

THE YALE JOURNAL OF INTERNATIONAL LAW

Volume 12, Number 1, Winter 1987

Articles

From Nuremberg to the Hague: The United States Position in *Nicaragua v. United States* and the Development of International Law

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Introduction

In the face of an adverse decision at the jurisdictional phase of *Nicaragua v. United States*, the United States withdrew from any further participation in the proceedings before the International Court of Justice ("I.C.J.").¹ In walking out of the Court, the United States effectively walked out on the system of international law that emerged in the post-World War II period.

Although the United States thereby declined to make a formal submission on the merits of the dispute, it has become clear what the U.S. position is, or would have been, before the Court. A consistent position has emerged in submissions to the Court at the jurisdictional phase, publications of the State Department, statements of the Legal Adviser to the State Department, and, most important, in two lengthy articles published by attorneys associated with the case.

Professor John Norton Moore, who worked for the Office of the Legal Adviser to the State Department when it represented the United States in the *Nicaragua* case, and Nicholas Rostow, who is currently a Special Assistant to the Legal Adviser, have each published an article on the case.² Taking substantially similar positions, each develops in systematic detail the U.S. claim that its actions towards Nicaragua are legitimate exercises of "collective self-defense."

In the long run, the position asserted by the United States will be of more significance than the opinion of the International Court of Justice. That opinion is likely to be an exercise in legal form without force: already the United States has indicated that it will ignore the ruling.³ The

1. Nicaragua instituted proceedings against the United States before the International Court of Justice on April 9, 1984. The Court has, to date, issued three opinions in the case: Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for the Indication of Provisional Measures, 1984 I.C.J. 169 (Order of May 10, 1984); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction of the Court and Admissibility of the Application, 1984 I.C.J. 392 (Judgment of Nov. 26, 1984) [hereinafter Jurisdiction and Admissibility]; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits (Judgment of June 27, 1986) [hereinafter Merits].

2. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986); Rostow, *Nicaragua and the Law of Self-Defense Revisited*, 11 YALE J. INT'L L. 437 (1986).

3. Although each member of the United Nations has an obligation pursuant to article 94 of the Charter "to comply with the decision of the International Court of Justice in any case to which it is a party," enforcement of a judgment against a recalcitrant party is, in that same article, assigned to the discretion of the Security Council. The United States has announced that it does not intend to comply with the Court's judgment. It vetoed the July 31, 1986,

U.S. position, on the other hand, manifests itself daily in the policies that the government pursues, not just in Central America, but around the world.⁴ For this reason alone, the U.S. position requires careful analysis and critique. But analysis of the U.S. position is valuable not just from a practical point of view. Even more important, it reveals much about the current state of international law.

The *Nicaragua* case throws into vivid relief the two-fold character of international law.⁵ On the one hand, there is authoritative text—treaties, judicial opinions, General Assembly resolutions; on the other hand, there is state practice. International law advances—or retreats—along both dimensions at once.⁶ Without any institution to work a convergence of authoritative, institutional decision-making and state practice, international law is characterized by the possibility of divergence between the

Security Council resolution that Nicaragua sought urging compliance with judgments of the I.C.J. N.Y. Times, Aug. 1, 1986, at A3, col. 1. Counsel for Nicaragua have publicly stated that they would seek enforcement in U.S. domestic courts, N.Y. Times, June 28, 1986, at A4, col. 4, but the barriers to justiciability—in particular, the political question doctrine—appear substantial. On problems of enforcement of I.C.J. judgments in general see M. REISMAN, NULLITY AND REVISION 637-859 (1971).

4. There are at least three other areas of the world in which the United States is currently providing assistance to insurgencies seeking the overthrow of established governments: Angola, Afghanistan, and Cambodia. See Rosenfeld, *The Guns of July*, 64 FOREIGN AFF. 698 (1986).

5. The disjunction between practice and text described in this paragraph has led to a recent methodological proposal to study the “incident”—an instance of overt international conflict between two or more actors in the international system—as the basic “international epistemic unit.” Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1 (1984). Reisman explains the methodological error that this new approach is to correct as follows:

International lawyers pay relatively little attention to the incidents from which political advisers infer their normative universe. Rather, they persist in constructing their normative universe from texts. They thus confine their attention to sources that were either merely ceremonial at their inception, or that . . . have ceased to be congruent with expectations of authority and control held by effective elites.

Id. at 4. The focus of this article, which analyzes the legal explanation advanced in support of the U.S. actions, perhaps falls half-way between a focus on text or on state behavior alone. See also D’Amato, *Nicaragua and International Law: The “Academic” and the “Real”*, 79 AM. J. INT’L L. 657, 664 (1985) (“The challenge to the international legal scholar is to dig beneath the verbiage, to peel off the ritual invocations of traditional rules in government press releases and to articulate the operative emerging rules of customary law.”).

6. The Statute of the I.C.J. recognizes both sources—“international conventions” (art. 38, para. 1(a)) and “international custom, as evidence of a general practice accepted as law” (art. 38, para. 1(b))—without acknowledging the problem of conflict. An interesting discussion of this two-fold character of international law can be found in Richard Falk’s defense of the proposition that the U.S. bombing of North Vietnam was both “a violation of international law . . . and a law-creating precedent.” Falk, *International Law and the United States Role in Vietnam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1126-27 (1967); see also Higgins, *The Legal Limits to the Use of Force by Sovereign States*, UNITED NATIONS PRACTICE, 37 BRIT. Y.B. INT’L L. 269, 319 (1961).

two.⁷ That gap, however, does not just signify the measure of illegality of a controverted practice. Because international law has the curious institutional form of allowing deviant practice to create law, the gap equally signifies the variety of creative forces at work in international law. The *Nicaragua* case and the events it triggered suggest that the gap is very wide now and that the two sources of international law are moving along radically divergent paths.

The U.S. position on the merits is essentially that the actions of which Nicaragua complains—U.S. support for, direction of, and involvement with the *contras*—are authorized by international law as actions taken in the collective self-defense of El Salvador.⁸ Nicaragua, the United States alleges, provides covert support for insurgents—the Farabundo Marti National Liberation Front (FMLN)—in El Salvador. This support, the United States claims, satisfies the “armed attack” standard of article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . .” Thus the United States asserts that, rather than violating international law, it is acting in support of the lawful right of a state to defend itself and to receive help in that defense.

With this understanding, the United States suggests that it is not the law, but the facts, that divide the parties.⁹ After all, the United States asserts, the actions it is accused of committing in and against Nicaragua are no different in kind from those that Nicaragua has pursued in El Salvador.¹⁰ The same legal theory that would condemn one must condemn the other, all other things being equal. That things are not equal, states the United States, is a question of fact and not law.

In this article, I argue that, contrary to the U.S. assertion, there are profound differences between the legal approaches of the United States

7. As discussed below, the differences in the institutional forms of decision-making in the Court and the Security Council, which has enforcement responsibility, virtually guarantee a gap between the declaration of law by the Court and the enforcement of that law by the Council. See *infra* text accompanying notes 144-48.

8. The United States also contends that Nicaraguan actions against Honduras and Costa Rica provide additional grounds to justify a collective self-defense rationale for the controverted actions. See Counter-memorial of the United States, The Questions of the Jurisdiction of the Court to Entertain the Dispute and of the Admissibility of Nicaragua's Application (Nicar. v. U.S.) (Aug. 17, 1984), I.C.J. Pleadings, at paras. 196-97 [hereinafter Counter-memorial]. The overwhelming bulk of the U.S. case, however, relies on the alleged Nicaraguan support for the FMLN. *Id.* at paras. 189-202.

9. See BUREAU OF PUBLIC AFFAIRS, U.S. DEPT. OF STATE, SPEC. REP. NO. 132, “REVOLUTION BEYOND OUR BORDERS”: SANDINISTA INTERVENTION IN CENTRAL AMERICA I (1985) (“The critical element of the debate, therefore, is not the identification of the applicable legal standard but the determination of the facts to be measured against the undisputed legal standard.”).

10. Counter-memorial, *supra* note 8, at para. 189.

and Nicaragua. The U.S. position essentially rejects the model of international law that developed in the post-World War II period—a model that combined an explicit conventionalism with a reliance on the “domestic analogy.”¹¹ Nicaragua bases its case precisely on the force of this domestic analogy. In its attempt to undermine this analogy, the United States has sought support in two models of international law that are themselves mutually inconsistent, yet united in their rejection of the domestic analogy. These two models I refer to as the “state sovereignty” model and the “human rights” model. How the contradiction between the two models is resolved is, I believe, the most serious issue for the future development of international law.

I. The Justiciability of State Violence

From the point of view of the development of international law, the *Nicaragua* case only takes on interest once we leave the facts and look at the clash of theories. To get to that point, however, requires a return both to the crucial legal events at the end of the Second World War and to the U.S. arguments on the admissibility of the *Nicaragua* case. Comparing Nuremberg of 1946 and the Hague of 1984 will suggest that the United States is, indeed, moving international law in a new direction.

A. *Nuremberg: 1946*

The arguments on jurisdiction and admissibility at the Hague were curiously devoid of reference to the Nuremberg Tribunal. In the immediate post-war period, international law developed within two institutional forms: the United Nations charter system and the Nuremberg proceedings in which major German war criminals were tried. While both counsel and court in the *Nicaragua* case focused in great detail on the former, they paid no attention to the latter. This is all the more curious since the Nuremberg experience involved the structuring of a court and that court's application of international law to state violence.¹² The connection between these two institutional developments—a connection symbolized in their joint birth at the Moscow and Yalta conferences—was

11. See *infra* text accompanying notes 107-09.

12. Interestingly, the elaborate dissent of Judge Schwebel makes reference to the proceedings at Nuremberg in discussing the issue of the justiciability of a claim of self-defense. Merits, *supra* note 1, dissenting opinion of Judge Schwebel, at para. 50. For a recent discussion of the meaning of the Nuremberg trials within a broader theory of the relationship of law to power, see Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 199 (1985) (“[T]he controversy about the trials in 1946 had not been so much a controversy over doctrine as one over jurisdiction and its exercise. The issue was not so much whether to make ‘law’ as it was whether to make a Court.”).

evident to all in 1946.¹³ Justice Jackson, for example, concluded his opening speech to the Nuremberg Tribunal by reminding the panel of this connection:

The usefulness of this effort to do justice is not to be measured by considering the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure. One step in this direction is the United Nations organization, which may take joint political action to prevent war if possible, and joint military action to insure that any country which starts a war will lose it. This Charter and this Trial . . . constitute another step in the same direction—judicial action . . . to ensure that those who start a war will pay for it personally.¹⁴

Unlike the I.C.J. proceedings, the Nuremberg trials focused on individual responsibility.¹⁵ Nevertheless, the dominant legal issue at Nuremberg was the status under international law of state-sponsored violence. Individual criminal responsibility was understood to be wholly dependent on an international law that applied to and regulated state conduct in the first instance. If state violence were not justiciable, then neither would individual responsibility for that violence be justiciable.

The basic legal argument by which the prosecution at Nuremberg hoped to extend international legal norms from states to individuals assumed the priority of state responsibility, both logically and temporally:

[T]he nations of the world had . . . sought to make aggressive war an international crime, and although previous tradition has sought to punish States rather than individuals, it is both logical and right that, if the act of waging war is itself an offense against International Law, those individuals who

13. In January 1942, representatives of nine occupied countries in Europe discussed punishment for war crimes at a conference at St. James, London. One year later, the War Crimes Conference was set up to gather information on war crimes. The decision to punish war criminals was made at the Moscow Conference of Allied Foreign Ministers in October 1943, the same conference at which the Allies declared that "they recognize the necessity of establishing . . . a general international organization, based on the principle of sovereign equality . . . for the maintenance of international peace and security." *Declaration of Four Nations on General Security*, 9 DEP'T ST. BULL. 308, 309 (1943) [hereinafter *Moscow Declaration*]. At the Yalta Conference of February 1945, the heads of government of the United States, the Soviet Union, and the United Kingdom elaborated on the Moscow Declaration by a joint declaration of a specific commitment to a trial of war criminals. In addition, the parties at Yalta reached the critical agreement on the voting formula within the Security Council and decided to call for a conference in San Francisco "to prepare the Charter" of the United Nations. V. DEAN, *THE FOUR CORNERSTONES OF PEACE* 25-38 (1946).

14. *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL* [hereinafter *NUREMBERG PROCEEDINGS*], pt. 1, at 85 (1948).

15. Given the holding of the I.C.J. on the merits and the jurisprudence under which the Nuremberg Tribunal found individual liability, an interesting question arises as to whether the I.C.J. holding necessarily implies that President Reagan and other responsible political leaders of the United States are war criminals under international law. The discomfort such a suggestion would cause is a measure of the continuing strength, or lack of strength, of the Nuremberg principles.

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shared personal responsibility for bringing such wars about should answer personally for the course into which they led their States.¹⁶

If an act of waging war could not be found by the Tribunal to amount to the international crime of aggressive war, then it would not be possible to locate criminal responsibility in particular individuals.

Given these historical origins of modern international law on the use of force, perhaps the greatest irony of the U.S. position at the Hague was its insistence that the international law of the Charter makes state use of violence nonjusticiable. The Charter era began with a trial that had at its center precisely such a subject matter.

Nuremberg is not just an historically contingent precedent—a unique event to be explained in terms of the problem of disposing of the leaders of the Third Reich. Rather, the connection between the justiciability of a controverted use of state violence and the development of international law was central to the Allied program. That program had come to identify the war effort itself with the advance of international law. Thus, Sir Hartley Shawcross, the Chief British Prosecutor, linked British participation in the war with its participation in the trial: “It is precisely because we realize that victory is not enough, that might is not necessarily right, that lasting peace and the rule of international law is not to be secured by the strong arm alone, that the British nation is taking part in this Trial.”¹⁷

By identifying the war effort with the trial, Shawcross was reiterating a position that Justice Jackson had already set forth for the United States in response to the charge that the Tribunal was applying new law retroactively:

The rule of law in the world, flouted by the lawlessness incited by these defendants, had to be restored at the cost to my country of over a million casualties, not to mention those of other nations. I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives.¹⁸

The trial, again in Jackson’s words, was to be “one of the most significant tributes that Power has ever paid to Reason.”¹⁹ Power must find its legitimacy in “progress in the law.”

Thus, the rule of international law took three forms in the immediate post-war period. First, there was the war effort itself: violence in the

16. NUREMBERG PROCEEDINGS, *supra* note 14, pt. 2, at 46 (statement of Shawcross).

17. *Id.* at 45.

18. NUREMBERG PROCEEDINGS, *supra* note 14, pt. 1, at 81.

19. *Id.* at 49.

service of law. Second, there was the new organization of the United Nations: politics in the service of law. And, finally, there were the actual judicial proceedings. The trial was the visible symbol that international law was no longer indifferent to state violence; that law, not power, was to be the foundation of the new international legal order.²⁰

The place of judicial process—of a court—in the international law of state violence reappears at Nuremberg in the substance of the arguments made before the Tribunal. The arguments at Nuremberg, in fact, canvassed much of the argument currently asserted by the United States. At Nuremberg, however, the United States was on the opposite side.

The Tribunal considered arguments about the relationship of state unilateral decision-making under a claim of self-defense to the universal pre-scriptions of international law, as well as arguments about the effect of inconsistent state practice on the rule of law. As at the Hague in 1984, these arguments were made within the context of a dispute over judicial competence. A legitimate role for the Tribunal, as a court, depended on its finding a rule of law the application of which could be subject to third-party review. Defense counsel Hermann Jahrreis²¹ argued both that claims of self-defense could not be subject to such review and that there was no rule of law that governed state decisions to use violence in pursuit of national interests.

Jahrreis carried the main burden of responding to the prosecution's claim that international law had established a judicially enforceable legal norm regulating the use of violence between states. His argument was two-fold. First, he claimed, with substantial factual support, that while an international community under law may have been the ideal of world leaders after the First World War, by 1939 that ideal had completely broken down:

By 1 September 1939 the varicus experiments, which had been tried since the First World War with a view to replace the "anarchic world order" of classical international law by a better, a genuine order of peace, were over. . . . [H]istory swept away all diplomatic and juridical artifices with supreme indifference.²²

20. Jackson accurately summarized this point: "This inquest represents the practical effort of four of the most mighty of nations . . . to utilise International Law to meet the greatest menace of our times—aggressive war." *Id.*

21. Professor Hermann Jahrreis, a German lawyer and scholar, served as an assistant counsel for defendant General Alfred Jodl.

22. NUREMBERG PROCEEDINGS, *supra* note 14, pt. 17, at 467.

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State practice had moved away from the model of a community under law.²³ In the absence of such a community, there could be no legal norm by which to evaluate a state decision to use violence. A rule of law that has become disembodied from the community is not law at all.

Second, and more important, Jahrreis argued that the reservations to the Kellogg-Briand Pact, the treaty upon which the prosecution primarily relied, indicated that it was mere form without substance.²⁴ That treaty's operative language provided that the parties "condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."²⁵

23. Jahrreis argued that each of the three great powers of the world had, by its actions, demonstrated the collapse of an international legal order. The actions he cited for this included Great Britain's withdrawal from the compulsory jurisdiction of the Permanent Court of International Justice, the Soviet Union's recognition of the liquidation of the Polish government as a consequence of the German attack and its decision to reach an agreement with Germany on the division of Poland, and the United States' adoption of a position of neutrality in 1939. Each of these actions, Jahrreis argued, was consistent with the rights of states under classical international law—what I have termed the "state sovereignty" approach to use of force—but inconsistent with the notion of an international community under law.

Jahrreis's position received its strongest articulation in the post-war trials in the dissent of Justice Pal, the Indian Judge in the International Military Tribunal for the Far East. Pal argued that "[i]n order to introduce the *conception of crime* in international life, it is essential that there would be an *international community* brought under the reign of law. But, as yet, there is no such community." INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, DISSENTIENT JUDGMENT OF JUSTICE R. B. PAL, at 48 (emphasis in original).

24. The diplomatic correspondence had been made public prior to the ratification of the Kellogg-Briand Pact. That correspondence demonstrated considerable concern with the effect of the treaty on the right of "self defense." The U.S. State Department had clarified its position as follows:

Self-defense. There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action.

Note of the Government of United States to the Governments of Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, Irish Free State, Italy, Japan, New Zealand, Poland, and South Africa (June 23, 1928), reprinted in *The Pact of Paris*, 243 INT'L CONCILIATION 60, 61 (1928). See also the British assertion of special rights to use force in "the defence" of "certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety." Chamberlain, Note from the British Foreign Minister to Houghton, the American Ambassador (May 19, 1928), reprinted in *id.* at 198.

25. Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57. Although the prosecution relied heavily upon the Kellogg-Briand Pact, as evidence of the illegal status of war under international law, it also cited: treaties concluded between the Soviet Union and a number of other states (Persia (1927), France (1935), China (1937)) in which the parties undertook to refrain from any act of aggression against one another; the Anti-War Treaty of Non-Aggression and Conciliation (Oct. 10, 1933); the Buenos Aires Convention of December 1936; resolutions of the 6th Pan-American Conference and of the Assembly of the League of Nations (Sept. 1927); the Draft Treaty for Mutual Assistance of 1923; the Preamble to the Geneva Protocol of 1924; the General Act for the Pacific Settlement of International Disputes (1928); and the Treaty of Locarno (Oct. 16, 1925). See NUREMBERG PROCEEDINGS, *supra* note 14, pt. 2, at 49-50.

Reviewing the reservations to the treaty, however, Jahrreis concluded: "Only on one thing did complete agreement exist: War of self-defense is permitted as an unalienable right of all States; without this right, sovereignty does not exist; and *every State is alone judge of whether in a given case it is waging war of self-defense.*"²⁶

Jahrreis did not have to look far for explicit support for this position. United States Secretary of State Kellogg had declared during the negotiations on the Pact that "the right of self-defense . . . is inherent in every sovereign state and is implicit in every treaty. Every nation . . . is alone competent to decide whether circumstances require recourse to war in self-defense."²⁷ If the Kellogg-Briand Pact were interpreted to permit a unilateral, unreviewable right to resort to war in self-defense, then it could not stand as a proposition of law, and, accordingly, there could be no place for a tribunal functioning as a court of law. From this, Jahrreis concluded that for the Tribunal to act as if there were a law to apply, rather than a political or moral program, would "contradict the very nature of law as a social order of human life arising out of history."²⁸

In short, Jahrreis relied on both of the possibly conflicting sources of international law: authoritative text and state practice.²⁹ But he saw no conflict; rather, he found mutually reinforcing failures to establish an international community bound by a rule of law that regulated the use of force to serve national interests.

Jahrreis's critique was intellectually stunning. He forced Shawcross to respond essentially by reconstructing history. Shawcross read out of the Kellogg-Briand Pact the critical reservations on self-defense. To salvage a judicial role for the Tribunal, he had to abandon precisely the position that the politicians had insisted on as the price of the Treaty:³⁰

Neither the Pact of Paris nor any other treaty was intended to—or could—take away the right of self-defense. Nor did it deprive its signatories of the right to determine, *in the first instance*, whether there was danger in delay and whether immediate action to defend themselves was imperative; and that only is the meaning of the express proviso that each State judges whether action in self-defense is necessary. But that does not mean that the State thus acting is the ultimate and only judge of the propriety and of the legality of its conduct. . . . Just as the individual is answerable for the

26. NUREMBERG PROCEEDINGS, *supra* note 14, pt. 18, at 86 (emphasis added).

27. *Id.* at 86.

28. *Id.* at 476

29. See *supra* text accompanying note 6.

30. For example, Secretary of State Kellogg's explanation of the unreviewable right of a state to use force in self-defense had been quoted, and relied upon, on the floor of the Senate. See 70 CONG. REC. 1181 (1929) (statement of Sen. Swanson (quoting speech by Secretary of State Kellogg (Apr. 28, 1928))).

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exercise of his common law right of self-defense, so the State is answerable if it abuses its discretion. . . . *The ultimate decision as to the lawfulness of action claimed to be taken in self-defense does not lie with the State concerned*, and for that reason, the right of self-defense . . . does not impair the capacity of a treaty to create legal obligations against war.³¹

The challenge to the judicial role was, accordingly, met by making an explicit appeal to what I call the “domestic analogy”: a state’s right to use violence in the international community must be understood as analogous to the individual’s right to use violence in the domestic community.³² Each may act, under certain circumstances, to defend itself against attack. However, law specifies both the circumstances necessary for the exercise of a right of unilateral, immediate response and the quality of the permitted response. Most importantly, in each case the assertion of the right is subject to review by the larger community. The role of a court, then, is the same in domestic and international law: to ensure that the authorized use of private violence extends no further than the legal right of self-defense.

Not only did Jahrreis force a dramatic change in the Allied position on the place of self-defense in international law, but he forced the Tribunal itself to take this view: “Whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be enforced.”³³ This statement simply reflects what was then common knowledge: “Rarely has a state, determined to make an attack, openly acknowledged that it was availing itself of war in order to attain its purpose. The aggressor state has almost always pretended that it was waging a defensive war.”³⁴ Thus, the Tribunal saw itself as playing a critical role in the development of an international law under which power would be subject to the limits of legal rights. Like counsel to both the prosecution and the defense, it understood that the effectiveness of that role depended upon the force of the domestic analogy.

For the parties and the Tribunal, then, adjudication was to be the process by which “enforcement” of international law occurred. Military victory alone was not law enforcement. If it were, then the defendants simply should have been shot on capture.³⁵ The point of adjudication is

31. NUREMBERG PROCEEDINGS, *supra* note 14, pt. 19, at 425 (emphasis added).

32. See *infra* text accompanying notes 117-43.

33. *Judgment*, NUREMBERG PROCEEDINGS, *supra* note 14, pt. 22, at 436.

34. H. WEHBERG, *THE OUTLAWRY OF WAR* 101 (1931).

35. There was, in fact, substantial sentiment—particularly among the British—in favor of this course of action. The Americans were the firmest supporters of a need for a trial. See R. CONOT, *JUDGMENT AT NUREMBERG* 14-16 (1983).

to ensure that the force which a state is authorized to pursue unilaterally—self-defense—extends no further than the protection of a set of legal rights that are themselves defined by international law. The role of the court is to ensure that enforcement of legal rights does not become aggression against the rights of others.

B. *The Hague: 1984*

In the *Nicaragua* case the United States sought to challenge this model of the role of an international court. In so doing, it essentially rearticulated both of Jahrreis's arguments concerning the nonjusticiable character of a claim of self-defense.

While the United States raised a wide variety of objections on both jurisdiction and admissibility grounds, the argument upon which I focus is that a use of force in violation of international law raises an issue that the U.N. Charter assigns exclusively to the competence of the political organs of the United Nations—in particular to the Security Council—and not to the International Court of Justice.³⁶ Given the central role of the judicial function in the domestic analogy, the U.S. position suggests a rejection of that model of international law.³⁷

In presenting this argument to the Court, the United States effectively resurrected the claim that self-defense under international law is a self-judging function, incompatible with third-party review. But while Jahrreis could rely on the explicit reservations to the Kellogg-Briand Pact, the United States had to rely upon a rather tenuous structural interpreta-

36. For a discussion of the inappropriateness of the reliance of the U.S. legal argument on an analogy to the domestic law of jurisdictional limits on courts, see generally Chayes, *Nicaragua, The United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985). Of course, an analogy to domestic law jurisdictional limits is not the same as the "domestic analogy" I discuss in the text. Other discussions of the Court's decision on jurisdiction and admissibility include Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128 (1986); Briggs, *Nicaragua v. United States: Jurisdiction and Admissibility*, 79 AM. J. INT'L L. 373 (1985); and Malloy, *Developments at the International Court of Justice: Provisional Measures and Jurisdiction in the Nicaragua Case*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 55 (1984).

37. Theoretically, other institutions—formal or informal—could perform the "judicial" function under the domestic analogy. But the United States suggests only the Security Council as the appropriate institution, which can perform no such function given the U.S. veto. There is a curious silence in the U.S. position on the possibility of the Organization of American States (O.A.S.) performing a "judicial" function parallel to that of the Security Council. At the jurisdictional phase the United States did argue that the dispute was inadmissible because the Contadora process had been recognized as the appropriate method for resolving the "issues of Central America." Counter-memorial, *supra* note 8, at paras. 532-51. But the United States did not argue that that process would perform the "judicial function" described above; rather, the Contadora process was described as a "comprehensive diplomatic initiative undertaken by the countries of the region to address the overall security, political, social and economic problems of Central America." *Id.* at para. 532. The U.S. claim of collective self-defense is not at issue in the Contadora process.

tion of the Charter. The critical proposition of the U.S. argument is as follows:

The evaluation of claims concerning the exercise of the “inherent right” of individual or collective self-defense is the necessary concomitant of the evaluation of claims that a particular resort to armed force constitutes a “threat to the peace, breach of the peace, or act of aggression.” The determination of the latter *ipso facto* determines the former, and is committed by Article 39 . . . to the competence of the Security Council.³⁸

This argument is unconvincing. Far from being obvious, it is simply wrong to suggest that Security Council action under chapter seven of the Charter necessarily implies a determination of the relative merits of the legal claims of the disputants. Surely, a determination can be made that there exists a “threat to the peace,” or a “breach of the peace”—although perhaps not an “act of aggression”—without making any determination that self-defense was rightly, or wrongly, invoked.³⁹ A typical action of the Security Council is to call for a cease fire under article 40, which does not imply a determination of the parties’ legal rights.⁴⁰ Moreover, the most typical action of the Security Council is no action at all. A failure to act scarcely implies that the parties’ legal rights have been either determined or respected.

The United States further strained logic and legal structure when it argued that the case presented not only an institutional problem within the structure of the Charter, but also a substantive conflict between the justiciability of state uses of violence and the “inherent right of self-defense” guaranteed by article 51:

A judgment of the Court that purported to deny the validity of a State’s claim to be engaged in self-defense whether individually or collectively, must necessarily “impair” the “inherent” right guaranteed to that State by Article 51 of the Charter. . . .

. . . .

38. *Id.* at para. 455.

39. Practice under article 39 has been so limited that no firm conclusions can be drawn from it. The Security Council has made a determination under article 39 on three occasions: the Palestinian question in July 1948, S.C. Res. 54, 3 U.N. SCOR Supp. (338th mtg.) at 76, U.N. Doc. S/INF/2/Rev.1 (III) (1948); the Korean situation, S.C. Res. 82, 5 U.N. SCOR (473d mtg.) at 7, U.N. Doc. S/INF/5/Rev.1 (1950); and the Rhodesian situation, S.C. Res. 232, 21 U.N. SCOR (1340th mtg.) at 7, U.N. Doc. S/INF/21/Rev.1 (1966). It has never made a determination under article 39 of an “act of aggression.”

40. In fact, it is not clear that the Security Council must make a determination under article 39 before it can invoke provisional measures under article 40. *See* L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 303 (3d ed. 1969). The result has been that the Council rarely specifies whether it is acting under article 40 (and so chapter seven), or articles 34 and 36 (and so chapter six) in making provisional recommendations for a cease-fire. *See id.* at 304-10.

It is, moreover, unnecessary for an adjudication of a Party's Article 51 claims to proceed to judgment for that Party's inherent right of individual and collective self-defense to be impaired. The fact that such claims are being subjected to judicial examination in the very midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment.⁴¹

The I.C.J. rejected this position, finding it not even deserving of an extended reply: "As to the inherent right of self-defense, the fact that it is referred to in the Charter as a 'right' is indicative of a legal dimension"⁴² Legal rights fall within the Court's jurisdiction, even if the particular dispute has "political implications or . . . involve[s] serious elements of the use of force."⁴³

The significance of the U.S. position goes well beyond its misreading of the allocation of responsibilities under the Charter.⁴⁴ This emerges clearly only when the obvious, but unspoken, legal and factual premise of the U.S. argument is made explicit. Unlike the situation before the Court, within the Security Council the United States possesses the right to veto any proposed resolution regarding the international community's evaluation of a claim of self-defense.⁴⁵ Reality cannot be so far divorced from law as to blind one to the fact that for a country that possesses the veto, unilateral determination of its right to use force in self-defense will not differ in any significant way from "assignment" of the issue to the Security Council. The issue of Security Council versus International Court is, for the United States, identical to the issue of unilateral versus multilateral decision-making.

For the United States to say that claims of self-defense are "reviewable" only by the Security Council is to reaffirm the pre-Nuremberg position, made explicit in the reservations to the Kellogg-Briand Pact: the use of force by the United States under a claim of self-defense is not a matter of law at all.⁴⁶ Without a right of third-party review, self-defense

41. Counter-memorial, *supra* note 8, at paras. 517, 519; see also *Hearing Before the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs*, 99th Cong., 1st Sess. 27-28 (1985) (statement of Abraham D. Sofaer, Legal Adviser, Department of State) [hereinafter Sofaer].

42. Jurisdiction and Admissibility, *supra* note 1, at 436.

43. *Id.* at 435.

44. See *supra* text accompanying notes 39-40. The United States completely confused the issue by appealing to the domestic law concept of a "political question." While it may be true that a use of force by the community *outside* of that community falls within the category of "political questions," this certainly is not true of the use of force within the community. A use of force between states is a use of force within the international community.

45. With deliberate irony, the United States characterizes this as simply an unfortunate consequence of the structure of the Security Council, but of no more consequence than the fact that it too is occasionally dissatisfied with outcomes at the Security Council. See Counter-memorial, *supra* note 8, at paras. 512-13.

46. This is true whenever a country with the veto is asserting a claim of self-defense.

remains a matter for the political judgment of the interested party alone. In that situation, the domestic analogy cannot hold.

This position has not only been demonstrated in the voting history of the United States in the Security Council,⁴⁷ but it has also been clearly set forth by the Legal Adviser to the State Department, Abraham Sofaer. In explaining to a congressional subcommittee the U.S. decision to terminate its acceptance of the International Court's compulsory jurisdiction, Sofaer stated:

Mr. Chairman . . . I would hope that you and the other members weigh carefully the national security implications of acceptance of the Court as a forum for resolving use-of-force questions. For example, would the Court be the proper forum for resolving disputes that gave rise to such actions as the Berlin airlift, the Cuban missile crisis, and most recently our diversion of the Achille Lauro terrorists? Each event involved questions of international law. At the same time, however, at stake on each occasion were interests of a fundamentally political nature, going to our nation's security. Such matters cannot be left for resolution by judicial means, let alone by a court such as the ICJ; rather they are the ultimate responsibilities assigned by our constitution to the President and Congress.⁴⁸

Note that Sofaer's position is not that the alternative to the Court is the Security Council. Rather, it is that the alternative to international, third-party review is pursuit of national interests as defined by the domestic agents responsible for protecting and pursuing those interests. Thus, Sofaer implicitly acknowledges the collapse of multilateral review—in the form of Security Council action—into simple unilateralism.

The U.S. position tracks not just Jahrreis's argument on the self-judging character of the right of self-defense, but also his thesis that there is no international community within which legal norms retain a stable meaning and are given force and effect. This argument is clearly stated

47. On each occasion that Nicaragua has sought Security Council action with respect to United States intervention in Nicaragua, the United States has vetoed otherwise unopposed Security Council resolutions. 37 U.N. SCOR (2347th mtg.) at 61, U.N. Doc. S/P.V.2347 (1982); 39 U.N. SCOR (2529th mtg.) at 111-12, U.N. Doc. S/P.V.2529 (1984); see also Reichler & Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder*, 11 YALE J. INT'L L. 462, 471 n.48 (1986). In 1985, the United States moved for a paragraph-by-paragraph vote on a Nicaraguan resolution, vetoing three paragraphs concerning the American "trade embargo and other coercive economic measures against Nicaragua." 40 U.N. SCOR (2580th mtg.) at 123, 127-28, U.N. Doc. S/P.V.2580 (1985); see also *id.* at 136 (comments by Nicaraguan Ambassador Chamorro Mora on the United States' use of three vetoes in one resolution). The rest of the resolution ultimately passed. S/Res. 562, U.N. Doc. S/INF/41 at 14 (1985).

48. Sofaer, *supra* note 41, at 13. This statement disposes of the U.S. argument that what distinguished the *Nicaragua* case from prior cases was that it involved an on-going, as opposed to a past, use of force. The important point for Sofaer is that these are issues for domestic political decision, not for third-party review under a rule of international law. Whether that review is post-hoc or contemporary with the controversial action is irrelevant.

by the Legal Adviser in his further comments on the U.S. withdrawal from the Court's compulsory jurisdiction:

The hopes of 1946 have not been borne out by experience. Currently only 46 of the 161 States entitled to accept the Court's compulsory jurisdiction have done so. . . . No other Permanent Member of the United Nations Security Council except the United Kingdom now accepts compulsory jurisdiction. Neither the Soviet Union nor any other Soviet bloc State has ever accepted compulsory jurisdiction.⁴⁹

Initially, it is not clear why this should be relevant. Compulsory jurisdiction under the optional clause of the Court's statute is, after all, governed by the principle of reciprocity.⁵⁰ The United States, by accepting that jurisdiction, did not subject itself to any asymmetrical obligations *vis-à-vis* non-accepting states.

Sofaer's point is, I believe, deeper. It is substantially the same point made by Jahrreis when he pointed to the withdrawal of Great Britain from the compulsory jurisdiction of the Permanent Court of International Justice in 1939 as indicative of the breakdown of an international community under law.⁵¹ Both Sofaer and Jahrreis are looking to compulsory jurisdiction as itself an indication of the development, or existence, of an international community under law. Instead of developing the adjudicatory institution of the Charter system, the major powers have relied on the Security Council, in which self-interest has priority over community interest. They have, in other words, failed to develop an international order that can give meaning to the concept of a community under law.⁵²

The U.S. position on the jurisdiction of the Court, accordingly, rejects the linkage of state violence and adjudication for two closely connected reasons. First, a decision to defend national interests by resort to violence may not be subject to review by the international community because responsibility for national security is a sovereign function that cannot be "contracted away."⁵³ Second, the international community is

49. *Id.* at 5.

50. On reciprocity, see S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 304-06 (1965).

51. See *supra* note 23.

52. See Merits, *supra* note 1, dissenting opinion of Judge Schwebel, at para. 60 ("[The Security Council] may arrive at a determination of aggression—or, as more often is the case, fail to arrive at a determination of aggression—for political rather than legal reasons. . . . In short, the Security Council is a political organ which acts for political reasons.").

53. This is an international law analogue of the Contract Clause of the U.S. Constitution. U.S. CONST. art. I, § 10. Judicial interpretation of that clause identifies certain core areas of sovereignty with respect to which a state may not enter into a contract that detracts from the state's ability to exercise those functions in the future. In these "core areas" a contract is always *ultra vires* because no government can act in such a way as to reduce the full sover-

not in fact a legal community at all—at least if we use the domestic community as a model—because the international agreements that were to be its foundation have never been given effect. These two points—the self-judging quality of self-defense and the lack of a true international community—continue to inform the view of international law that emerges from an analysis of the U.S. argument on the merits.

