Jus ad Bellum Before the International Court of Justice

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The norms controlling initiation of military force, or jus ad bellum as traditionally designated in international law, are among the most important normative principles in the international system. As properly understood, they stand firmly against aggression and facilitate the minimum order, which serves at the stable basis for exchange, agreement, and human creativity. As such, one would expect that the International Court of Justice, itself created as a barrier against war, would serve as a powerful force against aggression in expounding these norms. Sadly, however, the decisions of the International Court in this area have too frequently adopted an approach that encourages, rather than discourages, aggression. This is particularly so in the most important contemporary threat spectrum, that of “secret warfare,” covert attack and terrorism. This Article will briefly explore the requirements of a normative system effective in discouraging aggression, review the spectrum of forms of aggression and the contemporary importance of “secret warfare,” assess the normative structure of jus ad bellum under the United Nations Charter, and then analyze the principal use of force decisions of the International Court of Justice. The Article concludes not only that the Court has distorted the Charter framework in ways that encourage aggression, but also that in its legal analysis getting there, the Court has departed from the high quality of legal craftsmanship one expects of the Court. Finally, the Article urges that, given the central importance of the normative principles of jus ad bellum, foreign offices need to engage more openly and vocally in supporting the core Charter principles against aggression.

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INTRODUCTION

A core fundament of international law is that nations may not use force as a modality of change. That is, although nations are free to interact and seek change through peaceful means, they may not use force for change. This principle, introduced centrally into international law by the Kellogg-Briand Treaty of 1928,1 subsequently became a cornerstone of the United Nations Charter ("Charter") when adopted in 1945. It is widely known as the prohibition against aggression, or within international law circles, the normative principle of jus ad bellum.2 This principle of minimum order is a crucial starting point of a cooperative international order.

Correctly understood, modern jus ad bellum is not a blanket prohibition against use of force. Rather, it permits defense against aggression, actions lawfully authorized by the United Nations, actions undertaken with sovereign consent, and certain other regional and humanitarian actions. Of particular importance, for jus ad bellum as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, it treats aggression and defense equally, by failing to effectively differentiate between them, or even worse, it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own

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immune system against itself, thus encouraging aggression. Moreover, international institutions effectively ignoring aggression while condemning defense — thus supporting an inverse of the critically important principle banning use of force as a modality of change — will themselves inevitably be harmed as they, in turn, undermine the rule of law. Elsewhere, I have referred to an approach to *jus ad bellum* that effectively fails to differentiate between aggression and defense as a “minimalist” interpretation of the Charter. Minimalism” seems principally driven by a naive belief that the road to peace is to sanction all use of force, whether defensive or otherwise. This mindset, along with its “realist” opposite of simply rejecting the relevance of *jus ad bellum* and, more broadly, rejecting international law itself, do a disservice to the Charter framework and to our aspirations for a more peaceful world.

This Article, through a brief examination of principal *jus ad bellum* decisions of the International Court of Justice, will examine whether those decisions have strengthened the important law of the Charter or whether, sadly, they have too frequently adopted a minimalist approach undermining the Charter and encouraging aggression, particularly aggression in the “secret warfare” spectrum. First, however, this Article will briefly review underlying theory as to how a normative principle can deter aggression, the Charter normative framework, and principal forms of aggression in the contemporary international system.

The International Court of Justice is one of the world’s most historic and visible efforts to promote peace, as is evident in the name of its beautiful building in The Hague, “The Peace Palace,” and the motivation of Andrew Carnegie in making the building possible. It is particularly incumbent upon us, if we believe in the Court as an institution capable of making a difference in inhibiting war and aggression, that we support the Court through careful analysis of its work and suggestions for improvement where warranted. The opposite approach of “My Court Right or Wrong,” in the long run, neither respects nor serves the Court. It is in that spirit, as a supporter of international law and the Court, that this Article is written.

I. DETERRING AGGRESSION

Understanding of the causes of war and aggression is still in its infancy. Nevertheless, in the last century, newer data about “the democratic peace,”

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5. The first useful database for the study of war, the Correlates of War Project, was only
effects of high levels of bilateral trade, the importance of deterrence, and other more complete information about war and aggression have greatly enhanced our understanding of how violent conflicts develop. One of the more important newer theories in understanding war, termed “incentive theory,” focuses on the incentives to wage war that regime elite decision-makers draw from personal belief systems, key advisors or influential groups, the form of government in their country, and the international system as a whole. In classic international relations theory, we consider incentives affecting elite decision-makers and militating for or against war; incentives from “image one” (the individual, including key advisors and influential interest groups), “image two” (form of government), and “image three” (effect of external incentives from the international milieu, including the effect of international law). But whether we are using incentive theory or other contemporary theories in our understanding of war and aggression, it is clear that any normative system has its effect through influencing perspectives/subjectivities of, and/or costs for, regime elite decision-makers as they contemplate aggression.

To achieve a deterrent effect against aggression, a normative system must condemn aggression. But it must also differentiate between aggression and defense. The totality of incentives against aggression, including the totality of defensive responses from the international milieu, are also a core deterrent against aggression. Thus, if the normative system effectively de-legitimates and imposes costs on defensive action as much as it de-legitimates and imposes costs on aggression, then it will have undermined the overall normative response against aggression. And if it de-legitimates defensive action while ignoring aggression, it will have effectively thrown its weight on the side of aggression. At minimum, a system treating aggression and defense without effective differentiation simply turns the normative system into a cipher, as a potential aggressor knows that the defenders will bear at least equal cost from the normative system. It is the differential effect between treatment by the legal system of aggression (prohibited) and defense (permitted) that generates the deterrence against aggression from the legal system.

For the most part, aggression through regular army invasion, as in Hitler’s invasion of Poland starting World War II, will be quickly understood as aggression, despite propaganda efforts to initially persuade the world otherwise. The problem comes when the aggression is in the
form of secret warfare (conventionally called “indirect aggression”), terrorism, clandestine laying of mines, or other covert uses of force, the origins of which are not immediately understood. The problem is then compounded in court because of proof problems and the difficulty (indeed, usually impossibility without revealing sensitive sources and methods) in relying on the intelligence sources that reveal the secret aggression. Moreover, generally, the defensive responders are engaging in actions that they openly acknowledge, directly or indirectly, while the aggressors are simply lying to the world. This, in turn, plays into judicial practices weighting admissions against interest while giving lesser weight to sources of evidence consistent with a party’s interest. As will be seen in the next Part, these problems are compounded in the contemporary international system in which secret warfare and other forms of covert aggression are the norm rather than armies openly on the march.\(^9\)

### II. FORMS OF AGGRESSION

There are five principal forms of aggressive attack in the contemporary system.\(^10\) All are in violation of the United Nations Charter and contemporary international law. These are:

- **Full scale invasion.** Examples: Hitler’s 1939 invasion of Poland, North Korea’s 1950 invasion of South Korea, North Vietnam’s 1975 Post-Paris Accords invasion of South Vietnam, Saddam Hussein’s 1990 invasion of Kuwait, and the 2003 invasion of Iraq by the United States and the United Kingdom (among a coalition of other states).\(^11\)

- **Secret warfare.** This is traditionally known in international law as “indirect aggression” and involves the covert creation, funding, training, and arming of an insurgency directed at overthrow of the government of another state. Examples: North Vietnam’s

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9. For an interesting article addressing some of these issues in maintaining an effective right of defense against contemporary forms of covert aggression, see Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 246 (2011) (exploring “the immediacy requirement of an armed attack, the attribution standard for imputing the acts of irregulars to a state, and the twin requirements of necessity and proportionality.”) The author also notes that “the conservative pronouncements of the International Court of Justice (ICJ) on self-defense have further muddied already murky waters.” *Id.* at 245.

10. There may also be other forms not directly utilizing bombs and bullets, for example a major cyber-attack intentionally resulting in substantial loss of life or destruction of economic values.

11. I believe that the evidence today suggests that the 2003 invasion of Iraq by the United States and the United Kingdom was not consistent with the Charter. I have also taken the view that it was a strategic blunder by the George W. Bush Administration. Once the action was taken, however, the strategic question was dramatically transformed into one concerning credibility, self-determination for the people of Iraq, humanitarian considerations, and other important reasons supporting the need for a successful outcome.

- **Creation of a parallel state within a state.** The covert creation in a weak or failed state of a political party providing governmental services and a parallel army/militia (both in competition with the weak government) for the purpose of eventual takeover of the government either through the political process or military action, or for the purpose of waging secret warfare against neighboring states, or both. Examples: Iranian and Syrian support for Hamas in Palestine (with parallel attacks against Israel), and Iranian and Syrian support for Hezbollah in Lebanon (with parallel attacks against Israel).

- **Terrorism.** Covert support for violence directed against governments or civilian populations for the purpose of terror and other harm against the targeted government or population. Examples: Today, particularly al-Qaida against the United States and Western nations; Iran in Iraq, Afghanistan, and elsewhere; and a range of terrorist groups in attacks against Israel. Previously, almost too numerous to list, such as members of the Soviet-sponsored Warsaw Pact in supporting violent movements in Western Europe; Cuba in supporting violent movements in Latin and Central America; North Korea (the DRK) in covert attacks against South Korea and Japanese citizens; Libya in covert attacks against civil aviation, Western democracies and African nations; a range of radical political and drug cartel groups in Colombia and, more broadly, Latin America in attacks against governmental and civilian interests in Colombia, Mexico, and elsewhere in Latin America; and a range of radical Palestinian groups in covert attacks against Israel and Israeli interests worldwide.

- **Indiscriminate mining of international waterways.** Naval mines can be a lawful modality of warfare in settings of armed hostilities, provided their use is in compliance with Hague VII\textsuperscript{12} and other applicable *jus in bello* rules.\textsuperscript{13} But indiscriminate mining of straits used for international navigation and other international waterways used by neutral shipping is in violation of the Charter.

\textsuperscript{12} Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 36 Stat. 2332, T.S. 541 [hereinafter Hague VIII of 1907].

\textsuperscript{13} See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at ch. 1–14, 20 (2005).
and is an illegal use of force. Examples: the covert mining of international waterways, intentionally interfering with neutral rights and navigational freedoms, as Albania in the 1946 Corfu Channel affair, Libya in the 1984 mining of the Red Sea approaches to the Suez Canal, and Iran in the 1980–1987 mining of navigational channels used by neutral shipping in the Persian Gulf.

It should be noted with particular importance that in the contemporary world, covert aggression in a mixture of one or more of the last four categories of aggression is the predominant form of aggression de jure. Aggressive smaller regimes typically understand that they are no match for the conventional militaries of major powers, and as such, they utilize “asymmetric warfare,” which typically involves concealment of their role and an effort to deny attribution. In turn, such covert actions blend in with a background of ongoing global violence and are politically less likely to generate a collective military response on behalf of those attacked. Thus, these forms of covert attack present a particularly difficult problem for democratic nation responders. Indeed, for this reason, Moammar Gadhafi lectured his war college in Libya that had Saddam Hussein simply engaged in secret warfare against Kuwait, rather than a highly visible tank attack, Kuwait might be part of Iraq today.

In addition to generally opting for covert modes of aggression, contemporary aggressors have also understood that law is important and, as such, they can leverage the ambiguity of covert attack to seek to turn the law against the defenders. Today, this is widely discussed as a component of “lawfare.” For a healthy international legal system, efforts of an aggressor to turn the law against the defender should rebound against the aggressor. Law, and certainly jus ad bellum, in no way favors the aggressor — rather, it is antithetical to aggression. Sadly, however, as can be seen simply by the number of aggressors filing actions in the International Court of Justice against defensive actions, “lawfare” on the part of aggressors is alive and well. One of the costs to the system that

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16. This is in no way an argument for the “Realist-Rejectionist Model,” which rails against international law as a tool of weaker states seeking to tie down major powers. To the contrary, a system of international law, and particularly of prohibitions against use of force as a modality of major change, as is the core of current jus ad bellum, is of fundamental importance to all nations, big and small. On balance, the rule of law is powerfully supportive of widely adhered goals in the interests of all nations and “lawfare,” broadly conceived, should be a core modality of response.
such “lawfare” generates is not only undermining deterrence against aggression, but also undermining support for international law itself and important legal institutions such as the International Court of Justice. One direct cost of the Nicaragua decision, of course, has been the United States’ removal of its Article 36(2) acceptance of jurisdiction of the Court. The decision may well have also played a role in encouraging Iran to file its action against the United States in the upside-down Iran Platforms case.

III. THE CHARTER JUS AD BELLUM FRAMEWORK

As a point of reference, it is useful in any assessment of use-of-force decisions to review the lawful bases of use of force (jus ad bellum) under the United Nations Charter. Where there is a broad division of views, it will be noted. There are five bases for lawful use of force under the Charter framework:

1. Consent of a widely-recognized government. The government represents the state and its sovereignty, and normally, consent by a widely-recognized government suffices as a basis for lawful use of force on the territory of the consenting state.18

2. Pursuant to a valid decision of the United Nations. This basis encompasses action authorized by the Security Council acting lawfully (i.e., not in a manner ultra vires, as specified in Article 24(2) of the Charter) under Chapter VII (Articles 39, 42, and 48), or action authorized by the General Assembly (Articles 11 and 12) in settings “[w]hile the Security Council is [not] exercising in respect of any dispute or situation the functions assigned to it in the . . . Charter . . . unless the Security Council so requests”19 and that is not “enforcement” action. (“Enforcement action” is generally understood as action directed against a government, and thus, General Assembly authorization normally would relate to consensual settings such as peace-keeping operations.) It should be noted that when the Security Council seeks to authorize use of force, the authorizing resolution will normally use the language “acting under Chapter VII” (clearly triggering Article 39) and language specifically authorizing “all necessary means,” which is

against aggression and other outrages. Recently, for example, I have urged greater use of civil litigation as a tool against covert state supported terrorism. See John Norton Moore, Civil Litigation Against Terrorism, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR 197–234 (John Norton Moore & Robert F. Turner eds., 2010).


understood as authorizing use of force, as well as lesser measures. Contemporary United Nations practice, as opposed to the earlier custom of including actions under the “Uniting for Peace Resolution,” rarely will authorize use of force through the General Assembly, in part because of the substantial expense involved even with peace-keeping actions.

