

# COMMENTARY

## The Secret War In Central America— A Response To James P. Rowles

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In a recent issue of the *American Journal of International Law*, James P. Rowles replies<sup>1</sup> to my Article in the *American Journal* entitled *The Secret War in Central America and the Future of World Order*.<sup>2</sup> Although each of Rowles' principal points is dealt with fully in my original Article, I believe that a brief response would be useful to rebut specifically misstatements of my position and, more importantly, to discuss a number of misperceptions that continue to influence public discussion.

### I. MISSTATEMENTS OF POSITION

It would be unreasonable to expect perfect understanding of the work of another in a complex world order dispute. It is not unreasonable, however, to expect one who espouses an opposing position to possess sufficient understanding of the issues to avoid engaging in repeated misstatements of another's position. Unfortunately, Rowles makes at least six serious misstatements of my position.

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1. Rowles, "Secret Wars," Self-Defense and the Charter—A Reply to Professor Moore, 80 *Am. J. Int'l L.* 568 (1986).

2. Moore, *The Secret War in Central America and the Future of World Order*, 80 *Am. J. Int'l L.* 43 (1986).

First, Rowles asserts that I interpret the doctrine of *excès de pouvoir*<sup>3</sup> “so broadly as to conclude that the [International Court of Justice’s] rejection of El Salvador’s request to intervene [in the *Nicaragua* case] amounted to ‘an abuse of power depriving the Court of jurisdiction.’”<sup>4</sup> This absurdity is not my position; moreover, the juxtaposition of the quoted material from my Article to Rowles’ predicate is indefensible. Apparently, Rowles is unable to differentiate between my position and his caricature of that position. It is my clearly expressed position that the absence of El Salvador, and other substantially affected states, in a case arising under the important multilateral treaties of the United Nations and Organization of American States Charters manifestly triggered the United States multilateral treaty reservation, thereby depriving the Court of jurisdiction.<sup>5</sup> It is *not* my position, as Rowles would have the reader believe, that the International Court of Justice’s rejection without a hearing of El Salvador’s intervention request deprived the Court of jurisdiction.

Second, Rowles’ reply asserts that “[t]he essence of Moore’s argument on [the requirement of proportionality] is that all measures aimed at pressuring a state to cease an armed attack are to be treated as proportional so long as that attack continues.”<sup>6</sup> Again, this straw man is not my position. As stated in my Article, “[p]roportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is

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3. The term *excès de pouvoir* is adapted from French law and is translated to mean “excess of jurisdiction.” See Moore, *supra* note 2, at 97 (discussing strict standard required to assert *excès de pouvoir* as reason for refusing to obey an award).

4. Rowles, *supra* note 1, at 581 (quoting Moore, *supra* note 2, at 95).

5. Moore, *supra* note 2, at 100. The so-called Vandenberg or multilateral treaty reservation to the United States acceptance of jurisdiction specifically excludes from the Court’s jurisdiction “disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.” Declaration by the President of the United States of America Concerning the Recognition by the United States of Compulsory Jurisdiction of the International Court of Justice, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598. Thus, the Court is deprived of jurisdiction if substantially affected parties, such as El Salvador, on whose behalf the United States is acting in collective defense, are not parties to the case. See Moore, *supra* note 2, at 94. The United States had a right to act in collective defense pursuant to article 51 of the U.N. Charter, which states in pertinent part that “[n]othing in the present Charter shall impair the right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.” U.N. Charter art. 51. The O.A.S. Charter confirms this same right. O.A.S. Charter art. 3. See Moore, *supra* note 2, at 82 n.163.

6. Rowles, *supra* note 1, at 580.

reasonably necessary promptly to secure the permissible objectives of self-defense.”<sup>7</sup> Moreover, “[p]roportionality, correctly perceived, is not so much an exercise in matching levels of force between attacker and defender as, rather, a relation between lawful objectives in using force and the effective pursuit of those objectives in the way least destructive of other values.”<sup>8</sup>

Rowles is free to argue mechanistically that the requirements of proportionality limit a response solely to measures that would interdict arms transfers, or to some similar restrictive position. As will be discussed, I believe such a position would be wrong on both legal and policy grounds. In any event, Rowles should be able to differentiate between a position that ties proportionality to the relationship between lawful defense objectives and the minimum force necessary promptly to secure those objectives, and his caricature of that position that all measures are permissible during a continuing attack.

