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Peace and the World Court: A Comment on the Paramilitary Activities Case

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I. INTRODUCTION

One of the most painful experiences of my government service occurred on January 18, 1985, when as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs I was called on to sign letters informing Congress of the President's decision "not to participate further in the case brought by Nicaragua before the International Court of Justice."[1] I felt deeply that the United States approach was mistaken—not so much on legal[2] as on political grounds[3]—and in advocat-

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1. Letter from Robert F. Turner to Sen. Richard G. Lugar (January 7, 1986) (explaining the decision not to participate in the case any further). *See generally* R. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS (forthcoming, Institute for Foreign Policy Analysis 1987).

2. While I was not enthusiastic about one or two of the legal arguments that were being considered, on balance I thought the United States made a very strong case during the preliminary phase that Nicaragua had never perfected its acceptance of the Court's jurisdiction, and thus the Court manifestly lacked jurisdiction. However, given even a

ing my views I pushed strongly against the proper limits of legitimate

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reasonably fair hearing which I anticipated in light of the Court's handling of the *Iran Claims* case, I believed that the United States had an extremely strong case that it was acting legally pursuant to article 51 of the Charter should it choose to grant the Court jurisdiction to decide the case. Although I advocated going forward on the merits, I argued as a fallback that in the event the United States decided to avoid litigation, it should predicate such a decision on the 1946 Vandenberg Reservation to United States acceptance of ICJ jurisdiction, which denied the Court jurisdiction over cases involving disputes "arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." International Court of Justice: United States Recognition of Compulsory Jurisdiction, August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598. Although the United States successfully invoked this reservation *vis-à-vis* the absence of El Salvador, *see* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J. 14, 38, 146-50 [hereinafter Nicar. v. U.S., Merits], it failed to even argue the more compelling (and politically more powerful, *see infra* note 3) case, which would have emphasized the fact that key parties to the underlying dispute — *e.g.*, Cuba, Vietnam and the Soviet Union, which have been supplying or transporting most of the hundreds of tons of weapons and military equipment that Nicaragua has been smuggling into El Salvador since 1980 — refuse to accept the Court's jurisdiction and thus are beyond the reach of the ICJ. As the Court noted, "The Court has no jurisdiction to rule upon the conformity with international law of any conduct of states not parties to the present dispute. . . ." *Id.* at 109. The inability of the ICJ to deal effectively with the problem results primarily from the refusal of the Soviet Union and most of its Marxist-Leninist allies to accept the rule of international law and the compulsory jurisdiction of the World Court. The United States position would be essentially that set forth by Senator Vandenberg in 1945, when he told his Senate colleagues:

> I want a new dignity and a new authority for international law. I think American self-interest requires it. But . . . this also requires whole-hearted reciprocity. In honest candor I think we should tell other nations that this glorious thing we contemplate is not and cannot be one-sided. I think we must say again that unshared idealism is a menace which we could not undertake to underwrite in the postwar world.

91 CONG. REC. 166 (1945) (statement of Sen. Vandenberg). This was an approach I believed reasonable people could understand and had the added benefit of pressuring Managua's allies to submit to ICJ jurisdiction.

3. Despite its strong legal merits, the United States argument that Nicaragua had never properly accepted the Court's jurisdiction reminded me of an "exclusionary rule" defense — the implicit message for many would be that even if the United States could not be taken to court, its reliance on a "legal technicality" to keep the ICJ from considering the case on the merits was an apparent admission that the United States knew it was acting unlawfully and was afraid of having its actions considered on the merits. Although the strongest evidence of Nicaraguan aggression against its neighbors was highly classified and could not be shared with the Court without jeopardizing critical intelligence sources and methods, I felt that once the program had become public it was important for the United States to address the issues publicly on the merits. Public understanding and support is essential if United States foreign policy initiatives are to succeed. This means not only that policy must have a strong moral foundation, but also that this moral

dissent within the bureaucracy.

Having defended the Court against speculative criticism from lawyers and nonlawyers alike, I was particularly saddened to read its majority opinion on the merits of the case.[4] I believe the Court has done itself a grave disservice. It has given credence to legal interpretations that are inimical to the preservation of international peace and by its handling of evidence has fueled charges of political bias, thus jeopardizing its ability to deal with future international disputes which might threaten the peace. Although one can understand the Court's displeasure at the United States decision not to participate further in the proceedings of the case, the Court in its apparent anger has gone far towards vindicating the decision to withdraw. This result is most unfortunate, because international judicial tribunals have an important role to play in the resolution of international conflicts.

II. THE LAW: UNDERMINING COLLECTIVE DEFENSE

The Court's decision on the legal issues is so flawed that one hardly knows where to begin a critique. One would wish to be charitable and acknowledge at least that the Court properly rejected the idea of a "general right of intervention in support of an opposition within another State."[5] While this conclusion arguably represents a rejection of a central thesis of so-called "socialist international law,"[6] it was necessary in the instant case in order for the Court to hold against the United States for its support of the *contras.* Furthermore, the Court appears to have qualified its decision on this point to leave open the argument that such intervention is permissible in opposition to certain types of regimes.[7] This doctrine promotes war and is clearly incompatible with the fundamental

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underpinning must be apparent to the public. As Jefferson observed in 1809: "[I]t has a great effect on the opinion of our people and the world to have the moral right on our side. . . ." XII WRITINGS OF THOMAS JEFFERSON 274 (A. Lipscomb & A. Bergh, eds. 1904). By first appearing to hide behind a legal "loophole" and then walking away from the Court, the United States essentially surrendered the moral high ground in the debate — this was particularly ironic given the moral strength of the underlying United States objective of deterring international aggression.

4. Nicar. v. U.S., Merits, 1986 I.C.J. at 14.

5. *Id.* at 107-10. The Court said: "The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other." *Id.* at 124.

6. *See generally* J. MOORE & R. TURNER, INTERNATIONAL LAW AND THE BREZHNEV DOCTRINE (forthcoming, University Press of America 1987).

7. Nicar. v. U.S., Merits, 1986 I.C.J. at 108.

principles of the United Nations Charter (the Charter).

Two important legal doctrines emerge from the case that are unjustified by the Charter and contrary to the long-term interests of international peace. First, the Court concluded that the type of assistance Nicaragua is accused of supplying to the antigovernment guerrillas in El Salvador—a combination of arms, ammunition, money, training, secure military bases, command-and-control, and communications support[8]—does not constitute an "armed attack" under article 51 of the Charter.[9] Second, the Court held that in the absence of such narrowly defined "armed attack," a victim of external armed aggression may not seek necessary and proportional assistance, even under regional security arrangements in defense of its freedom.[10] This overly narrow construction of the "armed attack"[11] language in article 51—which translates "armed aggression" (*aggression armée*) in the equally authentic French text—is incompatible with the fundamental non-use-of-force provision of article 2(4),[12] the underlying purposes and principles of the United Na-

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8. The writer's forthcoming study includes a detailed discussion of Nicaraguan assistance to the Salvadoran insurgents, *see* R. TURNER, *supra* note 1. The House Permanent Select Committee on Intelligence provided a useful summary in May 1983, which on the basis of regularly reviewing "voluminous intelligence materials" concluded "with certainty" that "[a] major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas," that "[t]he Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities" and that "[t]he Sandinista leadership sanctions and directly facilitates all of the above functions." HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, AMENDMENT TO THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1983, H.R. Rep. No. 122, 98th Cong., 1st Sess., pt. 1, at 5-6 (1983). *See also* Nicar. v. U.S., Merits, 1986 I.C.J. at 6. Given this Committee's consistent opposition to United States support for the *contras* and the likelihood that its members were aware that these conclusions support arguments for more aid, these statements constitute virtual admissions against interest.

9. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . ." U.N. CHARTER, art. 51.

10. *See infra* notes 52-53 and accompanying text.

11. By this same narrow logic, the reference in article 51 to assisting "members" of the United Nations would suggest that the Charter prohibits collective assistance to nonmembers who are victims of armed aggression — a doctrine clearly rejected by the United Nations at the time of the Korean War.

