FROM PREROGATIVE TO PROHIBITION: ARTICLE 2(4) AS CUSTOMARY INTERNATIONAL LAW IN NICARAGUA V. U.S.

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In a regime where all subjects are sovereigns, the legal regulation of behavior becomes a complicated matter. No supranational legislative authority exists to enact laws which are binding on all States, and States are bound only by their consent either expressly given through a treaty or impliedly signified through custom.

The restrictive development of the law on the use of force in both treaty and customary law has been a most dynamic one. Over the last century, the right of States to wage war has narrowed down from an absolute prerogative to an absolute prohibition against the threat or use of force. The United Nations Charter first gave definitive expression to this emergent rule through Article 2(4), and the International Court of Justice (I.C.J.) in Nicaragua v. U.S. *confirmed that the non-use of force principle, as enunciated in the U.N. Charter, is customary international law and is binding upon all the nations of the world independently of any treaty that may embody it.*

This thesis studies Nicaragua v. U.S. *on two levels: first, it analyzes the consistency of the Court's legal conclusions with international law; and second, it examines the method employed by the Court in determining the existence of Article 2(4) in custom.*

This thesis also demonstrates that the Nicaragua *decision is significant to the international community in two respects: first, by solidifying the customary status of Article 2(4), the Court strengthens a rule once considered revolutionary but is now of the utmost importance in this strife-*

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torn world; second, the Court's method of determining the existence of Charter rules in customary law will have great practical applicability in the proof of the sources of State obligations in future I.C.J. cases and in various other fields of international law. In addition, this thesis suggests that the Philippines stands to benefit from a closer study of international law and the Nicaraguan experience in Nicaragua v. U.S. *because, as a country that shares with Nicaragua common historical and socio-political roots, the Philippines may find analogies that could be helpful in better understanding its past and present use of force position in international affairs.*

INTRODUCTION

A. Background

The use of force has been a constant in international affairs. On occasion, world public interest may be seized by the pressing issues of the times, examples of which are human rights, the new international economic order, and the environment. Issues change with the concerns of an era, but the need to regulate the use of international force transcends contemporary global concerns.

The world has probably never seen a century without war. The great Persian, Greek, Roman empires of old were built and destroyed through conquest. Medieval folklore is replete with accounts of crusading knights like El Cid who fought "for God, the king and Spain." Then there were the continental wars which raged for twenty years, thirty years, a hundred years.

New worlds were discovered and subjugated through military might, and the defeat of Napoleon in 1815 gave rise to the interlocking alliances that dragged Europe into the First World War.

The modern era has seen World War II, the Korean War, the Vietnam War, the Arab-Israeli wars, the India-Pakistan conflict, the Soviets in Afghanistan, the United States in Grenada, Nicaragua, and Panama, the Gulf War, and, fairly recently, the United Nations peacekeeping forces in Sarajevo and Kampuchea. Truly, the use of force has been ubiquitous in human history.

International aversion to war is, however, a relatively recent phenomenon. During the formative period of international law, the right to wage war was considered a natural function of the State, as well as a matter of exclusive sovereign prerogative.[1] Since there was no supranational body that could regulate the exercise of this prerogative, States could wage war virtually at will. In the hands of megalomaniacs like Napoleon and Hitler, this prerogative proved dangerous.

Largely because of the chaos war wrought on international legal relations and the untold suffering it brought upon humankind, the concept of war as an exclusive sovereign option gradually began to erode in the nascent years of this century. The major world powers at that time concluded various

[1] 2 L. OPPENHEIM, INTERNATIONAL LAW 178 (H. Lauterpacht, ed. 7th ed., 1952).

international instruments — like the 1907 Hague Declaration on the Renunciation of War, the Kellog-Briand Treaty, and the Covenant of the League of Nations — in order to limit the right to wage war. After the Second World War, the movement towards greater regulation of the use of force culminated in the drafting of the United Nations Charter and the formation of the United Nations organization. It is this worldwide movement to outlaw aggressive war that provides the backdrop for the International Court of Justice's discussion of the effect of the United Nations Charter as a treaty on the rules regulating the use of force in customary international law in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* or *Nicaragua v. U.S.*[2]

B. The United Nations

The name "United Nations" was adopted as a tribute in memory of United States President Franklin Delano Roosevelt. He first coined the term in the 1 January 1942 "Declaration by the United Nations,"[3] a document signed by the 47 nations which banded together to battle the Axis Powers. The name is now used to designate both the Charter and the international community constituted by the Charter.[4]

The purpose of the United Nations is to maintain international peace and security,[5] and contained in Article 2(4) of the United Nations Charter is an absolute prohibition on the unilateral resort to force:

> 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 manner inconsistent with the Purposes of the United Nations.

In addition to Article 2(4), Chapter VII of the Charter lays down various rules and procedures governing the use of force. It is the prime concern of this paper to study the clarification made by the International Court of Justice of the status of U.N. Charter treaty rules on the use of force both as treaty and as customary law in the Merits phase of *Nicaragua v. U.S.*

While world peace may be the principal goal of the United Nations, the Charter also undertakes to achieve broader ends[6] like the development of

[2] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Jurisdiction and Admissibility)*, 1984 I.C.J. Reports [hereinafter *Nicaragua v. U.S. (Jurisdiction)*]; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Merits)*, 1986 I.C.J. Reports 14 [hereinafter *Nicaragua v. U.S. (Merits)*].

[3] H. KELSEN, THE LAW OF THE UNITED NATIONS 3 (1951).

[4] *Id.* at 4.

[5] Article 1 (1), CHARTER OF THE UNITED NATIONS, 59 Stat. 1031, U.N.T.S. 993 (1945) [hereinafter U.N. CHARTER].

[6] L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 679 (1987) [hereinafter HENKIN, et. al., INTERNATIONAL LAW].

friendly relations among nations[7] and international cooperation in solving economic, social, cultural, and humanitarian problems.[8]

But apart from laying down rules and declaring principles and purposes, the U.N. Charter also created the system through which the aims and ideals of the treaty may be realized. The United Nations organization is comprised principally of the United Nations General Assembly, the Security Council, the Secretariat, and the International Court of Justice. Additional principal organs include the Economic and Social Council and a Trusteeship Council.

C. The International Court of Justice

The establishment of the International Court of Justice, like the creation of the United Nations, also represents a culmination. It is the crowning achievement of a "long development of the methods for the pacific settlement of international disputes, the origins of which are traced to classical times."[9]

1. BRIEF HISTORY

Pacific settlement in the form of mediation and arbitration trace their roots to Ancient Greece, India, China, Arabia, and the Islamic World. Later examples of arbitral bodies were the three mixed American-British commissions created by the Joy Treaty of 1874 and the 1871 Treaty of Washington under which the Alabama Claims were decided.

During the Hague Peace Conference of 1899, the Permanent Court of Arbitration was constituted, and it decided celebrated cases like the *Sovereignty over the Island of Las Palmas* in 1928. With the formation of the League of Nations after the First World War came the Permanent Court of International Justice (P.C.I.J.). Although the P.C.I.J. was created by the Covenant of the League, it was not part of the League organization.

The advent of the United Nations brought with it its own judicial organ—the International Court of Justice (I.C.J.). Unlike the P.C.I.J., the I.C.J., as the principal judicial organ of the United Nations,[10] was placed on equal footing with the other U.N. bodies, and its statute was annexed to the Charter. The Charter directed U.N. Members to settle their disputes through peaceful means,[11] and the I.C.J. was one U.N. forum through which this ideal of pacific settlement could be achieved.

[7] Article 1(2), U.N. CHARTER.

[8] Article 1(3), U.N. CHARTER.

[9] I.C.J. THE HAGUE, THE INTERNATIONAL COURT OF JUSTICE: A HANDBOOK 11 (1986) [hereinafter I.C.J. HANDBOOK].

[10] Article 92, U.N. CHARTER.

[11] Article 2(3), U.N. CHARTER.

2. MECHANICS OF THE I.C.J.

The International Court of Justice is composed of 15 judges elected to nine-year terms every three years by members of the General Assembly and by parties to the Statute of the International Court of Justice. Only States or international institutions with international legal personality may appear before the I.C.J.,[12] and the body renders decisions and advisory opinions for the former and advisory opinions for the latter.

The International Court of Justice exercises jurisdiction over international legal disputes. By definition, an international legal dispute is "a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests."[13]

Jurisdiction over the parties, or the *ratione personae*, is acquired only by the parties' consent.[14] This consent may be manifested voluntarily by bilateral agreements like a *compromis*[15] or a *forum prorogatum*.[16] Consent may also be manifested by inserting jurisdictional clauses in treaties and conventions empowering the I.C.J. to take cognizance of disputes arising out of such treaties and conventions.

Consent need not always be voluntary but may also be "recognized as compulsory *ipso facto* and without special agreement" through Article 36, par. 2 and 3 of the Statute of the International Court of Justice. The so-called "Optional Clause" provides for the Compulsory Jurisdiction of the I.C.J. The Optional Clause system is explained thus:

> This so-called "Optional Clause" system has led to the creation of a group of states who stand as it were in the same position towards the Court as the inhabitants of a country stand towards the courts of that country. Each state in this group has in principle the right to bring any one or more states belonging to the group before the Court by filing an application instituting proceedings with the Court, and, conversely, it has undertaken to appear before the Court should proceedings be instituted against it by one or more such other states. This is why such declarations are known as "declarations of acceptance of the compulsory jurisdiction of the Court."[17]

It was under the Optional Clause system that the I.C.J. acquired jurisdiction over Nicaragua and the United States in *Nicaragua v. U.S.*[18]

[12] Article 34, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE [hereinafter I.C.J. STATUTE].

[13] I.C.J. HANDBOOK, *supra* note 9, at 31.

[14] *Id.* at 32: "No sovereign state can be made a party in proceedings before the Court unless it has in some manner or other consented thereto."

[15] A *compromis* is a bilateral agreement by which both states agree to submit their particular dispute to the jurisdiction of the I.C.J. for settlement.

[16] I.C.J. HANDBOOK, *supra* note 9, at 32. In a *forum prorogatum*, only one state recognizes the jurisdiction of the Court, and the other state will recognize such jurisdiction later on. Eight I.C.J. cases were initiated in this manner.

[17] *Id.* at 37.

[18] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4 at 38, par. 56.

Over its 46-year history, the I.C.J. or World Court has heard and tried some 35 contentious cases and rendered some 18 advisory opinions. Interest in the I.C.J. dwindled in the 1970's and 1980's when the Court saw little activity, but interest in the Court was revived when a small country in the Central American isthmus filed an application against a neighboring superpower.

D. Nicaragua and the United States of America

1. THE MONROE DOCTRINE

The United States has long considered Latin America as its backyard. Through the Monroe Doctrine, the United States declared a policy against European intervention in the Pacific Northwest and Latin American regions of the Western Hemisphere. The doctrine was conceived and designed to elbow the Russians and the British out of these virgin territories, but it was first enunciated in 1823 when James Monroe declared that any intervention in the affairs of the new Latin American nations, whose independence the United States had already recognized, must be considered as "the manifestation of an unfriendly disposition toward the United States."[19] With time, this doctrine was expanded to justify intervention by the United States in Latin America in the name of its national security interests. Historical examples are numerous, but among the more familiar ones are the *Bahia de Cochino* affair in 1961, the invasion by U.S. marines of the Dominican Republic in 1965, and, fairly recently, U.S. involvement in Panama, Grenada, and Nicaragua in the 1980's.

2. THE UNITED STATES IN NICARAGUA

Nicaragua, the largest Central American republic in the Caribbean Basin, has had a long history of U.S. intervention both from American citizens and the U.S. Government. On the one hand, American citizens became embroiled in Nicaraguan politics in the 1840's when Cornelius Garrison of the Liberal Party recruited William Walker's band of 58 men to defeat the rival Conservative Party during Nicaragua's 36-year long civil war of Nicaragua.[20] On the other hand, the United States sent its Marines in the early 1900's during the fall of Jose Santos Zelaya, the Nicaraguan president who antagonized the U.S. government.[21] But never was U.S. influence so palpably felt in Nicaragua than it was during the 46-year reign of the U.S.-propped Somoza dynasty.

The overthrow of the Somoza dictatorship in 1979 by a popular coalition led by the Marxist *Frente Sandinista Liberacion Nacional* signalled the end of

[19] Van Alstyne, "Monroe Doctrine," in COLLIER'S ENCYCLOPEDIA 471-72 (1980).

[20] D. CLOSE, NICARAGUA: POLITICS, ECONOMICS, AND SOCIETY 15-16 (1988).

[21] *Id.* at 16-20.

amicable relations between Washington and Managua. The Cuban-trained Sandinista government became a great cause for concern for the United States, because the latter suspected the government of Managua of funding, training, and arming the growing communist insurgent armies of Costa Rica, Honduras, and El Salvador. To stem the tide of the communist threat, the United States not only organized the right-wing insurgent *Contras* to overthrow the Sandinista regime but also mobilized its own forces to mine Nicaraguan ports and fly their planes in Nicaraguan airspace. It was for these acts of force and intervention that Nicaragua sued the United States in the International Court of Justice in 1984.

3. *NICARAGUA V. U.S.*: THE CASE

The proceedings in the International Court of Justice saw two main phases: Jurisdiction and Admissibility (1984) and Merits (1986). Richard Falk writes that "[p]erhaps the most notable achievement of the Court's Judgment is its explicitation of the law governing the use of force in international relations."[22] Of particular interest to this writer is the Court's discussion of the effect of Article 2(4) of the U.N. Charter on the non-use of force principle in customary international law. Because the applicability to the United States of the Court's compulsory jurisdiction with respect to multilateral treaties like the U.N. Charter was qualified by the U.S. Multilateral Treaty Reservation, the Court was constrained to apply in its stead identical customary law on the matter. In paragraphs 172 to 201 of the decision on the Merits, the Court clarified that the U.N. Charter non-use of force rules find a parallel existence in customary international law and, as custom, have separate applicability.

Related literature on the *Nicaragua* decision focuses on the content of the rules regarding the prohibition on the use of force and self-defense. Not too much has been written regarding the Court's discourse on the *status* of U.N. Charter use of force rules as customary law, a point which this writer considers significant for two reasons. For one, there is disagreement among international law scholars regarding the effect of the U.N. Charter on the customary law that preceded it. Some publicists, on the one hand, say that the U.N. Charter has completely changed the regime and that no rules apart from those enunciated by the Charter are legally acceptable today; other publicists, on the other hand, are of the opinion that the Charter has actually codified the custom emerging after the end of the Second World War. For another, the Court's discourse being a discussion on the sources doctrine, will have implications on the use of force and, quite possibly, on other issues in international law.

[22] Falk, *The World Court's Achievement*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 106 at 108 (1987) [hereinafter A.J.I.L.].

E. Objective and Scope of the Study

It is the purpose of this paper to study, analyze, clarify, and explain the I.C.J.'s explicitation regarding the relationship of U.N. Charter rules on the use of force and customary international law rules on the same subject. Likewise, this paper seeks to discuss the significance of the *Nicaragua* decision for two sectors: the international community, in general, and the Philippines, in particular, being a Third World country whose Hispanic-American background bears a striking similarity to Nicaragua.

F. Limitations of the Study

Nicaragua v. U.S.'s Merits Phase alone is over five hundred pages long and deals with several other international law issues apart from the use of force, such as jurisdiction and admissibility, non-intervention, and sovereignty. It would be impossible for this writer to effectively address all of these issues in one paper, as each of these issues may be separate thesis topics in themselves.

A proper understanding of the Court's ruling on the status of U.N. Charter use of force rules requires that the discussion be situated in the context of the historical development of sources of international law, in general, and the use of force, in particular. It would be equally impossible for this writer to exhaust all related literature on the topic in the limited time given to write this thesis; hence, she focuses only on relevant and relatively recent material.

The writer of this thesis is not an international legal scholar. She is, however, an avid student of Public International Law whose interest in the field was sparked by her involvement with the Philip C. Jessup International Law Moot Court Competition and who has found in International Law a happy fusion of History and Philosophy, two of her most favorite disciplines in the past, with Law, her present concentration.

G. Organization of the Thesis

This thesis is divided into seven parts, the first of which is this introduction. Chapters One and Two, which comprise the second and the third parts, provide the theoretical frameworks for the study: Chapter One will explain the Sources Doctrine on custom and treaty; Chapter Two will apply the custom-treaty interplay to the non-use of force principle. Chapter Three, which is also the fourth part, will relate the pertinent background, facts, and ruling of *Nicaragua v. U.S.*, and Chapter Four, which is the fifth part, will analyze the Court's ruling. Chapter Five, which is the sixth part, will discuss the significance of the *Nicaragua* decision, and the seventh and final part will contain the writer's conclusions.

I. THE SOURCES DOCTRINE: TREATIES AND CUSTOM

A. The Sources Doctrine[23]

The intellectual currents of the nineteenth century veered towards the empirical sciences, and the preference for verifiable truth left an indelible mark on the philosophy of the era. One of the most significant schools of thought to emerge was Auguste Comte's sociological positivism. In turn, this philosophy, which does not consider as existing any fact that cannot be demonstrated to and appreciated by the senses, influenced juristic thinking, in general, and international law, in particular. In juristic thinking, the conception of a positive science of law strongly appealed to the intellectual climate that extolled inductive science; in international law, the traditional moral and natural law precepts for the legal validation of the behavior of States gave way to the objective standards whose principal intellectual instrument, according to Professor Oscar Schachter, has been the doctrine of sources.

Like its counterpart in empirical science, the doctrine of sources lays down verifiable conditions to ascertain and validate legal prescriptions. Schachter identifies these conditions as the observable manifestations of the "wills" of States as revealed in the two processes by which norms are formed: treaty and state practice accepted as law or custom. It became increasingly evident that States were motivated, not by morality or by natural law, but by power and self-interest; thus,

> [i]t followed that law could only be ascertained and determined through the actual methods used by States to give effect to their "political wills." In this way, the powerful ideas of positive science and State sovereignty were harnessed to create a doctrine for removing subjectivism and morality from the "science of international law."[24]

The Sources Doctrine appeased two sectors: for one, it satisfied the *realpolitik* school which was concerned with the actualities of State power and the importance of sovereignty; and for another, it fulfilled the intellectual requirements of the analytical theorists of law who sought to provide jurisprudence with a scientific foundation.

Dominant in the nineteenth century, the Sources Doctrine remains prevalent to this day. The doctrine finds expression and expansion in Article 38 of the Statute of the International Court of Justice which includes treaty and custom among its enumeration of the sources of international law and adds a few other sources.

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[23] This introduction is a summary of Professor Oscar Schachter's exposition in Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS (1982-V).

[24] *Id.*

> Article 38. I. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

The Sources Doctrine is, in the opinion of this writer, the heart of contemporary international law, for it is the primary means by which the legal basis for the regulation of the behavior of sovereigns is determined. In the absence of a supranational legislature authorized to enact laws binding on all States, States can only really be bound through their consent that is given either expressly through treaty or impliedly through custom. In this first Chapter, the writer outlines the two principal norms in the Sources Doctrine and discusses the interplay between them. This Chapter provides the theoretical framework crucial to understanding the sources discussion in *Nicaragua v. U.S.* which is the focus of this paper.

B. Custom

1. DEFINITION

Custom is defined by the Statute of the International Court of Justice as "evidence of a general practice accepted as law." This phrasing has been criticized as inaccurate, because "it is the practice which is evidence of the emergence of a custom."[25] Notwithstanding its phrasing, the definition contains the two most important elements of custom: general practice by States and acceptance as law.[26]

2. THE ELEMENTS OF CUSTOM

a. State Practice

Professor Mark Villiger considers state practice as the raw material of custom,[27] because it is state practice that creates customary international law.[28]

[25] HENKIN, ET. AL., INTERNATIONAL LAW, *supra* note 6, at 37.

[26] *Id.*

[27] M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

[28] Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 at 53 (1974-75) [hereinafter Akehurst, *Custom* and B.Y.I.L.].

State practice encompasses any act, statement, or behavior by a State from which its conscious attitude regarding its recognition of a customary rule can be inferred.[29]

There are two views on what constitutes state practice. On the one hand, the minority view espoused by publicists like Professor Anthony D'Amato limits state practice to physical acts.[30] His position finds support in Judge Read's dissenting opinion in the *Anglo-Norwegian Fisheries Case* in which His Excellency writes that "[t]he only convincing evidence of state practice is to be found in seizures, where the coastal State asserts its sovereignty over trespassing foreign ships."[31] On the other hand, the more popular view would consider both the acts and statements, or physical and verbal acts, of a State as state practice.[32]

What precisely are these acts and statements which would make up state practice? According to the International Law Commission, the "classical forms" include

> treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations.[33]

Professor Michael Akehurst offers a different classification for examples of state practice: statements in context, i.e., claims or declarations made in the midst of a legal dispute; statements *in abstracto* which embrace voting for or against resolutions and conventions; domestic legislation and national judgments; admissions and omissions, and the practice of international institutions and individuals.[34]

State practice as a concept may be broken down further into its three component elements: duration, uniformity, and generality.

1) DURATION

In the *North Sea Continental Shelf Cases*, the judgment and separate opinions of the International Court of Justice clarified that no precise length of time need be shown to prove that a practice has existed, because the time factor is helpful only in demonstrating that the other requirements of custom have

[29] *This definition is a combination of elements found in the definitions of Professors Villiger and Akehurst in* VILLIGER, *supra* note 27 at 4, *and* Akehurst, *Custom, Id.*

[30] D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971) *cited in* Akehurst, *Custom, supra* note 28 at 1.

[31] *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway) 1951 I.C.J. Rep. 116 at 191 [hereinafter *Anglo-Norwegian Fisheries Case*] *cited in Id.*

[32] Quite a few publicists advocate this view, among them being Messrs. Michael Akehurst, R.R. Baxter, and Mark Villiger.

[33] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION [hereinafter Y.B.I.L.C.] 368 (1950) *cited in* VILLIGER, *supra* note 27 at 4.

[34] See generally Akehurst, *Custom, supra* note 28 at 53.

been met.[35] In short, duration is a function of generality and uniformity. To quote Professor Ian Brownlie:

> Provided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency.[36]

There have, in fact, been cases where, because of the immediate and widespread acceptance of international law rules, "instant customary law" has developed. Common examples of instant custom are rules relating to outer space and, arguably, the environment.

2) UNIFORMITY OR CONSISTENCY IN PRACTICE

The World Court suggested in the *Asylum Case* that customary rules must be based on a constant and uniform usage.[37] It follows, therefore, that one single act or statement by a State will not give rise to a customary rule but that the identical acts or statements must be repeated over time. Akehurst, however, proposes to qualify the Court's statement by viewing it within the context of the peculiar circumstances of the *Asylum Case*. In that case, Colombia attempted to justify its grant of diplomatic asylum to Peruvian rebel leader Haya de la Torre by claiming that the exercise of diplomatic asylum is a custom. The Court struck down Colombia's assertion by noting the uncertainty, contradiction, fluctuation, and discrepancy in the exercise of this alleged custom and concluding that "[i]t has not been possible to discern... any constant and uniform usage, accepted as law."[38] Thus, what is crucial in meeting the uniformity requirement is not repetition but consistency in state practice.

One should not, however, be so hasty as to infer that mere inconsistency in state practice is fatal to the formation of a customary law. One must distinguish between the kinds of inconsistencies. Akehurst writes that *major inconsistencies* in state practice, seen in a large amount of States going against the rule, prevents the formation of custom, but that *minor inconsistencies*, seen in a small amount of practice defying the rule, will not prevent the creation of custom. Further, he adds that when there is *no practice* that goes against an alleged custom, a small amount of practice would suffice to create a customary rule.[39]

[35] *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) 1969 I.C.J. Rep. 4 at 42-43, par. 73-74 [hereinafter *North Sea Continental Shelf Cases*].

[36] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (4th ed., 1990) [hereinafter BROWNLIE, PRINCIPLES].

[37] *Asylum Case* (Colombia v. Peru), 1950 I.C.J. Rep. 116 at 191 [hereinafter *Asylum Case*] *cited in* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 27 (5th ed., 1984).