Third, Rowles’ reply asserts that I believe that the objectives of the United States and of the *contras* “are limited to the halting of shipments of arms and other supplies to El Salvador.”<sup>9</sup> This factual misstatement is closely related to Rowles’ confusion on proportionality. Again, this straw man is easily rebutted by a plethora of public statements asserting broader objectives of the *contra* effort. My position on this point, which I took some pains to discuss fully in a section of the Article dedicated specifically to the issue,<sup>10</sup> is that the *contra* strategy as a defensive strategy properly includes, but is not limited to, interdiction of weapons flows.

The *contra* strategy is not a politically and militarily static effort that seeks solely to interdict arms transfers (as failed in Vietnam), but a defensive strategy that seeks to shift the military multiplier effect against the attacking state to more effectively halt the armed attack. The principal objective of the *contra* strategy is to halt the armed attack, not simply the shipments of arms and supplies; this may well require a direct political threat to the Sandinista regime. Thus, as summarized in my Article, “[t]he argument that the *contras* are not engaged in the direct interdiction of weapons is both

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7. Moore, *supra* note 2, at 87 (quoting M. McDougal & F. Feliciano, *Law and Minimum Public Order* 242 (1961)).

8. *Id.* at 89.

9. Rowles, *supra* note 1, at 579.

10. Moore, *supra* note 2, at 111-15 (discussing “The Alleged ‘American Brezhnev Doctrine’”).

factually wrong and naive in missing the point that assistance to the contras is a defensive strategy."<sup>11</sup>

Fourth, Rowles' reply asserts that "Moore believes that the shipment of arms constitutes an armed attack within the meaning of article 51 of the [United Nations] Charter."<sup>12</sup> It must be satisfying to dispatch such a straw argument with rapier reason. This proposition does not, however, remotely state my position—again clearly expressed—that armed attack includes "indirect aggression" as well as open and acknowledged attack. Precisely what mix of factors, including arms transfers to insurgents, constitutes an attack of sufficient intensity as to amount to an armed attack will depend on context. In the Central American context, however, I left no doubt that in my view the relevant mix of factors that do constitute a Nicaraguan armed attack against El Salvador include far more than merely the shipment of arms:

[S]ince mid-1980 Cuba and Nicaragua have been waging a secret war against neighboring Central American states, particularly El Salvador. The attack on El Salvador is neither temporary nor small-time. It fields forces roughly one-sixth the size of the Salvadoran Army and has resulted in thousands of war casualties and over a billion dollars in direct war damage to the Salvadoran economy. Although their figures are likely to be inflated, the FMLN insurgents claim that they have inflicted more than 18,000 casualties on the Salvadoran armed forces to date, and that in the first half of 1985 they continued to kill Salvadorans at a rate of 400 per week. Cuban and Nicaraguan involvement in this serious attack includes: participation in organizing the effective insurgency; the provision of arms; the laundering of Soviet-bloc for Western arms; transshipment of arms and assistance in covert transport; assistance in military planning; financing; ammunition and explosives supply; logistics assistance; the provision of secure command and control facilities; the training of insurgents; communications assistance; intelligence and code assistance; political, propaganda and international support; and the use of Nicaraguan territory as sanctuary for attack. With the exception of some re-

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11. *Id.* at 114.

12. Rowles, *supra* note 1, at 579.

duction in arms transport since 1982—1983, these activities are continuing today in a serious effort to overthrow the democratically elected Government of El Salvador.<sup>13</sup>

Fifth, Rowles' reply asserts that my "legal arguments . . . would in practice allow a state to use force in response to a real *or alleged* armed attack represented by low-level shipments of arms."<sup>14</sup> Rowles is at it again in erroneously ascribing to me the position that low-level shipments of arms, without more, constitutes an armed attack. This time, however, he broadens his argument possibly to imply—although his intent is unclear—that mere *allegations* of an armed attack or of arms transfer might fill the bill and rise to the level of an armed attack. Neither view remotely states any position supported by me; indeed, both views are so fragile as to blow away in the wind without the necessity of Rowles' rebuttal. Most disturbingly, this fifth misstatement of position, as well as the fourth discussed above, may mislead the reader to believe that the only significant involvement of Nicaragua with the insurgency in El Salvador has been "low level shipments of arms." This focus on arms transfer to the exclusion of other indicia of the Nicaraguan involvement has been a central tactic employed by Nicaragua in its arguments to the World Court.