12. "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.*" U.N. CHARTER,

tions as set forth in article 1(1)[13] and the clear *travaux préparatoires* of the Charter.[14]

Space does not permit a detailed discussion of the full extent of Nicaragua's intervention in El Salvador,[15] and the legal principles involved do not depend on the facts of any particular case. At issue is whether the Charter prohibits a relatively small and peaceful state from seeking necessary and proportional defensive help from its regional treaty partners[16] when a more powerful state (or group of states) unlawfully attempts to overthrow the first state's government by providing massive amounts of arms and military equipment, money, training, military advice and other means short of committing its own troops to battle.

This issue is critical because the preferred forms of aggression in the contemporary world are low-intensity and covert intervention. Indirect armed aggression can totally transform the nature of an internal struggle and, in the long run, overthrow a relatively weak state's government as effectively and completely as a direct cross-border invasion.[17] A holding

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art. 2, sec. 4 (emphasis added). Writing in *Self-Defence in International Law*, Professor Bowett has observed:

> [T]he view of Committee I at San Francisco was that this prohibition [in article 2(4) of the Charter] left the right of self-defense unimpaired; in the words of its rapporteur "the use of arms in legitimate self-defence remains admitted and unimpaired." . . . Indeed, it is difficult to see what other conclusion could be reached, for if we examine the substantive rights protected by self-defence the absence of any inconsistency with Art. 2(4) is apparent. Action undertaken for the purpose of, and limited to, the defence of a state's political independence, territorial integrity, the lives and property of its nationals . . . cannot by definition involve a threat or use of force "against the territorial integrity or political independence" of any other state. . . . Nor can it be said that the protection of those same substantive rights by the exercise of self-defence is "in any other manner inconsistent with the Purposes of the United Nations." . . .

BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184-86 (1958), *quoted in* 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 43-44 (1971).

13. "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end; to take effective *collective* measures for the prevention and removal of *threats to the peace,* and for the *suppression of acts of aggression* or other *breaches of the peace.* . . ." U.N. CHARTER, art. I, para. 1 (emphasis added).

14. *See infra* notes 27-31 and accompanying text.

15. For such a discussion, see generally R. TURNER, *supra* note 1, and Moore, *The Secret War in Central America and the Future of World Order,* 80 AM. J. INT'L L. 43 (1986).

16. Or for that matter, from any willing state.

17. "Quite obviously, indirect aggression can undermine the sovereignty of a state as effectively as a traditional armed attack. To argue that a state may not employ force to combat indirect aggression reveals a considerable lack of understanding of the purposes of the Charter. The drafters meant only to proscribe the unlawful use of force, not coercion

by the World Court that restricts weak states to their own resources in responding to this type of aggression may produce two unfortunate results: (1) potential aggressors may be encouraged to subvert weaker and more peaceful states; and (2) less powerful states that may have focused their energies on providing for the needs of their people, with confidence that their friends and treaty partners would help in the event they became a victim of aggression, may need to reexamine their own military capabilities. In the end, this could lead to an outbreak of arms races as individual states find it necessary to provide independently for their own defense. Either of these consequences would be unfortunate.

Unquestionably, it is unlawful under the Charter and customary international law for more powerful states to engineer the overthrow of weaker states by providing arms, logistical support, training and similar assistance to opposition groups within the less powerful states. To do so would violate article 2(4) of the Charter[18] and numerous other international legal instruments.[19] The 1950 "Peace Through Deeds" Resolution of the United Nations General Assembly summarized the prevailing law

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in defense of such basic values as political independence or territorial integrity." R. HULL & J. NOVOGROD, LAW AND VIETNAM 120 (1968). *See also* a statement by British Foreign Secretary Lloyd to the House of Commons in the context of the 1958 United States deployment of armed forces in Lebanon:

> What happens? A foreign Government determines to use a dissident element within another State to overthrow the legitimate Government by force. The technique is the smuggling of arms and explosives, the infiltration of agents, a virulent propaganda campaign, incitement to insurrection and assassination and, finally, the plot against the lives of the constitutional leaders. . . .
>
> On the general points of principle affecting indirect aggression, I believe that a country has the right to ask for help from other countries when it feels itself to be in danger. . . . Unless countries are prepared to respond to such appeals for help I think that we shall see one country after another go down to this form of aggression. . . .

Statement of British Foreign Secretary Lloyd to House of Commons (discussing United States assistance to the Government of Lebanon in 1958), *quoted in* 12 WHITEMAN, *supra* note 12, at 221.

18. *See, e.g.,* those instruments listed in Moore, *supra* note 15, at 80-81.

19. *See supra* note 12. The key question in an article 2(4) analysis ought to be whether the state in question has substantially and intentionally contributed to a "threat or use of force against the territorial integrity or political independence of any state," and not whether the actual instruments used for this aggression were native to the aggressor, the victim or a third state. Thus, one should distinguish between interventions which do not involve a use of force (e.g., propaganda, espionage, economic pressure), and intervention intended to result in the use of armed force, the destruction of property and the taking of lives (e.g., direct invasion, employing mercenaries to conduct an invasion or providing substantial assistance to armed guerrilla groups for the purpose of assisting them in bringing about political change in another state by armed force).

well, providing:

> The General Assembly, . . . condemning the intervention of a state in the internal affairs of another state for the purpose of changing its legally established government by the threat or use of force,
>
> 1. *Solemnly* reaffirms that, whatever the weapons used, any aggression, whether committed openly, or BY FOMENTING CIVIL STRIFE in the interest of a foreign power, or otherwise, is THE GRAVEST OF ALL CRIMES AGAINST PEACE AND SECURITY THROUGHOUT THE WORLD;
>
> 2. *Determines* that for the realization of lasting peace and security it is indispensable:
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> (1) That prompt UNITED action be taken to meet aggression wherever it arises. . . .[20]

The Charter does not define the term "aggression," in part because many states were concerned that no definition could be comprehensive enough to insure that potential aggressors could not find a loophole to avoid its terms.[21] In 1951, however, the General Assembly asked the International Law Commission to attempt to define "aggression."[22] The

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20. G.A. Res. 380-V, 5 U.N. GAOR, Supp. (No. 20) at 13, U.N. Doc. A/1775 (1950) (emphasis added). *See also* the November 3, 1947 General Assembly Resolution in which the General Assembly "[c]ondemn[ed] all forms of propaganda . . . which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression. . . ." G.A. Res. 110 (II), 2 U.N. GAOR (108th plen. mtg.) at 205 (1947) and the "Essentials of Peace" Resolution approved by the United Nations General Assembly on December 1, 1949, which called upon every nation: "3. *To refrain* from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State." G.A. Res. 290(IV), 4 U.N. GAOR (261st plen. mtg.) (1949).

21. As President Truman explained in 1950:

> At the San Francisco Conference . . . there was a movement to insert a definition of aggression in the United Nations Charter. The United States opposed this proposal. It took the position that a definition of aggression cannot be so comprehensive as to include all cases of aggression and cannot take into account the various circumstances which might enter into the determination of aggression in a particular case. Any definition of aggression is a trap for the innocent and an invitation to the guilty.

Report by the President to Congress for the year 1950 at 170, *quoted in* 5 WHITEMAN, *supra* note 12, at 740.

22. Report of the International Law Commission, Covering the work of its third session, 16 May-27 July 1951, 6 U.N. GAOR Supp. (No. 9), U.N. Doc. A/1858 (1951), *reprinted in* [1951] 1 Y.B. INT'L L. COMM'N 89-122, 221-237, 378-381, 389-394, 422-423, U.N. Doc. A/CN.4/Ser.A/1951, *quoted in* 5 WHITEMAN, *supra* note 12, at 745-47. The Committee's records indicate:

> The International Law Commission considered whether it should follow the enumerative method or try to draft a definition of aggression in general terms. Mr. Yepes of Colombia submitted a proposal based on the enumerative method. Mr.

Commission arrived at the following definition:

> Aggression is the threat or use of force by a State or government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.[23]

Following the approval of the "Peace Through Deeds" Resolution by the overwhelming majority of the General Assembly, the International Law Commission included as a definition of "aggression" in its draft Code of Offences Against the Peace and Security of Mankind: "The undertaking or encouragement by the authorities of a State of activities cal-

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Amado of Brazil and Mr. Alfaro of Panama submitted general formulas. "The sense of the Commission was that it was undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive. . . . It was therefore decided that the only practical course was to aim at a general and abstract definition." For this purpose, the Commission took as a basis of discussion the text submitted by Mr. Alfaro, as it was the broadest definition before the Commission. . . .

