A Social Justice Theory of Self-Defense at the World Court

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I. Introduction

This article offers a theory of social justice that helps to explain use of force or *jus ad bellum* jurisprudence at the World Court.[1] More precisely, the theory provides a prism for understanding the interpretation of Article 2(4) and Article 51 of the U.N. Charter in cases before the International Court of Justice (ICJ). The judgments and opinions of the ICJ offer an empirical basis for proposing that social justice rationale is a key driver of the Court's major decisions on analyzing questions of *jus ad bellum* in the law of armed conflict. Social justice is derived from critical theory and pragmatism, and the term is used here to mean the use of plenary or administrative power (or in the context of international relations, transnational, or global authority) to achieve equal or at least equitable distribution of scarce resources among many peoples or nations.[2]

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[1] This article uses the term "World Court" to mean the "International Court of Justice." Purists could note, however, that the term "World Court" may refer not only to the ICJ, but also to any of the other international courts located in The Hague, such as the International Criminal Court (ICC), the Permanent Court of Arbitration (PCA) and the Permanent Court of International Justice (PCIJ), an historical court established under the League of Nations.

[2] Jürgen Habermas, *Paradigms of Law*, *in* Habermas on Law and Democracy: Critical Exchanges: Philosophy, Social Theory, and the Rule of Law 14-15 (Michael Rosenfeld & Andrew Arato, eds., 1998).

This article focuses on three ICJ cases involving the use of force by one state against another: *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, (Apr. 19); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27); and *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 161, (Nov. 6). In the first case, the ICJ conducted analysis that provides a glimpse into the reasoning of the Court on *jus ad bellum*. In the latter two cases, the Court passed judgment on the issue of the use of force. The United States was a litigant in the two most important cases regarding the relationship between armed aggression and self-defense, opposing Nicaragua and Iran.[3] Both Nicaragua and Iran were authoritarian states at the time the cases against the United States were before the Court. Similarly, the United Kingdom faced a totalitarian communist nation, Albania, in the *Corfu Channel* proceedings. The United States and the United Kingdom have litigated more cases before the Court than any other countries (22 and 13, respectively). As the progenitors for rule of law in contemporary international politics, it is perhaps unsurprising that the two liberal democracies would utilize the mechanism of the World Court to resolve disputes. Yet, the social justice analytical model for use of force tends to resolve findings of fact and issues of law against the two English-speaking nations. Whereas some scholars have claimed that the judgments of the ICJ are politically-motivated, this article suggests that it may be more accurate to say the judgments of the Court, at least in cases concerning the use of force between states, are philosophically-motivated, but in a way that tends to disadvantage powerful states.[4]

II. Background

Like the issues that come before the U.N. Security Council, the cases that appear before the ICJ are among the most politically salient among states.[5] The relationship between Article 2(4) of the U.N. Charter, proscribing the aggressive use of force, and Article 51 of the U.N. Charter, concerning the inherent right of self-defense, may be called the Charter paradigm—the rule set governing *jus ad bellum*. Professor John Norton Moore concludes the fundamental purpose of the Charter paradigm—the prevention of coercion as a modality of state interaction—simply prohibits the aggressive use of force among nations.[6] The Charter paradigm replaced two thousand years of law and practice rooted in the Just War paradigm. The Just War paradigm grew out of Roman philosophy and Catholic theology, and was based on the notion that initiation of warfare was permissible only if the conflict met certain criteria of political justice, religious doctrine, or

[3] *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, (June 27). *Oil Platforms* (Iran v. U.S.) 2003 I.C.J. 161, (Nov. 6).

[4] Davis R. Robinson, *The Role of Politics in the Election and the Work of Judges at the Int'l Ct. of Justice*, 97 PROC. AM. SOC'Y INT'L L. 277, 277-93 (2003); Michael Reisman, *Review of Metamorphoses: Judge Shigeru Oda and the Int'l Ct. of Justice*, 33 CAN. Y.B. INT'L L. 185, 185-221 (1995).

[5] ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INT'L REGULATORY AGREEMENTS 46, 205 (1998).

[6] John N. Moore, *The Use of Force in Int'l Relations: Norms Concerning the Initiation of Coercion, in* NATIONAL SECURITY LAW 69, 112 (John N. Moore & Robert F. Turner eds., Carolina Acad. Press, 2d ed. 2005).

philosophical ethics. The Charter paradigm, on the other hand, shifted analysis toward less subjective factors, while also banning the use of force by states except in self-defense. While a handful of other situations remain in the U.N. Charter era in which states are entitled to use force, such as pursuant to a U.N. Security Council resolution under Chapter VII, or perhaps in fulfillment of regional arrangements under Chapter VIII, the rule against the aggressive use of force dramatically changed the legal, philosophical, and political space in which questions on the use of force were considered.

Under the Charter paradigm, armed attack—or more accurately, armed aggression (*aggression armee* in the equally authoritative French translation)—is made illegal.[7] While the 1928 Kellogg-Briand Pact prohibited the conduct of "war" as an instrument of state policy, the U.N. Charter proscription is much broader. With the Charter, the threat to use force is as much a violation of Article 2(4) as is an actual use of force, foreclosing even minor uses of covert coercion.[8] A complementary bedrock Charter principle is that all nations possess an inherent right of self-defense. Article 51 reflects the customary principle. The two articles—2(4) and 51—constitute the core provisions of *jus ad bellum*. Additional provisions of the Charter and a handful of ICJ decisions complement the two articles. Article 1(1), for example, states, "acts of aggression or other breaches of the peace constitute armed aggression."[9] This text suggests not only that an actual breach of the peace is *prima facie* evidence of aggression, but also that "other breaches of the peace," that are distinct from "acts of aggression," may be considered "armed aggression."[10] Article 39 provides further detail, stating ". . .the Security Council shall determine the existence of any threat to the peace, a breach of the peace, or act of aggression," thereby suggesting that the three terms of art are discrete separate categories.

