# THE NICARAGUAN MILITARY ACTIVITIES CASE (NICARAGUA v. UNITED STATES OF AMERICA)

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## I. INTRODUCTION

On June 27, 1986, the International Court of Justice[1] declared in the *Military Activities Case*[2] that the United States, though absent from the proceedings, had violated customary international law with respect to aggression against Nicaragua and also had violated the "object and purpose" of the Treaty of Friendship, Commerce and Navigation of January 21, 1956[3] between the two states.[4]

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1. The jurisprudence of the International Court of Justice and its predecessor court, the Permanent Court of International Justice, can be found in the following sources and the materials they cite: S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965); I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION (1965); Waldock, *Decline of the Optional Clause*, 1955 BRIT. Y.B. INT'L L. 278-79; R. ANAND, COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (1961); 12 M. WHITEMAN, DIGEST INT'L L. (rev. ed. 1971); WORLD AFFAIRS (Summer 1985); *Nicaragua vs. the United States Before the International Court of Justice* (Guest Editor: Allan Gerson)—particularly the articles by Myres S. McDougal, Bruce Rashkow, Fred L. Morrison and Harry H. Almond, Jr. For reference on political disputes, *see* C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW (Corbett trans. rev. ed. 1968). As to the use of force and aggression, *see* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). For information on the P.C.I.J., *see* M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 (1943); L. GROSS, THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE (1976); D. BOWETT, SELF DEFENSE IN INTERNATIONAL LAW (1958); G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1957-1976). *See also* the standard case books BISHOP, GREEN, BRIGGS & SOHN, WORLD LAW AND UNITED NATIONS LAW; J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM (2d ed. 1981). The opinion of the Court in the Nicaraguan Case and of three dissenting judges, Schwebel, Jennings and Oda, also provide valuable sources. The works of Professor Myres S. McDougal and his associates in particular must be singled out for their importance in establishing this inquiry. The element of power in international relations can be reviewed in N. SPYKMAN, AMERICA'S STRATEGY IN WORLD POLITICS (THE UNITED STATES AND THE BALANCE OF POWER) (1942). *See also* Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986) and the materials cited there; J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT (1959); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

2. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 [hereinafter *Military Activities Case*], also known as the *Nicaraguan Mining Case*.

3. Treaty of Friendship, Commerce and Navigation and Protocol, Jan. 21, 1956,

While the full impact of this decision on the future of the Court cannot be assessed at this time, a preliminary appraisal of its strategic implications can be made.

The *Military Activities Case* was commenced on April 9, 1985, when Nicaragua filed an application with the Court[5] to begin proceedings against the United States with respect to alleged military and paramilitary activities in and against Nicaragua.[6] On May 10, 1984, the Court ordered as provisional measures that the United States cease the restriction of access to Nicaraguan ports, refrain from the laying of mines in Nicaraguan waters, cease activities infringing on the sovereignty and independence of Nicaragua through the use of force and join with Nicaragua in ensuring that no action would be taken to prejudice the rights of the other in carrying out the decision of the Court.

In its determinations regarding jurisdiction over the matter, the Court declared in its judgment dated November 26, 1985, that it had jurisdiction under customary international law both with respect to the parties and the subject matter of the case pursuant to

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United States—Nicaragua, *entered into force* May 24, 1958, *notice of termination given by United States* May 1, 1985, *effective* May 1, 1986, 9 U.S.T. 449, T.I.A.S. No. 4024, 367 U.N.T.S. 3 [hereinafter Treaty of 1956].

4. In its opinion, the Court observed that Nicaragua had claimed, *inter alia*, that the actions of the United States were such as to defeat the "object and purpose" of the Treaty of 1956. *Military Activities Case*, 1986 I.C.J. at 22. The Court in fact found breaches of obligations assumed by the United States under Article XIX of the treaty. *Id.* at 147-48. Article XIX was raised by Nicaragua and noted by the Court in its judgment of 26 November 1984 on jurisdiction of the Court and admissibility of the application, *printed in* XXIV I.L.M. 59 (1985). The Court noted that Article XIX provides that

> "Between the territories of the two Parties there shall be freedom of commerce and navigation" (para. 1) and continues "3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party . . . , to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigations . . .[sic]"

*Military Activities Case*, 1986 I.C.J at 140 (quoting arts. XIX(1) and (3) of Treaty of 1956, *supra* note 3).