The Commission "felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as the fomenting of civil strife by one State in another, the arming by a State of organized bands for offensive purposes directed against another State, and the sending of 'volunteers' to engage in hostilities against another State." . . . The Commission finally decided to amend the definition proposed by Mr. Alfaro by including threat of force. Certain other changes were made in the text submitted by Mr. Alfaro.

Id. at 745-46.

23. 5 WHITEMAN, *supra* note 12, at 746. Some members considered this definition as not comprehensive and "dangerously restrictive" of United Nations action. In the final vote, the Commission rejected the definition by a vote of 7 to 3 with one abstention. *Id.* at 747. Sir Humphrey Waldock, discussing a Commission comment on its proposed definition, wrote:

> The Commission . . . expressly said that aggression may also be committed by other acts than resort to armed force in breach of the Charter. It indicated that some of the other crimes in its list might equally constitute acts of aggression and seems to have had in mind particularly:
>
> *(a) The incursion into the territory of one State from the territory of another by armed bands acting for a political purpose. . . .*
>
> *(b) Fomenting civil strife, or tolerating activities calculated to foment civil strife, in another State. . . .*
>
> *(c) Encouragement of terrorist activities in another State or toleration of organised activities calculated to carry out terrorist acts in another State. . . .*

Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 508-11 (1952, vol. II), *quoted in* 5 WHITEMAN, *supra* note 12, at 749-50.

culated to foment civil strife in another State, or the toleration by the authorities of a state of organized activities calculated to foment civil strife in another State."[24] Given the parties to the present International Court of Justice (ICJ) case, it is noteworthy that American states were particularly prominent in the efforts to ensure that the definition of aggression encompassed indirect actions.[25]

In responding to armed aggression, a state may use necessary and proportional armed force,[26] and also may seek the help of other states in defending itself. The language of article 51 of the Charter recognizes the right of individual or collective self-defense as an "inherent" right of states.[27] For the parties to the instant ICJ case, the 1945 Act of Chapultepec included the doctrine of collective defense, providing in part 1(3): "That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall . . . be considered as an act of aggression against the other States which sign this Act."[28]

This doctrine was carried forward a few months later in the drafting of article 51 of the U.N. Charter, under the able leadership of U.S. Senator Arthur Vandenberg, who chaired the subcommittee of Commission III at San Francisco.[29] In summarizing the product of the negotiations,

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24. *Question of Defining Aggression: Report of the Secretary-General*, 7 U.N. GAOR Annexes (Agenda Item 54) at 17, 71-74, U.N. Doc. A/2211 (1952) [hereinafter *Defining Aggression*], *quoted in* 5 WHITEMAN, *supra* note 12, at 823.

25. Bolivia proposed, for example, a draft resolution in early 1952 defining as "an act of aggression" any "action taken by a State, overtly or covertly, to incite the people of another State to rebellion with the object of changing the political structure for the benefit of a foreign Power." *Id.* Other states that were outspoken in support of outlawing indirect as well as direct aggression included: Colombia, the Dominican Republic, Canada, the United States and Uruguay. *See* 5 WHITEMAN, *supra* note 12, at 824-25.

26. *See, e.g.*, BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 265-68 (1963), *quoted in* 12 WHITEMAN, *supra* note 12, at 13; BOWETT, *supra* note 12, at 184-86, *quoted in* 12 WHITEMAN, *supra* note 12, at 43-44; HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE ORGANS OF THE UNITED NATIONS 200-204 (1963), *quoted in* 12 WHITEMAN, *supra* note 12, at 62-63.

27. U.N. CHARTER, art. 51. Senator Vandenberg, who was primarily responsible for drafting the article (*see infra* at note 29 and accompanying text), argued in 1949: "[A]rticle 51 is not the source of the right of individual and collective self-defense. It does not establish this right; it merely recognizes its sovereign existence in all states whether in or out of the United Nations." 95 CONG. REC. 8896 (1949) (statement of Sen. Vandenberg).

28. Treaty of Reciprocal Assistance and American Solidarity, March 8, 1945, pt. I, para. 3, 60 Stat. 1831, T.I.A.S. No. 1543.

29. 95 CONG. REC. App. at 3347 (1949) (statement of Sen. Vandenberg). *See also* CURRENT BIOGRAPHY: WHO'S NEWS AND WHY 1948, at 639 (1949).

Vandenberg told the second meeting of Commission III on June 13, 1945: "[W]e have here recognized the inherent right of self-defense, whether individual or collective, which permits any sovereign state among us . . . to ward off attack pending adequate action by the parent body. And we specifically recognize the continuous validity of mutual protection pacts . . . ."[30] In a 1949 address to the Inter-American Bar Association, Vandenberg stressed that one of the primary reasons for insisting on the right of states to act independently to meet aggression was the realization that the veto power could block effective action by the Security Council. He stated: "[I]f the Security Council fails to act—or is stopped from acting, for example, by a veto—article 51 continues to confound aggression. The United Nations is thus saved from final impotence. So is righteous peace."[31]

In May 1947 the United Nations Commission of Investigation Concerning Greek Frontier Incidents reported to the United Nations Security Council that Yugoslavia, Albania and Bulgaria had "supported the guerrilla warfare in Greece."[32] During the Security Council's consideration of the issue, a United States representative "expressed the view that the failure of the Security Council to act did not preclude individual or collective action by states willing to act, so long as the action taken was in accordance with the general purposes and principles of the United Nations."[33] Although a Soviet veto[34] blocked effective Security Council

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30. Statement of Senator Vandenberg at San Francisco Conference, *quoted in* 12 WHITEMAN, *supra* note 12, at 99. *See also* 91 CONG. REC. 6982 (1945) (statement of Sen. Vandenberg).

31. 91 CONG. REC. App. at 3347 (1949) (statement of Sen. Vandenberg). Other senior United States officials took an identical position. In July 1945 John Foster Dulles told the Senate Foreign Relations Committee: "At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council." The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations, 79th Cong., 1st Sess. 349-50 (1945) (statement of John Foster Dulles, official adviser to United States delegation at San Francisco), *quoted in* 12 WHITEMAN, *supra* note 12, at 85.

32. The U.S. & U.N. Report by the President to Congress for the Year 1947 at 17-23 [hereinafter U.S. & U.N.: Report], *quoted in* 5 WHITEMAN, *supra* note 12, at 281. *See also* 93 CONG. REC. 3277 (1947) (statement of Sen. Vandenberg).

33. GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 104, 106-107 (2d ed. 1949), *quoted in* 12 WHITEMAN, *supra* note 12, at 23. United States Representative Austin told the Security Council:

> I do not think that we should interpret narrowly the "Great Charter" of the United Nations. In modern times, there are many ways in which force can be used by one State against the territorial integrity of another. Invasion by organized ar-

action, the General Assembly did pass a resolution declaring that "the continued aid given by Albania, Bulgaria and Yugoslavia to the Greek guerrillas endangers peace in the Balkans, and is inconsistent with the purposes and principles of the Charter of the United Nations."[35]

That the Court has chosen a dispute among American states to limit the important doctrine of collective defense is ironic, for it was at the initial insistence of Latin American delegations that the drafters inserted the collective security provision of article 51 in the Charter in 1945.[36]

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mies is not the only means for delivering an attack against a country's independence. Force is effectively used today through devious methods of infiltration, intimidation and subterfuge.

But this does not deceive anyone. No intelligent person in possession of the facts can fail to recognize here the use of force, however devious the subterfuge may be. We must recognize what intelligent and informed citizens already know. Yugoslavia, Bulgaria and Albania, in supporting guerrillas in northern Greece, have been using force against the territorial integrity and political independence of Greece. They have in fact been committing acts of the very kind which the United Nations was designed to prevent, and have violated the most important of the basic principles upon which our Organization was founded.

2 U.N. SCOR (147th and 148th mtg.) at 1120-21 (1947), *quoted in* Nicar. v. U.S., Merits, 1986 I.C.J. at 335 (Schwebel, J., dissenting).