The "legislative" function of the Charter and the "judicial" function of the Court is relatively contained and limited, so grasping ICJ *jus ad bellum* jurisprudence requires consideration of only a handful of articles from the Charter and judgments of the Court. One goal in delivering opinions of the Court is to provide a guidepost for nations and leaders. Each decision ought to serve not only to resolve conflicts at hand, but also to stand as an authoritative interpretation of the U.N. Charter that can be applied by third parties in conflict settings unrelated to the actual opinion. Surprisingly, however, the ICJ has not done a great job in this regard, and the judges have created widespread confusion over how the Court approaches the most important issues of war and peace.[11] Commentators, scholars, and diplomats have tried to fill the void.[12] In common law countries, law-

[7] UN Charter, art. 2, para. 4.

[8] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 27-28 (June 27).

[9] U.N. Charter art. 1, para 1.

[10] *Id.* art. 2, para. 4.

[11] James A. Green, The Int'l Ct. of Justice and Self-Defense in Int'l Law 24-27 (2009).

[12] *See*, *e.g.*, Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 Am. J. Int'l L. 872, 878 (1947); *see also,* Myres S. McDougal & Florentino P.

yers attempt to reconcile cases by identifying common streams of legal thought that flow through court decisions. But this approach has not proved altogether useful for shedding light on the ICJ's approach to *jus ad bellum* because the Court treats parties that are similarly situated in different ways, revealing a gap between legal doctrine and judicial opinion. This social justice theory attempts to fill that lacuna.

Much of the debate over interpretation of the Charter paradigm pivots on the fundamental purpose of public international law. While the modern state system and classic scholarship concerning the use of force in international law was predicated on war avoidance and conflict prevention—in short, stability—post-modern and contemporary visions expound a different goal, one that has all of the trappings of international social justice. Political scientist Quincy Wright captured the conventional view, when he wrote, "[t]hose who have sought to make. . .aggression identical with injustice have misconceived the function of the term in the Charter and in international law. It is a rule of order, not justice."[13] The idea that international law should be designed to maintain a stable international order is a European concept that was the product of the unfathomable horrors of two world wars—conflagrations that taught the West that the ends of war rarely eclipse the horrendous costs of the fight.

But by the 1960s and 1970s, a fresh vision of international law emerged from newly independent states. Centuries of colonialism, apartheid, foreign oppression, and foreign control of many Third World states influenced the independent states to adopt a different calculus for the purpose of international law, which reduced the preference for systemic and regional stability in favor of achieving a more socially just international system. Market-based international political economy was challenged by the claims of neo-colonialism and dependency theory, and radical ideas for a New International Economic Order.[14] Global media was rejected in favor of a New World Information and Communication Order.[15] The watchword was decolonization and a shift in power and authority from North to South, rather than the maintenance of systemic durability hopelessly rigged in favor of the global North. Much more subtly, but no less real, was an analogous development in international law. While the movement for Third World Approaches to International Law[16] was germinating, the ICJ was already tacitly ap-

FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-241 (1961); *see also,* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 182-207 (4th ed. 2005).

[13] QUINCY WRIGHT, THE ROLE OF INT'L LAW IN THE ELIMINATION OF WAR 14 (1961).

[14] The Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201(May 1, 1974), *reprinted in* 13 I.L.M. 715 (1974); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), U.N. Doc. A/RES/S-6/3202 (May 1, 1974), *reprinted in* 13 I.L.M. 720 (1974); *see also* Introduction to the Rep. of the Secretary-General on the Work of the Organization, 55th Sess. June 16 1973-June 15, 1974, U.N. Doc. A/55/1, *reprinted in* 11 U.N. MONTHLY CHRON. 115, 119 (Aug.-Sept. 1974).

[15] *See, e.g.,* Mustapha Masmoudi, *The New World Information Order*, 29 J. OF COMM. 172, 172-79 (1979).

[16] Referred to as "TWAIL," Third World Approaches to International Law constitutes a revisionist stream of international law scholarship that seeks "to construct alternative visions of modernity and development. . .." BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 3 (2003); *see also* M. Mutua, *What is TWAIL?,* 94

plying social justice in its judgments.[17] The resulting confusion over ICJ jurisprudence on the use of force has created a vacuum, underscoring the need for a unified theory.

This article unveils a theory of ICJ *jus ad bellum* jurisprudence that is informed by the philosophy of the late John Rawls. Rawls is the key to understanding the ICJ's philosophical approach or a legal theory behind *jus ad bellum* decisions in cases concerning the use of force. This Rawlsian approach to the ICJ constitutes an entirely new methodology to understanding past ICJ decisions, and perhaps offers some guide to predicting the outcome of future disputes before the Court. Although the ICJ still delivers judgments that use conventional language concerning stability and order, the philosophical assumptions implicit in the judgments, and the doubts that are resolved in favor of weaker states, make a convincing case that the Court prefers outcomes that promote a conception of world social justice.

This theory is not normative; I am not necessarily suggesting that the ICJ should in fact approach *jus ad bellum* questions from a Rawlsian perspective. Rather, this approach is empirical. The goal of any theory is to offer some predictive value. Legal theory separates attorneys, who are experts in the law and have the goal of predicting legal outcomes, from legal philosophers, who are free to dream, regardless of the aftermath or actual outcome. Lawyers are paid to advise clients in a predictive manner that optimizes the client's current position and informs the likely course of future decisions. Since this analysis is not normative or doctrinal, it is also not prescriptive. The analysis brings to the surface for closer inspection a number of interesting questions about the nature of the jurisprudence at the ICJ on the use of force. I refrain from teasing out what may prove to be some of the repercussions of the legal theory, and instead set forth the model, and then step away so that readers may form their own ideas concerning whether the evidence supports the hypothesis, and if so, what impact it may have.

This model suggests that we can better understand the ICJ use of force jurisprudence by applying the social justice theory. "Social justice" means the considerations of equity and the division of social and political costs and benefits in society. How are the institutions in a local community or global society structured? These rights and duties are apportioned in a domestic setting through the machinery of executive governance, the legislature, and the courts. The anarchic nature of the international system, of course, lacks the well-developed institutions that inhere to a domestic society. In domestic society, courts exercise plenary jurisdiction over the general public. In international relations, the ICJ, although not competent to adjudicate cases without the consent of the parties, still serves a role in crafting authoritative decisions. In all cases, however, the goals of social

ASIL PROCEEDINGS 31 (2000); *see also* K. Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WISC. INT'L L. J. 353 (1998); U. Baxi, *What may the Third World Expects from International Law?,* 27 THIRD WORLD Q. 713 (2006).

