The Use of Force in the Nicaraguan Cases

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Table of Contents

I. Introduction

The prohibition of the use of force in the settlement of international disputes is among the most significant developments in public international law of the twentieth century. At the outset of what historian Eric Hobsbawm branded the 'short twentieth century',[1] resort to war was not in principle considered to be contrary to the law of nations. On 28 July 1914, Austria's armed attack on Serbia was explained by the latter's failure to accede to an ultimatum. Days later, when Germany invaded Belgium, the charge that international law had been breached was premised on the violation of a century-old treaty enshrining Belgian neutrality.[2] At the Paris Peace Conference, the Commission on Responsibilities said responsibility for the war lay with Austria and Germany who pursued 'a policy of aggression, the concealment of which gives to the origin of this

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[1] Eric Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914–1991*, London: Michael Joseph, 1994.

[2] Treaty of London, 19 April 1939, art. 1.

war the character of a dark conspiracy against the peace of Europe'.[3] But the Commission resisted the proposal to try the German emperor for his role in starting the war after concluding that 'a war of aggression may not be considered as an act directly contrary to positive law'.[4] The Council of Four subsequently decided to try the Kaiser for 'a supreme offence against international morality and the sanctity of treaties'.[5] In his unsuccessful effort to obtain the Kaiser's extradition from the Netherlands, Clemenceau described the charge not as 'une accusation publique ayant le caractère juridique quant au fond' but rather '*un acte de haute politique internationale imposée par la conscience universelle dans lequel les formes du droit ont été prévues uniquement pour assurer à l'accusé un ensemble de garanties tel que le droit publique n'en a jamais connu*'.[6]

When the 'short twentieth century' came to a close, with the fall of the Berlin Wall and the collapse of the Soviet Union, there could be no doubt about the prohibition of the use of force to settle international disputes. According to article 2(4) of the Charter of the United Nations, '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. A year after its adoption, the International Military Tribunal described crimes against peace as the 'supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[7] This evolution in international law may also be glimpsed in the holding of the International Court of Justice, in its first contentious case, that the United Kingdom had violated Albanian sovereignty when a well-armed flotilla swept the Corfu Channel of mines.[8] In 1966, in its Commentary on the draft articles on the law of treaties, the International Law Commission said that the prohibition of the use of force 'constituted a conspicuous example of a rule in international law having the

[3] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', (1920) 14 *American Journal of International Law* 95, at p. 98.
[4] *Ibid.*, p. 118.
[5] Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, art. 227.
[6] Paul Mevis and Jan Reijntjes, 'Hang Kaiser Wilhelm! But For What? A Criminal Law Perspective', in Morten Bergsmo, Cheah Wui Ling and Yi Ping, eds., *Historical Origins of International Criminal Law: Volume 1,* Brussels: Torkel Opsahl Academic EPublisher, 2014, pp. 213-258, at p. 216.
[7] *France* et al. v. *Göring* et al., (1946) 22 IMT 411, at p. 427.
[8] *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 35.

character of *jus cogens*'.[9] Four years later, in the *Barcelona Traction case*, the International Court of Justice described the 'outlawing of acts of aggression' as an obligation *erga omnes.*[10]

This profoundly important legal development may well have been crowned by the International Court of Justice in its judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua*. President Singh attempted to put the issue in context in his separate opinion:

> [T]his cardinal principle of non-use of force in international relations has been the pivotal point of a time-honoured legal philosophy that has evolved particularly after the two World Wars of the current century. It has thus been deliberately extended to cover the illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war which aspect may not have been established by the law of the League of Nations, or by the Nuremberg or Tokyo Trials, but left to be expressly developed and codified by the United Nations Charter. The logic behind this extension of the principle of non-use of force to reprisals has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War - an event so dreaded in 1946 as to have justified concrete measures being taken forthwith to eliminate such a contingency arising in the future.[11]

President Singh heralded 'the contribution of the Court in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens*', describing it as 'the very cornerstone of the human effort to promote peace in a world torn by strife'.[12]

Three applications concern the attacks on the Sandinista government by so-called *contras* during the early 1980s. The first of them, filed in 1984, was directed against the United States of America. It resulted in what is without doubt one of the Court's most important judgments. Nicaragua prevailed, with large, comfortable majorities of

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[9] Yearbook of the International Law Commission 1966, Volume II, UN Doc. A/CN.4/SER. A/1966/Add. 1, p. 247. Cited in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, Separate Opinion of Judge Sette-Camara, p. 182, at p. 189.

[10] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* p. 32, para. 34.

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, Separate Opinion of Judge Nagendra Singh, p. 141, at p. 141.

[12] *Ibid*., p. 142.

the Court finding the United States to have violated customary international law governing the use of force, non-intervention and territorial sovereignty, as well as some bilateral treaties.

