

Nicaragua
Student Materials

- Decided by the International Court of Justice in June 1986
- Key topics: making international law (customary international law); use of force (self-defense)

Learning Objectives

- Understand and apply:
 - UN Charter requirements for collective self-defense
 - elements of customary international law

- Analyze and evaluate:
 - how the judges assessed legitimate claims of collective self-defense
 - the gravity threshold for the use of force
 - how the judges asserted customary international law

Background Information

In 1979, a socialist political party seized power in Nicaragua, overthrowing a dictator who was closely aligned with the US. Many US foreign policy experts feared that the new Nicaraguan government would bolster Soviet Union influence in Latin America. The full extent of the US response is not known since many US activities were covert operations run by the Central Intelligence Agency. However, it is well-established that the US intervened directly by planting mines in Nicaraguan waters. Additionally, the US intervened indirectly by providing military aid and training to various rebel groups, which were collectively known as the *contras*.

In 1984, Nicaragua sued the US at the International Court of Justice, arguing that the US violated international law by using force and intervening in Nicaragua. The US publicly defended its actions by arguing that its activities were taken to help defend Nicaragua's neighbors—Costa Rica, El Salvador, and Honduras—from armed attacks by Nicaragua.

Because of limits that the US placed on the Court's jurisdiction, the ICJ could not rule directly on the legality of the US actions under the UN Charter. The ICJ could only rule based on customary international law. Accordingly, in the redacted judgment below, the ICJ first had to establish: what is the applicable customary international law? Second, the ICJ then had to ask: how does this law apply to the specific US activities in Nicaragua?

Relevant Legal Texts

UNGA Resolution 2625 (XXV—1970): “Declaration on Friendly Relations”¹

The General Assembly,

Reaffirming ... that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations ...

Convinced that the strict observance by states of the obligation not to intervene in the affairs of any other state is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security ...

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter ...

Solemnly proclaims the following principles:

The principle that states 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

¹ Long title: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States

Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state ... Such a threat or use of force constitutes a violation of international law ...

Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another state.

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife ... in another state ...

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political ... elements, are in violation of international law ...

No state shall organize, assist, foment, finance, incite or tolerate ... armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state ...

UNGA Resolution 3314 (XXIX—1974): “Definition of Aggression”

Article 1

Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations ...

Article 3

Any of the following acts ... shall ... qualify as an act of aggression:

- (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,
- (b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;
- (c) The blockade of the ports or coasts of a state by the armed forces of another state;
- (d) An attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state;
- (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;
- (g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Majority Judgment

Part I: What is the applicable law?

The Court begins by discussing that it will rule based on customary international law. Its assessment of customary international law will be shaped, though, by two treaties: the Charter of the United Nations, and the Charter of the Organization of American States. The Court discusses the two components of customary international law: state practice and acceptance as law (*opinio juris*).

The Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of states ... In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States ... Bound as it is by Article 38 of its Statute to apply ... international custom “as evidence of a general practice accepted as law”, the Court may not disregard the essential role played by general practice. Where two states agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of states is confirmed by practice ...

It is not to be expected that in the practice of states the application of the rules in question should have been perfect, in the sense that states should have refrained, with complete consistency, from the use of force ... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule ...

The Court argues that the use of force is prohibited the UN Charter, which is treaty law. However, the Court must rule based on customary international law in this case.² The Court argues that UN General Assembly resolutions are evidence of *opinio juris*, as are various regional agreements to which the US belongs. The Court concludes (based on this evidence of *opinio juris*) that customary international law prohibits the use of force.

Both parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The

² Note: This restriction came from limits that the US placed on the jurisdiction of the ICJ.

parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to 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. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from ... the attitude of the parties and the attitude of states towards certain General Assembly resolutions, and particularly [the “Declaration on Friendly Relations”]. 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 by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law ...

As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression ... and ratification of the Montevideo Convention on Rights and Duties of States ... Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of states participating in the Conference on Security and Co-operation in Europe ..., whereby the participating states undertake to “refrain in their mutual relations, as well as in their international relations in general,” ... from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating states prohibiting the use of force in international relations.

A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law ...

The Court then notes that there is variation in the severity of the use of force. It argues that UN General Assembly resolutions suggest that not all forceful acts can be considered “armed attacks.”

It will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the [Declaration on Friendly Relations] ... As already observed, the adoption by states of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force ...

The Court notes that the UN Charter allows collective self-defense in response to an armed attack. Both the UN Charter and UN General Assembly resolutions suggest that this exception is an “inherent right” that exists under customary international law.