[38] *Id.*

[39] *Id.* at 28.

Moreover, even if a customary rule has already been formed, there are situations in which such rule would still not apply to particular States. This is the case of the *persistent objector*, which Villiger succinctly explains below:

> A persistently objecting State is not bound by the eventual customary rule if the State fulfills *two conditions*. First, the objections must have been maintained from the early stages of the rule onwards, up to its formation, and beyond...Second, the objections must be maintained consistently, seeing that the position of other States which may have come to rely on the position of the objector, has to be protected.[40]

Professor Jonathan Charney challenges the Persistent Objector Rule as not being status-creating. In his view, the Rule is of "temporary or strategic value" as a phase in the evolution of customary rules, but it cannot serve a permanent role, because "one does not really believe that States have the independence freely to grant or withhold their consent to the rules of customary international law."[41]

There is also the case of the *subsequent objector* or a State which dissents from a customary rule after its formation. It is doubtful whether a small group of States advocating a rule contrary to the custom can affect the status of the custom or can escape liability in case of the custom's breach. But if a substantially large number of States assert a new rule, "the momentum of increased defection, complemented by acquiescence, may result in a new rule."[42] But if the process of defection is slower and neither the old nor the new rule can boast of drawing the majority of adherents to its ranks, Brownlie concludes that "the consequence is a network of special relations based on opposability, acquiescence, and historic title."[43]

3) GENERALITY

The term "generality" introduces a quantitative dimension to the elements of state practice. By general is meant that there is a common and widespread practice among States.[44] By general, however, is not meant that the practice must be universal. Professor D.J. Harris writes that the *North Sea Continental Shelf Cases* demonstrates the position that a practice need not be followed by all States for it to be the basis of a general custom;[45] although,

[40] VILLIGER, *supra* note 27 at 16.

[41] Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 B.Y.I.L. 1 at 24 (1985).

[42] BROWNLIE, PRINCIPLES, *supra* note 36, at 11.

[43] *Id.*

[44] VILLIGER, *supra* note 27 at 13.

[45] *North Sea Continental Shelf Cases*, 1969 I.C.J. Rep. 4 *cited in* D.J. HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 41 (4th ed., 1991).

Villiger suggests that there must at least be a representation of all the major political and socio-economic systems.[46]

Akehurst defines a *general custom* as one that is "binding, not only on states whose practice created it, but also on States whose practice neither supports nor rejects the custom, and on new States which come into being after the custom has become well established."[47] There are times, however, when a general custom does not apply to a group of States within a region, because a *special custom*, which conflicts with the general custom, applies to the group. Akehurst neatly summarizes the rules on special custom: as between States to whom the special custom applies, the special custom will prevail over the general custom, unless the general custom is *jus cogens*;[48] but as between a State covered by a special custom and a State that is not so covered, the general custom will apply.[49]

b. Opinio Juris Sive Necessitatis

State practice, by itself, will not suffice to create a customary rule. There is an additional imperative that a State believes that it follows a certain practice because there is a legal obligation to do so and that if it were to depart from the practice, it would suffer some form of sanction. In the *North Sea Continental Shelf Cases*, the International Court of Justice expounded on this requirement:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it...The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[50]

This conviction on the part of States is what is termed *opinio juris sive necessitatis* or *opinio juris*. It is the presence of this element that distinguishes whether a certain practice is a legal obligation or is merely a product of usage, comity, or morality.[51]

The definition of *opinio juris* varies depending on the kind of rule created. If the rule, on the one hand, imposes a duty, *opinio juris* would be defined as a belief that a certain form of conduct is *required* by international law. To

[46] VILLIGER, *supra* note 27, at 13.

[47] Akehurst, *Custom*, *supra* note 28, at 29.

[48] *Jus cogens*, according to Article 53 of the Vienna Convention on the Law of Treaties is "...a peremptory norm of international law...accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[49] Akehurst, *Custom*, *supra* note 28, at 29.

[50] *North Sea Continental Shelf Cases*, 1969 I.C.J. Rep. 4 at 44

[51] BROWNLIE, PRINCIPLES, *supra* note 36, at 7.

prove the existence of this kind of rule, one must establish the following: first, that States have acted in a manner required by the alleged rule; second, that other States have not protested that such acts are illegal; and third, that States regard the action as obligatory. On the other hand, if the rule created is merely permissive, *opinio juris* is a conviction felt by States that a certain conduct is *permitted* by international law. To prove a permissive custom, one must establish the following: first, that some States have acted in a particular way; and second, that other States, whose interests were affected by such acts or claims, have not protested that such acts or claims are illegal.[52] Akehurst cites the *Lotus Case* as an illustration of the difference between mandatory and permissive customary rules.[53]

Being a belief or conviction, *opinio juris* is necessarily a psychological element which is a slippery and difficult, albeit an essential, ingredient to prove. Brownlie observes that the International Court of Justice has adopted two varying approaches in order to determine the existence of *opinio juris*. In the first and more lenient approach, the Court has displayed a willingness to assume the existence of this element on the basis of the following: evidence of a general practice, a consensus in the literature, or the previous determination by the Court or other international tribunals. In the second and more rigorous approach, the Court has called for more positive evidence establishing the recognition of the validity of the rules in question in the practice of States. The choice of either method depends on two factors: first, the nature of the issues, and second, the discretion of the Court.[54]

3. ROLE AS A SOURCE OF LAW

Wolfgang Friedmann considers custom as the major instrument of law-making in primitive society which has heretofore been the principal source of law-making in international society.[55] As a source of law, custom posseses a special value and enjoys superiority over other forms, because, despite its imprecision, it "reflects a deeply felt community of law."[56] But Charles de Visscher seems to think that custom is inappropriate for these present times, and he points out a new weakness: its inability to crystallize in this rapidly changing and heterogenous modern world.

> Malleable as it is, custom can neither establish itself, nor evolve and so remain a source of living law, when, owing to the rapidity with which they follow each other or to their equivocal or contradictory character, State activities cease to crystallise into "a general practice accepted as law."[57]

[52] AKEHURST, *supra* note 37, at 29-30.

[53] *Lotus Case* (France v. Turkey), 1927 P.C.I.J. Merits A, No. 10 *cited in Id.* at 30.

[54] BROWNLIE, PRINCIPLES, *supra* note 36, at 7.

[55] W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 121-23 (1964) *cited in* HARRIS, *supra* note 45, at 44.

[56] C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 161-62 *cited in Id.* at 46.

[57] *Id.*

C. Treaties

1. DEFINITION

The other process by which norms are created under the Sources Doctrine is by the conclusion of treaties. A treaty, according to the 1969 Vienna Convention on the Law of Treaties, is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[58]

2. CATEGORIES OF TREATIES[59]

a. General Multilateral Treaty

A general multilateral treaty very often lays down rules of behavior and is of a fundamentally norm-creating character; it is open to all States or to all members of a regional group. Usually, these treaties either codify customs or are constitutive of them. A clear example of a general multilateral treaty is the United Nations Charter.

b. Mechanism-setting Treaty

Some treaties establish a regional or functional collaborative mechanism through which States can regulate or manage a particular sphere of activity. These treaties advocate certain purposes and principles which they try to achieve through the decisions, recommendations, or rules adopted by the administrative organs that they establish. The international regimes created by treaties of this class are sometimes termed "international administrative law."[60] An example of this is the General Agreement on Tariffs and Trade.

c. Bilateral Treaties

This category of treaties encompasses treaties entered into between two States and those among three or four States. Their tone is more contractual rather than legislative, and there is a mutual exchange of rights and obligations regarding particular subjects such as extradition, air transport, trade, friendship, and alliance.

[58] Art. 29, VIENNA CONVENTION ON THE LAW OF TREATIES, U.K.T.S. No. 58 (1980), Cmnd. 7964; 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969); 63 A.J.I.L. 875 (1969).

[59] *This is a summary of the discussion found in* HENKIN, ET. AL., INTERNATIONAL LAW, *supra* note 6, at 70.

[60] *Id.* at 71.

3. ROLE AS A SOURCE OF LAW

a. Contractual

Treaties and conventions occupy the first rung in the enumeration of sources in Article 38 of the I.C.J. Statute. Although no hierarchy was intended by such listing, the priority given to treaties is said to reflect an understanding of States and international lawyers alike that treaties must be applied to the party in the first instance, in the same way that contracts are applicable to individuals bound by them.[61] Two principles justify this position: *lex specialis derogat generali*, or special rules prevail over general ones; and the intention of the parties in selecting certain rules to govern their relations rather than general international law.[62]

In the absence of both specificity and intentions, treaties and custom occupy equal rank, with preeminence being given to that later in time and subject to two presumptions: first, that a treaty is not terminated or altered by a subsequent change in custom, unless the parties so intend; and second, that the treaty does not derogate from general custom.

b. "Law-Making"

Apart from being the main mechanism through which all kinds of international transactions are conducted, Professor D.J. Harris considers the formation of treaties as "the closest analogy to legislation that international law has to offer."[63] Brownlie explains that treaties like the United Nations Charter create general norms for future conduct of the parties in terms of legal propositions. While the nature of their binding effect is contractual, sometimes there are several factors - like the number of the parties, explicit acceptance of rules of law, and the declaratory nature of the provisions - which converge "to produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule."[64]

D. Interplay Between Custom and Treaty

Among the different kinds of treaties, it is with the multilateral "law-making" treaty that custom finds an affinity. Indeed, custom and the multilateral "law-making" treaty are not diametric sources but complementary ones. A treaty, on the one hand, can embody a custom thus providing a clear and categorical explicitation of rules which otherwise would have been nebulous and slippery; while a custom, on the other hand, refers to a treaty as evidence for establishing its existence. Also, a treaty can trigger a change in the customary regime by laying down a law that eventually becomes a custom. The first example refers

[61] *Id.* at 69.

[62] *Id.*

[63] HARRIS, *supra* note 45, at 729.

[64] BROWNLIE, PRINCIPLES, *supra* note 36, at 12.

to the codification treaty; the second, to the constitutive treaty. It is in these two types of treaty that the interplay between custom and treaty is best seen.

1. THE CODIFICATION TREATY

A codification treaty, according to Professor R.R. Baxter, is one which "photographs" the state of the law at the time of the treaty's adoption[65] and whose provisions attempt to provide a clear formulation of the present customary rules. That such a treaty itself, or its provisions, are declaratory of customary law may be demonstrated by studying the following: first, evidence intrinsic to the treaty, like the preamble, the provisions, and the *travaux preparatoires*; and second, evidence extrinsic to the treaty, that is, the state of customary international law *vis-a-vis* the treaty.[66] Examples of codification treaties may be seen in some provisions of the Geneva Convention on the Continental Shelf and the Vienna Convention on the Law of Treaties.

Once it has been established that a treaty codifies a custom, and provided that it has been signed and ratified by a great number of States, the codification treaty "is powerful evidence of the state of customary international law [which]... deploys its effects upon non-parties to the treaty."[67] Indeed, even States which have neither signed nor ratified a codification treaty may not escape liability from breaching treaty rules which are declaratory of a custom, because the source of the obligation is no longer the treaty but the custom as enunciated by the treaty.

And even if such a treaty is unsigned or has not yet entered into force, it still has some evidentiary value, because of the careful consideration given to its drafting and a considerable degree of acceptance by participating States.[68] But this force diminishes when the treaty remains ineffective with the passage of time.

2. THE CONSTITUTIVE TREATY

Some treaties try to change custom by laying down new laws, which, "with the passage of time and general acceptance become sources of new customary law."[69] Baxter suggests that the appropriate course to adopt in determining whether the rules of the constitutive treaty have passed into custom is to examine its reception into state practice. The burden of adducing evidence showing state practice from the time of the treaty's adoption up to the time of the dispute or litigation lies on the party who asserts that the law created by treaty has indeed become customary law. How may this burden be discharged? Baxter proposes two methods:

[65] Baxter, *Multilateral Treaties as Evidence of Customary Law*, 41 B.Y.I.L. 275 at 299 (1965-66).

[66] *Id.* at 287.

[67] *Id.* at 286.

[68] *Id.* at 292.

[69] *Id.* at 294.

> The first is *to demonstrate that the treaty or a particular article has been accepted by non-parties by express reference to the treaty or article* —that is, through a sort of incorporation by reference into customary law. The other is *to show the state of customary international law independently of the treaty and then that the rule of customary law is the same as that of the treaty.*[70] (italics supplied)

Professor D'Amato views Baxter's traditional methods of little help to counsel of either side of a case in which a treaty provision is "relied upon in support of an allegation of a rule of customary law to the same substantive effect," because the latter's arguments seem to be directed toward "the issue of whether a treaty itself happens to coincide with existing law or depart from it, and not whether there are any law-creation consequences for either alternative."[71] D'Amato advocates instead the Rule of Manifest Intent articulated by the Court in the *North Sea Continental Shelf Cases* for the interpretation of both codificatory and constitutive treaties:

> [T]he Court's test is simply that if there is a *provision in a treaty that is generalizable into a rule of customary law, then we must look to its form and structure within the treaty to see if there is a manifest intent that it be of a norm-creating character.* The norm thus created may simply reinforce a pre-existing norm of customary law, or it may sharpen it or define it more precisely, or indeed it may create a new norm either in an area where a rule had not existed or in an area where a pre-existing rule is supplanted.[72] (italics supplied)

In *Nicaragua v. U.S.*, the International Court of Justice was faced precisely with the interplay of treaty and custom as sources of international law with regard to the U.N. Charter's rules on the use of force, significantly the Court's analysis and conclusions on the nature of these rules hinged on how it classified these rules as either codificatory or constitutive of custom. Thus, it is in this light that the foregoing discussion is relevant, and the subsequent Chapter's exposition, illustrative.

II. THE INTERPLAY BETWEEN CUSTOM AND TREATY IN THE USE OF FORCE REALM IN INTERNATIONAL LAW

A. The Traditional Law

1. WAR AND ABSOLUTE SOVEREIGNTY

Former I.C.J. Judge Philip C. Jessup observed that "the most dramatic weakness of traditional international law has been its admission that a State may use force to compel compliance with its will."[73] Indeed, under the customary

[70] *Id.* at 297.

[71] D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules in International Law*, 64 A.J.I.L. 892 at 901 (1970) [hereinafter D'Amato, *Manifest Intent*].

[72] *Id.* at 899.

[73] P. JESSUP, A MODERN LAW OF NATIONS 57 (1952) [hereinafter JESSUP].

law regime of the world prior to the General Treaty on the Renunciation of War and the United Nations Charter, war was an instrument of national policy that fulfilled two contradictory functions: for one, it was a self-help measure used to vindicate claims that were justified (the just war) or alleged to be justified (the unjust war) under international law; for another, it was a legally recognized instrument for challenging and changing the very rights which were being enforced under the first function.[74]

Jessup attributes the "weakness" of traditional law to two factors: first, the concept of absolute sovereignty, which recognized a State's untrammelled right to pursue its own national interests; and second, the lack of a well-developed international organization with competent powers[75] which could either *enforce* international law, in order to avoid waging war as a means of self-help, or *adapt* international law to changing conditions, in lieu of using war as a tool for change. Without this supranational organization to regulate and centralize the use of international force, war was considered a necessity in an international community that remained in the "state of nature" vividly described by political theorists like Thomas Hobbes:

> But though there had never been any time, wherein particular men were in a condition of war one against another; *yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators;* having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbors; *which is a posture of war.*[76] (italics supplied)

If war, the most widespread and destructive use of force, was acceptable under traditional law, then it follows that lesser, more legally justifiable uses of force - like limited reprisals, self-defense, defense of nationals and properties abroad, and humanitarian intervention - would likewise be acceptable.

2. SOME TRADITIONAL USES OF FORCE SHORT OF WAR

a. Reprisals

The Award of the Tribunal in the *Naulilaa Case* defines a reprisal as "an act of self-help (*selbsthilfehandlung*) by the injured State, responding—after an unsatisfied demand—to an act contrary to international law committed by the offending State."[77] The act of self-help may or may not involve force but is nonetheless "injurious and [would be] otherwise internationally illegal"[78] were it not for the fact that it was adopted by a State in retaliation to a prior international delinquency committed against it by another State. The object of reprisals, whether armed or non-armed, is to obtain reparation and to avoid further injury. It is more severe than a retorsion, because a retorsion, unlike a reprisal, is merely an unfriendly, discourteous, but legal act adopted by a state to avenge an equally unfriendly, discourteous but legal act done to it by another State.

For a reprisal to be lawful, it must be preceded by the *sine qua non* requirement of a prior international delinquency committed by one State against another. There must, in addition, be proof of an unsatisfied demand to warrant the necessity of the reprisal, and the act of reprisal must be proportionate to the injury committed.[79] Reprisals may be performed only by state organs, not by private individuals,[80] and they may be directed "against anything and everything that belongs to, or is due to, the delinquent State or its citizens."[81]

b. Self-Defense

The right of every State to resort to force in order to defend its territory and sovereignty is well-established in international law. The use of force in self-defense "excuses incidental or consequent infringement of the rights of another State [which, however]... may be privileged to resist."[82]

Any explanation regarding the traditional right to self-defense must unavoidably include a discussion of the *Caroline Case*.[83] During the 1837 Canadian Rebellion against Great Britain, Canadian rebel leaders recruited American nationals to attack British ships from a station at Navy Island. Arms were supplied to the rebels through an American vessel called *The Caroline*. The British seized *The Caroline* while it was docked at an American port and claimed that their acts were justified under the doctrine of self-defense. The statement of American secretary Daniel Webster, which has since been immortalized as the "Webster Rule," lays down the twin requirements of necessity and proportionality for a valid exercise of the right to self-defense:

> It will be for... [Her Majesty's] Government to show a *necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of The United States at all, did *nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.*[84] (italics supplied)

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[74] 2 L. OPPENHEIM, *supra* note 1, at 177-78.

[75] JESSUP, *supra* note 73, at 157.

[76] T. HOBBES, LEVIATHAN at 187-88 (C. MacPherson ed., 1968) *cited in* Kahn, *From the Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE INT'L. L. J. 1 at 32 (1987).

[77] *The Naulilaa Case (Portugal v. Germany)*, 2 R.I.A.A. 1012 (Translation) *cited in* HARRIS, *supra* note 45, at 9.

[78] 2 L. OPPENHEIM, *supra* note 1, at 136.

[79] *Id.* at 141.

[80] *Id.*

[81] *Id.* at 138.

[82] JESSUP, *supra* note 73, at 163.

[83] *The Caroline in* 2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906).

[84] Mr. Webster to Mr. Fox (24 April 1841) *cited in* HARRIS, *supra* note 45, at 848.

That *The Caroline* was seized even when it was not actually engaged in armed attack demonstrates that the right of self-defense is available to anticipate future attacks. Under the traditional customary law, therefore, the right of self-defense could be invoked both against an actual armed attack as well as against an anticipated one.

c. Defense of Property and Nationals

Traditional international law also recognized the right of States to employ armed force to protect the lives and property of its nationals while they are within the territory of another State "in situations where the state of their residence, because of revolutionary disturbances or other reasons, is unable or unwilling to grant them the protection to which they are entitled."[85] Jessup hesitates to subsume this type of "defense" under the right to self-defense, because it is more akin to intervention.[86]

d. Humanitarian Intervention

Professor Fernando Teson defines humanitarian intervention as "the use of international force to help victims of government-directed human rights deprivations."[87] Humanitarian intervention is a legally permissible use of force when a State "renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny them their fundamental human rights and to shock the conscience of mankind."[88] The justification for humanitarian intervention, according to sixteenth century writers like Gentili, was premised on the right of States to go to war in defense of the "common rights of mankind,"[89] which include among them human rights.

3. EARLY EFFORTS TO REGULATE INTERNATIONAL VIOLENCE

In the absence of an international organization to centralize the regulation of the use of force, war continued to be viewed both as a reality and a necessity in international relations. The twilight of the nineteenth century saw the beginnings of the international movement to limit by treaty the customary right of States to seek recourse through war.

a. Hague Conferences of 1899 and 1907

The Hague Conferences of 1899 and 1907, together with the movement for the pacific settlement of international disputes, "marked the beginning

[85] JESSUP, *supra* note 73, at 169.

[86] *Id.*

[87] F. TESON, HUMANITARIAN INTERVENION: AN INQUIRY INTO LAW AND MORALITY 128 (1988).

[88] 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312-24, 319-20 (H. Lauterpacht ed., 8th ed., 1955).

[89] *See* A. GENTILI, DE JURE BELLI LIBRI TRES., Ch. XVI and XXV (Carnegie ed., J.C. Rolfe trans. 1933) *cited in* Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AJIL 110 at 114 (1991).

of the attempts to limit the right of war both as an instrument of law and as a legally recognised means for changing legal rights."[90] Wars, for example, could no longer be waged to collect debts.[91] Also, States had the duty to report to conciliation commissions prior to engagement in hostilities.[92]

b. League of Nations

The League of Nations, formed after World War I to promote international cooperation and to achieve international peace and security, was the first international organization devoted to collective security. Its Covenant, which had provisions on disarmament and pacific settlement, created the Permanent Court of International Justice, apart from establishing the League Council.

Under the League of Nations, what was outlawed was not war *per se* but the resort to war without an attempt towards pacific settlement. The Covenant was a weak instrument which left to its Members the discretion "to decide whether a breach had occurred or an act of war had been committed" as well as to decide whether it wanted to carry out the Council's rcommendations.[93] The League's initial successes with the Graeco-Bulgarian Crises were rendered inconsequential by the League's ineptitude during subsequent events like the Manchurian Incident and Germany's incursions into the Rhine, Austria, Czechoslovakia, and Poland, all of which eventually led to the outbreak of World War II.

c. The Kellog-Briand Pact of 1928

Still in force to this day, the General Treaty for the Renunciation of War represents "an authoritative and practically universal expression"[94] of pre-United Nations Charter attempts to outlaw war. The High Contracting Parties to the Treaty, also called the Kellog-Briand Pact, "condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."[95] Furthermore, the High Contracting Parties committed themselves to seek only pacific means to resolve all disputes and conflicts between them.[96]

[90] 2 L. OPPENHEIM, *supra* note 1, at 179.

[91] HAGUE CONVENTION OF 1907 RESPECTING THE LIMITATION OF THE EMPLOYMENT OF FORCE FOR THE RECOVERY OF CONTRACT DEBTS.

[92] *See* HAGUE CONVENTIONS FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, U.K.T.S. 9 (1901), Cd. 798. Article 9 on the International Commission of Inquiry *and* The Permanent Commissions of Inquiry (the Bryan Arbitration Treaties) of 1914.

[93] D. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 16 (1963).

[94] 2 L. OPPENHEIM, *supra* note 1, at 181.

[95] GENERAL TREATY FOR THE RENUNCIATION OF WAR (1928), Article I, U.K.T.S. 29 (1929), Cmnd. 3412; 94 L.N.T.S. 57

[96] *Id.* at Article II.

B. *The Advent of the United Nations*

The horrors of the Second World War saw the end of the metamorphosis of the international regime on the use of force from the traditional to the modern. World War II gave birth to "twin offspring"[97]: the Nuremberg Charter and the Charter of the United Nations. These two seminal instruments were to lead the war-weary world in its quest for peace under the rule of law. The Nuremberg principles, "affirmed in unmistakable terms that aggressive war is illegal and that persons responsible for such wars are guilty of an international crime."[98] On the one hand, Nuremberg could be described as backward-looking in that it sought to exact retribution for past infractions committed by German officers during World War II. The United Nations Charter, on the other hand, may be said to be forward-looking in that it sought to create a system through which world peace could be achieved and preserved and succeeding generations spared from the scourge of war.[99]

1. SOVEREIGN EQUALITY

While the old international regime was based on the notion that States were absolute sovereigns, the United Nations "is based on the principle of sovereign equality of all its members."[100] Thus, while war was a natural right and function of an absolute sovereign, the unfettered right to resort to force is incompatible with a system premised on mutual respect among equal sovereigns. Consistent with this mutual respect are the positive duties of every Member to cooperate with each other, to resort to peaceful means of settling disputes, and, as an inverse corollary, to refrain from the unilateral resort to force.