The United States promptly declared that it would not abide by the judgment, in defiance of article 94 of the Charter of the United Nations that requires every Member State 'to comply with the decision of the International Court of Justice in any case to which it is a party'. Flush with victory, Nicaragua filed applications against Honduras and Costa Rica that focused on violations of the prohibition of the use of force under both conventional and customary international law. These cases never reached the merits stage. Nicaragua submitted declarations of discontinuance and directed removal of the cases against Costa Rica and Honduras from the list.[13] In the main case against the United States, Nicaragua filed a memorial on the subject of reparations. However, it subsequently informed the Court that the two countries had reached agreement 'aimed at enhancing Nicaragua's economic, commercial and technical development to the maximum extent possible'. Like the other two cases, *Military and Paramilitary Activities in and against Nicaragua* ended with a discontinuance.[14]

II. Use of Force issues in the Case against the United States.

A. Provisional measures order of 10 May 1984

On 9 April 1984, Nicaragua submitted an application against the United States of America with respect to military and paramilitary activities in and directed against it. According to the application, 'the United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally-accepted principles of international law'.[15] The Application cited legislation enacted that year by the American Congress budgeting

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[13] *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica), Order of 19 August 1987, I.C.J. Reports 1987*, p. 182; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Order of 27 May 1992, I.C.J. Reports 1992,* p. 222**.**

[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991,* p. 47.

[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Application instituting proceedings filed in the Registry of the Court on 9 April 1984*, para. 1.

$24 million to support 'directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual'.[16] Nicaragua sought a condemnation of the United States for violating its obligations under several treaties, including article 2(4) of the Charter of the United Nations and articles 18 and 20 of the Charter of the Organization of American States, as well as 'its obligation under general and customary international law'. Nicaragua accompanied its application with a request for provisional measures:

> First, that the United States should immediately cease and desist from providing directly or indirectly any support including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua . . . then, that the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua.[17]

In support of its application, Nicaragua alleged that the United States was 'presently engaged in the use of force and the threat of force against Nicaragua through the instrumentality of a mercenary army of more than 10,000 men, recruited, paid, equipped, supplied, trained and directed by the United States, and by means of the direct action of personnel of the Central Intelligence Agency and the U.S. armed forces'. Nicaragua pointed to the deaths of more than 1,400 Nicaraguans as well as other dire consequences of the use of force. The United States responded by arguing that the Court was without jurisdiction. It also pointed to ongoing negotiations involving several Central American States known as the 'Contadora process'.

The Court granted Nicaragua's request for provisional measures but noted, as is the case in all such rulings, that it was without prejudice to the merits of the case. It held by fourteen votes to one:

> The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any Other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any

[16] *Ibid*., para. 4.
[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984,* p. 169, at p. 173.

> military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.[18]

Judges Mosler and Jennings wrote a separate opinion recalling that 'the duties, in accordance with the provisions of the United Nations Charter, and in accordance with the Charter of the Organization of American States, to refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and to refrain from intervention in matters within the domestic jurisdiction of a State, are duties which apply to the Applicant State as well as to the Respondent State'.[19] The judge of American nationality, Stephen Schwebel, was the lone dissenter. He assailed the 'preoccupation of the Court' with Nicaragua's claims as being 'so objectionable, as a matter of law, as a matter of equity, and as a matter of the place of the Court as the principal judicial organ of the United Nations'. Judge Schwebel described the prohibition on the use of force set out in article 2(4) of the Charter of the United Nations as a 'bedrock' principle of international law that was not merely a bilateral rule 'in whose observance and realization third States have no legal interest' but a universal norm in which all States had a legal interest.[20]

B. Jurisdiction and admissibility judgment of 26 November 1984

At the jurisdiction and admissibility stage, the United States submitted arguments dealing with matters germane to the issue of the legality of the use of force. The United States argued, in its Counter-Memorial, that charges concerning the unlawful use of force were reserved to the Security Council by article 39 of the Charter of the

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[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984,* p. 169, at p. 187.
[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984,* p. 169, Separate Opinion of Judges Mosler and Jennings, p. 189.
[20] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984,* p. 169, Dissenting Opinion of Judge Schwebel, p. 190, at p. 196.