Apart from its vagueness, the term "object and purpose" lends itself to subjective assessments. For example, in Articles 18, 19 and 20 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/C 39/27 (1969), *reprinted in* 8 I.L.M 679 (1969), the same term is used with respect to obligations of states that have signed treaties and with respect to reservations. In his dissent, however, Judge Schwebel found Article XXI (1)(d) of the Treaty of 1956 controlling. This Article provides that "[t]he present Treaty shall not preclude the application of measures: . . . necessary to fulfill the obligations of a party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests. . . ."

5. Statute of the International Court of Justice, Oct. 24, 1945, *annexed to* the Charter of the United Nations. All members of the United Nations are *ipso facto* parties to the statute by virtue of Article 93 of the United Nations Charter, 59 Stat. 1055, T.S. No. 993.

6. *See Reflections of the State Department on the U.S. and World Court*, WORLD AFFAIRS 53 (1985). *See also* memorials of the parties and accompanying documents filed in the jurisdictional phase of the case.

Articles 36(2) and (5) of the Statute of the Court. Further, the Court announced that it had jurisdiction under the Treaty of 1956.[7] In its letter dated January 18, 1985, the United States withdrew from the Court, observing that the Court had no jurisdiction and that the judgment "was clearly and manifestly erroneous as to both fact and law."[8]

In reaching its decision on the merits of the case, the Court relied on submissions of Nicaragua, on testimony of witnesses called by Nicaragua and on data and information from public sources, including the news media and public documents of the United States government. In a long dissent, Judge Schwebel rejected the Court's findings in their entirety except for a violation that he found inherent in the failure of the United States to notify mariners about the blockade. Dissents were also filed by Judges Oda and Jennings.

## II. HOLDINGS

The Court held generally that its jurisdiction was not established under the United States declaration of August 26, 1946, by which it submitted to the Court's jurisdiction. The reason for this finding was that the U.S. declaration contained a reservation with respect to multilateral treaties, including the United Nations Charter, which stated that its submittal to jurisdiction would depend on all parties to the treaty appearing. Instead, jurisdiction was based on customary international law with respect to aggression and the Treaty of 1956.

As to the material issues, the Court held that

—the actions of the United States were not justifiable under its rights of self-defense or collective self-defense;

—the actions taken by the United States in support of *contra* forces constituted a breach of customary international law with respect to obligations not to intervene in the affairs of another state;

—actions by the United States, including the mining of waters and overflights of Nicaragua, during the first months of 1984 breached customary international law not to use force, breached Nicaraguan sovereignty and were contrary to obligations relating to peaceful maritime commerce;

—the dissemination of a CIA manual on guerrilla warfare

7. *Military Activities Case*, 1986 I.C.J. at 17.
8. *Id.*

amounted to the promotion of acts "contrary to the general principles of humanitarian law," but this dissemination was not imputable to the United States;
—embargoes by the United States declared on May 1, 1985, as to trade with Nicaragua and the forcible actions mentioned above were in breach of the Treaty of 1956; and
—the United States was to terminate all violations and was obliged to make reparation to Nicaragua for the breaches of customary international law and for the breaches of the Treaty of 1956, with the "form and amount of such reparation, failing agreement between the Parties, [to] be settled by the Court . . . "[9]

## III. Issues and Assumptions

The legal issues in the case appeared to be:

Whether the use of force in on-going hostilities is an issue justiciable by the Court and whether the Court in seeking to resolve this issue is resolving a "legal dispute" pursuant to its mandate under Article 36(2) of the Statute of the Court; and whether the Court is the proper organ to address and regulate when and under what conditions the use of force among states during on-going hostilities is impermissible.

### *A. Legal Dispute—Justiciability*

Jurisdiction of the Court in cases such as the *Military Activities Case* is limited by Article 36(2) of the Statute of the Court to those "legal disputes" which raise issues of international law. The meaning of "legal disputes," however, is ambiguous; clarification comes through judicial opinions. As Charles de Visscher, a noted European authority, observed,

[i]t was in the attempts, vain as they were, to classify international disputes according to their justiciability that the political criterion was for a long time most carefully studied. Before the war of 1914-1918, international law doctrine, close enough on this point to international treaties, was agreed in regarding disputes of major importance as not arbitrable or justiciable. The authors who had gone most deeply into the difficulty found precise expression for their thought in the observation that this class must include all those disputes whose settlement "might seriously affect the future possibilities of State power."[10]

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9. *See id.* at 14.
10. C. de Visscher, Theory and Reality in Public International Law 75 (Corbett trans. 1957) (footnotes omitted).