3. Individual or Collective Defense. Individual and collective defense in response to aggression were lawful bases for use of force under the 1928 Kellogg-Briand Pact (Pact of Paris), which is the most important pre-Charter international instrument outlawing force as a modality of major change in international relations. That is, the Kellogg-Briand Pact “condemned recourse to war for the solution of international controversies, and renounced it as an instrument of national policy in [parties’] relations with one another.” The United Nations Charter built on Kellogg-Briand and broadened its prohibition (in Article 2(4)) to include a ban on aggression below the threshold of “war” and also banned “the threat” of aggressive use of force, as well as the actual aggressive use of force. The Charter, however, in its early draft paralleling Kellogg-Briand (and thus saying nothing about defensive use of force), and ultimately in the addition of Article 51 added at the request of Latin American nations seeking to enshrine their defensive rights under the Inter-American regional security system, was not intended to limit the pre-existing right of individual and collective defense. A careful review of the Travaux Préparatoires of the Charter shows only that in Commission I, Committee 1, which dealt with the general purposes and principles of the UN Charter, the final Dumbarton Oaks Charter Proposal merely incorporated an Australian proposal for Article 2(4) adding the language “against the territorial integrity or political independence of any member or state” with the declared purpose of spelling out “the most typical form of aggression” concerning forceful change of

20. See Kellogg-Briand Pact, art. 1.

21. See Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia, U.N. Doc. 2 G/14 (1) (May 5, 1945), in 3 UNITED NATIONS COMM. OF JURISTS, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION SAN FRANCISCO, 1945, at 543–53 (1945) (stating the Australian Proposal); see also HERBERT VERE EVATT, THE UNITED NATIONS 18–20 (1948) (explaining the Australian proposal, stating that “[a]s a result of the [phrase ‘against the territorial integrity or political independence of any State’], any infringement by a Member of these principles] would involve a clear breach of the Charter. Thus the most typical form of aggression would place the aggressor clearly in the wrong at the bar of the United Nations.”); Verbatim Minutes of the Second Plenary Session, U.N. Doc. 20 P/6 (Apr. 28, 1945), in 1 UNITED NATIONS COMM. OF JURISTS, supra, at 174 (further explanation by the Deputy Prime Minister of Australia, Francis Forde, stating “The application of this principle should ensure that no question relating to a change of frontiers or an abrogation of a state’s independence could be decided other
frontiers or of a state’s independence. The discussion also fully dealt with *jus ad bellum* issues by reference to “aggression,” not “armed attack.” Indeed, “aggression” has conventionally remained the rubric under which countless international law scholars seek to define unlawful use of force and the parameters of *jus ad bellum.*

Because, however, the English language version of Article 51, added to the Charter in Committee 4 of Commission III (dealing with Chapter VIII and regional uses of force), uses the language “if an armed attack occurs,” and because arguably some statements of the U.S. Delegation in the Committee III discussion surrounding what became Article 51 can be interpreted as banning “anticipatory defense” (even under the pre-Charter strict standards for any such use of force), a minimalist interpretation of the Charter has urged that the “armed attack” language in Article 51 both limited the right of defense and banned anticipatory defense. Still, scholars increasingly have accepted that the proper rubric for determining *jus ad bellum* is not “armed attack,” which is never defined in the Charter, but rather the traditional “aggression armée,” which is the phrase used in the equally authentic French language version of Article 51. Moreover, today there is

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22. Critically, this prohibition also applies to de facto as well as de jure boundaries, as was evident, for example, during the Korean and Falkland/Malvinas wars. Any other interpretation would expose the world to countless wars over disputed islands and land and ocean boundaries.


24. Reasons supporting that the Charter did not limit the traditional right of individual and collective defense despite the English language version of Article 51 include:

- The discussion in Committee 4 of Commission III concerning what became Article 51, as well as the statements of the U.S. Delegation arguably addressing anticipatory defense, were focused on the rights of regional arrangements, not on the use of force in general;
- The discussions in Commission I, Committee I, which dealt with the general purposes and principles of the UN Charter, including norms concerning use of force, show that the right of defense remains unimpaired. This discussion in Committee I of Commission I, focused on the broadest and most important questions of purposes and principles of the Charter, would seem to trump that in Committee 4 of Commission III, which was focused on rules for “regional arrangements” in Chapter VIII of the Charter;
- The broader U.S. view on use of force (rooted in no inhibition on the traditional right of defense) was still being asserted, and accepted, on June 5 in Committee I(1) despite the earlier May 14 apparently limiting discussion and language in Committee III (4). If there was an intent to limit the right of defense generally by the “armed attack” language in the English language version of Article 51 surely there would have been a discussion about such restrictions in Commission I, which was the Commission charged globally with the
widespread acceptance of the right of anticipatory defense, provided it meets the traditional strict "imminence of attack" standard of the pre-Charter right of anticipatory defense.\textsuperscript{25} Most importantly for an analysis of \textit{jus ad bellum} law under the Charter, while there is at least an arguable basis in the \textit{travaux} and the English language version of Article 51 for minimalists to argue that anticipatory defense is no longer lawful, there is absolutely nothing in the language or the \textit{travaux} of the Charter suggesting that the right of defense does not apply against the covert aggression spectrum, including terrorist aggression directed from non-state actors and indiscriminate mining of international waterways. Nor is there any requirement in the Charter of a public or written request from a victim of aggression to trigger a right of participation in collective defense. Indeed, this latter restriction would seem counter to the core of contemporary regional defense arrangements such as the Rio\textsuperscript{26} and NATO Treaties,\textsuperscript{27} which by their terms declare that an attack against one member is an attack against all members. Actions in defense are required to be reported to the Security Council, though there is no Charter requirement of continuous reporting.\textsuperscript{28} Failure to report, sadly all too frequent, is to miss one of the most important opportunities to alert the world to an aggressive attack.

4. Lawful action pursuant to a regional arrangement. Such action, under Chapter VIII of the Charter, by the strict language of the Charter itself is lawful if it is "consistent with the Purposes and Principles of the United Nations,"\textsuperscript{29} and is either not an

\begin{itemize}
  \item There was no discussion reflecting an intent to write this discussion concerning regional arrangements broadly into use of force norms when a procedural committee simply moved Article 51 to Chapter VII from Chapter VIII;
  \item There is no definition given in the Charter of "armed attack" as would be expected were this an important restriction on the traditional right of individual and collective defense;
  \item The equally authentic French language version of the Charter uses the traditional term "aggression armée" in Article 51, rather than "armed attack"; and
  \item There is no evidence that the cryptic discussion in Commission III by members of the U.S. Delegation, a discussion arguably supporting a limitation on the right of anticipatory defense, was accepted as a proper interpretation by any other delegation. Indeed, statements of the U.S. Delegation could not bind other delegations.
\end{itemize}

\textsuperscript{28} U.N. Charter art. 51.
\textsuperscript{29} Id. art. 52.
“enforcement action,” or, if an “enforcement action” is authorized by the Security Council, and, by an implicit purpose of regional arrangements, the action is in relation only to a member state of the regional arrangement. That is, the old Warsaw Pact, which was a regional arrangement under Chapter VIII, did not grant authorization to take any action concerning NATO nations because the NATO nations were not members of the Warsaw Pact. Additionally, the Arab League is not authorized to take any action concerning Israel under this basis. Principal contemporary regional arrangements would certainly include the Arab League, NATO, the Rio Treaty, and the Organization of Eastern Caribbean States (OECS — the English-speaking countries of the Eastern Caribbean). Given the clarity under both the language and the travaux of the Charter for this fourth basis for lawful use of force, it remains puzzling why minimalist interpretations of the Charter never mention this basis.

5. Use of force under the threshold of Article 2(4). Article 2(4), drafted by Commission I (charged with the general global rules concerning jus ad bellum), provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This is the core prohibition in the UN Charter on use of force, and the discussion in Committee 1 of Commission I makes it clear that this is the provision understood by the framers as governing the prohibition against aggression under the Charter. Thus, if a limited action such as protection of nationals or humanitarian intervention is neither inconsistent with the “Purposes of the United Nations” nor seeks to alter frontiers or remove political independence of a state, it is not prohibited by the language of Article 2(4). The core actions under this basis are, of course, protection of nationals and humanitarian intervention. There is a robust long-term and continuing debate as to the lawfulness of both protection of nationals and humanitarian intervention, and I will not engage those debates at this point. It should be noted, however, that many states have officially recognized the right of protection of nationals under certain

30. Id. art. 53.
31. This is implicit in Article 52 and Chapter VIII of the Charter.
32. See 3 UNITED NATIONS COMM. OF JURISTS, supra note 21, at 35, 179, 237, 399, 454, 554–58, 582–88.
33. Note that both protection of nationals and humanitarian intervention can also be textually argued under the Charter to be rooted in the right of individual and collective defense.
extreme threats to their nationals, and in the contemporary world, at least the United Kingdom recognizes the lawfulness of humanitarian intervention under appropriate conditions.\textsuperscript{34}

Uses of force as a modality of major change in the international system that do not fall under one of these five lawful bases are illegal aggression. This is so whether the aggression takes place through open invasion of tank armies across international boundaries, secret warfare, covert mining of internationally privileged straits, or terrorism, whether committed by state actors or non-state actors. The international law is so clear on the illegality of these actions that it needs no citation here.

The use of force, to be lawful, must fall under one of these five bases. But, in addition, \textit{jus ad bellum} also requires that the action meet standards of “necessity” and “proportionality.” Neither of these requirements is textually spelled out in the Charter, indicating yet again that lawful use of force cannot be simply assessed by “logic chopping” the Charter’s text. But these requirements are generally understood to also apply to \textit{jus ad bellum}, and in a slightly different modality to \textit{jus in bello} law as well. Because of their general nature as basic principles, these concepts are particularly subject to minimalist application in use of force decisions.

Necessity as a general proposition in \textit{jus ad bellum} is best understood as a prohibition against use of force except in protection of major values. And proportionality as a general proposition in \textit{jus ad bellum} is best understood as a requirement that responding coercion must be limited in intensity and magnitude to what is reasonably necessary to promptly secure the permissible objectives of defense. Emphatically, proportionality in \textit{jus ad bellum} is not simply tit-for-tat application of equivalent force, such as ten tanks to respond to an attack from ten tanks, or tit-for-tat measurement of damages. Indeed, military doctrine calls for application of overwhelming force, and history shows that failure to do so frequently results in much higher casualties on all sides.\textsuperscript{35} As Myres McDougal and Florentino Feliciano write in their seminal work on use of force law:

\begin{footnotesize}
\begin{enumerate}
\item I, and many other scholars, have long recognized not only the lawfulness of protection of nationals but also that of humanitarian intervention. For a classic debate on humanitarian intervention, the Ian Brownlie/Richard Lillich exchange, see Ian Brownlie, \textit{Humanitarian Intervention, in Law & Civil War in the Modern World} 217–28 (John Norton Moore ed., 1974; Richard B. Lillich, \textit{Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives}, in \textit{id.} at 229–51; see also \textit{id.} at 25. for my own long-standing support for humanitarian intervention. Humanitarian intervention is not the same as the “right of protection,” which is limited to UN-authorized use of force, as in the recent action in Libya.

\item Examples of failure to effectively respond with adequate force or effective strategy necessary promptly to secure the permissible objectives of defense, with resulting higher casualties, include the limited defensive responses from the United States in the Vietnam War and Israel in the Second Lebanon War.
\end{enumerate}
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[The requirements of necessity and proportionality . . . can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in a particular context. What remains to be stressed is that reasonableness in a particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operation and functional significance for community goals in given instances of coercion.]

IV. PRINCIPAL USE OF FORCE DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

This section will examine, in turn, the decisions of the International Court of Justice in the 1949 Corfu Channel case, the 1986 Nicaragua case, the 2003 Iranian Platforms case, the 2004 Israeli Wall case, and the 2005 Congo case. These are the primary ICJ cases that address *jus ad bellum* issues.

A. The Corfu Channel Case

In 1946, the People's Republic of Albania arranged for, or knew of, the covert laying of a naval minefield of anchored automatic mines in the North Corfu Channel, a strait used for international navigation. No notice was given of the minefield as required by Hague Convention VIII of 1907. Two British destroyers, the *Saumarez* and the *Volage*, struck mines while transiting the strait on October 22, 1946. Subsequently, on November 13, 1946, the British Navy swept the remaining mines from the Channel. The United Kingdom then brought a legal action against Albania in the ICJ. Albania urged that it had not been proved that Albania laid the mines or knew of them, and countered that the United Kingdom

37. Without greater knowledge of the complex factual context of the Congo case, this analysis will only partially address the 2005 Case Concerning Armed Activities on the Territory of the Congo. Certainly that decision is correct, however, that consent by a widely recognized government is a lawful basis for use of force on the territory of the consenting state. And it is correct in accepting in its analysis that certain guerrilla or insurgent cross-border attacks against a state that are directly or indirectly supported by the state from which the attacks originate can create a right of defense in response against that state. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 146 (Dec. 19).

This analysis of *jus ad bellum* issues before the International Court of Justice will not examine the jurisdictional findings of the Court in these cases, findings that are particularly strained in the *Nicaragua* and *Iranian Platforms* cases.
39. Id. at 22, 36.
42. Id. at 13.
violated its sovereignty by passing through its territorial sea and sweeping mines there with no previous notification or consent by the Government of Albania.\textsuperscript{43} The International Court of Justice concluded “that the laying of the minefield which caused the explosions on October 22, 1946, could not have been accomplished without the knowledge of the Albanian Government.”\textsuperscript{44} It then held Albania responsible, not for aggression, but rather under “elementary considerations of humanity . . .; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”\textsuperscript{45} On the subject of straits in law of the sea for which the case is frequently cited, the Court held that “[u]nless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.”\textsuperscript{46} The Court, however, also held that the United Kingdom had violated the right of innocent passage through Albanian territorial waters when it subsequently conducted the mine sweeping operation in the Corfu Channel.

The \textit{Corfu Channel} decision has been well received.\textsuperscript{47} It was an unremarkable case in which the victim of an illegal use of force (the clandestine mining of an international strait through which shipping of every nation had a right to pass) brought the action before the Court, and the Court held that the mining, or at least failure to give notice of the mining, was an illegal action by Albania for which it was liable to pay compensation. But in a hint of minimalism concerning use of force, the Court also held that the subsequent mine sweeping operation by Britain in the Corfu Channel “violated the sovereignty of . . . Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction.”\textsuperscript{48} Even more troubling, the vote holding Albania responsible for the clandestine and illegal mining of a strait used for international navigation was eleven to five, while the vote declaring that the United Kingdom in sweeping the mines had violated Albanian sovereignty was unanimous.\textsuperscript{49}

\begin{footnotes}
\item 43. \textit{Id.} at 11–12.
\item 44. \textit{Id.} at 22.
\item 45. \textit{Id.}
\item 46. \textit{Id.} at 28 (The Court also set out the modern test as to whether a strait is a “strait used for international navigation.”).
\item 47. \textit{Id.}
\item 48. \textit{Id.}
\item 49. \textit{Id.}
\end{footnotes}
The *Corfu Channel* decision, on balance, has been constructive in the development of the rule of law concerning state responsibility and the definition of straits used for international navigation, and it was certainly correct in holding Albania responsible for its illegal use of force in mining such a strait. But the implications of its holding that the sweeping of the mines by the United Kingdom violated international law are troubling on *jus ad bellum* grounds. Clandestine automatic contact mines laid in peacetime to restrict passage through a strait used for international navigation are just as much a use of force as if Albanian shore batteries were to fire on passing ship traffic. There is no discussion of use of force by the Court, but rather a softer state responsibility ground is relied on as the basis for decision. More importantly, the implication of the second holding against the United Kingdom is that it is illegal to sweep naval mines blocking a strait used for navigation, even when it was illegal to mine the strait. One wonders whether the Court understood the implications of its parallel holding undermining the defensive right, for the implication is simply that if a state illegally mines a strait used for international navigation in peacetime—in flagrant disregard of community freedoms in use of the strait for international navigation—the options for other states are simply to accept the status quo, thus losing their critical navigational rights, or to respond by sweeping the mines and be condemned equally with the mining state. This, in effect, undermines the law against such illegal mining by removing the defensive right. One also wonders whether the Court would have reached this same "even-handed" conclusion had Albanian batteries fired on the British ships and the British ships had, in defense, fired back. Or if Albania declared that it would fire its shore batteries on transiting ships, would that mean under the implications of the Court's ruling that there could be no legal challenge through attempted transit because the necessary counter-battery fire would be equally illegal with the Albanian action? As such, when the use of force dimensions of the *Corfu Channel* decision are fully analyzed, there is a disturbing tilt against exercise of a lawful defensive right, despite the generally constructive nature of the decision.