Sixth, Rowles' reply asserts:

[T]he fundamental thrust of Professor Moore's arguments regarding both self-defense and compliance with the decisions of the International Court of Justice is that the corresponding judgments are matters that may be properly decided, unilaterally, by any state. Thus, a state need only assert that it is acting in self-defense, or that, *in its view*, the decisions of the Court exceed its authority, to escape legal responsibility.<sup>15</sup>

Oh come now! I take no such position. Rowles seems unable to distinguish between his caricature position of law as nothing more than unilateral caprice and the correct legal positions that indirect aggression is included under article 51 of the U.N. Charter,<sup>16</sup> that

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13. Moore, *supra* note 2, at 60 (footnote omitted).

14. Rowles, *supra* note 1, at 580.

15. *Id.* at 582.

16. Article 51 of the U.N. Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United

proportionality is more than a mechanistic requirement limiting defensive response to interdiction of arms transfers, and that there may be legal limits on actions of the International Court of Justice, specifically when it manifestly exceeds its jurisdiction while simultaneously contradicting the U.N. Charter in an area of *jus cogens*.

## II. CONTINUING MISPERCEPTIONS IN THE CENTRAL AMERICAN WAR

Rowles constructs a model of the Central American conflict that is built on at least nine legal and factual misperceptions. Because these misperceptions tend to recur in discussions of the Central American conflict, and because at least some of these have now been embraced by a majority of the International Court of Justice, a brief reengagement may be useful.

First, Rowles relies on a model that portrays Nicaragua as providing only small-scale assistance to the insurgents in El Salvador, at least after initial large-scale surge shipments of arms from late 1980 to early 1981. Rowles' model thus focuses on arms shipments while ignoring or downplaying a variety of other important indicia of involvement. Evidence of close Nicaraguan involvement with the insurgency across a range of such indicators is set aside as ambiguous or is ignored, and an alleged requirement of proof of Sandinista "direction and control" is introduced, stressed, and said to be found lacking. In this respect, to be fair, Rowles' model is similar to that of the majority of the International Court of Justice.

The problem with this *de minimis* model is that it does not accurately portray the reality of a sophisticated politico-military effort led from Cuba and Nicaragua to forcefully overturn the government of El Salvador, and to destabilize and ultimately overturn the governments of Costa Rica and Honduras. A totality of evidence consistent with this reality and inconsistent with the *de minimis* model is set out in my Central American Article,<sup>17</sup> has been developed in even greater detail in a recent book I have writ-

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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-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the Present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

17. Moore, *supra* note 2, at 56-69 (discussing "The Secret War").

ten,<sup>18</sup> is fully documented in a forthcoming book by Robert F. Turner,<sup>19</sup> and, most important, is set out for all the world to see in the dissenting opinion of Judge Stephen Schwebel in the *Nicaragua* case.<sup>20</sup>

Although space precludes developing the evidence here, several brief comments on the assumptions of the *de minimis* model are in order. Both Rowles and a majority of the Court concede major arms shipments to the insurgents in the 1980-81 period. Both, however, err in attaching too much significance to an assumed lessening of arms shipments since that period. The very purpose of these early "surge" shipments was to stockpile the bulk of arms needed by the insurgents. That seems to be largely what has happened in El Salvador; these surge shipments should therefore carry no less responsibility than shipments evenly spread out.

The *de minimis* model is also wrong in focusing almost exclusively on arms transfers, which in recent years better fit such a model, rather than on a variety of other important indicators, such as participation in organizing the insurgency, the laundering of Soviet-bloc for Western arms, assistance in military planning, financing, ammunition and explosives supply, logistics assistance, the provision of secure command and control facilities, the training of insurgents, including training for specific military attacks, communications assistance, intelligence and code assistance, and the use of Nicaraguan territory as sanctuary for attack.<sup>21</sup> It seems clear that if the United States were to engage in such activities for over half a decade against Cuba, for instance, that it would be regarded as having made an armed attack.

The key to the *de minimis* model's double standard is not only to ignore a broad range of factors in the attack, but also to insist that, unless the evidence conclusively demonstrates something called "direction and control" of guerrilla activities, these factors do not generate an armed attack. Since the secret attack is accompanied by denials of involvement and the defensive response is rel-

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18. J. Moore, *The Secret War in Central America: Sandinista Assault on World Order* 22-36 (1987).

19. R. Turner, *Nicaragua v. United States: A Lawyer Looks at the Facts* (1987) (unpublished manuscript) (on file at the Center for Law and National Security, University of Virginia School of Law) (devoting three separate chapters to Nicaraguan aggression against El Salvador, Honduras, and Costa Rica).

20. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 289-527 (Judgment of June 27) (Schwebel, J., dissenting).

21. See Moore, *supra* note 2, at 60.

actively open, *voilà* legal responsibility for the defensive response but not for the original aggressive attack. Indirect aggression, however, has never required any touchstone of "direction and control" in order to constitute an armed attack.<sup>22</sup> Even if it did, it is dizzying that the Court could conclude U.S. responsibility for the defensive *contra* response but make no such conclusion regarding Nicaraguan responsibility for the Sandinista attack. How is U.S. direction and control of the *contras* stronger than that of the FMLN by the Sandinistas? If official statements to the Court inconsistent with the public record made the difference in fact determinations on this issue, then sadly the Court has made such misstatements more likely in the future.

Second, Rowles, and a majority of the Court, have adopted an erroneously narrow conception of armed attack. The issue is, of course, not whether every small-scale transfer of arms to insurgents is an armed attack—that would be absurd—but whether an intense and sustained indirect attack employing substantial and multifaceted assistance to insurgents can be an armed attack. It is the position of the United States, and the majority view of publicists, that the latter can clearly constitute an armed attack.<sup>23</sup> The contrary view was rejected during the General Assembly exercise on the definition of aggression<sup>24</sup> and, despite the decision of the Court in the *Nicaragua* case, it will not be adopted by the principal democracies. Again, Judge Stephen Schwebel brilliantly sum-

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22. Only the idiosyncratic view of Professor Brownlie, who served as counsel for Nicaragua, requires "control by the principal, the aggressor state, and an actual use of force by its agents" for there to be an armed attack. I. Brownlie, *International Law and Use of Force by States* 373 (1963). There is no evidence to support this view, in either the text or the *travaux préparatoires*, that the draftsmen intended to narrow the right of individual and collective defense under article 51 of the U.N. Charter by requiring any touchstone of direction and control. See Moore, *supra* note 2, at 82-86.

23. See Moore, *supra* note 2, at 84-85 (citing the scholarly work of a number of professors who all argue that "armed attack" includes "indirect aggression" as well as open warfare and citing the record of U.S. Senate consideration of the NATO treaty, which is based on article 51, which confirms that "armed attack" within the meaning of the NATO treaty is not limited to open invasion).

24. The United Nations Definition of Aggression plainly recognizes that aggression may include indirect aggression. Article 3, paragraph (g) thereof defines acts of aggression as "[t]he sending by or on behalf of a single State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [invasion, military occupation, use of weapons, etc.], or its substantial involvement therein." G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 143, U.N. Doc. A/9631 (1974).



marized the law on this point in his dissent.<sup>25</sup>

Even more importantly, a position that excludes indirect aggression from the provisions of article 51 of the U.N. Charter would be appallingly wrong as a matter of policy. Indirect aggression can just as effectively deprive a nation of its self-determination and just as effectively kill and destroy its people and economy as armies on the march. To deprive those facing such indirect aggression of the right of individual and collective defense is inconsistent with the requirements of self-determination and world order. It is also politically unrealistic in a decentralized international system. Indeed, in a world continually threatened by indirect support for terrorism, coups, and insurgent warfare, surely the effort should be to strengthen measures against such indirect aggressive attacks, as well as the right of effective defense against them, and not the opposite.

Moreover, a restrictive theory that excludes indirect aggression from article 51 would effectively destroy the essential U.N. Charter distinction between aggression and defense by treating both equally. Indeed, in the real world, as the majority of the International Court of Justice all too sadly demonstrated in the *Nicaragua* case, the effect of such a view is that the secret attack is ignored and the defensive response is treated as the very aggressive attack to which it is responding. Since the secret attack is accompanied by denials of involvement and the defensive response is relatively open, legal responsibility somewhat automatically attaches for the defensive response but not for the aggressive attack.

Third, Rowles has adopted a narrow and mechanistic test of proportionality that seems to focus largely on whether actions are intended directly to interdict weapons shipments. As discussed above, this is simply not an accurate test of proportionality. Proportionality is the requirement that nations use the minimum force reasonably necessary to end promptly an armed attack. If a broader response in kind, through assistance to insurgents, is the most effective way to meet this requirement, it is lawful. An international legal regime that would permit only ineffective defense, or permit more destructive direct bombing even if it is less effective than assistance to insurgents in ending an attack, would not deserve our moral allegiance. Fortunately, international law imposes

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25. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 154-71 (Judgment of June 27) (Schwebel, J., dissenting).

no such absurd requirement.