Under current practice, some disputes are distinguished on the basis of being "political" disputes;[11] that is, disputes that need to be resolved among states through negotiation or through processes other than those of judicial tribunals.[12] As Judge Oda indicated, one approach has been to sever those disputes that involve the "vital" interests of states, that is, in current terminology, the security and defense interests, because these are issues states have always reserved to themselves.

While the opinions and decision process of the United States Supreme Court can bear at best only superficial similarities to the World Court, the discussion in *Baker v. Carr*[13] concerning the "political question" somewhat clarifies the problem that an international tribunal faces in seeking to control the issues before it. Under the United Nations Charter, both the "political" question issue, that is, the "separation of powers" among competing decision-making organs, and the managerial issue, that is, the judicial control over the issues, come together. The observations of Justice Brennan in *Baker* are relevant to this merger:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[14]

While stressing again that the World Court is not operating in the same policy arena as the United States Supreme Court, a common concern is apparent: Which is the appropriate organ to decide

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11. States usually manage the "political dispute" issue by reservations in their submittals to the jurisdiction of the Court or by the withholding of their appearances where the jurisdiction is to be based on state consent. *See Military Activities Case*, 1986 I.C.J. at 236-46 (Oda, J., dissenting), concerning the question of "non liquet," noting that issues may be resolved by transfer to another decision process.

12. As de Visscher added, "[t]he notion of the political covers in international relations realities as yet uncontrolled not only by law but even by reason; its fluid and capricious character defies all attempts at classification." C. DE VISSCHER, *supra* note 10, at 77.

13. 369 U.S. 186 (1962).

14. *Id.* at 217.

on matters of aggression? It is evident from the practice of states that, without exception, issues that might involve the use of force, the conduct of hostilities, the use of weapons and combat and warfare in general have been withheld from the court.[15]

The only case that appears to have involved such matters, and then only peripherally, was the *Corfu Channel Case*.[16] But in that case, the hostile situation had abated. Moreover, the case had strong peacetime elements: The United Kingdom was contesting the actions of a coastal state which had forcibly closed transit to an adjacent international channel during peacetime. Without an extended examination into standards, policies and facts relating to the use of force, the Court was able to hold favorably for the United Kingdom to forcibly assert its own rights to transit. In sum, the Court recognized the right asserted by the United Kingdom and its claim to resort to force, if necessary.

There is a marked difference between a case such as that involving the Corfu Channel, where the rights of states to defend themselves if forcibly opposed in passing through international straits are at issue, and the *Military Activities Case*, where aggression is to be appraised in the context of continuing hostilities. The practice of states with regard to aggression demonstrates a widely shared perception that this is a global order issue. It resembles both the domestic legislative process and the development of constitutional law. An interesting comparison can also be made between the United States Supreme Court and the International Court of Justice with respect to the purpose of each institution and the corresponding avenues of application and interpretation of law. The United States Supreme Court, unlike the International Court of Justice, was and is expected to work out constitutional issues in an established public order, not to shape the emergence of a global public order through the efforts of nation states. While the Supreme Court can rely on a long tradition of common law and English legal and constitutional precedents, the International Court

15. *See* 12 M. WHITEMAN, *supra* note 1, at 1191, where the Legal Advisor to the Department of State observed that the Security Council cannot compel states to go to Court; it can only recommend that they do so.

16. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4. The Namibia Case (Advisory Opinion on the Continued Presence of South Africa in Namibia South West Africa), 1971 I.C.J. 16, is also inapplicable because the Security Council requested an advisory opinion and recommended that the parties resolve the issues in court. The question put by the Security Council makes this clear: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?" 1971 I.C.J. at 17; *see generally supra* note 1.

must adjudicate opposing claims and policies of nation states forming their own objectives with regard to the resulting public order. Aggression, as such, has not been raised in either the advisory or contentious proceedings in the present Court or its predecessor. But, it has been the subject of lengthy efforts aimed at arriving at a definition, commencing with proposals from the Soviet Union in 1933.[17] The concept has been introduced into non-aggression treaties adopted between the wars. It appears in the Helsinki Accords[18] and in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations[19] and was defined in the Resolution of the General Assembly on the Definition of Aggression.[20]

