. A majority of members of Congress either bought the Administration’s message that the Sandinistas were die-in-the-wool Communists serving the Soviet Union’s Central American surrogate, or were so afraid they would be attacked as soft on Communism that they were cowed into supporting the no-longer covert war. By 1983, Congress openly and expressly authorized funds for the war, albeit subject to the ´pig-leaf of a proviso, known as the Boland Amendment, that the funds could not be used for the purpose of “overthrowing” the Government of Nicaragua. This was easily circumvented by the CIA. It disingenuously reported that it and the Contras were not trying to overthrow the Sandinistas, merely to stop them from sending arms to El Salvador, which it knew the Sandinistas were not doing.

Nicaragua appeared to be out of moves. The CIA was just getting started, however. In 1983, it opened a “southern front,” organizing a new Contra force in Costa Rica, just across Nicaragua’s southern boundary. Now the

5. Id. at 11.
Sandinistas were under pressure both from the north and the south, fighting a war on two fronts. The arrival of more Soviet military assistance, necessary to their survival, only provided more fuel for the White House's propaganda machine. Wasn't this proof that Nicaragua had become a Soviet satellite? There were signs that Democrats in Congress, especially in the Democrat-controlled House of Representatives, were growing uneasy with the Administration's bellicosity, and concerned about the behavior of the Contras, whom respectable human rights organizations were accusing of repeated atrocities against innocent civilians. The CIA, in particular, was severely criticized for preparing and distributing to the Contras a field manual entitled *Psychological Operations in Guerrilla Warfare*, that recommended the murder of local Sandinista civilian leaders. Despite the so-called "CIA Murder Manual," there were not enough votes to cut off U.S. assistance, but the margin in the House favoring the Administration's policy was shrinking.

This was the context in which the idea of Nicaragua suing the United States in the World Court was born. It first came to life in a discussion I had with Carlos Arguello, Nicaragua's minister of justice, on July 19, 1983. Arguello was an outstanding lawyer with an independent and razor sharp mind, who grew up in New York and spoke English fluently and without an accent. He was one of very few Sandinista officials (along with Hollywood-born d'Escoto) with a sophisticated understanding of American attitudes, values, politics, and society. Through our four years of facing difficult challenges together, we became good friends and spent many long nights agonizing over U.S.-Nicaragua relations. What could be done to change U.S. policy? There was no way to alter the ideologically driven thinking of the Reagan Administration. The only hope was to persuade Congress to stop the war by cutting off the funds that kept it going.

Having lobbied in vain against "Contra aid" for more than a year, it was obvious to me that we could never win the argument as long as the question was whether the Sandinistas were Cuban-style Communists in thrall to the Soviet Union. They were not, but the Administration's propaganda campaign had overwhelmed Nicaragua's efforts to present a more objective picture of itself. And even if members of Congress recognized that the Administration was grossly exaggerating the Sandinistas' sins and the threat they posed to the United States, they were afraid of opening themselves to attack from the right for being stooges of the Communists. It was clear that to win the debate in Congress we had to change the question.

That was the reason for proposing that Nicaragua sue the United States in the World Court: to change the focus of the debate in Congress in order to win forthcoming votes on Contra aid. The question would no longer be the simplistic one asked (and answered) by the Reagan Administration: whether the Sandinistas were Communists whose very existence threatened U.S. interests. With the United States in the defendant's dock in The Hague, members of Congress would have to ask themselves whether U.S. national interests were truly served when America wantonly disregarded, and thereby undermined, the most fundamental principles of international law. As Abe Chayes put it during our meeting in Cambridge, the suit would force a change in the debate by holding up a mirror to America's face and challenging its image of itself as a law-abiding nation proud of its role in creating, supporting and defending the international legal order. The reflection could not be pleasing: an international outlaw guilty of the same offenses—trampling on the political independence and territorial sovereignty of a small and defenseless nation—that Americans associated with the adversary they disdainfully called the "evil empire."

As Abe pointed out, it was Nicaragua's good fortune that the World Court was highly regarded in the United States. In 1980, the Carter Administration had gone to the Court to challenge Iran's seizure of the U.S. Embassy in Tehran and scores of diplomatic personnel; the Court responded with a unanimous condemnation of Iran's actions and an order to return the Embassy and free the hostages. The moral and legal authority of the Court's order strengthened the U.S. position vis-à-vis Iran and helped persuade the latter to accept a diplomatic settlement. Nicaragua's suit was similarly designed to capture the moral high ground and use it to win the support of the international community, U.S. public opinion, and, ultimately, the U.S. Congress. In its suit, Nicaragua would carry the same banner that the United States had against Iran—fighting for compliance with international law. Like Iran, the United States would be cast in the role of defending the indefensible.

It was not necessary to change everyone's thinking on U.S. policy toward Nicaragua. All that was required to defeat Contra aid was to change the votes of about fifteen to twenty members of Congress, most of them House Democrats. Public opinion and media attention stirred by Nicaragua's suit was certain to be helpful in facilitating their conversion. But first it was necessary to convert the Sandinistas themselves, who knew little about the Court and feared that, like the Security Council and other organs of the United Nations, it was susceptible to U.S. manipulation. This fear was fed by the Soviets and, especially, the Cubans, who strongly advised Nicaragua against bringing the suit. Although they undoubtedly believed that the United States wielded great influence over the Court and could block any adverse ruling, it is hard to resist the suspicion that neither the Soviet Union nor Cuba would have been thrilled by Nicaragua's pursuit of a judgment condemning foreign intervention in the affairs of a sovereign state. However, Arguello and d'Escoto immediately saw that the suit offered a real possibility for ending U.S. military support of the Contras, which was rapidly becoming Nicaragua's number one national priority. The foreign minister asked me to prepare a comprehensive memo describing the Court, identifying the judges, setting forth all of Nicaragua's legal arguments and supporting evidence, analyzing the anticipated legal and factual defenses from the United States, discussing the possible outcomes of the suit, and pre-
dictating how U.S. policy—particularly support for the Contras—would be affected. In the meantime, he would lobby Daniel Ortega and other key leaders from the National Directorate to begin the process of convincing them to authorize the suit.

The process took several months. Discreet consultations were made with friendly governments, including Mexico, whose diplomatic ranks included two of Latin America’s most respected international legal experts: Foreign Minister Bernardo Sepúlveda and his predecessor (and then-Ambassador to France) Jorge Castañeda. Both agreed that Nicaragua had a strong case on the merits, something we already knew. More importantly, each of them expressed the view that, notwithstanding the enormous pressure the United States was bound to bring, the Court would render a judgment based on the merits of the case. Another critical consultation took place at U.N. headquarters in New York. A meeting was arranged with one of the judges of the Court, from a nonaligned nation, to inquire whether, in his opinion, the Court would render an impartial judgment in a case brought by Nicaragua against the United States, or whether the judges would feel obliged, for whatever reason, to favor the United States. The answer was unequivocal: the composition of the Court was such that it could be counted upon to decide the case on its merits.

In January 1984, the government of Nicaragua decided to sue the United States in the World Court. An excited d’Escoto called me aside at a reception in Managua to give me the news. The next day, d’Escoto, Arguello, and I met with Daniel Ortega and Sergio Ramírez to discuss how to proceed. The Nicaraguans were anxious to file the suit as soon as possible. The war had escalated. Oil pipelines and storage tanks across the country were being dynamited, and mines were being laid in the ports, threatening to cut off all commerce with the outside world. The Sandinistas felt the noose tightening around their necks.

I suggested that our first task should be to recruit a team of prominent international lawyers, experienced before the World Court, to handle the case. I had already decided to recommend Abe Chajes as lead counsel. Ortega looked at me like I must be crazy; d’Escoto explained that this case was “too important to Nicaragua to entrust to strangers.” “Then who are you going to get to represent you?” I asked incredulously. “You,” said a resolute Ortega, pointing to Arguello and me as the others nodded their assent. I was overwhelmed both by the display of confidence in me, and by the naiveté of this proposition. “I appreciate your confidence,” I responded, “but this case is too important to entrust exclusively to lawyers who have never appeared before the Court. I will certainly serve on Nicaragua’s legal team if that is what you want, but to win the case we must hire lawyers with international experience and prestige that the case requires. Of course, they must be people whom Nicaragua can trust. Fortunately, I know someone who would be perfect for the job, a former professor of mine at Harvard Law School.” After a lengthy discussion, I was authorized to approach Abe, determine whether he was interested and, if so, invite him to Nicaragua. The Sandinistas were not yet ready to hire a “stranger,” but they were at least willing to meet one.

Abe’s visit to Nicaragua in February 1984 was a huge success. He was his usual positive self—optimistic, enthusiastic, encouraging, and sympathetic—and, at the same time, shrewdly analytical about the legal and political dimensions of U.S.-Nicaragua relations and the undertaking we were about to initiate. The Sandinistas were bowled over by him. Beyond his warmth and his brilliance, which they quickly apprehended, they saw that he was a man of honor and courage, who was willing to take their case as a matter of principle and would not abandon them if the going got tough, or if the Reagan Administration got nasty toward him personally, which it ultimately did. If they had understood the word, they would have agreed that he was what his nephew Adam called him at the memorial service held in his honor at Harvard Law School in September 2000: a rezaddik (in Hebrew, a righteous man). Abe connected immediately with d’Escoto, the U.S.-born foreign minister and priest. They were both loquacious, outgoing, and cultured men of the world, who could discuss art, literature, history, politics, food, or wine with equal aplomb. They were also great storytellers (neither of whom was averse to peppering his stories with the names of the great personages he had known) and they enjoyed each other’s tales and company immensely. Abe also hit it off with the shy and taciturn Ortega, who was more comfortable listening than making small talk. In a discussion that lasted several hours, Ortega patiently answered all of Abe’s probing questions about himself, his colleagues on the National Directorate, their domestic and foreign policies and objectives (including their attitudes toward democracy and human rights in Nicaragua and their commitment to the rebels in El Salvador), and their relationship with the United States. Abe asked similar questions of just about everyone he met in Nicaragua. He concluded that the Sandinista’s overarching priority was to achieve greater social and economic justice for Nicaragua’s poor, who constituted seventy percent of the population, and who had suffered oppression and exploitation throughout Nicaragua’s history, especially during the forty-five-year Somoza dynasty. Abe satisfied himself that Ortega was not the communist dictator that the Reagan Administration tried to portray, but a nationalist with humanitarian values who was open to moving Nicaragua in a democratic direction, with the right influence. Abe saw that implacable U.S. hostility had pushed Ortega into unwanted dependence on the Soviet Union and Cuba, as well as wartime domestic policies that stressed security over civil liberties.

Abe told Ortega and the other Sandinista leaders that Nicaragua had a strong, but not invincible case against the United States. He explained that the judges of the World Court were eminent international jurists, who would first and foremost apply the law, but that they were also human beings and, as such, could not help but be influenced by their impressions as to
whether Nicaragua was a sympathetic plaintiff. To make the judges more likely to rule in Nicaragua's favor, he emphasized, the government had to do two things. First, it had to refrain from sending arms or other supplies to the Salvadoran rebels. It would be seen as hypocritical, he said, for Nicaragua to complain about U.S. support for the Contras while, at the same time, it was supporting rebels in El Salvador, regardless of the merits of their case. Second, he said, the Nicaraguan government had to remove restrictions on civil liberties, because establishing a more democratic political environment would make Nicaragua more sympathetic not only to the Court but also to the U.S. Congress in the battle over Contra aid. Abe knew better than to lecture Ortega on non-intervention in El Salvador or democracy in Nicaragua; the Sandinistas, and many other Nicaraguans, were tired of foreigners—especially Americans—telling them what to do. However, Abe wisely put his political advice in the context of a lawyer counseling a client on how to win a case. He made Ortega see that non-intervention in El Salvador and democratization at home were critical to the objectives the Sandinistas had set for themselves: success in the World Court and defeat of American aid to the Contras.

Ortega assured Abe that Nicaragua had curtailed arms shipments to El Salvador after the failed final offensive of January 1981 and had not renewed them. He said that he agreed with Abe's point, and that the shipments would not be resumed, at least during the pendency of the suit. To reinforce his message, Abe warned that, with all of the sophisticated surveillance equipment that the United States had trained on Nicaragua and transit points to El Salvador, Nicaragua could not send anything there without the United States knowing about it. Ortega understood. He also said he would begin a process of relaxing restrictions on domestic political activities, but as long as the war lasted certain precautions had to be taken to keep the CIA from exploiting an open political system to destabilize the government. In fact, national elections were held in 1984 and, as the security situation improved during the next several years, most restrictions on civil liberties were eventually removed. Ironically, it was Abe—not the Reagan Administration—who served the legitimate interests of the United States by effectively encouraging the Sandinista leadership to stay out of El Salvador and implement democratic reforms at home. The White House, through its policy of confrontation, was pushing the Sandinistas in the opposite direction.

The next step was to fill out the rest of the team that would represent Nicaragua in The Hague. The most obvious candidate, after Abe, was Ian Brownlie, Chichele Professor of International Law at Oxford, and the world’s foremost authority on the use of force in international law. Brownlie also had the advantage of having appeared before the World Court many times. He was not only experienced in the Court’s procedures and idiosyncrasies but deeply respected and admired by the judges. Unlike other European academics, Brownlie was as outstanding a practitioner as he was a theoretician, and he knew how to try a case as well as spin a legal argument. When Arguello and I met with him at Oxford, we discovered still another positive factor: Brownlie sympathized with the Sandinistas’ commitments to social and economic justice and national independence, and recoiled at the arrogant anti-communism and bullying tactics of both the Reagan and Thatcher Governments.