[17] *See, e.g.,* RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 14-15 (1999); *see also,* Christine Gray, *The Charter Limitations on the Use of Force: Theory and Practice*, *in* THE SECURITY COUNCIL AND THE USE OF FORCE 86, 87-89 (Vaughn Lowe et al, eds., 2008).

justice are to consider how advantages and liabilities, costs and benefits, are distributed within a polity.

After World War II, social justice seeped into international law and institutions for two reasons. First, the retributive peace at Versailles was largely blamed for the "twenty years' crisis" that led to World War II, so notions of justice became intertwined with security. Second, the process of decolonization exposed the long-standing injustices that fomented wars from Algeria to Vietnam. Much of the U.N. system began to take into account social justice equities in daily operations and long-term planning. The United Nations Educational, Social, Cultural Organization, the U.N. Environment Program, the International Monetary Fund, and the World Bank, for example, were, in large part, created specifically to generate a more just, verdant, and equitable world order. Nations pay dues to the United Nations based upon the size of each member state's economy - with some exceptions that inure to the benefit of developing states, such as China - exceptions that only prove the rule of socially conscious planning at the United Nations.[18] Thus, social justice issues have become a useful lens through which to view some aspects of the international system and international institutions. It is curious then, that the geometry of social justice has not been a greater part of the conventional legal analysis of *jus ad bellum*. The recognition of how the ICJ applies social justice theory to questions of *jus ad bellum* is long overdue.

What informs ICJ *jus ad bellum* jurisprudence? Certainly, the provisions of the U.N. Charter provide underlying authority, but the high level of generality of the articles more often beg the question than provide an answer. The paucity and inconsistency of the ICJ case law on the use of force means that a conventional common law analysis is unlikely to be productive. There are some scenarios that represent clear-cut cases. There is no doubt, for example, that the German invasion of Poland in 1939 is a classic violation of the rule against armed aggression. Since the end of World War II, however, the cases of aggression have been much more ambiguous, typically involving attacks by irregular forces, armed non-state groups, and sundry militant and terrorist organizations. The Vietnamese National Liberation Front or Vi?t c?ng in Indochina, the *Fuerzas Armadas Revolucionarias de Colombia* or Revolutionary Armed Forces of Colombia (FARC) in South America, the Iranian Revolutionary Guard Corps (IRGC) in the Persian Gulf, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Party of God or Hezbollah in Lebanon, and the *?arakat al-Muqâwamat al –Islâmiyyah* or Islamic Resistance Movement (Hamas) in Gaza are just a small number of the sub-state groups that have conducted concerted low-intensity warfare against member states of the United Nations. These groups are often supported, supplied, or working in direct concert with rogue governments in order to shield states from responsibility for their aggression.

[18] Erskine Childers and Brian Urquhart, Renewing the United Nations System 150-51 (1999).

III. Social Justice and the Use of Force Jurisprudence

Nearly every judge on the ICJ appears to tacitly apply a Rawlsian analysis of *jus ad bellum*. The iconic philosopher John Rawls viewed social justice as fairness, and his model of the social contract builds on the works of John Locke in the *Second Treatise on Government* (1690), Jean Jacques Rousseau's *Of the Social Contract* (1762), and Emmanuel Kant's profound exegesis *Foundations of the Metaphysics of Morals* (1785) and his essay of 1795, *Perpetual Peace*.[19] These great works establish the canon of social contract theory, an approach associated with a humanitarian ethic that forms the foundation for constitutional government and human rights. In social contract theory, free and equal people possess moral authority in society, and all people are entitled to defend their natural rights. Individual security and happiness are universal values, and the government is enlisted in the service of providing these public goods to citizens. If the government fails in delivering the public goods, individuals may resist encroachment of their human rights by challenging the government.

In his effort to build a better social contract, Rawls sought to obtain a "realistic utopia."[20] Rawls provided a roadmap to achieve the goals of the political philosophers by arguing that all rules in a society specify a certain system of cooperation that is supposed to advance mutual benefit and the common good. All participants in the system receive benefits from cooperation in the compact. But systemic friction is inevitable, and "each legal system also is marked by conflict and a clash of interests."[21] The participants in the system are occupied with shaping the system in order to optimize the distribution of benefits they receive and reduce the costs apportioned to them. "What is just and unjust, however, is usually in dispute."[22] Inevitably, a Byzantine legal-political structure thwarts communitarian interests and further distorts the social contract.

Rawls uses the heuristic device of "original position" to redraw the map of political and economic geography.[23] The original position constitutes those principles that "free and rational persons concerned with their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[24] The broad principles regulate all subsequent legal relationships in society, providing the parameters for political, governmental and economic interaction. Rawls calls this regard for the principles of justice as "justice as fairness." Justice as fairness requires each participant in the system to fashion a notion of justice without first knowing their initial status, power, or fortune in society. The naturally occurring distribution of assets and abilities, strengths and weaknesses, and the vagaries of fortune are all assumed to be unknown. Rawls even assumes that the participants do not know their own "conceptions of good"

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[19] JOHN RAWLS, THE LAW OF PEOPLES 10 (1999).

[20] *Id.* at 4-7.

[21] JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

[22] *Id.* at 3-4.

[23] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 30-32.

[24] RAWLS, A THEORY OF JUSTICE *supra* note 21, at 4.

or even their own "psychological propensities." "The principles of justice," Rawls argues, are selected, "behind a veil of ignorance."[25]

This condition of imposed ignorance prepares participants to ponder and develop rational and mutually disinterested rules to govern society in a manner that is most equitable or fair. Rawls argues that since the choices are made behind a "veil of ignorance" concerning the original position of each actor, persons naturally:

> would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.[26]

All persons would gravitate toward this conception of justice as a way to protect themselves from the prospect of being cast in an unfortunate, weak, or vulnerable original position. The concept of justice as fairness nullifies the accidents of natural fortune in original position, benefiting all the participants in the system. The theory departs from most systems of political economy, Rawls suggests, because classic political economy benefits only the fortunate few.

The apportionment of rights and duties, and of costs and benefits, creates clashes or conflicts in society, and Rawls argues that the best way to resolve these conflicts is to shape a system where the distribution of costs and benefits are apportioned in order to benefit, or resolve any doubts, in favor of those in the least desirable original position.[27] The veil of ignorance forces participants to think about how to create a system in which benefits inure to all, and the only way to design such a system is to protect the weakest members of society.