2. PROHIBITION ON THE USE OF FORCE

Probably the most significant provision of the United Nations Charter is the prohibition on the use of force contained in Article 2(4), which reads:

> 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.

[97] TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 78 (1970).

[98] Schachter, *In Defense of International Rules on the Use of Force*, 53 UNIV. CHI. L. REV. 113 (1986). [hereinafter Schachter, *In Defense*].

[99] Preamble, U.N. CHARTER.

[100] Article 2 (1), U.N. CHARTER.

Unlike prior formulations, the Charter prohibition outlaws not just aggressive war but even the resort to the use or threat of force.

It is interesting that Article 2(4) mentions neither "war" nor "aggression," which are terms contained in earlier instruments like the Covenant of the League of Nations and the Kellog-Briand Pact. Instead, the U.N. Charter employs the more general term "force" which, in the view of Professors Louis Henkin, Richard Pugh, Oscar Schachter, and Henry Smit, was meant to embrace all USES of force - whether or not war had been formally declared - and thereby preclude circumvention by U.N. Members.[101] Apart from armed force, the term "force" can also be used "in a wide sense to embrace all types of coercion: economic, political, and psychological as well as physical."[102] Third World countries have advocated this broad interpretation; whereas, First World States have strongly resisted their attempts.

Article 2(4) prohibits, in addition to the *use* of force, the *threat* of force as well. Professor Romana Sadurska defines this as "an act that is designed to create a psychological condition on the target of apprehension, anxiety, and eventually fear, which would erode the target's resistance to change or will pressure it toward preserving the *status quo*."[103] Sadurska considers a threat of force as a form of coercion which, in the opinion of this writer, is inconsistent with the U.N. Charter, because through it, one sovereign State drastically restricts or suppresses the choices[104] of another equally sovereign State.

3. EXCEPTIONS TO THE PROHIBITION

The United Nations Charter allows only two exceptions to Article 2(4): force used in self-defense when an armed attack occurs and force when authorized by the United Nations Security Council under Chapter VII of the Charter.[105]

a. *Article 51: Individual and Collective Self-Defense*

The right to self-defense under the U.N. Charter is enunciated in Article 51:

> Nothing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[101] HENKIN, ET. AT., INTERNATIONAL LAW, *supra* note 6, at 677.

[102] Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 at 1624 (1984) [hereinafter Schachter, *The Right of States*].

[103] Sadurska, *Threats of Force*, 82 A.J.I.L. 239 at 241 (1988).

[104] *Id.*

[105] Schachter, *The Right of States*, *supra* note 102, at 1620.

A plain reading of Article 51 will reveal that the Charter introduces several innovations, as well as clarifications, to the traditional rule of self-defense. First of all, the determination of the validity of a self-defense action has been centralized. While States have, in the first instance, the right to determine whether a resort to force in self-defense is necessary, "the actor invokes the right at his peril and his conduct is subject to subsequent review"[106] by the Security Council.

Second, there is the explicit requirement that an armed attack occur prior to the exercise of the right. Under traditional international law, as earlier discussed, such a requirement was not necessary. There are, on the one hand, publicists who argue that the U.N. Charter has narrowed the scope of the right and has outlawed anticipatory self-defense.[107] There are, on the other hand, equally numerous publicists who argue that Article 51 has actually preserved the traditional self-defense rule in view of the present state of nuclear armaments, which might render a State waiting for an armed attack incapacitated to resist and its right to self-defense, useless.[108]

And third, Article 51 clearly shows that the right of self-defense is both individual and collective. Professor Derek W. Bowett imposes two restrictions on the right to collective self-defense: first, that each participating State must have an individual right to self-defense in that particular dispute; and second, that there exists an agreement between States in the style of the Arab League or the Organisation of American States to exercise their rights in concert.[109] Bowett writes that concerted State action that does not bear these earmarks of collective self-defense belongs more to the concept of collective security under the aegis of the United Nations Security Council.[110]

b. *Enforcement Actions*

Article 39 of the U.N. Charter confers upon the Security Council the jurisdiction to determine whether there exists any threat to the peace, breach of the peace, or act of aggression. The Security Council, which is composed of Five Permanent Members[111] with veto power and Ten Elective Members,

[106] JESSUP, *supra* note 73, at 165.

[107] *See* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 367 (1963); L. HENKIN, HOW NATIONS BEHAVE 136 (2nd ed. 1979); JESSUP, *supra* note 73, at 166; KELSEN, *supra* note 3, at 797-98.

[108] *See* M. MCDOUGAL AND F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 233-36 (1961); D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-89, 191-92 (1958); L. GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS 301 (1949); A. THOMAS AND A. J. THOMAS, NON-INTERVENTION 123-24 (1956); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455 at 495-99 (1952-II).

[109] Bowett, *Collective Self-Defence under the Charter of the United Nations*, 32 B.Y.I.L. 130 at 139-40 (1955-56).

[110] *Id.* at 140.

[111] The Big Five: United States, Russia (which has since taken over the seat of the Union of Soviet Socialist Republics), People's Republic of China, Great Britain, and France.

also has the power to make recommendations and to decide what measures to take in order to maintain or restore international peace and security.[112]

Under Article 41 of the Charter, the Security Council may call upon all Members to undertake non-forcible measures for the maintenance of international peace and security. An example of a non-forcible measure is the economic blockade imposed by the Security Council on Southern Rhodesia after its white minority unilaterally declared the country's independence from Great Britain.[113]

When non-forcible measures have proven inadequate, the Security Council is authorized under Article 42 of the Charter to "take such action by air, sea or land forces as may be necessary to maintain or restore international peace or security."[114] The Korean War is often cited as the textbook case of a United Nations enforcement action under Article 42.[115] Contrary to popular opinion, Operation Desert Storm undertaken against Iraq by Saudi Arabia, Syria, Jordan, Great Britain, and France under the leadership of the United States during the recent Gulf War is *not* a UN enforcement action but a *"mestizo"* case involving what Schachter describes as a "U.N.-sanctioned collective self-defense measure."[116]

Should the Security Council fail to act because of the lack of unanimity, the General Assembly is authorized to recommend the necessary measures to preserve international peace and security.[117]

c. *Other uses of force*

Outside these two exceptions, other uses of force recognized as valid under the traditional law are of doubtful legality under the contemporary regime. For instance, armed reprisals, which traditional law considered acceptable under certain circumstances, have been viewed as inconsistent with obligations under the United Nations system.[118]

With respect to the defense of property and nationals, Schachter writes that this exception may still be allowed today provided the following requisites, proposed by Sir Humphrey Waldock, are met: There must be (1) an

[112] Article 39, U.N. CHARTER.

[113] *See* S.C.O.R., 21st Year, 1276th Meeting, pp. 5 et. seq. (9 April 1966) *cited in* HARRIS, *supra* note 43, at 887.

[114] Article 42, U.N. CHARTER.

[115] *See* Security Council Resolution of June 25, 1950, S.C.O.R., 5th Year, Resolutions and Decisions 4-5; Security Council Resolution of June 27, 1950, S.C.O.R., 5th Year, Resolutions and Decisions 5; *and* Security Council Resolution of July 7, 1950, S.C.O.R., 5th Year, Resolutions and Decisions 5 *cited in* HARRIS, *supra* note 45, at 882-84.

[116] Schachter, *United Nations Law in the Gulf Conflict* in *Agora*, 85 A.J.I.L. 452 at 462 (1991).

[117] Uniting for Peace Resolution, U.N. G.A. Res. 377 (V 1950).

[118] Declaration of Principles of International Law Concerning Friendly Relations, U.N. G.A. Res. 2625 (XXV 1970) (Adopted without a vote): "States have a duty to refrain from acts of reprisal involving the use of force."

imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury.[119]

The most prominent example of a post-Charter exercise of the right to defend nationals occurred during the Israeli raid at Entebbe, Uganda. A fourth requisite is suggested by the U.S. rescue attempt during the Iran Hostage Crisis—that peaceful means had been exhausted or were unavailable.[120]

With respect to humanitarian intervention, the International Court of Justice in 1986 rejected the notion that humanitarian intervention can involve the use of force.[121] Professor Teson, however, qualifies the Court's statement by confining it within the narrow aspects of the *Nicaragua* case.[122] He maintains that humanitarian intervention continues to be valid, because it is a use of force which is not inconsistent with the Charter and one made necessary by the failure of the collective security system.[123]

4. THE UNITED NATIONS AS AN ORGANIZATION AND AS A TREATY

a. As an Organization: The U.N.'s Three-Wheeled Mechanism

The makeup of the U.N. organization draws heavily on the domestic analogy of government structure composed of a legislature, an executive, and a judiciary. Together with the fundamental principles enshrined in the Charter, the U.N.'s "three-wheeled mechanism," with the General Assembly as legislature, the Security Council as executive, and the International Court of Justice as judiciary,[124] is described by former I.C.J. President Nagendra Singh as the Charter's two-fold path to peace and its greatest achievement.[125] The achievement perhaps lies in that the United Nations Charter not only lays down rules but also provides an effective machinery through which its rules may be and have been implemented. Created in 1945, the United Nations, continues to function to this day, and recent world events after the Gulf War only serve to underscore the increasing reliance placed upon the United Nations system by the international community.

[119] Schachter, *The Right of States*, *supra* note 102, at 1629-30.

[120] *Id.* at 1631.

[121] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 135, par. 269.

[122] TESON, *supra* note 87, at 243-44.

[123] *Id.* at 231.

[124] Kahn, *supra* note 76, at 30.

[125] Nagendra Singh, Speech: Presentation of the Court's Emblem to the United Nations, 15 October 1986.

b. As a Treaty: Universal Membership

With an original membership of 51 States, the United Nations has a present membership of 159. Only nine States remain non-U.N. Members.[126]

With a clear majority of States in the world being bound by the Charter as a treaty, it could be argued that customary international law on the use of force would now seem irrelevant, even unnecessary. In 1984, however, the United States, as respondent in proceedings before the I.C.J., contended that since "the only general and customary international law on which Nicaragua can base its claims is that of the Charter" and the United States' multilateral treaty reservation to the Court's compulsory jurisdiction barred adjudication under multilateral treaties, the reservation bars all of the applicant Nicaragua's claims.[127] It is in this context that the customary law status of U.N. Charter use of force rules, independently of the treaty, became crucial to Nicaragua and material to this study.

III. THE CUSTOM – CHARTER PARALLEL IN *THE CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA*

A. Nicaragua: A Brief Historical Sketch[128]

Nicaragua lies at the geographic heart of Central America and is bounded on the north by Honduras, on the south by Costa Rica, on the east by the Atlantic Ocean, and on the west by the Pacific Ocean. Although the largest of the Central American republics with an area of 148,000 sq.km., Nicaragua is the least densely populated with only three million people.

1. INDIAN AND IBERIAN ROOTS

Nicaragua derives its name from *Nicarao*, a group of Indian agricultural peoples who comprised Nicaragua's indigenous population prior to the Spanish conquest. Although the *Nicaraos* lived in towns and maintained complex governmental structures and trading relations, their culture never reached the level of advancement attained by neighboring cradles of ancient civilization like the Incas of Peru and the Mayas and Aztecs of Mesoamerica.

Nicaragua became a Spanish colony in 1522 when Gil Gonzalez arrived from Panama to conquer, convert, and explore. The *conquistadores* brought to their overseas empire the strong Church-State alliance that helped the

[126] Switzerland, San Marino, Liechtenstein, The Vatican, Monaco, Nauru, Tonga, Kiribati, and Tuvalu *enumerated in* HARRIS, *supra* note 345, at 104.

[127] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 92-93, par. 173.

[128] *This historical account is summarized from* CLOSE, *supra* note 20, at 2, 6-35.

Spaniards reconquer Spain from the Moors after eight centuries of religious war. The *conquistadores* also introduced to their Latin American colonies their corporatist governmental structures, such as the *encomienda*[129] and the *adelantado*,[130] and a value system which considered combat and adventure to be worthier pursuits for a Christian gentleman over peaceful, productive activities like farming. The *conquistador* is the predecessor of the Latin American *caudillo* who, like his forbearer, operated ostensibly under the auspices of Crown and Church but was really a military entreprenuer who used his skill at arms to acquire and hold wealth and status.

Napoleon's invasion of Spain signalled the end of the Spanish empire in Latin America. The revolution began in Buenos Aires in 1810 and was completed in 1823 with the creation of an independent Mexico and the formation of the United Provinces of Central America.

But from 1821 to 1857, civil war erupted in Nicaragua between the Conservatives and the Liberals. During that period, the British were able to secure for themselves suzerainty over the Mosquito coast. Fresh from its acquisitions of Oregon from the British and California from Mexico, the Americans looked to Central America for a canal to consolidate her coasts and to forestall heightened British activity in that region. American filibusters under the leadership of William Walker and Cornelius Garrison helped the Liberals defeat the Conservatives in 1853, but Walker's puppet regime was driven out of Nicaragua by the British navy and the Central American armies.[131]

2. U.S. SUZERAINTY

The Conservatives ruled Nicaragua from 1857-1909. President José Santos Zelaya and the Nicaraguan coffee barons brought unprecedented prosperity to Nicaragua. Unfortunately, Zelaya antagonized the Americans. As a result of strained relations, the United States chose Panama over Nicaragua as the site of their canal. To retaliate, Zelaya sought the help of the Japanese and the Germans for another canal, provoking the Americans to engineer his ouster.

During the fall of Zelaya, the United States sent Marines to Nicaragua to protect American lives and property, but their influence soon spread from the military sphere to the economic and the political. Before they left, the Americans conducted elections, put up the National Guard, and concluded the Bryan-Chamorro treaty that assured the United States of a naval base in Nicaragua including a perpetual option to open a canal.

[129] T. AGONCILLO & M. GUERRERO, HISTORY OF THE FILIPINO PEOPLE 85 (1979): "The *encomienda* was, theoretically, a right vested by the king upon a Spaniard who had helped in the 'pacification' and settlement of a 'heathen' country. As such it was a public office. The *encomendero* was empowered to collect taxes in the community assigned to him and was enjoined, in return, to protect and convert the natives to Christianity."

[130] CLOSE, *supra* note 20, at 8: "the *adelantado*...was the powerful, nearly autonomous governor of a frontier region."

[131] *Id.* at 15-16.

Civil war broke out again between the Conservatives and the Liberals soon after the Americans left; thus, the United States was forced to intervene once more. The Peace of Tipitapa gave the presidency to the Liberal general Moncada. The treaty satisfied all but one Liberal general, Augusto Cesar Sandino, who denounced the pact and continued his fight against Moncada and the Americans. Sandino and his guerillas put down their arms only in 1933 when their *Ejercito Defensor de la Soberania Nacional* was given amnesty, and 36,800 sq.km. of Segovia mountain land was set aside for their agricultural cooperatives.

Before leaving Nicaragua, the United States turned over command of the National Guard to Nicaraguan officers. For *jefe director* the Americans chose Anastacio Somoza Garcia whose only assets were his well-connected wife and his fluency in colloquial English. Somoza promptly engineered Sandino's assassination, manuevered to become President, and consolidated his iron grip on Nicaragua which was to last for 46 years.

3. THE SOMOZA DYNASTY: 1933-1979

Anastacio "Tacho" Somoza and, later on, his sons, Luis and Tachito, turned the Liberal Party into their own political machine and the National Guard into their personal army. They also amended the Nicaraguan constitution to suit their needs.

The Somozas amassed a family fortune in U.S. $ 500 million by controlling the only two meatpacking plants in the country, half the sugar mills, two thirds of commercial fishing, 40% of rice production, the largest milk processing plant, cement manufacture, the national steamship and the only airline company, a newspaper, a radio station, and two television stations.[132] Most importantly, they kept themselves in the good graces of their powerful neighbor to the north, such that U.S. President Franklin Delano Roosevelt remarked: "Somoza may be a son of a bitch, but he's our son of a bitch."[133] Under Somoza rule, the Central Intelligence Agency (C.I.A.) used Managua's Las Mercedes airport for bombing and strafing raids in its coup against Guatemala's Arbenz Government. The Somozas also allowed Nicaragua to be used as a base for the *Bahia de Cochino* invasion and contributed men to the Organisation of American States (O.A.S.) peacekeeping forces after the American invasion of the Dominican Republic.[134]

Dissent came from the disunited Conservatives and later from the guerilla *Frente Sandinista Liberacion Nacional* founded by Tomas Borge, but these groups were never able to significantly weaken the Somozas.[135] The beginning of the end came in the wake of the country's disenchantment with Tachito Somoza during the great earthquake of 1972. The *caudillo* used the calamity to increase his wealth and power instead of helping his countrymen.[136]

[132] E. GARCIA, THE FILIPINO QUEST: A JUST AND LASTING PEACE 222 (1988).

[133] *Time*, 15 November 1948, at 43.

[134] CLOSE, *supra* note 20, at 28.

[135] *Id.* at 26.

[136] *Id.* at 28.

Opposition to the Somoza regime burgeoned. Internationally, the Somozas lost the support of the O.A.S. countries which drafted a Manifesto demanding that free elections be held and democratic reforms be instituted in Nicaragua. This manifesto was accepted by the Sandinistas. Domestically, the Sandinista-led coalition began to attract adherents from a wide mass and bourgeoisie base. A bloody civil war toppled the dictatorship in 1979, and the fledgling Sandinista government received the encouraging recognition of and aid from the international community.[137]

4. THE SANDINISTAS: TROUBLE IN THE BACKYARD

Perception of the Sandinista government varies according to one's political leanings.

On the one hand, Latin American specialist Professor Ed Garcia of the University of the Philippines describes the Socialist government established by the Sandinistas as one committed to political pluralism, a mixed economy, popular participation and mobilization, national defense, and non-alignment.[138] The regime launched a literacy crusade to reduce illiteracy from 50.3% to 12% and tripled its expenditures for health. The Sandinistas nationalized banks and encouraged workers to organize. They abolished the death penalty and brought 25% of the cultivable land under government control.[139]

On the other hand, John Norton Moore, agent for the United States in the *Nicaragua* case, accuses the Sandinistas of adopting three policies "that are the root cause of the threat to world order in Central America": the suppression of democratic pluralism, the massive ideologically aligned military buildup, and the "secret war" against its non-Socialist Central American neighbors.[140] First, Moore claims that the Sandinista *comandantes* eased out all the moderate elements from the government to establish a totalitarian police state along Communist lines and violated its commitment to the O.A.S. under the Manifesto to put up a pluralist democracy. It also established very close links with radical States and groups like Cuba, the Soviet Bloc, and the Palestinians. Second, the Sandinista Army swelled to six times the size of the Somoza National Guard and received training and arms from Cuba. Third, the Sandinistas proclaimed support for "revolutionary internationalism" and allegedly engaged in a "secret war" against El Salvador, Guatemala, Honduras, and Costa Rica by training, arming, and directing the insurgent armies of these countries through a clandestine traffic across jungle borders. The U.S. State Department has long considered it a major goal of Cuba to

[137] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4. See Dissenting Opinion of Judge Stephen Schwebel at 274, par. 19-20.

[138] GARCIA, *supra* note 132, at 225.

[139] *Id.* at 224.

[140] Moore, *The Secret War in Central America and the Future of World Order*, 80 A.J.I.L. 43 at 48-49 *and see in particular pages* 50, 52, 54, and 56 (1986).

export its communist revolution to the rest of America,[141] and, because of the Sandinista government's activities, it viewed Nicaragua as a valuable Cuban ally in this effort.

To stem the tide of communist takeover in Central America, the United States allegedly undertook to organize, arm, train, and control the right-wing *Contra* army comprised of the *Fuerza Democratica Nicaraguense* and the *Allianza Revolucionaria Democratica* in order to overthrow the Sandinista government.[142]

B. Before the World Court for Relief: Jurisdiction and Admissibility

On 9 April 1984, the Ambassador of Nicaragua to the Netherlands filed an Application with the International Court of Justice against the United States and requested provisional measures.

In the course of the oral proceedings for provisional measures, the United States contended that the I.C.J. lacked the jurisdiction to deal with the Nicaraguan Application and asked that the case be removed from the list. On 10 May 1984, the Court rejected the U.S. request for removal and decided that written proceedings should first address the joint issues of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application.

Nicaragua submitted its Memorial on 30 June 1984 and the United States, its Countermemorial on 17 August 1984. Prior to the close of the written proceedings on the Jurisdiction phase, El Salvador filed a Declaration of Intervention under Article 63 of the Statute, but this was found inadmissible in as much as it was related to ongoing proceedings.

1. JURISDICTION

Nicaragua based the Court's jurisdiction on the declarations made by both Parties accepting the compulsory jurisdiction of the Court under Art. 36 par. 2 of the I.C.J. Statute, which reads:

> Article 36
>
> x x x
>
> 2. The states parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other states accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

[141] *Zemel v. Rusk*, 381 U.S. 1, 14; 14 L.ed. 2d. 179, 189 (1965).

[142] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 21, par. 201.

It further claimed that the Court had jurisdiction under the compromissory clause of the bilateral 1958 Treaty for Friendship, Commerce, and Navigation with the United States.[143]

In its Countermemorial, the United States challenged the Court's jurisdiction by contesting the declarations relied upon by Nicaragua. The United States claimed that Nicaragua's 1929 Declaration of Acceptance of the compulsory jurisdiction of the Permanent Court of International Justice was ineffective, because it was never ratified. The Court struck down this contention and stated that there was an effective commitment through Nicaragua's signature and its acquiescence.[144]

The United States then cast doubt on the validity of its own 1946 Declaration of Acceptance as regards the case. On 6 April 1984, U.S. Secretary of State George Schultz submitted a modification of its Declaration by excluding from its scope conflicts in Central America. The Court ruled that the modification did not affect Nicaragua's 9 April 1984 Application, because the modification needed six months' notice to take effect.

In addition, the United States invoked a proviso in its Declaration which, it claimed, barred Nicaragua's claims. The U.S. Declaration of Acceptance contained three provisos which excluded the following from the Court's compulsory jurisdiction: first, disputes over which other tribunals enjoy jurisdiction; second, matters within the domestic jurisdiction of the United States; and third:

> disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.[145]

The third reservation was made by Senator Vandenberg; it came to be known as the Multilateral Treaty Reservation (M.T.R.) or the Vandenberg Reservation. It was meant to protect the United States and third States from "the inherently prejudicial effects of partial adjudication of complex multiparty disputes."[146]

The United States contended that the M.T.R. barred all of Nicaragua's claims that arose under multilateral treaties like the U.N. Charter, the O.A.S. Charter, the Montevideo Convention, and the Havana Charter. In addition, the United States argued that the M.T.R. barred claims arising under customary international law rules which were found in these multilateral treaties.[147] The Court rejected the U.S. arguments and held that claims arising under customary international law gave rise to a distinct cause of action. The Court, however, could not render a full ruling on the M.T.R., because the determination of which States were affected by the present dispute was not a preliminary matter; thus, complete adjudication on the M.T.R. was reserved for the Merits phase.[148]

[143] *Id.* at 17, par. 9.

[144] *Nicaragua v. U.S. (Jurisdiction)*, 1984 I.C.J. Reports 392 at 408, 410.

[145] *Id.* at 421.

[146] *Id.* at 422.

[147] *Id.* at 423.

2. ADMISSIBILITY

The United States contended that the Nicaraguan Application was inadmissible on several grounds. The most pertinent defense interposed by the United States was that the subject matter of the dispute was inadmissible, because it fell within the jurisdiction of the U.N. Security Council as it dealt with an unlawful use of force by Nicaragua, on the one hand, and an ongoing exercise of the inherent right to individual and collective self-defense by the United States, on the other hand. The Court held that the Security Council's jurisdiction, although primary, was not exclusive; thus, the I.C.J. held that it was not precluded from entertaining the case.[149] In his dissenting opinion, Judge Stephen Schwebel agreed with this particular finding, because "nowhere in the text of the Statute of the Court is there any indication that disputes involving the continuing use of armed force are excluded from its jurisdiction."[150] Moreover, Judge Stephen Schwebel pointed out that

> [W]hile the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination...In short, the Security Council is a *political organ which acts for political reasons*. It may take legal considerations into account, but *unlike a court, it is not bound to apply them*.[151] (italics supplied)

3. JUDGMENT

On 26 November 1984, the Court rendered a Judgment finding, by 15 votes to one,[152] that it had jurisdiction to try the case and, by a unanimous vote, that Nicaragua's Application was admissible.[153]

C. The Decision on the Merits

On 18 January 1984, the Agent of the United States filed a letter describing the Judgment on Jurisdiction and Admissibility as clearly and manifestly erroneous and signifiying its withdrawal from further proceedings. Soon after, the United States also terminated its Declaration under the Optional Clause.