With Chayes and Brownlie on the team, only one element was missing: a francophone. To better address the French-speaking and continental lawyers on the Court, we wanted a top French international lawyer. President Francois Mitterrand, a Socialist, was a supporter of Nicaragua, and his government was discreetly advised about the forthcoming suit and asked to recommend a French member for our legal team. We were surprised and a bit disappointed at first when the name we were given was not one of the great French luminaries, but a young professor at the University of Paris, Alain Pellet, who had never appeared before the Court. This posed a serious dilemma for Nicaragua, which could not afford to risk offending the French government by rejecting its candidate. However, Arguello and I were reassured upon meeting Pellet in Paris. We were impressed by his intellect, charm and zeal for the case, and we felt he would fit in well with the rest of the team. Pellet, of course, went on to become the outstanding French international lawyer of his generation after his stellar performance in Nicaragua’s case launched him to prominence.

Pellet was not the only future superstar to cut his teeth on the Nicaragua case. Arguello, who performed brilliantly as Nicaragua’s agent, was appointed ambassador to the Netherlands so he could reside in The Hague and devote nearly full time to the World Court; serving three successive Nicaraguan governments, he became his country’s indispensable authority on international legal matters. My younger associates Judy Appelbaum, Paul Kahn, and David Wippman all went on to stardom as well. Appelbaum later made a national reputation for herself in civil rights law, and became the general counsel to the National Women’s Law Center; Kahn and Wippman became eminent professors of international law, respectively, at Yale and Cornell Law Schools. Abe’s student law clerks were brilliant young women whom we all knew were destined for professional greatness: Kathleen Milton, now at the Office of the Legal Advisor of the U.S. Department of State, and Anne-Marie Slaughter, Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School.

Chayes, Brownlie, Pellet, Arguello, and I met in Paris in March 1984 to discuss strategy and timing for the filing of the suit. We were all convinced that Nicaragua could win the case on the merits, but we had serious concerns about whether we would ever get to the merits. The first hurdle was establishing the jurisdiction of the Court. Both Nicaragua and the United States had formally accepted the compulsory jurisdiction of the Court, but there was a strange twist to Nicaragua’s acceptance. While Nicaragua’s
Another hurdle that we thought we had to overcome before getting the Court to the merits of the case was presented by the terms of the 1946 U.S. declaration accepting the Court's compulsory jurisdiction. There was a great debate in the Senate over U.S. ratification of the Truman Administration's acceptance of the Court's jurisdiction. The United States had never accepted the jurisdiction of the ICJ, and some of the same nationalist fears about subjecting to an international court were raised against the 1946 declaration submitting to the jurisdiction of the ICJ. Senate ratification was accomplished only after certain amendments were added to the original declaration. One of these, known as the Connally Amendment (after Senator Thomas Connally of Texas), provided that U.S. acceptance of the Court's jurisdiction did not apply to domestic matters, and isolated the United States as the exclusive right to determine whether a particular matter was domestic. The effect of this amendment was to insert an escape clause in the declaration. By invoking the Connally Amendment, the United States could avoid any suit against it in the Court, simply by declaring that it involved a domestic matter. Our team assumed that the Reagan Administration would use the Connally Amendment to escape the Court's jurisdiction and kill Nicaragua's case. We considered this the biggest problem we would face, and we had no solution. Arguello and I hoped that even a short-lived suit would be enough to affect the debate in Congress, especially if U.S. invocation of the Connally Amendment could be presented as a flight from the Court to avoid a certain defeat—in effect an admission that the Reagan Administration's actions in and against Nicaragua were indefensible.

We were committed to going forward with the suit in spite of these obstacles. We also agreed to seek interim measures of protection, specifically, an order compelling the United States to cease and desist immediately from all interference in Nicaragua's internal affairs, including the sponsorship and support of rebels fighting against the Nicaraguan government. We could hardly complain about these activities, and the death and destruction they were causing, and fail to request emergency relief, that would have undermined the credibility of our allegations. Moreover, seeking interim measures and an early hearing would maximize the political impact of the suit by keeping it in the public eye after the initial filing date. Finally, all the Court needed to proceed to interim measures was a prima facie basis for jurisdiction, which the matching declarations provided. Even if the case were later dismissed on jurisdictional grounds we still had a chance to obtain interim measures against the United States. We decided that the suit would be filed on April 11, 1984. I was tasked with drafting the Application to the Court. In the meantime, we agreed to do everything possible to keep the suit secret. Surprise was an important element of our strategy.

As things turned out, we were the only ones surprised. First, on April 4, an investigative reporter for the Wall Street Journal broke the blockbuster story, based on impeccable U.S. government sources, that the CIA itself had
mired Nicaragua's harbors. The Reagan Administration was caught in flagrante delicto, and unable to deny the allegations. Editorials from leading newspapers around the country condemned the mining as an "act of war" that threatened not only Nicaragua but ships of third states, including friends and allies of the United States, engaged in peaceful maritime commerce. Members of Congress joined in the criticism, including Senator Barry Goldwater, Chairman of the Senate Select Committee on Intelligence, and the last of all one hundred senators that could be accused of sympathy for the "Communists." Senator Goldwater, in an open letter to CIA Director William Casey, called the mining of Nicaragua's harbors a "crazy" act that "violate[d] international law." Of course, it did not take an article in the Wall Street Journal to call Nicaragua's attention to the fact that its harbors were mined—exploding ships were sufficient evidence of this—or to lead the Sandinistas to believe that the CIA was involved. But the Journal article and the subsequent public exchanges in Washington constituted irreparable proof of CIA responsibility. They focused attention, one week before Nicaragua filed suit, on the illegality of U.S. actions against Nicaragua. This was a tremendous shot in the arm for our case. To take full advantage of it, I re-drafted the Application (which had already been circulated to and approved by the other members of our team) to include it. Among other things, it provided real substance to our claim based on the FCN treaty. No one could continue to challenge Abe's argument that U.S. actions, which now included the mining of Nicaragua's harbors, violated a treaty of friendship, commerce, and navigation. The only downside to the publication of the mining story was that, with the suit filed almost immediately on its heels, many commentators assumed that the suit was only about the mining of the harbors. That was a notorious but small part of it. The suit challenged the whole array of U.S. military and paramilitary activities in and against Nicaragua, particularly U.S. support for the Contra rebels fighting the Nicaraguan government.

The second surprise turned out to be equally beneficial to Nicaragua, although it did not seem so at first. Foreign Minister d'Escoto and Abe had come to Washington on Saturday, April 7 to work with me on the finishing touches to the Application, and to prepare for the press conference announcing the filing of the suit on the morning of April 11. Brownlie and Arguello were to hold a simultaneous press conference in The Hague. The foreign minister, Abe, and I planned to meet on April 9 and 10 with certain members of Congress—including Senator Christopher Dodd and Representatives Jim Wright and Michael Barnes, whose speeches condemning U.S. support for the Contras (reported in the Congressional Record) were quoted in our soon-to-be-filed Application—to give them the courtesy of a "heads up" about our use of their statements. On Sunday, April 8, d'Escoto and I were watching the evening news on television, and were stunned by an urgent flash that the United States had unilaterally withdrawn its acceptance of the World Court's jurisdiction after learning that Nicaragua was planning to file suit against it. We looked at each other in disbelief: had the U.S. slipped out of the trap we were just about to spring? But we knew that something had to be wrong with the story. The 1946 declaration by which the United States accepted the Court's compulsory jurisdiction stated expressly that its acceptance of jurisdiction was effective with respect to every other state that accepted the Court's jurisdiction, and would only be withdrawn on six months notice. That meant a U.S. withdrawal on the eve of suit by Nicaragua, which had a similar declaration on file with the Court, could not deprive the Court of jurisdiction. What was the Reagan Administration thinking? We immediately called Abe. "A blunder," he shouted with his customary enthusiasm, "a colossal blunder. But to be sure, let's call Brownlie (who was already in The Hague) and ask him to get a copy of whatever the U.S. filed first thing in the morning and have him read it to us." We agreed to do so, and, also for maximum impact, to file our suit the next morning, April 9, instead of waiting until April 11 as originally planned. From the television treatment given to the purported U.S. withdrawal from the Court's jurisdiction (especially following the recent news about the CIA's role in mining Nicaragua's harbors), this was certain to be front page news in the next day's major newspapers. By filing suit immediately, we would assure front page treatment of the case the following day as well.

Brownlie called us at 4 a.m. (10 a.m. in The Hague). He had obtained a copy of the U.S. submission to the Court, signed by Secretary of State George Shultz, stating that the United States was withdrawing its acceptance of compulsory jurisdiction vis-à-vis any Central American state. Brownlie was appalled by the State Department's iniquity. The withdrawal was plainly ineffective to prevent Nicaragua from obtaining jurisdiction over the United States, given the six-month notice of withdrawal pledged in the original U.S. declaration. Worse, by withdrawing only with respect to suits by Central American states, the United States was telling not only the World Court but the whole world that it was running away from a suit by Nicaragua. There could hardly have been a more powerful admission of guilt, and that is precisely the way most of the U.S. news media and many members of Congress interpreted Shultz's letter. U.S. intelligence services had succeeded in learning Nicaragua's secret plan to file suit, but the White House was unable to capitalize on this information. Instead, it handed Nicaragua an enormous political and propaganda victory. The craven attempt to flee the Court magnified both the attention given to Nicaragua's suit and its credibility. There was an electric atmosphere at the packed Washington press conference announcing the suit, and presenting none other than Abram Chayes, professor at Harvard Law School and former legal advisor to the State Department, as counsel. The suit and the U.S. reaction remained on the front pages for an entire week. Editorial comment was overwhelmingly favorable to Nicaragua, and cartoonists had a field day with the Reagan Administration's flight from justice; one of them depicted Reagan dressed as a cave man and thumbing his nose at the Court, while similarly
will-permit me a personal word," he began, and then he spoke of his last appearance before the Court, twenty years earlier, in the Certain Expenses case, when Judge Stephen Schwebel "was my valued associate on the United States team." But there was method to Abe's apparent self-indulgence. It was his way of letting the rest of the Court know that he was senior to Schwebel, whom, as the U.S. judge on the Court, we expected to be hostile to Nicaragua. Turning to the case at hand, Abe looked directly at the judges and told them that the "request for interim protection presents this Court with what is literally a matter of life and death for hundreds of Nicaraguan citizens." He movingly described the death and destruction inflicted on Nicaragua by the mining of its harbors, the demolition of its vital infrastructure, and the Contras' attacks; he meticulously laid out the incontrovertible evidence of U.S. responsibility for these events and the resulting loss of life and property; and he demonstrated that these actions violated basic principles of international law and were indefensible. Abe's argument for interim measures demonstrated the urgency of Nicaragua's request; and focused the Court's attention on upcoming congressional votes on Contra aid, which were the main targets of the suit:

Finally, the urgency of the situation could hardly be greater. At this very moment, as we debate this matter in this Great Hall, more than 8,000 armed mercenaries financed, armed, equipped, and directed by the United States are on the attack inside Nicaraguan territory. Without the financial and military support provided by the United States this army will be forced to terminate its offensive and withdraw from Nicaraguan territory.

Senior officials of the United States Government have reported that of the $24 million appropriated in December 1983, $22 million had been spent by the end of March 1984, leaving only $2 million remaining. Thus, the United States officials reported, the funds could be exhausted by the end of this month. In short, if no additional financial or other support is provided to the mercenaries, hundreds of Nicaraguan lives will be spared and further irremovable prejudice to Nicaragua's rights as a sovereign state will be avoided.

But as we debate this matter here, the United States Congress in Washington is debating the appropriation of an additional $21 million at the urging of the President of the United States and his Administration—$21 million to permit the mercenaries to keep their military offensive going. The Senate has already approved this expenditure and only the concurrence of the House of Representatives is required before

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7. Id. at 30.
the funds can be disbursed to the mercenaries. This action may be forthcoming within days.\textsuperscript{8}

The Court ruled overwhelmingly in Nicaragua’s favor and granted the interim measures that we requested. By a vote of 15-0, it ordered the United States immediately to cease and refrain from laying mines or taking any other action to block or endanger access to Nicaragua’s ports. By a vote of 14-1 (with only Judge Schwebel dissenting), the Court ordered the United States to respect Nicaragua’s sovereignty and not to jeopardize it by any military or paramilitary activities, or by the threat or use of force against its territorial integrity or political independence. The Court’s condemnation of U.S. support for the Contras was unmissable. The decision was published on May 10, 1984. The House of Representatives voted on Contra aid on May 25. The final tally was 177 in favor and 241 against. Contra aid was defeated for the first time. And it was not the last. For the next two years, the House of Representatives consistently opposed the White House’s requests for renewed aid to the Contras. While a number of factors contributed to the House’s defeat of Contra aid, Nicaragua’s suit and its focus on international law, the Reagan Administration’s ham-handed attempts to escape judgment, and the Court’s rulings in Nicaragua’s favor on interim measures and (later) jurisdiction indisputably played their part.

The two-year hiatus in Congressionally authorized Contra aid had a decisive impact on the war in Nicaragua and on U.S. policy. According to General Joaquín Cuadra, chief of staff of the Nicaraguan Army, the moratorium on aid forced the Contras to scale down the size and frequency of their attacks inside Nicaragua, reduced the military pressure on the Sandinistas, and gave them much-needed time to build up the manpower and acquire the equipment (especially Soviet helicopter gunships) necessary to achieve military superiority. After mid-1984, the Contras continued to inflict damage, but they never again mounted a serious threat to the Nicaraguan army or government. Meanwhile, to keep the Contras in the field after the House cut off aid, the White House and the CIA conspired to support them illegally, behind the backs of Congress and the public. Lt. Col. Oliver North, then an obscure Marine officer detailed to the National Security Council, became the key operative in a variety of reckless schemes to obtain guns and money for the Contras, including the infamous deal to supply arms to Iran in exchange for funds to buy weapons for the Contras. These activities eventually exploded into the Iran-Contra scandal that interfered the Reagan Administration’s misguided Central America policy once and for all, and gave the small states of the isthmus (including Nicaragua) the breathing space, free of U.S. pressure, to negotiate a historic peace agreement that ultimately led to free and fair elections, and an end to civil wars, throughout the region. Thus, the World Court delivered what turned out to be a devastating blow to the

Reagan Administration’s war on Nicaragua. It set off a chain reaction that helped convince Congress to cut off funding for the Contras, gave Nicaragua the respite it needed to turn the tide of battle, and forced the White House into egregious tactical errors that ultimately undid its entire policy.