Fourth, Rowles' apparent position that a formal invitation from El Salvador must be found for the United States to participate in collective defense—despite El Salvador's statement to the Court that it considered itself "under the pressure of an effective armed attack on the part of Nicaragua," and its reiterations of the importance of defensive assistance from the United States and other democratic nations<sup>26</sup>—reaches a low in formalism not seen since the heady days of code pleading. In the real world, there has never been any doubt that the United States and El Salvador are working closely together to prevent the Cuban-Nicaraguan armed attack from succeeding.<sup>27</sup>

Fifth, Rowles' discussion of the "reporting requirement" of article 51 as it relates to a quasi-covert defensive response in the *Nicaragua* case is incomplete in at least two major respects.<sup>28</sup> He fails to mention that article 51, which itself establishes the reporting requirement, states that "[n]othing in the present Charter shall impair the inherent right of individual or collective" defense.<sup>29</sup> Rowles also fails to mention that the equally authentic French text of article 51 uses the phrase "*portées a la connaissance du Conseil*" rather than "reported to the Security Council."<sup>30</sup> In the real world, the Central American issue has repeatedly been before the Security Council and discussed there by the United States.<sup>31</sup> Again, Rowles seems more interested in formalism than reality.

Despite my disagreement with Rowles on this point, I believe it

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26. Declaration of Intervention of the Republic of El Salvador, Aug. 15, 1984, Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*), 1984 I.C.J. 215 (Order of Oct. 4) reprinted in 24 I.L.M. 38, 39, 41 (1985).

27. See Moore, *supra* note 2, at 62-63, 63 n.77 (reciting a collection of Salvadoran official statements regarding the Nicaraguan attack on El Salvador and United States assistance in response); see also Turner, *supra* note 20, at 164-70 (devoting nearly seven manuscript pages to official Salvadoran statements on this point, some dating from as early as May and June of 1980).

28. See Moore, *supra* note 2, at 90 n.189.

29. U.N. Charter art. 51.

30. Journal Officiel (French) 329 (Jan. 13, 1946).

31. See, e.g., statement by Ambassador Kirkpatrick before the Security Council on March 30, 1984, 39 U.N. SCOR (2525th mtg.) at 37-52, U.N. Doc. S/PV.2525 (prov. ed. 1984). On November 4, 1982, Stephen Bond, the Alternate United States Representative in the Sixth Committee, informed the United Nations in the context of a statement calling attention to Sandinista support for insurgencies in neighboring states that "we have given and will continue to provide assistance to governments of that troubled region when requested to do so by the government itself." U.S. Mission to the U.N., Press Release USUN 114 (82) (Nov. 4, 1982) at 2.

would have been better policy for the United States to have raised Nicaragua's armed attacks against neighboring states in the Security Council as those attacks began in 1980-81. I also think the United States would have been well-advised to have more visibly continually informed the Council of these ongoing attacks and to have alerted the Council to the fact that the United States and El Salvador were responding together in collective defense.

Sixth, Rowles suggests that the real purpose of U.S. assistance to the *contras* is to replace the Sandinista government, and that such an objective exceeds the lawful requirements of proportionality. It is not difficult for Rowles or anyone else to find high level statements that seemingly support this view of U.S. objectives. The difficulty with this assumption, however, is that there is an even more complete set of high level statements, as set out in my Article in the *American Journal*, clearly rooting United States actions in collective defense.<sup>32</sup> Moreover, historically the *contra* program was a response to Nicaraguan aggression against its neighbors and not a result of a dislike—also certainly present—for Marxism-Leninism in Nicaragua.<sup>33</sup> Additionally, the Boland Amendment<sup>34</sup> imposed on U.S. policy a binding legal constraint that its policy in Central America not be solely intended to overthrow the Government of Nicaragua.<sup>35</sup> Most important, in a setting where lesser means have failed to halt Nicaragua's aggression toward its neighbors, force aimed at the political structures of the Sandinista junta is a tit-for-tat response in kind that is proportional. Nor in the setting of ongoing armed attack and defensive response is it startling—except to formalists who require purity of verbal formulae—for national leaders to acknowledge the nature of the Sandinista regime as the root of the problem.