[148] *Id.* at 425, par. 75-76.

[149] *Id.* at 433-35, par. 93-95.

[150] Dissenting Opinion of Judge Stephen Schwebel, *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. at 289, par. 58 [hereinafter Schwebel Dissent].

[151] *Id.* at 290, par. 59

[152] In Favour: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Larrachiere, Mbaye, Bedjaoui; Judge *ad hoc* Colliard. Against: Judge Schwebel.

[153] *Nicaragua v. U.S. (Jurisdiction)*, 1984 I.C.J. Rep. 392 at 442.

Professor Thomas Franck commented that, by withdrawing from the proceedings, the United States government "turned its back not only on the International Court of Justice, but on 40 years of leadership in the cause of world peace through law."[154]

Notwithstanding a U.S. withdrawal, the Court proceeded to hear the case on the merits and required the Parties to submit written pleadings. Because the United States did not file a Countermemorial, Nicaragua asked the Court to decide in favor of its claim under Article 53 of the Statute. Under the said Article, the Court is allowed to proceed despite non-appearance by one of the Parties, but it must first satisfy itself not only that it has jurisdiction over the dispute, but that Nicaragua's claim is well-founded in both fact and law. As to the law, the Court is not limited to an examination of the legal arguments raised by the Parties but may, on its own initiative, refer to other applicable sources; as to the facts, the Court is not bound by the material formally submitted to it, but may make its own inquiries. The United States, as a non-appearing defendant State, forfeited its opportunity to present counter-evidence.

1. THE ARGUMENTS

a. Nicargua's Grounds

On the factual aspect, Nicaragua accused the United States primarily of directly or indirectly supporting military and paramilitary operations in Nicaragua. Indirectly, the United States is alleged to have effectively controlled, devised, and directed the strategy and tactics of the *contras* whose insurgent actvities caused Nicaragua material damage and widespread loss of life. Directly, the United States mined Nicaraguan ports, oil installations, a naval base and flew its planes inside Nicaraguan airspace to gather intelligence, to arm and give provisions to the *contras*, and to intimidate the population. The United States caused not only military damage to Nicaragua but economic damage as well: it withdrew aid, drastically reduced sugar quotas, imposed a trade embargo, and blocked the provision of loans from the Inter-American Development Bank and the International Bank for Reconstruction and Development.[155]

Nicaragua contended as a matter of law that the United States acted in violation of the following international law obligations: (1) Article 2(4) of the United Nations Charter and customary international law obligation to refrain from the threat or use of force; (2) the Charter of the Organisation of American States and customary international law rules on non-intervention; (3) the obligation to respect the territorial sovereignty of Nicaragua; (4) the obligation not to defeat the object and purpose of the 1956 Treaty of Friendship, Commerce, and Navigation between Nicaragua and the US.[156]

[154] Franck, *Icy Day at the I.C.J.*, 79 A.J.I.L. 379 AT 380 (1985).

[155] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 21-22, par. 20-22.

[156] *Id.* at 22, par. 23.

b. U.S. Defenses

As earlier noted, the United States did not submit a Countermemorial during the proceedings on the merits. The Court was constrained to rely on other documents submitted previously by the United States prior to its withdrawal. As regards the use of force issue, it would seem that the U.S. defense had a two-fold character: on the procedural aspect, the United States invoked the Vandenberg Reservation; on the substantive aspect, it hinted in its arguments against admissibility that its actions were justified acts of collective self-defense under the O.A.S. system.

1) MULTILATERAL TREATY RESERVATION

Nicaragua premised its case on violations by the United States of several multilateral treaties which include, *inter alia*, the U.N. and O.A.S. Charters. It was the position of the United States that the I.C.J. had no jurisdiction to adjudicate on the case, because the M.T.R. excludes from its application disputes arising under multilateral treaties, save in two exceptions,[157] neither of which were available in this case.

2) COLLECTIVE SELF-DEFENSE

The United States claimed that its activities in and against Nicaragua were undertaken in pursuance of its inherent right to individual and collective self-defense which was, in turn, consistent with its treaty commitments under the Inter-American Treaty of Reciprocal Assistance, because it had merely responded to requests from El Salvador, Honduras, and Costa Rica for assistance in their acts of self-defense against Nicaraguan aggression.[158] But this substantive argument was invoked only to illustrate that the dispute was one that arose out of multilateral treaties and that the case, therefore, was excluded from the United States' Declaration of Acceptance.[159]

2. ON THE MULTILATERAL TREATY RESERVATION

a. Not a Preliminary Matter

In order to rule properly on the scope and applicability of the Multilateral Treaty Reservation, the Court had to resolve, first, whether the United States had waived the reservation; or second, whether affected third States who were parties to the multilateral treaties were also parties to the case. According to the terms of the Vandenberg Reservation, Article 36 will not apply if either of these two situations are present.

[157] These exceptions, as earlier mentioned, were that of the failure to implead affected states and that of waiver. The Philippines Declaration of Acceptance under Article 36 also contains a similar reservation.

[158] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 70, par. 126.

[159] *Id.* at 34, par. 46.

As earlier discussed, the Court could not make a complete judgment on the scope and effect of the M.T.R. during the Jurisdiction phase because the issue was not exclusively preliminary in character. Giving a definitive interpretation to the term "affected state" was not found possible at the precursory stages of the case.

b. The Reservation Applies

From the very nature of the respondent's arguments, it is quite obvious that the United States did not waive the applicability of the reservation. Its assertion of the self-defense argument was precisely to illustrate that the case fell under the multilateral treaties which were the subject of the reservation.

As to States which would be affected by the Judgment but were non-parties to the case, the Court held that even if only one of the three non-party States were found to be affected, the reservation would take full effect, and the Court found that El Salvador was indeed so affected. Hence, the Vandenberg Reservation applied.

c. The Effect of the Reservation

The Court's statement on the matter was cryptic. By 11 votes to four,[160] the Court held that the reservation only barred the applicability of the U.N. Charter and the Charter of the O.A.S. as multilateral treaty law, and the majority further stated "it has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply."[161]

Nicaragua very prudently alleged that the military and paramilitary activities of the United States violated these multilateral treaties *and* its obligations under *customary international law*. But even without this allegation, the Court could, under Article 53 of the Statute, look into other sources of international law transgressed by the defendant State. This would lead the Court right back to the application of customary international law.

D. The Custom-Charter Parallel

1. THE U.S. POSITION ON THE CONSEQUENCES OF THE RESERVATION

The United States argued that the only general and customary law on which Nicaragua based its claims was Article 2(4) of the United Nations Charter. But this treaty rule, which has since become customary law, subsumes and supervenes related principles of international law. In other words, the United States asserted that Article 2(4) of the U.N. Charter is now the

[160] In Favour: President Nagendra Singh; Vice President de Larrachiere; Judges Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Evensen. Against: Judges Ruda, Elias, Sette-Camara, Ni.

[161] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 14 at 38, par. 56.

only source of the prohibition on the use of force. Thus, since the U.N. Charter is a multilateral treaty, and the Multilateral Treaty Reservation applied, all of Nicaragua's claims were effectively barred.[162]

Furthermore, the reservation likewise barred any rule of customary international law whose content is also the subject of a provision in the multilateral treaties concerned.[163] The U.S. position was summarized in the majority opinion as follows:

> [T]he existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.[164]

2. IDENTICAL YET SEPARATE

a. "Identity"

That identical rules may co-exist in a treaty regime and in a customary law regime is not an unprecedented concept, as the Court has recognized this possibility earlier in the *North Sea Continental Shelf Cases*.[165]

The Court, however, rejected outright the U.S. argument that customary international law and U.N. Charter rules on the use of force were completely identical: "on a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules are not identical in content."[166]

To illustrate, the Court cited Article 51 of the U.N. Charter on self-defense. For one, the right of self-defense as it exists in the Charter acknowledges a pre-existing customary right ("inherent right" or "*droit naturel*") whose subsequent customary content was influenced, though not supervened, by the Charter. For another, Article 51 does not contain exactly the same elements as its customary counterpart, because Article 51 does not regulate all aspects of the content of self-defense;[167] thus, this lack is impliedly to be supplied by the customary law counterpart of self-defense.[168]

b. Independent Applicability

Even assuming, however, that the content of customary law and treaty law on the use of force were completely identical, the incorporation of a

[162] *Id.* at 92-93, par. 173.

[163] *Id.*

[164] *Id.* at 93, par. 174.

[165] *Id.* at 95, par. 177.

[166] *Id.* at 94, par. 175.

[167] *Id.* at 94, par. 196.

[168] Mrazek, *Prohibition on the Use and Threat of Force: Self-Defence and Self-Help in International Law*, ANNUAIRE CANADIEN DE DROIT INT'L. 81 at 86 (1989).

customary norm into treaty law cannot deprive the customary rule of its applicability separate and distinct from the treaty norm. In its Judgment of 26 November 1984, the Court initially affirmed:

> The fact that the...principles...have been codified or embodied in multilateral conventions *does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.* Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, *continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.*[169] (italics supplied)

This theory of independent applicability does not violate the principle of *pacta sunt servanda* for the United States in this case. Since the content of the rules in the Charter and in custom is essentially, though not completely, identical, it cannot be said that the Court is applying standards other than those by which the Parties had agreed to conduct themselves in their international relations.[170]

The Court gave two reasons why the mere embodiment of a customary rule in a convention would not bar separate applicability of the rule as custom even to parties of the treaty.

1) WHEN A TREATY IS SUSPENDED OR TERMINATED

First, a party to the treaty may argue that the treaty does not apply to the dispute. For instance, a State may argue that the other State has committed an act which has defeated the very object of the treaty; thus, it is exempted from observing the treaty. In this instance, even if the treaty cannot apply, treaty rules which are customary cannot be suspended as well.[171]

2) WHEN A TREATY CREATES INSTITUTIONS TO IMPLEMENT A RULE

Second, a State may accept a treaty rule not simply because it favors the application of the rule itself, but also because the treaty establishes implementing institutions and mechanisms that a sate considers desirable. The structures belong to the treaty regime, not to customary law; hence, the rule as it exists in custom cannot be regulated by the treaty organs created to regulate the treaty rule and must, therefore, be subjected to treatment separate from the treaty rule within the treaty's regime.[172]

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[169] *Nicaragua v. U.S. (Jurisdiction)*, 1984 I.C.J. Reports at 424, par. 73.

[170] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 96, par. 180-81.

[171] *Id.* at 95, par. 178.

[172] *Id.*

3. WHY CHARTER RULES ARE ESSENTIALLY CUSTOMARY

Because the Court was constrained to apply customary international law in lieu of multilateral treaties, it became necessary to determine what precisely was the customary law on the use of force, both as regards the alleged U.S. violations of the general prohibition, as well as the exception it claimed by way of defense.

a. Article 2(4): Prohibition on the Use of Force

Both Parties agreed that Article 2(4) of the U.N. Charter declares the modern customary law regarding the threat or use of force and that it is an accurate incorporation of the principle as it is found in customary international law.[173] While the Parties recognized and accepted a treaty-law obligation to refrain in their international relations from the threat or use of force, the Court must satisfy itself that there is in customary international law an *opinio juris* regarding this rule. The Court found that there was indeed an *opinio juris* which could be deduced from the attitude of the Parties and the international community in their participation in various international instruments.[174]

1) GENERAL ASSEMBLY RESOLUTIONS

The Court cited as its primary example of a resolution evidencing *opinio juris* among States the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States. More than just reiterating and clarifying the treaty commitment, the Declaration on Friendly Relations "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution themselves."[175] The prohibition on the use of force may thus be regarded as a principle of customary international law apart from the U.N. Charter's provisions on collective security and Article 43 armed contigents.[176]

The Court determined that *opinio juris* on the non-use of force principle in general encompassed the distinctions made by the Declaration regarding certain particular aspects of the principle, like the distinctions between the most grave form of use of force with other less grave forms. Equally included in the general ban on the threat or use of force are armed reprisals; forcible actions which deprive peoples of their right to self-determination, freedom, and independence; sending of irregular forces or armed bands into the territory of other States; organizing or instigating acts of civil strife and terrorism in another State.[177] The Court traced the origins of the obligation to refrain from engaging in even less grave uses of force to as far back as the 1933 Convention

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[173] *Id.* at 98-99, par. 187.

[174] *Id.* at 99, par. 188.

[175] *Id.* at 100, par. 188.

[176] *Id.*

[177] *Id.* at 100, par. 191.

on the Rights and Duties of States in the Event of Civil Strife and is confirmed by a 1972 Resolution of the General Assembly of the O.A.S.[178]

2) CONVENTIONS

To prove *opinio juris* on the part of the United States, the Court likewise attached great weight to U.S. participation in two conferences: the 1928 Sixth International Conference of American States, where the United States supported a resolution condemning aggression, and the 1975 Conference on Security and Co-operation in Europe (the Helsinki Declaration), where participating States undertook to refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force.[179] Notable too is U.S. ratification of the 1933 Montevideo Convention on Rights and Duties of States,[180] because Article 11 of that convention imposes upon parties the obligation not to recognize territorial acquisitions obtained by force under the principle of *ex iniuria non oritus ius*.[181]

3) STATEMENTS BY OFFICIAL BODIES

Evidence that the non-use of force principle as expressed by Article 2(4) of the Charter is supported by the necessary *opinio juris* is further provided by statements made by State representatives who describe the principle as being not only customary international law but also a fundamental and cardinal rule of such principle and as having the character of *jus cogens*.[182]

4) INTERNATIONAL LAW COMMISSION

The Court also referred to the view expressed by the International Law Commission on the *jus cogens* character of the non-use of force principle as further justification for its conclusion that Article 2(4) is customary international law.[183]

b. Article 51: The Right of Self-Defense

1) CUSTOMARY RIGHT

The United States characterized its actions as falling within an equally recognized exception to the non-use of force principle — the right to self-defense. This right finds its modern expression in Article 51 of the U.N.

[178] *Id.* at 102, par. 192.

[179] CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, Final Act, 14 I.L.M. 1292 (1973).

[180] MONTEVIDEO CONVENTION ON THE RIGHTS AND DUTIES OF STATES 1933, 165 L.N.T.S. 19; U.S.T.S. 881; 4 Malloy 4807; 28 A.J.I.L. Supp. 75 (1934).

[181] No benefit may be derived from an illegal act.

[182] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4 at 100, par. 190.

[183] *Id.*

Charter. That the right is customary is betrayed by the wording of the provision itself, which, as earlier discussed, refers to it as an "inherent right." Outside the provision, certain U.N. General Assembly resolutions, like the Declaration on Friendly Relations, recognize that the right to self-defense as an exception to the prohibition on the use of force is a matter of customary international law.[184]

2) CUSTOMARY CONTENT

On the requirement of an armed attack, the parties placed sole reliance on the right of self-defense in the case of an armed attack that has already occurred. The Court expressed no view regarding the availability of the right in case of an imminent attack. The Court, however, discussed the forms in which such an armed attack may occur, and agreed that the term may be applied to indirect attacks. Thus, the right of self-defense may properly be invoked against the sending by a state of armed bands to the territory of another State, "if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."[185] But while the sending of armed bands qualifies as an armed attack, the Court did not believe that the concept included assistance to rebels by providing weapons or logistical support. Such an act consitutes only an act of intervention.

On the *Caroline* requirement of necessity and proportionality, the Court acknowledged these twin standards as forming part of the customary content of the right of self-defense.[186]

On the proper exercise of the right to collective self-defense, the Court clarified that the customary right had two requisites: first, the attacked State must form and declare the view that it has been attacked; and second, the attacked State must request third States to render assistance.[187]

Article 51 contains a requirement to report to the Security Council after a State has exercised the right of self-defense. While such a requisite is not of a customary nature, "for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence."[188]

3) RESULT OF SELF-DEFENSE ARGUMENT

By a vote of 12 to three,[189] the Court found the United States liable for use of force violations for attacking Puerto Sandino, Corinto, Potosi Naval

[184] *Id.* at 102, par. 195.

[185] *Id.*

[186] *Id.* at 103, par. 194.

[187] *Id.* at 105, par. 199.

[188] *Id.*

[189] In Favour: President Nagendra Singh; Vice President de Larrachiere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni, and Evensen; Judge *ad hoc* Colliard. Against: Judges Oda, Schwebel, and Sir Robert Jennings.

Base, and San Juan del Norte and for laying mines in the internal waters of Nicaragua.[190]

Thus, the Court rejected, also by 12 votes to three,[191] the United States's invocation of collective self-defense primarily because there was no request for U.S. assistance from any beleaguered State.[192] Professor Richard Falk even suggests that there was no armed attack against El Salvador. At most, Nicaragua's activities amounted only to intervention.[193]

IV. AN ANALYSIS OF THE CUSTOM-CHARTER PARALLEL IN *NICARAGUA V. U.S.*

A. The Charter as Custom

1. CUSTOMARY

Prior to *Nicaragua v. U.S.*, the International Law Commission had already expressed the view in 1966 that "the law of the Charter concerning the prohibition on the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."[194] As early as 1966, the Charter was considered not as an ordinary treaty and its rules on non-use of force, not as mere treaty rules. The International Court of Justice has also said in the 1970 *Barcelona Traction Case* that the principles of international law outlawing acts of aggression are obligations *erga omnes*.[195] In *Nicaragua v. U.S.*, the Court further clarifies the status of the Charter prohibition on the use of force as *customary international law*.[196]

The Court's decision thus confirms the restrictive development of the law on the use of force. The right to use force, which was once an absolute prerogative of sovereigns, is now absolutely prohibited by Article 2(4) of the

[190] *Id.* at 146-47.

[191] In Favour: President Nagendra Singh; Vice President de Larrachiere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni, and Evensen; Judge *ad hoc* Colliard. Against: Judges Oda, Schwebel, and Sir Robert Jennings.

[192] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 14 at 123, par. 238.

[193] Falk, *supra* note 22, at 110.

[194] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 100, par. 189 *citing* par. (1) of the commentary of the Commission to Article 50 to its Draft Articles on the Law of Treaties. *ILC Yearbook*, 1966-II, at 247.

[195] *Barcelona Traction, Light, and Power Company Ltd. (Judgment)*, 1970 I.C.J. Reports 32, par. 33. In this case, the Court distinguished between obligations that a State owes towards the international community as a whole and those arising *vis-a-vis* another State in the field of diplomatic protection. The former, "[b]y their very nature...are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." In par. 34, the Court enumerated some examples of obligations *erga omnes* which included among them the outlawing of acts of aggression.

[196] *See* HARRIS, *supra* note 45, at 820.

Charter. The right to self-defense in Article 51, which was formerly only one among many other acceptable uses of force short of war, is presently only one of the accepted exceptions to the absolute prohibition.[197]

Significantly, the Court made the term "use of force" more concrete in scope and application by acknowledging that the less grave uses of force described in the Declaration on Friendly Relations were encompassed within the customary prohibition together with the most grave use of force, which is war.[198]

2. SEPARATE AND INDEPENDENT

More significantly, the Court emphasized that, as custom, the prohibition on the use of force and the right to self-defense have an existence separate from and an application independent of the U.N. Charter. The articulation of these rules in the treaty does not preclude their separate applicability as customary law.[199]

Perhaps this statement may be more clearly understood when one accepts the proposition that the common reference to general multilateral treaties, such as the U.N. Charter, as "law-making" or as "international legislation" is, strictly speaking, quite inaccurate.[200] Sir Gerald Fitzmaurice stresses the contractual aspect of a treaty and considers a treaty more as a source of obligation rather than a source of law: "[T]hey are no more a source of law than an ordinary private law contract; which simply creates rights and obligations..."[201] Thus, even if a treaty codifies a custom or even if a treaty successfully generates a new customary rule, the treaty will remain, between the parties *inter se*, the primary source of the obligation. Under the principle of *pacta sunt servanda*, parties to a treaty are bound to fulfill their treaty obligations in good faith. As to parties outside the treaty, however, the source of the obligation cannot be the treaty, because a treaty does not create either obligations or rights for a third State without its consent, by virtue of the principle *pacta tertiis nec nocent nec prosunt*.[202] Nonetheless, if the treaty's rules are already customary, they bind even non-parties to the treaty. The source of the obligation for non-parties is custom as enunciated in the treaty.

The novelty in *Nicaragua v. U.S.* is that both the United States and Nicaragua are parties to the U.N. Charter. *Inter se*, their relations must be governed in the first instance by the treaty by virtue of two rules of interpretation: the maxim *lex specialis derogat generali*, or special rules prevail over general ones,

[197] *See* Schachter, *The Right of States*, *supra* note 102, at 1624.

[198] *See* Chapter Three, *supra* p. 41.

[199] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4 at 96, par. 179.

[200] HARRIS, *supra* note 45, at 47.

[201] FITZMAURICE, SYMBOLAE VERZILJL 153 (1958) *cited in Id.* at 46.

[202] This maxim, which undoubtedly reflects customary international law, is embodied in Article 34 of the Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent."

and the intention of the parties.[203] The United States argued that the effect of the Vandenberg Reservation was to confine the Court's jurisdiction to the U.N. Charter as the only applicable law between the parties *inter se*. The Court rejected this proposition and clarified that the inapplicability of one source (in this case, treaty law) does not automatically exclude other sources of law such as custom, which have identical or substantially similar rules.

To illustrate how custom remains an acceptable source of international law despite treaties containing identical rules, the Court cited the examples of two kinds of treaties embodying customary rules.[204]

Under the first kind of treaty, the Court discussed how a customary rule in a treaty continued to apply even to treaty parties who avail of their right to suspend or terminate the treaty. Using Article 51 of the U.N. Charter to illustrate the second kind of treaty rule, the Court demonstrated how the same rules in treaty and custom are accorded different treatment, because the mechanics or institutions created by the treaty do not become customary norms even if the rule they seek to implement is customary.

In dissent, Judge Stephen Schwebel notes that while the Court's argument is "technically defensible," it "would vitiate a limitation which the United States has imposed upon the jurisdiciton of the Court."[205] In his view, the question concerned is not one of the applicable source of law but one of consent to the Court's jurisdiction. According to the established practice of the Court, jurisdiction will not be upheld "unless the intention to confer it has been proved beyond reasonable doubt."[206] While the writer of this thesis does agree with Judge Schwebel on this point, she will, however, neither examine nor evaluate the *validity* of the Court's assumption of jurisdiction over the case but will confine herself to the *effect* of such assumption on the Court's discussion on sources of international law.

3. BENEATH THE CONCLUSIONS

Apart from evaluating the soundness of the Court's legal conclusions with regard to the customary status of U.N. Charter use of force rules, it is equally important to examine the reasoning and method which form the bases of its conclusions.

The writer observes two aspects in the Court's approach which have been the object of much criticism and which, therefore, need some clarification: first, its attempt to establish the existence of the customary rule independent of the Charter; and second, its manner of proving the custom itself, with regard both to the material used as proof and the process it followed to prove the customary nature of the rules.

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[203] HENKIN, et. al., *supra* note 6, at 69.

[204] See discussion in Chapter Three, *supra* p. 40.

[205] Schwebel Dissent, Nicaragua v. U.S. (Merits), 1986 I.C.J. Rep. at 305, par. 96.

[206] *Id. quoting Certain Norwegian Loans (Judgment)*, 1957 I.C.J. Rep. at 58.