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50. There is a concern that counsel before courts (not just the International Court of Justice) frequently have about judicial decision, that is, a fear that judges will seek to have a politically correct outcome and "split the difference," rather than fully and neutrally applying the law. I have elsewhere referred to this tendency as "the even-handed cop-out." There may be some of this at work in the *Corfu Channel* decision. The difference between the eleven to five (concerning Albanian responsibility) and unanimous (concerning United Kingdom responsibility) votes on the core holdings of state responsibility, however, may even suggest some partisan leanings or more considerable minimalist leanings with respect to use of force decisions.
B. The Nicaragua Case

"In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador."

Miguel d'Escoto Brockman, Foreign Minister of Nicaragua, Affidavit filed before the International Court of Justice, April 21, 1984.

"You don't understand revolutionary truth. What is true is what serves the ends of the revolution."

Nicaraguan Minister of Social Welfare Lea Guido de López to United States Officials.

In 1979, the corrupt regime of Anastasio Somoza in Nicaragua was overthrown by a revolution that at its inception was broad-based and popular. Relatively quickly, however, effective military and political control became concentrated in the FSLN (the Sandinistas), a radical faction that had been heavily supported by Fidel Castro. Despite efforts by Washington to have good relations with the new government, the nine commandants of the FSLN (three each from three previously feuding Marxist-Leninist factions brought together by Fidel Castro in a 1978 Havana meeting) began to set aside democratic institutions and assert tight control over civil society, adopted a foreign policy aligned with Cuba, began a major military build-up, and, most seriously, began a secret war against neighboring states, particularly El Salvador, but including Costa Rica, Guatemala, and Honduras as well. The insurgency in El Salvador,

51. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27, 1986). As a reminder, I served as a Deputy Agent of the United States at the jurisdictional phase of this case. Unfortunately, the United States did not participate at the merits phase of the case. I will not here discuss the jurisdictional issues other than to note that it is hornbook international law that the United Nations Charter use of force requirements would trump any inconsistent provisions of treaty or customary international law. It is thus logically difficult to follow the Court in its conclusion that it can decide the case based on the customary law of use of force without applying the Charter. For since the Charter governs the case if there is any inconsistency with customary law, how can the customary law be applied without at least implicitly interpreting the Charter use of force norms?

This section is based, in part, on research from my previous article on this case. John Norton Moore, The Secret War in Central America and the Future of World Order, 80 AM. J. INT'L L. 43 (1986).


53. Lawrence Harrison, We Tried to Accept Nicaragua's Revolution, WASH. POST, June 30, 1983, at A27.

54. Moore, supra note 51, at 44-46; see also Thomas E. Skidmore & Peter H. Smith, MODERN LATIN AMERICA 375 (6th ed. 2005).

55. Moore, supra note 51, at 44-46.

56. On the background of the Nicaraguan Revolution and the takeover by the Sandinistas, see generally JOHN NORTON MOORE, THE SECRET WAR IN CENTRAL AMERICA — SANDINISTA ASSAULT ON WORLD ORDER (1987).
covertly supported by the Sandinistas, was not a small-scale or narrowly based secret campaign. Rather it was a major covert armed aggression seriously intended to overthrow the government of El Salvador, and it was undertaken with a broad base of support from the Sandinistas that included financial backing, organizational support, arms, explosives and ammunition, insurgent training, military planning, covert transport, logistics, intelligence and cryptographic support, communication support, and strong worldwide political support. At their height, the insurgents fielded forces at least one-sixth the size of the entire Salvadorian Army. They caused thousands of casualties in El Salvador and over a billion dollars in direct war damage to the Salvadorian economy. Indeed, this FMLN insurgency claimed to have inflicted more than 18,000 casualties in El Salvador, and in the first half of 1985, it was causing an estimated 400 casualties per week. As was stated by Miguel Bolanos Hunter, a former knowledgeable figure within the Sandinista government:

\[\text{[T]he Sandinistas are offering total help, advice, and direction on how to manage both the war and international politics. Salvadoran guerillas have been and continue to be trained in Nicaragua. The Sandinistas have helped the Salvadorans with their air force, army, and navy, in transporting arms into El Salvador. Some arms come from Cuba via Nicaragua. The Salvadorans have two command centers in Nicaragua: one for communications and the other to meet with the Nicaraguan high command. The Salvadoran high command stays in Managua all the time, unless they go back to rally the troops. They are then flown in for a day and flown back. The political people have homes in Nicaragua.}\]

57. Moore, supra note 51, at 60.
58. Id.
59. Id.
60. Id.
61. On the details of the Sandinista secret war against El Salvador and neighboring states, see generally Moore, supra note 56; Robert Turner, Nicaragua v. United States: A Look at the Facts (1987). Turner's study was compiled from classified information available to the United States Government in preparation for possible use before the International Court of Justice in the Nicaragua case. After the United States pulled out of the case, the study was declassified and published. The author had previously served as Counsel to the President's Intelligence Oversight Board. See also Robert F. Turner, Peace and the World Court: A Comment on the Paramilitary Activities Case, 20 Vand. J. Transnat'l L. 53, 55 (1987) (“The Court's decision on the legal issues is so flawed that one hardly knows where to begin a critique.”).
62. Heritage Foundation, Inside Communist Nicaragua: The Miguel Bolanos Hunter Transcripts, 294 Backgrounder 12 (Sept. 30, 1983), available at http://tinyurl.com/7b8xruy (Note that this publicly-available evidence of the Sandinista armed aggression, like much other such evidence, was available over two years prior to the decision of the Court in the Nicaragua case).
A small sample of the evidence concerning the Sandinista aggression against neighboring countries, as set out both in my book *The Secret War in Central America: Sandinista Assault on World Order* (prepared from unclassified sources), and Robert F. Turner's book *Nicaragua v. United States: A Look at the Facts* (prepared using classified material), is as follows:

- A May 13, 1983, Report of the Democratically-controlled House Permanent Select Committee on Intelligence, which had been critical of Reagan Administration policy, reported, "The insurgents are well-trained, well-equipped with modern weapons and supplies and rely on the use of sites in Nicaragua for command and control and for logistical support. . . . intelligence supporting these judgments provided to the Committee is convincing." 63

- A March 4, 1982, Report of the House Permanent Select Committee on Intelligence had stated, "There is further persuasive evidence that the Sandinista government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further providing the insurgents bases of operations in Nicaragua." 64

- Congress as a whole noted in the Intelligence Authorization Act of 1984 that: "[b]y providing military support (including arms, training, logistical, command and control and communication facilities) to groups seeking to overthrow the Government of El Salvador and other Central American governments, the Government of National Reconstruction of Nicaragua has violated Article 18 of the Charter of the Organization of American States." 65

- President Duarte of El Salvador said in a press conference on July 27, 1984, "What I have said, from the Salvadoran standpoint, is that we have a problem of aggression by a nation called Nicaragua against El Salvador, that these gentlemen are sending in weapons, training people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night." 66

- The Foreign Minister of Honduras said before the United

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64. See id.
Nations Security Council in April of 1984, that his “country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population.”

- On April 11, 1984, the New York Times reported from Managua that “Western European and Latin American diplomats here say the Nicaraguan Government is continuing to send military equipment to the Salvadoran insurgents and to operate training camps for them inside Nicaragua.”

- Robert F. Turner writes, based on a review of the classified cables: “Nicaragua has supported the Marxist guerrillas in El Salvador, inter alia, by providing arms, equipment, money, training, command-and-control assistance, and a headquarters and radio station on Nicaraguan soil. It is important to keep in mind that United States support for the use of military force against the Sandinista regime did not begin until well over a year after Nicaragua launched a major campaign to overthrow the governments of neighboring states. The facts on this point are clear and beyond serious question . . .”

- Turner also notes: “Although for political reasons Nicaragua generally denies its role in assisting armed revolutionary movements seeking to overthrow democratically-elected governments in neighboring states, support for ‘national liberation movements’ has been a consistent element of FSLN strategy from its inception.”

- Turner further notes: “According to Romero [former FPL Central Committee member Napoleon Romero Garcia], the FPL [insurgency in El Salvador] has a monthly operating budget of between U.S. $65,000 and $100,000. About $15,000 to $20,000 of this is raised inside El Salvador, and between $50,000 and $80,000 is received each month from the FPL National Finance Commission in Nicaragua.”

- And Turner notes: “At least four training camps inside Nicaragua, used extensively for training Salvadoran insurgents, have been identified: (1) the base of Ostional in the southern province of Rivas; (2) a converted National Guard camp in

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69. ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS 231 (pre-publication manuscript of March 5, 1986, on file at the Center for National Security Law).
70. TURNER, supra note 61, at 43.
71. Id. at 68.
northwestern Nicaragua close to the Rio Tamarindo; (3) the camp of Tamagas, which specializes in teaching sabotage techniques, about 20 kilometers outside Managua; and (4) a new camp (which opened in 1984) near Santa Julia on Nicaragua’s Coseguina Peninsula. ... At any given time, as many as a few hundred Salvadoran insurgents are reported to be receiving training in these camps.”

After reviewing the options, and determined not to turn the Central American conflict into a decades-long Vietnam experience, the United States decided against responding toward Cuba, which was also assisting the insurgency, or either maintaining a static defense inside El Salvador or conducting a full-scale invasion of Nicaragua. Rather, the United States chose to respond to the Nicaraguan aggression by doing to Nicaragua, on a more restricted scale, what Nicaragua was doing in its secret attack against neighboring countries. Thus, the United States assisted in organizing, training, financing and arming a “contra” insurgency against the Sandinista regime in Managua. The motivation for this response was clearly defensive, and every effort had been made previously to peacefully end the FSLN secret aggression against neighboring states. As the effort progressed, Congress even removed overthrow of the Sandinista regime as a permissible goal of the contra policy, in sharp contrast with the continuing objective of the Sandinista effort directed against El Salvador and neighboring states.

The core case for a lawful United States response in collective defense to assist El Salvador against the Sandinista armed aggression is simple and obvious. The United States was bound by Article 3 of the Rio Defense Treaty with El Salvador to come to the assistance of El Salvador against the armed attack made on El Salvador by the Sandinistas. Further, the Rio Treaty provides that an attack against El Salvador was to be treated as though it were an attack against the United States. The Sandinista attack also generated a right of collective defense, even though it was in the form of covert “indirect aggression” as opposed to a regular army invasion. Some examples of authoritative support for this right of defense against

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72. Id. at 69–70.
73. Moore, supra note 51, at 69–71.
74. Id. at 71–73.
75. Id. at 72.
76. Id. at 73.
77. Id. at 74.
78. Id. at 75.
79. Id. at 69–70.
80. Id. at 69–71.
81. Id. at 71–73.
82. Id. at 72.
83. Id. at 73.
84. Id. at 74.
85. Id. at 75.
86. Id. at 76.
87. Id. at 77.
88. Id. at 78.
89. Id. at 79.
90. Id. at 80.
91. Id. at 81.
92. Id. at 82.
93. Id. at 83.
94. Id. at 84.
95. Id. at 85.
96. Id. at 86.
97. Id. at 87.
98. Id. at 88.
99. Id. at 89.
100. Id. at 90.
101. Id. at 91.
102. Id. at 92.
“indirect aggression,” as previously set out in my book on the Nicaraguan conflict,79 include:

- Article 3(g) of the United Nations Definition of Aggression specifically recognizes that aggression can include indirect aggression.80 It characterizes as aggression “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [invasion, military occupation, use of weapons, etc.], or its substantial involvement therein.”81

- Hans Kelsen writes: “Since the Charter of the UN does not define the term armed attack used in Article 51, the members of the UN exercising this right of individual or collective... defense, may interpret armed attack to mean not only an action in which a state uses its own armed forces but also a revolutionary movement which takes place in one state but which is initiated or supported by another state.”82

- A.J. Thomas and Ann Van Wynen Thomas, experts on the OAS system, write: “The force which should comprise ‘armed attack’... would include not only a direct use of force whereby a state operates through regular military units, but also an indirect use of force whereby a state operates through irregular groups or terrorists who are citizens but political dissidents of the victim nation.... The victim state may exercise its right of individual self-defense against the aggressor state....”83 They further add: “[T]he OAS has labeled assistance by a state to a revolutionary group in another state for purposes of subversion as being aggression....”84

- Oscar Schachter, a former Legal Adviser to UNITAR, writes: “[I]t would not only be illegal for a state to finance insurgent movements or to allow its territory to be used for organizing and training armed opposition movements, but such tactics would open that state to an armed defensive action by or on behalf of the victim of the indirect aggression.”85

79. MOORE, supra note 56, at 76–79.
81. Id. at 143.
84. Id. at 42.
• During the Greek emergency in 1947, the United States regarded Albanian, Bulgarian, and Yugoslavian assistance to insurgents in Greece as an armed attack.86
• During the Algerian War, France regarded assistance to Algerian insurgents from a Tunisian rebel base at Sakiet-Sidi-Youssef as an armed attack justifying a defensive response against the base.87
• The record of U.S. Senate consideration of the NATO Treaty, based on Article 51 of the Charter and parallel to the earlier Rio Treaty in its defensive right, points out that “armed attack” may include serious external assistance to insurgents and is not limited to open invasion.88
• During the 1964 Venezuelan emergency, the Ministers of Foreign Affairs of the Organization of American States adopted the view that serious indirect aggression could justify the use of force in defense under the United Nations and OAS Charters “in either individual or collective form.”89

Sadly, the United States neglected to report its response to the Security Council under Article 51 in any substantial way — that is, effectively presenting evidence of the aggression by the Sandinistas against neighboring states — though the contra response was publicly discussed in the United States and around the world.90 The political vacuum of publicly available information about Nicaragua's aggression created an erroneous widespread belief that President Reagan was simply engaged in an effort to

(1986). Schachter also writes, “It seems reasonable . . . to allow an attack victim to retaliate with force beyond the immediate area of attack when it has good reason to expect further attack from the same source.” Id. at 132.