United Nations.[21] The United States also contended that dealing with Nicaragua's suit would require it to rule on the application of article 51 of the Charter, a matter it said was also the prerogative of the Security Council. Moreover, it said that subjecting such claims to judicial examination in the course of a conflict would impair the exercise of the right of self-defence.[22]

Rejecting Washington's objections, the Court cited article 24 of the Charter whereby the Security Council has primary but not exclusive responsibility in matters of international peace and security.[23] With respect to the article 51 issue, the Court said that the fact that the Charter refers to self-defence as a 'right' provides an indication of its 'legal dimension'. Consequently, 'if in the present proceedings it becomes necessary for the Court to judge in this respect between the Parties - for the rights of no other State may be adjudicated in these proceedings - it cannot be debarred from doing so by the existence of a procedure for the States concerned to report to the Security Council in this connection'.[24]

The United States also contended that there was an inherent obstacle to the judicial examination of an ongoing conflict. Such a situation could not provide 'a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes.'[25] Dismissing the argument, the Court noted that to the extent there were difficulties proving the charges, this was a problem for Nicaragua as it bore the burden of proof. 'A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this', it said.[26]

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[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 392, paras. 89-91.
[22] *Ibid*., para. 91.
[23] *Ibid.*, para. 95.
[24] *Ibid*., para. 98.
[25] *Ibid*., para. 99.
[26] *Ibid*., para. 101.

C. Judgment on the merits of 27 June 1986

In its judgment on the merits of 27 June 1986, the Court imputed two manifestations of the use of force to the United States: the laying of mines in Nicaraguan interna1 or territorial waters in early 1984[27] and certain attacks on Nicaraguan ports, oil installations and a naval base in 1983 and 1984.[28] It said that these activities were 'infringements of the principle of the prohibition of the use of force' unless they could be justified by circumstances that exclude their unlawfulness.[29] Rejecting the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica that the United States had invoked to justify its conduct, the Court concluded that 'the United States has violated the principle prohibiting recourse to the threat or use of force'.[30]

The Court concluded that although there was no evidence that the United States had actually participated in military or paramilitary operations within Nicaragua, it said it was 'clear' that such operations conducted by *contras* 'were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the *contras* by the United States'.[31] The Court also recognized that the recruitment, encouragement and assistance provided by the United States to the *contras* was a 'prima facie violation' of the principle of the non-use of force. The Court concluded that to the extent that the assistance to the *contras* involved a threat or use of force, this constituted a breach of international law by the United States.[32] It rejected Nicaragua's charge that military manoeuvres conducted by the United States could be considered a breach of 'the principle forbidding recourse to the threat or use of force'.[33]

The Court pointed to the prohibition in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance

[27] *Ibid*., paras. 80, 227.
[28] *Ibid*., paras. 81, 86, 227. In the dispositive it referred specifically to attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984.
[29] *Ibid.*, para. 227.
[30] *Ibid.*, para. 238.
[31] *Ibid.*, para. 106.
[32] *Ibid*., para 238.
[33] *Ibid.*

with the Charter of the United Nations,[34] adopted by the General Assembly in 1971, of 'organizing or encouraging the organization of irregular forces or armed bands. . . for incursion into the territory of another State' and 'participating in acts of civil strife . . . in another State', noting that 'participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force"'. It said that while arming and training of the *contras* would fall within the prohibition, 'this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras,* while undoubtedly an act of intervention in the interna1 affairs of Nicaragua … does not in itself amount to a use of force.[35]

After losing its challenge to jurisdiction and admissibility, the United States decided to boycott the proceedings and, therefore, did not participate in the merits phase.[36] In its judgment, the Court noted that the United States had not made any pleading on the merits and was not represented at the oral hearing. However it observed that in its Counter-Memorial for the jurisdiction and admissibility stage of the proceedings, the United States had 'made clear' that 'by providing, upon request, proportionate and appropriate assistance to third States not before the Court' it claimed 'to be acting in reliance on the inherent right of self-defence "guaranteed ... by Article 51 of the Charter" of the United Nations, that is to say the right of collective self-defence'.[37] The arguments of the United States were also developed in academic journal articles by lawyers who were close to the government.[38]

III. Customary international law and the use of force

Although it had rejected the challenge to jurisdiction and admissibility, at the merits stage the Court held that it did not have jurisdiction to rule on breaches of multilateral treaties by the United States because of the reservation, known as the 'Vandenberg

[34] UNGA Res. 2625 (XXV), 24 October 1970.
[35] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 228.
[36] *Ibid.*, para. 10.
[37] *Ibid.*, para. 24.
[38] *See* e.g. John Norton Moore, 'The Secret War in Central America and the Future of World Order', (1986) 80 *American Journal of International Law* 43 and Nicholas Rostow, 'Nicaragua and the Law of Self-Defense Revisited', (1986) 11 *Yale Journal of International Law* 437.

reservation', that accompanied its declaration accepting the jurisdiction of the Court. Nevertheless, the Court concluded that it was not prevented from examining charges made by Nicaragua, in particular those concerning the use of force, to the extent that they arose as a result of obligations under customary international law.[39] The United States had argued at the jurisdiction and admissibility stage that the Court could not consider the issue of use of force from the standpoint of customary law because the matter had been exhaustively codified in the Charter of the United Nations and in particular by article 2(4).[40] Although the Court had rejected the contention in its 1984 decision, it felt that it was necessary to 'develop and refine' its views on this point in its judgment on the merits.[41]