After ruling on interim measures, the Court fixed a timetable for the parties to submit Memorials on jurisdiction, and scheduled oral hearings for October 1984. The interim measures decision itself concluded that the matching declarations accepting compulsory jurisdiction constituted a prima facie case that the Court had jurisdiction over the dispute, but deferred two issues to the jurisdictional phase: first, whether Nicaragua’s failure to deposit its instrument of ratification of the Statute of the PCIJ constituted a fatal flaw that nullified its acceptance of jurisdiction; and second, whether the Shultz letter had effectively withdrawn U.S. acceptance of the Court’s jurisdiction vis-à-vis Nicaragua.

We were amazed when the 1100-page U.S. Counter-Memorial opposing jurisdiction failed to mention the Connally Amendment. We later learned that Davis Robinson, the legal advisor to the State Department, had taken a strong stance against use of the Amendment, and had persuaded Secretary of State Shultz and others that it should not be relied on for two reasons. First, he pointed out that the State Department had always opposed the Amendment on principle, and had even questioned its validity, arguing that it defeated the purpose of compulsory jurisdiction if a state could avoid it merely by the artifice of declaring the underlying dispute a “domestic matter.” If the United States ducked the Court’s jurisdiction on this ground, it would encourage other states to do the same, until nothing would be left of compulsory jurisdiction. Robinson’s principled position separated him from virtually all other U.S. officials involved in the formulation or execution of the Reagan Administration’s Nicaragua policy, who were willing to do whatever it took to punish the Sandinistas, regardless of legality or impact on other deeply held U.S. values and interests. Robinson was a former student of Abe’s, and Abe was proud of him. Robinson’s second argument against invoking the Connally Amendment was that the United States would defeat jurisdiction without it, because of Nicaragua’s technical failure to accept compulsory jurisdiction and the Shultz letter. His judgment proved wrong. He left government service six months later.

The arguments on jurisdiction were highly technical. It was undisputed that, in 1929, Nicaragua declared its acceptance of the compulsory jurisdiction of the PCIJ, pursuant to Article 36 of the Statute of the Court, and that its declaration was without limitation as to time or circumstance. However, Nicaragua’s acceptance of the PCIJ’s jurisdiction was marred by its failure to complete ratification of the Statute of the Court. Nicaragua duly ratified the Statute in 1935, and four years later notified the Court that it was sending the instrument of ratification. For unknown reasons, the instrument never arrived at the Court. Technically, the ratification was never completed. Nica-

\textsuperscript{8} Id. at 57.
ragua and the United States agreed that, because of this lapse, Nicaragua was never bound by the PCJ’s compulsory jurisdiction. Nicaragua contended, however, that its declaration (which was unlimited as to time) was still in force when the PCJ was replaced by the International Court of Justice in 1945, such that, when it ratified the Statute of the ICJ and duly deposited its instrument of ratification with the Registrar, it became bound by the compulsory jurisdiction of the new Court. Abe argued to the Court that Nicaragua’s contention was supported by the plain meaning of Article 36(5) of the Statute of the ICJ, which states that: “Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are deemed still in force shall be deemed, as between parties to the present Statute, acceptance of the compulsory jurisdiction of the International Court of Justice ....” Abe’s characteristic wit enlivened any debate, even one on such an esoteric subject as this. He had great fun picking apart the U.S. interpretation of Article 36(5), which also purported to be based on its “plain meaning”:

The United States professes to find a different meaning in the text of the Article. They say it is the “plain meaning” of the language. They take 10 pages of the Counter-Memorial in attempting to establish the asserted “plain meaning.” However, so it cannot be as plain as all that.

The United States professes to find great comfort for its “plain meaning” argument in its asserted inability to find anyone else who reads the Article as Nicaragua does .... The United States apparently did not look very far. If it had consulted its own Memorial filed in the Aerial Incident case, it would have found an argument that Nicaragua could well adopt as a fair statement of its own.

Brownlie gave the Court additional reasons, beyond Abe’s interpretation of Article 36(5), for concluding that Nicaragua’s declaration of acceptance of the Court’s jurisdiction was valid and binding. He argued persuasively that Nicaragua’s conduct for nearly forty years, since its ratification of the Statute of the ICJ, manifested its acceptance of the Court’s compulsory jurisdiction, citing as examples: its failure to object to its inclusion in the Court’s list of states accepting compulsory jurisdiction and its acquiescence to Honduras’ contention, in an earlier case before the Court, that jurisdiction was based in part on Nicaragua’s acceptance of compulsory jurisdiction under Article 36(5). Brownlie also took on the Shultz letter and tore it to pieces. He zeroed in on the contradiction between the 1946 U.S. declaration, which provided that it would not be withdrawn absent six months notice, and Secretary Shultz’s attempt to withdraw the declaration on no notice whatsoever.


Plainly, Brownlie argued, the letter was ineffective against a suit filed within a mere three days of its delivery. Thus, jurisdiction was fully established by the existence of two valid declarations of acceptance of the Court’s jurisdiction. Abe then returned to the podium to present Nicaragua’s alternative basis for jurisdiction, Article XXIV of the 1956 Treaty of Friendship, Commerce, and Navigation between Nicaragua and the United States.

For the second time in six months, the Court ruled overwhelmingly in Nicaragua’s favor. On November 26, 1984, the Court voted 15-1 “that it has jurisdiction to entertain this case.” The only contrary vote was Schwelb’s. (There were sixteen votes this time because Nicaragua had exercised its right to appoint a judge ad hoc, the distinguished French jurist Claude-Albert Collard.) Eleven of the judges agreed that the declarations of Nicaragua and the United States constituted acceptances of the Court’s compulsory jurisdiction. The opinion of the Court made it clear that it adopted both Abe’s argument based on the plain meaning of Article 36(5) and Brownlie’s argument based on Nicaragua’s conduct. Fourteen judges agreed that the IGCN treaty provided an additional source of jurisdiction. Only Schwelb found jurisdiction in ‘neither the parties’ declarations nor their treaty.

For the White House, the defeat on jurisdiction was too much to take. It had reluctantly allowed the State Department to appear and defend the case up to this point, gambling that it could avoid the merits by prevailing on jurisdictional grounds. But the strategy backfired. By defending the case and losing on jurisdiction, the Administration found itself headed inexorably in the direction it least wanted to go: toward the merits of the case, where it knew its defenses were so weak that it could not win. It had only two choices, both bad: abandon ship or go down with it. The White House chose the former. On January 18, 1985, the United States formally announced its withdrawal from the case.

The reaction of much of the news media, the Congress, and the public was exactly what the Reagan Administration deserved: outrage. Abe explained why, in a lecture two months later at Columbia University:

[^T]: The United States should have been prepared to present its case before a duly constituted tribunal like any other defendant, and to abide by the judgment of the law. Such a response was especially called for from the United States, for we pride ourselves on being a nation that is ruled by law. We are a nation that has played a major role in the establishment of the World Court and the international legal order, a nation that frequently calls on others to account in terms of the precepts of international law. The obligation weighed even more heavily after the Court, as it is authorized to do by its Statute, decided by overwhelming majorities after full and fair hearing in which the United States did par-
participate, that it had jurisdiction over the parties and that the subject matter was appropriate for judicial consideration.10

Unlike Abe, the Reagan Administration had no desire to hold America to its own best standards. On October 9, 1983, the Administration withdrew in its entirety the 1946 declaration accepting the Court’s compulsory jurisdiction. Abe called it “a sad day for America. And it was especially distressing for anyone who is trying to teach international law to American law students.”

While the reaction in most quarters was hostile to the White House for its rejection of the Court, some U.S. academics criticized Nicaragua and its lawyers, especially Abe, for bringing a case that caused the U.S. walkout. They argued that Nicaragua’s suit undermined respect for the Court by demonstrating its powerlessness—for surely a superpower like the United States would continue pursuing a foreign policy it considered vital to its national interests even if the Court ordered it to stop, and the Court had no means of enforcing its order. When superpowers and their vital interests are involved, the critics contended, “judicial pacifism” is called for. Abe was appalled by this argument. Holding anyone, even superpowers, above the law contradicted his most fundamental beliefs about equal justice under law, the role of courts, and the rule of law itself. He addressed the question head on:

Does not all this weaken the Court and undermine its legitimacy—at least as to pronouncements involving peace and security? Is not the whole edifice of international adjudication, already fragile, put at risk?

These are penetrating and difficult questions. Although the Court could not refer to them in its decision on jurisdiction, I have little doubt that they weighed heavily on the judges. But in addressing these questions, we should not forget that the legitimacy of the Court and the prospects for the rule of law in international affairs are at stake whether the Court decides or refuses to decide the case before it . . . . And in the circumstances, it is only in the Hague that Nicaragua can face the United States on equal terms. It is the only forum where the outcome is not predetermined by the disparities of military and economic power between the parties. In the countries of the world that are possessed of neither the purse nor the sword, it would be a severe blow to the legitimacy and moral authority of the Court as well as to the claims for international law, if the door to that forum were closed.11

Abe also disputed his critics’ premise that the United States would defy the Court’s judgment. He believed they underestimated America, its deep-seated commitment to the rule of law, and the strength it derives as a nation from that commitment. His statement on the subject is eloquent testimony of his faith in his country, and in its commitment to its own best standards:

We cannot say how the United States will respond to an adverse judgment in the Nicaragua case. The answer must await the event. And the answer will be more complex than is commonly thought. Although the President has large powers to establish and carry out our United States foreign policy, he is not the United States. Especially where policy requires funds to carry it out, he shares power with the Congress. I think it is evident that the actions of the Court to date and the efforts of the Administration to escape adjudication have already influenced the debate about whether and on what terms to continue financial assistance to the Contras.

And beyond the Congress are the American people. As has been remarked many times, we are, at bottom, a law-abiding nation. We believe in government under law. In my opinion, it will be impossible to sustain a controversial policy over a long period, requiring continuous financial support and public justification, if that policy has been declared unlawful by a duly constituted and authoritative tribunal. That may be a handicap for a superpower in today’s world. We may labor under a burden of constraint that does not apply symmetrically to others. Perhaps that is not fair. But I think it is the kind of country we are, and I would not have it any other way.12

We reached the merits, at last. In September 1985, fifteen months after filing suit, we were finally assembled in the World Court to present the witnesses, documents, and arguments that would prove the United States had used force and the threat of force against Nicaragua in violation of international law. In contrast to the prior hearings, the U.S. counsel table was empty, as a consequence of the White House’s decision to withdraw from the case. However, it would not be entirely true to say that the United States was not represented by counsel. Judge Schwobel, for all practical purposes, took on that role. He placed into the record unattributed documents, informally supplied by the State Department, that portrayed Nicaragua as a Communist, totalitarian state bent on exporting revolution throughout Central America. He confronted Nicaragua’s lawyers (including Abe) about statements attributed to them in an American newspaper, and he cross-examined Nicaragua’s witnesses from his seat on the bench. Schwobel’s partisanship added spice to an otherwise one-sided presentation, but it did nothing to diminish the strength of Nicaragua’s case. For example, his cross-examination of David MacMichael, the former CIA intelligence analyst, drew laughter from the other judges when, in an attempt to link the Sandinistas to the Salvadoran rebels (known as the “FMLN”), he asked the

11. Id. at 1478–79.
12. Id. at 1477–78.
witness about signs all over Nicaragua expressing support for the FMLN. "I do not want to trivialize this," MacMichael responded, "... [but] I could not help but notice as I took the tram to Delft yesterday that a large wall in Rijswijk is painted with the letters FMLN."\(^{13}\)

Nicaragua's case against the United States was fully evidenced by acts of Congress, committee reports, speeches on the floor of the House and Senate, public statements by President Reagan and senior officials of his Administration, and U.S. government documents obtained by and published in the news media. U.S. responsibility for the mining of Nicaragua's harbors, the destruction of its infrastructure, and the recruitment, training, arming, and directing of the Contras was easily established and undeniable. Although the United States did not appear in Court, the White House—nevertheless tried to influence the proceedings through a series of public statements justifying U.S. actions in and against Nicaragua as a legitimate exercise of the "collective self-defense" of El Salvador, which allegedly was under "armed attack" by Nicaragua via the trafficking of arms from the Sandinistas to the FMLN. Abe played a major role in Nicaragua's twofold response. First, he brought MacMichael to the witness stand to show that there was no truth to the U.S. contention that the Sandinistas were supplying arms to the FMLN; second, he made the principal legal argument demonstrating that Nicaragua's purported assistance to the Salvadoran rebels did not amount to an "armed attack" under international law, and therefore could not constitute the basis for the use of force in individual or collective self-defense under Article 51 of the UN Charter.

Abe's direct examination of MacMichael was great theater. The judges were noticeably intrigued to have a representative of the infamous CIA appear as a witness in their stately courtroom. Not a paper rustled as they gave their rapt attention to his businesslike testimony that there was no credible evidence that the government of Nicaragua sent arms to rebels in El Salvador after March 1981, the date the witness assumed responsibility for monitoring and analyzing such evidence. Was there evidence that the government of Nicaragua approved, authorized, or condoned the shipment of arms across its territory to Salvadoran rebels during this period? No. Was there evidence that the government of Nicaragua had advance knowledge of any such shipments? No. Asked by Abe at the end of the examination whether he believed the Sandinistas were trafficking arms to the FMLN, MacMichael answered: "I do not believe that such a traffic goes on now or has gone on for the past four years at least...."\(^{14}\)

Abe's examination of MacMichael had gone so smoothly that, when he sat down next to me at the counsel table, I asked him how many witnesses he had examined in court during his career. "Counting MacMichael?" he asked. "Yes," I answered. "One," he said. I was stunned, but Abe wasn't joking. He never examined another witness, but he did a superb job on his first try. Abe was not quite as successful in preparing MacMichael for cross-examination. The ex-CIA analyst enjoyed center stage, and wanted to talk—too much. We squirmed repeatedly as he gave long-winded answers to Schwebel's questions, ignoring Abe's instructions to be as brief as possible. At one point, Schwebel got MacMichael to volunteer that the Sandinistas had supplied arms to the FMLN prior to the January 1981 "final offensive," but he held his ground that there was no credible evidence that they resumed this activity at any time after January 1981.\(^{15}\) If anything, MacMichael's gratuitous testimony at Nicaragua's expense underscored his credibility, but we continued to hold our breath until he finally stopped talking and stepped down off the stand.