I want now to evaluate that argument in two stages. First, I will look at the U.S. position from the perspective of the Charter system: does the U.S. interpretation of article 51 give reasonable force and effect to the purposes and structure of the Charter system? Second, having argued that it does not, I will analyze the significance of the U.S. position within the broader context of the development of modern international law. I will argue that in its consistent rejection of the domestic analogy the United States presents a vision of international law profoundly inconsistent not just with the conclusions of the Nuremberg Tribunal, but also with the general development of international law in the post-war period.

II. Article 51: The Exception Becomes the Rule

The United States contends that the legal category of self-defense authorizes its actions with respect to Nicaragua. Although self-defense has a firm foundation in customary international law,⁵⁴ the concept finds its authoritative, modern expression in article 51 of the U.N. Charter.⁵⁵ Rostow summarizes the thesis: “The United States . . . asserts that its actions against Nicaragua are legally justified under article 51 of the U.N. Charter as actions of collective self-defense against Nicaragua’s unlawful support, since 1979, for guerrilla groups attempting to overthrow the governments of El Salvador and Honduras.”⁵⁶

This appeal to self-defense is necessary because it is the only remaining category of international law under which it is generally accepted that a

eignty of its successors to state power. *See United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

54. The classic formulation of the customary law concept of self-defense occurred in the *Caroline* case. *See* 29 BRITISH AND FOREIGN STATE PAPERS: 1840-41, at 1137-38; and 30 BRITISH AND FOREIGN STATE PAPERS: 1841-42, at 195-96.

55. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-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 maintain or restore international peace and security.

56. Rostow, *supra* note 2, at 438; *see also* Moore, *supra* note 2, at 82.

state may assert a unilateral right to use force.⁵⁷ That right, under article 51, may be asserted only in response to an "armed attack."⁵⁸ Accordingly, if the U.S. action amounts to a use of force in the absence of an authoritative international organization's request, then any claim for its legality must describe some armed attack as the foundation for an exercise of the right of self-defense.

Analysis of the scope of the category of self-defense tells us much about the state of international law, because it is there that the interests of the international community and the individual state meet. The broader the category within which a state may exercise a unilateral right to use force, the more likely it is that the exercise of state violence will escape community control. Accordingly, the broader the category of self-defense, the less the domestic analogy can apply to the international community.

Setting aside the factual controversy over whether, or to what degree, Nicaragua has actually supported the FMLN in El Salvador,⁵⁹ the United States is entering extremely controversial legal territory in attempting to extend the concept of self-defense to the Nicaraguan situa-

57. There is general, although not universal, agreement that "self-defense is the only contemporary legal justification for recourse to force." Farer, *Law and War*, in 3 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 34 (1971). But see J. STONE, *AGGRESSION AND WORLD ORDER* 43 (1958) ("There is . . . no clear legal warrant for reading the Charter and the *travaux préparatoires*, as is sometimes done, as if article 2(4) excluded all resort to force except in self-defense or under the authority of the United Nations, thus excluding these other possibilities.").

58. International law has witnessed a continuing debate over whether self-defense in the post-Charter world is limited to "armed attacks"—the express language of article 51. See *Force, Intervention and Neutrality in Contemporary International Law*, 57 *AM. SOC'Y INT'L L. PROC.* 163 (1963) (statement by Myres McDougal); J. STONE, *supra* note 57, at 92-101; D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 182-99 (1958); J. BRIERLY, *THE LAW OF NATIONS* 413-32 (H. Waldock 6th ed. 1963); L. HENKIN, *HOW NATIONS BEHAVE* 140-45 (1979); I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 270-78 (1963). Much of this debate has focused on the status of "anticipatory self-defense"—the response to an "imminent threat of force," rather than to an actual attack. The Court in the *Nicaragua* case carefully avoided making any statement on this issue, noting that the parties rely on "only the right of self-defense in the case of an armed attack which has already occurred." Merits, *supra* note 1, at 92. Although Moore indicates that he supports a nonrestrictive reading of article 51, he also indicates that this is not an issue in the context of the *Nicaragua* case. Moore, *supra* note 2, at 82-83.

59. On the basis of the evidence available to it, which may or may not have been complete, the Court concluded that:

between July 1979 . . . and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadoran 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.

Merits, *supra* note 1, at para. 160.

tion.⁶⁰ The scope of that controversy is hardly suggested by the ease with which Moore and Rostow appear to move through this terrain.

There are three critical points to the U.S. position on the scope of self-defense under international law. First, third-party support for an indigenous insurgency amounts to an "armed attack" by the supporting state. Second, deciding whether and with what level of force to respond to such an "intervention" lies equally within the authority of each state that may choose to act in self-defense or in "collective" self-defense of the state that is the target of the intervention. Third, action taken in collective self-defense may be "covert" and may include attacks on targets not directly involved in the controverted intervention.⁶¹

A. *Armed Attack or Intervention?*

The essential first element in the U.S. legal position is the proposition that Nicaraguan support for the FMLN constitutes an "armed attack" under article 51. However, neither Moore nor Rostow suggests that the insurgency in El Salvador is merely a covert operation by agents of Nicaragua.⁶² Likewise, the United States does not claim that Nicaragua is covertly sending its own forces into El Salvador or that the FMLN is

60. See, e.g., Farer, *supra* note 57, at 30 ("Precisely what behavior constitutes an 'armed attack,' whether, for example, it includes assistance to guerrillas who are indigenous to the state in which they are operating, is not terribly clear."). The difficulty of extending the category of self-defense to civil war situations is well illustrated in the extensive debate over the international legality of United States participation in the Vietnam war. Much of that debate has been published in the four volume work, *THE VIETNAM WAR AND INTERNATIONAL LAW* (R. Falk ed. 1968).

61. Of these three propositions, the opinion of the I.C.J. rejects the first two and does not reach the third. Thus, the Court held that it "does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support." Merits, *supra* note 1, at para. 93. The Court then went on to hold that "it is the State which is the victim of an armed attack which 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." *Id.*

62. Nicaragua's Application to the I.C.J. made just such a claim with respect to the U.S. relationship to the *contras*. Nicaragua's constant reference to the *contras* as "mercenaries" emphasized this point. The Court summarized Nicaragua's position as follows: "According to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government." Merits, *supra* note 1, at para. 114. The Court did not accept this view of the relationship between the *contras* and the United States. *Id.* at para. 116. In any case, there is a deeper asymmetry between the legal position of the United States and that of Nicaragua: Nicaragua claimed that U.S. involvement in Nicaragua violates article 2(4), which prohibits a "threat or use of force," rather than an "armed attack." The United States, on the other hand, based its legal justification on article 51, which requires an "armed attack." Symmetry would arise only if Nicaragua asserted a right to attack the United States in response to its actions in and against Nicaragua.

simply an "agency" of the Nicaraguan government.⁶³ Under traditional standards, the alleged Nicaraguan actions would be classified as an "intervention" in a civil war.⁶⁴

The international legal norms governing such interventions are unclear.⁶⁵ A number of competing legal categories can arguably be applied

63. The Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1974), includes 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 armed attack conducted by regular forces, "or its substantial involvement therein." *Id.* at art. 3(g). The Court accepted the first half of this paragraph as defining actions that fall within the customary law prohibition on armed attacks, but it failed to consider the scope and effect of the second half—"substantial involvement." Merits, *supra* note 1, at para. 195. The implicit suggestion is that not every act of "aggression" constitutes an "armed attack."

64. This is a point that was thoroughly debated in the Vietnam War literature. See, e.g., Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1137 (1966) ("To call hostile intervention not only impermissible but an instance of the most serious illegality—an armed attack—seems very unfortunate. In addition to a tendency to escalate any particular conflict, the position that interventions are armed attacks so broadens the notion of armed attack that all nations will be able to make plausible claims of self-defense in almost every situation of protracted internal war."); see also Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1068-69 (1967). It is ironic that the United States has developed this theory of an identity between intervention and armed attack in the context of the inter-American system. The O.A.S. was established against a background of a long history of U.S. intervention in the affairs of Latin American countries, the termination of which was one of the objectives of the new organization. The present position of the United States, however, by relying on the O.A.S. Charter's reference to self-defense, finds a license for unilateral intervention of precisely the sort that the Charter was designed to prevent. See Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147, 1158-59 (1967):

It is apparent from its constituent instruments that, in its early years, the post-war inter-American system was primarily concerned with the maintenance by each state of absolute and exclusive authority over its own territory, free of extra-continental or intra-continental intervention. It also seems clear that those who signed the OAS Charter in 1948 did not imagine that the OAS would be empowered to undertake "multilateral intervention" or "collective security action" against a member state of the Organization, except perhaps in the limited instance where a state's non-compliance with the doctrine of non-intervention compelled corrective action by the OAS in order to sustain the doctrine.

65. International law is notoriously vague on the standards under which a state is authorized to use force in a variety of situations. For example, Higgins lists the following claims that have been made to support intervention on the side of an existing government: that armed resistance, mere rebellion or insurgency is taking place; that in the absence of recognition of a state of belligerency arms may be sold to the lawful government; that arms may always be sold to a recognized government; that there exists a treaty obligation to sell arms; that the insurgents are being assisted by third-parties; that another state is assisting the lawful government; that the conflict is occurring within a superpower's sphere of interest; and that humanitarian reasons dictate the necessity of intervention. On the other hand, she lists the following claims in favor of supporting insurgents: that a state is at war with the government which is engaged in the civil war; that support must be given to the right of self-determination; that the insurgents are fighting a war of liberation; that humanitarian or ethnic reasons support intervention; and that major interests of state require the support of the rebels. Higgins, *Internal War and International Law*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, *supra* note 57, at 97-106.

in such circumstances, but the legal consequences of choice among these categories vary dramatically.⁶⁶

Under several of these categories the alleged Nicaraguan intervention might be an authorized use of force. The insurgency in El Salvador, because of the FMLN's effective control of substantial territory within that country, could, for example, satisfy the customary international law norm of a state of "belligerency."⁶⁷ In that case, Nicaragua may have a legal right to pursue a policy of support for the insurgents on the grounds that this is a proportionate "counterintervention" in response to U.S. support for a government fighting a civil war.⁶⁸ Similarly, the human rights abuses in El Salvador—even if one accepts the U.S. view of the present Duarte regime—have been infamous.⁶⁹ The alleged Nicaraguan intervention might accordingly be justified on a theory of "humanitarian intervention."⁷⁰

Thus, it is not clear that the alleged actions of Nicaragua violate international law. Even if there were agreement that they did amount to a delict under international law, it would not necessarily follow that they constitute an "armed attack."⁷¹ To find an armed attack is to find authorization for a military response; it is to extend the use of force to another state and to allow the involvement of third-party states in the violence through the category of "collective self-defense." Packed into a determination that an "armed attack" has occurred are many of the most important functions of an international legal order. It is not a determination that should be made lightly.

66. The I.C.J. carefully distinguished between the categories of "armed attack," to which a responsive use of force is authorized apart from a decision by the Security Council, and an "intervention," which is also a delict under international law, but to which a responsive use of force—especially a collective use of force—is not authorized. See Merits, *supra* note 1, at paras. 195, 211, 228-30 & 249.

67. See 2 L. OPPENHEIM, INTERNATIONAL LAW §§ 126, 297-99 (H. Lauterpacht 7th ed. 1952); Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE (J. Rosenau ed. 1964); Higgins, *International Law and Civil Conflict*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 169 (E. Laird ed. 1972).

68. A right of counterintervention has, for example, recently been defended by Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1642 (1984), and Cutler, *The Right to Intervene*, 64 FOREIGN AFF. 96 (1985). In the absence of a right of counterintervention, it might be the case that a duty of neutrality exists as between the government and the insurgents in El Salvador. See Schachter, *supra*, at 1643. In that case, United States aid to the Duarte government would also be prohibited.

69. See, e.g., AMERICAS WATCH COMMITTEE & THE AMERICAN CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR (3d Supp. July 19, 1983) at 15 ("Since October 1979, [the human rights monitoring office of the Archdiocese of San Salvador] and its predecessor office have tabulated more than 36,000 political murders.").

70. For arguments in support of a right of humanitarian intervention, see works cited *infra* note 165.

71. See *supra* note 66.

Precisely because of the complexity of international legal rights in the civil-war context and the potential for spreading violence, "intervention" in the form of support for one faction has presented one of the most difficult of contemporary international law subjects.⁷² For this reason, it is critical to maintain the distinction between the legal categories of "intervention" and "armed attack." Failure to do so may authorize a use of violence disproportionate to the threat to legal rights. The cure may be worse than the disease.

This does not mean that an "intervention" can never constitute an "armed attack." But the criteria used to determine when an intervention is the "functional equivalent" of an armed attack must be closely examined. Since the conclusion that an armed attack has occurred is the legal condition for a use of violence against the intervening state, these criteria are going to be largely determinative of the level and scope of lawful unilateral recourse to international violence. Both procedurally and substantively, the criteria suggested by the United States would allow the single exception for unilateral resort to violence to undermine completely the rule prohibiting recourse to violence.

B. *Self-Defense and Decision-Making Authority*

While article 51 preserves the right of self-defense against an armed attack in the absence of Security Council action, nothing in article 51—or its counterpart, article 3 of the Rio Treaty⁷³—indicates by whom the determination is to be made that an armed attack has occurred. The answer to this question must be based on an analysis of the broader institutional structure within which international law is given form and effect.

Neither Moore nor Rostow in theory, nor the United States in practice, has demonstrated any sensitivity to the institutional context within which this determination must be made.⁷⁴ Within the Americas, for ex-

72. See, e.g., the essays collected in *LAW AND CIVIL WAR IN THE MODERN WORLD* (J. Moore ed. 1974).

73. Article 3(1) of the Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, at 24, 21 U.N.T.S. 77, 95 [hereinafter Rio Treaty] provides:

The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

74. This can be contrasted with the sensitivity to international institutions that the United States demonstrated in the Cuban Missile Crisis. There the United States was careful not to put the blockade into effect, although it had already been announced, until after the vote in the O.A.S. authorizing such action. See A. CHAYES, I. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 1058-1149 (1969). Moore specifically rejects this analogy and argument. Moore, *supra* note 2, at 107 n.250.

ample, it is essential to recall that the Rio Treaty treats “armed attack” differently from “an aggression which is not an armed attack.”⁷⁵ While article 3 preserves the inherent right of individual or collective self-defense against an armed attack, article 6 provides for collective action through the Organ of Consultation to respond to “an aggression which is not an armed attack.” Thus, the critical decision under the O.A.S. system is whether an intervention constitutes an armed attack or something short of an armed attack. In U.N. Charter terminology, “an aggression which is not an armed attack” might constitute a “use of force” or a “breach of the peace,” neither of which necessarily satisfies the armed attack requirement of article 51.⁷⁶

Article 51 was written with large-scale cross-border attacks in mind: uses of violence in which there is ordinarily little dispute about whether an “armed attack” has occurred.⁷⁷ However, the paradigmatic example of violence in the contemporary world is not Hitler’s blitzkrieg, but precisely the kind of low-level insurgency that we see in Nicaragua and El Salvador. Here, there is likely to be a substantial dispute about the existence and quality of an alleged intervention. The exception created by article 51 will entirely swallow the rule if the permissible use of force depends solely upon a unilateral judgment as to whether alleged third-party support for an insurgency in another state is an “armed attack.” As Tom Franck has written, “the more subtle and indirect the encour-

75. Rio Treaty, *supra* note 73, arts. 3 (referring to an “armed attack”) & 6 (referring to “an aggression which is not an armed attack”). This distinction reflects the same concern as is marked by the U.N. Charter’s distinction between an “armed attack,” in article 51, and “a threat to the peace, breach of the peace or act of aggression,” in article 39.

76. See Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT’L L. 621, 665 (1985) (arguing that to “qualify as legitimate collective self-defense, the United States needs to invoke the Rio Treaty. . . . If indeed illegal Nicaraguan assistance could be demonstrated, then charges could be presented to a convocation of a Meeting of Consultation under article 6 of the Rio Treaty.”). *But see* Moore, *supra* note 2, at 104-05 (responding to Joyner and Grimaldi’s argument).

77. See Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT’L L. 809, 812 (1970):

The great wars of the past, up to the time of the San Francisco Conference, were generally initiated by organized incursions of large military formations of one state onto the territory of another, incursions usually preceded by mobilization and massing of troops and underscored by formal declarations of war. Because it was familiar to them, it was to aggression of this kind that the drafters of Article 51 addressed themselves.

Article 51 was apparently drafted by Senator Vandenberg in response to fears concerning the status of the inter-American System. *See infra* note 80. No definition or explanation of the term “armed attack” occurs either in the records of the Conference or in the private papers of Senator Vandenberg. Given that article 39 specifically refers to “aggression,” as well as the long history of concern with the definition of “aggression,” it is hard to believe that the term “armed attack” was not intended to have a narrower scope than “aggression.” *See* D. BOWETT, *supra* note 62, at 184 n.4; Falk, *supra* note 67, at 228 n.68 (“The architects of the design for the United Nations evidently did not understand that the central peace-keeping tasks of the post-World War II world would require gradually expanding competence to restrain the scale and scope of intrastate violence.”).

agement, the more tenuous becomes the analogy to an 'armed attack'."⁷⁸ The U.S. position would split apart the authorization of state violence in self-defense and the enforcement of legal rights, creating a legal structure in which the authority to use violence exceeds the scope of legal rights among community members.

Nevertheless, both Moore and Rostow insist that this critical decision must be made unilaterally by those countries that are least likely to make it under objective legal norms: the regime—and its allies—that finds itself in the midst of a civil war. As Rostow puts it, "the judgment of the state being attacked is final, unless and until the Security Council takes measures necessary to maintain international peace and security."⁷⁹ For a country that possesses the veto in the Security Council, or is supported in its actions by such a country, this is the same as saying that the unilateral decision of that country is final.⁸⁰

This neglect of institutional structure—the insistence on unilateral decision-making—is coupled with an absence of objective criteria either to inform or to evaluate that decision. The lack of such criteria applies both to the decision to resort to violence and to subsequent decisions regarding the level of violence to employ. With respect to both kinds of decisions, Moore and Rostow resort to the most subjective of criteria: the purpose of the decision-maker.