John Rawls expanded his *Theory of Justice* and the concept of original position beyond individuals in a domestic polity to states operating in an international system.[28] Countries may be evaluated based on their original position within the international system, and the benefits or detriments of each state could be accommodated to level the global "playing field." Rather than focusing exactly on the state as a level of analysis, Rawls shifted from a Westphalian view of a international society based on states to a broader focus on "peoples"—groups bound together by common kinship, tribal or religious affiliation, or nationhood.[29] Peoples share common sympathies and conceptions of justice, and subscribe to a unified moral code.

Unlike a state, Rawls claimed that the idea of peoples has a moral content, and he suggested that peoples are generally reasonable and may be expected to honor

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[25] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 30.

[26] RAWLS, A THEORY OF JUSTICE *supra* note 21, at 7-15.

[27] *Id.*

[28] RAWLS, THE LAW OF PEOPLES, *supra* note 19, at 23-27.

[29] *Id.* at 23-24.

fair terms of cooperation.[30] Because peoples are not states, they are unwilling to impose their political or social ideals on other reasonable peoples.

The Rawlsian approach can and has been applied to international relations, with states rather than individual people sitting in an original position, serving as the subjects of the thought experiment. Like humans in a national society, countries in the global system find themselves in varying conditions of original position. The contemporary world is filled with nations that are well endowed with accidental fortune, or others seemingly cursed with disadvantage. Many of the differences in original position are exposed by a North-South relief map. Whereas Iceland has abundant "green" energy, and Canada and Russia are awash in oil, natural gas and minerals, Bangladesh and Somalia struggle with inhospitable geography—the former drenched in seasonal torrents of rain and the other perpetually arid. Japan has virtually no natural resources, but plenty of fresh water and access to the sea. Agriculture in Egypt has been dependent upon a single river for four millennia. European tribes coalesced into empire and state, leaving incongruent multicultural principalities littered throughout the Balkans. The straight lines that cut modern states from the map of colonialism separated clans and tribes in Asia, Africa and Latin America, without any consideration for the social or cultural fabric of society. The truism that "life is not fair," reflects that people enter this world with vastly different capacities and conditions; the same is true for nations. The accidents of original position in the international system influence how the ICJ views the use of force, in ways that are both subtle but dispositive. The tacit application of a Rawlsian vision of *jus ad bellum* is evident in inconsistencies in how the ICJ deals with the issue in cases in which one of the primary issues involves the use of force.

A. Protecting the Global Commons: The Corfu Channel Case

One of the earliest examples of ICJ use of force jurisprudence is the *Corfu Channel* Case.[31] The case arose out of a dispute over British naval transits through the Corfu strait in the Adriatic Sea. Although the case most commonly is cited for the proposition that all nations enjoy the right of transit through international straits, the decision on the merits also raised important issues in dicta that provide a glimpse of the direction of *jus ad bellum* jurisprudence at the ICJ.

In the first few years following World War II, the Royal Navy used the Corfu Channel to provide aid to the beleaguered Greeks, who were engaged in a struggle against a large and gathering communist insurgency. The People's Republic of Albania spread throughout the eastern side of the Corfu Channel. At the time, the government in Tirana had turned the tiny nation into a hard line communist enclave. The Greek island of Corfu lies on the western side of the channel. The Royal Navy swept the Channel clear of mines in 1944 and 1945 and declared the waterway safe. At its narrowest point, the Channel closed to only three nautical miles, and Albania and Greece could claim a territorial sea out to the median line.

[30] *Id.* at 23-27.

[31] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, ¶ 35 (Apr. 19).

Because of the rocky seabed of the Corfu Island side of the channel, however, ships using the route were forced to navigate within a mile of the Albanian coast as they negotiated the narrow channel off the port of Saranda in southeastern Albania.[32]

There were three separate events involving Albanian attacks on Royal Navy ships using the Channel of Corfu.[33] During the first incident, Royal Navy ships came under fire from Albanian shore battery fortifications. In the second incident, Royal Navy ships struck mines while transiting the channel. The third incident, which gave rise to the ICJ case, occurred when the Royal Navy was conducting mine-clearing operations in the Corfu Channel, but in Albanian territorial waters. Albania complained to the United Nations that the British mine countermeasure operations violated Albanian sovereignty over the coastal state's territorial seas.

On May 15, 1946, two Royal Navy ships transited the Corfu Channel and came under fire from Albanian shore batteries, but the warships suffered no casualties.[34] The British protested the attack, but Albania charged that the warships were violating Albanian sovereignty.[35] On October 22, 1946, another British Navy flotilla composed of the cruisers HMS *Mauritius* and *Leander* and the destroyers HMS *Saumarez* and HMS *Volage*, proceeded through the Medri channel area of the Corfu Strait.[36] The narrow passage previously had been swept for mines.[37] The *Saumarez* struck a mine at 14:53, however, and the blast caused severe damage to the ship and produced dozens of casualties.[38] *Volage* closed on *Saumarez* and took her into tow stern first.[39] At 16:06, a mine exploded near the *Volage*, severing the towline.[40] While working damage control in the forward spaces, which were damaged by the mine, *Volage* reconnected the tow to *Saumarez* and both ships proceeded stern first, arriving at Corfu Roads at 03:10 the next morning.[41] The Royal Navy suffered 44 dead and 42 injured in the mine strikes.[42]

The British then took operational, diplomatic, and legal action. Determined that it would re-sweep the Channel for mines in order to make the waterway safe, and to obtain evidence of state responsibility, the Royal Navy began "Operation Retail" to clear mines from the strait. Although the Corfu Channel was a strait used for international transit, it also constituted Albanian territorial seas. The

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[32] Stuart Thomson, *Maritime Jurisdiction and the Law of the Sea*, *in* THE ROYAL NAVY AND MARITIME POWER IN THE TWENTIETH CENTURY 148-49 (Ian Speller, Ed., 2005).

[33] *Id.* at 149, 154.