Our wait for the Court's final ruling was interminable. It took nine months from the close of the hearing until the Court announced its decision on June 27, 1986. Arguello and Browlie were in The Hague for the announcement. Abe and I were in Washington, where our colleagues would fax us a copy of the decision in time for our appearance at a morning press conference at the Nicaraguan embassy. The night before was a long one for us. We worried about the length of time it took the Court to resolve the case. Was it really for a big surprise? Had the United States somehow pressured the Court? Even if we won, would the margin of victory be so small as to amount to a political defeat? Neither of us slept, and we were wide awake when Arguello called at 6 a.m. Washington time: Congratulations! Nicaragua won on all issues by lopsided margins ranging from 12-3 to 14-1. (There were fifteen judges again because one had recently passed away.) The Court overwhelmingly rejected the argument that U.S. actions constituted justifiable collective self-defense. It expressly condemned as violations of international law all forms of U.S. support for the Contras (12-3), direct U.S. attacks on Nicaraguan facilities and infrastructure (12-3), and the mining of Nicaragua's ports (14-1). It ruled that many of these actions also violated the bilateral treaty of friendship, commerce, and navigation (14-1). It found that the U.S. production and dissemination to Contra forces of the 1983 manual "Psychological Operations in Guerrilla Warfare" encouraged the Contras to commit acts contrary to general principles of humanitarian law (14-1). And it ordered the United States to pay reparations to Nicaragua for all injuries caused by its violations of customary international law (12-3) and the bilateral treaty (14-1). It was a tremendous victory for Nicaragua. We could not have asked for more. Abe and I embraced each other: Mission accomplished!

The government of Nicaragua was jubilant. It immediately proclaimed June 27 a national holiday: "International Law Day." More than just the

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13. See MacMichael, supra note 1, at 36.
15. Id. at 33, 41.
Sandinistas celebrated. The victory over the United States boosted the pride of most Nicaraguans. Throughout its history, Nicaragua had been dominated by the United States, from the brief conquest of the country by William Walker in the 1850s, through the repeated interventions of the U.S. Marines in the first three decades of the twentieth century, to the installation of the first General Somoza in 1933 (about whom President Franklin Roosevelt is reported to have said: "He may be a son of a bitch, but he's our son of a bitch") and the forty-five years of U.S. military and economic support for the Somoza family dictatorship. And now the United States was intervening again in Nicaragua's affairs, through its military assistance to the remnants of the Somoza regime. What made Nicaragua's triumph especially satisfying to its long-suffering citizens was its moral quality. Nicaragua had not defeated the United States with purse or sword, to use Abe's words, but with law and justice.

The Reagan Administration was not done with Contra aid yet, however. Its incessant propaganda campaign turned up the political heat on the Democrats. "With the Contra vote," wrote White House Communications Director Pat Buchanan, "the Democratic Party will reveal whether it stands with Ronald Reagan and the Resistance—or with Daniel Ortega and the Communists."16 Attacks of this nature, plus the serendipity of Ortega's ill-timed trip to Moscow, convinced just enough members of Congress to switch their votes to authorize another round of Contra aid by a vote of 221-209. The vote took place on June 25, 1986, two days before the World Court's ruling. The margin was so close that, had the dates been reversed and the ruling issued two days before the vote, it is most unlikely the aid would have been approved. Was the timing merely a fortunate coincidence for the Reagan Administration, or did it somehow manage to cause a delay in the Court's ruling just long enough to push the date of the ruling beyond the date of the Contra aid vote? Whatever the answer, the aid was too late and too little to affect the course of the war. The Sandinistas had used the previous two years to gain absolute military superiority, which they never relinquished. The Contras continued to suffer. But it was well within the Sandinistas' capacity to endure.

Nicaragua immediately called on the United States to comply with the Court's decision and stop supporting the Contras. The White House ignored the ruling altogether and continued to finance and direct the Contras' activities. Nicaragua responded by filing new suits in the Court against Costa Rica and Honduras. Foreign Minister d'Escoto called the members of the legal team to Managua for a meeting. He told us: "We brought the circus master to justice, but he won't obey the court. So now we'll go after the clowns." Some of us doubted the wisdom of this strategy, because Nicaragua would not be as sympathetic a plaintiff against Costa Rica or Honduras as it was against the United States, and it risked losing in those lawsuits everything it gained in the victory over the United States. However, d'Escoto was determined to go forward, and it's a good thing he did: his strategy turned out to be brilliant. The Reagan Administration could not carry on its proxy war against Nicaragua without the support of Costa Rica and Honduras, both of which allowed the Contras to maintain bases in their territories, and to launch attacks against Nicaragua from those bases. By permitting their territories to be used for such purposes, those countries were themselves guilty of violations against Nicaragua's sovereignty, territorial integrity, and political independence. However, unlike the United States, they were not superpowers that could dare to defy the Court. Thus, they were extremely vulnerable to suit by Nicaragua. And d'Escoto reasoned that if Costa Rica and Honduras were ordered or persuaded to close down the Contras' bases, the war would be over despite the White House's determination to keep it going. Accordingly, Nicaragua responded to the Reagan Administration's defiance of the Court's ruling by going back to the Court, this time against its Central American neighbors.

Both of the "clowns" were shocked by the suits, especially Costa Rica, which thought itself superior to its Central American neighbors—especially Nicaragua—because of its image as a democratic, law-abiding, model citizen of the international community. The newly elected president, Oscar Arias, made it his highest priority to avoid having his country labeled an international outlaw. Arias was the right man for his time; he was intelligent, independent, and committed to peace. He saw the Reagan Administration's war on Nicaragua as misguided and dangerous for the entire region. But he was no admirer of the Sandinistas. He agreed with the White House's stated objectives of promoting democracy in Nicaragua and stopping arms transfers to the rebels in El Salvador. But he was convinced that the war and the Contras were counterproductive to these goals, and that they were plunging all of Central America into chaos. He was stubbornly determined to pursue what was best for the region, and to resist pressure from Washington. His initial efforts to promote a peace agreement among the heads of all five Central American states, in the summer of 1986, were thwarted by White House pressure on the presidents of Honduras and El Salvador. But Arias soon had a historic opportunity to advance his peace plan.

The opportunity was set in motion in November 1986, by a sixteen-year-old Sandinista soldier who, on his first day in the field, shot down a plane that was dropping supplies to Contra fighters. As the aircraft plummeted, Eugene Hassenfus—a U.S. citizen under contract to the CIA—parachuted to earth and was taken prisoner. The White House and the CIA panicked. At first they denied any connection to Hassenfus, but he freely told the throngs of reporters the Sandinistas permitted him to see him that he and numerous others had been supplying arms and ammunition to the Contras for two years, as employees of a CIA-front air service company that took its or-

lars directly from the White House. Investigative reporters painstakingly followed Hassanin’s trail, and it led them eventually to Oliver North, the central figure in the secret White House operation to continue supplying the Contras illegally after Congress cut off aid in 1984. (In response to Nicaragua’s suit and the World Court’s order on interim measures, among other factors). The investigation uncovered the biggest scandal to afflict the Reagan Administration in its eight years in office: Iran-Contra. It led to the appointment of an independent counsel and criminal indictments of senior Administration officials, including North, National Security Advisors Robert MacFarlane and John Poindexter, Secretary of Defense Casper Weinberger, and Assistant Secretary of State Elliot Abrams; Attorney General Edwin Meese and White House Chief of Staff Donald Regan resigned.

The scandal and its aftermath destroyed whatever remained of the Reagan Administration’s credibility on Nicaragua. With the White House weakened and distracted, others seized the initiative on Central American issues. Speaker of the House Jim Wright, who had always opposed the war on Nicaragua, was emboldened to lead an effort in the House of Representatives to find peaceful solutions to the armed conflicts in Nicaragua and El Salvador and to terminate both Contra aid and massive U.S. military assistance to the government of El Salvador. He appointed Representative David Bonior of Michigan to head a specially created House Task Force on Central America with these objectives in mind. In the Senate, Christopher Dodd of Connecticut, who spoke Spanish fluently and knew Latin America well, was the leading spokesman for a new, peace-oriented policy in Central America. Wright, Bonior, and Dodd saw Arias as the vehicle for a new approach to the problems of the region, emphasizing the attainment of democracy and peace via negotiation rather than war. Arias welcomed their support, and together they created what became known as the “Arias Plan” for peace in Central America. The plan had five key elements: (1) termination of all support to irregular forces in the region (including Contra aid), and prohibition on the use of territory by irregular forces to attack another state; (2) direct talks between governments and irregular forces in Nicaragua, El Salvador, and Guatemala to negotiate a cease-fire; (3) direct negotiations between governments and civil opposition groups to remove restrictions on civil liberties and set the conditions for democratic elections; (4) downsizing of armed forces to specific levels necessary solely for defense; (5) peace agreements among all five countries of the region. Arias was willing to devote himself to the achievement of this plan, and endure the full weight of the Reagan Administration’s wrath, but he insisted that Nicaragua drop its suit against Costa Rica in the World Court.

What Arias could not achieve in 1986, before Iran-Contra, he accomplished the following summer. In August 1987, the five Central American presidents, meeting in Guatemala City, formally agreed to and signed the Arias peace plan. President Vinicio Cerezo of Guatemala was an ardent supporter, and he labored long and hard to convince his colleagues José Napo-

león Duarte of El Salvador and José Azcona of Honduras that they had a moral obligation to resist U.S. pressure and do what they knew in their hearts was best for their countrymen and for all of Central America. There is no doubt that the weakened position of the White House, and the more assertive attitude of the Democrats, who controlled the House and Senate and were now prepared to confront President Reagan on Central America, persuaded Duarte and Azcona to accept their colleagues’ entreaties and sign on to the Arias plan. In return for Arias’ efforts, President Daniel Ortega agreed to withdraw Nicaragua’s suit against Costa Rica. But he rejected President Azcona’s demand for equal treatment. Ortega would only grant a “suspension” of the suit against Honduras to maintain an incentive for that country to resist the inevitable pressure from the Reagan Administration. The five presidents all realized the historic importance of the Arias Plan; it was not only a path to peace and democracy for the region but also a declaration of independence from the United States.

The international community heaped praise on the Central American presidents, and Arias in particular. In November 1987, Arias was awarded the Nobel Peace Prize—another blow to the Reagan Administration. The next month, the Sandinistas and the Contras met for the first time in a series of negotiating sessions that produced—contrary to everyone’s expectations, including the parties themselves—a cease-fire agreement, signed in March 1988, that ended most of the fighting in Nicaragua. The previous month, while these peace talks were in progress, the House of Representatives gave the final coup de grâce to U.S. military assistance to the Contras, voting down Contra aid by a margin of 219 to 211. From then on, the Contras could only receive “humanitarian assistance,” which was expressly allowed under the terms of the March 1988 cease-fire agreement. In Nicaragua, restrictions on civil liberties were lifted in accordance with the Arias Plan and the cease-fire agreement. In January 1989, George Bush replaced Ronald Reagan as President of the United States. With their arch-enemy finally gone, the Sandinistas felt confident enough to open up their political system: they scheduled national elections for February 1990 and negotiated with opposition parties in the intervening months to reach agreement on the conditions to make them free and fair. The elections were held as scheduled and, to the surprise of many, Violeta Chamorro defeated Daniel Ortega in the presidential election. Her fourteen-party coalition won a majority in the National Assembly. Ortega and the Sandinistas demonstrated their commitment to democracy by accepting the results of the election and leaving office. In so doing, they became the first sitting government in the entire 169-year history of the Nicaraguan state to give up power as the result of an election. Whatever else may be said of them, the Sandinistas made indelible contributions to democratic development in Nicaragua when they came to power by overthrowing the Somoza dictatorship, and when they left it by accepting their electoral defeat gracefully. In the latter, they lived up to Abe Chayes’s expectations of them, and justified his decision to become their lawyer.
With the Sandinistas out of office, the Bush Administration found it easy to comply with the World Court’s orders of June 27, 1986, all except the ones relating to the obligation to pay reparations to Nicaragua. Our legal team had already submitted a Memorial on reparations to the Court, accompanied by volumes of material calculating the injuries inflicted on Nicaragua by the U.S. conduct. The Court declared to be in violation of international law. The claim ran into the billions of dollars. But the Court had never fixed a date for the oral hearings on reparations. Presumably, it was awaiting the outcome of the elections, in the United States and Nicaragua, to see if they would have any impact on the case. In fact, they did. The Bush Administration embraced the newly elected government of President Chamorro, and offered substantial economic assistance to help reconstruct the country, starting with $200 million in the first year. However, there was no way to get the aid through Congress as long as there was a potential World Court judgment of billions of dollars hanging over the United States. Wisely choosing the reality of a friendly relationship with the United States over the theoretical value of a monetary judgment that was unlikely ever to be satisfied, President Chamorro agreed to withdraw Nicaragua’s request for reparations in 1991. That marked the end of all proceedings in Nicaragua v. United States of America.