Observing that the United States appeared to take the view that 'the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content'.[42] It pointed to the reference to the 'inherent right' of individual or collective self-defence set out in article 51 of the Charter as evidence of a body of law that was quite explicitly left intact rather than subsumed by the Charter.[43] Although acknowledging the possibility that treaty law and customary law might diverge with the passage of time, the Court said that in the area of the use of force, 'the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter'.[44] It continued: 'The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.'[45] Later in the judgment, the Court said that what was unlawful, in accordance with the principle of the prohibition of the use of force, 'is recourse to either the threat or the use of force against the territorial integrity or

[39] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 172.
[40] *Ibid*., para. 173.
[41] *Ibid.*, para. 174.
[42] *Ibid*.
[43] *Ibid*., para. 176.
[44] *Ibid.*, para. 181.
[45] *Ibid*.

political independence of any State'.[46]

Turning to the specific content of the customary international law relevant to the use of force, the Court noted that both the United States and Nicaragua took the view that 'the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law'.[47] For evidence of *opinio juris*, the Court pointed to declarations adopted by the United Nations General Assembly, in particular the Friendly Relations Declaration,[48] the Helsinki Final Act,[49] and the work of the International Law Commission.[50] According to James Crawford, '[t]his constitutes the most extensive reliance by the Court on resolutions of international organizations as a source of law'.[51]

In a formulation that has frequently been referred to, the Court said it was necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms', given the importance of the latter in the dispute between Nicaragua and the United States. Although such 'less grave forms' of the use of force could not provide a justification for exercise of the right of self-defence, they might be invoked to answer charges that the principle of non-intervention in the internal affairs of a State had been breached.[52] The Court turned again to the Friendly Relations Declaration because '[a]longside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force'.[53] As examples drawn from the Declaration, the Court noted a duty upon States 'to refrain from acts of reprisal involving the use of force', 'to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence', 'to refrain from organizing or encouraging the organization of

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[46] *Ibid*., para. 227.
[47] *Ibid*., para. 188. See, however, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, Dissenting Opinion of Judge Jennings, p. 518, at p. 520.
[48] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 180.
[49] *Ibid.*, para. 189.
[50] *Ibid.*, para. 190.
[51] James R. Crawford, 'Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)', in Rüdiger Woflrum, ed., *Max Planck Encyclopedia of Public International Law*, Vol. VII, Oxford: Oxford University Press, 2012, pp. 173-183, at p. 178.
[52] *Ibid*., paras. 247, 249.
[53] *Ibid*., para. 191.

irregular forces or armed bands, including mercenaries, for incursion into the territory of another State', and 'to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force'.[54]

IV. Individual and collective self-defence

The Court noted that under customary law there were exceptions to the prohibition on the use of force. In particular, it pointed to the right to both individual and collective self-defence, something that finds codification in article 51 of the Charter of the United Nations.[55] Returning again to the Declaration on Friendly Relations, it pointed to the following caveat: 'nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful'. According to the Court, '[t]his resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law'.[56] The Court recalled that it was not expressing any view on the lawfulness of a response to an imminent threat of armed attack and that it was concerned only with one that had already occurred. It noted that the lawfulness of measures taken in self-defence depended upon observance of criteria of necessity and proportionality.[57] In this respect, the Court concluded that the acts of the United States could not be described as either necessary or proportionate under the circumstances.[58]

Because the United States had invoked the right of collective self-defence, the Court considered it was required to examine evidence of the use of force by Nicaragua. It noted that '[t]he possible lawfulness of a response to the imminent threat of an armed

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[54] *Ibid*.
[55] For discussion of the *travaux préparatoires* of article 51, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, Dissenting Opinion of Judge Oda, p. 212, paras. 91-96.
[56] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 193.
[57] *Ibid*., para. 194.
[58] Ibid., para. 237.

attack which has not yet taken place has not been raised' and that, consequently, it was required 'to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence'.[59] The Court referred to the Counter-Memorial of the United States on jurisdiction and admissibility, where it was alleged that Nicaragua had 'promoted and supported guerilla violence in neighbouring countries', especially El Salvador, but also Guatemala, Costa Rica and Honduras, and that it had conducted cross-border military attacks on Honduras and Costa Rica.[60] The Court found that until early 1981 that 'an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador', but it said '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, or that the Government of Nicaragua was responsible for any flow of arms at either period'.[61] It said that there was evidence of certain trans-border military incursions into the territories of Honduras and Costa Rica that could be imputed to Nicaragua, but was sceptical about evidence that these States had requested protection by the United States.[62]

The Court turned to another General Assembly resolution, that of 1974 setting out the definition of aggression, in order to identify the criteria necessary for the existence of an 'armed attack'. [63] It said that the exercise of individual self-defence was conditioned on the State having been the victim of an 'armed attack'.[64] With reference to article 3(g) of the definition of aggression, the Court said that an armed attack 'must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia)* an actual armed attack conducted by