[34] *Corfu Channel,* 1949 I.C.J. at 13-14.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

dual nature of the strait created legal issues for the international law of the sea. As stated, historically, the *Corfu Channel Case* has stood for the proposition that all states enjoy the right of transit through international straits overlapped by coastal state territorial seas, and the decision still serves as valuable precedent for that rule, even after adoption of the United Nations Convention on the Law of the Sea in 1982. The ICJ decision also, however, presages later views emanating from the Court on what level of coercion triggers the use of force by one nation, and the permissive boundaries of self-defense.[43] The case also colored Great Britain's policy toward Albania, as London cut off discussions with Tirana over the initiation of diplomatic relations. Diplomatic ties between the two nations were restored only after the fall of the Berlin Wall.

Soon after the mine strikes, the United Kingdom brought a case against Albania in the ICJ. Albania threw up numerous procedural maneuvers to delay the hearing, but ultimately the Court rendered a decision in 1949. The ICJ found that the laying of the minefield was the proximate cause of the explosions on October 22, 1946, and "could not have been accomplished without the knowledge of the Albanian Government."[44] The Court also noted Albania's "complete failure to carry out its [search and rescue] duties after the explosions," and the tribunal in the Netherlands was nonplussed at the "dilatory nature of [Albania's] diplomatic notes" concerning the issue.[45] The Court ordered Albania to pay £875,000 in compensation to Great Britain, or the equivalent of more than £20 million today.[46]

But the Court was not entirely supportive of the British position, either, stating that in order to "ensure respect for international law," the World Court "must declare that the [mine sweeping operation] of the British Navy constituted a violation of Albanian sovereignty."[47] The Court rejected the United Kingdom's argument that "Operation Retail" was a method of self-protection or self-help, because "respect for territorial sovereignty is an essential foundation of international relations."[48] Further scolding the British government for demining the Corfu Channel, the judgment stated:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful

[43] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *see also* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 77 (Nov. 6).

[44] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 19).

[45] *Id.* at 35.

[46] *Id.* at 11.

[47] *Id.* at 35.

[48] *Id.*

> States, and might easily lead to perverting the administration of international justice itself.[49]

The case is an early indication of the direction of the Court's jurisprudence on matters of aggression and self-defense, and is the first omen of disparate legal standards governing the use of force between wealthy and powerful states and impoverished and weak states. The Court implicitly began to soft-peddle low-level aggression, which is the tool of weaker states, while at the same time strongly repudiating direct and robust measures taken in self-defense by the stronger nations. In this case, the measures in self-defense that the British took were both non-kinetic, and offered a free public good to the international community, but the Court could not forgo the opportunity to condemn "Operation Retail." This was the first international judicial case following World War II that illustrated that in the annals of war and peace, all states are not treated precisely the same, but rather the costs and burdens of international tension are tilted slightly against the more powerful nations.

B. Defining Aggression Up in the Post-Colonial Era

The next major case concerning the use of force, aggression, and self-defense is the landmark decision *Military and Paramilitary Activities in and against Nicaragua* of 1986.[50] The case arose out of warfare ignited by Sandinista aggression throughout Central America, and the efforts by the U.S. administration of President Ronald Reagan to simultaneously strengthen more moderate regional partners, while exposing the Sandinista regime to a U.S.-funded insurgency as a means of leveling the playing field. But even before the war in Central America reached an apex in the early-1980s, the General Assembly was active in rearranging the conventional understanding of aggression and self-defense to make it easier for non-state insurgents to topple states. The U.N. General Assembly adopted Resolution 3314 in 1974 that attempted to capture an updated definition of aggression.[51]

The General Assembly resolution set forth that the use of armed force by a state constitutes aggression. Moreover, the definition of aggression is without prejudice to the right of self-determination and the "rights of peoples under colonial or racist regimes or other forms of alien domination, or that are involved in struggles toward that end, and that seek or receive support in accordance of [*sic*] the principles within the Charter."[52]

Disagreement over the issue of how to characterize an armed band leaving one state and entering into another for the purpose of conducting low-intensity warfare constituted one of the major difficulties in reaching consensus on the definition of aggression. Agreement was finally reached, however, by narrowing the

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[49] *See id.*

[50] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[51] G.A. Res. 3314 (XXIX), art. 3(d), U.N. Doc A/RES/3314 (Dec. 14, 1974).

[52] *Id.*

language from earlier proposals. The final text limited aggression to the "sending" of organized groups into another state, rather than activities that merely serve to organize and support such irregular forces in another state. Furthermore, the armed bands or groups have to carry out acts "of such gravity" as to be tantamount to more traditional acts of warfare that are considered aggression under the resolution, such as (a) invasion of a state by the armed forces of another state, (b) "bombardment by the armed forces of a state against the territory of another state," (c) blockade of ports or coasts by one state against another state, (d) an attack by one state on another against the "land, sea, or air forces, or marine and air fleets," of another state, (e) the use of the armed forces of one state, "which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory," and, (f) one state allowing its territory to be used by another state to perpetuate an act of aggression against a third state. Article 5 of the Definition continues: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." Finally, Article 7 takes away with the left hand what already was given by the right, in stating: "Nothing in this Definition, and in particular Article 3, could in any way prejudice the right of self-determination, freedom and independence . . . of peoples forcibly deprived of that right. . .. Particularly peoples under colonial and racist regimes or other forms of alien domination. . .."[53]

The resolution bought some interesting issues to the surface. The cardinal distinction between Article 2(4) of the U.N. Charter and U.N. General Assembly resolution 3314 of 1974 is that the General Assembly resolution does not recognize the threat of force as a type of aggression. In the view of the General Assembly, an actual use of armed force is required. The Security Council never endorsed resolution 3314, but the social justice approach to thinking about aggression by anti-Western insurgencies persisted. The provisions of Article 7 of the definition of aggression virtually exempted acts of warfare by those supporting groups violently seeking to overthrow "colonial or racist regimes." Subsequent decisions by the ICJ implicitly adopted resolution 3314, and thereby restricted the scope of what would be considered "aggression" through the tint of social justice, while imposing a corresponding limit on the scope of actions that could be taken in self-defense by (typically Western) states.

C. Paramilitary Activities: The Nicaragua Case

The 1986 ICJ Nicaragua judgment, for example, constricted the right of El Salvador, Honduras and Guatemala to resist Nicaraguan-funded insurgents, while attempting to prevent the United States and its allies from low-intensity warfare to pressure the Nicaraguan Sandinista regime. Importantly, the Court did not only draw the line between conventional and irregular warfare, forbidding the former and looking the other way at the latter, but it also drew a jurisprudential

[53] *Id.*

line that left unconventional attack largely outside of the ambit of unlawful aggression.