34. U.S. & U.N.: Report, *supra* note 32, at 17-23, *quoted in* 5 WHITEMAN, *supra* note 12, at 282.

35. G.A. Res. 193, 3 U.N. GAOR at 18-19 (1948), *reprinted in* McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057, 1111-1112 (1959), *quoted in* 5 WHITEMAN, *supra* note 12, at 825.

36. *See North Atlantic Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 81st Cong., 1st Sess. 101, 102, 104-105 (1949) [hereinafter *North Atlantic Treaty: Hearings*] (statement of Lleras Camargo, delegate of Colombia, at the meeting of Committee III/4), *quoted in* 12 WHITEMAN, *supra* note 12, at 99. On May 23, 1945, Colombia delegate Lleras Camargo told Committee III/4:

The Latin American countries understood, as Senator Vandenberg has said, that the origin of the term, "collective self-defense" is identified with the necessity of preserving regional systems like the inter-American one. . . . And the right of defense is not limited to the country which is the direct victim of aggression but extends to those countries which have established solidarity, through regional arrangements, with the country directly attacked. This is the typical case of the American system. The Act of Chapultepec provides for the collective defense of the hemisphere and establishes that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed in sub-committee yesterday, is authorized for all of them.

Id. It is perhaps worth noting that Senator Vandenberg, who also helped negotiate the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty), 62 Stat. 1681, T.I.A.S. No. 1838, 121 U.N.T.S. 77, understood that by the terms of the Rio Treaty, in

Reflecting on this history, Senator Vandenberg explained to his Senate colleagues in 1949:

> To make a long story short, Latin-America rebelled—and so did we. *If the omission [of the right of collective self-defense] had not been rectified there would have been no Charter.* It was rectified, finally, after infinite travail, by agreement upon article 51 of the Charter. *Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance.*[37]

There is additional irony in the Court's use of a dispute involving Cuban and other Marxist-Leninist aggression in Latin America to limit the scope of collective self-defense. The Inter-American system has addressed such aggression on numerous occasions and has taken the position repeatedly that collective self-defense involving the use of armed force was permissible if necessary to bring such aggression to an end.[38]

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the event of an attack against a party to the treaty it was the right of every other party to "decide upon its *own immediate* action in fulfillment of the basic pledge" of the treaty — prior to any agreement on a collective response. Vandenberg, *Successful Conclusion of the Inter-American Conference*, 17 DEP'T ST. BULL. 502, 504 (September 14, 1947) (emphasis in original).

37. 95 CONG. REC. 8892 (1949) (statement of Sen. Vandenberg) (emphasis added).

38. Consider, for example, the Organization of American States (OAS) response to Cuban aggression against Venezuela in 1963, 12 WHITEMAN, *supra* note 12, at 814-15, 819-20. In considering Cuban aggression against Venezuela, the ministers at the Ninth Meeting of Consultation of Ministers of Foreign Affairs resolved:

> 2. To condemn emphatically the present Government of Cuba for its acts of aggression and of intervention against the territorial inviolability, the sovereignty, and the political independence of Venezuela.
>
> . . . .
>
> 5. To warn the Government of Cuba that if it should persist in carrying out acts that possess characteristics of aggression and intervention against one or more of the member states of the Organization, the member states shall preserve their essential rights as sovereign states by the use of *self-defense* in either individual or *collective* form, *which could go so far as resort to armed force,* until such time as the Organ of Consultation takes measures to guarantee the peace and security of the hemisphere.

Id. at 819-20 (emphasis added). For the full text of this resolution, *see* 5 WHITEMAN, *supra* note 12, at 841-42.

Professors Thomas and Thomas have written:

> [T]he OAS has labelled assistance by a state to a revolutionary group in another state for purposes of subversion as being aggression or intervention. If this subversive intervention culminates in an armed attack by the rebel group, it can be said that an armed attack as visualized by Article 3 of the Rio Treaty has occurred.

A. THOMAS & A. THOMAS, THE DOMINICAN REPUBLIC CRISIS 1965: WORKING PAPER FROM THE NINTH HAMMERSKJÖLD FORUM 27-28 (1967), *quoted in* Moore, *supra* note 15, at 84.

Moreover, collective defense responses in the Inter-American system have not been limited merely to overt and direct armed aggression. A 1966 study by the Inter-American Institute of International Legal Studies observed:

> [W]hen the [OAS] Charter sets forth the principle of solidarity it refers to "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State" . . . and not only to "armed attack," as does the Rio Treaty, and . . . it does not limit the validity of "collective self-defense" to an aggression of that nature. . . ."[39]

Turning from the OAS Charter to the Rio Treaty, this same study concluded:

> [N]othing prevents the characterization as acts of aggression, of certain acts, analogous to invasion or armed attack, which do not exactly possess the characteristics of the acts described in Article 9 [of the Rio Treaty]. In this regard, acts which have been compared to armed attack for purposes of self-defense or other reasons should be borne in mind, such as "aid to armed bands" as foreseen in the Act Relating to the Definition of Aggression (1932-33), including the state's tolerance of these activities, and material aid to "guerrillas" operating in the territory of a third state, which was the position assumed by certain governments in the course of the debates in the United Nations on the Greek question (1947). In brief, like the [OAS] Charter, the Rio Treaty intrinsically appears to authorize a certain flexibility in interpreting the type of action that follows from the different hypotheses of aggression.[40]

Addressing the question of "just which measures of self-defense . . . states are authorized to take until the Organ of Consultation meets and takes a decision," this important study concludes that, "in the inter-American system," the institution of self-defense "has been extended to cover 'aggression which is not an armed attack.' "[41]

The United States Senate discussed the issue of collective self-defense in detail during its consideration of the North Atlantic Treaty in 1949. Testifying before the Senate Foreign Relations Committee, Secretary of State Dean Acheson noted that the provisions of article 51 had been removed from the portion of the Charter dealing with "Regional arrangements" so that the "inherent right of individual and collective self-de-

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39. INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, THE INTER-AMERICAN SYSTEM—ITS DEVELOPMENT AND STRENGTHENING 108-18 (1966), *quoted in* 12 WHITEMAN, *supra* note 12, at 695.

40. 12 WHITEMAN, *supra* note 12, at 696.

41. *Id.* at 698.

fense should not be associated with any other idea whatever; it is a complete, absolute right. . . ."[42] Senator Fulbright asked: "Would an internal revolution, perhaps aided and abetted by an outside state, in which armed force was being used in an attempt to drive the recognized government from power be deemed an 'armed attack' within the meaning of article 5 [of the NATO treaty]?" Secretary Acheson responded: "I think it would be an armed attack."[43]

In a lengthy report to the Senate on this treaty, Senator Vandenberg, who had risen since San Francisco to the position of Chairman of the Foreign Relations Committee, explained:

> Are we bound to support a member state against internal attack which seeks to overthrow the government? We are not bound, directly or indirectly, to take sides in civil wars. We are pledged only against armed aggression by one state against another. If civil war should include external armed aggression, identified by us as such, we would be obligated to take such steps against the external armed aggression as we would deem necessary to restore and maintain the security of the North Atlantic area.[44]

Many non-American experts have also endorsed this consistent United

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42. *North Atlantic Treaty: Hearings, supra* note 36, at 17, *quoted in* 12 WHITEMAN, *supra* note 12, at 94-95.

43. *North Atlantic Treaty: Hearings, supra* note 36, at 58, *quoted in* 12 WHITEMAN, *supra* note 12, at 232.

44. 95 CONG. REC. 8897 (1949) (statement of Sen. Vandenberg). The report of the Senate Foreign Relations Committee which accompanied the NATO Treaty dealt with the application of article 5 to externally-assisted revolutionary movements in this way:

> The committee notes that article 5 would come into operation only when a nation had committed an international crime by launching an armed attack against a party to the treaty. The first question which would arise would be whether or not an armed attack had in fact occurred. If the circumstances were not clear, there would presumably be consultation but each party would have the responsibility of determining for itself the answer to this question of fact. . . . Obviously, purely internal disorders or revolutions would not be considered "armed attacks" within the meaning of article 5. However, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack. Each party would have to decide, in the light of the circumstances surrounding the case and the nature and extent of the assistance, whether, in fact, an armed attack had occurred and article 5 [was] thus brought into play.