[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 35.
[60] *Ibid.*, para. 128.
[61] *Ibid*., paras. 160, 229-230.
[62] *Ibid*., paras. 164-166, 231-234.
[63] UNGA Res. 3314 (XXIX), 14 December 1974, 'Definition of Aggression'.
[64] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 195

regular forces, "or its substantial involvement therein"'.[65] It explained that this description reflected customary international law. Furthermore, 'in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces'. But the Court refused to extend the scope of an armed attack under customary law to 'assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the interna1 or external affairs of other States.'[66]

The notion of 'collective self-defence' owes its existence to the Charter of the United Nations. Arguably, the word 'inherent' in article 51 is meant to modify 'individual' and not 'collective'. As Judge Jennings noted in his dissenting opinion, 'collective self-defence is a concept that lends itself to abuse'. He said that '[o]ne must therefore sympathize with the anxiety of the Court to define it in terms of some strictness'.[67] The Court required that the State that is the victim of the armed attack 'must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation.'[68] The Court insisted that '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"'.[69] According to the Court, the Central American States themselves did not appear to consider that they had been victims of an 'armed attack' at the relevant times. Thus, what the Court described as a *sine qua non* for exercise of 'collective self defence' was simply not present and

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[65] For discussion of the drafting of the Declaration on Aggression, *see Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, Dissenting Opinion of Judge Schwebel, p. 249, paras. 162-171.
[66] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, paras. 195, 230.
[67] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, Dissenting Opinion of Judge Jennings, p. 518, at p. 533.
[68] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 195.
[69] *Ibid*., para. 211.

could not therefore justify the use of force by the United States.[70] It also said 'there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.'[71]

The second sentence of article 51 of the Charter of the United Nations requires that measures taken by States in the exercise of the inherent right of self-defence 'shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'. The Court did not consider this requirement to be contained within the customary law on the right of self-defence. It said that it was 'not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed'. Nevertheless, to the extent that self-defence is invoked to justify measures that would otherwise breach both the principle prohibiting resort to force in both customary law and the Charter of the United Nations, the Court said that 'it is to be expected that the conditions of the Charter should be respected'. Consequently, the reporting requirement in the second sentence of article 51 is relevant to the customary law analysis because 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence'.[72] The Court noted that at no time had the United States addressed such a report to the Security Council. Acknowledging that it was without jurisdiction to find the United States to be in breach of the article 51 requirement, the Court said however that its conduct 'hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence'.[73] It pointed out that the United States had itself taken the position in the Security Council that a failure to observe the report requirement contradicted the

[70] *Ibid*., para. 237.
[71] *Ibid*., para. 199.
[72] *Ibid*., para. 200.
[73] *Ibid*., para. 235.

claim of a State to be acting on the basis of collective self-defence.[74] The Court's reference concerned a statement by the United States with respect to Soviet military activity in Afghanistan in 1980.

V. Subsequent case law of the Court and the Judgment in Military and Paramilitary Activities

Issues concerning the use of force and the inherent right of self-defence have returned to the Court on several occasions since the Nicaragua cases. In its 1996 Advisory Opinion on nuclear weapons, the Court repeated its pronouncement in *Military and Paramilitary Activities in and against Nicaragua* about the requirement that any measures of self-defence meet conditions of necessity and proportionality.[75] When it then declared that '[t]he proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances',[76] the Court opened the door for its controversial holding that the use of nuclear weapons might be lawful in 'an extreme circumstance of self-defence, in which [a State's] very survival would be at stake'.[77] Judge Koroma, in his separate opinion, argued that in *Nicaragua* the Court had 'rejected the assertion that the right of self-defence is not subject to international law', but that in its Advisory Opinion it 'would appear to be departing from its own jurisprudence by saying that it cannot determine conclusively whether or not it would be lawful for a State to use nuclear weapons'.[78]

The *Oil Platforms* case, taken by Iran against the United States, bore many similarities with *Military and Paramilitary Activities in and against Nicaragua*. In a dissenting opinion, Judge Elaraby compared the firm language in *Nicaragua* with the 'rather truncated and consequently incomplete' *dispositif* that the Court adopted. He

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[74] *Ibid*., citing UN Doc. S/PV.2187.
[75] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, para. 41. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, Dissenting Opinion of Judge Higgins, p. 583, para. 4-5.
[76] *Ibid*., para. 42.
[77] *Ibid*., para. 97.
[78] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, Dissenting Opinion of Judge Koroma, p. 556, at p. 561.