90. As a consultant to the President's Intelligence Oversight Board (the PIOB), I had access to the substantial evidence of the secret aggression being waged by the Sandinistas against neighboring states and concluded, after reviewing the facts, that the United States had a lawful right of defense in response, and an obligation to assist El Salvador in resisting the armed aggression. Accordingly, I went with Robert F. Turner, then Counsel to the PIOB, to see the Acting Legal Adviser to the Department of State to urge United States reporting of the defensive response to the Security Council as required under Article 51. We thought agreement had been reached to report, but unfortunately no significant report was ever made to the Security Council.
remove an unwelcome Marxist-Leninist government from this hemisphere. Into this political vacuum, Nicaragua, as the aggressor, astoundingly filed an action in the International Court of Justice against the United States for the contra operation, including the small-scale mining of the harbors of Nicaragua that was part of the contra effort. The Sandinista narrative to the Court was simply that President Reagan had begun a covert all-out war against Nicaragua. Nothing was said about the extensive efforts of the Reagan Administration to have good relations with the new Sandinista Government, nor the ongoing secret war being waged by the Sandinistas against neighboring states, which was the reason for the contra response. Taken by surprise in the midst of preparation of an important presentation to the International Court of Justice in the Gulf of Maine case, the United States wrongly sought to revoke its jurisdiction through a letter not effectively taking account of the time period required for revocation. Running from the case, rather than embracing it as an opportunity to bring the facts of Nicaragua’s aggression to the world, further added to a climate, including the one before the Court, that the United States had something to hide. A third mistake then made by the United States was to withdraw from the merits phase of the case, thus giving the Sandinistas a free ride before the Court. None of these considerable errors of the United States in handling the Nicaragua case, however, justified the Court’s shockingly skewed judgment.

It is remarkable that an aggressor should file an action in the International Court of Justice against the defender. Once such an action

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91. The Sandinistas were quite good at waging “lawfare” against the United States, which they subsequently did in relation to certain accusations against the contras.

92. For the continued reiteration of this narrative by the agent of Nicaragua before the Court on the occasion of the 10th anniversary of the Nicaragua Judgment, see Notes by the Agent of Nicaragua on the Occasion of the 10th Anniversary of the Judgment of the Court in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 2 (presented at the Institute of Social Studies in June 1996 to a class of students of Professor Nico Schruver and handed out to participants in the Symposium “The Nicaragua Case 25 Years Later,” 27 June 2011). This was again the theme of the attorneys for Nicaragua on the occasion of the June 2011 Symposium at the Hague Academy of International Law.


94. As a Deputy Agent of the United States in the Nicaragua case, I strongly urged the United States to continue on to the merits phase. Indeed, as part of this effort, a confidential panel of the American Society of International Law was put together to advise about the decision to go forward or not. The panel overwhelmingly advised going forward to the merits phase and revealing to the world the secret war being waged by the Sandinistas against neighboring countries. I also personally urged the then-head of the CIA, Bill Casey, to support this approach. Ultimately, however, the U.S. Government did not take this advice.

95. The manner in which the Court handled the case also raised some questions about its functionings. Apparently, a meeting was arranged at United Nations headquarters in New York with a Judge of the International Court of Justice prior to Nicaragua’s decision to file the case to ask whether the Court would render an impartial judgment in a case brought by Nicaragua against the United States or, rather, whether the Court would simply favor the United States. The case was then
is filed by an aggressor, of course, it is not at all remarkable that the presentation by the aggressor to the Court will amount to a fraud on the Court. It is beyond remarkable, however, that the Court should then hold the defender accountable while ignoring the armed aggression and the fraud on the Court. The Court managed this result in the Nicaragua case through first, severely restricting the flow of information and evidence on which the Court could judge; second, accepting a Sandinista characterization of their actions against El Salvador as simply providing modest weapons transfers or logistic support—likely sometime in the past; third, ignoring available evidence showing the covert armed aggression against El Salvador; fourth, defining “armed attack” so narrowly as to effectively remove the right of defense against secret warfare; and finally, declaring a new rule with no textual basis in the Charter and applying it with no credible examination of the factual predicate, that “there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to be attacked.”

Examining each of these failures in turn, the Court most egregiously narrowed the available evidence by first denying the request of El Salvador, the directly attacked victim state, to intervene in the case, and second, by refusing the suggestion of Judge Schwebel for the Court to enable an independent investigation in the region. This initial failure is particularly disappointing given the requirement in Article 53 of the Statute of the Court that “[w]henever one of the parties does not appear . . . [t]he Court must . . . satisfy itself, not only that it has jurisdiction . . . but also that the claim is well founded in fact and law.”

filed by Nicaragua after receiving assurances from the Judge that the composition of the Court was such that Nicaragua could count on an impartial judgment on the merits. See Paul S. Reichler, Holding America to its Own Best Standards: Abe Chayes and Nicaragua in the World Court, 42 HARVARD INT’L L.J. 15, 24 (2001).

96. This Article does not address the jurisdictional issues, but, as I have previously written, in my judgment, the Court lacked jurisdiction and reached rather remarkably to find jurisdiction in the case. For a discussion of the jurisdictional issues, see MOORE, supra note 56, at 83–90. At the Symposium “The Nicaragua Case 25 Years Later,” held at the Hague Academy of International Law on June 27, 2011, Professor James Crawford severely criticized the jurisdictional holdings of the Court, and Professor Philippe Sands took the position that jurisdiction based on the bilateral United States/Nicaragua Treaty of Friendship, Commerce and Navigation should not have survived the failure to engage in negotiations as a prerequisite for jurisdiction.

97. The Court does not find that Nicaragua “was responsible for any flow of arms,” and it also concludes that “the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale . . . .” Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986 I.C.J. 14, 76 (June 27, 1986).

98. Id. at 105.

Second, the Court\(^\text{100}\) simply accepted the Sandinistas' narrative to the Court that any involvement they had with the insurgency in El Salvador was at most simply a modest transfer of weapons and some logistical support at some time in the past to what was simply one faction in a "civil war" in El Salvador. As the affidavit to the Court of Miguel d'Escoto Brockman, the Foreign Minister of Nicaragua, illustrates, Nicaragua sought to have the Court believe that the issue was that the Sandinista Government "engaged . . . in provision of arms or other supplies to either of the factions engaged in a civil war in El Salvador." This narrative cleverly seeks to distract attention from the broad range of support for the armed insurgency in El Salvador and to characterize it as simply about "arms and supplies" and "factions . . . engaged in a civil war in El Salvador" rather than the reality of an armed aggression against El Salvador. Interestingly, the Court also gave a title to the case that narrowly reflected the Sandinista argument, "Case Concerning Military and Paramilitary Activities in and Against Nicaragua," not, for example, "Case Concerning Military and Paramilitary Activities in Central America," which, at least, would have picked up El Salvador and neighboring Central American states subject to the Sandinista aggression.\(^\text{101}\)

Third, the Court ignored the abundant evidence available at the time, of which it could have taken judicial notice, of the armed aggression from the Sandinistas against neighboring states. Indeed, the contemporaneous book that I put together about the Sandinista assault on world order, containing a substantial compilation of information about the armed aggression, was compiled completely from open sources available to the Court.\(^\text{102}\) Fourth, the Court defined "armed attack" so narrowly as to preclude a lawful defensive response to "secret war" aggression when it concluded that "armed attack" does not include "assistance to rebels in the form of the provision of weapons or logistical or other support."\(^\text{103}\) Interestingly, while the Court says that it is applying customary international law, as opposed to the Charter, it focuses on the "armed attack" language set out in Article

\(^{100}\) This absence of a more complete and balanced factual review caused other factual problems for the Court as well. These included failure of the Court to note the notice actually given of the small-scale mining of the harbors of Nicaragua, including ignoring the uncontroverted evidence to this effect before the Court from multiple sources. See John Norton Moore, The Nicaragua Case and the Deterioration of World Order, 81 AM. J. INT'L L. 151, 153–54 (1987).

\(^{101}\) The even more bland, but clearly neutral, title suggested to the Court by the United States was "Case Concerning an Application of Nicaragua Against the United States of America." Submission of the Agent of the United States of America to the Registrar, May 2, 1984, in 5 INTERNATIONAL COURT OF JUSTICE, CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA) 377, 378 (2001).

\(^{102}\) MOORE, supra note 56.

51 of the Charter\textsuperscript{104} rather than focusing on what has certainly been regarded as the core test of illegal use of force in the history of international law, that of "aggression."\textsuperscript{105} Perhaps the Court chose this route because there is such a visible and available basis for defense against "indirect aggression." As Judge Schwebel noted in his dissent, which shredded the majority opinion on both legal and factual grounds: "In short the Court appears to offer — quite gratuitously — a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival."\textsuperscript{106} The implications of the Court's narrowing of the definition of aggression sufficient to justify a lawful defensive response in the secret warfare spectrum is, precisely as Judge Schwebel noted, effectively to remove the right of defense against secret warfare or "indirect aggression," thus encouraging this particularly dangerous form of aggression and undermining the Charter structure. Judge Greenwood is correct when he notes in his analysis of the use-of-force decisions of the ICJ that any distinction between armed attacks and other "less grave" uses of force has "no basis in state practice."\textsuperscript{107}

Finally, the Court announced that nowhere in the text of the Charter or previous customary international law of use of force was a "rule permitting the exercise of collective self-defense in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to have been attacked."\textsuperscript{108} This "rule" is of dubious legal ancestry and, even more egregiously, is not factually accurate as applied to El Salvador. First, the portion of the rule requiring a "request" from the attacked State is arguably not consistent with language in existing collective security agreements, such as the Rio Treaty applicable to the United States and El Salvador, which declare that aggression against one is aggression against all.\textsuperscript{109} Further, there may be defensive responses that for political reasons

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\item[104.] Id. at 71, 94, 101, 102–06.
\item[106.] \textit{Military and Paramilitary Activities in and Against Nicaragua}, 1986 I.C.J. at 350 (Schwebel, J., dissenting).
\item[108.] \textit{Military and Paramilitary Activities in and Against Nicaragua}, 1986 I.C.J. at 105.
\item[109.] The Court skips over this language of the Rio Treaty to instead rely on other language in the treaty that says, "[o]n the request of the State or States directly attacked . . . ." It then writes this language broadly into the customary law of the use of force even though under the Court's jurisdictional posture it cannot directly apply the Rio Treaty. Id. at 14, 105–06.
\end{enumerate}
\end{footnotesize}
would be better handled without public "request" for assistance. In addition, this asserted "rule" has subsequently been used by the Court in the Iran Platforms case to simply narrow the context of aggression and exclude all of the Iranian attacks against ships of thirty other nations and to focus instead on attacks against ships of the United States, thus hugely distorting the true nature of the Iranian aggression against neutral shipping in the Gulf.\(^{110}\) And, of course, there is nothing in the text of Article 51 of the Charter that imposes such a "rule." Surely the real rule here is that, in fact, a government must have requested assistance in collective defense against attack, or the states concerned were in a collective security agreement manifesting prior agreement that an attack against one is an attack against all. One contemporary example is the invocation of the NATO Treaty by America's NATO partners in the aftermath of the 9/11 attacks against the United States — an invocation of collective assistance immediately made by other NATO members absent any "request" from the United States.

The second part of this new "rule" announced by the Court in the Nicaragua case that "the State in question should have declared itself to have been attacked" is also constructed out of whole cloth. There is no such textual requirement in Article 51 or elsewhere in the Charter, nor in customary international law. And once again, particularly in responding to covert "secret warfare" attacks, there may be valid political reasons why a state does not want to declare itself attacked and would prefer a lower-key covert response. With respect to the neglect in the Nicaragua case of the factual predicate of this asserted "rule," it simply does not apply, as a rudimentary factual inquiry would have revealed. The Government of El Salvador was working in collective defense with the United States against the Sandinista aggression, El Salvador had declared itself attacked, and it had requested U.S. assistance in response. Moreover, under Article 3 of the Rio Treaty, applicable to the defense relationship between the United States and El Salvador, the attack against El Salvador created a legal obligation for the United States to assist against the attack. Further, the Rio Treaty provides that an attack against El Salvador was to be treated as though it were an attack against the United States itself.\(^{111}\) Most egregiously, however, the Court simply seeks to explain away as being unsure of applicable dates the clear statements to the Court of both the United States and El Salvador (contained respectively in the U.S. jurisdictional stage Counter-Memorial and El Salvador's Declaration of Intervention) that El Salvador had been attacked and had requested U.S. assistance in collective defense.\(^{112}\) If the Court had lingering doubts about

\(^{110}\) See infra Part IV(C), addressing the Iran Platforms case.

\(^{111}\) Rio Treaty, art. 3(1).

\(^{112}\) Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. at 87-88.
either of these factual predicates or dates of request, one would have thought perhaps a letter addressed to El Salvador, asking if it felt that it had been attacked and had asked the United States to work with it in collective defense in response, might have been appropriate. But there was no such letter forthcoming from the Court.113

In many other ways as well, the decision of the majority in the Nicaragua case shows inadequate understanding of the requirements of effective war fighting against covert attack. For example, the Court seems to suggest that El Salvador could have been adequately defended simply by El Salvador and the United States “put[ting] an end to the traffic [in arms and ammunition],”114 presumably not then needing to respond against the territory of the attacking state. But this is a classic “minimalist” argument in interpreting the Charter—that is, curtailing the right of defense against the attacking state in settings of “indirect aggression” simply to the territory of the attacked state or against infiltration routes. The result of such a disastrous rule would be to encourage secret warfare and to make such warfare nearly impossible to defeat. The Court simply does not seem to understand the difficulty in obtaining adequate intelligence and effectively combating a covert attack by a response limited to the territory of the attacked state or limited to efforts to curtail infiltration.115

Of particular note, the decision of the Court in the Nicaragua case failed to condemn, even in passing, the clearly illegal attacks from Nicaragua against neighboring states. The Court specifically found “that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up until the early months of 1981.”116 At minimum in view of this finding, one would have expected the Court to condemn this illegal support from Nicaragua. But the Court remains silent on the Sandinistas’ covert aggression while condemning the defensive response.

113. Whatever the status of this rule today, in the aftermath of the Nicaragua decision it would be better practice to obtain a public written request setting out the attack and request for collective assistance. This was done in relation to United States assistance to Kuwait in the Gulf War.


115. For many different views, pro and con, of the decision of the Court in the *Nicaragua* case, see the articles collected in the special section of the *American Journal of International Law*, *Appraisals of the ICJ’s Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT’L L. 77 (1987), including my article. I would agree with the observation of John Lawrence Hargrove in this collection of views on the decision when he says:

The most important single consequence of *Nicaragua v. United States of America* may well turn out to be its impact on the vitality of the law of the United Nations Charter governing force and self-defense. Will the case make it more likely, or less, that the law will become an increasingly effective working part of the international system? In this overridingly important respect, I am afraid the whole episode must be reckoned a misfortune of some magnitude.


The dissenting opinion of Judge Oda focuses primarily on issues of jurisdiction and admissibility, and he believes that based on these preliminary matters, the Court should not have reached the merits. Judge Oda importantly takes on the Court for incomplete fact-finding. In this connection, he notes that “the materials available through official publications of the United States Government suggest completely opposite facts [than those found by the Court].” And he concludes on this point that “[t]he Court should . . . have been wary of over-facile ‘satisfaction’ as to the facts, and perhaps should not have ventured to deliver a Judgment on the basis of such unreliable sources of evidence.”