The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right ... which any state possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by states demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the [Declaration on Friendly Relations], the reference to the prohibition of force is followed by a paragraph stating that:

nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

This resolution demonstrates that the states represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

The Court examines what conditions apply to the use of force in self-defence. It argues that: (1) state actions must be necessary and proportionate; (2) actions must be in response to an armed attack; (3) the victim of an armed attack must also declare itself to be a victim; and (4) the victim must request assistance.

With regard to the characteristics governing the right of self-defence, since the parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use ... The parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality ...

In the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this ... An armed attack [includes] not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to” ... an actual armed attack conducted by regular forces ... This description, contained in Article 3, paragraph (g), of the Definition of Aggression ..., may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to 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. But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states. It is also clear that it is the state which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another state to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the

state for whose benefit this right is used will have declared itself to be the victim of an armed attack ...

The Court finds that in customary international law ... there is no rule permitting the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the state which is the victim of the alleged attack is additional to the requirement that such a state should have declared itself to have been attacked.

The Court then argues that customary international law does not have a reporting requirement. Nonetheless, the Court argues that it can consider whether a state reported its actions under Article 51 as an indication of whether a state was genuinely acting in self-defense.

At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the state claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the state is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by states in exercise of this right of self-defence must be “immediately reported” to the Security Council ... In customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus 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 ...

Part II: How does the relevant law apply to the facts of the case?

The Court then proceeded to apply these legal arguments to the facts of the case. It began by examining the direct acts taken by the US and asks whether these qualify as a use of force under Article 2(4).

What is unlawful ... is recourse to either the threat or the use of force against the territorial integrity or political independence of any state. For the most part, the complaints by Nicaragua are of the actual use of force against it by the United States. Of the acts which the Court has found imputable to the Government of the United States, the following are relevant in this respect:

- the laying of mines in Nicaraguan internal or territorial waters in early 1984 ...
- certain attacks on Nicaraguan ports, oil installations and a naval base ...

These activities constitute infringements of the principle of the prohibition of the use of force ... unless they are justified by circumstances which exclude their unlawfulness ...

The Court then considers whether US support for the *contras* qualifies as a use of force under Article 2(4). The Court argues that “arming and training” the *contras* was a use of force, while giving them funding was not a use of force.

Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in

recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua ...

As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that ... the United States has committed a *prima facie* violation of that principle by its assistance to the *contras* in Nicaragua by “organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another state”, and “participating in acts of civil strife ... in another state”, in the terms of [the Declaration on Friendly Relations.] Participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to “involve a threat or use of force”. In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular,

the Court considers that the mere supply of funds to the *contras* ... does not in itself amount to a use of force.

The Court then asks whether the US's use of force was permissible as collective self-defense under Article 51 of the UN Charter. The Court notes that to make this determination, it must first decide whether Nicaragua committed a prior armed attack.

The Court must thus consider whether ... the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

The Court summarizes its factual finding regarding the flow of arms from Nicaragua to El Salvador. The Court concludes Nicaragua did not attack El Salvador because providing arms to rebels is not an armed attack. The Court then acknowledges that it lacks adequate information about "transborder incursions" from Nicaragua into Costa Rica and Honduras.

As regards El Salvador, the Court has found ... that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another state constitutes an armed attack on that state ...

Turning to Honduras and Costa Rica, the Court has also stated ... that certain transborder incursions into the territory of those two states ... were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of

these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an “armed attack” by Nicaragua on either or both states ...

However, the Court argues that Costa Rica, El Salvador, and Honduras did not act as though they had been victims of an armed attack. Additionally, the US did not report its activities to the UN Security Council, as required by Article 51 of the UN Charter. The Court argues that this omission suggests that the US wasn't actually engaging in collective self-defense.

The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim state, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim state wishes another state to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the state in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim state to the United States for help in the exercise of collective self-defence.

The Court has seen no evidence that the conduct of those states was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request ...

As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court; in neither of these is there mention of armed attack or collective self-defence ...

There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that state on the question of the existence of an armed attack.

At no time ... has the United States Government addressed to the Security Council ... the report which is required by Article 51 of the United Nations Charter in respect of measures which a state believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as [a] breach of ... customary international law ... But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter ...

Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack, and the date of its official request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The states concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua [were] the most accentuated; they did so behave only at a time when these facts fell furthest short of ... an armed attack ...

Finally, the Court argues that US actions violated the standards of necessity and proportionality.

Since the Court has found that the condition ... required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 ... cannot be said to correspond to a "necessity" justifying the United States' action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their

effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. Whether or not the assistance to the *contras* might meet the criterion of proportionality, the Court cannot regard the United States activities ... relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

In conclusion, the Court rejected the US argument that its use of force was justified as collective self-defence.

Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force.