The *Frente Sandinista de Liberación Nacional* (Sandinista Front for National Liberation—FSLN) came to power on July 19, 1979, with the overthrow of the regime of Anastasio Somoza Jr. Shortly thereafter, the Nicaraguan regime was conducting communist guerilla operations throughout Central America.[54] Nicaragua was bent on a campaign of "international liberation," supporting terrorism in Honduras, El Salvador and Costa Rica, and sponsoring a Marxist guerilla movement in El Salvador.[55] Nicaragua launched clandestine attacks against neighboring El Salvador in an effort to destabilize the country and replace the government in San Salvador with a compliant communist regime.[56] In April, 1980, U.S. Ambassador Robert White sent a cable recounting Nicaragua's support for El Salvadoran guerilla fighters, including arms, ammunition, money, combat training, provision of border sanctuaries, and command and control circuits. Nicaraguan assistance was dispositive in transforming the nature of the conflict in El Salvador from a "prerevolutionary" protest movement into a bona fide national insurgency.[57] By 1981, the Washington Post was reporting that Nicaragua's "guerillas have proven they can mount coordinated actions virtually anywhere in this overcrowded Central American country and operate almost freely in the rural areas."[58]

In response, the United States and some other nations began to fund *la contrarrevolución* or Counterrevolution *(Contras).* On January 4, 1982, President Reagan enacted National Security Decision Directive 17 (NSDD-17), which authorized the Central Intelligence Agency to recruit and support Honduras and El Salvador with nearly $50 million in military funding, including $19 million in military aid to the Contras.[59] Support for the Contras was one element of the Reagan doctrine, championing anti-communist movements to overthrow Soviet-supported communist dictatorships. The violence affected civilian populations throughout Central America, and reports of atrocities were levied at both sides.[60] The Sandinista regime was brought to the negotiating table in 1987 by military successes of the Contras. In 1988, elections were held. A relatively free vote of the people deposed FSLN leader Daniel Ortega.[61] On April 25, 1990, Violeta

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[54] ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS 98-108 (1987).

[55] Id.

[56] Christopher Dickey, *U.S. Adds 'Lethal' Aid to El Salvador,* WASH. POST, Jan. 18, 1981, at A1.

[57] *The World: El Salvador Tilts Further Toward Full Civil War*, N.Y. TIMES, Apr. 6, 1980, at 2E.

[58] Dickey, *supra* note 56.

[59] President Ronald Reagan, National Security Decision Directive on Cuba and Central America, January 4, 1982, *available at* http://www.fas.org/irp/offdocs/nsdd/nsdd-017.htm; WILLIAM C. BANKS AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 58 (1994).

[60] James LeMoyne, *Peasants Tell of Rights Abuses by Sandinistas*, N.Y. TIMES, June 28, 1987, http://www.nytimes.com/1987/06/28/world/peasants-tell-of-rights-abuses-by-sandinistas.html.

[61] Mark A. Uhlig, *Turnover in Nicaragua; Nicaraguan Opposition Routs Sandinistas; U.S. Pledges Aid, Tied to Orderly Turnover*, N.Y. TIMES, Feb. 27, 1990, http://www.nytimes.com/1990/02/27/world/turnover-nicaragua-nicaraguan-opposition-routs-sandinistas-us-pledges-aidtied.html?pagewanted=all&src=pm.

Barrios Torres de Chamorro took office as president of Nicaragua, after a 55.2% to 40.8% landslide victory over Ortega, with Chamorro winning 68% of the rural vote.[62]

But in 1984, the government of Nicaragua brought suit against the United States before the ICJ, arguing that U.S. action in supporting the Contras, including mining the ports in Nicaragua, was a violation of the country's sovereignty.[63] The United States countered that the operations were in support of collective self-defense under Article 51 of the U.N. Charter. The Court disagreed. By a vote of 15 to 0, the judges held during an interim decision that the U.S. should "immediately cease and refrain from any action restricting, blockading, or endangering access to Nicaraguan ports, and, in particular, to the laying of mines."[64] Similarly, by a vote of 14 to 1, the Court ruled that Nicaragua's right to sovereignty should be fully respected, and may not be jeopardized by U.S.-supported military or paramilitary activities.[65] The ICJ concluded that the United States was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations."[66] In reaching this decision, the Court had found that "training, arming, equipping, financing and supplying [of] the Contra forces" was a violation of international law.[67]

The ICJ rejected the argument that Nicaragua's efforts to fuel insurgency against its neighbors justified actions taken against the Sandinista regime as a form of self-defense. The distinction between U.S. efforts and Nicaraguan efforts in the conflict pivoted on whether Nicaragua or the United States exercised "effective control" of the insurgent attacks. The United States was found to have exercised "effective control" over laying the sea mines in Nicaraguan waters, whereas the ICJ found that the Sandinista regime lacked the same level of control over the communist insurgents that were destabilizing other Central American governments. The ICJ's idea of "effective control" was amplified in the 2007 Genocide Case, when the Court reaffirmed it, and flirted with the criterion of "overall control."[68] The concept of effective control ultimately was integrated

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[62] Susan Benesch, *Nicaragua Opposition Winds Soundly; Ortega Concedes*, ST. PETERSBURG TIMES, February 27, 1990, at A1l; Linda Diebel, *Nicaraguans Pin Big Hopes on Chamorro*, THE TORONTO STAR, April 24, 1990, at A14.

[63] HOWARD S. LEVIE, MINE WARFARE AT SEA 163-64 (1992).

[64] Provisional Measures, Order of 10 May 1984, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 169, 186-87.

[65] *Id.*

[66] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 149 (June 27).

[67] *Id.* at 146.

[68] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 2007 I.C.J. 91 (Feb. 26). The test of overall control is set forth in the UN Secretary-General Reports to the General Assembly on East Timor. U.N. Secretary-General, *Situation of Human Rights in East Timnor: Rep. of the Secretary-General*, UN doc A/54/660 (Dec. 10, 1999).

into the Draft Articles on State Responsibility for Internationally Wrongful Acts.[69]

A requirement of armed attack as interpreted by the ICJ means there is a gap between a minor violation of Article 2(4) against a state and the requirement that a violation must amount to an armed attack before the victim state can lawfully defend itself under Article 51. Nearly a quarter century ago, John Norton Moore criticized the paradox created by the Court. The ruling meant that a member state of the United Nations could be faced with a situation of defensive necessity, but not be lawfully entitled to respond under Article 51.[70] Another case in point is the U.S.-Iran "tanker war" of the 1980s.