Of the decision to resort to violence, Rostow writes: "Inevitably, the issue turns on the purpose of the use of force; a lawful use of force affirms legal rights."⁸¹ This contention would have been more appropriate 100 years ago, when international law authorized reprisals—unilateral uses of violence in pursuit of legal rights.⁸² With respect to the Charter scheme,

78. Franck, *supra* note 77, at 812. Franck's analysis of article 2(4) leads him to conclude that "[o]bviously, a rule of law which permits a state to use force whenever it thinks it has been attacked is not much of a rule." *Id.* at 816.

79. Rostow, *supra* note 2, at 455; see also Sofaer, *supra* note 41, at 9-10.

80. Historically, article 51 was designed specifically to preserve freedom of action within the inter-American system, "without endangering the universality of the jurisdiction of the Security Council." Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872 (1947). The fear was that unilateral action of a permanent member of the Security Council—through the exercise of the veto—might block collective action within the inter-American system. While it is ironic that the United States now reads the provision for "collective" self-defense as a vehicle for unilateral action that is insulated from collective review, there is also a certain symmetry to that position. Article 51 did not eliminate the effect of a veto; it simply moved that effect to the opposite side.

81. Rostow, *supra* note 2, at 452 (footnote omitted).

82. See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972). Bowett observes that "[f]ew propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal." Nonetheless, he examines the ways in which "[i]n recent years . . . this norm of international law has acquired its own 'credibility gap' by reason of the divergence between the norm and the actual practice of states." *Id.* at 1.

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Rostow's statement is comparable to a claim that, within the domestic order, a private use of violence is legal as long as it is intended to enforce legal rights. In both the domestic and international legal orders, conventional restraints have substantially restricted the right of a member of the community to pursue violent enforcement of legal rights, whether of its own or another's.⁸³

While it may be true that a "lawful use of force affirms legal rights," it is certainly not the case that every use of force to affirm legal rights is lawful. Rostow's statement completely ignores the institutional form that gives effect to this substantive correlation of rights and remedies. Furthermore, history is strewn with examples of self-interested uses of state violence masquerading under claims of legitimate purpose.⁸⁴

Similarly, Moore's only measure of an "armed attack," the predicate for a lawful, unilateral use of violence, is a "situatio[n] that threaten[s] fundamental values."⁸⁵ Even if we assume that "fundamental values" correspond to legal rights, Moore fails to consider the conventional shape given the right of private enforcement—self-defense—and, like Rostow, fails to consider the institutional structure that surrounds and limits the right of self-defense.

A similar subjectivism appears in Moore and Rostow's analysis of the permissible scope of violence within the category of self-defense. Although Moore argues that the *contras* have attacked shipment facilities in Nicaragua from which material was sent to El Salvador, neither Moore nor Rostow limits violence in the service of collective self-defense to such targets.⁸⁶ Thus, Rostow writes, "there is no prohibition on particular forms of self-defense so long as they are reasonably calculated to end the unlawful use of force that triggered and justified the defensive use of force."⁸⁷

83. Obviously, I reject the restrictive reading of the effect of article 51 on the customary law norm of self-defense. See D. BOWETT, *supra* note 62.

84. At Nuremberg, for example, the defendants argued that the German attack on Norway was justified as anticipatory self-defense. See NUREMBERG PROCEEDINGS, *supra* note 14, pt. 22, at 435-36. Similarly, Italy defended its attack on Ethiopia, before the League of Nations, as action in self-defense. See Statement of Baron Aloisi, Italian delegate to the League, 15th Plenary Meeting (Oct. 10, 1935), LEAGUE OF NATIONS O.J. Spec. Supp. 138, at 102-05 (1935).

85. Moore, *supra* note 2, at 86.

86. Compare this to United States policy on the bombing of North Vietnam. President Nixon stated that U.S. targets were "military sites in North Vietnam, the passes that lead from North Vietnam into South Vietnam, the military complexes, the military supply lines." The President's News Conference of December 10, 1970, 6 WEEKLY COMP. PRES. DOC. 1650, 1651 (1970).

87. Rostow, *supra* note 2, at 453 (referring to attacks on economic and civilian targets, including the mining of Nicaraguan harbors).

Moore defends *contra* attacks on economic targets as attempts to divert the Nicaraguan government, as well as Nicaraguan economic resources, to "internal concerns."⁸⁸ What matters now is the "purpose" of the military action and not the target. Even inconsistent purposes are perfectly permissible. Thus, because the U.S. purpose is only to defend El Salvador, it is not "infected" by the *contras*' purpose of overthrowing the Nicaraguan government.⁸⁹ Similarly, Moore writes of the customary law proportionality requirement: "Most importantly, the *contras*' response meets the test of proportionality, for it has blunted that attack but not yet ended it."⁹⁰ This view amounts to the claim that U.S. actions were proportional because they did not achieve their purpose.⁹¹ That is, the fact that the alleged shipments to the FMLN continue must mean that the U.S. intervention has not yet exceeded the measure of proportionality.⁹²

The process of expansion of the category of self-defense continues in the U.S. position on the operation of the legal category of "collective self-defense."⁹³ As interpreted by the United States, collective self-defense would create a legal right in each of the major powers to extend the use of violence well beyond the immediate conflict. The United States contends that the legal category of collective self-defense shifts to the third-party state—here the United States—all control over, and responsibility for, interventionist decisions once the minimum conditions for a claim of

88. Moore, *supra* note 2, at 72.

89. One wonders how the Nicaraguans are to differentiate between "purposes" in responding to the *contras*. See *infra* text accompanying notes 199-200 (discussion of the "paradox of self-defense"); see also Merits, *supra* note 1, at para. 241 (discussion of the relevance of the *contras*' purposes, even if they diverge from those of the United States).

90. Moore, *supra* note 2, at 107.

91. There has long been a debate over whether the customary law requirement of proportionality refers to the ends for which force is used or the means by which force is used. See, e.g., Farer, *supra* note 57, at 28-30. Moore's argument, and the United States' actions, indicate that their measure of proportionality goes to ends and not means. This suggests that the measure of injury a country may suffer from responsive uses of force will vary not so much with the threat asserted, but with the tenacity with which the threat is supported.

92. Interestingly, neither Moore nor Rostow considers the customary law norm of "discrimination," under which innocent, civilian targets are afforded a level of immunity from attack. See, e.g., J. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 196-204 (1981). The reason for this omission is probably that both seek to defend the mining of the Nicaraguan harbors, an act of force directed primarily against neutral shipping. Such a direct, covert attack on neutrals cannot easily be reconciled with the concept of "discrimination" among appropriate targets. Nevertheless, Rostow labels the mining a "proportional response." Rostow, *supra* note 2, at 454; see also Moore, *supra* note 2, at 87 n.183.

93. The actual phrase "collective self-defense," as a technical term, was an innovation of the Charter. See Kunz, *supra* note 80, at 872-74. On state practice prior to the Charter, see D. BOWETT, *supra* note 62, at 207-15.

self-defense are met.⁹⁴ Thus Moore, reflecting the position taken in the U.S. Counter-memorial at the jurisdictional phase, writes:

[A]ll that is required for collective self-defense is a *general request* for assistance and . . . subsequent to such a request the requested state determines the measures that it may individually take. Thus, El Salvador, which has requested general U.S. assistance in meeting an armed attack against it, is not required to approve each U.S. action such as assistance to the *contras*.⁹⁵

Accordingly, Moore relieves El Salvador of all responsibility for the U.S. decision to intervene violently in Nicaragua. Collective self-defense becomes a general license for a third state to pursue its own conception of appropriate military policy, within exceedingly broad limits. According to Rostow, for example, a U.S. response—based on such a “general request”—could include military action against any government providing support to the FMLN.⁹⁶ Given that the United States alleges a wide range of such support, this would include action against the USSR, Cuba, Vietnam, and a number of Eastern European countries. Such a broad vision of international law’s authorization of unilateral violence reduces the restraints of international law to form without substance. It necessarily shifts the focus from the legal constraint to the substantive norms that translate legal permission to use violence into state policy to use violence.

C. *Covert Action as an Element of Self-Defense*

Finally, the procedural/institutional problems of authorization are exacerbated by the covert nature of the U.S. operation in Nicaragua. The United States, for several years, refused to acknowledge the extent of its involvement in Nicaragua.⁹⁷ Ever since the Vietnam War there has been

94. Historically, there have been three different positions taken on the meaning of collective self-defense in international law. First, any nation is free to respond with force to an armed attack on any other nation. Second, a nation must have some substantial security interest that is threatened by the armed attack on another state before it can respond with a use of force under collective self-defense. Third, only a state that is itself the subject of an armed attack can act with other states similarly threatened in collective self-defense. See Farer, *supra* note 57, at 67. The first position is embodied in formal collective defense arrangements such as NATO and the Rio Treaty. The second position has been defended in M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 251-52 (1961) and L. OPPENHEIM, *supra* note 67, at 155. The third position is that of D. BOWETT, *supra* note 62, at 205-07 and J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 245 (1959).

95. Moore, *supra* note 2, at 104 n.240; see Counter-memorial, *supra* note 8, at para. 82.

96. See Rostow, *supra* note 2, at 453.

97. Despite the fact that the U.S. Administration adopted the policy of intervention in Nicaragua in complete secrecy, carried out that intervention covertly, and initially denied public responsibility for a number of actions for which it was directly responsible—e.g., the mining of Nicaraguan harbors and the attack on oil facilities at Corinto—both Rostow and Moore argue that the U.S. policy of openness places it at a disadvantage with Nicaragua, which is

a vigorous debate within the international legal community over whether "self-defense" in response to an intervention in the form of material and logistical support for an indigenous armed insurgency can extend beyond the territory of the country suffering the civil war.⁹⁸ While the United States has, since Vietnam, defended the legality of extra-territorial response, this is the first instance in which covert action has been linked to self-defense, and, more particularly, to collective self-defense.⁹⁹

The United States would now allow collective self-defense in response to an alleged intervention not only to extend beyond the territory in dispute, but also to take the form of covert military action directed at a range of military, political, and economic targets within the territory of the alleged intervenor. Neither Moore nor Rostow finds this problematic.¹⁰⁰ Nevertheless, successful linkage of these two categories would, perhaps more than any other proposition put forward by the United States, undermine the regulation of force attempted by the Charter system. Claims to covert "enforcement" of legal rights would be just as destructive of the international legal order as they would be of the domestic legal order, where covert uses of governmental violence are associated with illegitimate, repressive regimes.¹⁰¹

Article 51 of the U.N. Charter, as well as article 3 of the Rio Treaty, are exceptions within a system of collective security founded on the concept of collective, institutional regulation of the international use of violence. The decision to use force in self-defense is an exception procedurally as well: it represents an essentially private decision in a collective system within which decisions to use force otherwise are to be made by international institutions carrying out their responsibilities in a

conducting a "secret war" in Central America. See Moore, *supra* note 2, at 102-03; Rostow, *supra* note 2, at 439.

98. See Falk, *supra* note 64, at 1126; Moore, *supra* note 64, at 1073-77; Schachter, *supra* note 68, at 1643.

99. In the mid-1970's, President Ford caused something of a furor when he responded to a question about the legitimacy of covert intervention by the United States in the affairs of other countries as follows: "I am not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that historically, as well as presently, such actions are taken in the best interest of the countries involved." The President's News Conference of September 16, 1974, 10 WEEKLY COMP. PRES. DOC. 1157, 1162 (1974); see *Covert Intervention and International Law*, 69 AM. SOC'Y INT'L L. PROC. 192 (1975).

100. Rostow argues that "[p]ermissible uses of force in self-defense . . . may take as many forms as the impermissible uses of force giving rise to the claimed right to act in self-defense." Rostow, *supra* note 2, at 453; see also Moore, *supra* note 2, at 89-90.

101. The United States Bill of Rights is largely concerned with assuring that authorized uses of violence in defense of legal rights will occur in a manner fully open to public review. Consider, for example, the sixth amendment rights to a "public trial," to confront witnesses and to compulsory process, as well as the fourth amendment warrant requirements, and the fifth amendment grand jury requirement. U.S. CONST. amends. IV-VI.

public forum. Even the self-defense exception of article 51 requires a public reporting to the Security Council.¹⁰²

Claims of self-defense need to be publicly asserted, just as actions in self-defense need to be publicly performed, if there is to be the possibility of a countervailing judgment by the world community.¹⁰³ Public condemnation consequent to public exposure is the chief constraint that a decentralized system of decision-making and authority can have.¹⁰⁴ In the face of a contraction in the jurisdiction of the I.C.J. and an increase in the use of the veto, international law, at least for the immediate future, is likely to be characterized by ever greater decentralization.

Covert actions, however, often are taken primarily to preserve public "deniability." Article 51, in the U.S. view, would thus become a legal vehicle for action without responsibility. A unilateral decision to use violence could be both made and executed secretly. This is no longer a system of public law at all. Accordingly, even if the United States were correct in its allegation that Nicaragua had engaged in an armed attack, it cannot be the case that article 51 allows covert, collective self-defense.¹⁰⁵ To accept that would be to return to the concept of secret alliances and treaty arrangements that characterized international relations at the end of the 19th century.¹⁰⁶

Perhaps the greatest tragedy of the *Nicaragua* case was that the withdrawal of the United States effectively foreclosed the possibility of developing an institutional machinery for determining whether the exception of article 51 properly applies to a particular use of force. In the absence of such a procedure, article 51 becomes a self-judging reservation to article 2(4), at least with respect to any country that exercises a veto in the

102. The United States failed adequately to deal with this point in its contention that it had met the reporting requirement simply by virtue of "discuss[ing] the Central American conflict in the Council," Moore, *supra* note 2, at 90 n.189, when the issue had been brought before the Council by other states. "Discussing" is not the same as publicly taking responsibility by putting forth a legal claim for review by the larger community.

103. See L. HENKIN, *supra* note 62, at 39-87 (on diffuse enforcement mechanisms under international law).

104. See, e.g., Senator Goldwater's reaction to the revelation of U.S. mining of Nicaragua's harbors, 130 CONG. REC. H 2559 (daily ed. Apr. 11, 1984) ("The president has asked us to back his foreign policy . . . [H]ow can we back his foreign policy when we don't know what the hell he is doing.").

105. Moore seems to confuse a covert policy, meaning one designed to permit the denial of responsibility, with guerrilla operations, which are simply nonconventional uses of force. Moore, *supra* note 2, at 89. The latter are not associated with public deniability, although they may be associated with secrecy. Only the former is at issue here.

106. Bismark, for example, entered secret defense treaties with Austria and Rumania. The Franco-Russian Alliance of 1894, the convention which established the sides of World War I, was also a secret document. See G. KENNAN, *THE FATEFUL ALLIANCE* 193-94, 236-37 (1984).

Security Council. In the place of that procedural void, the United States now proposes a system that entirely lacks objective criteria, relying instead on the interested party's subjective purposes and perception of external threats.

III. State Sovereignty and the Strength of the Domestic Analogy

So far, I have analyzed the U.S. interpretation of the scope and breadth of article 51 from an internal perspective—i.e., from the perspective of the structure and purposes of the Charter system. I now want to place this interpretation within the larger context of the development of international law in the twentieth century. That development has been marked by the progressive application of law to war—by the movement away from a system in which every state had a legally unbounded right to pursue its national interests through violence, to one in which war is subject to severe substantive and procedural legal constraints. In general terms, this has been an advance from a system in which the international community was understood on the model of a Hobbesian state of nature, to one in which that community is understood on the model of the domestic analogy. In this section, I explain this development and demonstrate that the U.S. position in the *Nicaragua* case represents a return to that earlier conception of international law.

A. *International Law and the Domestic Analogy*

The domestic model of a community under law includes the following elements: (1) a system of legal rights among the individuals who are members of the community; (2) a prohibition on the private use of violence;¹⁰⁷ (3) authorization of violence solely for the purpose of enforcement of legal rights; and (4) an institutional structure within which the legitimacy of any exercise of violence—the correlation of (1) and (3)—can be measured.¹⁰⁸ While there are other possible models, this is the model of law against which international law has traditionally framed its

107. As will become clear, this is not a prohibition on any use of violence by a private citizen, but rather a prohibition on the use of violence for private ends. See *infra* text accompanying notes 111-14.

108. My enumeration is a matter of convenience rather than principle. What I identify as a separate element in point two, could just as easily be identified as a particular "legal right" within point one—the right to be free from unauthorized violence. This is generally the approach of international law. See U.N. CHARTER, art. 2, para. 4, discussed *infra* at text accompanying notes 138-42.

claim to be law at all, and against which that claim has been measured.¹⁰⁹

The analytic power of this model is not hard to understand. The unregulated use of force is usually understood as a demonstration of the absence of law, often conceptualized as the “state of nature.”¹¹⁰ A community under law is never indifferent to any use of violence among its members. This concern is not the result of some uniquely injurious consequence of violence.¹¹¹ Rather, the community’s concern with violence is a concern with the underlying rule put into effect by violence. Violence is rarely an end in itself. Private violence is a means used in the service of private ends. Private violence is at odds with the concept of community, because it gives effect to a principle of order other than the community’s concept of rights and duties.

The consequence of this understanding of the relationship between violence and community is that every organized political community claims for its governmental institutions a monopoly on the legal right to use violence.¹¹² This does not mean that members of the community will never suffer from violence, but only that each exercise of force must be justified by a legal rule. If the act of force cannot be justified, law gener-

109. I. BROWNLIE, *supra* note 62, is a good example of an approach to international law that adopts this model of law. See, for example, his analysis of whether the traditional doctrine of “self-preservation” is consistent with a “legal order.” *Id.* at 47-48. See also H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 340 (1973):

Should we, however, contrary to the theory of “just war,” refuse to regard war as in principle forbidden and permitted only as a reaction against a delict, we would no longer be in a position to conceive of general international law as an order turning the employment of force into a monopoly of the community. Under these circumstances, general international law could no longer be considered as a legal order.

But cf. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 233-34 (1964) (a model “transplanted from domestic life” does not “fit the international setting”); M. McDUGAL, *STUDIES IN WORLD PUBLIC ORDER* (1960).

110. In the classic political science literature, the “state of nature” was identified both with an absence of law and with an unrestrained use of violence. See, e.g., T. HOBBS, *LEVIATHAN*, 223-28 (C. MacPherson ed. 1968).

111. The socialist critique of a capitalist legal order, for example, relies heavily on the injuries that result from private ownership of the means of production—injuries that may be every bit as destructive as physical violence. McDougal and Feliciano, who derive quite different conclusions from mine, have discussed the interplay between the modalities of coercion and the quality or level of coercion, as well as the relevance of these factors to international law: “Beyond cavil, political and economic pressures may, in some particular contexts, endanger ‘international peace and security and justice’ when they assume such proportions and intensity as to generate a substantial likelihood or need for a military response.” M. McDUGAL & F. FELICIANO, *supra* note 94, at 125 (footnote omitted); see also Higgins, *supra* note 6, at 278 (“What is ‘force’? The first [element] is the *method* of coercion—military, economic, diplomatic or ideological—and the second is the *degree* of coercion involved.” (emphasis in original)).