The stirring memorial service in Abe’s honor, held in Harvard Law School’s Ames Courtroom in September 2000, I met Abe’s daughter Eve. She told me her father had taken her to Nicaragua in the late 1980s to see the country for herself, especially to witness the literacy programs, health clinics, peasant and urban cooperatives, and thousands of dedicated young men and women from around the world attracted by the promise of helping people build a better life—and willing to brave the difficult and dangerous conditions of the Nicaraguan countryside, including Contra attacks. Eve told me it was one of the greatest experiences of her life, and it drew her closer to her father than she had ever been. She also told me that, during their travels together in Nicaragua, Abe told her that representing Nicaragua in the World Court was the professional experience—of all the many accomplishments that star-studded his amazing career—of which he was most proud. I will always feel blessed to have played a part in giving him that opportunity, because he gave so much to me—and to thousands of other students, faculty, jurists, practitioners, theoreticians, colleagues, and friends. Let us all honor Abe’s memory, and the country he loved, by assuring that America is always held to its own best standards.
LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS

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Is warfare turning into lawfare? In other words, is international law undercutting the ability of the U.S. to conduct effective military interventions? Is it becoming a vehicle to exploit American values in ways that actually increase risks to civilians? In short, is law becoming more of the problem in modern war instead of part of the solution?

Some experts seem to think so. In his Foreign Affairs review of General Wesley Clark’s fascinating book on the Balkan wars, Professor Richard K. Betts laments the role law and lawyers played in the Kosovo campaign as well as military interventions generally. He asserts that the “hyperlegalism applied to NATO’s campaign made the conflict reminiscent of the quaint norms of premodern war.” Further, he alleges that lawyers “constrained even the preparations for decisive combat” and declares:

One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations – to a

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degree unprecedented in previous wars.... The role played by lawyers in this war should also be sobering – indeed alarming – for devotees of power politics who denigrate the impact of law on international conflict....NATO’s lawyers...became in effect, its tactical commanders.2

International lawyers David Rivkin and Lee Casey express a somewhat different but darker view in a recent National Interest article.3 They contend that a “new” kind of international law is emerging that is “profoundly undemocratic at its core” and “has the potential to undermine American leadership in the post-Cold War global system.” With respect to armed interventions, Rivkin and Casey argue that the “American military is particularly vulnerable” because of the “unrealistic norms” – especially in relation to collateral damage – propounded by the advocates of this new international law. “If the trends of international law are allowed to mature into binding rules,” they state, “international law may become one of the most potent weapons ever deployed against the United States.”

Professor Betts, and perhaps to a lesser extent Messrs. Rivkin and Casey, will find support in my conclusions about Operation Allied Force.4 I believe the air campaign against Kosovo and Serbia may represent something of a high-water mark of the influence of international law in military interventions, at least in the short term. The aftermath of that conflict, along with the repercussions of the terrible events of September 11th, seem to have set in motion forces that will diminish the role of law (if not lawyers themselves) far beyond the hyperlegalisms to which Betts objects. Explaining why I make this prediction is a prime purpose of the following discussion.

The essay first examines the rise of law in modern military interventions. Next, it contends that “lawfare,” that is, the use of law as a weapon of war, is the most recent feature of twenty-first century combat.5 The paper then describes how law and lawyers are
integrated into the planning and execution of air operations conducted by the United States. The essay surveys debates that have arisen with regard to emerging weapons technologies. It concludes by making some observations about the future of law and war in the new millennium.

Although academic fashion favors the term “international humanitarian law” (IHL), this paper will not adopt it. There is really no universally accepted definition of the phrase, and in practice it too often appears to embrace not just treaties with specific obligations and accepted norms of customary international law, but also a collage of other (often amorphous) agreements, non-binding resolutions, unilateral declarations, and political statements. Instead of IHL, the paper will rely upon the descriptor “law of armed conflict” (LOAC). While many of the same objections might be raised about it as with IHL, far greater consensus exists as to its scope – if not its interpretation – in specific situations.

This essay offers several broad themes for consideration: 1) law is not, and can never be, the vehicle to ameliorate the horror of war to the extent its advocates hope and, indeed, seem to expect; 2) although not yet fully institutionalized, the role of law and lawyers in American military interventions is surprisingly pervasive for practical, warfighting reasons as much as altruistic, human rights-oriented ones; 3) advocates of international law during armed conflict are often ill-informed by the realities of military strategy and technologies; and 4) there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.
How did international law become so important in military interventions? A number of rather disparate factors coalesced to give it the prominence it enjoys today. Basic to them is the long-standing desire of the world community (and especially the West) to use law to prevent conflict altogether or, failing that, to make the conduct of war as humane as possible. The appalling experience of World War II gave new impetus to the latter idea, resulting in the Geneva Conventions of 1949 that today form LOAC's nucleus.

A principle focus of that effort - and one that is very prominent today - was to spare noncombatants the adverse effects of war. Parenthetically, however, the record shows that the ratio of civilians to military personnel killed in armed conflicts has, in fact, increased since the Conventions of 1949. This illustrates the limits of law as a mitigator of the suffering intrinsic to war.

More recently, LOAC indirectly benefited from a much larger international phenomenon: globalization. Globalization heightened the status of law generally if for no other reason than the need for certainty in international commercial transactions. Worldwide trade requires international administrative and judicial forums to resolve contract, claims, intellectual property, and similar disputes. Where law is absent, so are investors and others needed for economic development. Even otherwise repressive societies recognize that they must embrace law in their relations with other countries if they hope to gain the benefits of modernity.
The effect of globalization is especially felt in Europe where, coincidentally, many LOAC initiatives originate. In order to obtain the economies of scale needed to succeed in an extremely competitive business environment, Europeans progressively abandoned elements of their sovereignty in ways unthinkable to Americans. They are acculturated to binding themselves in their everyday life (as Americans have consciously not done) to a multitude of rules and regulations imposed externally.

Herein, perhaps, lies the genesis of some of the division we see in LOAC interpretations with our European colleagues. Europeans are comfortable, for example, obeying the dictates of the European Parliament, essentially a foreign legislature vis-à-vis the citizens of any individual country; Americans fought a revolution so as never to do so. For this and other reasons the respective mindsets are different, and this is reflected in contrasting approaches to international law.9

Europeans also appear to be more accepting of the increasing number of nongovernmental organizations (NGOs) that involve themselves in LOAC matters. Many NGOs are wonderful, philanthropic groups that perform selfless, difficult work in dangerous places. However, Americans are inclined to be wary of those NGOs who purport to speak – literally – for the “world” on political issues, including LOAC. Too often NGO positions look like political agendas. With respect to LOAC, it must always be kept in mind that NGOs are not political entities equivalent to sovereign nations; rather, they are no more than self-selected, idiosyncratic interest groups that are not accountable to any ballot box. This perspective is sometimes ignored, to the detriment of LOAC development and interpretation.

There is an undeniable element of anti-Americanism in international law as it is developing today. Rivkin and Casey argue quite persuasively that “the impetus in international law today stems from both our allies and our adversaries, who have chosen to
use it as a means to check, or at least harness, American power."\textsuperscript{10} This may be the real reason for the incessant criticism of U.S. positions that marks so much of the debate in the international legal community.

One factor influential to the rise of LOAC is the revolution in information technology. It has spawned high-tech global news organizations that rapidly deliver information - including graphic images of war - to publics everywhere. This is particularly important when considered in conjunction with another attribute of the information age: the spread of democracy.\textsuperscript{11} Shaped by raw news footage, public perceptions of how conflicts are fought significantly affect military interventions. Professors W. Michael Reisman and Chris T. Antoniou state:

\begin{quote}
In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.\textsuperscript{12}
\end{quote}

The velocity of today's communications capabilities presents real challenges to democracies as well as to those governments that, if not truly democratic, nevertheless depend upon support from constituencies that have access to globalized information sources.\textsuperscript{13} When television airs unfiltered, near real-time footage of what appear to be LOAC violations, complications result.\textsuperscript{14}

General Clark found during the Kosovo operation that "[t]he new technologies impacted powerfully at the political levels. The instantaneous flow of news and especially imagery could overwhelm the ability of governments to explain, investigate, coordinate, and confirm." Increasingly, foes of the United States see this development as a vulnerability
to be exploited. No longer able to seriously confront – let alone defeat – America militarily, they resort to a strategy that can be labeled "lawfare."
Lawfare describes a method of warfare where law is used as a means of realizing a military objective.\textsuperscript{15} Though at first blush one might assume lawfare would result in less suffering in war (and sometimes it does\textsuperscript{16}), in practice it too often produces behavior that jeopardizes the protection of the truly innocent. There are many dimensions to lawfare, but the one increasingly embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather than seeking battlefield victories, \textit{per se}, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.

In this sense, lawfare has a firm basis in Clausewitzean analysis. Karl von Clausewitz, the great military theorist, spoke of a "remarkable trinity" of the people, the government, and the military whose combined energies produce victory in war.\textsuperscript{17} Belligerents attempt to impose the converse on their adversaries, that is, the deconstruction of Clausewitz's trinity. The traditional U.S. approach to accomplishing victory -- and the one LOAC endorses -- focuses on the military element and seeks to diminish the enemy's armed strength. America's challengers focus on the people element and seek to diminish the strength of their support for the military effort.

Evidence shows this technique can work. The Vietnam War -- where U.S. forces never suffered a true military defeat -- is the model that today's adversaries repeatedly try to replicate. Of course, they hope to use the vastly accelerated news cycle to achieve success far more rapidly and at much less cost than did the Vietnamese. If they can make the
American electorate believe, as Reisman and Antoniou put it, that the “war is being conducted in an unfair, inhumane, or iniquitous way” necessary public backing might collapse. Even if U.S. public opinion is unwavering – as it appears to be with respect to the current war on terrorism\textsuperscript{18} – the cooperation of coalition governments nevertheless might weaken if their people become disenchanted with the way armed force is being used.\textsuperscript{19} This is especially problematic for the Air Force if it results in the derial of vital basing and overflight rights.

As Reisman and Antoniou point out, sometimes the mere perception of LOAC violations can significantly impact operations. The Gulf War provides two examples of situations where LOAC was not violated yet the perception that it may have been had clear military consequences. The first concerned the attack on the Al Firdos bunker in Baghdad that was believed by the allies to be a command and control node. Some experts concluded that the post-attack pictures of the bodies of family members of high Iraqi officials (who evidently used the bunker as a bomb shelter) being excavated from the wreckage achieved politically what the Iraqi air defenses could not do militarily: rendering downtown Baghdad immune from attack.\textsuperscript{20}

Worried coalition leaders put the city virtually off-limits to avoid a repetition of like scenes reaching their peoples. Similarly, fears about the impact on coalition constituencies of the images of hundreds of burnt out vehicles along the so-called “Highway of Death” following an air attack on retreating Iraqi forces was a significant factor in the early termination of hostilities.\textsuperscript{21} That left the Republican Guard intact to slaughter Kurds and helped keep Saddam Hussein in power to this day.

America's enemies, who study such cases, may draw lessons from them, and callously capitalize on collateral damage incidents. As already suggested, their goal is to gain political leverage by portraying U.S. forces as insensitive to LOAC and human rights.
Unfortunately, opponents unconstrained by humanitarian ethics now take the strategy to the next level, that of orchestrating situations that deliberately endanger noncombatants. Ironically, by overselling precision weapons and other high-tech capabilities, the U.S. Air Force may have unwittingly made itself vulnerable to this very strategy.

There are several ways opponents wage lawfare against U.S. forces. One technique is to use civilians as involuntary (and sometimes voluntary\textsuperscript{22}) human shields. In addition, adversaries place military assets in noncombatant facilities such as religious structures and NGO compounds in the hopes of either deterring attacks, or if attacks do take place, producing collateral damage media events that serve their cause. The Taliban, according to media reports, employed this tactic. Specifically, \textit{U.S. News \& World Report} says, "[h]eavy weaponry is being sheltered in several mosques to deter attacks. The Taliban has even placed a tank and two large antiaircraft guns under trees in front of the office of CARE International...."\textsuperscript{23} The use of NGO facilities to deter legitimate air attacks creates the potential for tension between the NGOs and the armed forces, and raises questions about NGO responsibilities during conflict.

In any event, I have found that most senior U.S. military leaders, and certainly those in the Air Force, recognize that the fact or perception of LOAC violations can frustrate mission accomplishment. They are also aware of the rising number of post-conflict investigations – both formal ones like the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) examination of the Kosovo operation,\textsuperscript{24} as well as those conducted by NGOs, academics, and others.

For military leaders, real frustration arises when international lawyers assert as irrefutable truths principles that are unmistakably wrong. A good example is one of the most controversial air attacks of the Kosovo conflict. On April 23, 1999, Radio Television Serbia (RTS), the state-run media station in central Belgrade, was bombed by coalition
aircraft. As a result of this attack, sixteen people were killed, and another sixteen injured. International lawyers, news organizations, and NGOs criticized the attack. Typical of the rationale for the complaints is the Human Rights Watch report that asserted that RTS made "no direct contribution to the military effort" and that the "risks involved...grossly outweigh any perceived military benefit." 

Apparently relying on evidence that indicated that RTS broadcasts whipped up ethnic hatreds for years, Air Commodore David Wilby, a NATO spokesman, insisted, "Serb radio and TV is an instrument of propaganda and repression.... It is...a legitimate target in this campaign." His statement is consistent with U.S. legal thinking. The RTS strike was subsequently the subject of a review by the ICTY (and a lawsuit before the European Court of Human Rights). Although the ICTY accepted NATO's later explanation that the facility was being used for military communications, it made it clear that but for that circumstance, strikes against the broadcasting stations were likely unlawful. Specifically, the ICTY contended:

While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the "concrete and direct" military advantage necessary to make them a legitimate military objective.

This is a rather startling statement in a military sense because even a passing familiarity with Clausewitz and other strategists - not to mention America's own experience in Vietnam - make it plain that "undermin[ing] the government's political support" does offer a very "direct and concrete" military advantage especially in today's world. It makes it appear that some international lawyers fail to appreciate that popular support is a "center of gravity" in contemporary military interventions, and information age technologies like radio and television are instrumental in shaping that support.
In fact, a recent RAND study confirms that concerns about Serb popular will were a key reason Milosevic decided to settle when he did. They interpret the LOAC as if they are disconnected from humanitarian values, support for the law inevitably wanes. Specifically, to military professionals it is absurd – and even duplicitous – to contend, as the ICTY report seems to do, that it is somehow preferable to slaughter masses of enemy troops to achieve victory - in lieu of merely destroying a propaganda organ propping up a perverse regime (at the price of small, albeit regrettable, numbers of civilian casualties).