NORTH ATLANTIC TREATY, REPORT OF THE SENATE COMM. ON FOREIGN RELATIONS, S. EXEC. REP. NO. 8, 81st Cong., 1st Sess. 13 (1949), *quoted in* 12 WHITEMAN, *supra* note 12, at 856.

States position[45] on the scope of the inherent right of states to collective

45. For example, in July 1958 the Government of Lebanon asked the United States to send armed forces to help preserve the independence and integrity of that country, which was facing a revolt "supported by sizable amounts of arms, ammunition, and money . . . infiltrated from Syria. . . ." *Message from President Eisenhower to the Congress of the United States*, July 15, 1958, 39 DEP'T ST. BULL., No. 997, at 182-83 (1958), *quoted in* 5 WHITEMAN, *supra* note 12, at 827. In explaining this deployment to the United States Congress, President Eisenhower asserted:

> I have concluded that . . . the measures thus far taken by the United Nations Security Council are not sufficient to preserve the independence and integrity of Lebanon. . . . Pending the taking of adequate measures by the United Nations, the United States will be acting pursuant to what the United Nations Charter recognizes is an inherent right — the right of all nations to work together and to seek help when necessary to preserve their independence.

PUBLIC PAPERS OF THE PRESIDENT: DWIGHT D. EISENHOWER 1958, at 550-52 (1959), *quoted in* 5 WHITEMAN, *supra* note 12, at 475. In addressing the Third Emergency Special Session of the United Nations General Assembly on August 13, 1958, President Eisenhower said:

> Our assistance to Lebanon has but one single purpose — that is the purpose of the charter and of such historic resolutions of the United Nations as the "Essentials of Peace" resolution of 1949 and the "Peace Through Deeds" resolution of 1950. These denounce, as a form of aggression and as an international crime, the fomenting of civil strife in the interest of a foreign power.

Program for the Near East, 39 DEP'T ST. BULL., No. 1001, at 337-38 (1958), *quoted in* 5 WHITEMAN, *supra* note 12, at 836. More than a decade later, on March 25, 1969, Lawrence Hargrove, United Nations Representative to the Special Committee on the Question of Defining Aggression, said:

> The Charter speaks in Article 2, paragraph 4, of the "use of force" in international relations; it does not differentiate among the various kinds of illegal force, ascribing degrees of illegality according to the nature of the techniques of force employed. . . . There is simply no provision in the Charter, from start to finish, which suggests that a State can in any way escape or ameliorate the Charter's condemnation of illegal acts of force against another State by a judicious selection of means to its illegal ends.

Nicar. v. U.S., Merits, 1986 I.C.J. at 336 (Schwebel, J., dissenting). Four years later, Steven Schwebel, United States Representative to the Special Committee on the Question of Defining Aggression, observed that "the Charter of the United Nations makes no distinction between direct and indirect uses of force" and that the "most pervasive forms of modern aggression tend to be indirect ones." *Id.* United States support for "collective" measures in response to Cuban intervention in Latin America dates back to 1959. For example, following Cuban-sponsored guerrilla campaigns against Panama, Nicaragua and the Dominican Republic, United States Ambassador Dreier told the Council of the Organization of American States on July 10, 1959:

> It is evident, Mr. Chairman, that basic principles of the Organization of American States are indeed jeopardized by the present situation. One of these principles is that of nonintervention in the internal affairs of other states. The active participation of foreign elements in effort to overthrow the governments of states in this area constitutes a definite threat to that principle. If it is permitted to be violated

defense.[46] Sir Humphrey Waldock has written, for example, that "any assistance to a Member engaged in legitimate self-defence appears to be authorised by article 51."[47]

Not every act of external assistance to an insurgency movement constitutes an "armed attack" and justifies a responsive use of force. To determine whether acts constitute armed aggression, one must consider the nature and extent of the external assistance and its relative impact on the ability of the indigenous insurgents to accomplish their objectives. Under these criteria, the Nicaraguan aggression against El Salvador certainly qualifies as an armed attack.[48] The central issue, however, should be whether the aggression is of such a nature to justify an armed defensive response, not whether a victim of external armed aggression may obtain the help of treaty partners in exercising its admitted right of self-defense.

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in the present situation, it will be violated increasingly in the future. The foundation of our structure will then quickly crumble. Another principle affected here is that of collective security as set forth in the clear terms of the Rio Treaty and the Charter of the Organization. The OAS has developed a system without parallel elsewhere in the world for guaranteeing the security of states against aggression.

41 DEP'T ST. BULL., No. 1048, at 136-38 (1959), *quoted in* 12 WHITEMAN, *supra* note 12, at 791.

46. For example, Mr. Röling, of the Netherlands, told the 289th meeting of the United Nations General Assembly: "Article 51 of the charter referred only to the inherent right of self-defence in the event of 'armed attack.' But if the right of self-defence was based on the right of self-preservation, a State must surely have the right to defend itself against both types [direct and indirect] of aggression." *Defining Aggression*, *supra* note 24, at 17, 71-74, *quoted in* 5 WHITEMAN, *supra* note 12, at 820. *See also* 12 WHITEMAN, *supra* note 12, at 91. Professor Quincy Wright — whose distinguished career included service as president of the American Society of International Law, the American Political Science Association, and the International Political Science Association — argued in 1957 that "every international obligation not to engage in hostilities carries the qualification, by implication if not by express statement, that it does not impair a state's capacity to use armed force . . . for necessary self-defense, . . . or for assisting, if requested, another state in an armed action permissible to the latter." Wright, *Intervention, 1956*, 51 AM. J. INT'L L. 257, 269 (1957).

47. Waldock, *supra* note 23, at 504, *quoted in* 12 WHITEMAN, *supra* note 12, at 98.

48. *See generally* R. TURNER, *supra* note 1, and Moore, *supra* note 15. Nicaraguan aid totally transformed the nature of the conflict in El Salvador between 1980 and early 1981. In April 1980 United States Ambassador Robert White characterized El Salvador as being in "a prerevolutionary situation." *El Salvador Tilts Further Toward Full Civil War*, N.Y. Times, Apr. 6, 1980, at E2, col. 1. *Cf.* Wood, *Carter Orders Military Supplies to Embattled Junta in Salvador*, Wash. Star, Jan. 15, 1981, at 1, col. 1. In January 1981 the *Washington Post* reported: "[T]he guerrillas have proven they can mount coordinated actions virtually anywhere in this overcrowded Central American country and operate almost freely in the rural areas." Dickey, *U.S. Adds "Lethal" Aid to El Salvador*, Wash. Post, Jan. 18, 1981, at 1, col. 4.

Unfortunately, the Court has seen fit to limit sharply the fundamental doctrine of collective self-defense.[49] While recognizing that "assistance to rebels in the form of the provision of weapons or logistical or other support . . . . may be regarded as a threat or use of force,"[50] and "may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful. . . ,"[51] nevertheless, the Court concluded:

> [T]he lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today — whether customary international law or that of the United Nations system — States do not have a right of "collective" armed response to acts which do not constitute an "armed attack."[52]

Subsequently, the Court reaffirmed this conclusion and stated:

> The acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of

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49. Keep in mind that Senator Vandenberg, who was essentially the "father" of article 51, indicated that the Charter would not have been approved in this article's absence. *See supra* note 37 and accompanying text.

50. Nicar. v. U.S., Merits, 1986 I.C.J. at 104.

51. *Id.* at 127.