112. See, e.g., J. LOCKE, *TWO TREATISES OF GOVERNMENT* 366-67 (P. Laslett rev. ed. 1963); T. HOBBS, *supra* note 110, at 227-28.

ally affords a means of redress.¹¹³ The critical point is not the possibility of redress, but that violence is now sanctioned only as a means of enforcement of previously articulated legal rights. A "legitimate" use of violence, then, is one in which the act has been authorized as a means of securing or enforcing a legal right. In Jackson's words at Nuremberg, this is power paying tribute to reason.¹¹⁴

Within the terms of this model of a lawful community, if the international community of states is properly to be spoken of as a community under law, it must regulate the use of violence among its members. Because the international community historically did not meet this condition, it seemed obvious to early political theorists that the international community remained a "state of nature." Hobbes, for example, wrote:

But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbors; which is a posture of war.¹¹⁵

State violence without external regulation implies the implementation of a "private" principle of order that is inconsistent with the concept of an international community of states under law. Without such regulation, "lawful" order can, at best, be nothing more than a coincidence of individual state political judgments of national interest,¹¹⁶ or, at worst,

113. Exceptions to a legal rule may exist without undermining the general validity or force of the rule. In criminal law, for example, we find the doctrine of "excuse," under which it is conceded that an action is wrongful, but nevertheless the actor is not held accountable. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 759-875 (1978). There may also be procedural barriers to the application of a general rule under particular circumstances—for example, procedural rules limiting availability of federal *habeas corpus* review.

The I.C.J. at the merits phase of this case considered this issue:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. . . . [T]he Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

Merits, *supra* note 1, at para. 186.

114. See *supra* text accompanying note 19.

115. T. HOBBS, *supra* note 110, at 187-88. For a contemporary critique of the Hobbesian position see C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 35-50 (1979).

116. An interesting and well-known discussion of this point is found in Aristotle's *Politics*, in which he argues that an organized political community must incorporate a principle of order that is more than geographical proximity and more than simply participating in a private

an order imposed by the command of a powerful state against a weaker. Between these alternatives, the domestic model seemed to offer a vision of a world community that is both richer and more secure.

Transposition of the domestic model to international law gives rise to the domestic analogy. The domestic analogy has the following elements. First, the members of the international community, to whom legal rights attach, are states. Second, a state may not use violence against other states except as authorized by international law. Third, authorization to use violence under international law must be limited to the enforcement of the legal rights of states. Fourth, the community of states will enforce this correlation of legal rights and authorized violence.¹¹⁷

A consequence of the reliance on the domestic analogy as the measure of law was that as long as the international community recognized an unrestricted right to resort to war, the claim of international law to be law was weak at best.¹¹⁸ Recognition of such a right to resort to war implied that the authorization to use violence was far broader than the

law system that protects individual interests. Aristotle, *Politics*, in *THE BASIC WORKS OF ARISTOTLE* 1146 (R. McKeon ed. 1970). A political community is distinguished from a mere aggregate by virtue of its principle of order—justice—and citizens are distinguished from mere residents by virtue of their participation “in the administration of justice, and in [the holding of] offices.” *Id.* at 1177. For a contemporary theory that relies heavily on this notion of the community as introducing a unique principle of order, see R. DWORKIN, *LAW’S EMPIRE* (1985), and the distinction he draws between the “bare community” and the “true community.” *Id.* at 201.

117. Again, my enumeration of the elements is a matter of convenience and emphasis. The clearest and most detailed defense of the domestic analogy is to be found in M. WALZER, *JUST AND UNJUST WARS* 58-63 (1977). Walzer includes six propositions in his description of this model of international law. Although the formulation is somewhat different from my four-fold characterization, the content is essentially the same: 1. “There exists an international society of independent states.” 2. “This international society has a law that establishes the rights of its members.” 3. “Any use of force . . . by one state against the [rights] of another constitutes aggression and is a criminal act.” 4. “Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.” 5. “Nothing but aggression can justify war.” 6. “Once the aggressor state has been militarily repulsed, it can also be punished.” *Id.* at 61-62.

An interesting discussion of the force and place of the domestic analogy in international law can be found in Bull, *Society and Anarchy in International Relations*, in *DIPLOMATIC INVESTIGATIONS* 35 (1966). His analysis in that essay of competing theories of international law differs somewhat from that which I present. But in another essay, *The Grotian Conception of International Law*, *id.* at 51, Bull identifies the two competing theories in terms very close to those that I use in describing the human rights and the state sovereignty approaches to international law.

118. See, e.g., Clive Perry’s description of the intellectual attitude of 19th century European leaders toward international law:

[T]here then obtained a different legal notion of the central problem of policy, namely war The international law of the time condoned, even enhanced, war. This being the case, its elaborate rules on other topics, including the precise manner of carrying out war, were inevitably prejudiced and to a degree necessarily trivial and illogical. And this being the case, the time being one of the gathering of war clouds, these rules merited little attention from those concerned with great affairs.

domain of legal rights among states. While it is imaginable that a society would "recognize" legal rights broader than the structure of the authorization of violence—not every legal right or relationship must be enforceable by an appeal to state sanctioned violence¹¹⁹—it is not imaginable that a society would recognize a structure of authorization that is broader than the structure of legal rights. While the former might be problematic, the latter is a description of either a tyrannical political order, if authorization runs to the institutions of government, or of anarchy, if authorization runs to members of the community. Anarchy among states is the "state of nature."

The traditional way to make this point of a discontinuity between the authority to use force and underlying legal rights—of the inappropriateness of the domestic analogy—was through the proposition that legal rights among states could be changed—terminated or created—by resort to war. This was the standard position, found in all the major treatises, right through the beginning of this century.¹²⁰ This, in turn, meant that those legal rights could not themselves be legitimating norms for the use of violence; they could not be such as long as they were themselves a product of violence.

For this reason, nineteenth century international law distinguished between war, which was held to be "outside" of the legal order, and the use of force "short of war."¹²¹ Within the latter, a series of legal categories developed—e.g., retorsion and reprisal—which were designed to describe and establish the relationship between legal rights and authorized violence.¹²² These were categories by which state violence could, accord-

BRITISH FOREIGN POLICY UNDER EDWARD GREY 91-92 (F. Hinsley ed. 1977), cited in E. Rostow, *Disputes Involving the Inherent Right of Self Defense*, at 8-9 (1986) (unpublished manuscript) (on file with the *Yale Journal of International Law*).

119. The distinction between domestic legal rights and judicial remedies has been the subject of a lively debate recently in the context of remedial measures to correct long-term discrimination against minority groups. See Fiss, *Forms of Justice*, 93 HARV. L. REV. 1 (1979); Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983); Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741 (1985).

120. See I. BROWNIE, *supra* note 109, at 20 and works cited therein ("[T]he right of states to go to war and to obtain territory by right of conquest was unlimited although some qualifications to this position had appeared by 1914. Situations resulting from resort to force were regarded as legally valid . . .").

121. See *id.* at 45:

By perhaps the year 1880 it had become recognized in the practice of states that certain legal conditions were to be observed if resort to force was not to be regarded as creating a formal war. . . . Reprisals, pacific blockade, and various types of intervention appeared as institutions of customary law.

122. *Id.* at 46-48; see also, *The Naulilaa Arbitration* (Ger. v. Port.), 2 R. Int'l Arb. Awards 1011 (1928).

ingly, be legitimated as enforcement of existing rights, rather than understood as the creation of new rights.

To say that the claim of international law to be law was weak is not to say that there were no cogent theoretical explanations of why international law had this character. These theories generally pointed to the sovereign character of the state as itself incompatible with this concept of an international community under law. While the domestic analogy requires that states occupy the same position in international law that individuals occupy in domestic law, this alternative view argues that these two parts of the analogy—states and individuals—are incommensurable. State sovereignty, by this view, has no appropriate analogy within the domestic context.

The state sovereignty argument runs as follows: individuals only have rights within a political/legal community, but states have rights wholly apart from, and prior to, any legally ordered international community. Domestic law is essentially tied to a hierarchical structure that gives meaning to legal rights through the power of enforcement. But there can be no such hierarchy in the international context, because to admit hierarchy is to deny sovereignty. International society is essentially a horizontal relationship of independent state actors making independent evaluations of their own vital, national interests.

I am not concerned with the argument that this simply reflects the inadequate development of multinational institutions with enforcement authority under international law. Rather, the challenge is more basic. Any such hierarchical, international institution would, on this view, be incompatible with the very nature of the state. State sovereignty is an irreducible first principle that cannot permit the development of a supervening legal authority.

One of the best and most influential expressions of this view is that of the eighteenth century Swiss jurist Vattel.¹²³ For Vattel, the domestic analogy is completely backwards. The international community is not analogous to the domestic community; rather, the proper analogy is of the international community to the domestic state of nature. This asymmetry follows from Vattel's understanding of the character of sovereign authority.

Vattel sees the state as a distinct "moral person" with its own set of rights and obligations. The first of these rights is to be "absolutely free and independent with respect to all other men, and all *other* Nations."¹²⁴

123. See generally VATTEL, THE LAW OF NATIONS 53 (J. Chitty ed. 1867).

124. *Id.* at 53 (emphasis in original).

The critical foundation of Vattel's theory follows from the way in which he interprets this concept of independence:

The liberty of that nation would not remain entire, if the others were to arrogate to themselves the right of inspecting and regulating *her* actions; an assumption on their part, that would be contrary to the laws of nature, which declare every nation free and independent of all the others.¹²⁵

Since no nation can judge another, each is free to define for itself exactly what is required of it: "As a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes to her—of what she can or cannot do"¹²⁶ Necessarily, to the extent that two nations adopt conflicting plans, the conflict cannot be resolved by an appeal to a third party—that would violate the essential sovereignty of each. Conflict must be resolved through each state's recourse to those means that it believes, on the basis of its own independent judgment, to be appropriate. In the classic formulation, this amounts to a license to pursue war to defend vital interests.

B. *Conventionalism and the Domestic Analogy*

The growth of international law required the extension of law to war itself, and not just to the conduct of war.¹²⁷ The self-conscious need to take this step in the first part of this century revealed the essentially conventional nature of modern international law.¹²⁸ By "conventional," I mean that international law is founded neither on an abstract theory of moral rights nor on an abstract theory of state sovereignty, but on a set of historical agreements. This conventional character was revealed, for example, in the explicit contrast with Vattel's claim that unrestrained state sovereignty was demanded by the "laws of nature." The conven-

125. *Id.* at 55 (emphasis in original).

126. *Id.* at 58.

127. The application of positive treaty law to the conduct of war developed quickly in the later part of the nineteenth century, starting with the 1856 Paris Declaration Respecting Maritime Law and the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes. DOCUMENTS ON THE LAWS OF WAR 23, 29 (1982). International conferences to consider the laws of warfare were held in Brussels in 1874, Declaration of Brussels, Aug. 27, 1874, *cited in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 194 (L. Friedman ed. 1972) and in the Hague in 1899 and 1907, Hague Conventions of July 29, 1899 and Oct. 18, 1907, *cited in id.* at 204-397.

128. It was not logically necessary that this self-conscious development of international law be understood as an exclusively "conventional" enterprise. For example, Grotius, in the natural law tradition, was self-consciously attempting to move international law to a new level. See generally, GROTIUS, *infra* note 168. Conferences could conceivably have been held to discuss the "natural rights" of states. Despite the logical possibility, historically the need for change made the law itself appear to be a matter of convention.

tional agreements that emerged reflect a unique historical burden—the development of total war in the first half of this century.¹²⁹

The “conventional” nature of modern international law is marked by the abrupt change in its content in the post-World War I period.¹³⁰ That change was first evidenced in a new proposition put forth in the Covenant of the League of Nations: the international community of states is no longer indifferent to any use of violence among states.¹³¹ Of course, having made the founding declaration of a community under law, the League proceeded to demonstrate just the sort of indifference to state violence that had characterized the previous international order.¹³² The international community under law soon gave way to the community at war.

Despite the practical failure of the League, the subsequent development of international law continued to reflect the unique history of state violence in this century. The experience of modern war led states to accept conventionally defined constraints on their traditional freedom to

129. Such conventional agreements need not be formal—e.g., treaties; they may instead be “customary.” On the sources of customary international law, the I.C.J. has recently written:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 29-30 (Judgment of June 30).

130. Sir Hartley Shawcross, the British prosecutor at Nuremberg, described this change as follows:

These repeated declarations, these repeated condemnations of wars of aggression [after World War I], testified to the fact that with the establishment of the League of Nations, with the legal developments which followed it, the place of war in International Law had undergone a profound change. War was ceasing to be the unrestricted prerogative of sovereign states.

NUREMBERG PROCEEDINGS, *supra* note 14, pt. 2, at 49.

131. The formal declaration of this change in international law is found in article 11 of the League of Nations Covenant: “Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.”

132. Among the numerous instances of state violence in the period following World War I, the League took formal punitive action in response to a state use of force only once. That one instance was Italy’s attack on Ethiopia. Even in that case, the League declined to invoke the one sanction—an oil embargo—that would have had a dramatic effect on Italy. See Spencer, *The Italian-Ethiopian Dispute and the League of Nations*, 31 AM. J. INT’L L. 614, 625 (1937). That failure was compounded by a failure of the principle of non-recognition—the Stimson Doctrine—under which an “illegal” use of force would not be allowed to alter or create legally cognizable rights. Stimson Note to Governments of Japan and China (Jan. 7, 1932), 1 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES—JAPAN: 1931-1941, at 76 (1943). Despite the League’s actions against Italy, ultimately the League effectively recognized the Italian annexation of Ethiopia. See R. LANGER, SEIZURE OF TERRITORY 134-36 (1947).

use force in pursuit of vital national interests.¹³³ Thus, the first principle of modern international law has become the general prohibition on the unilateral use of violence.¹³⁴ This principle emerged out of the Covenant of the League and the Kellogg-Briand Pact—treaties consciously entered into with the purpose of terminating the nineteenth century principle that international law did not speak to the decision of a state to resort to war. The principle was carried forward and fully developed in the U.N. Charter system.¹³⁵

This conventionalism in international law has been understood as the historical realization of the mythical social contract in domestic law.¹³⁶ Perhaps this is a consequence of an identification of the total character of modern war with the state of nature. More likely it is a consequence of the effect on the legal imagination of certain domestic political theorists—Hobbes and Locke in particular—who clearly identified pre-modern international society and the state of nature. In any case, the identification is seen vividly in the force that the domestic analogy has had on the international legal imagination, particularly in the construction of modern international legal institutions.¹³⁷ An examination of the

133. See, e.g., Bull, *The Grotian Conception of International Society*, in DIPLOMATIC INVESTIGATIONS, *supra* note 117, at 55:

The League of Nations Covenant, the Paris Pact and the United Nations Charter all reject the older doctrine of an unqualified prerogative of states to resort to war; and all present war as something which can be legitimate only when it is the means by which the law is upheld, whether such war is undertaken on the independent decision of particular states or on the authority of bodies, such as the United Nations Security Council, deemed to represent the society of nations as a whole.

134. Henkin, for example, speaking of the U.N. Charter's prohibition of unilateral use of force, has written that "[t]he Charter contains little else of a general normative character, as distinguished from obligations to obey or cooperate with U.N. organs." L. HENKIN, *supra* note 62, at 136 n.*. The International Law Commission has expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." Report of the International Law Commission to the General Assembly, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

135. By the "Charter system" I refer to the entire post-war system of international law organized around the Charter. Thus, it includes the Charter of the Organization of American States and the Rio Treaty, which are of particular relevance in this context.

136. The explicit connection between domestic law state of nature theories and international relations had been drawn by Locke:

'Tis often asked . . . *Where are, or ever were, there any Men in such a State of Nature?* To which it may suffice as an answer . . . That since all . . . Rulers of *Independent Governments* . . . are in a State of Nature, 'tis plain the World never was, nor ever will be, without Numbers of Men in that State. I have named all Governors of *Independent Communities*, whether they are, or are not, in League with others: For 'tis not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing together mutually to enter into one Community, and make one Body Politick.

J. LOCKE, *supra* note 108, at 317 (emphasis in original).

137. The appeal to the domestic analogy which I describe must be distinguished from the appeal to the U.S. domestic law doctrine of separation of powers. The United States relied

basic structure of the U.N. Charter system reveals the close connection between modern conventionalism and the appeal to the domestic analogy.

The Charter represents a conventional undertaking by which states recognize legal rights that attach to each other in a reciprocal, mutual creation of the international community.¹³⁸ The first of these rights is the right to be free from the use of force against the state's "territorial integrity and political independence."¹³⁹ The Charter declares that the community of states, by claiming a right to intervene in any act of violence between states, is no longer indifferent to such acts.¹⁴⁰ Such a declaration of concern is necessary if the conventionally established community is to maintain itself as a community under law within the framework of the domestic analogy.

Alongside this system of rights, the Charter establishes a system authorizing the use of force. As in the domestic community, authorization extends to both community enforcement institutions and to individual members, under specified substantive and procedural conditions.¹⁴¹ Finally, it establishes institutions—the Security Council and the International Court of Justice—which can measure the exercise of authorized violence against the legal rights of states as members of the international

heavily on the latter at the jurisdictional phase of the case, particularly on the U.S. "political question" doctrine, which imposes limits on judicial competence as a consequence of the institutional separation of powers under the U.S. Constitution. On the problems of transposing this doctrine from domestic courts to the International Court, see Chayes, *supra* note 36.

138. See U.N. CHARTER art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members."). Farer has identified this condition of reciprocity as a key element of the customary law on force: "A powerful state would not intentionally impose limitations on its freedom of action which were not accepted by all its peers. An apparent corollary assumption was that state acceptance of customary obligations was conditioned on reciprocal behavior by other leading states. The obligation terminated when reciprocity ceased." Farer, *supra* note 57, at 19.

139. U.N. CHARTER art. 2, para. 4. This is the core right established by the Charter, but it is not the only right. As a constitutional document, the Charter is primarily concerned with establishing procedural rights within the institutions of the United Nations. Most other substantive rights are derived from the decision-making processes of those institutions.

140. The opening sentence of the Charter makes this absolutely clear: "*We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war . . .*" U.N. CHARTER Preamble (emphasis in original).