Therefore, knowing the legal challenges they will face, savvy American commanders seldom go to war without their attorneys. Along these lines, Michael Ignatieff, who has written extensively about the role of law and lawyers in the Balkan conflict, provides real insight into the thinking of many senior officers. He observes: "[Lawyers] provide harried decision-makers with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure he will not face legal consequences." In short, the predominance of law and lawyers in U.S. military interventions is as much a concession to the verities of modern war as it is an altruistic commitment to human rights. Unsurprisingly, a significant number of military lawyers and paralegals were deployed for Operation Enduring Freedom to supplement those already serving in the region.
Until Operation Just Cause, the successful 1989 intervention that dethroned Panamanian strongman Manual Noriega, compliance with international law wholly depended upon the knowledge and disposition of commanders and their planners. Military lawyers taught LOAC classes – which rarely progressed much beyond the basics – and prosecuted those who violated it, but were rarely found advising commanders on the legal aspects of combat operations.

Beginning with Just Cause, however, that changed - perhaps in recognition that after-the-fact prosecutions would not undo the political damage LOAC violations could inflict. During the Gulf War, judge advocates (JAGs) vetted targets, worked rules of engagement (ROE) matters, and advised on other warfighting issues, all to favorable comment from senior military leaders. Since then military lawyers regularly have made their way into command posts and planning cells in order to prevent the kind of incidents that could derail a military operation.

In U.S. operations the requirement for legal advice is embedded in specific military instructions. For example, the Chairman of the Joint Chiefs of Staff directs that “all operation plans...concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are [to be] reviewed by the command legal advisor to ensure compliance with domestic and international law.” This provides the formal authority for JAGs to insert themselves into the planning and execution processes of combat operations.
In practice this is done in a rather ad hoc fashion with the precise methodology much dependent upon the individual personalities involved.

Although this system has worked reasonably well over the years, the Air Force is now engaged in developing specific doctrine to institutionalize and standardize the role of lawyers in the air operations center (AOC) - the nerve center for the application of airpower in military interventions. This effort builds upon the lessons learned since 1989, the most critical being the importance of involving JAGs in each stage of the air tasking order (ATO) cycle that produces the master air attack plan (MAAP). Knowing exactly when and how to most productively provide legal advice is essential to a JAG’s success in an AOC.

For example, raising legal objections after the MAAP is built is problematic because it is very difficult to re-target or re-weaponeer a particular sortie at that late stage. If the legal objection is serious enough, the sortie may be lost entirely. To avoid such situations, JAGs in the AOC work around the clock with action officers as they develop strategy and select targets, weapons, and employment tactics, all of which can play into the overall legal assessment. Military lawyers also help write the ROE chapter of the Special Instructions (or SPINS in Air Force parlance) that become the aircrews’ operational bible.

Pre-planned targets in the MAAP ordinarily have a “BE” number that reflects its designation in what is called the “basic encyclopedia.” JAGs review the target folders associated with each BE. They evaluate the imagery and other intelligence products that show the target’s military purpose as well as its potential for collateral damage. The quality and quantity of the intelligence can vary, but usually there is enough to make an informed judgment. The folder's data is used to apply what is known as a “tiered” analysis technique that results in an assessment of the collateral damage risk. The technical process takes into account specific weapons’ characteristics to include their precision capabilities and fragmentation patterns. The analysis for certain targets - especially in cities - may include
elaborate evaluations of the blast effects on the kind of buildings found near the weapon's estimated impact point. The results are interpolated with known population distributions to make casualty projections.

Computerized decision-support systems exist to help make collateral damage assessments. While useful tools, they cannot (and should not) substitute for the considered judgment of lawyers or, for that matter, commanders. Warfighting remains an art, not a science reducible to the sterile algorithms of electronic data processing. Military history is littered with examples – Doolittle's Raid on Tokyo, McArthur's landing at Inchon, and, indeed, the American Revolution itself – for which no computer would predict success.

However, when applied to collateral damage forecasts, automated assessments produce what might be considered "evidence." In other words, if a commander chooses to pursue an attack in a way a machine tabulates as possibly causing unnecessary noncombatant losses, he or she may some day be called to account. Commanders are wise, therefore, to make some sort of contemporaneous record of the thinking that led to their decisions. Admittedly, it could be difficult to articulate the rationale (especially if the reason is mainly the commander's instinct honed by years of experience) but increasingly it may be necessary to try – and the JAG can assist in that process.

Computerized systems notwithstanding, much of the intellectual heavy lifting remains subjective and fact-specific. In my experience, JAGs very rarely are presented with questions that have straightforward answers in the law. The targeteers and planners are too well trained anymore to even think about proposing obviously illegal options. More often JAGs deal with 'gray' areas, just like the commanders they serve. How certain is the intelligence? Exactly how many civilians do we think might be hurt? How critical is the target? Do we have the right weapons available? These are the questions that are hashed out during the long hours of ATO development.
Some of the thorniest issues entail dual-use targets, that is, those involving assets - mainly infrastructure elements - that both civilians and military forces draw upon. Dual-use targets can be contentious for two reasons:

First, determining the extent that they make a "concrete and direct military contribution" to the enemy's war effort, as required by LOAC, is sometimes difficult and controversial. This is another area where U.S. practice is not always coterminous with that of coalition partners. Americans tend to take a more holistic approach to an enemy's war-making capability than do many other countries. The U.S. view readily appreciates that seemingly disparate parts of the civilian infrastructure collectively form indispensable components to the ability to conduct modern, high-tech war.

Second, assuming the proposed target does make the direct contribution LOAC requires, it still must be demonstrated that the anticipated military gain from the bombing outweighs the expected collateral damage. Complicating the calculations is the fact that often there are few immediate casualties from an attack on a dual-use target. The adverse effect on civilians of infrastructure loss may only manifest itself over time.

Electrical grids are an oft-cited example of a dual-use target. Contemporary societies, especially in urbanized settings, are dependent upon supplies of electricity, as are their militaries. An Air Force study shows that because of the availability of alternate electricity sources for military sites, the utility of attacking the grid itself is often less than many airmen assume.\textsuperscript{50} The issue is very fact-specific, and can vary widely from operation to operation. Nevertheless, interrupting the electrical flow despite the existence of backup systems can still yield significant military benefits. Doing so injects friction into the adversary's military machine as he frantically tries to switch to temporary power sources that themselves may be of uncertain reliability. When possible, the Air Force employs
means that disrupt electrical supplies (and other dual-use assets) without permanently destroying infrastructure.

An ancillary problem arises when the inherent ambiguity of dual-use targets is combined with the need to protect intelligence sources and methods. Although not an Air Force operation, the 1998 cruise missile attack on a Sudanese pharmaceutical factory illustrates the hazards. This facility was alleged to have been involved in the manufacture of compounds intended for terrorists' chemical weapons. Initially, there was a reluctance to disclose the intelligence information supporting the strike.51 Unfortunately, this led to the questioning of the attack's legitimacy by many nations, including some of America's strongest allies. The lesson is that the U.S. must be prepared to prove its case in the 'court of world opinion' in addition to more conventional forums.52 Thus, if the intelligence information is so sensitive that it cannot be disclosed, decision-makers must carefully consider whether the target should be struck at all, especially if the purpose is mainly a psychological one.

Psychological or "message" targets sometimes present perplexing challenges. These are strikes aimed at bona fide military objectives but whose intended effect is primarily psychological. Legally, they are subject to the same analysis as any other target; nevertheless, they raise some interesting issues. For example, following the Gulf War, Air Force lawyers were criticized (unfairly in my view) for questioning the propriety of a proposal to strike a statue of Saddam Hussein.53 That case aside, the real sticking point in these situations is whether or not enough objective data exists to conclude that the desired psychological effect will result. The evaluation becomes skewed when an American bias is applied to the psychology of another culture. General Charles Horner, the air commander during the Gulf War, discussed this problem in the context of the bombing of the Baath Party headquarters:

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In terms of bombing the Baath Party headquarters, we looked at Saddam Hussein and the Baath Party as one. We wanted to show weakness in the Baath Party and thus weakness in Saddam Hussein. We wanted to embarrass him in front of his people as well as limit the loss of life. But what we didn't realize was that it doesn't matter what the people think. In the final analysis, we looked at it through American eyes, which was wrong.54

Somewhat ironically, JAGs spend a great deal of time not, as one might expect, trying to prevent LOAC violations, but rather explaining to targeteurs, planners, and even commanders that the law is not the war fighting impediment they tend to think it is. In some instances this is the result of an incomplete understanding of LOAC. For example, during Desert Fox's 1998 strikes against Iraq55 a young targeteur expressed concern that bombing a Republican Guard barracks at night (when it presumably would be occupied) somehow violated the concept of proportionality.56 Of course, proportionality in a LOAC sense seeks to weigh the military advantage against potential noncombatant casualties, not combatants like the Republican Guard. Indeed, killing them was the military basis for the strike in the first place.

A related issue engages the whole notion of collateral damage. Some military people believe that a prediction of high collateral damage ipso facto makes an attack unlawful. This is simply wrong. Anticipating high collateral damage merely means that the military value of the target must be great enough to justify the unintended losses. Savvy political reasoning might counsel against hitting a particular target solely out of fear of high civilian casualties, but that is altogether different from saying the law prohibits the attack.

A more debatable proposition relates to the status of voluntary human shields such as those Serb civilians who deliberately occupied bridges in Belgrade during the Balkan war. They hoped to deter NATO attacks by presenting a vexing quandary for military planners:
how to attack the bridges without killing the "noncombatant" protesters. This issue is politically complex, but not - in my view - legally difficult. In attempting to defend an otherwise legitimate target from attack - albeit by creating a psychological conundrum for NATO - the bridge occupiers lost their noncombatant immunity. In essence, they made themselves part of the bridges’ defense system. As such, they were subject to attack to the same degree as any other combatant so long as they remained on the spans.

As convoluted as these issues may appear, “time sensitive targeting” (TST) presents a markedly more difficult challenge. This process relates to targets of opportunity (usually mobile ones). In certain cases this can require re-directing (“reflowing’) a sortie from a preplanned target to an unplanned one. Because of growing pressure to minimize the sensor-to-shooter time, TST is the part of the air operations’ process that probably is most vulnerable to incurring unintended collateral damage. By its very nature, the TST dynamics do not allow for the studied examination of target folders that the preplanned process permits. This is yet another reason JAGs must be physically present in the AOC at all times to be available to work with the controllers when these "opportunities” arise.

TST sometimes allows the JAG only a split-second to formulate advice involving life and death. He or she may be obliged to do so based on much less than perfect data. Mistakes can happen, both in terms of unexpected collateral damage as well as - conversely - missed opportunities to damage the enemy. Indeed, TST issues in Enduring Freedom generated media reports critical of JAGs. It is impossible at this time to verify the accuracy of those stories, but they do highlight an important issue applicable to all operations. What, exactly, is the JAG’s authority? Does the JAG sit as some kind of legal satrap with ultimate power over a commander’s actions?

The short answer is “no.” A good JAG asks the hard questions, plays devil’s advocate, and demands the best of the intelligence assets and operational processes. In the
end, however, the decision to attack belongs to the commander. If the commander directs what appears to be a LOAC violation despite clear legal advice — something, incidentally, I have never seen — the JAG is obliged to report the incident to a superior command who, in turn, must conduct an inquiry.60 If that avenue is unavailable or inappropriate under the circumstances, by law a JAG can bypass the chain of command and communicate directly with any supervising JAG, including The Judge Advocate General of the Air Force.61 In short, there are multiple ways of ensuring that an alleged LOAC violation is surfaced and investigated.

Concluding that a command action amounts to a breach of LOAC responsibilities is an extremely serious matter, and very different from merely disagreeing with the wisdom of a particular decision. It is important, therefore, that the JAG carefully and explicitly distinguish between an opinion as to prudent war fighting, and his or her formal, legal judgment on a LOAC matter, that is, one to be followed under pain of otherwise being considered (and reported as) a war criminal. Legal assessments of particular targets are generally the province of the JAGs in the AOC, not that of military or civilian lawyers at higher levels. Lawyers in the upper chain of command do review the overall operations plan, rules of engagement, broad target categories, and even certain highly sensitive sites. However, those attorneys would not ordinarily provide real-time advice about targets of opportunity.

That said, Information Age capabilities present challenges for everyone involved in air operations, the legal function being only one of those affected. The technology now exists for persons far from the area of operations to receive much of the same data as is available in the AOC. This may suggest to some that the viewpoint of those distant from the battlefield is equally valid — especially in air operations — as those deployed forward. In my judgment this is a mistake. As I argued previously, war fighting is an art, and one that still very much depends upon human interaction. Even the most advanced communications
systems do not replicate the intangible value of direct human interface. Person-to-person contact injects an important element of humanity into what can easily become an impersonal and potentially inhumane enterprise.

Serving in command centers does require the assigned JAG to acquire and maintain technical proficiency with the AOC's specialized communications and computer systems. Most AOCs employ the Theater Battle Management Core Systems (TBMCS). JAGs - like everyone else working in the AOC - must complete a specified course of study in order to master it. JAGs also receive focused instruction in operations law, and many have advanced (post-law school) degrees in international law from the nation's premier civilian institutions.

Equally important is the lawyer's knowledge of purely military matters. Access to decisionmakers is ephemeral and can be instantly forfeited if credibility is lost for any reason. For the JAG this means he or she must maintain an in-depth understanding of military history, equipment, strategy, and more. Senior Air Force leaders have high expectations in this regard, as General Hal M. Hornburg, a veteran of many combat operations and currently the Commander of Air Combat Command, noted in a June 2001 address:

[JAGs] need to understand the big picture. I was in the CACC during Desert Fox. Who do you think was standing right behind me? It was my JAG. That person needs to know the law and the rules of engagement, but he or she also needs to understand things bigger than just the law. They've got to understand combat.62

To ensure they do "understand combat," JAGs selected to work in AOCs are all uniformed officers who, by and large, are graduates of exactly the same staff schools and war colleges as any other officer. In fact, JAGs are routinely top graduates of professional
military education (PME) institutions, and they are known to garner a disproportionate share of the academic prizes.