expressed concern 'that the parameters defined in the United Nations Charter and reaffirmed by the Court's jurisprudence established in the Nicaragua case may be detrimentally affected as a result of the formulation adopted'.[79] With reference to *Nicaragua*, he said that the Court should have '[p]ronounce[d] in clear terms that the use of force by the United States was a breach of its obligations under customary international law not to use force in any form against another State'.[80] Attractive as his views may seem, Judge Kooijmans was undoubtedly correct to insist that the case was about a bi-lateral treaty rather than the obligations of the United States under customary international law. He explained that '[i]n spite of the similarities between the Nicaragua case and the present case, this essential difference should be kept in mind continuously since in the present case the Court's jurisdiction is considerably more limited'.[81] The Court recalled its insistence that measures taken in self-defence be necessary and proportionate, and that this is not something whose assessment is left to the subjective judgment of the party.[82] The Court also signalled its statement in *Nicaragua* distinguishing between armed attack capable of justifying resort to self-defence and 'less grave forms' of the use of force.[83]

The issue of self-defence also arose in the Advisory Opinion on the *Wall*, but the Court, without citing *Military and Paramilitary Activities in and against Nicaragua*, said that article 51 of the Charter had no application to the case.[84] Judge Higgins expressly disagreed with the Court's holding in *Nicaragua* that self-defence could only be invoked in response to an armed attack although 'accepting, as I must, that this is to be regarded as a statement of the law as it now stands'.[85] With reference to the 1986 judgment, the Court affirmed that 'the principles as to the use of force

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[79] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, Dissenting Opinion of Judge Elaraby, p. 290, at p. 292.
[80] *Ibid.*
[81] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, Separate Opinion of Judge Kooijmans, p. 246, para. 17. Also, *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, Separate Opinion of Judge Owada, p. 306, paras. 32, 37.
[82] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, paras. 43, 74, 76.
[83] Ibid., paras. 51, 64.
[84] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, para. 139.
[85] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, Separate Opinion of Judge Higgins, p. 207, para. 33.

incorporated in the Charter reflect customary international law'.[86]

Finally, issues concerning the use of force were also considered by the Court in *Armed Activities on the Territory of the Congo*. The case concerned military intervention in the eastern part of the Democratic Republic of the Congo by Ugandan troops. Parallel claims were filed against Rwanda and Burundi but they were soon discontinued.[87] Issuing judgment on the merits in the Ugandan case, the Court began by noting that self-defence was invoked only with respect to an armed attack that had already occurred, recalling that this was also the case in *Nicaragua* and that it had expressed no view on the issue of the lawfulness of a response to the imminent threat of armed attack. 'So it is in the present case', said the Court.[88] However, it said it felt constrained to note that a Ugandan High Command document concerning the presence of its troops in the Democratic Republic of the Congo did not make reference to armed attacks that had already occurred. Rather, the document justified this with reference to 'Uganda's legitimate security interests' in a context that was 'essentially preventative'. The Court concluded that there was no legal or factual basis for a claim of self-defence by Uganda and therefore no need to address 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'. It also said that it need not consider the issues of necessity and proportionality. Nevertheless, it observed that 'the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end'.[89]

The Court's reserved approach came in for criticism from some of its members. Citing *Nicaragua*, Judge Kooijmans criticized the failure to 'answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, "because of its scale and effects, would have been classified as an armed attack rather

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[86] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 136, para. 87.
[87] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* **v.** *Burundi), Order of 30 January 2001, I.C.J. Reports 2001,* p. 3; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 30 January 2001 and ref. to the 2006 Judgment on the new request*.
[88] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para. 143.
[89] *Ibid.*, para. 147.

than as a mere frontier incident had it been carried out by regular armed forces" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 103, para. 195) but no involvement of the "host Government" can be proved'.[90] Judge Elaraby pointed to the Court's recognition, in *Nicaragua*, that article 3(g) of the General Assembly Declaration on Aggression should be taken as a statement of customary international law:

> The gravity of the factual circumstances and context of the present case dwarfs that of the *Nicaragua* case. The acknowledgment by the Court of the customary international law status of the definition of aggression is of considerable importance to the instant case and in particular to the Democratic Republic of the Congo's claim that Uganda has violated the prohibition of aggression in international law. Indeed the definition of aggression applies *a fortiori* to the situation at hand: the full force of the Charter provisions are applicable; the nature and form of the activities under consideration fall far more clearly within the scope of the definition; the evidence before the Court is more complete and both Parties have been present at all stages of the proceedings.[91]

Describing the Court's statement on aggression in the *Nicaragua* case as *dicta*, Judge Elaraby insisted that it had rarely if ever been called upon to pronounce itself on such an egregious case of aggression. 'This makes it all the more important for the Court to consider the question carefully and — in the light of its dicta in the *Nicaragua* case — to respond positively to the Democratic Republic of the Congo's allegation that Ugandan armed activities against and on its territory amount to aggression and constitute a breach of its obligations under international law', he said.[92]