141. See U.N. CHARTER ch. VII ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"). That chapter authorizes the Security Council to "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security." *Id.* at art. 42. It also authorizes, at least in the sense of carrying forward, "the inherent right of individual or collective self-defence if an armed attack occurs." *Id.* at art. 51. In addition, chapter eight ("Regional Arrangements") has been interpreted to allow regional arrangements of states to engage in the collective use of force. See Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963) (discussing O.A.S. action with respect to the U.S. quarantine of Cuba during the missile crisis).

community.¹⁴² Thus, conventionalism and the domestic analogy are essentially intertwined in contemporary international law.

C. *The Charter and the Domestic Analogy*

While the ideal of the domestic analogy served as the theoretical basis for the Charter system, the political reality was such that the Charter did not bring forth a *complete* legal system as measured by the domestic model. Within that model, a legitimate use of violence is one in which force is authorized as a means of securing legal rights. Those rights must be defined apart from the exercise of violence—the right cannot simply be a right to use force—or else legitimacy and authority collapse.¹⁴³ One of the weaknesses of the Charter, however, is a residual ambiguity in the relationship between the legal authorization to use force and legal rights.

Rights and authorization are linked in the first stated purpose of the United Nations set forth in article 1(1): “to take effective collective measures for the . . . suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment of international disputes.” But the Charter’s further specification of legal rights and authorization of state violence marks a possible divergence of the two. This is dramatically marked by the Charter’s failure to use identical language in describing rights and authorization.¹⁴⁴

142. That the Security Council may evaluate any state exercise of violence under a claim of right is clear from the text of the Charter itself. See U.N. CHARTER art. 39. That the International Court of Justice is also authorized to evaluate the legality of a claim of right to exercise state violence was one of the conclusions of the International Court of Justice at the jurisdictional phase of the *Nicaragua* case. See Jurisdiction and Admissibility, *supra* note 1, at 434-36.

143. For an interesting discussion of this point, see G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 112-16 (1981). Wills argues that the theory of separation of powers for Madison was not fundamentally about institutional structure and separation of agencies: “The doctrine . . . was not meant to address the practical problem of keeping powers limited and separate but to see why, in theory, the very legitimacy of a regime depends on their separation. It does not speak to matters of fact but moves in the order of right.” *Id.* at 112-13.

144. The majority opinion of the International Court of Justice and the dissent of Judge Schwebel illustrate the potential for disagreement on the relationship between chapter seven—specifically article 51—and chapter one—specifically article 2(4). The majority held that not every use of force prohibited by article 2(4) satisfies the “armed attack” requirement of article 51. Thus, a use of force may amount to an illegal intervention, but nevertheless not authorize a violent response under article 51. See Merits, *supra* note 1, at para. 211. Judge Schwebel, on the other hand, implied that a state may defend itself—singly or collectively—under article 51 against any use of force that violates article 2(4). *Id.*, dissenting opinion of Judge Schwebel, at paras. 154-73 (arguing that support for insurgents violates article 2(4) and accordingly permits a responsive use of force in self-defense). Thus, for Schwebel, the authorization to individual states under article 51 approaches the scope of authorization to the collectivity—the Security Council—under articles 39-42. See also Farer, *supra* note 57, at 32-36 (discussing the difficul-

Article 2(4) declares that the essential legal right of a state as a member of the international community is to be free "from the threat or use of force against the [state's] territorial integrity or political independence." The authorization of the use of force in the Charter, however, refers to no such right. The Security Council is authorized to use force in response to "any threat to the peace, breach of the peace, or act of aggression"—article 39—and members are authorized to use force in self-defense against "armed attack"—article 51.¹⁴⁵

This difference in language marks a difference in institutional arrangements as well.¹⁴⁶ Under the Charter system, the declarative function, the articulation of legal rights, is performed primarily by the International Court of Justice and the General Assembly.¹⁴⁷ Both of these institutions

ties of reconciling articles 2(4) and 51 and concluding that "the proposition that self-defense is necessarily compatible with Paragraph 4 seems to fall well short of being a truism").

145. More precisely, members are authorized to exercise self-defense in response to an armed attack "until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51. Neither text nor practice makes clear who is to decide that the Security Council has satisfied this condition for the termination of the right of self-defense. Secretary of State Dulles, testifying in 1954, when asked who decides when the Council has taken such "necessary" measures, stated that "the determination as to that adequacy . . . would be ours to make." L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 40, at 352. Goodrich, Hambro and Simons comment on this statement as follows: "It is not clear whether he meant that every nation had that right, or that as a practical matter, the veto power would not permit the Security Council to take a decision with which the United States disagreed." *Id.* But see H. Kelsen, RECENT TRENDS IN THE LAW OF THE UNITED NATIONS 927-28 (1951) (Security Council action under article 51 "terminate[s] the exercise of the right of—individual or collective—self-defense," and requires that states "act only in conformity with the measures that the Security Council took.").

146. One common method of reconciling the Charter's description of legal rights with its authorization of the use of force is to argue that the "armed attack" clause of article 51 does not operate as a substantive condition limiting the right of self-defense. See works cited *supra* note 58. My own view is that reconciliation requires a synthetic understanding of the institutional authorization of violence—that the authorization of self-defense is narrower than the authorization that runs to the Security Council, and perhaps to regional organizations. The reconciliation of rights and authorizations was to occur in the development of the substantive norms under which these collective institutions would act, and not in individual action to defend legal rights. See, e.g., Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9) (condemning unilateral intervention in defense of legal rights).

147. Unlike the domestic law system, international law does not recognize a legislative institution with the authority to create legal rights. Rather, international legal rights emerge either through a course of practice—custom—or through *ad hoc* arrangements that are authorized to bind states—positive law. The latter include not just treaties negotiated directly by the parties, but also those peaceful dispute-resolution mechanisms that states may agree to use. See U.N. CHARTER ch. VI. The I.C.J. operates in this category of consensual resolution of individual disputes. Thus, article 36 of chapter six specifically mentions the Court as the appropriate, but not the sole, forum for resolving legal disputes. The operation of the political organs of the United Nations, on the other hand, plays a role in the clarification and formation of customary law by formulating legal standards around which states may organize their practice and expectations. See Higgins, *The United Nations and Lawmaking: The Political Organs*, PROC. AM. SOC'Y INT'L L. 37, 38-39 (1970). But see J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969) (differentiating among kinds of resolutions and their legal effects).

are majoritarian; in neither do the major powers have a veto. On the other hand, the decision to use violence—under either article 39, which requires agreement within the Security Council, or article 51, which requires individual or collective judgments on an *ad hoc* basis—allows for the maximum expression of political self-interest. The relationship between political decisions to use force and the system of legal rights may be highly problematic; the Charter left the link between chapter one on principles and purposes and chapter seven on enforcement largely to future development.¹⁴⁸ But the institutions that could assure a correlation of rights and authorization—the I.C.J. and the Security Council—had structural weaknesses that made principled development difficult: the Court did not have compulsory jurisdiction and the Security Council permitted the permanent member veto.

The *Nicaragua* case was located squarely on this fault line in the Charter system. This was already apparent at the interim relief phase of the case. To construct its claim, Nicaragua seized on the concept of the judicial function within the domestic analogy. That function, as I argued above, is to insure the structural correlation between legal rights and the authorized use of violence. This model suggests that the Court is the preeminent legitimating institution within the international community, a point argued by the Nicaraguan Agent:

In conclusion . . . let me say that in trying to find a peaceful solution to this situation, Nicaragua has used all the diplomatic channels open to it. . . . Our latest attempt was in the Security Council of the United Nations. The resolution proposed by Nicaragua condemned the mining of our ports and called on all States to refrain from carrying out, supporting or promoting any type of military action against any State of the region. . . . The only negative vote was cast by the United States itself, which exercised its veto power. Today we have come to knock on the Court's door, searching and hoping for justice. We have come searching, not for armaments or troops to defend us, but for the moral support of the highest legal authority in the world.¹⁴⁹

The United States rejected this institutional role of the Court at the jurisdictional phase, noting that never before had a country brought an

148. There were three possible futures: first, that political decisions would be used to intervene in violation of international legal rights; second, that political decisions would be used to enforce state's rights under international law; and third, that there would be a failure to reach political decisions at all, and thus a failure of enforcement. The second alternative has, unfortunately, turned out to be the most neglected.

149. 1984 I.C.J. Pleadings (Verbatim Record, uncorrected), CR 84/8, Apr. 25, 1984, at 25-26. This model of the Court's function made it highly unlikely that the Court would decline jurisdiction.

ongoing use of violence before the Court.¹⁵⁰ It argued that the authorization of force under international law, including the Charter, has a non-justiciable relation to legal rights. In the U.S. view, the two have split apart; or, perhaps more accurately, the Charter never succeeded in bringing them together.¹⁵¹

Similarly, the merits phase placed the dispute squarely on this fault line of the Charter system. The dispute on the merits raised the question of the relationship between the legal right to be free of force established in article 2(4) and the authorization to use force in article 51. Thus, Nicaragua opened its application with an appeal to the core legal rights of a state within the contemporary system of international law: "[T]he United States 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."¹⁵² The United States responded that the controverted use of force was authorized by international law under the category of self-defense.¹⁵³ Thus, the merits phase raised precisely the question of the relevance of the domestic model of legitimacy under which the private use of violence is authorized only within a narrow scope, limited to the enforcement of a specified set of legal rights under a narrow set of circumstances.

We are now in a position to understand the significance of the United States interpretation of the scope and effect of collective self-defense under article 51. For the United States, article 51 has become the textual vehicle through which the Vattelien image of state sovereignty has reentered international law.¹⁵⁴ This is an image of a sovereign that cannot submit its evaluation of the national interest—which it is prepared to pursue by force—to a hierarchy of legal regulation by the international

150. The United States found a ground of inadmissibility in the novelty of the claim. The United States argued that the Court was not equipped to carry out the fact-finding required of the judicial function in this context, Counter-memorial, *supra* note 8, at paras. 522-30, and that past practice and the structure of the Charter made clear that this was a subject matter "specifically committed to other modes of resolution by the Charter." *Id.* at paras. 444-92.

151. Interestingly, the United States invoked the domestic doctrine of separation of powers and the specific subsidiary doctrine of nonjusticiable political questions as the framework for its rejection of the domestic analogy at the jurisdictional stage. On the difference between the domestic analogy and use of the domestic doctrine of separation of powers, see *supra* note 137.

152. Application of Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings (Application dated Apr. 9, 1984), at para. 1.

153. The United States summarized the importance of this case to the Court's jurisprudence as follows: "[I]t is the first time that a State engaged in armed aggression against its neighbors has sought to use the Court as a means of preventing another State from going to the assistance of those neighbors pursuant to the inherent right of individual and collective self-defense." Counter-memorial, *supra* note 8, at para. 6.

154. See *supra* text accompanying notes 124-26.

community. It is a state that is by definition always free to pursue its vital interests as it alone perceives them. It must maintain such freedom because it lives within a state of nature in which obeying the rules could only disadvantage it as other states take advantage of its acquiescence. This "state of nature" is not a flaw or weakness in the international order; rather, it is the essence of that order.

Of course, the United States does not say this outright; it wants to maintain the appearance of adhering to the conventional legal norms as they have developed in the post-war period. But that entire system was founded on a vision of the maximum collective control of force, not the minimum. It was founded on a minimization of state authority to pursue its objectives unilaterally through force. It was designed to eliminate, not carry forward, the Vattelien image of state sovereignty. In the *Nicaragua* case, however, the United States appeals to the formal language of the Charter to pursue its interests through a use of violence completely beyond the control of the international community.

The U.S. defense of a virtually limitless authorization for unilateral decisions to use force represents a breakdown in the conventional international law system founded on the prohibition of unilateral resort to interstate violence. Contemporary international law no longer asks whether violence will be employed, but toward what end it will be used: how will the modern superpower define its self-interest? This is the significance of the Reagan Doctrine, and before that of the Carter Doctrine and the Brezhnev Doctrine as well. Without effective international law norms, we seek some notice, from the superpowers themselves, of the areas of risk.

IV. The Relevance of Human Rights

The appeal to the purpose of state-initiated violence links the arguments concerning the scope and application of article 51 to a still unexamined aspect of the U.S. position in the *Nicaragua* case: the repeated reference by the United States to alleged human rights abuses by the Nicaraguan government. The United States included such allegations in its Counter-memorial at the jurisdictional phase of the case, and Moore devotes considerable attention to these issues in his defense of the U.S. legal position.¹⁵⁵ Once article 51 has been interpreted to create "a wide-open invitation to the great powers to engage each other in limited wars fought vicariously on borrowed terrain and with others' lives,"¹⁵⁶ the relevant

155. See *id.* at paras. 215-19; Moore, *supra* note 2, at 49-52, 117-25.

156. Franck, *supra* note 77, at 818.

issue is the ideology for which each side contends. If that is the situation we confront, then a genuine commitment to human rights might be a step forward.¹⁵⁷ In this section I explore the meaning of this barely emerging human rights theme in the *Nicaragua* case.

There is, of course, nothing new about representatives of the United States accusing the Nicaraguan government of human rights abuses. The publicly stated policy of the United States—especially as articulated by the President—relies heavily on such allegations as a ground for U.S. support for the *contras*.¹⁵⁸ While this may be a consideration in the formulation of U.S. foreign policy, these claims about Nicaraguan domestic policy do not fit easily into a legal argument in support of the U.S. use of force against Nicaragua.¹⁵⁹

The legally problematic character of this material leads Moore to introduce his account of alleged human rights abuses by the Nicaraguan government with a disclaimer: “[T]he Sandinistas’ repeated offenses against native populations, organized labor, the Catholic Church and other groups in Nicaraguan society violate important international human rights guarantees. Nevertheless, with respect to the [U.S.] use of force, the ongoing Cuban-Nicaraguan armed aggression is solely determinative.”¹⁶⁰ In a footnote he adds that “although some scholars support a right of humanitarian intervention, I believe that the core issue in the Central American conflict is aggression and defensive response.”¹⁶¹

157. I do not mean to suggest that the U.S. position in Nicaragua reflects a “genuine” commitment to human rights. I would welcome a serious debate on which human rights should be defended by violence. For an interesting reflection of the place of human rights in the U.S. legal position in this case, and a similar plea for such a debate, see D’Amato, *supra* note 5.

158. See N.Y. Times, June 17, 1986, at A3, col. 4.

159. The I.C.J. said the following about the place of allegations of human rights violations in the U.S. legal argument:

[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. . . . [T]he protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

Merits, *supra* note 1, at para. 268.

160. Moore, *supra* note 2, at 49 (footnotes omitted).

161. *Id.* at 49 n.21. Traditionally, “humanitarian intervention” referred to the use of force within the territory of another state for the protection of nationals of the intervening state. See D. BOWETT, *supra* note 62, at 87-105; Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); Bowett, *Intervention in Self-Defense*, in LAW AND CIVIL WAR IN THE MODERN WORLD, *supra* note 72, at 38, 44-45. The concept has, however, recently been expanded to include intervention to protect foreign nationals against their own

Although the "core issue" is not normally the "exclusive" issue, Moore's only explicit reason for introducing the human rights material is "to provide an understanding of the full context" of the threat "to world order in Central America."¹⁶² This suggests more than might at first appear since Moore—as well as Rostow—believes that international law must incorporate a "world order" perspective.¹⁶³ Moore's conclusion, for example, explicitly links the world order and legal order perspectives: "[T]he secret war in Central America," he writes, "illustrates the danger to world-order—and to the legal order itself—posed by the assault of radical regimes."¹⁶⁴ Thus, while Moore indicates that his legal case need not rely on this concept of humanitarian intervention, the amount of attention he gives to the issue and his general normative perspective suggest otherwise.¹⁶⁵

The Court too noted, in several places, this ambiguous appeal to a "human rights" perspective in the U.S. position:

United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, [and] its ideology. . . . But these were statements of international policy, and not an assertion of rules of existing international law. . . . [T]he United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances.¹⁶⁶

Apparently, the United States is relying on a legal argument that fails to capture what it simultaneously portrays as an essential political

government. See works cited *infra* note 165. This is the sense in which the human rights issue is relevant in the Nicaraguan context.

162. Moore, *supra* note 2, at 48.

163. See, e.g., the discussion of the normative role in international law of a "world public order embodying the values commonly characterized as those of human dignity in a society of freedom and abundance," in M. McDUGAL & F. FELICIANO, *supra* note 94, at 10-11.

164. Moore, *supra* note 2, at 125; see also Rostow, *supra* note 2, at 439 ("The dispute as to events in Central America and the law applicable to them thus has greater significance than the outcome of a particular lawsuit, however important. It involves persistent, unresolved conflicts over the rules underlying world public order and the application of those rules.").

165. The academic, legal argument over a right of humanitarian intervention is illustrated in the dispute between Brownlie, who opposes any such right, and Lillich, who supports it. See Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD, *supra* note 72, at 217; Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *id.* at 229; see also Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L. L. 275 (1973); D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L. L. 385 (1985).

166. Merits, *supra* note 1, at paras. 207-08; see also *id.* at para. 266.

ground for its policy. But there is, I would suggest, a certain spillover of the political position into the legal position. To understand the significance of this spillover requires that we first look at the deeper structure of the two kinds of claims: self-defense and humanitarian intervention.

A. *The State and the Individual as Bearers of International Legal Rights*

By itself, the concept of “self-defense” suggests that every state may defend itself under an equally valid legal title. The normative force of the concept rests on the proposition that every community is entitled to determine its governance and legal order apart from violent coercion from outside of that community.¹⁶⁷ Thus, article 51 speaks of an “armed attack” as the only factual predicate for an assertion of self-defense.¹⁶⁸ Every state that is subject to such an attack may rely on its “inherent” right to defend itself and to call on other members of the international community to come to its support. Because the concept of self-defense does not itself distinguish between legitimate and illegitimate regimes, it is ideally situated to expose the tension between those approaches to international law that focus on the individual and those that focus on the state as the basic holder of rights within the international community.

167. For an elaboration of the moral foundations of this presumption, see, Walzer, *The Moral Standing of States*, in *INTERNATIONAL ETHICS* 217, 220-24 (1985). Even Walzer, who strongly defends as a “morally necessary presumption” the right of a state to resist outside intervention, acknowledges that there are certain narrow “rules of disregard” in which intervention is legitimate and self-defense, accordingly, is not. See M. WALZER, *supra* note 117, at 89-108. The fact, of course, that a state is presumptively entitled to defend itself as a matter of international law says nothing about whether it is entitled to receive, as opposed to request, the help of others in defending itself, or even whether it is entitled to the aid of its own citizens in that defense.