In my experience, the U.S. practice of deploying military lawyers as advisors for combat operations is not widely shared by coalition partners. Except for a smattering of British, Canadian, and Australian JAGs, non-U.S. lawyers of any kind are rarely found in command centers. In their absence, some contingents simply accept the legal interpretations given by American JAGs. Of course, this can present problems – to include ethical ones – where, for example, the U.S. is not a party to a LOAC-related treaty that a coalition partner has ratified.

When a coalition partner does deploy a JAG to work with his or her American counterparts, productive synergies can result. During Bright Star 99/00, a multinational exercise that took place in Egypt in 1999, the AOC legal cadre included a British JAG. Working together from the desert command post, the coalition JAG team used legal research software and U.S. communications capabilities to obtain the actual text of British law related to anti-personnel landmines.63 Properly interpreted, this allowed U.K. forces to play a tangential but useful role in an operation involving American air-delivered munitions that contained anti-personnel mines.

Unhappily, such productive exchanges are all too uncommon. Many contingents look for legal guidance from civilian lawyers in their ministries of defense hundreds or thousands of miles away. (Protocol I of the Geneva Conventions does require legal advisors to be available at all levels of command,64 although it does not specify what “available” means in physical terms.) This creates practical problems in terms of delays, as well as more substantive ones. The inability to communicate directly with legal advisor counterparts makes it extremely difficult to ensure that all the facts and circumstances so critical to legal assessments are properly conveyed. In my judgment, more nations need to develop a
trained cadre of military lawyers to support combat operations in the field. The emphasis on “military” is purposeful and is based on two key factors:

First, in addition to attendance at PMEs described above, it takes years of full-time immersion in the military environment at the tactical level to have the necessary familiarity with the weapons and their delivery systems to properly advise the commander-client. Successful lawyering in the AOC requires the ability to offer operational alternatives when LOAC issues arise, and few civilian lawyers have the right background to do that. In addition, legal issues should be couched whenever possible in operational terms that are meaningful to the military commander, and this requires first-hand military experience. In my opinion, professional warrior-lawyers working side-by-side with fellow officers are the best means to ensure legal considerations are taken into account during military interventions.

Second, there is an aspect to dealing with military leaders that is subtle but very real. Specifically, it is unlikely that any civilian lawyer (and especially one distant from the area of operation), can really penetrate the culture of the armed forces, however well trained and knowledgeable he or she may be. In my view, to have the necessary access, credibility, and trust the lawyer must be part of the officer corps. It is a mistake, as historian John Keegan observes, to assume that a connection between a civilian and a military occupation (in this instance, the legal profession) equates to “identity or even similarity” with members of the military caste.65 Frankly, it is difficult enough for a commissioned officer, who is a member of a profession as unpopular as law, to gain the acceptance and confidence of the operators; it would be near impossible for a civilian to do so.
Too often it seems that civilian lawyers and/or humanitarian actors suffer from an insufficient understanding of the military consequences of their legal positions. This can lead to situations that serve to make the law an object of disdain to many in uniform. Consider the desire among international law activists to eliminate or control the emerging technologies of war. Many military leaders view technological change as inevitable, and, regardless of efforts to limit or ban such technologies, believe they will eventually appear on the battlefield.

Much of U.S. military thinking is rooted in the axiom that "technology has permitted the division of mankind into ruler and ruled."66 The U.S. is always looking for ways to substitute machines for manpower - and has enjoyed great success in doing so.67 As Harry Truman once remarked, "we have won the battle of the laboratories."68 Compared to many allied populates, U.S. taxpayers have borne more than their share of the cost of the development of expensive technology (e.g., precision weapons) that reduces casualties on both sides.69 Accordingly, no one should be surprised that Americans and their armed forces are reluctant to welcome proposals that seem to limit the development and use of technology in war fighting.

Focusing LOAC efforts on technology seems more than a little ironic given the history of recent conflicts. Most people consider the machete-based slaughters in Rwanda, the deliberate amputation of the limbs of children in Sierra Leone, as well as the horrific genocide and rape that took place in the Balkans, as examples of the worst atrocities of late twentieth-century conflicts.70 Each case employed decidedly low-tech means; in fact, it is
generally the intervention of high-tech forces of the U.S. and the West that finally brought a halt to the conflicts.

Nevertheless, efforts to limit or ban altogether certain technologies persist, and they often catch the fancy of international celebrities. The classic illustration is the campaign to ban antipersonnel landmines. The tragic death of Britain’s Princess Diana, one of the movement’s most enthusiastic supporters, served to propel the adoption of what is known as the Ottawa Convention.\textsuperscript{71} Virtually every major nation has ratified the Convention, the U.S. being one of the conspicuous exceptions. It is true that landmines have caused death and injury to hundreds if not thousands of innocent civilians in recent years. It is equally true, however, that landmines used as they should have been under pre-existing agreements have not caused many casualties. Nor have many innocent people been victimized by any of the new generation of self-neutralizing devices now available.

The Ottawa Convention illustrates two nagging problems in international law: 1) What is to be gained by expanding the scope of prohibitions when there is every expectation that existing bans are – and will be – ignored by those most responsible for the problem the new agreement is supposed to remedy; and 2) What are the unintended consequences of trying to limit high-tech implements of war in an era when rapid technological change creates uses that were not (and could not be) envisioned or accounted for when the agreement was drafted?

Regarding the first concern, one must reject out of hand the argument that because some violate the law, there is no point in following the law in the first place. Nonetheless, very often – as in the case of landmines – the key causes of noncombatant suffering are already prohibited. For example, Protocol II to the 1980 Conventional Weapons Treaty (the U.S. and most other nations are parties to the relevant provisions)\textsuperscript{72} bans the indiscriminate use of mines, and requires the marking of minefields and their post-hostilities removal so as
to limit noncombatant casualties. If a party were disposed to ignore the requirements of the 1980 agreement, how would the Ottawa Convention deter them? Second, by prohibiting the production of advanced self-neutralizing mines, those who want to use the weapons are more likely to resort to crude varieties instead of ones that render themselves harmless over time.

It also is possible that the ban could produce unintended consequences that result in more, not less, human suffering. One legitimate – and humane - military use is attacking a weapons-of-mass-destruction site thereby rendering it unusable until it can be brought under control by friendly forces. Rather than use a high explosive that might scatter pollutants into the atmosphere, one might douse the installation with hundreds or even thousands of highly sophisticated landmines.

Another similarly practical use of mines is against infrastructure targets. Consider airfields. From the military perspective, all that is often needed is to block the enemy from using the site, sometimes only temporarily. One way is to blow up the aircraft, tower, runway, support buildings, and so forth. Another way would be to shower the runway with a variety of landmines that make it impossible for aircraft to land or takeoff. The advantage of the latter course is that once you enter the post-conflict stage, instead of a hopelessly destroyed asset you have recoverable infrastructure upon which to build the necessary postwar economy. This is the kind of real world problem that military and civilian decision-makers face today.

Some organizations want to apply the landmine ban to cluster munitions. Although not designed as landmines, the failure rate of a cluster bomb’s submunitions can leave some unexploded ordinance in enemy territory. Unwary noncombatants are in peril if they come in contact with the devices. However, this relatively rare situation does not explain the weapon’s humanitarian virtues. Specifically, because each bomblet contains
only a small amount of explosive, they are not as destructive as other weapons, and this can save lives. For example, where an enemy places military equipment such as an anti-aircraft system on something like a dam, cluster munitions can attack the site without risking the catastrophic destruction of the dam itself.

It is easy to conjure up similar examples. Banning cluster munitions invites adversaries to wage lawfare by placing military objects on or near facilities whose destruction by other weapons (e.g., high-explosives) puts civilians and their property at risk. This is especially a problem with the European Union’s proposal to prohibit the use of cluster bombs in what it defines as urban areas.\textsuperscript{76} The EU policy could suggest to adversaries that they should locate themselves in urban areas to escape the weapon. Experience shows that fighting in cities inevitably causes far more adverse effects on more civilians than any cluster bomb submunitions. Furthermore, the law should not be indifferent to the specific context of - and rationale for - the weapon’s proposed use. Deputy Secretary of Defense Paul Wolfowitz responded to criticisms of cluster bomb use in Enduring Freedom by pointing out that the U.S. had lost thousands of civilians in a single day, and would “use the weapons we need to win this war.”\textsuperscript{77}

What makes bans on technology so problematic is the sheer unpredictability of future applications. Weapons expert and retired Army colonel John B. Alexander makes this point quite forcefully in the summer 2001 issue of the Harvard International Review.\textsuperscript{78} Alexander contends that nonlethal technologies have great potential to minimize combatant and noncombatant casualties alike, but their development is blocked by what he charges are “emotionally based and broadly worded treaties.”\textsuperscript{79} Essentially, he contends that the agreements were established at a time when no one envisioned that various chemical and biological agents “could actually be used to reduce casualties.”\textsuperscript{80} Although he overstates his case somewhat (nonlethal riot control agents were banned as a method of warfare in the 1993 Chemical Weapons Convention\textsuperscript{81}) his essential point is correct: “Technologies do not
cause bad behavior. It is people who use technologies for evil purposes that demonstrate bad behavior.”

Even the most horrific weapons can have humanitarian value depending upon how they are (or, perhaps more properly, are not) used. Nuclear weapons – probably the subject of more intense international negotiation than any other weapons’ technology in the history of man – have a remarkable record that supports Alexander’s thesis. Military historian Martin Van Creveld makes the interesting observation that “in every region where [nuclear weapons] have been introduced, large-scale interstate war has as good as disappeared.” The idea is not to advocate the spread of nuclear weaponry, but just to point out that limiting the technologies of war is not an unqualified virtue.

Another interesting “values” issue is raised by the international campaign against blinding lasers as a means of warfare. No one would seriously debate the proposition that blindness is a gravely debilitating affliction. It is still difficult to understand why it is a more unfortunate condition than traumatic amputation, paralysis, or any other similar injury that occurs in war. Assuming a laser is used under circumstances where one could lawfully kill an opponent, it seems indisputably more humane to blind him than slay him. In advocating the ban, however, the International Committee of the Red Cross (ICRC) appears to draw a different conclusion. The ICRC, evidently unaware of the philosophical implications of what it was saying, in essence argued that adversaries would just use other weapons to finish off blinded combatants. Again, this is the illogical argument that presumes that since a belligerent will break existing law (i.e., kill wounded hors de combat), enacting more law will somehow improve the situation.

Looking ahead, it will be interesting to see how the international legal community approaches the issue of unmanned and other robotic combat systems. These technologies are rapidly gaining acceptance in high-tech militaries like that of the U.S.
questions, however, as to how they should be employed. As one analyst notes, "[p]eople are generally more comfortable with somebody being in the loop when things are being shot and decisions are being made."Nevertheless, as these weapons are considered, the focus should not be on how they achieve their results, but rather the degree to which their impact honors LOAC and humanitarian values. A more difficult and problematic issue is presented by the military challenges occasioned by Operation Enduring Freedom. The safest and most effective means, for example, of rooting enemy fighters out of caves may be to employ flamethrowers. This controversial weapon is not currently in the U.S. inventory, but press reports have mentioned its possible use.
The events of September 11th will have a profound effect on the role of law in military interventions. The psychological impact of savage attacks on the American homeland, along with fears raised by the anthrax incidents, radically diminish the public's desire for what Professor Betts might describe as hyperlegalistic processes. Recognizing the dimensions of the new threat, Americans have supported legislation giving law enforcement authorities vastly greater powers at the expense of what heretofore were accepted individual rights.69 Considering Americans' willingness to sacrifice their own legal protections, they are unlikely to be overly demanding about the supposed legal rights of foreign belligerents.

Americans are much more concerned about finding and stopping the perpetrators of violence than they are about the niceties of international law. Despite the president's statements to the contrary, many pundits called for the outright killing of those responsible, and derided the notion of trying to bring the perpetrators to justice in a criminal court.60 Unlike international law devotees, many Americans are exasperated with the law, especially when traditional applications have proven to be an inadequate guarantor of basic security on September 11th. Stewart Baker, the former general counsel of the National Security Agency, concludes "[w]e have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that."91 Consequently, in security matters, contemporary American discourse is pervaded by the notion that "[t]he time for legal maneuverings, extraditions and trials is past."92
While reports of civilian casualties in Enduring Freedom cause disturbances among allied populaces, the support of the U.S. electorate for the military intervention remains strong. This is not a sign of callous indifference, but rather of a growing acceptance in the body politic that war inevitably causes unintended tragedies. Additionally, the public is becoming better educated as to how adversaries are manipulating civilian casualties to wage lawfare. I believe they are much less prone to assume from media reports that U.S. forces are waging war "in an unfair, inhumane, or iniquitous way." I also sense that the continued public support is an expression of the people's conviction that the U.S. military - which for years has topped the polls as the institution in which Americans have the most confidence - is doing everything it can to minimize the impact on noncombatants.

To those in the military, the persistent criticisms by some international lawyers, NGOs, academics, and others regarding U.S. and coalition air operations in Iraq, the Balkans, and Afghanistan have been extremely counter-productive. In too many instances, the criticisms appear alternately uninformed or patently politicized. Following Operation Allied Force, the allegations that the altitudes flown during combat sorties caused unnecessary civilian casualties were especially infuriating to airmen. The accusations did not seem to appreciate that the armed forces of democracies at war are properly guided by and subordinate to policies set by elected leaders, not the desires of those in uniform. That is the way the rule of law is supposed to work in free countries. Furthermore, some reports were wildly inaccurate - even Human Rights Watch could point to only one instance where high-altitude attacks might have caused unnecessary civilian injuries.