Judge Oda also states, “[I]f it was necessary for the Court to take up the concept of collective self-defense — and I do not agree that it was — this concept should have been more extensively probed by the Court in its first Judgment to broach the subject.” In this connection, he notes an important textual point concerning the difference between the equally authentic English and French versions of Article 51 of the Charter. While the English version uses the apparently redundant language of “individual or collective self-defence,” the French version drops the “self” and simply says more clearly “au droit naturel de légitime défense, individuelle ou collective.” I have for years taught in my classes that the version of Article 51 that better captures the concept of defense as intended by the framers of the Charter was the French version, both in its appropriate use of “agression armée,” the basic concept used by international lawyers to denote illegal use of force, rather than the confusing English language version use of the new and undefined term “armed attack,” as well as the dropping of the unnecessary and confusing “self” before the reference to defense in the French version of the phrase “individual or collective defense.”

The dissenting opinion of Judge Sir Robert Jennings properly expresses “regret over the United States decision not to appear.” Judge Jennings then dissents with respect to the Court’s decision to decide the case on the basis of customary international law when the Court’s jurisdiction was excluded in application of the United Nations Charter. Among other points he makes in dissent here, he notes that the dispute itself concerned

117. Id. at 213–53 (Oda, J., dissenting).
118. Id. at 240–45.
119. Id. at 245.
120. Id. at 258.
121. See id. at 256.
122. Id. at 528 (Jennings, J., dissenting). Based on an erroneous assumption that no notice was given to international shipping of the small-scale mining of Nicaragua’s harbors, Judge Jennings did conclude on this basis that the mine-laying was unlawful. Id. at 536. This erroneous factual assumption is both a cost of the United States failing to appear and inadequate fact-finding by the Court of a fact clearly publicly on the record (that multiple notices had been given to international shipping of the mining).
“the use of force, and collective self-defence” under the Nations Charter as the governing law of the case. As such, the Court had no jurisdiction under the United States’ multilateral jurisdiction exception.

Although Judge Jennings does not fully address the question of what is an “armed attack” for purposes of the right of defense, he both makes the point that the Court ignores the equally authentic French text of Article 51 which speaks of an “aggression armée,” rather than “armed attack,” and he condemns the majority for going much too far in declaring that the provision of arms coupled with logistical or other support is not an armed attack. Clearly, Judge Jennings would look to overall involvement in determining whether an armed attack/aggression armée has occurred. And he correctly notes a central policy weakness of the “minimalist” interpretation by the Court of when an armed attack/aggression armée has taken place justifying a right of defense. Thus, he writes:

[The Court’s “minimalist” interpretation] looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. . . . [I]t seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.

Judge Jennings also criticizes the majority’s new requirement for lawful collective defense that an attacked state must first have “declared” itself to have been attacked and then have made a formal request for assistance. He writes: “It may be doubted whether it is helpful to suggest that the attacked State must in some more or less formal way have ‘declared’ itself the victim of an attack and then have, as an additional ‘requirement,’ made a formal request to a particular third State for assistance.” In this connection, he correctly points out, as ignored by the majority, that collective defense under a collective defense agreement in which the parties agree in advance that an attack against one is an attack against all is not simply “an idea of vicarious defence by champions,” but rather is “an organized system of collective security by which the security of each member is made really and truly to have become involved with the security of the others, thus providing a true basis for a system of collective self-

123. Id. at 534.
124. Id. at 534.
125. Id. at 543.
126. Id. at 543–44.
127. Id. at 544.
128. Id. at 545.
defense.Obviously, in settings with such genuine collective security provisions, the parties themselves have already previously declared — indeed formally, even in treaty form — that an attack against one is an attack against all.

On the facts, Judge Jennings criticizes the majority on one of its principal failings of playing into the hands of the Sandinista strategy in seeking to have the Court believe any involvement on their part in the insurgency in El Salvador was simply a prior small-scale arms transfer, if anything. Thus, he writes:

I remain somewhat doubtful whether the Nicaraguan involvement with Salvadorian rebels has not involved some forms of "other support" besides the possible provision, whether officially or unofficially, of weapons. There seems to have been perhaps overmuch concentration on the question of the supply, or transit, of arms; as if that were of itself crucial, which it is not.130

The dissenting opinion of Judge Schwebel is a classic. His 268-page opinion is certainly one of the most effective dissents ever written, and tears the majority opinion apart on both the facts and the law. Judge Schwebel begins with twenty-five pages of "Factual Premises" that powerfully reveal the Sandinista aggression against neighboring states and the United States' defensive response. He concludes clearly and powerfully that Nicaragua was the aggressor and that the United States was acting lawfully in defense against Nicaragua. Anyone doubting the case for lawful defense should simply review this compendium of the facts compiled by Judge Schwebel and obviously available to the majority.

On the law, Judge Schwebel also addresses a core deficiency of the majority: their "minimalist" interpretation of armed attack and aggression in settings, such as this, of secret warfare or "indirect aggression." In this connection, he notes that the Court's conclusion as to the scope of armed attack in settings of "indirect aggression" is simply inconsistent with the General Assembly's Definition of Aggression,131 among other important sources of law. His analysis of the problem of "indirect aggression," including the history of the General Assembly Definition of Aggression, is one of the most complete and brilliant to deal with the subject anywhere. He is clearly correct both as to the law and the pernicious policy consequences of a "minimalist" interpretation of "indirect aggression."132

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129. Id. at 545-46.
130. Id. at 544.
Subsequent events have dramatically demonstrated the upside-down nature of the Nicaragua case. Some of these subsequent events are summarized in a Postscript in Rosenne’s *The World Court — What It Is and How It Works*, as follows:

**POSTSCRIPT**

An explosion in a car repair shop in Managua, on 23 May 1993 led to the discovery of a weapons cache containing, among other things, a number of surface-to-air missiles, large quantities of ammunition and military weapons, and plastic and other explosives. Many documents were also found, including 300 passports of different nationalities. This was established as belonging to the Salvadorean guerillas, material assistance to whom had been denied before the Court by Nicaragua. As part of the agreements of 1987 and later for the establishment of a firm and lasting peace in Central America and particularly for the settlement of hostilities in El Salvador, the Salvadorean guerillas had undertaken to declare and surrender all these arms and war material to the United Nations Observer Mission in El Salvador (ONUSAL) for destruction. The cache, which had not been declared, both demonstrated the violation of the agreements by the Salvadorean guerillas and Nicaragua’s involvement in aiding and abetting them. This cannot be reconciled with statements made in Court on behalf of Nicaragua.

The revelations that followed this explosion led to a grave crisis of confidence between the Secretary-General of the United Nations and the Salvadorean guerillas, who later acknowledged their deception of the Secretary-General and ONUSAL and apologized to the Secretary-General. This incident gave rise to prolonged correspondence duly reported to the Security Council, which adopted two resolutions on the matter.

To a very large extent these revelations brought to light a situation closely resembling that which had been described by the State Department in the brochure noted on p. 116, above, [“Revolution Beyond our Borders: Sandinista Intervention in Central America”] and confirmed facts elucidated by Judge Schwebel in his questioning from the Bench.

This is not the first time that an international tribunal has been misled by one of the parties in its appreciation of the facts. It remains to be seen how far these later revelations, following on an accidental explosion in Managua, will affect the different assessments that have been made of this case and its value as a precedent, especially where the unwilling respondent withdrew
from further participation in the proceedings before the merits were reached.\textsuperscript{13}

As for the Sandinista bringing of this action and subsequent victory in Court, the case has become the preeminent example of upside-down “lawfare,” that is, the legal system being used by an aggressor to restrict the effective right of defense. There has also been no accountability for the erroneous statement made to the Court in a sworn affidavit by Miguel d’Escoto Brockmann, the Foreign Minister of Nicaragua, that “my government . . . has not been engaged, in the provision of arms or other supplies . . .” to the FMLN insurgency in El Salvador. Subsequent discoveries demonstrate that the FMLN insurgency held large quantities of arms in Nicaragua, a fact that the FMLN acknowledged in 1993, strongly suggesting that Nicaragua lied about providing material support to the FMLN.\textsuperscript{134} Ultimately, when in 1990 the Sandinistas were unexpectedly defeated in elections, a new Government of Nicaragua then requested, on September 12, 1991, that the Court discontinue the proceedings in the case. On September 25, 1991, the United States informed the Court that it “welcomes the Nicaraguan request for discontinuance of the proceedings.”\textsuperscript{135} Most importantly for the future, though the Sandinista aggressors won in Court against the United States, the principal losers were the Court itself and the international legal system.\textsuperscript{136}


\textsuperscript{135} Letter from the Legal Adviser of the U.S. Department of State to the Court (Sept. 25, 1991), available at http://tinyurl.com/7ejbfox. It has been reported that despite Nicaragua’s officially informing the Court that it renounced “all further right of action based on the case,” the now-returned-to-office Ortega Government has considered a referendum in Nicaragua asking whether the new Government should again sue the United States in the International Court of Justice, asking for $27 billion in reparations in implementation of the merits decision of the Court. Such a suit, of course, would contradict a specific statement made by Nicaragua to the Court. More importantly, should any such suit be brought, the United States should take the occasion to present the now voluminous evidence as to the Sandinista fraud on the Court. Indeed, the United States should embrace any new engagement with the Court and should use any such opportunity to set the factual record straight and to demonstrate that the judgment is void as procured by a fraud on the Court. In any such contingency, the United States should also consider a counter claim asking for triple reparations for the damage done to the United States — and to the Court — as a result of the egregious fraud on the Court perpetrated by Nicaraguan officials when they swore to the Court that their Government was not arming and assisting the aggression against El Salvador.

\textsuperscript{136} During the discussion of the Nicaragua decision at the June 27, 2011, Hague Academy of International Law Panel on the 25th Anniversary of the decision, supporters of the decision
C. The Iran Platforms Case

As a stalemate dragged on in the Iran-Iraq War, begun by Iraq in 1980–1981, Iran began clandestine mining of the international waterways in the Arabian/Persian Gulf in areas where neutral shipping of the world must transit for oil exported from Kuwait, Saudi Arabia, and the Gulf Emirates. Iran also began missile attacks against neutral shipping in the Gulf, sometimes using its offshore oil platforms as spotting and intelligence centers for such attacks. The motivation for these attacks by Iran on neutral shipping was apparently to drive up the cost of shipping (including insurance and added risk cost for crew) for nations friendly to Iraq during the Iran-Iraq War. It is estimated that during the course of the war, from 1980–1987, Iran conducted more than two hundred such attacks on “merchant shipping outside the Iranian exclusion zone, in international waters and the territorial seas of Gulf states.” These attacks were against ships of thirty-one nations and resulted in sixty-three deaths. One summary of the serious physical damage to Gulf shipping from these attacks, quite apart from the tragic loss of life, was two ships sunk, totaling 40,000 gross tons, and fifteen ships damaged as constructive total loss of 480,000 gross tons, for a total loss of 520,000 gross tons. The result was, of course, a massive interference with transportation of oil so vital for the world economy.

trumpeted the case as one of “truth to power,” urging that a smaller aggrieved state had taken on a superpower and won. “Truth to power” is an appealing slogan, cutting to the nature of the rule of law and the judicial neutrality we all support. But to the contrary, the decision is the opposite of “truth to power,” both factually and legally. Factually, the principal risk from the Sandinista aggression was not to the United States but to its neighboring Central American states of El Salvador and Costa Rica. These states had far smaller armies than Nicaragua, which, under the Sandinistas, was loading up with Warsaw Pact main battle tanks, Hind attack helicopters so prominent in the Soviet invasion of Afghanistan, and river-crossing amphibious tanks. Quite across the board, the Sandinistas were engaged in an unprecedented military buildup for a Central American country. Indeed, Costa Rica, in comparison, had no army at all. And legally, there is, of course, no principle of the Charter that gives small states the right to engage in aggression. Rather, this core normative principle applies to states big and small. The reality, rather than “truth to power,” then, was that the Court was failing to condemn a serious and continuing armed aggression against neighboring smaller states from the Sandinistas, while condemning the collective defense response for the purpose of assisting the smaller victim states. This discussion is based on the author's recollection from his participation on the June 27, 2011, Hague Academy of International Law Panel on the 25th Anniversary of the Nicaragua decision.

139. Id. at 7-9.
140. Id. at 8-9.
141. Id. at 9 (emphasis in original).
142. Id.
143. See SUSAN HOLLY, CONFLICT IN THE GULF: ECONOMIC AND MARITIME IMPLICATIONS OF THE IRAN-IRAQ WAR (1988). Calculations were made by the author of this Article.
144. Id. at 40–43.
In response, the United States and the United Kingdom reflagged certain Kuwaiti tankers as American and British flag vessels and begin to provide naval escorts for the tankers. On October 16, 1987, the Kuwaiti tanker *Sea Isle City*, reflagged as a U.S. vessel, was hit by an Iranian fired missile. Three days later, in response, the United States attacked several offshore Iranian oil platforms used for spotting attacks against neutral shipping. Subsequently, on April 14, 1988, the U.S. warship the *Samuel B. Roberts* struck a mine in international waters near Bahrain. Four days later, the United States in response struck and destroyed two other Iranian offshore oil platforms used as spotting centers for attacks on neutral shipping. In both cases, the United States provided prior warning to enable Iranians on the platforms to leave before the destruction of the platforms. The attacks were obviously and specifically in response to Iranian attacks against neutral shipping in the Gulf, including U.S. ships. Indeed, on October 19, the United States had promptly reported its defensive efforts against the ongoing Iranian attacks to the United Nations Security Council pursuant to Article 51. The U.S. report described the missile attack on the *Sea Isle City* as "the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce." It went on to add: "These actions [by Iran] are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation." With respect to the second attack on the Iran oil platforms, the United States again reported to the Security Council. Its report on April 18, 1988 stated:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States

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146. *Id.* at 41–52.
147. *Id.* at 53–72.
148. *Id.* at 77–82.
149. *Id.* at 83–90.
150. *Id.*
152. *Id.*
153. Letter from the Acting Permanent Representative of the United States of America to the President of the Security Council, U.N. Doc. S/19791 (Apr. 18, 1988). Reporting to the Security Council under Article 51 of the Charter is of fundamental importance to informing the world of aggression and the determination to end the aggression through an exercise of the right of defense. It is one of the best “bully pulpits” available to detail the aggression, and to miss the opportunity is always a mistake. The United States got it right in the Iran attack on neutral shipping in the Gulf setting, and wrong in not reporting effectively during the secret war in Central America.
forces have exercised their inherent right of self-defense under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf. The actions taken are necessary and proportionate to the threat posed by such hostile Iranian action.