52. *Id.* at 110. *See also id.* at 120 ("The exercise of the right of collective self-defense presupposes that an armed attack has occurred. . . .") Given the virtual "mirror image" nature of the United States assistance to the *contras vis-á-vis* Sandinista aid to the Salvadoran insurgents, it is interesting to note the Court's description of the United States action as an "armed response" to Nicaraguan actions which the Court refuses to acknowledge is an "armed attack" (or "armed aggression"). Compare the types of assistance that the House Permanent Select Committee on Intelligence found "with certainty" that Nicaragua had been giving to the rebels in El Salvador, *supra* note 8, with the Court's finding that United States support for the *contras* "took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc." *Id.* at 61. Nicaragua did not even claim that United States personnel took a direct part in any hostilities, *see, e.g., id.* at 45, 61, 118-19, 124-25. The Court concluded specifically that the evidence presented failed to prove the United States "created" the *contra* force, and further failed to prove the United States gave "direct . . . combat support" to the *contras,* as Nicaragua had charged. *Id.* at 61-62.

force.[53]

The legal principle the Court embraced in this holding is not unique. Indeed, a draft by thirteen relatively small states as an alternative to Soviet[54] and Western[55] definitions of "aggression" before the General Assembly in 1974 proposed a similar rule.[56] Yet as Professor Julius Stone observed, the draft was "at odds with the Charter and general international law as hither to accepted . . ."[57] and both the United Nations Special Committee on the Question of Defining Aggression and the General Assembly have rejected it.[58]

The message in the Court's holding is as clear as it is alarming. After a massive seven year buildup, Nicaragua has now the largest military force in the history of Central America.[59] While the Sandinistas have increased their army by approximately 2000 percent,[60] their peace-loving

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53. *Id.* at 127.

54. The Soviet draft definition included under the heading "armed aggression (direct or indirect)": "The use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force with the aim of promoting an internal upheaval in another State. . . ." A/8719, p. 8, *quoted in* Nicar. v. U.S., Merits, 1986 I.C.J. at 341 (Schwebel, J., dissenting).

55. Australia, Canada, Italy, Japan, the United Kingdom and the United States proposed that the General Assembly definition of aggression bar "overt or covert, direct or indirect" use of force by a state against the territorial integrity or political independence of another state, including: "(7) Organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State." *Id.*

56. The thirteen state proposal provided: "When a state is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defense against the other State under Article 51 of the Charter." *Id.* at 342.

57. J. STONE, CONFLICT THROUGH CONSENSUS 89-90 (1977), *quoted in* Nicar. v. U.S., Merits, 1986 I.C.J. at 342 (Schwebel, J., dissenting).

58. Article 3 of the General Assembly's Definition of Aggression included: "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, *or its substantial involvement therein.*" Nicar. v. U.S., Merits, 1986 I.C.J. at 343 (Schwebel, J., dissenting) (emphasis added).

59. *See generally* U.S. DEP'T OF STATE AND U.S. DEP'T OF DEFENSE, THE SANDINISTA MILITARY BUILDUP (Rev. 1985). Months before the United States even began considering giving aid to the Nicaraguan insurgency, the Sandinistas announced plans to build the largest armed forces in the history of Central America. *See, e.g.,* Riding, *Fearful Nicaraguans Building 200,000-Strong Militia*, N.Y. Times, Feb. 20, 1981, at A2, col. 3.

60. Nicaraguan Vice Minister of Interior Luis Carriön testified before the Court on September 13, 1985, that "the Sandinista forces by the end of 1979 — the Sandinista

neighbor to the south, Costa Rica, has continued to pursue its democratic path without any army at all.[61] During this time, Costa Rican leaders have frequently denounced Nicaragua for its support of terrorist activities,[62] which were unprecedented in modern Costa Rica prior to the Sandinista victory in Nicaragua, and there are indications that Nicaragua intends eventually to engineer the overthrow of the Costa Rican government.[63] Until June 27, 1986, when the Court issued its opinion on

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armed forces — were somewhere in between 3,000 and 4,000 armed men. . . . [T]he armed men were around 3,000 or a little bit more." Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Uncorrected Verbatim Record, CR 85/20, at 45 (1985) [hereinafter Uncorrected Verbatim Record]. In 1986 the London-based International Institute of Strategic Studies estimated there were nearly 64,000 active duty soldiers in the Sandinista army. *Central America Sets Arms Growth Record*, Wash. Times, Jan. 14, 1986, at 6A, col. 5. The current Nicaraguan army is about 8.5 times larger than the 7,500 member National Guard of the Somoza dictatorship in late 1978. *See, e.g.*, Riding, *Supplementary Material*, N.Y. Times News Service, Aug. 24, 1978, at 24.

61. Costa Rica, which has a population (approximately 2.8 million) similar in size to that of Nicaragua (approximately 3.1 million), has no army and only a lightly-armed "civil guard" of about 8,000 men. *See, e.g., Costa Rica Asks U.S. for Small Arms*, N.Y. Times, May 6, 1984, at 12, col. 1.

62. For example, following the July 3, 1982 bombing of the San Jose office of the Honduran National Airline (SAHSA), the Costa Rican government arrested a member of the Colombian terrorist organization "M-19," who confessed to the crime. On July 27 the Costa Rican Government declared three officials of the Nicaraguan Embassy *personae non gratae,* and informed other foreign embassies in San Jose that the terrorist had admitted he was acting under a "plan" devised and directed from Managua, Nicaragua, by Rafael Lacayo of the Nicaraguan Ministry of Interior. He stated that the plan "included operations to sabotage important facilities in Costa Rica, other terrorist acts, kidnappings, attacks on banks and acts against public institutions, agencies, and companies of other Central American countries." This statement by the Costa Rican Ministry of Foreign Relations and Worship was transmitted to the Court on August 17, 1984, during the jurisdictional phase of the proceedings. Counter-Memorial for the United States, Nicaragua v. United States (Annex 57) (submitted to the International Court of Justice, August 17, 1984) [hereinafter Counter-Memorial].

63. As a Costa Rican newspaper reported:

> Costa Rican President Luis Alberto Monge Alvarez charged that "In our country terrorism and subversion can only exist with outside help because among the Costa Ricans objective conditions do not exist for these two phenomena to occur." The President commented on this matter when he confirmed that he had asked former President Jose Figueres to speak to . . . Sandinist leaders of the concern regarding the participation of Nicaraguan diplomats in acts of terrorism and subversion. . . . The President asked Figueres to tell . . . the Sandinist leaders that the participation of Nicaraguan Embassy and consulate officials in terrorist actions had been proven. He also sent . . . the message that he had information . . . that there was a plan to destabilize our country and thereby destroy our democratic system.

the merits of the *Paramilitary Activities* case, Costa Rica had every reason to believe that its treaty partners could come to its aid in the event of an intensification of Nicaraguan aggression (which aggression, it is worth noting, Nicaragua did not even bother to deny before the Court).[64] Sadly, because of the World Court's handling of this case, that may no longer be true. The long-term impact of this decision on both Nicaragua and Costa Rica is unknown, but one can hardly view it as a positive development in promoting regional peace and stability. In 1983, a public opinion poll conducted by the Gallup organization reported that sixty-nine percent of the people surveyed in Costa Rica identified Nicaragua as a military threat to their own country.[65] When the Gallup organization updated the poll two years later, the figure had increased to ninety-two per cent.[66]

III. THE FACTS: SELECTIVE TREATMENT OF EVIDENCE

The Court's decision to narrow the scope of a state's right to collective self-defense in the face of armed external aggression is deeply troubling, but it may not be the most alarming aspect of the opinion. The manner in which the Court handled evidence offered by the two sides is of equal concern for anyone who would have wished to see the Court play a constructive role in the resolution of armed international conflicts in the future. A few brief examples suffice to explain my shock and disappointment at the Court's handling of the evidence.[67]

La Nacion (San Jose, Costa Rica), Aug. 1, 1982, p. 4A. A former Sandinista intelligence officer, Miguel Bolaños Hunter, has charged:

> Since 1979 there has been a plan to neutralize democracy in Costa Rica. They are doing it covertly in Costa Rica. They are training guerrilla groups and infiltrating unions to cause agitation. The idea is to cause clashes with the police and Costa Rican soldiers to cause a break between the unions and the president. When the economy gets worse they will be able to have an organized popular force aided by the guerrilla forces already there.

The Heritage Foundation, "Inside Communist Nicaragua: The Miguel Bolaños Transcripts," BACKGROUNDER, Sept. 30, 1983, at 12 (interview with Miguel Bolaños by *Washington Post* of June 16-17, 1983). *See also* R. TURNER, *supra* note 1.

64. "In the proceedings on the merits, Nicaraguara . . . has not specifically referred to the allegations of attacks on Honduras or Costa Rica." Nicar. v. U.S., Merits, 1986 I.C.J at 72.