Judge Simma was also very critical for many of the same reasons as Judges Kooijmans and Elaraby. He noted that '[c]ompared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel, Military and Paramilitary Activities in and against Nicaragua* or *Oil Platforms,* border on the insignificant'.[93] According to Judge Simma, '[f]rom the *Nicaragua* case

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[90] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, Separate Opinion of Judge Kooijmans, p. 306, para. 26.
[91] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, Separate Opinion of Judge Elaraby, p. 327, para. 16.
[92] *Ibid.*, para. 18.
[93] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, Separate Opinion of Judge Simma, p. 334, para. 2.

onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors'.[94] He called upon the Court to reconsider the 'restrictive reading' of article 51 of the Charter that it adopted in *Nicaragua* whereby an attack by a non-State group, even if on a large scale, could not provide a justification for the exercise of the right to self-defence.[95]

VI. Influence on the Rome Statute of the International Criminal Court

The judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* was not without influence in the negotiation of the Rome Statute of the International Criminal Court, and particularly the amendments on the crime of aggression that were adopted at the Kampala Review Conference in June 2010.[96] Two issues presented obstacles that the Rome Conference of 1998 was unable to resolve: the definition of the crime of aggression and the role of the Security Council in authorizing the Court to exercise jurisdiction over the crime.

With respect to the definition, the challenge was to distinguish between acts of aggression warranting criminal prosecution and those of lesser gravity, reflecting the words in *Nicaragua* about 'less grave' forms of the use of force.[97] The Kampala Review Conference adopted a definition of the crime of aggression that incorporates the acts of aggression listed in the 1974 General Assembly Declaration. The reliance placed upon the Declaration by the International Court of Justice was regularly referred to during the negotiations of the definition in the Rome Statute.[98] Article 8 *bis* of the Rome Statute, which entered into force in 2013 but which cannot be exercised by the Court until 2017, states that the 'crime of aggression' is an 'act of

[94] *Ibid.,* para. 9.
[95] *Ibid.*, para. 11.
[96] The Crime of Aggression, RC/Res.6.
[97] Andreas Zimmermann and Elisa Freiberg, 'Article 8 *bis*. Crime of aggression', in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 3rd edn., Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2015, pp. 568-606, at p. 583.
[98] For example, *Historical Review of Developments Relating to the Crime of Aggression*, UN Doc. PCNICC/2002/WGCA/L.1, paras. 448-449.

aggression' that 'by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. In a statement at the conclusion of the Kampala Conference, Cuba declared that 'the phrase "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" is ambiguous and may give rise to problems, as it would be the Court itself that would qualify these elements, with the usual subjective factor'. According to Cuba, 'the use of force by a State in a manner inconsistent with the Charter of the United Nations constitutes in itself a violation of the Charter'.[99] Along similar lines, Iran declared that '[a]ny act of aggression is serious by its very nature, irrespective of its consequences'.[100]

The United States delegation, having rejected the negotiations of the definition of aggression that took place prior to Kampala, just as it had done a quarter of a century earlier in the oral hearing on the merits in *Military and Paramilitary Activities in and against Nicaragua*, did not directly attack the consensus that had been reached in the Special Working Group on the Crime of Aggression. Instead, it attempted to introduce Understandings aimed at attenuating the prohibition of aggression. Two of the Understandings that were adopted concern the threshold clause:

> 6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
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> 7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

Both Understandings appear to constrain still further the 'manifest violation' threshold established in article 8*bis*(1). The language in Understanding 6 is derived from article 2 of the definition of aggression in General Assembly Resolution 3314 (XXIX). Addition of the phrase 'in accordance with the Charter of the United Nations' resulted from an Iranian proposal that was politely accepted by the American

[99] Statements by Observer States after the adoption of resolution RC/Res.6 on the crime of aggression, RC/11, pp. 125-7, at p. 125.
[100] *Ibid*., p. 126.

delegation. It had the consequence of transforming the Understanding so that any use of force requires authorization by the Security Council.[101] This is in keeping with the concept of the 'responsibility to protect' as set out in a 2005 General Assembly resolution.[102] However, the hope of the American delegation had been to widen this so that so-called 'humanitarian intervention' would be judged in light of its professed purposes, even if it did not have Security Council authorization. An Understanding to this effect proposed by the American delegation was rejected.[103]

At the Rome Conference, the permanent members of the Security Council had insisted that the Court could not proceed with a prosecution for aggression unless it had prior authorization from the Council.[104] Although in a somewhat different form, this was essentially the view advanced by the United States in *Nicaragua* when it contended that the International Court of Justice was without jurisdiction because the use of force had been reserved to the Security Council by article 39 of the Charter of the United Nations. The Court rejected the position of the United States, as was noted in a study prepared by the United Nations Secretariat to assist the negotiations of the aggression provisions in the Rome Statute.[105] The permanent members persisted in their view about the prerogatives of the Security Council up to and even during the Kampala Conference. Ultimately, however, the amendments that were adopted authorize the Prosecutor to proceed with a case of aggression without any requirement that she obtain the permission of the Security Council. In explanation of vote, France said it had 'decided not to oppose the consensus, despite the fact that it cannot associate itself with this draft text as it disregards the relevant provisions of the Charter of the United Nations'. The United Kingdom pointed to article 39 of the Charter and said 'the text that has been adopted cannot derogate from the primacy of the United Nations Security Council in relation to the maintenance of international peace and security'.[106]