In establishing the United Nations, states realized that aggression was a matter that needed both to be "defined" through future practice and then limited. Article 2(4), providing for limitations undertaken directly by the member states, was balanced through preserving the right of states to self-defense and collective self-defense set forth in Article 51.[21]

The Charter is not, however, the constitutive instrument of a firmly established global order with authority and competence entrusted to its decision-making orders.[22] Nevertheless, there are ele-

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17. For a note on the Soviet proposal on aggression and for further developments, *see* W. BISHOP, INTERNATIONAL LAW 923-26 (3d ed. 1971). The Soviet proposal was in the context of the League of Nations actions and is notable for making all acts of aggression turn on the party that *first* commits the prohibited acts.

18. Final of the Conference on Security and Cooperation in Europe ("Helsinki Accords"), Aug. 1, 1975, Dep't State Pub. No. 8826, *reprinted in* 14 I.L.M. 1929 (1975).

19. G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971).

20. G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975).

21. For an extensive review of the legality of United States intervention in Vietnam, *see* the memorandum of the Legal Advisor of the Department of State and the independent lawyers' memorandum *in* 12 M. WHITEMAN, *supra* note 1, at 121.

22. *See* McDougal, *International Law and the Future*, 50 MISS. L.J. 259, 310 (1980) (footnote omitted):

> The number one problem of humankind remains . . . that of security in the sense of establishing a minimum order, in control of unauthorized coercion and violence, which will permit more effective pursuit of an optimum order in maximization of the shaping and sharing of all values. Through articles 2(4) and 51 of the United Nations Charter, and many ancillary prescriptions, the global community has at long last achieved a workable distinction between impermissible and permissible coercion, admitting of application in particular instances in support of minimum order. It remains, however, for the community to establish an appropriate institutional framework both for disinterested, third-party appraisal of particular instances of alleged impermissible coercion and for the application of appropriate sanctioning measures in preventing and deterring coercion and in restoring and rehabilitating

ments of "separation of powers" and those elements make the observations in *Baker v. Carr* relevant to appraising the Court's role in global affairs. Article 24 vests the Security Council with the "primary responsibility for the maintenance of international peace and security."[23] In the same article, the members of the United Nations "agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

In the United Nations practice, the "primary responsibility" has become the "exclusive responsibility" in large measure because the General Assembly has only recommendatory powers. The Resolution on the Definition of Aggression reflects both the limited powers of the General Assembly and the exclusive powers of the Security Council. Even the "Uniting for Peace" Resolution[24] could only consider the matter with a view to making appropriate recommendations to members for collective measures.[25] But, the Charter provides in Article 25 that members "agree to accept and carry out the decisions of the Security Council." No such provision in the Charter establishes comparable decisional authority in the General Assembly.[26]

Moreover, the overall context of the Charter is aimed at seeking effective control over the use of force and over aggression in particular. The primary objectives of the Charter include the establishment of security among states, that is the "maintenance of international peace and security," and the promotion of human rights. These appear in the Preamble, in the articles on "purposes and principles" set forth in Chapter I and throughout the Charter. All of the organs have a role with respect to such matters, but the decisional role is limited to the Security Council.

Chapter IV, concerning specific settlement of disputes, and Chapter VII, concerning action with respect to threats to the peace, breaches of the peace and acts of aggression, provide the major

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public order. Though contemporary nation-states receive tremendous benefits from constitutive process, they have as yet been only imperfectly subjected to its complementary burdens.

23. U.N. CHARTER, art. 24 ¶ 1.

24. "Uniting for Peace" Resolution, Nov. 3, 1950, G.A. Res. 377A(V), 5 U.N. GAOR Supp. (No. 20) at 10, U.N. Doc. A/1775 (1951).

25. For a valuable follow-up to the expectations of the "Uniting for Peace" Resolution, *see* the reports of the Collective Measures Committee established by the General Assembly *in* 12 M. WHITEMAN, *supra* note 1, at 342-49. *See also* the identification of arms, ammunition and the implements of war that might be included in an embargo, *id.* at 349.

26. The framework of Security Council authority under the United Nations Charter, Chapter VI for peacekeeping, appears in 12 M. WHITEMAN, *supra* note 1, at 894-1152; for the International Court of Justice, *see id.* at 1153-1471.

framework in which aggression is to be managed. Under Article 39, the Security Council has far-reaching and singular authority to make determinations about threats and aggression, to make recommendations and decisions as to measures to be taken by way of preventing, deterring or countering aggression and to formulate the strategies for restoring peace and security. In these powers, the Security Council has authority readily identified with law: It determines and interprets the applicable law or standards to be applied, it invokes that law or standard and it applies or enforces that law or standard.