D. Irregular Maritime Warfare: The Oil Platforms Case

In July 1987, the United States began "Operation Earnest Will," which was the largest naval convoy operation since World War II. American warships shepherded re-flagged Kuwaiti tankers through the Persian Gulf.[71] In September 1987, the Iranian ship *Iran Ajr* was caught clandestinely laying mines; the vessel was captured by U.S. naval forces and scuttled. On October 16, 1987, the re-flagged Kuwaiti supertanker *Sea Isle City* was struck by a silkworm anti-ship cruise missile. The missile was launched from the al-Faw peninsula, the Iraqi sandspit tucked between Iran and Kuwait, which was occupied at the time by Iranian military forces. The tanker was not carrying oil, as it was maneuvering in Kuwaiti waters to be loaded. The missile struck the wheelhouse and crew quarters of the ship, blinding the ship's master, a U.S. citizen, and wounding 18 crewmembers. Since the ship was so close to shore, it was not under the protection of U.S. escort warships. The vessel was heavily damaged by the missile strike, and it took four months to repair the ship. Three days after the attack, the United States launched "Operation Nimble Archer," destroying two oil platforms in the Rostam oil field.[72] The offshore structures were not in production and were being used as tactical communication relay points by Iranian military forces.

It was not until April 1988, however, when the U.S. Navy frigate USS *Samuel B. Roberts* (FFG-58) struck an Iranian mine that American involvement in the "tanker war" entered a major combat phase. On April 14, Iranian sea mines nearly sank the *Roberts*. Four days later, U.S. naval forces began "Operation

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[69] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/56/49 (Vol. 1)/Corr.4, art. 28(1) (Dec. 12, 2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

[70] John Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 AM. J. INT'L L. 151, 152 (1987); *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).

[71] The use of the term "Persian Gulf" rather than "Arabian Gulf" does not imply a political judgment, but rather reflects the historic term for the semi-enclosed body of water adjacent to the Arabian Sea. The historical name "Persian Gulf," has been used by the United Nations, and the term "Arabian Gulf" is another term for the "Red Sea." On the other hand, the Arab League uses the term "Arabian Gulf," and in Arabic documents submitted to the United Nations.

[72] LEE ALLEN ZATARAIN, TANKER WAR: AMERICA'S FIRST CONFLICT WITH IRAN, 1987-1988 155 (2008).

Praying Mantis," which resulted in the sinking of the Iranian warships *Sablan* and *Sahand* and several smaller Iranian offshore missile patrol boats.[73] The Court later noted that if the U.S. response to the 1987 missile attack on the *Sea Isle City* had been shown to be necessary, it might have been considered proportionate.

The U.S. response to the mine strike against the *Roberts* was the extensive "Operation Praying Mantis." "Operation Praying Mantis" involved attacks on several Iranian oil platforms, but also the destruction of two Iranian frigates and a number of other Iranian naval vessels and aircraft.[74] "Operation Praying Mantis" is still the largest naval surface action conducted by the U.S. Navy since World War II. Three Navy surface action groups (SAGs) comprised of three ships each went into battle on April 18. Two of the SAGs went after derelict Iranian oil platforms, destroying the Siri and Sassan platforms. Iranians stationed on both of the oil platforms resisted after being warned that they would be attacked, but U.S. naval and helicopter gunfire overpowered the forces. Marines and Navy SEALs captured the two rigs, set demolition charges on them, and departed unscathed. A third SAG sought out the *Sabalan*, and aided by aircraft from the aircraft carrier USS *Enterprise*, sent the Iranian frigate to the bottom of the sea.

To avenge the morning actions against their two oil platforms, the Iranians sent the *Sahand*, sister ship of the *Sabalan*, to attack nearby oil platforms owned by United Arab Emirates. A U.S. Navy A-6E Intruder attack aircraft from the *Enterprise* intercepted the *Sahand*. The *Sahand* launched surface-to-air missiles at the Navy aircraft, and U.S. jets responded with the release of two Harpoon missiles and four laser-guided bombs, which struck the Iranian ship. The guided-missile destroyer USS *Joseph Strauss* arrived shortly thereafter, and fired another Harpoon missile into the *Sahand*, sinking the Iranian frigate.

The government of Iran brought suit against the United States in the ICJ. The Court found that although a mine strike by one country against a single warship of another nation may be sufficient to give rise to the inherent right of self-defense, in this case the Court was unwilling to attribute the attack to Iran. The Court mused that even if the attack on *Samuel B. Roberts* was attributable to Iran, it did not necessarily follow that such aggression would cross the gravity threshold entitling the United States to take military action in self-defense.

On November 6, 2003, the ICJ ruled by 14 votes to two, that the series of retaliatory attacks by the U.S. Navy against Iranian oil platforms in the Persian Gulf in 1987 and 1988, constituted an unlawful use of force.[75] The ICJ also rejected, by 15 votes to one, the U.S. counterclaim seeking a finding of Iranian

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[73] Patrick E. Tyler, *Gulf Rules of Engagement a Dilemma for U.S.; American Ship Commander Operate in Increasingly Dangerous War Zone*, THE WASH. POST, July 4, 1988, at A1; *see also* ZATARAIN, *supra* note 72, at 206-09.

[74] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 77 (Nov. 6).

[75] *Id.* ¶ 125. Interestingly, the Court first determined that the attacks did not violate a 1955 commerce treaty between the United States and Iran since the attacks did not adversely affect freedom of commerce between the territories of the two treaty partners. The judges from Egypt and Jordan dissented on this issue, finding that the attacks did violate the terms of the Treaty of Commerce. The Court's rejection of the U.S. actions as a means of self-defense were entirely gratuitous, as it was not necessary to answer the question before the court, which focused on whether either party had violated the commerce treaty.

liability for interfering with the freedoms of commerce and navigation in the Gulf by attacking international civil and naval shipping with missiles and mines.[76] The Court was unwilling to attribute any of the attacks by missiles or mines to Iran.