168. Article 51 does not distinguish among the purposes for which that attack may have been mounted. Nevertheless, a legal use of force against a state presumably preempts any claim of self-defense as a basis for resistance. Thus, an “armed attack” must necessarily constitute a violation of article 2(4), even though it is not the case that every violation of article 2(4) constitutes an “armed attack.” Article 2(4) prohibits any “threat or use of force” against the “territorial integrity or political independence” of a state, or in any manner “inconsistent with the purposes of the United Nations.” Arguably, however, even a legally authorized use of force can transgress the limits of proportionality and necessity, and thus itself become a delict under international law—a point already made by Grotius:

[T]he case may arise in which there may be a just defence of subjects who engage in a war that is not merely doubtful but obviously unjust. For since an enemy, although waging a just war, does not have the true and perfect right of killing innocent subjects, who are not responsible for the war . . . it follows that, if it is certain that the enemy comes with such a spirit that he absolutely refuses to spare the lives of hostile subjects when he can, these subjects may defend themselves by the law of nature, of which they are not deprived by the law of nations.

GROTIUS, *THE LAW OF WAR AND PEACE* 595 (F. Kelsey trans. 1925).

The domestic analogy has been challenged historically not only by the Vattelian image of state sovereignty, but, equally importantly, by a moral vision that understands states as artificial, geographical units of no necessary moral—and therefore no necessary legal—significance.¹⁶⁹ On this view, the analogy cannot hold because states do not stand in the place of individuals within the international community; rather, only individuals have rights. States are no more than artificial aggregations of individuals. Any rights these artificial entities may have are entirely derivative from, and a function of, the underlying community of individuals. Those individual rights—human rights—must be the basis of the international community, in exactly the same way that they must be the basis of the domestic community.

Human rights theorists thus challenge the analogy between the domestic and international community by asserting that there is only one relevant community—that defined by relationships resting on human rights that accrue to individuals. The international community is not something separate from the domestic community. These are simply different geographical divisions of a single, morally relevant entity.

The human rights challenge to the domestic analogy is not a recent innovation.¹⁷⁰ Rather, the concept of international law has deep roots in this cosmopolitan notion of human rights. One way to generate an international, as opposed to a national, legal order is to deny the relevance of state boundaries to legal obligations.¹⁷¹ One way to do that is to identify legal and moral obligations. Grotius, writing in 1625, took just this view of the foundation of international law.

169. A third challenge focuses on the inadequacy of enforcement mechanisms under international law. I do not consider this challenge, because nothing automatically follows as to the appropriateness of the domestic analogy from the factual observation that international law-enforcement mechanisms are in a primitive state. This condition can be taken either as a practical problem to be cured by a greater effort to create effective institutions or as a necessary feature of the international legal order that will always undermine the domestic analogy. The choice between these positions cannot be made by appeal merely to the factual observation of the present inadequacy of enforcement institutions.

170. For an interesting exchange on the adequacy of the domestic analogy in the face of the human rights critique, see the debate between Luban and Walzer reprinted in *INTERNATIONAL ETHICS*, *supra* note 169, at 165-243.

171. Human rights theorists in international law are the theoretical descendants of early just-war theologians. Human rights theories emerge naturally out of a theoretical view of the transnational character of religious rights and duties. Grotius is the key link between the pre-modern, religious perspective on international legal obligations and the modern international legal concern with human rights. See *infra* notes 172-80 and accompanying text; see also Kennedy, *Primitive Legal Scholarship*, 27 HARV. J. INT'L L. 1, 77 (1986) ("[I]n secularizing the primitive vision of a world-wide normative order, [Grotius] emphasizes those aspects of doctrine which define and limit sovereign authority rather than developing theoretical elaborations of the international divine and natural order.").

For Grotius, international law would have a firm foundation only if it could be shown that the proposition "might makes right" in international affairs was not consistent with the "law of nature." By this he meant that such a Machiavellian policy orientation must be demonstrated to be inconsistent with a fair understanding of human nature. The demonstration that he offered starts from the premise that the essence of human nature, its unique, distinguishing characteristic, is "an impelling desire for society, that is, for the social life."¹⁷²

It is a necessary aspect of human nature, accordingly, that men exist in and sustain a peaceful community. Those principles necessary for the maintenance of that community are, therefore, "laws of nature." From this it follows that the defense of those principles is just, and action inconsistent with those principles is unjust. Power is thereby subordinated to reason; there is an objective measure for the just exercise of power.

Grotius develops this theme in extraordinary detail. But the main features of the system emerge even from such a short summary.¹⁷³ First, international law is not discontinuous with domestic law. Rather, both are parts of the same system, because both are founded in the essential character of the individual.¹⁷⁴ Second, all states are bound by this system of rights and obligations: the moral foundation of the system guarantees its universality and prohibits any state from "opting out."¹⁷⁵ Third, no state can justly impose obligations upon its own members that are inconsistent with these fundamental moral precepts, because the state has no authority apart from this system of rights.¹⁷⁶ Fourth, the state has no special relationship to its own citizens, because the moral claims of every individual are exactly the same. Consequently, humanitarian interven-

172. GROTIUS, *supra* note 168, at 11; see also Kennedy, *supra* note 171, at 79 ("Natural law [for Grotius] is derived from an Aristotelian drive towards sociability which manifests itself in rules necessary for the fulfillment of this human condition.").

173. For excellent discussions of the elements of the Grotian system of international law, see Lauterpacht, *The Grotian Tradition in International Law*, [1946] BRIT. Y.B. INT'L L. 1; and Bull, *The Grotian Conception of International Law*, *supra* note 117.

174. Thus, Grotius does not distinguish in principle between private wars and public wars. Although a private war is simply a use of violence between private individuals within the domestic order, while a public war is an action of one community against another, both are permissible to the extent that they enforce legal/moral rights. See GROTIUS, *supra* note 168, at 184.

175. *Id.* at 11-13, 38-39. The basis for positive law, or conventional agreements, on the other hand, is only "expediency." *Id.* at 15. While the expedient may vary with changing circumstances, human nature and the law that is derived from it remain the same.

176. For example, Grotius insists that citizens evaluate for themselves the justice of a war and engage in civil disobedience if they conclude that the war is unjust. *Id.* at 587 ("If those under the rule of another are ordered to take the field, as often occurs, they should altogether refrain from so doing if it is clear to them that the cause of the war is unjust.").

tion stands in exactly the same position as self-defense. Each must be measured by the rights that are being defended.

A human rights theory, accordingly, stands in the Grotian tradition when it maintains that there are instances (depending on the limits placed on practical application of first principles, there may, in fact, be many such instances¹⁷⁷) in which state boundaries may be ignored for the sake of vindicating or protecting the rights of individuals. Such theories necessarily imply that violent intervention is legally authorized under some circumstances.¹⁷⁸ The reciprocal side of this proposition—true under every just-war theory—is that there are situations in which states may suffer violent intervention but may not legally defend themselves.¹⁷⁹ Thus, a human rights approach to international law will always undermine the concept of self-defense as an autonomous legal norm. Self-defense is only legitimate in those instances in which it coincides with the defense of individual rights.¹⁸⁰

Humanitarian intervention and self-defense, as categories of justification for the use of violence, represent two fundamentally different approaches to international law. The former appeals to the notion that the individual is the bearer of morally cognizable and legally relevant rights; the latter appeals to the domestic analogy and the conventional system within which the state is the bearer of legal rights.¹⁸¹ Accordingly, an

177. See the debate between Walzer and Luban, *supra* note 170. Walzer suggests that Luban, who defends the proposition that a just war is "a war in defense of socially basic human rights," is arguing that "we are bound to fight all the just wars we are able to fight—up to the point of exhaustion and incapacity." *Id.* at 231.

178. In the formal terms I introduced above, *supra* text accompanying notes 173-75, a human rights theory describes a set of legally cognized rights between the members of a community and, correspondingly, authorizes the use of force to enforce those rights. This balance describes a "legitimate" use of force.

179. Grotius, for example, wrote: "Not less unacceptable is the doctrine of those who hold that defence is justifiable on the part of those who have deserved that war be made upon them" GROTIUS, *supra* note 168, at 185. This same argument has recently been put forward by the State Department with respect to Nicaragua. See N.Y. Times, Mar. 29, 1986, at 4, col. 1 (quoting an unnamed State Department official: "Our position is that Nicaragua is an aggressor state. . . . An aggressor state does not have the right of self-defense.").

180. Luban, who characterizes Walzer's defense of community autonomy and the right of self-defense as an "appeal to pluralism," argues against Walzer as follows: "Human rights accrue to people no matter what country they live in and regardless of history and traditions. If human rights exist at all, they set a moral limit to pluralism." Luban, *The Romance of the Nation-State*, in INTERNATIONAL ETHICS, *supra* note 167, at 242. This is simply a contemporary version of Grotius's insistence that every citizen decline to participate in an unjust war, regardless of his political obligations. Theories of "civil disobedience" are essentially bound up with understanding this priority of moral obligation over political obligation.

181. Although article 51 refers to self-defense against "armed attack" as an "inherent right," the legal category of self-defense is a conventionally defined authorization for the use of force. Its conventional character is evident in the fact that the contemporary legal authorization it describes is substantially narrower than the broad, traditional concept of "self-preservation." Self-preservation was traditionally understood to include the right to use force to

argument that relies heavily on the concept of self-defense can be wedded to an appeal to human rights only with some difficulty.¹⁸²

The difficulty of this marriage was demonstrated at Nuremberg when the Tribunal declined to recognize as actionable under international law the separately charged offense of “crimes against humanity.” Such crimes differed from “war crimes” in that they involved the protection of citizens of a state from abuses by their own government, rather than violations by one state of the rights of citizens of another state.¹⁸³ Because the centerpiece of the Tribunal’s work was the consideration of the legal status of aggressive war—the international law violation that corresponds to the right of self-defense—it could not easily extend the conceptual framework that it had developed to include the individualistic perspective required to give legal form to the concept of crimes against humanity.

The “marriage” was, therefore, accomplished by insisting that only those alleged “crimes against humanity” that were war crimes—i.e., that involved foreign nationals—or were committed as part of the effort to wage aggressive war could constitute violations of international law:

[F]rom the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment . . . did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constitute crimes against humanity.¹⁸⁴

preserve vital interests—without limit and as defined by the state itself. *See* I. BROWNLIE, *supra* note 109, at 40-49 (discussion of the substantial identity of the categories of “self-preservation,” “self-defense,” “intervention,” and “necessity” in customary international law in the period 1815-1914). A state was free to rank the strength of its interests as it saw fit. Self-defense against armed attack might be no more important, on this view, than preserving a balance of power or spreading an ideology.

182. One possible way of establishing the relevance of a human rights issue within a state-centered approach would be to find a positive treaty commitment by a state to pursue certain domestic policies. There is a suggestion of this argument in the U.S. effort to establish the relevance of an alleged commitment by the Sandinistas to the O.A.S. in July 1979, prior to their successful seizure of power. That commitment contributed to the decision of the O.A.S. to end recognition of the Somoza regime and grant recognition to the Sandinistas. The Court, however, rejected the argument that the Sandinista communication to the O.A.S. established a legal obligation, and certainly not one enforceable unilaterally through a use of force by the United States. *See* Merits, *supra* note 1, at paras. 257-62. *But see id.*, dissenting opinion of Judge Schwebel, at paras. 243-49.

183. The Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis defined “war crimes” to “include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory.” Art. 6(b), *cited in* 39 AM. J. INT’L L. (Supp. 1945) 257, 260. It defined “crimes against humanity” to include “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.” Art. 6(c), *cited in id.* at 260.

184. Judgment, NUREMBERG PROCEEDINGS, *supra* note 14, at 468.

Given that self-defense is the centerpiece of the U.S. defense against the Nicaraguan charge, the United States cannot be too open in its acknowledgement of any reliance on a human rights, or individualistic, perspective. Nevertheless, the human rights issues appear as a constant underlying theme of the U.S. argument and of the U.S. policy in general.¹⁸⁵ Despite the disclaimer of legal reliance on the controversial, yet developing, law of humanitarian intervention, the United States is weaving into its argument just such a human rights perspective.

The human rights theme is developed in two respects. First, a repeated subtheme of the U.S. position is that the Sandinista government in Nicaragua is "illegitimate."¹⁸⁶ Second, the situation in Nicaragua is placed by both Moore and Rostow in a geopolitical context far broader than the assessment of the distribution of legal rights between the parties to the dispute that Nicaragua brought before the Court. For Moore, as for Rostow, "world order" is at stake in this dispute, not just the rights

185. For example, despite the fact that the legal arguments presented rely heavily on the right of collective self-defense as a basis for U.S. policy, President Reagan has summarized U.S. policy on the "removal" of the Nicaraguan government as follows:

Well, remove in the sense of its present structure, in which it is a Communist totalitarian state, and it is not a government chosen by the people. . . . We believe . . . that we have an obligation to be of help where we can to freedom fighters and lovers of freedom and democracy, from Afghanistan to Nicaragua. . . .

The President's News Conference of February 21, 1985, 21 WEEKLY COMP. PRES. DOC. 209, 212 (1985).

Moore's accusations, as well, move well beyond the labelling of the Nicaraguan government a "Cuban-style totalitarianism." Moore lists a number of alleged Nicaraguan human rights violations, including a "take-over" of the media and the labor unions, harassment of the church, anti-semitism, and "continual political killings, disappearances and torture and a substantial number of political prisoners." Moore, *supra* note 2, at 121. Sections of his argument cover topics such as "pluralism, human rights and nonalignment," and "human rights and the war of misinformation." *Id.* at 49, 117.

186. The U.S. Counter-memorial at the jurisdictional phase, for example, considered the status in Nicaragua of elections, the press, the right to criticize the government, and the origin of an internal opposition—all matters of internal Nicaraguan politics. Outside the litigation context, the theme of "illegitimacy" has been constant and obvious in official statements explaining the basis of U.S. policy. Counter-memorial, *supra* note 8, at paras. 211-25. President Reagan has explained U.S. support for the *contras* as follows:

[H]ere was a revolution that took place that seemed to express all the things we all believe in. Well now, they have not carried out those things. And they are there by force. And what really—other than being in control of the capital . . . —what makes them any more a legitimate government than the people of Nicaragua who are asking for a chance to vote for the kind of government they want.

Foreign and Domestic Issues, Question-and-Answer Session with Reporters (May 4, 1983), 19 WEEKLY COMP. PRES. DOC. 643, 650 (1983). Again, on March 11, 1985, the President described the Nicaraguan government as follows:

Well, they call themselves a government. . . . I think we have to ignore this pretense of an election they just held. This is not a government. This is a faction of the revolution that has taken over at the point of a gun.

BUS. WK., Mar. 11, 1985, at 69.

of Nicaragua under international law.¹⁸⁷ I will comment briefly on each of these themes to show how they are connected to an individualistic approach to international law and are essentially at odds with conventionalism and the domestic analogy.

B. *Human Rights and Governmental Legitimacy*

Legitimacy, as I use the term, refers to the quality of the relationship between the government and the internal community. An "illegitimate" regime is one that uses force in order to secure its own position—i.e., it uses violence apart from the enforcement of legal rights among citizens.¹⁸⁸ Because each community is free to define these rights in a variety of ways, to assess a charge of illegitimacy requires an analysis of the legal rights of citizens within a given community.¹⁸⁹ Only when the system of legal rights is clear can the authorization of violence be measured against a standard of legitimacy.¹⁹⁰ This concept of social and cultural self-determination is a basic assumption of the contemporary international legal system. It is the basis of the claim that states, not individuals, are the bearers of international legal rights, the first of which is that of being free from violent interventions.

The United States does not engage in any such analysis of the Nicaraguan legal order. Rather, the perspective of the United States and its supporters is that of an external critic. Such a perspective requires a general theory of the "appropriate" legal rights among members of the community. This, then, can provide a measure of the intra-community exercise of force by a government. These legal rights—rights that are applicable in every community—are generally labeled "human

187. Moore, *supra* note 2, at 125-27; see also Rostow, *supra* note 2, at 438 ("Consciously or unconsciously, participants in the discussion [of the Nicaraguan question] are also addressing the future of world public order and of American foreign policy."); *supra* text accompanying note 162.

188. See *supra* text accompanying notes 109-14.

189. Consider, for example, differences in rights to private property or the right to control labor. A similar point has been made by Reisman in his discussion of sanctions, of which the use of force is one example: "Sanctions are techniques and strategies for supporting public order. They cannot be divorced from the sociopolitical context in which they operate because they are integral to it. . . . Separating sanctions from their plenary social context is comparable to the quixotic attempt to separate law from its context." Reisman, *Sanctions and Enforcement*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER*, *supra* note 57, at 275-76.

190. Walzer, who adopts a similar theory of legitimacy, finds a moral basis for the defense of the domestic analogy in the difficulty a foreigner has in reaching an understanding of the character of the rights within a community. He argues that "a state is legitimate or not depending upon the 'fit' of government and community, that is, the degree to which the government actually represents the political life of its people." Walzer, *supra* note 167, at 222. The difficulty of evaluating that fit without having experienced the life and history of the community leads him to conclude that "states can be presumptively legitimate in international society and actually illegitimate at home." *Id.*

rights.”¹⁹¹ They are rights that attach to the individual as such; they do not accrue to one as a member of a particular, historical community. The external critique of legitimacy, then, requires that international law recognize certain legal rights that attach to the individual as such and measure governmental authority by reference to these rights.

This concept of illegitimacy is very much evident in Moore’s article. He writes, for example, that Nicaragua is “a regime whose legitimacy is based solely on a seizure of power with foreign assistance.”¹⁹² “Foreign assistance” suggests a discontinuity between power and authority from the very beginning. The violent seizure of power has been maintained, he suggests, by a continuation of oppression and violence against the community:

Sadly . . . the nine Marxist-Leninist comandantes who had controlled the effective military insurgency progressively assumed power and thus caused a purge of genuine democrats. In addition, the comandantes curtailed civil and political rights, denied free elections, initiated massive militarization of society and, in general, began to move sharply toward Cuban-style totalitarianism.¹⁹³

This is coupled with a description of the creation of an intelligence agency allegedly designed to “infiltrate and watch over all segments of society,” and, ultimately, with the accusation of massive political murders and imprisonments.¹⁹⁴

The implication is that the Nicaraguan government maintains authority only by virtue of the use of force and the threat of force against its own community. Moore is clearly suggesting that the Nicaraguan government is not one that should, or need, be respected as genuinely representative of the Nicaraguan community. His comparison of Nicaragua’s human rights record with that of the *contras* gains its meaning in this context.¹⁹⁵ The comparison is intended to suggest that the *contras* have a stronger claim to the title of “legitimate representative” of the Nicaraguan community than that of the formal government.¹⁹⁶

191. By using the term “human rights” I do not mean to suggest agreement either with the facts that the United States alleges to exist in Nicaragua or with the values the United States includes within this category—values reflective of a moral aversion to communism. For the concept of “human rights” to be useful in international law, it must be consistent with the ideological tenets of the major political systems of the world. If it is not, then it may still provide a theory of justice, but not a system by which radically different political systems will be able to regulate their relations with each other.