B. The Method of the Nicaragua *Court*

1. DISENTANGLING CHARTER FROM CUSTOM

In a discussion panel convened during the 1987 annual meeting of the American Society for International Law (A.S.I.L.), Professor Oscar Schachter noted that "the Court did not follow its normal pronouncements with respect to the distinction between the two, e.g., that Charter provisions are declaratory of previously existing custom or that treaty law generates or crystallizes new norms of customary international law."[207] Making such a distinction is essential to fully appreciate the mechanics of the relationship between the Charter and customary international law, and it is particularly significant in trying to establish the existence of the custom apart from the Charter.

On the one hand, when a treaty codifies the custom, the task of proving the separate existence of the customary rule is not too difficult. Prior to treaty, the custom already had, in a manner of speaking, a separate life. What remains to be done is to look for evidence within the treaty of an intent to codify the custom or to compare the customary rule with the treaty text. Easier still is the middle course advocated by Professor R.R. Baxter:

> ... [T]o give a *presumptive effect* as evidence of customary law to the treaty purporting to declare that law while allowing the State or individual against whom the treaty is proferred the right to demonstrate that the particular treaty provision invoked does not correctly express the law.[208] (italics supplied)

The task of proving the customary existence of Article 51 was relatively simple for the Court, because the right of self-defense clearly has a customary origin. There was, in addition, internal evidence furnished by the provision itself ("inherent right") that the treaty codified customary law. But it was much more difficult to prove the customary existence of Article 2(4).

On the other hand, when treaties create new law, the task becomes more exacting, because prior to the treaty, the rule had no existence at all. Baxter suggests two ways of proving created custom: first, to demonstrate that non-parties to the treaty have invoked its provisions; and second, to show the state of customary international law independently of the treaty.

Obviously, there is a difference in the manner of proving custom's existence apart from the treaty or — in the A.S.I.L. panel's terms — in *disentangling* the custom from the treaty. In this difference lies the significance of distinguishing whether the Charter non-use of force rules codify custom or create it.

According to Schachter, the Court fails to make the necessary distinction. Upon closer reading, however, the writer noticed that the Court considered the Charter rules as *codificatory*.

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[207] Schachter, *Disentangling Treaty and Customary International Law*, 1987 A.S.I.L. Proc. 157 at 158 [hereinafter Schachter, *Disentangling*].

[208] Baxter, *supra* note 65, at 289.

> The fact that the above-mentioned principles...have been *codified or embodied in multilateral conventions* does not mean they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the *non-use of force*...continue to be binding as part of customary international law, despite the operation of *provisions of conventional law in which they have been incorporated.*[209] (italics supplied)

I.C.J. President Nagendra Singh seems to agree with the Court's characterization, for His Excellency writes in his separate opinion that "the concepts are inherently based in customary international law in their origins, but have been developed further by treaty law."[210]

Sir Robert Jennings disagrees with the Court, and in his dissent, argues that "(i)t could hardly be contended that these provisions of the Charter were merely a codification of the existing customary law."[211] He cites the introduction of the term "force" instead of war and the extension of the prohibition to "threat of force" as important innovations. He also submits that the collective aspect of the inherent right to self-defense does not have a customary origin. To bolster his position, Sir Robert Jennings quotes Sir Humphrey Waldock:

> The illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war was not established beyond all doubt by the law of the League, or by the Nuremberg and Tokyo trials. That was brought about by the law of the Charter.[212]

Other publicists, while not categorically stating that Article 2(4) created custom, nonetheless imply it. Article 2(4) has been described as the U.N. Charter's great break with the past, for prior to the U.N. Charter there was no customary international law prohibition on the use of force.[213]

If the U.N. Charter does create custom, there would be a problem in trying to prove the separate customary existence of Article 2(4). Following Baxter's first suggestion of citing the practice of non-parties would yield insignificant results, because only nine States in the world — Switzerland, San Marino, Liechtenstein, The Vatican, Monaco, Nauru, Tonga, Kiribati, and Tuvalu — remain non-Charter Members. Implementing the second suggestion is equally difficult, for Schachter asks: "(H)ow could the Court distinguish between practice by Charter signatories that is merely following treaty obligations and practice that is actively developing an independent rule?"[214]

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[209] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 93, par. 174.

[210] Separate Opinion of President Nagendra Singh, *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4 at 152.

[211] Separate Opinion of Sir Robert Jennings, *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4 at 530.

[212] *Id.* at 530, Sir Robert Jennings citing Waldock, 106 RECUEIL DES COURS at 231 (1962-II).

[213] *See* Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 A.J.I.L. 642 (1984) *and* Bernheim, *United States Armed Intervention in Nicaragua and Article 2(4) of the United Nations Charter*, 11 YALE INT'L. L.J. 104 (1985).

[214] Schachter, *Disentangling, supra* note 207, at 158.

Indeed, *if* the Charter did create custom, the Court unsuccessfully disentangles the custom from the treaty. The bulk of the Court's proof of *opinio juris* among States on Article 2(4) and, therefore, of this customary rule's separate existence is one U.N. G.A. Resolution: the Declaration on Friendly Relations. It is difficult to understand how a G.A. Resolution could successfully establish custom's separate existence, because on its face, this instrument seems to be the result of practice under the U.N. Charter. The Declaration on Friendly Relations is an authoritative interpretation of Charter provisions.[215] Even in proving the customary content of Article 51, the Court also relied on the Declaration on Friendly Relations.

Furthermore, Sir Robert Jennings writes that the Court's use of treaty provisions as "evidence" of custom "takes the form of an interpretation of treaty text."[216] He views this as inconsistent with the Court's pronouncement in par. 178 in which it acknowledges that the canons of interpreting treaty and custom are different:

> To indulge the treaty interpretation process, in order to determine the content of a posited customary rule, must raise a suspicion that it is in reality the treaty itself that is being applied under another name.[217]

Sir Robert Jennings, however, concedes that such an approach would be justifiable if the treaty *codified* the custom instead of creating it,[218] as was the case with Article 51.

The writer submits that the I.C.J.'s characterization of Article 2(4) as declaratory or codificatory is correct and that the I.C.J.'s method is, therefore, appropriate, because Article 2(4) is a very special kind of conventional rule.

Just as some writers consider Article 2(4) as constitutive of custom, other writers espouse the view that Article 2(4) was not really an innovation but a *codification* of rules in force in 1945 on the prevention of war.[219] Indeed, as discussed in Chapter Two, the Charter's prohibition on the use of force did not come out of nowhere, unlike some treaty rules. Beginning in the nineteenth century, there was already a notion developing or emerging in the international community that aggressive war was wrong and that there was a need to regulate the right of States to use armed force. But the failure of instruments like the Hague Conferences of 1899 and 1907 to prevent World War I brought about a change in the temper of States. In 1928, the Kellog-Briand Pact outlawed aggressive war, and for the first time the concept of collective security was introduced through the Covenant of the League of Nations.[220]

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[215] Oesterle, *United Nations Conference on Restrictive Business Practices*, 14 CORNELL INT'L. L. J. 1 at 3 (1981).

[216] Separate Opinion of Sir Robert Jennings *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports at 532.

[217] *Id.* at 532.

[218] *Id.*

[219] Wehburg, *L'interdiction du Recours a la Force*, 78 RECUEIL DES COURS 7 at 84 (1951-I) *cited in* 13 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 357 (1965).

[220] See discussion in Chapter Two, *supra* pp. 22-23.

Moreover, after World War I, the possibility of punishment did not seem an effective enough deterrent to aggressors. States began to feel that in order to prevent war, even the resort to *force* had to be outlawed. Thus, as early as 1937 major world powers like the United States already advocated abstinence by all nations from the *use of force* in pursuit of policy.[221] Again, in 1938, the United States through Secretary of State Hull declared the view that:

> In common with *all other nations we have, since the end of the World War, assumed a solemn obligation not to resort to force as an instrument of national policy*. All this gives us a moral right to express our deep concern over the rising of lawlessness, the growing disregard of treaties, the increasing reversion to the use of force, and the numerous other ominous tendencies which are emerging in the sphere of international relations.[222] (italics supplied)

Also, a provision of the 1938 Declaration of American Principles in Lima, Peru, read: "The use of force as an instrument of national or international policy is proscribed."[223] Thus, contrary to the common notion that Article 2(4) was a totally new idea in 1945, evidence in the practice of States shows that it was already emerging as a custom prior to World War II. Professor Ian Brownlie writes that:

> ... the *practice of states* between 1920 and 1945, and more particularly between 1928 and 1945, provides adequate evidence of a *customary rule that the use of force as an instrument of national policy otherwise than under a necessity of self-defense was illegal*.[224] (italics supplied)

The outbreak of World War II proved beyond doubt that the old system was inadequate to prevent war and underscored even more the necessity of stricter rules and a stronger system. By articulating for the first time the obligation to refrain from the *use of force* in a general multilateral treaty, Article 2(4) of the U.N. Charter only served to crystallize this emerging[225] customary norm, which had its origins nearly a decade before.

The belief of States that Article 2(4) was customary law is emphasized by the instant adherence of more than a majority of the nations of the world to the U.N. Charter, a treaty dedicated to the cause of world peace. By joining the United Nations, Member States accepted the obligation to extend the benefit of Article 2(4) to the entire international community, because under said provision the territorial integrity and political independence of *any* State

[221] 7 July 1937, Secretary of State Hull, Statement of Fundamental Principles, Press Releases, Department of State *cited in* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL 706 (1965).

[222] 17 March 1938, Secretary of State Hull's address before the National Press Club in Washington D.C., *Our Foreign Policy*, 1931-41, 1 FOREIGN RELATIONS JAPAN (1943) *cited in Id.*

[223] Declaration of American Principles, 8th Inter-American Conference, Lima, 1938 *cited in Id.* at 707.

[224] I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE 110 (1963).

[225] In the *North Sea Continental Shelf Cases*, the International Court of Justice recognized two types of codificatory treaties: first, that which codifies long-standing customary rules; and second, that which crystallizes emerging customary law. See 1969 I.C.J. Reports 4 at 39.

was protected. As a corollary, Member States undertook the duty imposed by Article 2(6) to police non-U.N. Members to comply with Article 2(4). Undertaking to fulfill these duties is indicative of a belief or conviction that the obligation to refrain from the threat or use of force was one that devolved upon *all* States. In addition, the writer suggests that these two provisions are generalizable into a rule of customary law whose language implies a norm-creating character and which satisfies the requirement of the Rule of Manifest Intent proposed by D'Amato.[226]

Taken together, it is submitted that the factors mentioned above would warrant the inference that because of the experience of two World Wars, the majority of the world's nations in 1945 were more than ever disposed not to resort to force and thereby expressly accepted a positive obligation to maintain peace in order to "spare future generations from the scourge of war."[227]

2. PROVING THE CUSTOM

The *Nicaragua* Court's technique for determining how customary rules are generated has been widely critiziced by many highly qualified publicists. The Court's approach displays two noticeable tendencies: first, the Court stresses verbal acts over material acts as evidence both of state practice and *opinio juris*; and second, it reasons backwards by first presuming the existence of the norm, then proving *opinio juris* and, finally, examining state practice. Professor Thomas M. Franck describes the Court's techniques in *Nicaragua v. U.S.* as "procedural and substantive innovations."[228]

a. Digging Beneath the Verbiage

According to Professor Frederic L. Kirgis, the *Nicaragua* Court stresses *opinio juris* at the expense of state practice.[229] Indeed, this writer observed that the Court paid great attention to the verbal acts of States as evidence of *opinio juris* on Article 2(4). To prove *opinio juris* in the general practice of States, for instance, the Court gave great weight to the consent given by States to the Declaration on Friendly Relations, the statements released by official State bodies, and the declarations of the International Law Commission. To prove *opinio juris* on the part of the United States, the Court cited the U.S. Countermemorial and its voting attitude in the Declaration on Friendly Relations, the Montevideo Convention, and the Helsinki Declaration.

By their nature, however, verbal acts can be evidence of *both* state practice and of *opinio juris* simultaneously. Thus, the writer will examine verbal acts in both respects, but she will first address the matter of verbal acts as state

[226] See discussion in Chapter One, *supra*, *citing* D'Amato, *Manifest Intent*, *supra* note 71, at 899.

[227] Preamble, U.N. Charter.

[228] Franck, *Some Observations on the I.C.J.'s Procedural and Substantive Innovations*, 81 A.J.I.L. 116 (1987) [hereinafter Franck, *Some Observations*].

[229] Kirgis, *Custom on a Sliding Scale*, 81 A.J.I.L. 146 at 148 (1987).

practice in the following section and will tackle the *opinio juris* dimension in the next.

At the outset, the writer excludes from her analysis the statements of the International Law Commission (I.L.C.), because these cannot amount to state practice. The members of the I.L.C. act not as representatives of their States but only in their individual capacities; thus, the drafts and other materials prepared within the I.L.C. are analogous only to the work of highly qualifed publicists[230] until they are acceded to by States.

1) VERBAL ACTS AS STATE PRACTICE

To consider statements and assertions by States as state practice is a traditionally correct position. Professor Michael Akehurst deems it the "better view" to regard state practice as consisting "not only of what states *do*, but also of what they *say*."[231] To this extent, the consideration given by the Court to the statements issued by official state organs and the consent given by states to G.A. Resolutions is sound. The *Nicaragua* Court, however, seems to have confined its scrutiny of state practice only to verbal acts and did not examine material or physical state practice on Article 2(4). It is this seeming disregard for physical state practice that the following discussion will attempt to examine.

Professor Anthony D'Amato advises against an over-reliance on what States *say* in the determination of customary international law. In his opinion, only physical acts count.[232] He cautions international legal scholars to be skeptical of lip service:

> The challenge to the international legal scholar is to dig beneath the verbiage, to peel off the ritual invocations of traditional rules in governmental press releases and to articulate the operative emerging rules of customary international law.[233]

While this writer does not entirely agree with D'Amato, she nonetheless submits that there should, *in general*, be a combination between verbal and physical acts in the examination of state practice. This position finds support in the writings of Professor Mark Villiger:

> ... for purposes of state practice, a written text amounts to nothing more than a consideration of the human mind put to paper. For written rules to have any value in the formative process of customary law, *further instances of material practice, in conjunction with written rules*, are required.[234] (italics supplied)

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[230] VILLIGER, *supra* note 27, at 79.

[231] AKEHURST, *supra* note 37, at 28.

[232] Akehurst, *Custom*, *supra* note 28, at 1.

[233] D'Amato, ***Nicaragua and International Law: The "Academic" and the "Real"***, 78 A.J.I.L. 657 at 664 (1985).

[234] VILLIGER, *supra* note 27, at 10.

The writer notes that in three landmark custom-treaty cases, namely, the *Asylum Case*, the *Anglo-Norwegian Fisheries Case*, and the *North Sea Continental Shelf Cases*, the International Court of Justice did examine both the treaties concerned and relevant *material* state practice. In the *Asylum Case*, the Court concluded that the uncertainty, contradiction, fluctuation, and discrepancy in the exercise of the alleged custom of granting diplomatic asylum prevented it from discerning any constant and uniform usage.[235] In the *Anglo-Norwegian Fisheries Case*, the Court declined to admit the existence of customary law, because its examination of state practice yielded a usage which, although preponderant, was neither uniform nor universal.[236] And in the *North Sea Continental Shelf Cases*, the Court found the fifteen cases cited to demonstrate the use of the equidistance principle to delimit continental shelf boundaries as insufficient to produce a custom, because there was no *opinio juris*.[237]

In *Nicaragua v. U.S.*, however, there was no equivalent examination of material state practice on the use of force issue; although, curiously, the Court did acknowledge the need to refer to it.[238] What makes the omission significant, according to Franck, is that state practice since the advent of the U.N. Charter has been inconsistent with Article 2(4):

> The customary norms cited by the Court are adhered to, at best, only by some states, in some instances, and have been ignored, alas, with impunity that at least two hundred instances of military conflict since the end of World War II.[239]

In short, an examination of the relevant physical state practice might even prove that the Charter prohibition is not customary. To quote Judge Schwebel:

> Indeed, it could even be argued that the practice, in contrast to the preachment, of States indicates that the restrictions on the use of force in international relations found in the Charter are not part of customary international law.[240]

An investigation of material state practice subsequent to the Charter is deemed essential to the study of customary international law, because customary law is in a state of constant flux. Besides, treaties can be modified by subsequent state practice. In the words of D'Amato:

> Customary rules...are not static. They change in content depending upon the amplitude of new vectors...*Article 2(4) did not freeze international law for all time subsequent to 1945. Rather the rule of Article 2(4) underwent change*

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[235] *Asylum Case*, 1950 I.C.J. Reports 116 at 191 *cited in* AKEHURST, *supra* note 37, at 28.

[236] H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 370 (1958).

[237] *North Sea Continental Shelf Cases*, 1969 I.C.J. Reports 4 at , par. 75 and 77.

[238] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 97, par. 184.

[239] Franck, *Some Observations*, *supra* note 228, at 119.

[240] Schwebel Dissent, 1986 I.C.J. Rep. 4 at 303, par. 94.

> *and modification almost from the beginning*...Hence, state practice since 1945 - whether considered as simply formative of international law or as constituting an interpretation of the Charter under the subsequent practice rule - has directly altered the meaning and content of Article 2(4).[241] (italics supplied)

But while it would be ideal to examine both verbal and physical acts as evidence of state practice, such a requirement might be too stringent, if not altogether impossible, in a *negative* obligation such as that imposed by Article 2(4). Since the obligation is *not to do*, the obligation is complied with when there is an *absence* of conflict. But one cannot infer from the mere absence of conflict that States abstain from the threat or use of force because they believe they ought to. Neither would it be wise to generalize that the presence of conflict betokens the belief of States that their use of force is no longer under any restraint. This sort of state practice would, by themselves, be inconclusive proof of *opinio juris* for a negative obligation. Perhaps for negative rules like Article 2(4), verbal acts positively affirming the belief of States in their existence and validity would provide better raw material from which the presence of *opinio juris* may be deduced.

2) VERBAL ACTS AS *OPINIO JURIS*

Apart from considering verbal acts as examples of state practice, the Court admitted these declarations as evidence of *opinio juris*. Most controversial in the view of many writers is the Court's novel regard for U.N. G.A. Resolutions, which catapulted these heretofore largely hortatory instruments to a prominence it has never enjoyed:

> The *effect of consent to the text* of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as *an acceptance of the validity of the rule or set of rules declared by the resolution themselves*.[242] (italics supplied)

Professor Fred L. Morrison finds this pronouncement "amazing," because it is a "substantial change from pre-existing practice and from the established meaning of the 'soft' General Assembly resolutions."[243]

Traditionally, the force of General Assembly Resolutions has been viewed in two ways: first, they are instruments of the General Assembly whose effect in international law depends on the legal authority of the body that passes it;[244] and second, they are *one* evidence of international law.[245]

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[241] D'Amato, *Trashing Customary International Law*, 81 A.J.I.L. 101 at 104-05 (1987) [D'Amato, *Trashing*].

[242] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 100 par. 188.

[243] Morrison, *The Jurisprudence of the Court in the Nicaragua Decision*, 1987 A.S.I.L. Proc. 258 at 261.

[244] *See Footnote No. 12* of Oesterle, *supra* note 215, at 3.

[245] *See generally* Schachter, *Resolutions of the General Assembly as Evidence of Law*, 178 RECUEIL DES COURS 114-21 (1982-V) [hereinafter Schachter, *G.A. Resolutions*].

Unlike treaties, U.N. G.A. Resolutions are not "hard law," because they are not sources of obligations. Depending on the legal authority of the General Assembly, U.N. G.A. Resolutions can only be either authoritative interpretations of the U.N. Charter or recommendatory declarations.

Some G.A. Resolutions, such as the Declaration on Friendly Relations[246] and the Definition of Aggression,[247] are considered as authoritative elucidations by the General Assembly of the meaning of some provisions of the U.N. Charter. As such and of themselves, these resolutions are significant.[248] As a general rule, however, G.A. Resolutions are merely recommendatory.[249] By themselves, these instruments do not legally bind Member States, neither do they establish international law; hence, the term "soft law." Notwithstanding, Judge Kleasted expressed the view that the effect of such Resolutions "are...not of a legal nature in the usual sense, but rather of a moral or political character."[250] Thus, even if G.A. Resolutions do not give rise to legal responsibility,

> [They] do exert considerable moral or political force by voicing global beliefs on the propriety of individual and state conduct. Non-conformists risk disapprobation and, in extreme cases, ostracism from the world community.[251]

By saying that the consent given by States to U.N. G.A. Resolutions manifests their acceptance of the rules declared therein, the *Nicaragua* Court actually made no pronouncement on the legal force of U.N. G.A. Resolutions as international instruments. The Court did not say that States were bound by the rules by virtue of the Resolution; thus, it did not harden soft law. Rather, the writer submits that the Court regarded consent to U.N. G.A. Resolutions as verbal acts evidencing *opinio juris*. This approach is consistent with the second view on U.N. G.A Resolutions, for according to Professor D.H.N. Johnson, these instruments may also be considered subsidiary means for determining international law.[252]

U.N. G.A. Resolutions have value as verbal acts amounting to state practice.[253] Professor David J. Harris considers them the "collective equivalent of unilateral general statements."[254] But it would be imprudent to generalize that all G.A. Resolutions are automatically good evidence of state practice

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[246] Oesterle, *supra* note 215, at 3.

[247] Schwebel Dissent, 1986 I.C.J. Rep. 4 at 345, par. 168.

[248] *Id.*

[249] Articles 10, 13, 14, 18, and 20, U.N. CHARTER.

[250] Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 B.Y.I.L. 97 at 100 (1955-56).

[251] Oesterle, *supra* note 215, at 3.

[252] Johnson, *supra* note 250, at 121-22.

[253] Sloan, *General Assembly Resolutions Revisited*, 57 B.Y.I.L. 39 (1987), quoted in HARRIS, *supra* note 45, at 59 [hereinafter Sloan in HARRIS].

[254] HARRIS, *supra* note 45, at 62.

and *opinio juris*. One must carefully weigh the value of each particular General Assembly Resolution as evidence of custom by examining several factors: the intent of the body passing the resolution, the voting pattern, and the practice of States subsequent to their passage.

For U.N. G.A. Resolution to be considered as evidence of international law, one must look into the *intent* of the States participating in its adoption. An examination of the language used, the explanations given by the sponsors, the statements made during the debates, the explanations of the votes help to ascertain whether the body meant the resolution to be mandatory or law-declaring or merely hortatory.[255]

In addition, the *voting pattern* of a U.N. G.A. Resolution is a fairly accurate reflection of the amount of support it enjoys in the international community. Villiger notes that "mere participation in a conference has no connexion with a concrete rule and possesses no value whatsoever."[256] Thus, the State must have participated actively somehow, usually by voting for or against a resolution or by agreeing, without vote, to its passage. The State's voting behavior could be considered as an expression of approval or disapproval which would, in turn, give some indication of its legal conviction.[257] Thus, if States unanimously vote in favor of a Resolution, their vote may be considered an excellent indication of their *opinio juris*.

The *Nicaragua* Court did not qualify what it meant by "consent." The writer suggests that consent must be construed to include not just voting but also consensus, because the Declaration on Friendly Relations, which was the example used by the Court to prove *opinio juris* on Article 2(4), was passed by mere consensus. A consensus is an approval without a general vote. By not raising an objection and agreeing to the resolution's passage, the State can be deemed to have acquiesced to the will of the majority, be it for approval or disapproval. This would be similar to the way publicists treat abstentions.[258]

The value of a consensus is that it "gives (only) *one* indication as to *communis opinio juris*;" although, "its value cannot be as unequivocal as that of a unanimous vote."[259] Indeed,

> Whatever its merits in general...consensus brings a certain *impoverishment of State practice*, since the informal negotiations are often not recorded, a fact which, in turn, may prolong the formation of customary law.[260] (italics supplied)

D'Amato disagrees with the value attached by the Court to the voting attitude of States in U.N. G.A. Resolutions. He bristles:

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[255] Sloan in HARRIS, *supra* note 45, at 60.

[256] VILLIGER, *supra* note 27, at 6.