Objection may be raised that even though these are conceded as the exclusive powers and authority of the Security Council, the Court can and should isolate those issues that amount to a "legal dispute" and "resolve" them. But here, the difficulty is simply that of function: The Court cannot be expected to take hold and manage the actions and policies of the states as such. It attempted to do so in the *Military Activities Case*, but this is unrealistic under the best of conditions. The Court, in the aggression cases, cannot satisfy its mandate of handing down decisions with "finality." As Judge Schwebel indicated, the facts in the *Military Activities Case* would be similar to probably any case of continuing hostilities or continuing threats of aggression. The process of isolating instances of illegal uses of force where force is traded off between the parties is meaningless.[27] Worse still, again as Judge Schwebel noted, the facts clearly reveal that Nicaragua was the aggressor and came into court with "unclean hands."

Objection is frequently made that the Security Council has been immobilized through the veto. But without the veto, the United Nations would never have been instituted. The veto reflects, both operationally and symbolically, that the contentions between states with sharply opposing and competing claims on the future of global order are not easily "solved." But even when the veto is exercised to prevent the Security Council from dealing with specific claims of aggression, the practice of states since the Second World War shows that other forces continue to apply to moderate or confine the conflict. The outbreaks of such violence compel states to recognize

27. *See Military Activities Case*, 1986 I.C.J. at 320-31 (Schwebel, J., dissenting) on the fact finding; *id.* at 331-53 on El Salvador's rights of self defense; *id.* at 353-62 as to the United States rights in collective self-defense with El Salvador; *id.* at 362-69 on necessity and proportionality (not discussed in the present paper); and *id.* at 369-73 on collective self-defense extended to measures taken in Nicaragua.

that they must move to share expectations and commonalities about public order and provide procedures and processes for the appropriate institutions to give such order effectiveness in terms of minimum security.

The authority of the Court is limited in several ways. First, it is a "judicial" organ and its role in the maintenance of international peace and security must therefore be determined by the limits necessarily imposed on the adjudicatory process while a public order is being shaped by states themselves. Further limitations appear in the nature of the Court's decision:

First, the ruling lacks binding force except between the parties and for the particular case; the judgment is final and without appeal; and limited authority is established for revision, subject, however, to discovery of new facts that would be a decisive factor in the decision but which were unknown when the decision was handed down.[28]

Second, the Court has no enforcement powers. Pursuant to Article 94 of the Charter, a party *may* have recourse to the Security Council for recommendations or decisions for measures to give effect to the judgment if the opposing party fails to perform under the judgment. But the Security Council, the veto aside, need act only in its own discretion.

Third, the Court has limited jurisdiction over the member states[29] and only forty-six states are subject to its jurisdiction.[30] None of the communist states except Cambodia have submitted and Israel notified the court of termination of its submittal effective November 21, 1986.

Whatever might have been the global expectations concerning the authority and control relating to the decisions of the Court when it was founded at the end of the Second World War, state practice since that war, and even under the predecessor Permanent Court of International Justice, indicates that states now anticipate that "legal disputes" will be limited to those disputes in which neither their major interests nor the means for promoting or achieving those interests are among the legal issues to be decided. Perhaps this is a reflection that states recognize that the development

28. *See* Statute of the Internatinal Court of Justice, *supra* note 4, art. 61.

29. *See supra* notes 10-11 and accompanying text.

30. On the states that have submitted to the jurisdiction of the International Court of Justice, *see Treaties in Force*, U.S. Dep't State Pub. 9433 (Jan. 1986). Almost all of the 46 states have attached conditions or "reservations."

of their law is shaped through a process of claims and counter-claims toward reciprocal tolerances and "certain uniformalities of pattern," flowing out of a competitive process inherently established among them.[31]

### *B. Other Issues*

The majority and dissenting opinions raised a number of other issues that are subordinate to the principal issue of aggression. Perhaps the most serious concerns that of the fact-finding competence of the Court. Judge Schwebel argued that the Court had failed to marshall all of the relevant facts.[32] But, even with the facts that it had, and even though facts were not provided by the United States (apart from those included in the jurisdictional phase of the proceeding), the Court should have been aware that Nicaragua appeared with "unclean hands," that is as an aggressor.