65. U.S. Information Agency, *Public Opinion in Four Countries of Central America,* Research Report R-1-84, at 11 (1984).

66. Meyer, *A Temptation for Democrats*, Wash. Times, Jan. 3, 1986, at D-1, col. 1.

67. It is important to keep in mind that article 53 of the Court's Statute provides that, in the event a party to a suit does not appear to defend its case, the Court "must . . . satisfy itself . . . that the claim [of the appearing party] is well founded in fact and law."

Perhaps the most fundamental factual issue confronting the Court was the question of alleged Nicaraguan assistance to the anti-government guerrillas in El Salvador. On this point, the parties were in total disagreement and the position of the United States depended on a finding that Nicaragua had been engaged in a major effort to overthrow the Government of El Salvador by providing extensive assistance to Salvadoran guerrilla groups. Although Nicaragua's Foreign Minister had provided a sworn affidavit to the Court asserting that his 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,"[68] the evidence suggested overwhelmingly that Nicaragua had begun providing substantial assistance to Salvadoran guerrillas more than a year before the United States began assisting the Nicaraguan *contras.*

In addition to the volumes of material the United States provided during the preliminary phase of the case,[69] the Court was aware that Nicaragua's American lawyers had told a Pulitzer Prize-winning *New York Times* reporter prior to the beginning of oral argument that they intended to admit to the Court that the Nicaraguan government had provided weapons in 1980-81.[70] During oral argument, Nicaragua's Agent and Counsel, Ambassador Carlos Argüello Gómez, implicitly acknowledged such aid.[71] Attachment three of annex 1 to Nicaragua's Memorial

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Unlike in a United States civil court — where, if a party refuses to appear, the opposing party's facts may be accepted on their face without further investigation by the court — in a case before the World Court "where one party is not appearing 'it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.' " Nicar. v. U.S., Merits, 1986 I.C.J. at 25 (quoting *Nuclear Tests*, 1974 I.C.J. at 263, 468).

68. Affidavit of Miguel D'Escoto Brockmann, Foreign Minister of Nicaragua, filed before International Court of Justice, Apr. 21, 1984.

69. *See, e.g., infra* notes 83-86.

70. The *New York Times* reported:

> Addressing a longstanding United States accusation, the lawyers for Nicaragua [Messrs. Chayes and Reichler] said they would acknowledge [to the Court] that the Managua Government supplied weapons to Salvadoran guerrillas for the big January 1981 offensive against the United States-backed Government of El Salvador. But they will argue that there is no credible evidence of sustained arms shipments since then.

Christian, *Nicaragua's American Lawyers Prepare Case*, N.Y. Times, Sept. 8, 1985, at 23, col. 1. *See also* Christian, *U.S. Says Nicaraguans Aid Salvadoran Rebels, id.*, Sept. 19, 1985, col. 5. During oral argument before the Court, Professor Chayes summarized the facts in this way: "Nicaragua produced concrete and credible evidence all of which shows that it was not supplying arms to El Salvador either now or in the *relevant* past. . . ." Uncorrected Verbatim Record, CR 85/26 at 30, Sept. 19, 1985 (emphasis added).

71. In discussing the allegation that Nicaragua provided arms to Salvadoran rebels in

on the merits of the case included a statement made to United States human rights investigators by Luis Carrión, Nicaragua's Vice Minister of the Interior and its most senior witness before the Court, in which he admitted his government had given aid in the past to the Salvadoran insurgents.[72] In addition, press accounts quoted Salvadoran guerrilla leaders as admitting they had received arms from Cuba through the Nicaraguan Government.[73] Most dramatically, when asked during skillful questioning from the bench whether it was his position that "it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency," Nicaragua's star expert witness, former Central Intelligence Agency (CIA) employee David MacMichel, told the court: "I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion."[74]

Indeed, the evidence of a substantial arms flow from Nicaragua to El Salvador in the early period was so overwhelming that the Court acknowledged it.[75] However, although under international law "there is a [rebuttable] presumption that a state has knowledge of what is being openly done in its territory,"[76] the Court simply accepted the Nicaraguan Government's assertion and concluded that Nicaragua must have been simply "powerless" to subdue the arms traffic taking place on its territory but against its wishes,[77] despite the wealth of evidence provided by Nicaragua's own lawyers and witnesses[78] and Sandinista statements

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1980 and 1981, Mr. Argüello argued: "The position of Nicaragua . . . is that it is of no relevance to discuss happenings five years ago when the evidence itself proves that in the past absolutely no question has been formulated as to the continuation of that situation; . . ." Uncorrected Verbatim Record, CR 85/25 at 15 (Sept. 19, 1985).

72. "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time." D. FOX AND M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTER REVOLUTIONARIES OPERATING IN NICARAGUA 34 (1985).

73. *See, e.g.*, Riding, *Salvador Rebels: Five-Sided Alliance Searching for New, Moderate Image*, N.Y. Times, Mar. 18, 1982, at A1, col. 3.

74. Nicar. v. U.S., Merits, 1986 I.C.J. at 75.

75. *Id.* at 82-83.

76. Corfu Channel Case, Merits, 1949 I.C.J. at 18, *quoted in* 12 WHITEMAN, *supra* note 12, at 19.

77. Nicar. v. U.S., Merits, 1986 I.C.J. at 85-86. The Court reasoned that "if . . . the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadoran armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic. . . ." *Id.*

78. *See supra* notes 70-72, 74 and accompanying text.

as early as 1969 openly advocating "support for national liberation movements in neighboring states."[79]

The way in which the Court dealt with "evidence" made this incredible conclusion a little easier to understand. The Court found as reliable evidence newspaper clippings quoting United States officials (in some cases unnamed) or providing other information damaging to the United States position.[80] However, when Nicaraguan President Daniel Ortega assured Peruvian novelist Mario Vargas Llosa, who later recounted the story in the *New York Times Magazine,* that under certain circumstances his government was "willing to stop the movement of military aid . . . through Nicaragua to El Salvador,"[81] the Court, relying on Nicaragua's representation that it was not giving such aid, concluded that this and similar admissions to the press were not credible.[82]

The Court's treatment of numerous captured Salvadoran guerrilla documents, reproduced in a lengthy United States Department of State white paper,[83] and detailing shipments by the Government of Nicaragua of hundreds of tons of arms and equipment to Salvadoran insurgents, was equally outrageous. Even though Nicaragua made no effort to challenge or discredit these documents, the Court disregarded them completely because they were "written using cryptic language and abbrevia-

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79. *See, e.g.,* points 13 and 14 of the 1969 *Program of the Sandinist Front of National Liberation, Tricontinental* No. 17, 61 (Mar./Apr. 1970). Point 13 provides in part: "The people's Sandinist revolution will practice a true combative solidarity with the peoples fighting for their liberation." Point 14 reads in part: "The People's Sandinist revolution . . . . will support an authentic unity with its brother peoples in Central America. This unity will begin with the cooperation of forces to achieve national liberation and establish a new social system, without imperialist domination or national betrayal." *Id.* at 68. *See also* Lewthwaite, *3 Leftist Chiefs Pledge Unity in Caribbean Area,* Baltimore Sun, Mar. 14, 1980, at 6 (quoting Daniel Ortega as committing himself to "aiding other revolutionaries"); D. NOLAN, THE IDEOLOGY AND THE SANDINISTAS AND THE NICARAGUAN REVOLUTION (1984).

80. Nicar. v. U.S., Merits, 1986 I.C.J. at 46, 50-51.

81. Llosa, *In Nicaragua,* N.Y. Times, Apr. 28, 1985, § 6 (Magazine), at 37. *See also* the statement by Mr. Ortega to Clifford Krauss, Wall St. J., Apr. 18, 1986, at 24. The Nicaraguan Government made no effort to deny or challenge these published quotations.

82. "[A]gainst the background of the firm denial by the Nicaraguan Government of complicity in an arms flow to El Salvador, the Court cannot regard remarks of this kind as an admission that the Government was in fact doing what it had already officially denied and continued subsequently to deny publicly." Nicar. v. U.S., Merits, 1986 I.C.J. at 79, 80.