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[101] *Ibid*.
[102] UN Doc. A/RES/60/1, para. 139.
[103] Claus Kreβ, Stefan Barriga, Leena Grover and Leonie von Holtzendorff, 'Negotiating the Understandings on the Crime of Aggression', in Stefan Barriga and Claus Kreβ, eds., *The Travaux Préparatoires of the Crime of Aggression*, Cambridge: Cambridge University Press, 2011, pp. 81-97.
[104] UN Doc. A/CONF.183/SR.9, para. 51.
[105] Historical Review of Developments Relating to the Crime of Aggression, UN Doc. PCNICC/2002/WGCA/L.1, paras. 435-437.
[106] Statements by States Parties in explanation of position after the adoption of resolution RC/Res.6 on

VII. Concluding remarks

In her Separate Opinion in the *Oil Platforms case*, Judge Higgins suggested that the United States had learned some lessons from the *Nicaragua* judgment. She noted that '[t]he United States - perhaps especially remembering the injunction of the Court in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* of 1986 as to the legal requirement of reporting any self-defence measures to the Security Council - had taken care to do so in this instance'.[107] Nevertheless, the United States continues to contest an inexorable legal development, manifested most vividly in *Military and Paramilitary Activities in and against Nicaragua*, towards limitation of the use of force. It fought a rearguard action at the 2010 Kampala Conference out of concern that the use of force dressed up as humanitarian intervention might be deemed a manifest violation of the Charter of the United Nations. It has continued its campaign to block the measures required by articles 15 *bis* and 15 *ter* of the Rome Statute that will enable the International Criminal Court to exercise jurisdiction over the crime of aggression.

Referring to the provisions of the Charter of the United Nations on the use of force, the High-level Panel on Threats, Challenges and Change convened by the Secretary-General of the United Nations in 2004 observed that '[f]or the first forty-four years of the United Nations, Member States often violated these rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 51 only rarely providing credible cover'.[108] The Panel pointed to the end of the Cold War as the turning point. It also observed that '[t]here were fewer inter-State wars in the last half of the twentieth century than in the first half'.[109] But this view greatly understates the situation. It exaggerates the scale of post-1945 international armed conflicts and neglects the importance of developments in public international law.

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the crime of aggression, RC/11, Annex VIII, pp. 122-124.

[107] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 161, Separate Opinion of Judge Higgins, p. 225, para. 50.

[108] A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565, para. 186 (references omitted). One authority indicated by the Panel was Thomas Franck, 'Some Observations on the I.C.J.'s Procedural and Substantive Innovations', (1987) 81 *American Journal of International Law* 116.

[109] *Ibid*., para. 11.

The two world wars of the first half of the twentieth century accounted for approximately 90 million deaths, or an average of about 2 million victims a year. During those fifty years many other armed conflicts resulted in huge numbers of casualties but it is unnecessary to add them to the total for the purposes of this demonstration. The world's population now exceeds 7 billion whereas it was 2 billion until 1950. When the first half of the twentieth century is compared with the early years of the twenty-first century, the contemporary equivalent of the previous century's fatality rate due to international armed conflict would be about 7 million per annum. Yet there have surely not been 7 million deaths due to international armed conflict in any of the first fifteen years of the century. In fact, there have not been 7 million deaths due to international armed conflict over the entire fifteen-year period. Probably there have not been 7 million deaths during that time due to armed conflict altogether, both non-international and international.

The 1986 judgment of the International Criminal Court in *Military and Paramilitary Activities in and against Nicaragua* is a landmark in the history of the Court as well as in the progressive development of international law on the use of force. It brought an end to doldrums in which the Court had long languished. Over the twenty-five years prior to the *Nicaragua* judgment, only seventeen applications had been filed with the Court. Perhaps its noble reputation, burnished by *Corfu Channel*, had suffered from the equivocations of the South-West Africa cases. All of that changed with *Nicaragua.* Over the twenty-five years that followed judgment, there were eighty-one applications. Since the time of the Monroe Doctrine, the United States had used real or threatened military power to impose its will on States throughout the hemisphere. In 1986, much of the world was impressed, indeed breathless, with a Court that could call Washington to account. The International Court of Justice deserves great credit for its independence, impartiality and integrity. And Nicaragua deserves great credit for taking the case.