Indeed, it is impossible to find examples in human history where so much combat power was applied as discreetly as in the aforementioned air operations. With respect to Operation Enduring Freedom, White House spokesman Ari Fleischer observed, "I don't think you'll ever witness a nation that has worked so hard to avoid civilian casualties as the
United States has.”\textsuperscript{102} That is exactly what military leaders at every level believe. They are convinced that they are doing everything they can to comply with LOAC.

While one would always hope for perfection in any human endeavor, in practice, I cannot see how the adherence to LOAC and the humanitarian values it represents can significantly improve in future military interventions. It should be kept in mind that the recent conflicts took place under circumstances where U.S. forces were not \textit{in extremis}. This allowed time for comparatively extensive and systematic evaluations of targets and strategies. We may not have that relative “luxury” in rapidly evolving future conflicts, and the warfighters know it.

By demeaning the sincere efforts of those tasked to use armed force in pursuit of national objectives, the critics put respect for the law itself in jeopardy. They unnecessarily alienate the very audience LOAC most needs to prosper in the proverbial ‘real world.’ I do not mean to imply that the armed forces are disposed to act in an illegal or immoral fashion, but rather to suggest that the seeming impossibility to satisfy the self-styled legal authorities encourages military leaders to pursue a more politically-oriented approach that searches for legal loopholes and technical compliance as opposed to a more expensive philosophical commitment. Put concisely, subjective measures of public tolerance might tend to replace reliance upon rigorous readings of LOAC as the principal guide. As much as popular support is critical to a democracy’s ability to fight, the transient and often emotionally charged politics of a nation at war do not always reflect the enduring human rights principles that underlie LOAC. All too easily, this approach can devolve into \textit{Kriegsraison} writ large.\textsuperscript{103}

Will international law, and specifically LOAC, become – as Rivkin and Casey predict – “one of the most potent weapons ever deployed against the United States?” Perhaps their hyperbole goes too far, but the point is an important one. It is not in the interest of anyone
concerned with humanitarian values to unnecessarily handcuff the United States – or any democracy – when force is required to restore and safeguard human rights generally. We must remind ourselves that our opponents are more than ready to exploit our values to defeat us, and they will do so without any concern about LOAC. Consider this disquieting statement from Chinese military leaders: “War has rules, but those rules are set by the West...if you use those rules, then weak countries have no chance...We are a weak country, so do we need to fight according to your rules? No.”

We should expect to see unscrupulous antagonists engage in ever more sophisticated versions of lawfare. In Colombia, insurgents use sensitivity to human rights abuses to attempt to decapitate the nation’s military leadership, thus jeopardizing South America’s oldest democracy. The Wall Street Journal reports that “by intimidation and bribery” rebels force peasants to use the “courts to press false charges – anonymously – against the most capable military leaders.” At the same time the guerrillas are blaming others for human rights abuses they commit themselves. Even Human Rights Watch is disillusioned: “We’ve come to the conclusion that they’re using international humanitarian law as just part of a P.R. campaign.” It is vital for the preservation of human rights to be concerned about developments such as this. If international law is to remain a viable force for good in military interventions, lawfare practitioners cannot be permitted to commandeer it for malevolent purposes.

This essay critiques aspects of LOAC as currently practiced, but it is not meant to denigrate its fundamental importance. Americans would not be Americans if they waged war unconstrained by the ethical values LOAC represents. Rather, this paper is intended as a reminder that those interested in promoting law as an ameliorator of the misery of war are obliged to ensure it does not become bogged down with interpretations that are at odds with legitimate military concerns. LOAC must remain receptive to new developments,
especially technological ones that can save lives, even if that means breaking old paradigms.  

We also must forge stronger links between those knowledgeable of military affairs and those civilian experts in LOAC. Only productive cooperation can achieve the critical mass necessary to sustain international law as a guiding element in military interventions. We should encourage other nations to develop a robust cadre of uniformed lawyers ready to provide insightful advice to commanders in the field. Finally, we must not allow thoughtless, ill-informed, and politically motivated accusations to trivialize LOAC's fundamental principles. If it does, LOAC will lose its credibility with the very people - and the very nation - it most needs to make certain it is observed and, more importantly, preserved.
Notes


2 Ibid., 129, 130.


5 The term “lawfare” seems to have first appeared in a manuscript by John Carlson and Neville Yeo Mens entitled “Whither Goeth the Law - Humanity or Barbarity”, in The Way Out - Radical Alternatives in Australia (M. Smith & D. Crossley, eds., 1975), accessible at http://www.lacweb.org.au/wbi.htm (last visited 24 November 2001). They assert that “lawfare replaces warfare and the duel is by words rather than swords”; this captures a key theme of lawfare as used in this essay.

6 But see note 104, supra, and accompanying text.


8 Geoffrey Parker, Cambridge Illustrated History of Warfare (Cambridge University Press, 1995), 369 (“the majority of the approximately fifty million people killed in war [since 1945] have been civilians”).


10 Rivkin and Casey, note 3, supra.


13 “The free flow of broadcast information in open societies has always had an impact on public opinion and the formulation of foreign policy. But now the flow has increased in volume and shortened news cycles have reduced the time for deliberation.” Joseph Nye, “Redefining the National Interest,” Foreign Affairs, July/August 1999, 22, 26.


15 See note 5, supra.

16 For example, the U.S. used law to deny hostile uses of commercial satellite imagery. See Michael R. Gordon, “Pentagon Comers Output of Special Afghan Images,” New York Times, October 19, 2001, reprinted in Dep’t of Defense, Current News Early Bird, 19 October 2001 (discussing the U.S. strategy of “buying all the rights to picture of Afghanistan taken by the world’s best commercial satellites”).

17 Karl von Clausewitz, On War (Michael Howard and Peter Paret, ed., and trans. 1976) (1832), 89.


Ibid., 476-477. See also Colin Powell, My American Journey (Random House, 1995), at 520 ("The television coverage... was starting to make it look as if we were engaged in slaughter for slaughter's sake.").

See, Libyans to Form Shield at Suspected Arms Plant, Baltimore Sun, May 17, 1996, at 14 (reporting a Libyan threat to surround a suspected chemical weapons plant with a human shield composed of millions of Muslims).


By shifting soldiers and military equipment into civilian neighborhoods and taking refuge in mosques, archeological sites and other nonmilitary facilities, Taliban forces are confronting U.S. authorities with the choice of risking civilian casualties and destruction of treasured Afghan assets or forgoing attacks.


See e.g., Jamie F. Metzl, Information Intervention, Foreign Affairs, November/December 1997, at 15.


According to the DoD General Counsel, “[w]hen it is determined that civilian media broadcasts are directly interfering with the accomplishment of the military force’s mission, there is no law of war objection to using minimum force to shut it down.” See Dep’t of Defense, Office of General Counsel, An Assessment of International Legal Issues in Information Operations, May 1999, at 9.

See note 25, supra, at para IV, B. iii.

Bankovic v. 17 NATO States, Application No. 52207/99, European Court of Human Rights, Pending Cases Before a Grand Chamber, accessible at http://www.echr.coe.int/BilingualDocuments/PendCase.htm (last visited 25 November 2001) (The U.S. is not a party to this lawsuit).

Id.

See note 17, supra, and accompanying text.

Centers of gravity are “those characteristics, capabilities, or localities from which military forces derive freedom of action, physical strength, or will to fight.” See Chairman of the Joint Chiefs of Staff, Joint Publication (Joint Pub) 1-02, DoD Dictionary of Military and Associated Terms 23 March 1994 as amended 29 June 1999 accessed 6 September 1999 at http://www.dtic.mil/doctrine/jel/doddict/data/c01075s.html.


Michael Ignatieff, Virtual War (Metropolitan Books, 2000), at 199.


39 The most famous case involves the My Lai massacre. See United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973). However, there were many other trials of American troops that though charged as traditional offenses (e.g., murder) they amounted to what would likely be considered “war crimes.” See e.g., Gary D. Solis, Song Than: An American War Crime (1997).


41 Chairman, Joint Chiefs of Staff Instr. (CJCSI) 5810.01A, Implementation of the DoD Law of War Program, para. 6(c)(5) (27 August 1999)

42 The draft doctrine is Air Force Doctrine Document 2-4.5 Doctrine for Legal Support of Aerospace Operations (draft). This effort is underway at the Air Force Doctrine Center see http://www.doctrine.af.mil/.


47 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol II], art. art. 51.5(b). The U.S. is not, however, a Party to Protocol II but accepts this portion as reflecting customary international law.

48 The principle of “proportionality” requires that the “collateral damage” to noncombatants or their property not be disproportionate in relation to the “concrete and direct military advantage anticipated.” The concept was codified in arts. 51.5(b) and 57.2(iii) of Protocol I, note 47, supra. While the U.S. has not ratified Additional Protocol I, this portion is considered part of customary international law.


51 The Department of Defense would only say that there was “high confidence” that the factory was used to make a precursor compound for a chemical agent. See Dep’t of Defense, Background Briefing, Terrorist Camp Strikes, 20 August 1998 accessible at http://www.defenselink.mil/news/Aug1998/x8201998_x820bomb.html (last visited 20 November 2001).

52 The attack is the subject of on-going litigation in U.S. courts by the plant’s owners. See Otis Bilodeau, When Bombs Miss their Mark, Legal Times, November 28, 2001 at http://www.law.com (last visited 28 November 2001).

53 See e.g., Williamson Murray, Air War in the Persian Gulf (1995), at 224-226 (criticizing the alleged role of Air Force lawyers with respect to a proposed bombing of a statue of Saddam Hussein). Murray’s version of events is disputed by Colonel Scott L. Silliman, USAF (Ret.), the former Staff Judge Advocate of what was then known as Tactical Air Command (TAC) (Murray contends that TAC legal advice that the statue was a protected cultural monument “was simply wrong.”). Silliman contends that no lawyer ever concluded that bombing the statue was illegal; lawyers only recommended that the target be carefully screened for conformance with existing legal standards. He believes the statue was removed from the target lists for
unrelated reasons. E-mail from Scott L. Silliman to Colonel Charles Dunlap, Staff Judge Advocate, U.S. Strategic Command (19 Feb. 1998) (on file with author).


56 See note 48, supra.

57 See e.g., Elaine M. Grossman, Air Force Chief Launches Major Effort To Improve Targeting Speed, Inside the Pentagon, November 8, 2001, at 3.

58 The media reports allege that opportunities to attack purported terrorists were lost due to overly cautious advice from a JAG. See Seymour M. Hersh, King's Ransom, The New Yorker, October 22, 2001 accessible at http://www.newyorker.com/FACTS/01110225a_FACT1 (last accessed 12 November 2001) and Thomas E. Ricks, Target Approval Delays Irk Air Force Officers, Washington Post, November 18, 2001, at A01.


60 Dep't of the Air Force Policy Directive 51-4, 26 April 1993 (describing the reporting and investigation of any apparent violation of LOAC).

61 See e.g., 10 U.S.C. § 806(b)


63 Cf. note 71 and 72, supra, and accompanying discussion.

64 Protocol I, note 47, supra, at art. 82.


66 Ronald Haycock and Keith Neilson, Men, Machines, and War (1988) at xii.


68 As quoted by Matthew Cooper in Making the World Safer, Time, November 26, 2001, at 83.

69 The relative weight of the defense burden is yet another area where U.S. and European approaches diverge. See e.g., Jeffery Gedmin, A Yearning Gap on Defense, Washington Times, December 8, 1999, at 15. (“The United States currently spends 3.2 percent of its GDP on defense. The European allies in average 2.1%.”). See also John Keegan, The U.S. Is Not Amused By Our Redundant Military Gestures, London Daily Telegraph, December 6, 1999 reprinted in Dep't of Defense, Current News Early Bird, 6 December 1999 (“The United States] has...continued to devote a larger proportion of its budgetary spending on defense - particularly defense research - than any European government ever has, to the great benefit of all its allies.”).

70 For a relatively dispassionate and comprehensive examination of war crimes in the modern context see Crimes of War Project accessible at http://www.crimesofwar.org/ (last visited 20 November 2001).

73 One such munition in the U.S. inventory is the CBU 89, “Gator” mine system. For a description of it, see Federation of American Scientists, CBU 89 Gator Mine, accessible at http://www.fas.org/man/dod-101/sys/dumb/cbu-89.htm (last visited 23 November 2001).  
76 See Tighe, note 74 supra.  
79 Id., at 69. Presumably, Alexander is referring to such widely-accepted agreements as the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571. See also note 81 supra.  
80 Alexander, Id., at 69.  
82 Alexander, note 78, supra.  
84 Protocol on Blinding Laser Weapons, 13 October 1995, CCW Protocol IV see note 72 supra. The U.S. is not a party to this Protocol.  
90 See e.g., Charles Krauthammer, To War, Not to Court, Washington Post, September 12, 2001, at 29 ("An open act of war demands a military response, not a judicial one")  
92 Wayde Minami, Attack is an Act of War; Treat it as such with quick Overwhelming Revenge, Air Force Times, September 24, 2001, at 78.
93 See note 18, supra.
94 See note 12, supra.
100 See note 26, supra.
103 Kriegsraison is a nineteenth century German doctrine that asserts that military necessity could justify any measures – even violations of the laws of war – when the necessities of the situation purportedly justified it. It is rejected as a principle of international law. See Dept’ of the Air Force Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations* (19 November 1976) at paragraph 1-3a(1).
107 See Geoffrey Best, *Law and War Since 1945*, at 289 (1994) (“[T]he law of war, wherever it began at all, began mainly as a matter of religion and ethics...It began in ethics and it has kept one foot in ethics ever since”).
108 Although beyond the scope of this paper, one such paradigm needing re-thinking may be the whole notion of noncombatancy with respect to the sentient, adult population of democratic and quasi-democratic states. See Charles J. Dunlap, Jr, *End of Innocence: Re-Thinking Noncombatancy in the Post-Kosovo Era*, *Strategic Review*, Summer 2000, at 9.