In the context of United States practice, for example, the facts by which a legislative body establishes law and the facts that are acquired for the purposes of adjudication differ because the purposes of these two processes differ. The World Court is expected to resolve "legal disputes," and except for competence *ex aequo et bono* afforded by the parties themselves, the Court must invoke the existing "law." The problem faced in a case concerning agression is largely a constitutive question—a question concerning the allocation of and the structure for exercising power among states. Such a question is comparable to that arising in the shaping of a constitution and establishing public order in that the issue of aggression requires the consideration of when force may be legitimately exercised, who may exercise such force and what conditions should be imposed on its exercise. No state perceives itself as the agressor when it resorts to the use of force; rather, each insists that its actions are justifiable and even supported by community standards.

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31. *See also* McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, *in* M. MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER 763, 773 (1960) (footnote omitted):

> Throughout the centuries of its development, one may observe the regime of the high seas as not a static body of absolute rules but rather a living, growing, customary law, grounded in the claims, practices, and sanctioning expectations of nation-states, and changing as the demands and expectations of decision-makers are changed by the exigencies of new social and economic interests, by the imperatives of an ever-developing technology and by other continually evolving conditions in the world arena.

32. *See also* Judge Oda's dissent on lack of sufficient means for the court to engage in fact-finding. 1986 I.C.J. at 240-44 (Oda, J., dissenting).

This inherently competitive element among states in the global process thwarts efforts to bring the use of force under control through either law or other measures.

It is in this context that three distinguished scholars have used the term "global war system" to describe the current system among states in which recourse to military measures, measures largely aimed at power and tending to favor coercion, dominates the actions among states:

> In the contemporary world community where the expectation persists that differences may be resolved by violence or war, assessments of power are continuous and significant factors in behavior.
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> The interrelations of control and authority in the global community, as in its lesser component communities, are intimate. It would, of course, be a gross misstatement to say that naked power is the key variable . . . the *ultima ratio.* Wherever such power operates, . . . it interstimulates with expectations of authority. But it would be equally wrong to ignore naked power in any scholarly inquiry or practical planning for decision making. Effective power, made authoritative, is a ubiquitous aspect of all social processes, an indispensable component of law. . . . The important fact is that it is effective power, taken as a whole and commonly comprised of both authority and control, that establishes and maintains processes of authoritative decision, both constitutive and public order, and hence affects the fundamental policies expresses in all law.[33]

In addition to the overriding significance of power as the critical element among states in their behavior, the fact-management process is one that must shape global order through a balancing process on a continuing basis, evidencing the principle of reciprocity in claims, demands and tolerances. In any given situation among states, including their conflicts or belligerency, activities or actions can be singled out and identified as "legal disputes." But what must be addressed, and where the Court must exercise self-restraint, is in deciding which of these disputes are manageable under judicial processes in both the international arenas and under the Charter, and also in which disputes a decision that is based on "finality" and limited enforcement possibilities will serve the fundamental objec-

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33. McDougal, Reisman & Willard, *The World Process of Effective Power: The Global War System*, in POWER AND POLICY IN QUEST OF LAW 353 (M. McDougal & W. Reisman eds. 1985). For information and analysis concerning constitutive and decision processes, *see generally* the works of McDougal and his associates on world public order, interpretation of treaties, outer space and the oceans.

tives of global order under the Charter.

There is grave danger that a court even in good faith and with good intentions can enter into "cases" and "controversies" in the global arena in which its own integrity as an organ of authority and control is at stake, in reality where its future authority is the critical issue. When this occurs, as in the *Military Activities Case*, a court is in danger of becoming the instrument of the policy of the winning side and no more.

Several issues raised by the Court and the dissenting judges merit further analysis. The issue of jurisdiction, while not pursued at length here, is important in that, as the United States sought to demonstrate by its withdrawal, in the absence of all parties, including the states adjacent to Nicaragua who had suffered from the aggression from Nicaragua, the Court's decision would be ineffectual. The Court's finding of jurisdiction, both *in personae* and as to the subject-matter, was based on customary international law, but was opposed in the dissenting opinions of Judges Schwebel, Jennings and Oda.