83. U.S. DEP'T OF STATE, COMMUNIST INTERFERENCE IN EL SALVADOR: DOCUMENTS DEMONSTRATING COMMUNIST SUPPORT OF THE SALVADORAN INSURGENCY, Feb. 23, 1981 [hereinafter COMMUNIST INTERFERENCE].

tions."[84] The Court explained: "For example, there are frequent references to 'Lagos' which, according to the United States, is a code-name for Nicaragua; but without such assistance [from United States experts], the Court cannot judge whether this interpretation is correct."[85] "*Lagos*" is Spanish for "lakes," and the two largest lakes in Central America (*Lago de Managua and Lago de Nicaragua*) both lie within a few kilometers of Managua.

Another code used in some of the documents is the letter "M," which the State Department in an accompanying glossary alleged meant "Managua." For example, an undated "trip report" attached as "Document G" to the white paper began by reporting: "We . . . arrived at M. on 13 July . . . . Bayardo's assistant told us . . . they were very busy with the celebration and it was very difficult to hold (a meeting) since the best time was after the 19th." The Court should have had little difficulty taking judicial notice that Bayardo Arce is a senior Sandinista *comandante,* and that July 19 is the anniversary of the Sandinista seizure of power in Nicaragua. If this was too difficult, the Court could have simply turned back to page three of the same document to read: "Since we were going to receive aid which all would pass through Nicaragua, they had thought of a 'triangular deal;' that is, they would give us arms from the EPS (Sandinista Peoples Army) and then replace them with those which are coming, . . . [from] the socialist world . . . ."[86] Many sources have confirmed the veracity of these documents,[87] and, as already noted, even Nicaragua has not challenged their authenticity. For the Court to dismiss them because some abbreviations are used is outrageous. Even if some of the documents were ambiguous because they included codes or abbreviations, a great deal of material was explicit and could have assisted the Court in understanding the facts.

The Court accepted the Nicaraguan position over that of the United States even regarding factual questions about which neither the Court nor the Government of Nicaragua could claim to possess reliable independent information. For example, the United States asserted that it was

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84. Nicar. v. U.S., Merits, 1986 I.C.J. at 78.

85. *Id.*

86. COMMUNIST INTERFERENCE, *supra* note 83, at 8.

87. Former United States Ambassador to El Salvador Robert White, who has been an outspoken critic of United States policy in Central America and was relieved of his post during the early weeks of the Reagan Administration, acknowledged that the evidence contained in the State Department white paper was "genuine" and that the Salvadoran guerrillas had "imported massive quantities of arms" by way of Nicaragua. *See, e.g.,* Hornblower, *Ousted Envoy Hits Arms Aid to Salvador*, Wash. Post, Feb. 26, 1981, at A1, col. 6.

providing assistance to the *contras* as part of a response to a request from the Government of El Salvador for assistance in repelling an armed attack from Nicaragua. The only state in a credible position to contradict this assertion was El Salvador, which filed instead a sworn Declaration of Intervention with the Court asserting that it had been the victim of an "armed attack" from Nicaragua "since at least 1980,"[88] that the attack was continuing,[89] and that it had asked the United States for assistance in collective self-defense.[90] Despite the existence of numerous public statements by Salvadoran officials dating back to 1980 denouncing Nicaraguan aggression and asking the United States for aid in resisting that aggression,[91] the Court noted that in a 1984 speech before the United States Security Council and a subsequent letter to the Court, El Salvador had not used the words "armed attack" or "collective self-defense" and reasoned thus:

> [I]t appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date

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88. Nicar. v. U.S., Merits, 1986 I.C.J. at 73.

89. *Id.*

90. *Id.* at 120. "El Salvador, confirming this assertion by the United States, told the Court in the Declaration of Intervention which it submitted on 15 August 1984 that it considered itself the victim of an armed attack by Nicaragua, and that it had asked the United States to exercise for its benefit the right of collective self-defence." *Id.* at 35.

91. Consider this account from the *Washington Post:* "[President] Duarte has denounced alleged Cuban and Nicaraguan intervention in El Salvador several times during the last few days. . . . He has also called on U.S. President-elect Ronald Reagan to 'export democracy' to El Salvador and the world and to increase aid to the government here . . . ." Dickey, *Fighting Subsides in El Salvador*, Wash. Post, Jan. 13, 1981, at A1, col. 6. On March 28, 1983, Salvadoran Foreign Minister Fidel Chávez-Meña warned the United Nations Security Council that El Salvador was the victim of "belligerent and hostile acts," and charged that Nicaragua "does not practice, and respects even less, the principle of non-interference in the internal affairs of Central American states." He added:

> Everyone is aware that the armed groups operating in El Salvador have their central headquarters in Nicaragua. It is there that decisions are made and logistic support is channeled — logistic support without which it would be impossible for them to continue in their struggle and without which they would have joined in the democratic process.

S/PV. 2425, at 7, Mar. 28, 1983. In an interview in December 1983 Salvadoran President Alvara Magaña Borja said that Nicaragua had "not ceased for one moment to invade our country." He added: "There is only one point of departure for the armed subversion, Nicaragua." *Interview with Salvadoran President Alvara Magaña, ABC* (Madrid), Dec. 22, 1983, *quoted in* Counter-Memorial, *supra* note 62 (Annex 51). For numerous other statements of a similar character, *see* R. TURNER, *supra* note 1.

> much later than the commencement of the United States activities which were allegedly justified by this request.[92]

This shocking decision to ignore the consistent and sworn statement of the only two sovereign states to have direct knowledge of the facts at issue does not even pass the "straight face" test. This decision was made despite El Salvador's explanation that it had intentionally exercised restraint in its public remarks in a desire to seek "a solution of understanding and mutual respect"[93] rather than engage in rhetoric that might lead to further escalation[94] and in the absence of any inconsistent statements from either government. It is difficult to defend the Court's handling of the facts of this case against charges of apparent political bias against the United States. The short-term injury to the United States, however, is less tragic than the long-term effect the decision may have on the Court's perceived moral authority and the willingness of other states to submit future controversies to the Court for resolution.

IV. CONCLUSION

This entire case has been most unfortunate. While one can understand, and indeed share, the Court's displeasure at the United States Government's decision not to participate in the merits phase,[95] the

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92. Nicar. v. U.S., Merits, 1986 I.C.J. at 120.

93. *Id.* at 121.

94. To the extent the Court is signaling future victims of aggression that they must energetically and openly denounce their attackers rather than seek a less confrontational resolution, this may also be unhelpful from the perspective of promoting the peaceful resolution of international disputes.

95. Indeed, one could argue that the case might have turned out differently had the United States made a full presentation of its position. However, as Judge Schwebel points out in his dissenting opinion, the evidence of political bias predates the United States decision to withdraw from the case. Judge Schwebel notes that even the title of the case "embraces the essential thesis of Nicaragua" and is thus "unprecedented." Nicar. v. U.S., Merits, 1986 I.C.J. at 320-21 (Schwebel, J., dissenting). He continues:

> Thus if one looks at the list of titles of all the cases which have previously been dealt with by this Court, . . . one cannot find a listing which is comparable. Take, for example, the first case, entitled: *Corfu Channel (United Kingdom v. Albania).* If that case had been entitled as the current case is, it would have read something like: *Mining activities in the Corfu Channel against the United Kingdom.* But the Court chose a neutral formula, which recognized implicitly that Albania might have had a defence to the claim of the United Kingdom. It did so in the case which, perhaps more than any other of this Court, has elements in common with the substance of the current case, concerning as it did uses of force and questions of intervention. In the list of the 70-odd cases of this Court, none is entitled so as to embrace only the contentions of the claimant and inferentially exclude those of

Court's end product is not an admirable one. It departs injudiciously from fundamental principles of law, displays a shocking selectivity in handling factual matters, and lends support to allegations of political bias. Those of us who still believe that international judicial tribunals have an important role to play in international conflict resolution can only view the case with sadness, because it may significantly undermine the credibility of these types of tribunals.

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the defendant — apart from the instant case.
Id. at 321. *See also* Sztucki, *Intervention Under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: the "Salvadoran Incident,"* 79 AM. J. INT'L L. 1005, 1036 (1985).