At approximately 1010 Eastern Daylight Time on 14 April the USS Samuel B. Roberts was struck by a mine approximately 60 miles east of Bahrain, in international waters. Ten US sailors were injured, one seriously, and the ship was damaged. The mine which struck the Roberts was one of at least four mines laid in this area. The United States has subsequently identified the mines by type, and we have conclusive evidence that these mines were manufactured recently in Iran. The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels. This is but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf.¹⁵⁴

On balance, the United States’ response to such a serious ongoing threat, not only to U.S. shipping interests, but to world shipping and the world economy, was constrained and was clearly both necessary (protecting essential interests in freedom of crucial oil shipments in one of the most economically vital international waterways on earth) and proportional (resulting in only modest destruction of targets being used by the Iranians to facilitate their attacks on neutral shipping in the Gulf).

Rather than end its illegal attacks on neutral shipping, Iran instead launched “lawfare” against the United States and brought an action in the International Court of Justice under the 1955 Treaty of Amity between the United States and Iran, complaining of the United States’ defensive response.¹⁵⁵ The Court, remarkably, first hugely narrowed the issue to only a few attacks against U.S. shipping, effectively ignoring the massive pattern of Iranian attacks against neutral shipping.¹⁵⁶ Never mind, either, the loss of sixty-three lives from these sustained Iranian attacks in the Gulf. The sleight of hand used by the Court here was simply taken from the creativity of the Court in the Nicaragua decision, as the Court declared that since the United States had not been invited by other nations to defend their interests, the Court could only consider attacks against these U.S. flag

¹⁵⁴. Id.
¹⁵⁵. Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899. One can only speculate here as to the effect of the Nicaragua decision in encouraging an aggressor to take to the Court against a defensive response.
vessels and not the ongoing massive Iranian challenge to neutral shipping in the Gulf. The Court then dismissed the evidence of the Iranian mining and missile attacks against U.S. shipping and concluded that even all of the United States’ evidence taken cumulatively does not “constitute an armed attack on the United States.” Of particular note, the Court used the open statements of the United States as to its defensive attacks as admissions against interest, while Iran simply denied its missile and mine attacks to the Court and, as such, made no admissions against interest. The Court even ignored the evidence showing that Iran was caught red-handed in the act of laying mines in international waters in the vicinity of Bahrain’s deep-water shipping channel. It dismissed this evidence with the observation:

There is no evidence that the mine laying alleged to have been carried out by the Iran Ajr, at a time when Iran was at war with Iraq, was aimed specifically at the United States; was laid with the specific intention of harming that ship, or other United States vessels.

Even were the Court correct in its factual analysis here that Iran had not intended attacks on U.S. shipping specifically, the clear implication of the Court’s decision is that indiscriminate attacks against neutral shipping in an international waterway would not permit a right of defense. Judge Buergenthal in a separate opinion makes the obvious point that “the manner in which the Court analyses the evidence . . . is seriously flawed.” In this connection, Judge Buergenthal particularly notes that the evidentiary approach used by the Court focuses exclusively on whether the U.S. actions were narrowly in response to an armed attack on the United States and that this approach “takes no account of the facts as they might reasonably have been assessed by the United States before it decided to act, given the context of the Iraq-Iran armed conflict and Iran’s consistent denial that it was not responsible for any military actions against neutral shipping.” Among numerous other deficiencies in the Court’s

157. Id. at 192.
158. Id. at 184.
159. Id. at 191–92 (noting that the United States “claim[ed] to have detected and boarded an Iranian vessel, the Iran Ajr, in the act of laying mines in international waters . . .”).
160. Id.
161. Michael Matheson has an excellent analysis of this point, as well as pointing out that “[i]n fact there was ample evidence that both the mine and missile attacks were indeed designed to destroy or at least to threaten US vessels.” Michael Matheson, Resort to Force 9 (June 2011) (unpublished manuscript) (published as Chapter 10 in Michael J. Matheson, International Civil Tribunals and Armed Conflict: Litigation on State Responsibility for the Use of Armed Force in Contemporary Conflicts (2012)).
163. Id. at 286.
factual analyses, Judge Buergenthal criticizes the Court’s fact-finding with respect to whether the Sea Isle City was the victim of an attack by Iran and whether the USS Samuel B. Roberts struck a mine laid by Iran.164

Finally, in addition to failing to find that the evidence supported any Iranian attacks on U.S. shipping, the Court applied an overly cabined assessment of necessity and proportionality in the responsive attacks against the offshore Iranian oil platforms to condemn the United States’ defensive response. The tests used have little reality in connection with military operations or the policy requirements of necessity and proportionality.165 Thus, the Court declared the first attack on the Iranian platforms as not meeting the test of “necessity” because “there is no evidence that the United States complained to Iran of the military activities of the platforms . . . [and] the United States forces attacked the R-4 platform as a ‘target of opportunity.’”166 But surely necessity is not measured by whether a belligerent has previously complained about a particular target, nor whether a target is the primary target of an attack mission or a secondary “target of opportunity.” This latter designation is simply a micro-level component of targeting rules of engagement for a particular mission and in no way suggests that a “target of opportunity” is not a necessary and appropriate target. The Court then went on to declare the second attack on Iranian platforms as disproportionate because the U.S. response destroyed several Iranian frigates and other naval vessels and aircraft in response “to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk . . . .”167 Narrowing proportionality even further, the Court declared that not even the part of the attack directed at the oil platforms alone “can be regarded, in the circumstances of this case, as a proportionate use of force in self-defense.”168 This is a classic failure to understand the purpose of the proportionality test that relates to force necessary promptly to end an armed attack and to achieve the lawful defensive objectives. Proportionality is emphatically not a test based on weighing targets damaged in an attack versus targets damaged in the defensive response.169 Nor is proportionality under jus ad

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164. Id. at 287–88.
165. The most important policy requirement being that of “reasonableness in a particular context.” MYRES S. McDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 242 (1961).
167. Id.
168. Id. at 198–99.
169. Id. Having personally argued the “prudential admissibility” arguments to the Court in the jurisdictional phase of the Nicaragua case, I was intrigued that Iran sought to argue against the United States counter-claim in the Iran Platforms case in part based on such an “admissibility” argument. Interestingly, in the Nicaragua case, the Court failed to respond to my admissibility arguments, instead responding to the easier “mandatory admissibility” argument made to the Court by my distinguished co-counsel Louis Sohn; responding as though this was the only admissibility argument made by the
bellum assessed in a micro-climate of tit-for-tat, but rather in relation to the response necessary promptly to end the aggressive attack.

D. The Israeli Wall Case

The Palestinian/Israeli conflict has been termed a struggle of "right against right." One element of the conflict that is clearly wrong, however, is the continuing use of terrorism against Israel and the extremist refusal of some actors on the Palestinian side (and among their state supporters of terror attacks — particularly Iran) to deny the existence of Israel and to seek to destroy the State of Israel through use of force. This continuing support for terrorism has not only been an affront to the Charter, but has also been an abomination for the Palestinian people who have been forced by this misguided strategy to endure suffering and privation for more than half a century. Elsewhere, I have dealt at length with the detailed historic background of this dispute, and I will not reexamine those issues here. Further, I will not here engage in a full analysis of the Israeli "wall," but rather will limit the discussion solely to the preposterous announcement by the Court implicitly, but unmistakably, declaring that there is no right of defense against non-state actors.

In 2002, in response to an ongoing wave of terrorist attacks, Israel began construction of what ultimately was to be a ninety-three-mile fence cordonning off the West Bank. Approximately 94% of this "wall" is chain-link fence, but certain urban areas include concrete barriers to preclude sniper fire. The United Nations General Assembly and the
Court chose to refer to this combined feature as the Israeli “Wall.”

From September 2002 to August 2003, in selected areas where the wall is now complete, seventy-three terror attacks were carried out, killing 293 Israelis and wounding 1950 more. In the year after the wall was completed in August 2003, however, there were only five attacks in those same areas, with only twenty-eight Israelis killed and eighty-one injured. More broadly, the Israeli Ministry of Foreign Affairs reports that in the three years preceding the construction of the fence (2001–2003), 6065 people were killed or wounded. In the three years following the construction, that number declined to 1985, an over 67% reduction in casualties. Despite considerable controversy about the precise path of the wall, a controversy also played out before Israeli domestic courts, the wall was clearly rooted in the right of defense against these ongoing terror attacks. Indeed, the terror attacks against Israel are no small issue. Between 2001 and 2007, approximately 8341 Israelis were killed or wounded in Palestinian terror attacks. Approximately 68% of these, or 5676, were civilians. Putting this casualty count in relation to the population of Israel means that approximately 1 in every 780 Israelis was killed or wounded by Palestinian terror attacks between 2001 and 2007. No government could stand aside in the face of such casualties and not respond with a robust defensive effort.

Although the General Assembly made no effort to stop the virtually continuous terror attacks against Israel prior to or subsequent to the construction of the wall, it sought an advisory opinion from the International Court of Justice as to the legality of the wall. Clearly revealing the tilt of the General Assembly in the Palestinian/Israeli dispute generally, the Resolution requesting the advisory opinion repeatedly condemns Israel and expresses grave concern “at the commencement and continuation of construction by Israel... of... [the] wall...” Not

175. Construction of a Wall, supra note 170, at 140–41, 145.
177. Id.
179. See id.
181. See Victims, supra note 178.
once does the Resolution address the continuous terror attacks directed against Israel that motivated the construction of the wall.

Clearly, an important issue in construction of the wall is whether Israel has a right to construct the wall in defense against the ongoing terror attacks, but the Court evaded this issue. After setting out the full text of Article 51 of the Charter, the Court simply declared, "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign state."184 The Court then concluded, "Consequently... Article 51 of the Charter has no relevance in this case."185 This, of course, is an implicit declaration that there is no right of defense against aggression perpetrated by non-state actors, which is palpably the reality of these attacks motivating the wall. Remarkably, the Court took this position immediately after quoting verbatim the language of Article 51 of the Charter, which patently has no such limitation.186 Equally remarkably, the Court cited no authority for this new restrictive reading of the Charter, nor seemed to understand the stupendous implications of this new doctrine in a world where terrorism from non-state actors is widely viewed as the core threat to world order. Nor did the Court reflect that such a pronouncement has no chance of international acceptance by victims of terror attacks and that it is squarely at odds with a pattern of Security Council Resolutions in response to the 9/11 attacks.187 The Court also simply ducked the issue of whether these non-state actors attacking Israel are covertly assisted by certain state actors in their ongoing terror attacks, particularly Syria and Iran.

E. The Congo Case188

The Congo case involved a history of alleged irregular rebel attacks against Uganda from the territory of the Democratic Republic of the Congo (DRC), and responses from Uganda on the territory of the Congo. In 1997, then-President of Zaire Mobutu Sésé Seko was forced from power by rebel leader Laurent-Désiré Kabila.189 During the two-year revolution, Kabila had requested and received military assistance from forces from Uganda and Rwanda.190 However, within a year of Kabila

184. Construction of a Wall, supra note 170, at 194.
185. Id.
186. Id.
189. Id. at 191, 194.
190. Id. at 196–99.
taking power, renaming the country the Democratic Republic of the Congo (DRC or “the Congo”), he demanded that the foreign troops leave.\textsuperscript{191} Forces loyal to the Rwandan and Ugandan governments stayed in eastern Congo and received support from those governments.\textsuperscript{192} A war began between Congolese government forces and Ugandan-supported forces, with other foreign states getting involved on both sides.\textsuperscript{193} In 1999, the warring states — the Congo, Angola, Namibia, Zimbabwe, Rwanda, and Uganda — signed the Lusaka Ceasefire Agreement, which required that the foreign states withdraw their forces and their support from Congolese rebel forces.\textsuperscript{194} Uganda, however, continued to support military forces in the Congo.\textsuperscript{195} It claimed that it had the right to do so because of prior consent given to Uganda to use force in the Congo\textsuperscript{196} and because irregular armed forces and Congolese-government supported forces were attacking into Uganda from the Congo.\textsuperscript{197} Uganda claimed that these attacks gave it a right to self-defense against these forces, including the right to attack those forces within the Congo.\textsuperscript{198}

In the \textit{Congo} case, the Congo accused Uganda of acts of aggression within the Congo both before and after the Lusaka Ceasefire Agreement. The Court excused certain actions of Uganda said to be pursuant to consent based on a prior agreement between the Congo and Uganda.\textsuperscript{199} However, the Court held Uganda responsible for other conduct that the Court believed went beyond consent, after prior consent had been revoked, and where the Court was unable to find that the Congo was directly or indirectly involved in the irregular attacks.\textsuperscript{200} The Court noted that while there were armed attacks originating from the Congo against Uganda and Ugandan forces, the Congo denied that it had any role in these attacks. The Congo argued that these were the actions of an independent, non-state military force, the Allied Democratic Forces (ADF).\textsuperscript{201} Uganda contended that the ADF was supported by the Congo.\textsuperscript{202}

The Court is certainly correct in the \textit{Congo} decision that consent by a sovereign state is a valid basis for lawful use of force under \textit{jus ad bellum}. It is also surely correct in the implication of its analysis that attacks by armed

\begin{thebibliography}{99}
\bibitem{footnote191} Id. at 198.
\bibitem{footnote192} Id. at 192–96.
\bibitem{footnote193} Id.
\bibitem{footnote194} Id. at 193.
\bibitem{footnote195} Id. at 192–96.
\bibitem{footnote196} Id. at 196–97.
\bibitem{footnote197} Id. at 213–15.
\bibitem{footnote198} Id.
\bibitem{footnote199} Id. at 196–99.
\bibitem{footnote200} Id. at 192–96, 209–12.
\bibitem{footnote201} Id. at 220.
\bibitem{footnote202} Id.
\end{thebibliography}
bands or irregulars directly or indirectly supported by a state gives rise to a
right of defense against that state. Unfortunately, however, the Court
leaves open whether there is any right of defense against attacks from rebel
groups operating from the territory of a third state where the third state is
not directly or indirectly involved with the attacks. Thus, the Court says:

The Court has found . . . that there is no satisfactory proof of the
involvement in these attacks, direct or indirect, of the Government
of the DRC. The attacks did not emanate from armed bands or
irregulars sent by the DRC or on behalf of the DRC . . . . This
Court is of the view that, on the evidence before it, even if this
series of deplorable attacks could be regarded as cumulative in
character, they still remained non-attributable to the DRC.

If the implication here is simply that it is illegal to target the third state
itself, when that state is not involved with insurgent attacks from its
territory and is unable to end those attacks, this would seem an appropriate
response. But if the implication here more broadly is that there is no right
of response on the territory of the third state against rebel groups
operating from the territory of that state, then the Court is seriously
limiting the right of defense under the Charter.