[257] *Id.* at 9.

[258] Sloan in HARRIS, *supra* note 45, at 60.

[259] VILLIGER, *supra* note 27, at 9.

[260] *Id.*

> If voting for a U.N. resolution means investing it with *opinio juris*, then the latter has no independent content; one may simply apply the U.N. resolution as it is and mislabel it "customary law."[261]

Schachter explains that the assertion of a rule by the General Assembly does not render the rule conclusive. In his view, the adoption of a U.N. G.A. Resolution does not make the rules therein "'instant custom,' nor do they thereby constitute the *opinio juris communis*."[262] According to Schachter, U.N. G.A. Resolutions

> ... are no more than evidence of *opinio juris* and relevant practice, and this means that their asserted correctness may be rebutted by contrary evidence. Even unanimous resolutions may not be sustainable as law in the face of inconsistent patterns of behaviour and contrary expressions of *opinio juris*.[263]

If assent to U.N. G.A. Resolutions may properly be regarded as one expression of *opinio juris*, then the *Nicaragua* Court did not err in considering consent to the Declaration on Friendly Relations as signifying the acceptance by States of that Resolution's rules. The problem, perhaps, lies in that the Court deduced the presence of *opinio juris* in the general practice of States primarily from *one* U.N. G.A. Resolution and subsidiarily from a very general reference to statements issued by official government organs *without* considering other evidence, such as subsequent resolutions and State practice outside the organization.[264] There is a lack of corroboration.

But the *Nicaragua* Court is not alone in its omission. In the *Western Sahara Case*,[265] the I.C.J. used U.N. G.A. Resolutions to ascertain the rules on self-determination. In *Texaco v. Libya*,[266] *Liamco v. Libya*,[267] and *Kuwait v. AMINOIL*,[268] arbitral tribunals relied on U.N. G.A. Resolution 1803 to determine the rules on expropriation.

It is the view of this writer that the *Nicaragua* Court should have examined the weight of the Declaration on Friendly Relations in the manner discussed above. While its conclusion regarding the weight of the Declaration on Friendly Relations as evidence of well-established principles of international law may have been correct, the Court ought to have made the necessary distinctions

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[261] D'Amato, *Trashing*, *supra* note 241, at 102.

[262] Schachter, *G.A. Resolutions*, *supra* note 245, at 114-21.

[263] *Id.* at 121.

[264] Sloan in HARRIS, *supra* note 45, at 61.

[265] *See Western Sahara Case*, 1975 I.C.J. Rep. 12.

[266] *See Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic*, 17 I.L.M. 1 (Int'l. Arb. Trib. 1978).

[267] *See Award in Dispute Between Libyan American Oil Company and the Government of the Libyan Arab Republic Relating to Petroleum Concessions*, 20 I.L.M. 1 (Arb. Trib. 1977).

[268] *See Award in the Matter of the Arbitration Between Kuwait and the American Independent Oil Company (AMINOIL)*, 21 I.L.M. 1 (Arb. Trib. 1977).

between that Resolution and other Resolutions in general, because its sparse reasoning might be misconstrued as license to disregard standards for evaluating the value of other U.N. G.A. Resolutions.

b. Reasoning Backwards

In automatically regarding consent to U.N. G.A. Resolutions as *opinio juris*, the *Nicaragua* Court, in D'Amato's view, "gets it completely backwards."[269] Professor Jonathan Charney portrays the Court's process as "a substantially modified approach."[270]

In two separate articles, D'Amato and Charney outline the Court's approach in similar terms:[271] first, the Court presumes that a "disembodied rule" exists by referring to statements in resolutions and treaties; second, the Court considers consent to the rule via the resolutions as acceptance that supplies *opinio juris*; and third, in the case of non-intervention, it examines state practice but dismisses contrary state practice as breaches of the norm. As earlier noted, there is no equivalent examination of material state practice for the non-use of force principle.

The usual procedure is to begin with an examination of state practice, because this is the "raw material of custom."[272] From the numerous instances demonstrating the existence of an alleged rule, one must deduce whether States acted in accordance with the rule because of a belief that they were obliged to do so. One must sift through the state practice to see whether there is *opinio juris*. Only then can it be inferred that there is a customary rule. The *Nicaragua* decision, in moving backwards, "seemed to create a new view regarding the creation of international customary norms."[273] D'Amato accuses the Court of completely misunderstanding customary law.[274]

The writer suggests that the Court's seemingly unorthodox procedure may be explained by accepting the proposition that Article 2(4) of the Charter codified emergent customary law. Presuming that the norm exists is not anathema to a codificatory treaty. As mentioned in an earlier section, Baxter suggests that a treaty rule purporting to codify a custom, such as Article 2(4), may be given a presumptive effect as customary international law; thus, the proof that the rule is not customary rests on the party who asserts that it is not. And in this case, neither party asserted that Article 2(4) was not a customary rule.

[269] D'Amato, *Trashing*, *supra* note 241, at 102.

[270] Charney, *Disentangling Treaty and Customary International Law*, 1987 A.S.I.L. Proc. 157 at 160 [hereinafter Charney, *Disentangling*].

[271] *See* D'Amato, *Trashing*, *supra* note 241, at 102 *and Id.* at 160.

[272] VILLIGER, *supra* note 27, at 4.

[273] Charney, *Disentangling*, *supra* note 270, at 160.

[274] D'Amato, *Trashing*, *supra* note 241, at 102.

C. The "Cavalier" Court

In his treatise, *The Development of International Law by the International Court*, Sir Hersch Lauterpacht cites four cases demonstrating what he calls the "restrictive method" adopted by the I.C.J. to ascertain the existence of customary international law.[275] Among those cases are the *Asylum Case* and *Anglo-Norwegian Fisheries Case* which are noted above. In all these cases, the Court investigated relevant material state practice. Lauterpacht elaborates on the necessity of examining material acts:

> Only an analysis of the relevant practice in *all* its available manifestations can provide an answer to these and other aspects of customary international law. An *exacting effort applied to the task of examining in detail the actual situations underlying an appeal to custom* may assist in coping with the mystery of custom oscillating inconclusively between being a law-creating source of legal rules and mere evidence of pre-existing law.[276] (italics supplied)

In this Chapter, the writer discussed the two "innovations" made by the Court in *Nicaragua v. U.S.* in determining customary international law: the stress given to verbal acts over physical acts as evidence both of state practice and *opinio juris* and the reverse reasoning. John Norton Moore would go so far as describing the Court's treatment as "cavalier":

> The process used by the Court to identify customary international law was remarkably cavalier. One would have thought that such an important series of findings about customary international law would have been accompanied by a more precise, full, and accurate analysis.[277]

Lauterpacht writes that there are compelling considerations of international justice and development of international law that favour a full measure of exhaustiveness of judicial pronouncements.[278] He goes on to cite two unfavorable effects. One effect is that when the Court does not offer reasons for its decisions, or offers inadequate ones, it unavoidably creates the impression of arbitrariness, because "the lack of articulate grounds as basis make it difficult to scrutinize the law underlying the decision, and it leaves the door open for imputing motives extraneous to the proper exercise of judicial function."[279] A second and worse effect is that the legal and moral authority of the judicial pronouncement would suffer "if the decision does not bear the visible hallmark of a comprehensive effort of a studious avoidance of short cuts of reasoning."[280] D'Amato sums it up succinctly:

[275] LAUTERPACHT, *supra* note 236, at 369.

[276] *Id.* at 379.

[277] Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 A.J.I.L. 151 at 159 (1987).

[278] LAUTERPACHT, *supra* note 236, at 37.

[279] *Id.*

[280] *Id.* at 40-41.

> The Court's uni-dimensional approach...Its lack of understanding, or conscious avoidance, of the theory of the interaction of custom and treaty undermine the authority of its judgment.[281]

But perhaps the Court's technique in *Nicaragua* may be considered a justified departure from the old restrictive approach, which Brownlie actually considers lenient.[282] The writer submits that there are two reasons why it was not necessary for the *Nicaragua* Court to be overly exacting in its proof of custom: first, the well-established position of Article 2(4) in international law; and second, the circumstances of the case.

The rules invoked in the *Anglo-Norwegian Fisheries, North Sea Continental Shelf Cases,* and *Asylum Case* involved relatively *new* rules on the law of the territorial sea, the law of the continental shelf, and the practice of granting diplomatic asylum; thus, the Court necessarily had to be strict. The non-use of force principle enunciated in Article 2(4) is, however, of an entirely different cloth.

The acceptance of Article 2(4) as law cannot seriously be questioned. Akehurst describes the rule as one "of universal validity; even the few States which are not members of the United Nations accept it as a rule of customary law."[283] Indeed, the drafting of the Charter occurred at a most critical time in human history. The horrors of World War II catalyzed the conscience of nations such that it demanded more urgently not only that aggressive war be prohibited but also that the use of force be proscribed.[284] Thus, when the smoke had cleared, the emerging rule, which began to surface after World War I, had crystallized after World War II and was articulated in the U.N. Charter. From the time it was articulated, Article 2(4) enjoyed an instantaneous universal assent by a clear majority of the nations of the world. The consent to be bound to this crystallized emergent principle by joining the United Nations is perhaps the most complete declaration of *opinio juris* on Article 2(4), as the act involved not only an expression of belief but also an assent to an obligation. That an examination of material state practice *after* the U.N. Charter might have yielded much inconsistency with Article 2(4) should not mislead one into concluding that the force of the prohibition has weakened. As earlier mentioned, Article 2(4) is couched in negative terms. Material state practice in support of the non-use of force principle would arise perhaps only in two instances: first, when States form defense pacts

[281] D'Amato, *Trashing, supra* note 241, at 103.

[282] BROWNLIE, PRINCIPLES, *supra* note 36, at 7. Brownlie observes two methods in the practice of the I.C.J.: one which assumes *opinio juris* from general practice and one which demands more positive evidence of recognition of the validity of rules in the practice of states. In many cases, which include the cases cited by Lauterpacht, the Court adopted the less rigorous method of proof.

[283] AKEHURST, *supra* note 37, at 219.

[284] See instruments preceding the U.N. Charter which were vital to its drafting: The Declaration by United Nations, the Atlantic Charter, the Moscow Declaration on General Security, the Dumbarton Oaks Conversations, the Yalta Agreement, and the Chinese Proposals.

in the fashion of the North Atlantic Treaty Organization; and second, when there are no international conflicts. But just as mere passivity is not necessarily compliance, neither does aggressive activity indicate that States believe the prohibition to be inexistent. To more clearly discern what States believe to be the rule, a reliance on verbal acts in support of a negative obligation like Article 2(4) is not only necessary but quite indispensable. Indeed, more than passivity, a more eloquent proof of a State's adherence to a negative obligation is the positive affirmation of its belief in the existence and validity of the rule through its verbal acts. Thus, state practice in derogation of Article 2(4) ought to be examined together with the verbal acts in support of the rule.

Since 1945, uses of force by States have not passed without comment from the international community which either condemns these acts or attempts to justify them. On the one hand, uses of force found inconsistent with Article 2(4) were condemned either by the international community convened at the General Assembly or represented at the Security Council,[285] or by individual States, non-governmental organizations, and the public on their own. Professor Oscar Schachter enumerates a few instances demonstrating the latter case:

> ... the shooting down of the Korean civilian aircraft by the U.S.S.R. in September, 1983, and the armed intervention by the United States in Grenada in October 1983. One need only recall the criticism of force used in Hungary, Czechoslovakia, Vietnam, Cambodia, Angola, Afghanistan, Lebanon, and Nicaragua to see that *along with, or sometimes without U.N. action, the 'world' in its diverse parts passes judgment on the legality of force and on the claims seeking to justify its use.*[286] (italics supplied)

On the other hand, violators almost always try to justify their uses of force under the accepted exceptions.[287] By either condemning or justifying uses of force, States could not have assailed the legal validity of Article 2(4), nor could they have asserted that a resort to force for any reason still fell within their sovereign prerogative. Admittedly, the attempt to justify could be self-serving; however, the States' "felt need to issue a legal justification is not without importance."[288]

When the material acts are qualified by the verbal acts, the inescapable observation is that States classify this inconsistent material state practice either as violations of the general prohibition or as one of its accepted exceptions. Rather than weaken Article 2(4), it would seem that state practice subsequent to the U.N. Charter actually proves that the prohibition is so deeply ingrained in States that they think in terms of this norm.

[285] *See* U.N. G.A. and Security Council Resolutions condemning Southern Rhodesia and imposing an economic blockade against it. Also, Security Council Resolutions against Israel, U.S.S.R. in Afghanistan, Iraq in Kuwait.

[286] *See* Schachter, *The Right of States, supra* note 102, at 1623.

[287] Israel, for example, attempted to justify its pre-emptive strike against Egypt, Jordan, and Syria in the 1970's and against Iraq's nuclear reactor in the early 1980's under Article 51.

[288] Schachter, *The Right of States, supra* note 102, at 1623.

That the international community affirms the validity of the non-use of force principle is underscored by the attempt of a number of States to broaden its scope. In the records of the Declaration on Friendly Relations and the Definition of Aggression, participating States have tried to make the terms "force" and "aggression" encompass acts not involving armed force.[289] The writer submits that this trend not only confirms the consciousness of and recognition by States of their obligation to refrain from resorting to force but also indicates that their acceptance of the principle behind it is so complete that they even want to expand its application.

The second reason why the Court did not find it necessary to be strict regarding the customary status of Article 2(4) is because both Nicaragua and the United States had already asserted this position in their pleadings.[290] For purposes of the case, there was no need for the Court to embark on an exhaustive treatment of this issue. With regard to this aspect, there was absent the danger perceived by Lauterpacht that contending governments would feel that their arguments were not considered in all their relevant aspects[291] and lose confidence in the Court.

It would be easy to criticize the *Nicaragua* Court for being oversimplistic in its treatment of the sources issue with regard to Article 2(4). This writer, however, suggests that the better view to take is that there was no need for the Court to be extremely rigorous in its demand for proof of material state practice and *opinio juris* to certify the existence of Article 2(4) in customary international law. As Brownlie himself recognizes, the approach of the Court in determining *opinio juris* has not been uniform and has been dependent both on the nature of the issues and its own discretion.[292] The seeming liberality of the *Nicaragua* Court ought, therefore, to be seen in the context not only of the case's peculiar circumstances, but, more important, of the rule that the Court was trying to prove, because, as the writer has demonstrated above, the status of Article 2(4) as a fundamental rule in international law is not subject to doubt.

V. THE SIGNIFICANCE OF THE NICARAGUA DECISION

A. Nicaragua v. U.S. *as an I.C.J. Decision*

The primary function of the International Court of Justice is to afford States a means for the pacific settlement of their disputes. But I.C.J. decisions, in themselves, have a special place in international law. Article 38 of the Statute of the International Court of Justice includes in its enumeration of the sources of law to be applied by the Court judicial decisions "as subsidiary

[289] *See* 5 WHITEMAN, *supra* note 221, at 831-32 *and* Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 A.J.I.L. 713 at 724 (1971).

[290] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Reports 14 at 98-99, par. 187.

[291] LAUTERPACHT, *supra* note 236, at 39.

[292] BROWNLIE, PRINCIPLES, *supra* note 36, at 7.

means for the determination of the rules of law." The key term is "subsidiary." The decisions of the I.C.J. are not formal sources of international law. I.C.J. cases do not make the law;[293] however, "the Court has made a tangible contribution to the development and clarification of the rules and principles of international law."[294]

1. CLARIFYING AND DEVELOPING INTERNATIONAL LAW

a. The Main Opinion

The pronouncements of the Court, while not strictly sources of law, are authoritative explicitations of the current state of international law. In the words of Sir Hersch Lauterpacht,

> ... undoubtedly, so long as the Court itself does not overrule its former pronouncements or so long as States have not by a treaty of a general character, adopted a different formulation of the law, *the ruling formally given by the Court on any question of international law must be considered as having settled for the time being the particular question at issue.*[295] (italics supplied)

That Article 2(4) is a customary rule whose existence and applicability are independent of the U.N. Charter and that customarily prohibited uses of force encompass grave and less grave uses of force enumerated in the Declaration on Friendly Relations must, for the time being, be considered as the definitive interpretation of the non-use of force principle.

In addition, the Court's technique for determining the customary status of Article 2(4) will likewise be definitive. The importance it gave to verbal acts, such as the voting attitude of States in resolutions and conventions, in the proof of a negative customary rule will influence how the Court and the international community will henceforth view the creation of customary law.

b. The Separate and Dissenting Opinions

Nicaragua v. U.S. also carries seven separate opinions[296] and three dissenting opinions.[297] Notable among these are Judge Stephen Schwebel's comprehensive 250-page dissent. Judge Schwebel rendered an opinion which dealt with the effect of a multilateral treaty reservation,[298] the Court's treatment of the evidence, especially with regard to Nicaragua's violations of Article 2(4)[299] and the propriety of the United States' exercise of the right

[293] HARRIS, *supra* note 45, at 55.

[294] LAUTERPACHT, *supra* note 236, at 5.

[295] *Id.* at 62.

[296] President Nagendra Singh, Judges Lachs, Ruda, Elias, Ago, Sette-Camara, and Ni.

[297] Judges Oda, Schwebel, and Sir Robert Jennings.

[298] See discussion in Chapter Four, *supra* p. 46.

[299] *See* Schwebel Dissent, Nicaragua v. US (Merits) 1986 I.C.J. Rep. 128-153.

to collective self-defense as a response to Nicaraguan aggression.[300] By granting judges, such as Judge Schwebel in this case, the right to append their individual dissenting and separate opinions, the Statute of the Court has made a "beneficent contribution to the development of international law and the authority of justice."[301] For as long as the main opinion is clear, binding, and authoritative,

> the individual Opinions of Judges, far from detracting from the standing of Judgments or Advisory Opinions, *add to their vitality, comprehension, and usefulness and greatly facilitate the fulfillment of the indirect purpose of the Court, which is to develop and to clarify international law.*[302] (italics supplied)

And should the majority opinion be questionable in view of the element of compromise that sometimes attends the main decision, "minority opinions of judges who could not square it with their judicial conscience to join the 'compact majority' are especially precious;"[303] thus, these minority opinions might sometimes constitute evidence of a kind which has an equal or even higher intrinsic value with regard to certain aspects of the majority opinion. In addition, Lauterpacht views a judicial dissent not only as an appeal to a more enlightened and informed legal opinion, but also "a powerful stimulus to the maximum effort of which a tribunal is capable."[304]

2. CONTINUITY IN JURISPRUDENCE

Unlike national courts, the International Court of Justice does not follow a strict rule of binding precedent. Article 59 of the I.C.J. Statute limits the binding force of the Court's decision to the parties in respect of that particular case. This is not to suggest that the Court ignores its previous decisions and starts afresh every time. Professor Georg Schwarzenberger notes that "a perusal of the practice of the World Court will reveal a remarkable consistency in its judgments."[305] There is a *continuity in jurisprudence*, even if previous pronouncements arose out of cases not *in pari materia* with the case under consideration, because "the principles underlying earlier decisions throw light on the question whether there is any solid foundation for the suggested rule of interpretation."[306]

Lauterpacht enumerates several reasons why there is in the practice of the Court an indirect acknowledgement of the persuasive authority of its judgments and opinions. For one, these decisions are a repository of legal

[300] *Id.* at 154-161.

[301] LAUTERPACHT, *supra* note 236, at 66.

[302] *Id.*

[303] 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 30 (3rd ed. 1957).

[304] LAUTERPACHT, *supra* note 236, at 66-67.

[305] 1 SCHWARZENBERGER, *supra* note 303, at 30.

[306] LAUTERPACHT, *supra* note 236, at 11.

experience to which the Court finds it convenient to adhere. For another, I.C.J. decisions embody what the Court has in the past considered to be good law. Also, respect for past decisions make for certainty, stability, and ultimately, the orderly administration of justice.[307]

3. IMPLICATIONS

a. Non-Use of Force as a Customary Rule

Solidifying the status of the non-use of force principle in customary international law is of unmeasurable significance for the international community. While the U.N. Charter prohibition has been around since the end of the Second World War, Professor Richard Bilder lamented in 1984 that there have been at least 120 significant armed conflicts since 1945, involving over 80 countries.[308] Wars have not grown fewer since the U.N. Charter. Indeed, there seems to be a war going on in some part of the world every minute, and the legacy that the twentieth century will leave in architecture will invariably include the cities of rubble in Beirut and Sarajevo together with New York skyscrapers. Thus, Professor Oscar Schachter observes that "there is widespread cynicism about their effect."[309] In view of repeated violations over the last forty years, what value would confirming Article 2(4)'s status have for the present day?

While it is true that the incessant use of force seems to mock the rule, it cannot automatically be inferred that States now believe that their right to use force is unfettered. As discussed in Chapter Four, material state practice in derogation of the norm should not be evaluated in isolation. Rather, it should be studied together with verbal state practice which characterizes the uses of force either as *exceptions* through justification by the offending states,[310] or as *breaches* through condemnation by the international community.[311] The reaction of the international community towards the use of force manifests an implicit acknowledgement of the standard, because if there were no prohibition on the use of force, why should there be an attempt to validate the acts of States at all?

In the view of this writer, the I.C.J.'s pronouncements in the *Nicaragua* case rendered the status of Article 2(4) as customary international law as unambiguous and its violation, more obviously severe and more easily determinable, in view of its acceptance of the use of force examples enumerated in the Declaration on Friendly Relations. *Nicaragua v. U.S.* likewise clarifies that liability for violating the use of force principle arises both from the treaty

[307] *Id.* at 14.

[308] Bilder, *The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?*, 1984 A.S.I.L. Proc. 68.

[309] Schachter, *The Right of States*, *supra* note 102, at 1620.

[310] *Id.* at 1623.

[311] *Id.* at 1622-23.

obligation and customary international law for all nations of the world, whether or not they are parties to the U.N. Charter and whether or not the U.N. Charter applies to a particular dispute.

b. Determining the Existence of Custom

Equally important with the Court's confirmation of the customary status of Article 2(4) is its treatment of the sources doctrine. Professor Fred L. Morrison remarks that the Court's treatment of how new customary international law is generated is its "most significant new pronouncement... [which] will have ramifications far beyond the immediate controversy."[312] The writer identifies two areas which stand to be affected by the *Nicaragua* Court's approach: first, the jurisprudence of the Court; and second, other fields of law.

1) THE JURISPRUDENCE OF THE COURT

As a matter of practice, the International Court of Justice refers back to previous cases when it seeks to bolster pronouncements it makes in a new decision. In *Nicaragua v. U.S.*, the Court expressly mentioned the *North Sea Continental Shelf Cases* and *United States Diplomatic and Consular Staff in Tehran*. Just as the Court availed of these cases in the *Nicaragua* decision, so will the Court avail of *Nicaragua* in the future. Or will it?

In the previous Chapter, this writer noted that many publicists observed "short cuts" in the Court's sources approach. The points may be summarized into two: the reliance on verbal acts as state practice and *opinio juris* and the "reverse reasoning."

The "reverse reasoning" has been justified as appropriate to the nature of Article 2(4) as codificatory; the reliance on verbal acts as state practice in support of Article 2(4) was made necessary by the *negative* character of the obligation. In line with reliance upon verbal acts as *opinio juris*, many publicists are uncomfortable with the Court's expansion of the obligation created by consenting to U.N. G.A. Resolutions. Morrison calls the Court's pronouncement "a kind of broadly expanded Ihlen declaration... [which] [i]n effect... changes General Assembly resolutions from a step in the evolution of international law to the end result of that process."[313] While this writer agrees with the Court regarding the value of the Declaration on Friendly Relations as evidence of *opinio juris* on Article 2(4), she did point out that the Court should have more carefully discussed that particular resolution in the light of standards which have evolved in the assessment of the evidentiary value of G.A. Resolutions in general.

Perhaps what may be said of the *Nicaragua* Court is not that its conclusions were wrong but that its reasoning was sparse. The seemingly revolutionary pronouncements coupled with the meager explanation create the impression that the Court has departed from its usual practice without good reason.[314] Creating such an impression is potentially dangerous, for both Schwarzenberger and Lauterpacht agree that the persuasive character of I.C.J. judgments depends to a large extent on the fullness, exhaustiveness, and cogency of the reasoning offered.[315] Moreover, Schwarzenberger observes that pronouncements marked by a remarkable economy in argument are the least convincing statements.