Furthermore, the Court speculated that even if Iran had committed the attacks, the violence did not rise to the level of an "armed attack." Because there was no "armed attack," the level and extent of violence was below the threshold of sufficient gravity that would warrant the right of self-defense on the part of the United States or other nations injured. The judgment stated, "[t]hese incidents do not seem to constitute an armed attack on the United States."[77]

In further considering the mine strike against the *Samuel B. Roberts*, the ICJ ruled that the mining of a single warship might actually be sufficient to cross the gravity threshold, but since the floating mines could not be attributed to Iran, the point was moot. The Court placed the burden on the United States to show that the attacks on its vessels "were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force."[78] But the Court was not satisfied that the U.S. attacks of 1987-1988 were necessary to respond to the shipping incidents in the Gulf more generally, or that they constituted a proportionate use of force in self-defense. The holding did, however, raise a troubling issue—that unprovoked violence against a warship might constitute and "armed attack," but that a similar unprovoked attack on a merchant ship—a civilian object protected from attack by the law of nations—could not constitute an "armed attack." This approach contradicts the U.N. General Assembly's determination that an attack on the land, sea or air forces or marine or air fleets of another country qualifies as armed aggression.[79] From a policy perspective, it might be considered disconcerting that civilian persons and objects are cloaked with less protection against armed attack than warships and military personnel.

IV. Conclusion: Realizing a Social Justice Theory

Scholars have scrutinized the judgments of the ICJ, arguing that for practical reasons, members vote the interests of the states that appoint them. Statistical methods have raised the charge that member judges of the ICJ tend to favor states that appoint them, and favor states that have a level of wealth that is close to that of their own states.[80]

A traditional common law analysis of the most important *jus ad bellum* cases that have been decided by the ICJ suggests that the Court condemns attacks based upon the "gravity" of the aggression. Gravity is the primary distinguishing

[76] *Id.* ¶¶ 72, 125.

[77] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6).

[78] *Id.* ¶ 51.

[79] G.A. Res. 3314 (XXIX), art. 3(d), U.N. Doc A/RES/3314 (Dec. 14, 1974).

[80] Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased*? 34 J. LEG. STUD. 599, 615-617 (2005).

feature of an armed attack, differentiating something more than a "mere frontier incident."[81] Analysis of the gravity of an attack focuses on its scale and effects.[82] Only the more grave assaults constitute an armed attack. Typically, "gravity" is a shortcut for whether the attack was attributable to a state, and, particularly, a large and powerful state. Armed aggression by irregular or guerilla forces are regarded as falling below the gravity threshold—unless, however, the insurgents are acting on behalf of a powerful state, such as the Contras in Central America. In the Nicaragua decision, the Court determined that the provision of weapons or provision of logistical or other support by Nicaragua to communist revolutionaries working to overthrow the governments in El Salvador and Honduras could be regarded as insufficient to qualify the activity as an "armed attack," even though it might constitute an "unlawful use of force," or at least a "breach of the principle of non-intervention."[83]

The rule that a state that suffers an armed attack enjoys the right of self-defense, but only if the aggression is of sufficient gravity, restrains states acting in defense while empowering non-state organizations conducting aggression. Furthermore, as the facts of the *Paramilitary Activities Case* and *Oil Platforms Case* illustrate, proportional and low-intensity responses by wealthy and powerful protagonists against a Third World antagonist throws a wrinkle into the Court's "gravity" analysis. In such cases, the gravity of the attack gives way to an outcome-oriented reasoning that appears to preference a vision of equity based on state power, with the Court putting its thumb on the scale in favor of the weaker nation.

The use of force by means of secret war against neighboring countries, as conducted by Nicaragua and Iran, including the clandestine sowing of sea mines in international shipping lanes, are not condemned by the Court as "armed attacks" since they lack sufficient gravity. But U.S.-funded counter revolution, the sowing of mines in the harbor of Puerto Sandino in Nicaragua, and destruction of inoperable oil platforms that are serving as surveillance and sea bases for Iranian Revolutionary Guard Corps Navy forces were rejected by the Court as violations of the U.N. Charter. In the case of Nicaragua, Robert F. Turner's classic study concludes:

> U.S. support for the Contras [was] a virtual mirror-image of Nicaraguan support for Salvadoran insurgents—albeit on a smaller scale and with greater regard for human rights—and that the primary objective of [the U.S.] program [was] to persuade Nicaragua to abandon its efforts to engineer the overthrow of neighboring governments by armed force.[84]

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[81] GREEN, *supra* note 11, at 33-38.

[82] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 101, ¶ 191 (June 27).

[83] *Id.* at 543 (Jennings, J., dissenting).

[84] TURNER, *supra* note 54, at xiii.

In this respect, U.S. assistance to the Contras was proportional and necessary to meet the threat of Nicaragua's attempt to export violent revolution.[85]

Likewise, U.S. missions against Iran were designed to contain conflict in the Gulf. Similar to the U.K. de-mining of the Corfu Channel, "Operation Praying Mantis" was focused on neutralizing manifest but protracted and low-intensity threats to the maritime commons. In each case, however, the weaker aggressor states employed irregular or asymmetrical naval warfare to impede shipping lanes used for international navigation. The random and unannounced sowing of sea mines in an international strait (*Corfu Channel*) and on the high seas (*Oil Platforms*) was treated no worse than defensive naval patrols conducted by the Royal Navy and the U.S. Navy. Although Western sea power stood at risk to protect international public infrastructure and sea lines of communication—in both cases, the Court repudiated the effort.

The full implication of the Court's Rawlsian approach has yet to play out. In the major use of force cases, the ICJ's *jus ad bellum* rationale suggests that weaker states that seek to make adjustments in the international system in their favor through the use of asymmetric and irregular attacks will find a rather compliant Court. The decisions thus far would tend toward reducing deterrence by the international community against such states. On the other hand, the United States and the more powerful nations, which serve as the patrons of the world system, might expect to receive unfavorable consideration by taking robust and concerted responses to such attacks. By raising the judicial (and thereby the political) cost of a defensive response, the Court reduces the likelihood that the United States and other status quo states will reply to asymmetric attacks with decisive armed force. This finding tends to suggest that the United States and its friends and allies face an unfriendly legal environment within which to protect and nurture global stability.

[85] *Id.* at 132-39.