V. THE TROUBLING LEGAL CRAFTSMANSHIP OF THE COURT IN ITS
Jus AD Bellum DECISIONS

One of the basic principles of international law, a rule central to the
functioning of the International Court of Justice and, more broadly, to that
of the international legal system itself, is that unless the parties agree to a
decision ex aequo et bono, the Court “is to decide in accordance with
international law.” In this connection, Article 38 of the Statute of the
International Court of Justice provides specifically that the Court “shall
apply,” as sources of international law:

- “international conventions . . . establishing rules expressly
  recognized by the contesting states”;
- “international custom, as evidence of a general practice accepted
  as law”;
- “the general principles of law recognized by civilized nations”;

and

203. Id. at 216–23.
204. Id. at 222–23, ¶ 146.
205. There is an excellent discussion of this issue in the Congo decision by Michael Matheson. See
Matheson, supra note 161. Matheson, who is one of the top experts in the United States on use of
force law, also faults the Court in the Congo decision for not providing a “very coherent explanation
of its understanding of the requirement of proportionality.” Id. at 24.
206. See, e.g., Statute of the International Court of Justice, supra note 99, art. 38(1).
• “...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

International courts, and particularly the International Court of Justice, which is composed of some of the top international law jurists in the world, typically do an excellent job in understanding and applying the law as it is rooted in the sources specified in Article 38 of the Statute. But inexplicably, the legal craftsmanship of the International Court of Justice has been lacking in *jus ad bellum* decisions.

In contrast, for example, with the careful application of the interpretive provisions of the 1969 Vienna Convention on the Law of Treaties by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its recent advisory opinion on obligations of sponsoring states with respect to activities in the area, the stretched ICJ *jus ad bellum* decisions have not been rooted in careful analysis of the text of the governing Charter provisions nor in analysis of the *travaux* of the Charter. There is simply no indication from the real world, either in the text of the Charter or its *travaux*, that governing Charter principles reflect as rules “expressly recognized by the contesting states” any of the following “rules” explicitly or implicitly applied by the Court in its *jus ad bellum* decisions, including:

- That the right of defense does not include the right to sweep mines clandestinely emplaced in an international waterway and targeting neutral shipping (implicit in the *Corfu Channel* decision);
- That there is no right of individual and collective defense against ongoing “less grave” aggression or “indirect aggression” (the *Nicaragua* decision) (also factually incorrect as an assumption about the seriousness of the multi-faceted covert Sandinista attack against neighboring states);
- That there is no right of individual and collective defense against indiscriminate attacks (implicit in the *Iran Platforms* decision) (also factually incorrect as an assumption about the attacks not knowingly directed against U.S. shipping in the Persian Gulf);
- That there is no right of individual and collective defense against attacks from non-state actors (the *Israeli Wall* decision);
- That there is no right of individual and collective defense against insurgent or rebel attacks from the territory of a third state where that third state is simply unwilling or unable to stop the

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207. *Id.*
attacks (implicit in the Congo decision);

- That there is no right of collective defense until an attacked state has first publicly declared itself to be attacked and has publicly requested assistance (the Nicaragua decision) (also factually incorrect as an assumption about the absence of declaration of an attack and request for assistance from El Salvador against the Sandinista attack);

- That the right of collective defense is not coterminous with the right of individual defense (implicit in the Nicaragua decision);

- That necessity in jus in bello law requires specific prior complaint about the role of a particular potential target of the defensive response (the Iran Platforms decision); and

- That proportionality in jus in bello law is a matter of weighing the damage done in an attack against the damage done in the defensive response (the Iran Platforms decision).

Nothing in the United Nations Charter or the governing law of jus in bello incorporates any of the above purported rules. Indeed, most are even inconsistent with the text of Article 51 of the Charter, which expressly declares, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . .” Further, in no case in which the Court has explicitly or implicitly adopted any of the above rules has it even made an attempt to demonstrate that the rule was an agreed limitation of the pre-Charter “inherent right” of defense necessary to comply with this Article 51 requirement. The policy implications of these “minimalist” rules are also to effectively undermine the crucial Charter prohibition against aggression by undermining the right of effective defense against such aggression.

On a case by case basis, the legal craftsmanship of ICJ jus ad bellum decisions is just as troubling. Thus, it is at least puzzling why the Court in the Corfu Channel decision did not regard an illegal use of force in the clandestine laying of mines in an international waterway as triggering the use of force norms of the Charter. Instead, the Court talked of other principles, such as “elementary considerations of humanity” and “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” Indeed, to this day, the Corfu Channel decision is routinely cited in international law classrooms as announcing a core principle concerning international environmental law rather than use of force law. No doubt the Court was thrown off here by the fact that the mines were laid in the territorial sea of Albania. This “territorial sea” focus, however, as an exclusive focus, is inconsistent with the Court’s own important parallel holding as to the rights of other nations to transit the strait as an international waterway. One could ask in this
connection, would we analyze an aggressive shelling by Albania of neutral shipping going through the strait as simply violating “elementary considerations of humanity,” or Albania “not allowing its territory to be used for acts contrary to the rights of other States,” or would we regard such a setting more appropriately as aggression in violation of the Charter? And how would we analyze the right of neutral shipping through the strait responding to shore batteries with counter-battery fire? Is Corfu Channel not a classic setting of jus ad bellum as governing law, whether the illegal aggression is through covert mining or shelling by shore batteries?

If Corfu Channel is puzzling, the Nicaragua decision baldly sets aside normal international law craftsmanship. Initially, the Court deals with its jurisdictional inability to apply the United Nations Charter by simply applying the customary international law of jus ad bellum, which it declares to be identical with those of the Charter. But it is hornbook international law that the Charter will prevail over any inconsistent customary international law. Indeed, Article 103 of the Charter embodies a legal obligation that the Charter will prevail over any inconsistent international agreement.210 How, then, can the Court apply the customary international law of jus ad bellum without simultaneously interpreting the Charter, which would prevail over the customary international law rule if there were any inconsistency? The Court also fails to consider important applicable regional agreements such as the Rio Treaty due to the Court’s own jurisdictional posture, even though such treaties would prevail over any inconsistent customary international law. Clearly, if a Court cannot apply governing international law, then it cannot properly decide a case, but yet the Court proceeds to do just that. On this point, the Dissenting Opinion of Judge Sir Robert Jennings nails the majority opinion. He writes:

Article 38 of the Court’s own Statute requires it first to apply “international conventions”, “general” as well as “particular” ones, “establishing rules expressly recognized by the contesting States”; and the relevant provisions of the Charter — and indeed also of the Charter of the Organization of American States, and of the Rio Treaty — have at all material times been principal elements of the applicable law governing the conduct, rights and obligations of the Parties. It seems, therefore, eccentric, if not perverse, to attempt to determine the central issues of the present case, after having first abstracted these principal elements of the law applicable to the case, and which still obligate both the parties.211

He further notes, "There is no escaping the fact that this is a decision of a dispute arising under Article 51."\(^{212}\)

Adding to its sleight of hand in setting aside governing treaty law, the Nicaragua decision largely ignores the substantial body of jus ad bellum law supporting a right of defense against "indirect aggression," that is, covert secret aggression supported by a third state for the purpose of overthrowing a government. In this connection, the dissenting opinion by Judge Schwebel unmistakably and correctly sets out this traditional body of jus ad bellum law.\(^{213}\) But the Court simply ignores this body of law despite its obvious relevance to the case.

Continuing its remarkable sleight of hand, the Court then seems to adopt a rule that there is no right of defense against ongoing less grave aggression (never mind for this purpose the factual inaccuracy of this characterization in the Nicaragua case). And the Court explicitly announces a new double-barreled jus ad bellum rule that for lawful collective defense, a requesting state must first publicly announce that it has been attacked and then publicly announce a request for assistance. The Court creates each of these rules out of whole cloth, citing their provenance neither in pre-Charter limitations on the "inherent" right of defense, any previous pattern of state practice or opinion juris, any previous rules from any source "expressly recognized by the contesting states," any "general principles of law recognized by civilized nations," nor even "teachings of the most highly qualified publicists." The Court thus both ignores the textual limitation apparent from the Article 51 statement that "[n]othing in the present Charter shall impair the inherent right" of defense, as well as the required basis of the new rules in a recognized source of international law. The creation of new jus ad bellum rules, said to be rules of customary international law, is even more remarkable in that it is the United Nations Charter that is the governing international law of jus ad bellum, and yet the Court jurisdictionally cannot even consider the Charter. How, then, can the Court announce new governing rules of jus ad bellum, even if such rules were consistent with the Article 38 function of the Court? Could it not do so only if these rules were part of the Charter jus ad bellum framework, which it is jurisdictionally precluded from examining?

Turning to the Iran Platforms decision, in its insistence that the evidence show a specific Iranian intent to harm U.S. shipping, the Court implicitly embraces a rule that there is no right of defense against indiscriminate mining of an international waterway. Although this purported jus ad bellum "rule" is a key element in the decision, once again the Court announces no treaty basis for this new rule, nor any pattern of state practice

\(^{212}\) Id. at 535.

\(^{213}\) Id. at 331–77 (Schwebel, J., dissenting).
demonstrating implicit state agreement for such a rule, nor any other “source” for such a rule. Nor does the Court seem to notice that its earlier Corfu Channel decision had not required a “specific intent” on the part of Albania that the mines be targeted at British ships.

Compounding its “minimalist” law making with respect to jus ad bellum law, the Court in Iranian Platforms goes on to apply concepts of necessity and proportionality that are not rooted in treaty law, state practice, or the teachings of “the most highly qualified publicists.” Thus, there is no precedent, nor any “source” of international law, cited by the Court for its assumption that “necessity” requires prior notification concerning the role of a specific defensive target, or that “proportionality” means equivalence between the aggressive attack and the defensive response. Moreover, in both respects, the “rule” implicitly applied is simply not previously accepted jus in bello law, and the widely-accepted meanings of both “necessity” and “proportionality” are quite different.

Perhaps the most shocking failure of legal craftsmanship is in the Israeli Wall decision. For there, the Court avoids the essential review of Israel’s right to construct the “wall” rooted in a right of defense against ongoing terrorist attacks by simply stating that “Israel does not claim that the attacks against it are imputable to a foreign state.” The relevance of this statement, in turn, comes from the preceding statement by the Court that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State.” The Court makes this remarkable statement immediately after quoting the text of Article 5, which, in fact, says nothing whatsoever about an attack “by one State against another State.” Thus, shockingly, here in its “minimalist” quest, the Court actually writes in language limiting the text of the Charter itself. Nor does the Court cite any “source” for its implicit rule, nor apparently understand the perverse policy consequences that would follow from such a rule eliminating the right of defense against aggression whenever that aggression is from non-state-sponsored actors.

Further, in its Congo decision, the Court disregards as a possible right of defense by Uganda that Uganda might have a right of defense against insurgent attacks from a territory of the Congo in a setting where the Congo is not involved with the attacks, and thus that the attacks would not be attributable to the Congo. Once again, however, the Court neither spells out the jus ad bellum “rule” it is implicitly adopting nor cites any

216. Construction of a Wall, supra note 170, at 194.
217. Id. at ¶ 139 (emphasis added).
218. Id.
authority for such a rule. Clearly, one of the core problems of implicit assumptions as to *jus ad bellum* rules is that the Court then never provides any legal basis for the rule. As with the other "minimalist" rules generated by the Court, in fact there seems to be no such basis in the law of the Charter for this rule.

Finally, with the exception of the *Corfu Channel* case, where the Court does employ a Committee of Experts of three naval officers drawn from neutral countries to carefully develop the facts for the Court—with an opportunity for the parties to comment—the fact-finding in these *jus ad bellum* decisions is woefully inadequate. This is particularly true in the *Nicaragua* and *Iranian Platforms* cases. Surely fact-finding is always of critical importance, and even more so when considering vital use of force decisions.

**CONCLUSION**

It is more than disappointing, given the origin of the International Court of Justice as a bulwark against war, to find that the Court has undermined the Charter structure against aggression, particularly in the spectrum of terrorism and covert warfare. But sadly, that is the reality. In five principal use of force decisions, the Court has twice condemned responsive measures to keep international straits open against illegal covert efforts to mine the straits, it has condemned a defensive response against a full-scale secret warfare attack against neighboring states without condemning the aggressor even in passing, it has waffled as to the right of defense against ongoing attacks from the territory of a third state, and it has preposterously denied the quite obvious, and indispensable, Charter right of defensive response against non-state terrorist attacks. In each case, it has done so without even the slightest basis in the Charter. There is an Annex appended to this paper that summarizes this sad reality, including whether the aggressor or defender filed the action in the Court, whether the aggressor or defender or both were sanctioned by the Court, whether the aggression was denied and the defense admitted, and whether the Court struggled in finding the facts.

Though hardly a valid excuse, the condemnation of two permanent members of the Security Council and Israel might, in part, represent simply a political skew of some of the Judges against major powers and Israel. Likely, however, a core reason for these inverted use of force decisions is that a majority of the international lawyers on the Court have embraced a "minimalist" interpretation of the Charter, an interpretation mistakenly of the belief that the road to peace is to sanction all use of force. Of critical importance for controlling war and deterring aggression, the actions of the International Court of Justice in these use of force cases
have largely ignored the aggressors while sanctioning the defensive response and narrowing the right of defense.\footnote{219} The net effect is to undermine the legal norms of the Charter against aggression so critical to international cooperation. Tragically, a Court created to stand against aggression has instead through controversial and inverted use of force decisions undermined normative deterrence against aggression. Simultaneously, since victims of aggression will simply not mutely accept aggressive attacks, the Court has also undermined its own authority and effectiveness.

So what is the way forward?

First, given the importance of the International Court of Justice, it is imperative that the Court begin to sanction aggression rigorously through every part of the aggression continuum, and particularly secret aggression, including “indirect aggression” and terrorism. Simultaneously, and of equal importance, the Court needs to support the right of individual and collective defense against aggression. A deterrent effect of the legal system against aggression depends substantially on the legal system maintaining a robust distinction between aggression (condemned) and defense (supported). The recent inversion of this requisite by the Court, particularly with the Nicaragua and Iran Platform decisions, is disgraceful. These decisions have encouraged covert aggression and cynical “lawfare” by the aggressors, and have harmed the important institutions of the Court and international law itself.

Specifically, the Court should in the future unequivocally support the following as jus ad bellum law under the Charter:\footnote{220}

- \textit{There is a right of individual and collective defense against any continuing aggression, whether large-scale or “less grave,” and whether overt invasion, covert secret warfare (“indirect aggression”), or terrorism. Conversely, there is no loss of the right of defense against continuing illegal aggression based on whether the illegal use of force is overt or covert or whether it is large-scale or small-scale. In each case, the limiting factor is simply the principle of proportionality, meaning a level of responsive force necessary to promptly end the illegal use of force. As Michael Matheson has observed, proportionality here includes a defensive response “adequate to protect... from further attack, including the destruction or neutralization of the forces or infrastructure that the attacking...\textit{}}

\textsuperscript{219} It is striking also that the Court has rejected a “clean hands” argument in these cases even as a second non-defense ground. For example, in the Iran Platform case, the Court rejects Iran’s covert mining of a major international waterway as making a difference even under a clean hands “justice and fairness” argument.