A closer study of the decision, however, would reveal that the economical reasoning was actually justified because of the unquestionable position of Article 2(4) in international law and the parties' own admissions. Given the circumstances of the case, there was no need for an overly exhaustive discussion.

The *Nicaragua* Court's treatment of the sources doctrine represents a landmark in I.C.J. decisions, because it is probably the first major sources discussion since the 1969 *North Sea Continental Shelf Cases*. Compared to earlier cases, however, *Nicaragua v. U.S.* seems to have liberalized the proof of custom. But on more careful scrutiny one will realize that the liberality is only apparent. The *Nicaragua* technique will not be ignored by cases to come, but neither must it be adhered to indiscriminately. Rather, the method should be calibrated carefully to apply to similar kinds of rules and similar circumstances.

2) PRACTICAL APPLICATION TO OTHER FIELDS OF LAW

Being a discussion on sources of law, the *Nicaragua* Court's technique for determining customary rules may be applied to many other fields of law. Publicists note that treaty-custom discussion in the *North Sea Continental Shelf Cases* was applied not just to the law of the sea, to which it was directly pertinent, but also to the law of war and the law of state responsibility. Similarly, the writer submits that the discussion in *Nicaragua v. U.S.* will help shed light on every field of international law which involves an interaction between treaty and custom, and that encompasses virtually *all* fields of international law.

As a general rule, treaties are usually preferred over custom in international practice, because they offer black-letter evidence of the law. Sir Humphrey Waldock, however, notes that "the importance of customary law in a legal system varies in inverse ratio to the degree of organisation of the community."[316] While it is true that the international community today is far more organized than it was in the past, still, the role that custom plays in this modern age cannot be discounted. *Nicaragua v. U.S.* only affirms this reality.

True, the treaty has been a most ubiquitous instrument in this century, but the treaties in existence do not regulate all aspects of the intercourse

[312] Morrison, *Legal Issues in the Nicaragua Opinion*, 81 A.J.I.L. 160 (1987) [hereinafter Morrison, *Legal Issues*].

[313] *Id.*

[314] LAUTERPACHT, *supra* note 236, at 19.

[315] *See* 1 SCHWARZENBERGER, *supra* note 303, at 30 *and* LAUTERPACHT, *supra* note 236, at 379.

[316] Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 40 (1962-II).

among States; neither do they bind all nations in the world. In the absence of treaty, custom will supply the law.

Many codificatory treaties today remain unratified by a majority of States, and they have not yet come into force. Some examples of these are the United Nations Convention on the Law of the Sea and the Vienna Convention on Succession of States In Respect of Treaties. To the extent that the provisions of these treaties accurately codify the custom, they will bind States even if the States concerned have not yet acceded to the treaties or even if the treaties have not yet come into force.

There are also treaties which create new law. Of particular prominence in this decade are the International Environmental Law instruments opened for signature in June 1992 during the Earth Summit at Rio de Janeiro in Brazil. Because of the *Nicaragua* decision, States who are not yet parties to these treaties could be held bound by the rules of these treaties if their representatives, say to the U.N. General Assembly, consent to a resolution on the same matter or permit one to be passed by consensus while failing to record an express negative vote.[317] By its affirmative vote or acquiscence, these States will be deemed to have accepted the validity of the resolution's rules as law, following the approach in *Nicaragua v. U.S.* that consent is an expression of its *opinio juris* at least with respect to the negative obligations contained in the resolution. These States will be bound, not to the resolution, but to the rule in *customary international law*, because consent to the resolution is evidence of state practice and *opinio juris* on the issue.

And even if the treaty does bind particular States but it cannot for some reason apply to a particular case, the treaty provision embodying a customary rule can, according to *Nicaragua*'s theory, still bind the States concerned.

Nicaragua v. U.S., in a manner of speaking, plugs all the loopholes. Nowadays, there really is no escaping the application of the law, and this augurs well for the cause of international law and order.

B. *The Philippines and* Nicaragua v. U.S.

That *Nicaragua v. U.S.* is significant for the international community is beyond question. The relevance of the decision for the Philippines, as a member of the international community, is likewise obvious in view of Article II, Section 2 of the 1987 Philippine Constitution, which reads:

> Section 2. The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land*, and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations. (italics supplied)

As a member of the family of nations which expressly recognizes international law principles through its municipal law, the Philippines adopts the ruling in *Nicaragua v. U.S.* in so far as it reflects the state of contemporary international law.

[317] *See* Morrison, *Legal Issues, supra* note 312, at 162.

But does the *Nicaragua* decision have a *special* relevance for the Philippines?

A comparative perusal of Philippine and Nicaraguan history, politics, economics, and culture will yield striking similarities. Although there is and can be no complete identity, the parallels were striking enough to make this writer wonder whether there are lessons to be drawn from *Nicaragua v. U.S.*, because the Philippines has been considered a Latin American country in East Asia.

In the second part of this final chapter, the writer will attempt to establish the special significance of *Nicaragua v. U.S.* for the Philippines. She will first trace key events, factors, and personalities in Philippine history which are similar to Nicaraguan history. The writer will not attempt a complete historical account; rather, she will focus only on the details pertinent to her purpose. The writer will then try to relate the doctrines of the case to the Philippines in order to offer a new and different angle from which to understand the country's position in international law.

1. A LATIN AMERICAN COUNTRY IN EAST ASIA

a. Where the Sun Never Sets

The Philippines and Nicaragua share a common colonizer - the Spaniards. As Spain's outpost in the East, the Philippines was the reason why the sun never set on Spain's vast empire.

Spain discovered the Philippines in April 1521, one year before Nicaragua, when the three strange ships of Portugese Ferdinand Magellan cast anchor before the town of Sugbu, now called Cebu.[318] Magellan never left the Philippines alive, for he perished by the sword of Lapu-lapu at the Battle of Mactan. And it was not until the 1565 expedition of Miguel Lopez de Legazpi that Spain conquered the Philippines through the same *conquistador* zeal that won Spain back from the Moors and colonized the islands with the same "God, gold, and glory" goals[319] by which it subjugated its Latin American colonies. Being both missionary State and civilizing Church,[320] the Spanish regime in the Philippines came under the Vice-Royalty of Mexico and bore the hallmarks of Spanish colonial institutions, like the *encomienda*. Both the Philippines and Nicaragua broke free of Spain in the nineteenth century—the Philippines in 1898, Nicaragua in 1823.

b. The Benevolent Imperialists

The Philippines and Nicaragua also share an American past. While Nicaragua was never actually a colony of the United States, the Philippines was an American colony for fifty years.

[318] H.V. DE LA COSTA, S.J., PHILIPPINE HISTORY: A SURVEY 15.

[319] *Id.* at 21-22.

[320] *Id.* at 84.

Through the 1898 Treaty of Paris, Spain ceded the Philippines to the United States for some thousand pieces of silver at the close of the Spanish-American War. The United States army, superior in arms and manpower, quickly defeated the rag-tag army led by General Emilio Aguinaldo which suffered betrayal at the hands of its *ilustrado* leaders and had enjoyed, at best, lukewarm peasant support.[321] The *ilustrados*, who earlier deserted the sinking Spanish ship and sided with the revolutionary regime,[322] shifted allegiance just as quickly and offered their services to the new colonizer.

With the help of the *ilustrado* defectors, the Americans began their imperialism of suasion. The Americans consciously sought to win the Filipinos over through what historian Peter Stanley calls a "politics of attraction." The rationale lies in the democratic nature of the American government:

> ... of all the forms of government, the *modern nation-state based upon consent is the least suited to empire.* The character of the Philippine insurrection and the politics of imperialism at home required that *victory be complemented by accomodation - that Filipinos be not merely defeated, but converted.*[323] (italics supplied)

Thus, the Americans embarked on a program of liberalization, secularization, and modernization. They built roads, schools, and other buildings; they vastly improved the health care system. There was economic development, but one dependent primarily on the U.S. economy.[324] Most significantly, Filipinos were also tutored in American-style government, especially during the administration of Democrat Governor General Francis Burton Harrison. This politics of attraction, however, sacrificed initiative for the sake of accomodation and co-opted the Philippine revolution.[325]

Independence was the most heated political issue during the American colonial regime, and the Philippines nearly attained it towards the end of the Commonwealth era were it not for the outbreak of World War II in 1942. Japan replaced the United States as the Philippines' colonial master for three years, but the Philippines gained independence from the victorious Americans soon after the end of the Pacific War.

c. *The Philippines as a Neo-Colony of the United States*

Although the American flag came down when American sovereignty over the Philippines formally ended on 4 July 1946, Stephen Shalom writes that "the Philippines remained subordinate to U.S. domination."[326]

[321] May, *Why the United States Won the Philippine-American War, 1899-1902*, PACIFIC HISTORICAL REVIEW 353-54 (1983).

[322] M. GUERRERO, PHILIPPINE SOCIAL HISTORY: GLOBAL TRADE AND LOCAL TRANSFORMATIONS 155 (McCoy and De Jesus, eds. 1982).

[323] P. STANLEY, A NATION IN THE MAKING: THE PHILIPPINES AND THE UNITED STATES, 1899-1921 268 (1974).

[324] N. OWEN, THE PHILIPPINE ECONOMY AND THE UNITED STATES: STUDIES IN THE PAST AND PRESENT INTERACTIONS 179 (1983).

[325] STANLEY, *supra* note 323, at 269.

[326] S.R. SHALOM, THE UNITED STATES AND THE PHILIPPINES: A STUDY OF NEOCOLONIALISM 183 (1986).

Filipinos fought loyally on the side of the Americans during the war, and they fought hard. Shalom writes that, at the end of the war, Manila came second only to Warsaw as "the most completely devastated capital city anywhere in the world."[327] But Filipinos were reassured no doubt by President Franklin D. Roosevelt's war time promises that the United States would provide assistance to the Philippines after the Japanese had been driven out.[328] The Philippines after World War II had three immediate and pressing requirements: rehabilitation assistance, a fair and equitable trade relationship, and a security guarantee. American assistance did come, but it was not without strings.

1) *U.S. Economic Interests*

To settle the trade relationship, the U.S. Congress passed the Philippine Trade Act.[329] This law pegged the Philippine peso to the American dollar; it provided for free trade between the two countries for the first eight years and then for a system of graduated tariffs before full tariffs could eventually be imposed in 1974. The most onerous provision in the Philippine Trade Act was the notorious "parity clause" which granted to U.S. citizens the same rights as Filipinos to exploit and develop agricultural, timber, and mineral lands and to operate public utilities. To ensure the acceptance of this provision, the United States made it a requisite condition for the release of much-needed rehabilitation assistance.[330]

Although tariffs eventually levelled off and the parity clause was dispensed with, the dependence created by these two instruments of American economic policy in the Philippines was hard to shake off. In fact, free trade with and, later on, lower tariffs on exports to the United States were continually delayed as concessions to the cooperative Filipino elite whose industries could not yet compete with the other trading partners of the United States. Tariff concessions were often granted in exchange for onerous economic concessions to the Americans.[331]

To this day, the Philippine economy remains dependent on direct foreign investment to an extent similar to that found in Latin American countries:

> There is one East Asian Case that does seem to fit the Latin American mold of investment dependence. The Philippines had the United States

[327] *Id.* at 33.

[328] COUNCIL ON FOREIGN RELATIONS, THE PHILIPPINE BASES: NEGOTIATING THE FUTURE 130 (1988) *citing* Berry, *The Military Bases and Postwar U.S.-Philippine Relations* [hereinafter Berry].

[329] AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF THE PHILIPPINES CONCERNING TRADE AND RELATED MATTERS DURING A TRANSITIONAL PERIOD FOLLOWING THE INSTITUTION OF PHILIPPINE INDEPENDENCE, signed at Manila, 4 July 1947. 1 Phil. Treaty Series 195, 1 D.F.A. T.S. No. 2 93, 43 U.N.T.S. 135.

[330] Berry, *supra* note 328, at 131.

[331] *See Shalom's discussion of the Laurel-Langley Agreement in* Shalom, *supra* note 326, at 95-98.

rather than Japan as its colonial power before World War II and *has therefore experienced a continuity in direct foreign investment which is more Latin American than East Asian in character.*[332] (italics supplied)

2) U.S. Political Interests

For the security guarantee, the United States successfully negotiated the Military Bases Agreement (M.B.A.) in 1947.[333] Although President Manuel Roxas tried to obtain favorable concessions for the Philippines, it was unfortunate that

> the United States was in a far superior negotiating position than was the Philippines. The historical relationship between the two countries possibly explains this advantage, but more important were the actual political and economic influences of the time.[334]

The Philippines at the end of World War II needed the United States more than the United States needed it, and the United States unabashedly availed of this advantage.

The M.B.A. had three perceived defects: first, ardent Filipino nationalists like Claro M. Recto and Tomas Confesor "argued that the Philippines could never be truly independent as long as foreign military forces were stationed in the country and a form of extraterritoriality obtained;"[335] second, Filipinos were uncertain whether the United States would assist the Philippines if it were attacked; and third, it was afraid of being drawn into a war because of its security relationship with the United States.[336]

To remedy the second and third defect, the Philippines and the United States entered into the Mutual Defense Treaty (M.D.T.) in 1951[337] and a Mutual Defense Board[338] was later formed. But the American government did not really take the Mutual Defense Treaty too seriously:

[332] Evans, *Class, State, and Dependence in East Asia: Lessons for Latin Americanists*, 203 at 208 *cited in* THE POLITICAL ECONOMY OF NEW ASIAN INDUSTRIALIZATION (Dayo, ed. 1987).

[333] AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE UNITED STATES OF AMERICA CONCERNING MILITARY BASES, Signed at Manila, 14 March 1947, 1 Phil. Treaty Series 357, 1 D.F.A. T.S. No. 2 144, 43 U.N.T.S. 271, T.I.A.S. 1775.

[334] Berry, *supra* note 328, at 136.

[335] *Id.* at 137.

[336] *Id.*

[337] MUTUAL DEFENSE TREATY BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE UNITED STATES OF AMERICA, Signed at Washington, 30 August 1951. 1 Phil. Treaty Series 727, II D.F.A. T.S. No. 1 13, 177 U.N.T.S. 133, 3 U.S.T. 3947, T.I.A.S. 2529.

[338] EXCHANGE OF NOTES CONSTITUTING AN AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE UNITED STATES OF AMERICA RELATING TO THE ESTABLISHMENT OF A MUTUAL DEFENSE BOARD AND THE ASSIGNMENT OF A MILITARY LIAISON OFFICER, Manila, 15 May 1958, 2 Phil. Treaty Series 717, 316 U.N.T.S. 163.

> United States officials were happy to humor the Philippine government by signing so long as they did not have to exchange military information with Manila or disturb "our present military arrangements which are particularly advantageous to us."[339]

Evidently, the United States was concerned primarily about their Bases rather than this token treaty.

The strategically-located Bases, particularly Clark Air Base and Subic Naval Base, were to become crucial to America's desire to pursue a strong policy in Asia, especially in view of China's conversion to communism in 1949 and Indo-China's collapse to communism in the late 1960's.

The Military Bases Agreement was re-negotiated several times.[340] Among the most hotly contested topics for revision were criminal jurisdiction and the shortening of the 99-year lease. To assuage nationalists in the Recto mold, the Americans allowed a Philippine Liaison officer in 1958 and, later, a Philippine Base Commander in 1979, but Lorenzo Tañada, Jose W. Diokno, and Jovito Salonga criticized such revisions as "symbolic."[341]

The Philippine Trade Act and the Military Bases Agreement were not the last encounter the Philippines would have with the United States in its history. Throughout the post-war era, the hand of Uncle Sam was seen in various political events.

To protect its political and economic interests in the Philippines, the United States always made sure that Filipino leaders were men loyal to them,[342] in much the same way that they deposed the unfriendly Zelaya in Nicaragua and propped up the corrupt Somoza family for thirty years. They worked through the local elite, and reciprocal benefits, such as economic concessions and loans, sustained the relationship.[343]

After the war, for instance, General Douglas MacArthur considered his personal friend Manuel Roxas as the best choice for Philippine president over Commonwealth President Sergio Osmeña. The Americans supported Roxas, even though he was accused of being a war-time collaborator, because he was unquestionably loyal to America apart from being thoroughly taken by Western culture. To illustrate, the writer quotes from Roxas's inauguration speech:

[339] SHALOM, *supra* note 326, at 75.

[340] The writer cites the following amendments, culled from William Berry's article: the aborted Garcia-Spruance attempt in 1954; Bendetsen-Pelaez in 1956; Bohlen-Serrano in 1958 which created the Mutual Defense Board, allowed a Philippine Liason Officer, and shortened the term to 25 years instead of 99 years; Blair-Menez in 1965 which provided for concurrent criminal jurisdiction; Ramos-Rusk in 1966 during which the 25-year period became effective; the Marcos-era negotiations in 1976, in 1979 which came with a U.S. $500 million military and economic assistance package and allowed a Philippine Base Commander, and in 1983 which came with a U.S. $900 million package; the Manglapus-Shultz Agreement in 1988, and, finally, the review and eventual termination of the MBA during the Aquino regime in 1991.

[341] Berry, *supra* note 328, at 149.

[342] SHALOM, *supra* note 326, at 185.

[343] *Id.* at 186.

> We are not of the Orient except by geography. We are part of the Western world by reason of culture, religion, ideology, and economies. We expect to remain part of the West, possibly as the ideological bridge between the Occident and the Orient.[344]

The Americans lent military assistance and advice to the reputedly corrupt Quirino administration to quell the Communist *Hukbalahaps* in the 1950's because Elpidio Quirino was "at least...basically friendly to us and is willing that our two countries continue their present special relationship."[345] Besides, the United States was not about to allow the Philippines to fall into Communist hands after China had just turned Red in 1949. Parenthetically, it is interesting that the *Huk* guerrilla movement of the Philippines was referred to in a guerrilla primer allegedly circulated by the United States among the *contras*.[346] Instrumental to the defeat of the Huks was America's anointed one, then Defense Secretary Ramon Magsaysay, whose election as President the Americans helped to engineer and who was described by *Time* magazine as "America's boy."[347]

But the most blatant display of American self-interest was its support for the dictator Ferdinand Marcos even after he had abolished formal democratic institutions in 1972, committed countless human rights violations, and enriched himself and his cronies in Somoza-fashion. Professor Ed Garcia suggests that Martial Law in the Philippines was no accident of history, because in the same period, several Latin American States underwent a series of sieges. He cites: the 1964 coup in Brazil; the 1966 and 1976 *golpes de estado* in Argentina; the five Bolivian coups from 1971 to 1980; the 1973 *auto-golpe* in Uruguay; and the 1973 murder of Chile's President Salvador Allende.[348]

Martial law greatly facilitated U.S. intervention in Philippine affairs:

> Martial law, in effect, opened the way for a further deepening of foreign economic dependence by creating the conditions of near absolute control. It was an ideal instrument for the creation of an 'open economy' whose ground rules were set up by presidential decrees without being subjected to critical scrutiny or popular protest. *In exchange, clear support from the U.S. government came by way of increased economic and military aid and the release of loans from the U.S.-controlled multilateral financial institutions like the World Bank and the IMF, exemplified by the more than ten-fold growth of foreign debt from U.S. $ 2.4 B in 1972 to U.S. $ 24.6 billion in October 1983.*[349] (italics supplied)

[344] *Id.* at 42.

[345] *Id.* at 70.

[346] Schwebel Dissent, Nicaragua v. U.S. (Merits), 1986 I.C.J. Reports at 520, par. 214

[347] *See* "America's Boy" *in* SHALOM, *supra* note 326, at 86-102.

[348] GARCIA, *supra* note 132, at 69.

[349] *Id.* at 70.

There was created a "debt trap" in which the Philippines will be mired for generations to come. American support for Marcos was not only economic and military but also moral. One cannot easily forget the words uttered in the early 1980's by then-Vice President George Bush in praise of Marcos's adherence to democratic institutions.

But the collapse of the economy and the growing Communist insurgency began to take their toll on the Marcos regime. Garcia suggests that the pattern of Philippine politics at the twilight of the Marcos years was similar to that in Nicaragua towards the end of the Somoza regime. But the Philippines took a different turn when Benigno Aquino, Jr. was assassinated and Marcos was ousted, not by a Communist-led coalition like the one in Nicaragua in 1979, but by a popular centrist revolt.[350] But it is interesting that Eden Pastora Gomez, Deputy Minister of Defense of the Sandinista Government, commented that the Sandinistas led a largely middle-class insurrection against a family dictatorship "[i]n a manner that has since been duplicated in the Philippines."[351]

d. Breaking Away

Developments during Corazon Aquino's administration demonstrate a weaning away from the United States. The Philippines ratified a new constitution in 1987 which contained significantly nationalistic provisions in the field of foreign relations and the economy, among them:

> Article II.
>
> Section 7. The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.
>
> Section 8. The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory.
>
> Section 19. The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

Moreover, a strong anti-Bases sentiment pervaded the deliberations. A number of commissioners argued against the Bases primarily on grounds of sovereignty.[352] The result was Article XVIII, Section 25:

> After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by a majority of the votes cast by the people

[350] Interview with Professor Ed Garcia, 21 July 1992.

[351] *See* Schwebel Dissent, Nicaragua v. U.S. (Merits), 1986 I.C.J. Reports at 508, par. 188.

[352] By *way of example, refer to the sponsorship speeches delivered by Commissioners Nolledo and Braid in* IV RECORDS 582 and 601.

in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

On 21 September 1991, the Military Bases Agreement expired, and negotiations were entered into by representatives of the United States government and the Philippines. The R.P.-U.S. Friendship Treaty prepared by the panels was, however, rejected by the Philippine Senate on the same day the M.B.A. expired. Less than a year later, the Philippines joined the Non-Aligned Movement (N.A.M.) on 3 September 1992. The N.A.M. is an aggrupation of Third World States formed in 1955 under the leadership of India's Jawaharlal Nehru, Yugoslavia's Josip Broz Tito, and Egypt's Gamal Abdel Nasser. At its inception, the N.A.M. was organized due to an enmity and distrust for the competing blocs of Western capitalism and Soviet socialism and was unified around the ideals of nuclear disarmament and economic amelioration for developing nations.[353] For many years, the Philippines had been an observer at N.A.M. summits. Symbolically, it was admitted into the movement after the Bases Treaty was rejected.

The eruption of Mount Pinatubo in July 1991 hastened the evacuation of Clark Air Base, and Subic Naval Base was finally turned over to the Philippines on 24 November 1992. In view of all these changes, President Fidel Ramos has ordered a comprehensive review of all aspects of R.P.-U.S. relations by a five-man committee: the Secretaries of Foreign Affairs, National Defense, and Trade and Industry; the Director-General of the National Economic Development Authority, and the National Security Adviser.[354] The Mutual Defense Treaty has assumed special prominence as the only remaining defense arrangement between the Philippines and the United States. According to a press release issued by the Mutual Defense Board, the United States henceforth "will no longer rely on fixed, permanent bases in South East Asia but on a variety of cooperation arrangements with virtually all countries in the region."[355] Once considered of trifling interest by the United States, the Mutual Defense Treaty and Mutual Defense Board will provide the framework and forum for this new cooperation and coordination.

2. IMPLICATIONS AND RELEVANCE

a. Non-Use of Force

Nicaragua's U.S. entanglements rendered it both victim of and co-principal in use of force violations. Under the Sandinistas, Nicaragua was attacked by the United States; under the Somozas, its government lent military support to the United States and allowed the latter to use its territory to perpetrate acts of aggression against neighboring Latin American countries.[356]

[353] Menezes, *Roots of the Non-Aligned Movement*, THE JAKARTA PUBLICATION, September 1992.

[354] See 14 July 1992 MEMORANDUM FROM THE OFFICE OF THE PRESIDENT.

[355] Philippine-United States Mutual Defense Board, Press Release, October 1992.