192. Moore, *supra* note 2, at 110.

193. *Id.* at 45.

194. *Id.* at 46, 121-23.

195. *Id.* at 117-25.

196. For reasons that are even less clear, Moore also believes that a comparison of the human rights records of the governments of El Salvador and Nicaragua is relevant. Moore,

Only this view explains why the United States believes it appropriate to escalate its involvement in Nicaragua while admitting that the alleged Nicaraguan involvement in El Salvador has simultaneously decreased.¹⁹⁷ Disproportionality of this sort cannot be explained by appealing to the concept of temporal priority—the allegation that Nicaraguan support for the FMLN preceded U.S. support for the *contras*.¹⁹⁸

Furthermore, only this view allows the United States to escape the “paradox of self-defense” in which both sides to a conflict have an equally valid claim of self-defense. If the Nicaraguan government were legitimate, then it could properly claim “self-defense” as a ground for resisting the *contras*, since they are seeking to displace the Sandinista government militarily.¹⁹⁹ U.S. support for the *contras*, even if itself founded on the collective self-defense of El Salvador, would not change the essential character of Nicaraguan resistance to an effort to displace the government. Thus, there would be two equal but opposing claims of self-defense.²⁰⁰

C. *Human Rights and World Order*

The illegitimacy argument described above assesses the relationship between the Nicaraguan government and the Nicaraguan community. The human rights perspective appears again in both Moore’s and Rostow’s appeal to “world order” as a general framework for analysis.²⁰¹

supra note 2, at 117-18. The suggestion of relevance implies an argument along the following lines: El Salvador and Nicaragua are raising identical claims of an illegal use of force through foreign involvement with an armed resistance movement. The equipoise between these two identical claims is broken by the comparison of the internal quality of the two regimes.

197. Observing this disjunction between the timing of the U.S. actions and that of the alleged assistance by Nicaragua to the FMLN, the I.C.J. concluded: “[T]he Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.” Merits, *supra* note 1, at para. 237. Moore too notes a decline in alleged Nicaraguan involvement with the FMLN beginning in 1982-83, but fails to draw any conclusions with respect to the legal requirements of proportionality from this decline. Moore, *supra* note 2, at 58.

198. The Court, which held that a victim state must believe itself to be the subject of an armed attack before any third state can rely on the authorization of a use of force in “collective self-defense,” found that the unlawful acts of the United States in and against Nicaragua significantly preceded any action by any of the alleged victim-states that might suggest a belief by that state that it was under armed attack by Nicaragua. Merits, *supra* note 1, at paras. 232-33.

199. The customary law doctrine of self-defense was formulated in a context in which British/Canadian forces were engaging irregular forces seeking violently to displace the Canadian authorities. See the *Caroline* case, *supra* note 54.

200. In theory, perhaps, the United States could argue that the Nicaraguan claim of self-defense is inapplicable to the marginal increase in the *contras*’ effort that results from U.S. support.

201. Both Moore and Rostow begin and end their arguments with discussions of the “world order” implications of the Nicaraguan dispute. On the concept of “world order” as

Although the concept of "world order" remains illusive at best, clearly they have something in mind that transcends a conventionalist view of international law. Like the illegitimacy argument, the "world order" perspective requires an evaluation of the quality of a regime.²⁰²

Moore finds a "fundamental threat" to world order in something that he labels the "radical regime." Radical regimes are identified by their "antipathy to democratic values and a 'true belief' in the use of force to spread their ideology."²⁰³ That ideology is not further identified by Moore, except to label it "revolutionary internationalism."²⁰⁴

The use of force in defense of ideology, however, is hardly a unique mark of one side of the current geopolitical confrontation. The Reagan Doctrine itself concerns the willingness of the United States to use force in pursuit of its interests.²⁰⁵ Because international law does not completely ban all international use of force by states, a state is free to appeal to ideological criteria in deciding when it will choose to use force in those situations in which that choice is permitted under international law.²⁰⁶ So it cannot be the willingness to use force alone that distinguishes the radical regime.

Neither is Moore stating simply that the "radical regime" is one that uses force in violation of international law. The category of "aggression" has long been available to describe a state that uses force in violation of article 2(4).²⁰⁷ Moore is trying to capture something more than the mere violation of article 2(4) in appealing to the twin concepts of "world order" and "radical regimes"; he is, in fact, entering the ideological debate.

providing a normative framework within which problems of international law are to be analyzed, see generally M. McDUGAL & F. FELICIANO, *supra* note 94.

202. For a critique of the "world order" approach to international law as originally set forth by McDougal and Feliciano, and particularly as applied to the problem of intervention in civil wars, see Farer, *supra* note 57, at 48-51:

[McDougal and Feliciano's] principal concern appears to be either avoidance of any change in the allegiance of states which identify with the bloc led by the United States or avoidance of change in either direction because of its possible impact on "the balance of global power which teeters precariously between two poles." . . . [They] are peculiarly sensitive to a single source of political identification, namely Communist ideology.

See also Friedman, *Intervention, Civil War and the Role of International Law*, 59 AM. SOC'Y INT'L L. PROC. 67 (1965).

203. Moore, *supra* note 2, at 42.

204. *Id.* at 44. But see *id.* at 125 n.342, where Moore recognizes that "[r]adical regimes do not in all cases subscribe to a common ideology."

205. For a discussion of the Reagan Doctrine, see generally Rosenfeld, *supra* note 4.

206. See *supra* note 65.

207. The Definition of Aggression adopted by the U.N. General Assembly states in article 3: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition." Definition of Aggression, *supra* note 63. For a discussion of the slight variation in language between the Definition and article 2(4) of the Charter, see 2 B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 27-30 (1975).

The inevitable suggestion is that not all states are “equal” within the international community. Distinctions must be drawn, in terms of the requirements of “world order,” between the western democracies and those states committed to a different view of social order and justice, what Moore labels “revolutionary justice.”

For both Moore and Rostow, the “world order” problem posed by the Nicaraguan version of “revolutionary justice” appears to be its anti-American ideological basis. Moore quotes statements of the Nicaraguan leadership proclaiming an “anti-Yankee,” “anti-bourgeois,” and “anti-imperialist” ideology. Similarly, Rostow finds significance in Nicaraguan pledges of an “anti-imperialist” national and international policy. However, neither Moore nor Rostow is so parochial as to suggest that this ideological slant is relevant simply because it may threaten U.S. interests.²⁰⁸ Rather, such statements create a “world order” problem because they demonstrate a failure of the Nicaraguan regime to follow a “pluralist” course, adopting instead the “Marxist-Leninist scientific doctrine of the revolution.”²⁰⁹

Such a “world order” perspective essentially requires a distinction between just and unjust societies.²¹⁰ A just regime is measured by its adherence to those values associated with the western democracies—values that fundamentally reflect a moral commitment to a wide range of individual freedom of choice.

I do not want to suggest that no such moral distinctions can ever be drawn, or that they should not be drawn. I do, however, want to point out the implications for international law of importing this political/moral discussion into the framework of international law. This distinction requires the articulation of values that are independent of the particular, historical community, and that have a normative effect wholly apart from the domain of conventional agreements. The appeal to these values

208. See *supra* note 159 on the difficulty that the Court had in determining what legal relevance the United States claimed for the express ideological underpinnings of its policy with respect to Nicaragua.

209. Moore, *supra* note 2, at 53 (quoting the Nicaraguan Minister of Defense, Humberto Ortega).

210. This distinction operates independently of the distinction between legitimate and illegitimate regimes discussed above. A government may be legitimate—that is, it may use force only to give effect to legal rights—yet unjust by virtue of the content of those rights. This distinction, however, is not one that is equally useful in every context. Thus, a system of legal rights may be so unjust—for example, it may establish a legal order of slavery or apartheid—that, to use Walzer’s term, there is no longer any fit between the governmental order and the community. Such a definition of rights approaches that discussed above, in which the legal right was simply the right to use force to pursue private interests. See *supra* text accompanying note 118. A government using force within such a system of rights is “legitimate” in form only: its claim to legitimacy can no longer serve as any counter to its obvious injustice.

in the context of a discussion concerning the legality of a state use of force means that these values will provide a foundation for legal distinctions that can ultimately legitimate interventionist uses of force not in the name of self-defense, but in the name of justice.²¹¹

Pursuit of the human rights perspective reveals closely allied theories of legitimacy and of the just regime behind the U.S. opposition to the *Nicaragua* case. To engage these arguments properly would require a discussion of the substantive values that inform these doctrines and then a consideration of the nature of an international law that could give effect to those values. The substantive debate about the norms of justice has been going on for hundreds of years. It is, at base, a debate about the relative place of individual freedom and community identity. This is not a debate that can fruitfully be entered into here. Rather, I want only to suggest that this is not the debate that has informed modern international law. That system, precisely in order to avoid the dispute over justice between widely divergent ideologies, turned to a new foundation in a conventional appeal to the domestic analogy under which states as such have rights.

Conclusion

The Grotian, or human rights, challenge to the domestic analogy is the polar opposite of the Vattelian, or state sovereignty, challenge. While the former challenges the domestic analogy's definition of the elements or members of the international legal community, the latter challenges its use of the concept of community in international relations. The latter argues that community and sovereignty are essentially conflicting categories; the former argues that there is no place in the international community for state sovereignty. The former takes individuals as an irreducible first principle; the latter, states.

While each of these positions has a respectable history within international law, both are essentially incompatible with the domestic analogy

211. See Friedman, *supra* note 202, at 68. Friedman argues that the McDougal-Lasswell approach creates a danger of unilateral intervention:

[I]t follows with dangerous ease that the defenders of the "values of a free world society," *i.e.*, principally the United States, may be justified in using preventive force and other forms of forceful intervention . . . when in their own unchecked judgment they consider such action necessary to counter a threat to the "values of human dignity."

Such a vision of international law would bring international law much closer to the actual foreign policy of the Reagan Administration, which has progressively strained the bounds of the concept of self-defense. Consider not only the Nicaraguan policy, but also the intervention in Grenada, *see* Joyner, *The United States Action in Grenada*, 78 AM. J. INT'L. L. 131-75 (1984), and the policy of support for insurgents in Angola, *see* N.Y. Times, Nov. 23, 1985, at A1, col. 2.

and with that conventionalism which relies upon the domestic analogy. The Grotian position converts international law into no more than a branch of moral inquiry; the rights and duties of states are coterminous with the rights and duties of the individuals who happen to be members of those states. The Vattelian position converts international law into a branch of political science.²¹² It conflates the categories of legal rights and legal authorization—or, what is the same thing, argues that one of the legal rights of states is the authority to use violence in pursuit of national interests.²¹³

Conventionalism is not itself a morally justified system, apart from contingent historical judgments about the consequences of adopting alternative systems.²¹⁴ Thus, it may well be that what the conventions require is inconsistent with a morally compelling claim of individual rights. Humanitarian intervention, for example, may be both morally correct and conventionally prohibited.²¹⁵ Equally, conventionalism may be inconsistent with historically or politically compelling claims of state “spheres of influence” or “vital interests.”²¹⁶

Nevertheless, conventionalism, along with its reliance on the domestic analogy, was the foundation of the contemporary international legal or-

212. George Kennan, for example, has long complained that American foreign policy is too influenced by legalistic thinking and not sufficiently guided by a grasp of the political interests of the United States. See, e.g., G. KENNAN, *REALITIES OF AMERICAN FOREIGN POLICY* 3-30 (1954).

213. This idea found expression in the pre-1914 customary law doctrine of “the non-justiciability of certain categories of disputes, for example those concerning ‘vital interests,’ ‘national honour,’ ‘non-legal’ disputes, and ‘political’ disputes.” I. BROWNLIE, *supra* note 109, at 23-24 (citing Lauterpacht). To say that a dispute was nonjusticiable was to say that a state had no legal obligation to submit it to arbitration or to any other peaceful means of settlement, and consequently that there were no legal restraints on a state’s right to use force to pursue its “vital” interests.

214. See Mavrodes, *Conventions and the Morality of War*, in 4 *PHIL. & PUB. AFF.* 117, 124-30 (1975) (discussion of “convention-dependent morality”).

215. See Walzer, *The Moral Standing of States*, *supra* note 167, at 234:

Individual rights may well derive . . . from our ideas about personality and moral agency, without reference to political processes and social circumstances. But the enforcement of rights is another matter. It is not the case that one can simply proclaim a list of rights and then look around for armed men to enforce it. Rights are only enforceable within political communities where they have been collectively recognized, and the process by which they come to be recognized is a political process which requires a political arena. . . . [T]he only global community is pluralist in character, a community of nations, not of humanity, and the rights recognized within it have been minimal

216. See, for example, Kennan’s discussion of the limited relevance of both international law and multilateral organizations with respect to the vital interests of the United States. G. KENNAN, *supra* note 212, at 38-39:

[I]t is important to the efficacy of international law itself that we should not overstrain its capabilities by attempting to apply it to those changes in international life that are clearly beyond its scope of relevance. I am thinking here of those elementary upheavals that involve the security of great political systems or reflect the emotional aspirations of entire nations.

der.²¹⁷ The importance of the U.S. position in the *Nicaragua* case is that, in essence, it represents a profound rejection of both conventionalism and the domestic analogy.²¹⁸ The strength of that position comes from its combining, or appealing to, both of the traditional alternative theories in order to develop the most compelling case possible against Nicaragua.

That the United States can reject the post-war vision of international law and return to earlier visions of the international community is a function of the fact that a gap has opened up between the norms of international law established in the Charter and national self-interest. The Charter was based on the idea that war itself had become a threat to each state's own self-interest in the stability of world order. The Charter was founded on the historically new idea that ideology could no longer safely employ violence, that future ideological battles must be fought with other weapons.

To secure this idea, the framers of the Charter system turned to the domestic analogy. International law would establish an international community within which states could compete only by such means as respected the rights of members of that community, and the first of those rights was defined as the freedom from violence. Enforcement would be possible as long as the major powers agreed on the central vision: that war, regardless of its ideological motivation, represented a threat to their own self-interest. But this function of "minimum international stability" has been assumed for the major powers by the balance of military power in the strategic standoff of mutual nuclear deterrence.

The paradox of the modern age is that the threat of unspeakable violence has set free, because it has contained, the forces of violence. Once

217. This is not to say that no traces of the alternative approaches to international law can be found in the U.N. Charter. In fact, while the Charter reflects the predominance of the domestic analogy, it contains elements of both of the competing theories. Thus, the concept of the priority of individual rights over state authority is suggested in the recognition of the principles of "human rights" and "fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, paras. 2-3. Similarly, the principle that sovereignty is an irreducible first principle is found in the recognition of the principles of "self-defense" and "the sovereign equality" of all states. *Id.* art. 51 & art. 2, para. 1. The Charter, accordingly, both relies on the domestic analogy and contains elements that are in conflict with that analogy, as well as with each other.

That the Charter contains conflicting values means that it is likely to be a source of conflicting theories of international law. Both sides in a controversy are likely to appeal to the Charter—albeit to different sections of the Charter—for support. Thus, in the *Nicaragua* case, we find Nicaragua relying on article 2(4)—the conventionally established prohibition on the use of force—and the United States relying on article 51's incorporation of an "inherent" right of self-defense. The text alone, given the incorporation of the conflicting values, is not likely to resolve the controversy.

218. Symbolic of this rejection is Rostow's appeal to "the logic of a state system" as the source of international legal rules. Rostow, *supra* note 2, at 450; *see also id.* at 449 ("Those rules are rooted in the nature of the world system of states.").

it became clear to the major powers that war would not escalate into total war, that there were strict limits on the use of force between themselves, the central, informing vision of the Charter no longer informed state policy. Ideology could again be coupled with violence, because it was no longer the case that any war threatened the overwhelming interest of the superpowers in minimum international stability. Enforcement of the system of conventionally-defined state rights became impossible, because the agreement upon which enforcement relied broke down in the absence of necessity.

The U.S. position on the merits of the *Nicaragua* case is nothing more than a reflection, and ultimately an articulation, of this contemporary reality. I have tried to evaluate the effect of this development on international law as it emerged in the Charter system. While the vision of international law that the United States formulates is hardly the model of a conventional legal system adopting the domestic analogy, the question remains of whether it is a model of law at all. The U.S. position, I believe, reflects the contemporary indeterminacy of the answer to this question in the international system.

While the attempt to create an international community founded on an institutional arrangement for the control of state violence has failed, that failure does not itself tell us whether we will move into a Grotian world of human rights or a Vattelian world of vital state interests. The latter is completely incompatible with a vision of law, since law must establish some external criterion by which a community can measure state behavior. The former, however, is not. An ideology of human rights could inform a vision of law, although not one founded on the domestic analogy.

Such a vision of law would threaten all states, labeling them artificial creations that do not necessarily possess normative value. Whatever value they do possess is a function of their acceptance and actualization of moral values existing prior to and apart from the state itself. This is a universalistic vision in which each individual must act as judge. But unlike Vattel's vision, that judgment is subject to objective standards and external criticism. This is a vision of law in which the philosophers will perhaps be kings at last.

A law of human rights puts a profound responsibility on each citizen to judge his own government, to evaluate its claims to be serving human rights. It makes each of us a potential enemy of the state, because our legal obligations are not defined by any authoritative decision-making mechanism within the state itself. The United States, in short, appeals to

a theory of human rights in justifying its conduct in Nicaragua at its own peril.

The U.S. position on the merits of the Nicaraguan dispute is a rich source of contemporary standards on the international law of state violence. It demonstrates the variety of elements that are creating a state of flux in that law: first, a rejection of the domestic analogy that informed conventional international law in the post-war period; second, a resurgence of the classical notion of state sovereignty as a first principle, a form of association that is incompatible with any broader notion of community and beyond the control of any international, hierarchical institution; and finally, an emergent notion of the relevance of human rights to international law. The jury is still out on which of these three competing visions of the state and the international community will come to dominate international law in the rest of this century. Certainly, the experience at the Hague has not answered that question.