\textsuperscript{220} This discussion of lawful use of force under the United Nations Charter has benefited from the excellent forthcoming article by Matheson, \textit{supra} note 161, at 249–80.
state is using to conduct or facilitate the attacks.”221 The only exception to this general standard, as an application of the principle of necessity, would be an isolated (not part of an ongoing pattern) and minor use of force, not threatening major values and in which other non-forceful remedies are available. The core point here is that the Charter does not limit the right of defense to open, as opposed to clandestine, aggression, nor large-scale, as opposed to small-scale or “less grave,” aggression. To maintain that the Charter is so limited both contradicts its plain language and effectively licenses clandestine attack and lesser uses of force. Thus, a continuing pattern of terrorist attacks is aggression generating a right of individual and collective defense in response.

- When illegal military assistance to an armed insurgent group justifies a defensive response against the assisting entity is contextually determined based on the seriousness of the threat to major values and the overall involvement of the assisting entity. Such a determination is more appropriately thought of as a determination concerning “necessity” rather than some threshold of “armed attack.” Matheson has observed in relation to such illegal assistance that:

  [Th]e law should not preclude the possibility of forcible measures against a state that deliberately provides any form of significant support to an armed group that may be expected to be used for military operations against another state, even if it does not direct those operations. This might include providing the group with arms, logistic support, intelligence or training for the purpose of supporting such operations, or permitting the group to operate from the supporting state’s territory.

Certainly, full-scale, multi-dimensional secret warfare, as exemplified by the Sandinista assault on neighboring states in Central America, engenders a full right of individual and collective defense.222

- The right of individual and collective defense applies as fully to indiscriminate attacks as to attacks aimed at a specific state or entity. As such, the illegal mining of international waterways generates a right of defense, whether the mining is indiscriminate or aimed at a particular entity or entities. Illegal mining of international waterways, or attacks against neutral shipping in such

221. Id. at 8.
222. Id. at 14.
waterways, generates a full right of defense, including the ability to sweep the mines and use force necessary to promptly end the illegal attacks against shipping. The right of defense under the Charter is not limited to discriminate as opposed to indiscriminate attacks. To maintain that the Charter is so limited both contradicts the plain language of the Charter and effectively licenses mining of international waterways or other indiscriminate attacks against neutral shipping.

- There is a right of individual and collective defense against ongoing or continuing aggression from non-state actors. The Charter makes no distinction limiting the right of defense, whether the aggression is from state actors or non-state actors. To assert such a limitation is to effectively license such attacks. Certainly, in a post-9/11 world, and in a world with weapons of mass destruction, it is understood that aggression from non-state actors can be of enormous consequence.

- There is a right of individual and collective defense against ongoing or continuing aggression from the territory of a third state if the third state is unwilling or unable to end the aggression. Every state has the responsibility to prevent its territory from being used as a base for aggression against other states. If a state is unwilling or unable to carry out that responsibility, there is a right of individual and collective defense on the part of the attacked state against the source of the aggression. The principles of necessity and proportionality, of course, apply as fully here as to any other defensive response. In particular, there should normally be a protest from the attacked state, and an effort to work with the third state if it is felt that they are not supporting the aggression, prior to the attacked state exercising its defensive response directly on the territory of the third state. If, of course, the state whose territory is being used for the irregular or rebel attacks is directly or indirectly involved in supporting those attacks, then that state itself may be a lawful target of defense, as is implied in the Congo decision. But even if there is no such involvement, the right of defense may still be exercised against the rebels or irregulars themselves.

- When there is a right of individual defense, there is a corresponding right of collective defense. There is no distinction between individual and collective defense. There is no textual basis for discrimination against collective defense in the Charter (indeed, Article 51 specifically refers to “individual” and “collective” defense), and

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223. See, e.g., Matheson, infra note 161, at 251–56.
to fail to fully support collective defense is to remove the protection accorded smaller states.

- **There is no requirement in the Charter that prior to the exercise of the right of individual and collective defense, a state must first publicly declare itself to have been attacked and, in the case of collective defense, have first publicly declared a request for assistance.** While these actions, of course, are the better practice in most settings, there may be exceptional circumstances in which states may wish to respond covertly to a covert attack — for example, to lessen the risk of escalation. And certainly, this “requirement” should not be used to narrow an ongoing indiscriminate attack to a particular damaged target or to deny the right of individual or collective defense itself. Nor should it be applied to collective defense under a collective defense agreement where the parties pledge that an attack against one is an attack against all.

- **Indiscriminate mining of international waterways, intentionally targeting neutral shipping, is aggression generating a right of individual and collective defense in response.** Shipping is a crucial interest of the world community. Over 90% of world trade moves by ship, whether oil from the Persian Gulf or manufactured goods from China. As such, preservation of navigational freedom is a core economic and political interest. Moreover, the right of ships of all nations to move on international waterways is a right belonging to those nations and is of as much value to them as their warships and physical assets. Intentional targeting of neutral shipping in international waterways is aggression and generates a full right of individual and collective defense.

- **There is a right of anticipatory defense in settings of imminent threat.** The Charter was not intended to end the right of anticipatory defense against imminent threats, and it has not done so. Imminence of threat relates primarily to immediacy of the threat, but it also may take account of seriousness of the threat. As such, threats rooted in high risk of use of weapons of mass destruction, particularly nuclear weapons, may qualify as imminent on a lower showing of immediacy. “Preemption,” however, as a doctrine announced by the George W. Bush Administration, and which seems not to have been rooted in

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225. “Intentional” here is used in the usual definition of a consequence either desired or adverted to as a likely occurrence. Thus, mining of an international waterway with the purpose of harming the ships of an opposing belligerent is nevertheless aggression against neutral shipping if the waterway is also used by neutral shipping.
imminence of the threat, is not a basis for lawful use of force.\textsuperscript{226}

Second, the Court needs to endorse a realistic concept of necessity and proportionality in relation to \textit{jus ad bellum} issues. The overly restrictive application of necessity and proportionality in the \textit{Iran Platforms} decision is shockingly ill-informed about the legal content and purposes of these important principles.

\textbf{Necessity and proportionality related to \textit{jus ad bellum} mean respectively a limitation of the use of force except in protection of major values (that is excluding a right of military response against minor non-ongoing and isolated events or insignificant actions), and a limitation on responding coercion in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of defense. Necessity in \textit{jus ad bellum} is not a matter of whether a particular lawful target has been the subject of a complaint to the target state, or whether under rules of engagement a target is a primary or secondary target or a target of opportunity. Necessity in \textit{jus ad bellum}, rather, refers to a macro-assessment of the overall context justifying the use of responsive force and is focused on whether the aggression was sufficiently serious as to justify a military response. Similarly, proportionality in \textit{jus ad bellum} is not a matter of whether the responsive use of force is limited in scope and intensity to that of the attack, or whether the damage from the responsive use of force exceeds that from the attack. Rather, it is a macro-assessment of the overall context as to whether the defensive response as a whole is reasonably necessary promptly to secure the permissible objectives of defense. As Judge Ago put it:

\begin{quote}
The requirement of \textit{proportionality} of the action taken in self-defense... concerns the relationship between that action and its purpose, namely... that of halting and repelling the attack... It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself.\textsuperscript{227}
\end{quote}

\textsuperscript{226} A new doctrine of “preemption,” not rooted in the standard of imminence of threat as is required for lawful anticipatory defense, needlessly pushes away potential coalition allies, undermines norms against unlawful use of force, and reverses incentives in ways that risk encouraging preemptive attack from states threatened with preemption or even their acquisition of nuclear weapons as a deterrent against such preemption.

\textsuperscript{227} Robert Ago, \textit{Addendum to the Eight Report on State Responsibility}, 2 Y.B. INT’L L. COMM’N 13, 69 (1980); see also Judge Higgins in the \textit{Nuclear Weapons} case: “[T]he concept of proportionality in self-defence limits a response to what is needed to reply to an attack.” It does not require “symmetry between the mode of the initial attack and the mode of response.” Legality of the Threat or Use of
Reasonableness in this context is also a matter of reasonable judgment from facts known to the defender at the time, and given an ongoing aggression, the defense should have reasonable latitude in this judgment. The burden of uncertainty here should be borne by the attacker, not the defender, lest proportionality undermine the right of effective defense. Necessity and proportionality in relation to *jus in bello*, of course, do have a more particularized locus in application of the principles of military necessity (relevance and importance to the military objective), discrimination, and avoidance of unnecessary suffering.

Third, the Court needs to more fully utilize its fact-gathering and assessment tools. Its failure to appropriately find the facts in the *Nicaragua* and *Iran Platform* cases was especially bankrupt. The Court has powerful tools, as set out in its Statute, for finding the facts.\(^{228}\) It should use them. Thus, under Article 49 of the Statute, it can “call upon the agents to produce any document or to supply any explanations... [and it can take] [f]ormal note... of any refusal.”\(^{229}\) Under Article 50 of the Statute, “[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.”\(^{230}\) And under Article 51, it can ask “relevant questions” of witnesses and experts.\(^{231}\) Similarly, the Court should be more receptive to permitting victims of aggression to intervene and make presentations to the Court. The decision of the Court in the *Nicaragua* case to turn down the effort by El Salvador to intervene, and then to make a variety of *ex cathedra* pronouncements about El Salvador, such as that it had never declared itself under attack or invited the United States to assist in its defense, just will not do.\(^{232}\) Further, the Court should

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\(^{229}\) Id. art. 49.

\(^{230}\) Id. art. 50.

\(^{231}\) Id. art. 51. The questioning of Nicaragua’s witnesses in the *Nicaragua* case by Judge Schwebel is an all too rare example of effective use of the Article 51 authority of the Court.

\(^{232}\) This is, of course, emphatically not an argument to excuse concerned parties from making a robust case before the Court. Certainly one of the factors complicating factual determinations for the Court in the *Nicaragua* decision was that the United States gave Nicaragua a free ride by withdrawing before the merits phase of the case. I have always felt that the United States should not only have welcomed the case as a bully pulpit to set the facts of the Sandinistas’ aggression before the world, but that we should have also sought the full panoply of attacked states to join us before the Court, including El Salvador, Costa Rica, Guatemala, and Honduras. In such a setting, the posture of the case, and likely outcome, would have been different.
reexamine its doctrine with respect to "burden of proof" and evidence necessary to reach judgment in these cases.

Finally, in relation to finding the facts in contentious use of force cases, the Court should end its practice, at least in the absence of other appropriate fact-finding, of accepting at full value admissions against interest by the parties while discounting other statements by the parties. For in covert aggression settings, this means that the Court will simply accept the admissions of the defenders that they are using force while finding no admissions from those engaged in secret warfare, covert mining, or other clandestine aggression. The resulting skew turns the factual setting on its head. Particularly in secret warfare settings where the aggressor is hiding its actions but the defender is openly admitting its defensive response, it is not appropriate to simply accept the statements of the defender as to its defensive actions as "statements against interest" while simultaneously ignoring the defender's statements as to the secret warfare attack to which it is responding. If there is doubt as to whether a secret warfare attack has taken place, then the Court might consider appointing a special master to examine the question or adopt some other appropriate procedure enabling more complete fact-finding. In this connection, perhaps also the Court needs to consider some form of sanctions for lying to the Court. Respect for the Court and its proceedings can only suffer if there is no cost for official lying in presentations to the Court. A good reminder of the reality that the aggressors will simply lie about their attacks and seek to make them invisible is the statement of Hashemi Rafsanjani as then-Chair of the Iranian Parliament, who was quoted as saying in relation to the attacks on neutral shipping in the Gulf, “If our ships are hit, the ships of Iraq’s partners’ will be hit. Of course, we will not claim responsibility for anything, for it is an invisible shot that is being fired.”

Matheson, in his new forthcoming work, parts of which this Article has generously drawn upon, has a chapter entitled “Determining the Facts on the Merits” that examines at length fact-finding by tribunals in settings of ongoing hostilities. His analysis presents an excellent overview of the fact-finding difficulties for international tribunals in these jus ad bellum cases. It also makes some excellent suggestions concerning burden of proof and best practices for such fact-finding. I commend it to the reader interested in a more thorough analysis of the fact-finding issues and reform of international tribunal fact-finding practices.

None of the above, of course, means that the Court should not also fully and vigorously apply jus in bello as well in use of force decisions. Jus in bello rules are parallel to the jus ad bellum rules discussed here and are also of

great importance for international law. The Court should, in application of these rules, also ensure accuracy and appropriate balance so as not to undermine an effective right of defense by exaggerated *jus in bello* arguments.

The contemporary failure of the International Court of Justice to effectively apply Charter norms concerning *jus ad bellum* also suggests a more open and vocal role for foreign offices. International law is not made solely by the Court. Rather, it is centrally a matter of explicit or implicit agreement by states. Use of force law is among the most important normative systems in international law. Given the critical importance of that legal structure for ending aggression and achieving a more peaceful world, to permit the Court's confused pronouncements to continue to influence expectations is a tragic mistake for world order. Thus, foreign offices should respond by individually or collectively affirming the principles above. As a first step, the U.S. Government might hold consultations with its NATO and Rio Treaty partners about individual or collective affirmation of correct interpretation of the Charter on the above points. Indeed, it might even be worthwhile to hold talks on these matters between the permanent members of the Security Council. It has now been a quarter of a century since the most serious errors of the International Court of Justice on *jus ad bellum* as set forth in the *Nicaragua* decision. The more recent *jus ad bellum* decisions of the Court in the *Iran Platforms* and *Israeli Wall* decisions have compounded the errors. Given the stakes for world order, and for the Court itself, continued silence about these mistakes of the Court in dealing with *jus ad bellum* is wrong.

The International Court of Justice is one of the world's most important international legal institutions. Its very reason for being is a belief that the rule of law can make a difference in reducing violent conflict. The recent record of the Court in *jus ad bellum* decisions stands in sharp contrast to that belief. It is past due for the Court to take a higher road. As I wrote shortly after the decision of the Court in the *Nicaragua* case:

In the haunting words of Churchill after Munich, the Court and more broadly the global deterrent system “have been tried in the balance and found wanting.” If there is any ray of hope from the *Nicaragua* decision, it may well be that it is so spectacularly wrong that it will contribute to greater understanding of the failure of the global deterrent system in the face of the secret-war challenge.235

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### Jus ad Bellum Characteristics of Principal International Court of Justice Decisions

<table>
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<tr>
<th>Decision</th>
<th>Who Files the Action, the Aggressor or the Defender?</th>
<th>Is the Aggressor Held Accountable by the Court?</th>
<th>Is the Defender Held Accountable by the Court?</th>
<th>Is the Aggression Covert &amp; Denied and the Defensive Response Open &amp; Admitted?</th>
<th>Does the Court Have Difficulty in Fact Determination?</th>
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<tbody>
<tr>
<td>Corfu Channel</td>
<td>Defender</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Slight</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>Aggressor</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Severe</td>
</tr>
<tr>
<td>Iran Platforms</td>
<td>Aggressor</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Severe</td>
</tr>
<tr>
<td>Israeli Wall</td>
<td>General Assembly Request for Advisory Opinion (GA tilts politically toward aggressor)</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Congo</td>
<td>Unclear</td>
<td>Unclear</td>
<td>Unclear</td>
<td>Yes</td>
<td>Severe</td>
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