[356] CLOSE, *supra* note 20, at 28.

Similarly, the writer will discuss in the following sections how the special relationship of the Philippines with the United States[357] also rendered the former a potential victim of and co-principal in a use of force violation.

1) ECONOMIC AND POLITICAL FORCE AND AGGRESSION

The Article 2(4) violation against Nicaragua was clear and direct: its ports were mined and its installations attacked.[358] Nicaragua is at the backyard of the United States; hence, access is infinitely easier. While the Philippines is an ocean away from the United States, it is submitted that she, too, may have been a victim to a special kind of Article 2(4) violation—that of economic and political force and aggression.

The word "force" in Article 2(4) of the U.N. Charter is an ambiguous one. That it applies only to actual armed force has never been definitely settled, but only implied.[359] The Third World States argued that it included "all forms of pressure, including those of a political and economic character, which have the effect of threatening the territorial integrity or political independence of any state."[360]

In like manner, when U.N. Members were in the process of defining "aggression," there was a proposal by some States to include political and economic aggression. Economic aggression, on the one hand, included

> ... threats of, or the effective application of, enforcement measures intended to obtain or maintain advantages or specific situations to the suppression of free competition in the international market and the economic subjugation of the country which was the victim of that kind of aggression. In all these cases, it was the economic integrity and independence of the State which was undermined and even completely destroyed.[361]

Colombia and Cuba endorsed such an inclusion, and a couple of treaties contained a provision on economic aggression, namely Article 16 of the Charter of the Organization of American States and Article 92, par. 2 of the Havana Charter. Political aggression, on the other hand, was defined during a U.N. G.A. session as a type of aggression that

> ... attacked the political integrity and independence of the State. One of its extreme forms resulted in the creation of so called 'puppet states' subject to permanent intervention by another State, which directs their internal and external affairs from abroad through the intermediary of a regime especially set up for that people.[362]

[357] See discussion earlier in this Chapter, *supra*

[358] *Nicaragua v. U.S. (Merits)*, 1986 I.C.J. Rep. 4 at 146.

[359] *See* Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations*, 65 A.J.I.L. 724-25 (1971).

[360] U.N. Doc. A/AC 125/ SR. 114 (1970) *cited in Id.* at 724.

[361] *See* 5 WHITEMAN, *supra* note 221, at 831.

[362] *See* U.N. G.A. Official Records, 4th Session, 6th Committee, Summary Records, November 29, 9149, 173rd meeting, at 202 *cited in Id.* at 832.

When a State works through third parties who are either foreigners or nationals seemingly acting on their own initiative, the aggression is an indirect one.[363]

Given the "special relationship" between the United States and the Philippines, the writer suggests that the concept of indirect economic and political force or aggression may be made used to explain the arguments and accusations often adopted by nationalists regarding the validity of U.S. involvement in the Philippines from the point of view of international law. The writer, however, concedes that the mechanics of the relationship may be too subtle to pin down.

2) DEFINITION OF AGGRESSION

Nonetheless, without even relying on the concepts of political and economic force and aggression, the writer submits that the use of force doctrine was relevant to the Philippines because of the U.S. Military Bases.

Article 3 of the Definition of Aggression[364] contains a non-exclusive enumeration of acts which constitute aggression. Reference may be made to the Definition of Aggression[364] as a source of obligation for U.N. Members not only as U.N. Charter law but also as custom. Like the Declaration on Friendly Relations, the Definition of Aggression was passed by consensus; thus, its adoption would, according to *Nicaragua v. U.S.*, also be an indication of the *opinio juris* of U.N. Members on the rules in that resolution. Three provisions in that enumeration are especially *apropos* to the U.S. Military Bases issue:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.
>
> (e) The use of 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 beyond the termination of the agreement.
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.

With respect to Article 3(a) of the Definition of Aggression, the Philippines could have been a victim of aggression committed against it by an enemy of the United States. All too familiar are warnings like those made by Senator Lorenzo Tañada that the Bases, "(f)ar from defending us... would pull us into the arena of nuclear conflict in the event of war between the United States and Soviet Russia."[365] In the same way Clark and Nichols Air Bases were the first to be attacked by the Japanese in World War II, so, too, would the U.S. Bases have been logical first targets in an armed conflict between the United States and the U.S.S.R.[366]

With respect to Article 3(e) of the Definition of Aggression, the Philippines could again have been a victim of aggression if the United States violated the Military Bases Agreement. It is common knowledge that the United States had a policy of neither confirming nor denying the presence of nuclear weapons in their facilities. Article II, Section 8 of the 1987 Philippine Constitution prohibits nuclear weapons in the Philippines. In 1988, R.P. Foreign Affairs Secretary Raul Manglapus and U.S. Secretary of State George Shultz entered into an agreement modifying the M.B.A. by incorporating into it a nuclear weapons-free provision:

> VI. NUCLEAR WEAPONS
>
> 1. Notwithstanding the provisions of Article III of the 1947 Military Bases Agreement, as amended, the storage or installation of nuclear or non-conventional weapons or their components in Philippine territory shall be subject to the agreement of the Government of the Philippines.
>
> 2. For purposes of paragraph 1, transits overflights or visits by U.S. aircraft or ships in Philippine territory shall not be considered storage or installation. These transits, overflights or visits will be conducted in accordance with existing procedures, which may be changed or modified as necessary, by mutual agreement between both parties.[367]

If the United States brought in, stored, and tested nuclear weapons in the Bases, it would have acted contrary to the provisions of the Military Bases Agreement as modified by the Manglapus-Shultz Agreement and could have been considered an aggressor within the meaning of Article 3(e) of the Definition of Aggression.

With respect to Article 3(f) of the Definition of Aggression, the Philippines could have been a co-principal in an act of aggression in contravention of its obligations under the U.N. Charter and customary international law. The fear of many Filipinos that the Philippines might unwittingly or wittingly become partners in a nuclear confrontation that is beyond the country's effective control[368] finds support in international law principles.

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[363] *Id.* at 821.

[364] U.N. G.A. Res. 3314 (XXIX), 14 December 1974. 29 G.A.O.R. Supp. (No. 31) 142, U.N. Doc. A\9631 (1974); 69 A.J.I.L. 480 (1975).

[365] Testimony delivered on 4 July 1986 by Senator Lorenzo Tañada before the Constitutional Commission's Committee on the Declaration of Principles and State Policies *cited in* GARCIA, *supra* note 132, at 236.

[366] *Id.*

[367] FOREIGN SERVICE INSTITUTE, MANGLAPUZ-SHULTZ MEMORANDUM OF AGREEMENT, 17 October 1988: SPEECHES AND DOCUMENTS ON THE 1988 REVIEW OF THE RP-U.S. MILITARY BASES AGREEMENT of 1947 AS AMENDED IN 1979, at 18-19 (1988).

[368] GARCIA, *supra* note 132, at 239.

b. After the Bases

The Bases are gone, the Cold War is over, and the spectre of Communism in both Central America and the Pacific region seems to have dissipated. That Nicaragua and the Philippines have diminished in importance in U.S. foreign policy and geopolitical interests is but a natural consequence. Nonetheless, the writer submits that the non-use of force doctrine clarified in *Nicaragua v. U.S.* does not cease to be relevant to the Philippines despite the evacuation of the U.S. Military Bases and the end of the Cold War.

1) R.P.-U.S. RELATIONS

The Military Bases issue was a highly controversial and emotional matter. The economic and military advantages of retention had to be weighed, on the one hand, against notions of independence and sovereignty, on the other. But what was clear from the early days of the Aquino Administration was that the advantageous arrangement enjoyed by the United States for more than forty years would soon come to an end. The departure of the Bases, paved by the 1987 Philippine Constitution, was only a matter of time.

Without taking a position on the socio-political aspects of the Bases issue, the writer believes that an assessment of Philippine foreign policy must be made in the light of international law rules on the non-use of force clarified in *Nicaragua v. U.S.*. A perusal of R.P.-U.S. relations dating from the Aquino Administration reveal a gradual disalignment of Philippine foreign policy from that of the United States. The break began with the Philippine Constitution, culminated in the rejection of the R.P.-U.S. Friendship Treaty, and reached a *denouement* with the Philippines's joining the Non-Aligned Movement. The writer submits that all these recent acts of the Philippine State may be seen as consistent with the Philippines' commitment to Article 2(4) of the U.N. Charter, in so far as it is a U.N. member, and to that same principle in customary international law, in so far as the Philippines is a member of the international community.

While retention of the U.S. Military Bases is not *per se* a breach of the non-use of force principle; nonetheless, the writer believes that their removal lessened the *risk* of involving the Philippines in a breach of international law with or from the United States under the provisions of the Definition of Aggression earlier discussed. In lessening this risk, the Philippines has abstained from the threat or use of force and has enhanced its good standing as a member of the international community.

2) TROUBLE IN THE REGION

Although this view may be applied to an evaluation of R.P.-U.S. relations, it may not be as helpful in affirming the soundness of R.P. foreign policy decisions *vis-a-vis* South East Asia. While the Philippines may have lessened the risk of being a victim of and co-principal in aggression with respect to the United States, it may have increased its vulnerability in South East Asia because of the Sabah claim and the Spratly Islands dispute. Recent developments in the region suggest that the removal of the Bases could actually increase the risk of the Philippines being a victim of a use of force violation.

The dispute over the island of Sabah has long been a sore point between the Philippines and Malaysia. All three Philippine Constitutions contain a definition of national territory which allow an assertion of sovereignty over Sabah. On the one hand, the Philippines claims that Malaysia only came to administer the island in 1878 when the Sultan of Sulu *leased* what was then North Borneo to the Austrian Gustavus von Overbeck and the Englishman Alfred Dent of the North Borneo Company. Malaysia, on the other hand, interprets the Sulu grant as a *sale* to the North Borneo Company which then surrendered the island to the British in 1946. In turn, the British ceded Sabah to Malaysia when the latter became independent in 1963.[369] The issue ripened into an international claim when President Diosdado Macapagal lodged a formal demand with the United Kingdom in 1962. The British parried Philippine attempts to bring the claim to the negotiating table, and Malaysia has adopted the same strategy of avoidance, because preserving the *status quo* is favorable to their interests.[370]

Another raging regional dispute over territory in the South China Sea is that over the Spratly Islands. Six countries — China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei — claim either all 53 islets or a part of the archipelago. Although barren, the Spratlys' allure lies in its rich marine resources, strategic sealane location, and reputedly vast undersea deposits of oil and natural gas. The right to exploit the archipelago's continental shelf and economic zone, which is embodied in the United Nations Convention on the Law of the Sea, is premised on sovereignty over the islands.

The Spratly Islands conflict has never been definitely settled. Vietnam, Malaysia, and the Philippines have already established military outposts in the islands, and over the years there have been minor skirmishes between the Chinese and the Vietnamesc, notably in 1974 and 1988, and among the Filipinos, the Malaysians, and the Taiwanese.[371] While China has expressed its willingness to enter into joint economic exploration,[372] its recent actions betray a contrary intent. Professor Ji Gouxing of the Shanghai Institute, in fact, acknowledges that "[t]he scenario with greatest possibility is the continuance of the present armed confrontation and separatist rule."[373]

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[369] Quisumbing, *The Sabah Dispute and the Asean Amity Treaty*, 1 BATAS AT KATARUNGAN 70 at 91 (1982).

[370] *Id.* at 94.

[371] Cariño, *The South China Sea Disputes: An Overview*, 3 CHINA CURRENTS 14 at 15-16 (January-March 1992).

[372] *Id.* at 16.

[373] Guoxing, *The Spratly Islands: China's Dispute with Vietnam*, 3 CHINA CURRENTS 20 at 25 (January-March 1992).

On 25 February 1992, China passed a law on territorial waters claiming sovereignty over all the islets in the South China Sea.[374] Soon after, China entered into a contract with a U.S. oil company, Crestone Energy Corporation, to explore potential oil fields in a block contiguous to an offshore Vietnamese oil field. In an internal Chinese document obtained by the *Far Eastern Economic Review*, a new Chinese foreign policy was set out revealing expansionist designs reminiscent of its Middle Kingdom days. Together with these aggressive moves, China has also embarked on a massive military build-up and triggered a regional arms race. In 1991, regional defense spending reached U.S. $ 86 billion in 1991, a figure which is second only to N.A.T.O.[375] Analysts construe a Chinese intention to fill up the power vacuum left by the United States and Russia: "What we are now witnessing is a Pax Sinica in the making, in place of a reluctant Pax Americana and an impotent Russia."[376]

That China has become so aggressive so soon after the termination of the U.S. Military Bases Agreement is probably more than a coincidence. Foreign ministers from members of the Association of South East Asian Nations (A.S.E.A.N.) met in Manila last July 1992 and openly called for continued U.S. military presence in the region because of the emergence of the Spratly Islands dispute as the new flashpoint in post-Cold War Asia.[377] This new danger has compelled the Philippines to assume a posture seemingly inconsistent with its recent assertions of independence from the United States. Because of its vulnerability and inability to match the military build-up of its neighbors, the Philippines has invoked American protection under the Mutual Defense Treaty.[378]

Perhaps the departure of the Bases should also be studied in the light of developments in the South China Sea. From a purely international law and *idealpolitik* perspective, the outright rejection of the new Bases treaty is an eloquent declaration of sovereignty which is consistent with the spirit of the U.N. Charter, but from a practical and *realpolitik* standpoint, the categorical refusal to retain the Bases without any viable defense alternative might have been a short-sighted move. Although the Philippines no longer risks being a potential victim of or co-principal in aggression from or with the United States, she is now very definitely a potential victim of a new aggressor — China.

c. *The I.C.J. as a Forum*

When Commissioner Adolfo S. Azcuna sponsored the nuclear weapons-free provision in the 1987 Constitution, he was asked on interpellation by Commissioner Villacorta how this provision could be enforced. Commissioner

[374] Chanda, *Treacherous Shoals*, FAR EASTERN ECONOMIC REVIEW, 14 at 15, col. 3 (August 1992).
[375] THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE: 1990-1991, 149 (1990).
[376] Hamzah, *China's Strategy*, FAR EASTERN ECONOMIC REVIEW, 22 col. 2 (August 1992).
[377] Chanda, *supra* note 374, 14.
[378] *Id.* at 17, col. 2.

Azcuna replied that one forum for enforcement could be the International Court of Justice, because contrary to common belief, the International Court of Justice is not a mere lackey of rich First World nations. Rather, the World Court has given due consideration to the cases lodged by Third World countries.[379] In *Nicaragua v. U.S.*, the Court substantiates this observation by "adjudicating mainly in favor of a small, beleaguered Third World country that is confronted by a pattern of escalating military intervention being planned and financed by the government of a superpower."[380] Garcia opines that the *Nicaragua* decision encourages faith in the system and establishes the authority of the World Court.[381] The Philippines, therefore, should not discount the existence of the World Court and should consider the feasibility of availing of the I.C.J. as a forum for the peaceful settlement of the present regional disputes.

And the Philippines has been the prime mover for the pacific resolution of the current conflicts. In the 1960's, the Philippines suggested that the Sabah claim be submitted to the I.C.J. for decision, but Malaysia refused.[382] Unfortunately, the Philippines cannot sue Malaysia in the I.C.J. without its consent the way Nicaragua sued the United States. Although the Philippines has accepted the compulsory jurisdiction of the Court, Malaysia has not done likewise.[383] The Sabah conflict is currently being reviewed by the Department of Foreign Affairs with the hope of obtaining diplomatic resolution.

With respect to the Spratly Islands contest, the Philippines hosted a meeting of A.S.E.A.N. foreign ministers in July 1992 and succeeded in securing a declaration from the six member States emphasizing the necessity of resolving issues of sovereignty and jurisdiction "by peaceful means, without resort to force."[384] Litigation cannot also be compelled in this case, as the Philippines is the only one among the six Spratly contenders which has accepted the Court's compulsory jurisdiction. The Philippines could, however, again suggest that the problem be submitted to the International Court of Justice as a last resort should all efforts towards a diplomatic resolution fail. Article 2(3) of the U.N. Charter requires all Member States to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." If any of the countries reject the suggestion of submitting the case to the I.C.J. and defiantly employs the first use of force without exhausting all available peaceful means, it could *prima facie* be considered the aggressor.[385] None of its territorial acquisitions would be valid under the principle of *ex iniuria non oritur ius*,[386] and the aggressor State could be subjected to appropriate Chapter VII U.N. sanctions.

[379] *See* IV RECORDS 818-25.
[380] Falk, *supra* note 22, at 106.
[381] Interview with Professor Ed Garcia, 21 July 1992.
[382] Quisumbing, *supra* note 369, at 96.
[383] *See* I.C.J. HANDBOOK, *supra* note 9, at 96.
[384] *See* A.S.E.A.N. Declaration on the South China Sea, *The Diplomatic Post*, 11 (April to July 1992).
[385] *See* Article 2, Definition of Aggression.
[386] A principle of customary international law enunciated in Article 11, MONTEVIDEO CONVENTION.

CONCLUSION

Nicaragua v. U.S. was spawned by the Cold War era, but it would be naive to automatically presume that its significance in international law would thaw at the era's closing.

In this thesis, the writer studied two of the most significant contributions made by the International Court of Justice to international law through *Nicaragua v. U.S.*: its "liberalized" approach to the proof of custom; and second, its conclusions on the customary status of Article 2(4) as a result of that approach. The Court's legal pronouncements, as well as the reasoning process by which it arrived at those pronouncements, will greatly influence contemporary international law as authoritative clarifications of the present state of the law and will far outlast the dispute that gave rise to the case.

Nicaragua v. U.S. has greatly facilitated the determination of the existence of a negative customary rule[387] and, in a way, has dispelled the notion that *opinio juris* is elusive. The Court gave primacy to verbal acts, like statements and consent to resolutions, as proof of state practice and, more importantly, as evidence of *opinio juris*.

While *Nicaragua*'s sources approach has been the subject of much criticism, the method was necessitated and justified by the nature of Article 2(4), being both an obligation phrased in the negative and a widely accepted one, and by the circumstances of the case. Indeed, the reliance placed by the *Nicaragua* Court upon verbal acts like General Assembly Resolutions in order to determine the existence and content of a customary rule, while not unprecedented in international law, ought not to be considered as blanket authority to automatically and indiscriminately consider all U.N. G.A. Resolutions and like verbal acts as evidence of custom without examining the intent underlying their passage, the voting behavior, and subsequent state practice. Some U.N. G.A. Resolutions, such as the Charter on Economic Rights and Duties, the Declaration on the New International Economic Order, and the United Nations Code on Restrictive Business Practices, contain rather new and highly controversial concepts and are considered as representative only of emergent law at best;[388] thus, the *Nicaragua* Court's pronouncement regarding the Declaration on Friendly Relations should not be unreasonably extrapolated to justify the conclusion that U.N. G.A. Resolutions of this type reflect custom.

Using its sources approach, the *Nicaragua* Court not only certified that Article 2(4) of the U.N. Charter is customary international law but also held that, as custom, it exists concurrently but yet independently of treaty law. This ruling is momentous in two respects: first, it confirms the restrictive development of the law on the use of force in customary international law from a system allowing an absolute prerogative to States to one which seeks

[387] See discussion in Chapter Four, *supra* pp. 53-54 and 61-62.

[388] *See* HARRIS, *supra* note 45, at 527-28.

to impose an absolute prohibition; and second, it has demonstrated that the non-use of force principle is so well-entrenched in customary law that the inapplicability of a treaty embodying it will not preclude the applicability of the same rule as custom. The cumulative effect of the decision is the strengthening of the non-use of force principle whose significance cannot be overemphasized in a world that has never been without armed conflict. As the Serbs shell yet another Croatian town, the Iranians purchase nuclear submarines from the Russians, and the Chinese proclaim their sovereignty and supremacy over the South China Sea, the world seems to move so much closer to the edge of global war.

With the evacuation of the U.S. Military Bases and the subsequent escalation of tension in the South China Sea, the danger from the use of international force strikes very close to home. In this thesis, this writer also studied *Nicaragua v. U.S.* in the light of Philippine history and current affairs, since the similarities between the Nicaraguan and Philippine experiences offer some valuable insights into the present Philippine position in foreign relations.

At the outset, *Nicaragua v. U.S.* might seem irrelevant to the Philippines, because U.S. use of force violations against Nicaragua were actual and blatant, while U.S. use of force in the Philippines were at times indirect and, for the most part, remained on the level of possibility. But it would be simplistic to discount the relevance of this decision because of this apparent absence of a direct connection. The more valuable and significant insight that the Philippines can glean from *Nicaragua v. U.S.* is an *attitude* that is vigilant in the protection of the rights of a State and a *perspective* that is international.

By adjudicating in favor of a poor, Third World country like Nicaragua the I.C.J. has opened up an option to other Third World States whose citizens may feel that in this era of sovereign equality, some sovereigns are more equal than others. Aware of its rights as an international person, Nicaragua presented a well-argued case in a peaceful forum often regarded as an instrument of the First World. While some quarters may consider the practical result of the decision as negligible, it is, for Nicaragua and the Third World, an important and decisive moral victory.

But vigilance in the assertion and protection of rights in international law would be ineffectual and even misdirected without a proper appreciation of the nature of these rights and the ramifications of their enforcement and protection in the international legal order. Perhaps negotiations are sometimes unsuccessful because international law arguments are weak or not fully understood.

Issues which affect a State will invariably have a municipal and an international dimension. It would help if Philippine policy-makers are enlightened to a more sophisticated understanding of the international legal order, for the benefits are two-pronged. On the one hand, the Philippines could derive reassurance both from the soundness and consistency of its internal decisions with international law and from the corresponding enhancement of its membership of good standing in the family of nations. On the other hand, the Philippines could learn valuable lessons from a closer study of international law and the

experience of countries similarly situated. From these lessons, the Philippines could gain both a clearer understanding of how mistakes were earlier committed and how they could be avoided, as well as a higher proficiency in reading and anticipating the trends that shape international affairs. Indeed, in a world that is perceptively getting smaller each day, it would unquestionably profit the Philippines to be a better student of international law and world affairs. An even greater awareness of global conditions would lead to the making of more enlightened policies and better crafted strategies which would ultimately inure to the country's benefit. Just as strong cases may be lost by the prosecution's mishandling, the Philippines may have been a victim of some of its own misguided policies. Perhaps the time has come for us to stop blaming others for our country's ills and to start helping ourselves to find better solutions through our own efforts.

ANCESTRAL DOMAIN RIGHTS: ISSUES, RESPONSES, AND RECOMMENDATIONS

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The right of tribal Filipinos to their ancestral domains and ancestral lands has been recognized by the Supreme Court since 1909 in Cariño v. Insular Government, *when, speaking through Justice Holmes, it ruled that ancestral lands never formed part of the public domain.*

Based on the Regalian Doctrine, however, the State considers itself the sole source of authority in the classification and disposition of public lands. Now entrenched in the Constitution, the Regalian Doctrine has been invoked by the government, time and again, to justify the taking of ancestral lands for development purposes.

The present national law on land ownership, which prohibits the alienation and occupation of forest lands, is founded on the Regalian Doctrine. Under the present law, tribal Filipinos may not acquire any rights over their ancestral lands, since these lands are mostly forest lands. The existence of tribal Filipinos, however, is profoundly integrated with the land, which constitutes their primary economic and cultural base. Thus, the loss, of ancestral lands means the loss of an entire cultural heritage.

Fortunately, the present Constitution recognizes the rights of tribal Filipinos to their ancestral domains. This paper proposes that this innovation in the Constitution carved out an exception to the coverage of the Regalian Doctrine. The unequivocal recognition by the Constitution of the rights of tribal Filipinos to their ancestral domains can only have one reasonable implication: ancestral lands do not form part of the lands of the public domain.

INTRODUCTION

A. Short Profile of Tribal Filipinos

Tribal Filipinos have been known by various names by different governments in the country for over 450 years. The Spanish colonial government called them "feroces" and "infieles." The North American colonial administration identified them as savages, illiterates, and non-Christians. The present Philippine Republic refers to them as national cultural minorities, national

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