According to Judge Schwebel, the Court's assumption of jurisdiction with regard to embargoes against trade with Nicaragua contrary to the Treaty of 1956 skirted the rights preserved by the United States in Article XXI. Those rights included the adoption of measures "necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests. . . ."[34] Judge Schwebel observed that the Court simply ignored the relevant and operative facts.

Finally, the Court's management of the use of force and of the United States intervention should have been discussed primarily in terms of aggression. The Court, however, set forth a confusing array of observations and assumptions about this issue, finding, for example, that the United States' obligations not to support the *contras* stems from the Geneva Conventions of 1949.[35] The Court argued that those conventions contain "general principles of humanitarian law" and that such principles come from the general practice of states. The Court concluded that the United States pursuant to

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34. *Military Activities Case*, 1986 I.C.J. at 307 (Schwebel, J., dissenting).

35. The four Geneva Conventions of 1949 entered into force for the United States on February 2, 1956. They are found, respectively, at 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

Articles 1 and 3 of the four Geneva Conventions had an obligation not to encourage persons in the Nicaraguan conflict to violate Article 3 principles. Apart from the weakness of this line of argument, the analysis depended on an assumption that the United States was the aggressor which, as Judge Schwebel noted, was not established by the facts. In truth, the facts established Nicaragua as aggressor.

## CONCLUSION

Even a brief preliminary assessment shows that the strategic implications of the opinion and the judicial process pursued by the World Court in the *Military Activities Case* are far-reaching. The Court faced an issue that called for invoking other decision-making processes. The Court has always been vested with limited decision-making authority even with respect to the "legal disputes" that it was anticipated would be heard. State actions already considered in the cases submitted to the Court provide a growing practice establishing the expectations of states with respect to the reach of its jurisdiction. States, in refusing to submit to such jurisdiction, have added to its limitations.[36] And the Court's authority is further limited by the judicial process and by states' expectations of courts' assessments of global order processes that relate to constituting the global order itself. Finally, there are severe limitations in the fact-finding and fact-management capabilities of the Court so that it is unable to come to grips with the realities of state conduct. More specifically, the Court is unable to work in a dynamic power process where states are introducing an array of strategic and policy instruments, claiming the legitimacy of their actions and aiming these instruments not only at their own goals, but also at shaping the global order itself.

Our long experience with the need to await developments of customary international law to take hold before resolving disputes is a need that can be transferred to the problem that a court faces when dealing with the strategies of states that resort to the use of force during on-going hostilities. Moreover, due to the increased use of force and violence among states since the Second World War, in large measure thereby acquiring an expanding "legitimacy," a court abstracted from the critical fora and processes for decision-

36. The United States' declaration and those of other states with respect to submittal to the jurisdiction of the International Court of Justice are considered *in* 12 M. WHITEMAN, *supra* note 1, at 1278-1351.

making among states, and away from the decision process that relates to shaping global order, is thrust into arenas where judicial management is not effective. It is faced with the need for self-restraint and the recognition that states are compelled to seek alternatives for their decision process. In the *Military Activities Case*, the Court was faced with a demand by the United States to establish that Nicaragua had brought the wrong case in the wrong forum. The Court had no real choice but to reject jurisdiction. This it failed to do. In turn, the United States had no choice but to withdraw from the Court. This it did.[37]

37. The arms control arena offers a useful model of how two states—the United States and the Soviet Union—have introduced claims and counterclaims concerning violations of treaty instruments relating to the control of weapons. The United States has claimed violations of the SALT and ABM agreements in the deployment of a major radar at Krasnoyarsk, the development and deployment of a new missile (SS-25), certain BACKFIRE improvements to give intercontinental operating capability and the encryption of ballistic missle telemetry, as well as violations of the Helsinki Final Act concerning notification of military exercises. On this subject, *see generally, The President's Unclassified Report to the Congress on Soviet Noncompliance with Arms Control Agreements*, White House Press Release, Jan. 23, 1984 and Feb. 1, 1985; U.S. Arms Control and Disarmament Agency, *Arms Control: U.S. Objectives, Negotiating, Efforts, Problems of Soviet Noncompliance,* Washington, USGRO, May 1984; *id.* as supplemented on Feb. 1, 1986; U.S. Congress, Senate Comm. on Armed Services, *Soviet Treaty Violations*, 98th Cong., 1st Sess. (1984), as supplemented by 99th Cong., 1st Sess. (1985); U. S. Dep't of State Bureau of Public Affairs, *Soviet Noncompliance with Arms Control Agreements*, GIST, Oct. 1985.