Seventh, Rowles ignores the international responsibility of the Sandinistas for their efforts to forcefully destabilize and overthrow their neighbors. Thus, even if one accepts Rowles' position that U.S. assistance to the *contras* is not a permissible defensive response, why is it that the United States would bear sole responsibility for the war in Central America? If U.S. *contra* assistance efforts are unlawful, then surely Sandinista support for insurgencies

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32. See Moore, *supra* note 2, at 111-15.

33. See *id.* at 47-48, 69-72.

34. Department of Defense Appropriations Act 1983, § 793, Pub. L. No. 97-377, § 101(c), 96 Stat. 1830, 1865 (1982).

35. See Moore, *supra* note 2, at 113-14.

and terrorism in neighboring states, to which the United States is responding, is also unlawful. The Sandinista effort is, after all, first in time, larger in size and effect, and aimed at more countries than any U.S. assistance to the *contras*.<sup>36</sup> This ineluctable conclusion of at least shared Sandinista responsibility can only be avoided by ignoring the issue, as does Rowles, or by ignoring the factual evidence of Sandinista support for the FMLN in El Salvador, and for other terrorist and insurgent groups in Costa Rica, Honduras, and elsewhere, as do both the majority of the World Court and, in part, Rowles. This is Rowles' most shocking intellectual failure as well as that of the majority opinion in the *Nicaragua* case. The essence of this failure is a double standard destructive of world order and inconsistent with any concept of the rule of law worthy of the name.

Eighth, Rowles asserts in response to the *excès de pouvoir* of the Court in the *Nicaragua* case that this ignores article 94, paragraph 1 of the Charter, which requires that "[e]ach Member of the United Nations undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party."<sup>37</sup> Rowles fails, however, to grasp that this argument is a classic example of the logical fallacy known as *petitio principii*, or more popularly as "begging the question."<sup>38</sup> That is, if the Court has exceeded its jurisdiction over the parties resulting in an *excès de pouvoir* as a result of its manifest failure to adhere to the terms of the United States acceptance of the Court's jurisdiction, and to the language of its own statute denying Nicaraguan acceptance, the United States is not "a party" to the case for the purposes of article 94, paragraph 1.

It is surely not surprising that the Court, like all other institutions created by man, should have some limits on its power. In this respect, article 51 of the Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense."<sup>39</sup> Article 92 makes the Statute of the Court<sup>40</sup> "an integral part of the Charter."<sup>41</sup> Thus, not even the Court can transform defense into aggression, and when it does its decision is sim-

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36. See *id.* at 89.

37. U.N. Charter art. 94, para. 1.

38. See S. Barker, *The Elements of Logic* 175-77 (1965).

39. U.N. Charter art. 51.

40. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

41. *Id.* art. 92.

ply void under the Charter itself. Even absent the clear textual basis of article 51, would Rowles mechanically argue that article 94, paragraph 1 requires national compliance with a court order to commit genocide? No such order is conceivable, of course, but as an intellectual proposition it is a fair test of the principle of judicial limits under article 94, paragraph 1. Sadly, in the *Nicaragua* case, the Court *has* declared a defensive response to be aggression, and has not even mildly condemned the aggressor, a result which prior to this case would also have been thought to be inconceivable.

Finally, Rowles characterizes the most important issue in the Central American debate as the "idea that disputes between nations may—and should—be decided by impartial, third-party determination of the relevant facts and law."<sup>42</sup> Precisely because it embodies a fundamental truth, this theme has crowd appeal, and has been trumpeted by counsel for Nicaragua, but it is only an incomplete description of the stakes. By far the most important stake in the *Nicaragua* case is whether the international community and its institutions will continue to succumb to the strategy of secret war or will realize that they must pull together to condemn aggressive attacks, whether overt or covert, and strengthen deterrence against such attacks.

It is the rapid deterioration of the Charter system through secret warfare and terrorist attack that most fundamentally threatens the foundations of the Charter system of world order. To adhere to the inverted *Nicaragua* case in this context would be both destabilizing and immoral. This position does not permit states "to escape legal responsibility," as Rowles avers.<sup>43</sup> As always in international law, national positions, including positions that the International Court of Justice is manifestly without jurisdiction and is impairing the inherent right of defense, are subject to international appraisal. Rowles might also note that attention to correct jurisdiction and judicial behavior may ultimately do more to strengthen real world use of the Court in appropriate disputes—and the rule of law—than dogmatic insistence on "my Court right or wrong."

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42. Rowles, *supra* note 1, at 582.

43. *Id.*

