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## THE *NICARAGUA* JUDGMENT AND THE USE OF FORCE – 30 YEARS LATER

### Abstract:

*In light of contemporary circumstances, on the 30th anniversary of the Nicaragua judgment it is worth revisiting and considering again certain legal problems decided by – and raised by – the ICJ judgment. This article addresses the importance of the judgment in terms of international legal regulations on the use of force. First and foremost, the article examines the concept of armed attack based on the “gravity” criterion elaborated by the Court and the exercise of the right of self-defence. Moreover, the relationship between customary international law and treaty law, as well as forcible counter-measures and military actions against non-State actors are also discussed in the article. It is argued that the “gravity” criterion used by the ICJ seems controversial and, consequently, may limit the right of self-defence. On the other hand, however, the judgment established a strong barrier to the realization of individual political interests by militarily powerful States. This is the Nicaragua judgment’s long-lasting legacy. In this sense the judgment has stood the test of time.*

**Keywords:** armed attack, counter-measures, customary international law, Nicaragua judgment, non-State actors, self-defence, UN Charter, use of force

### INTRODUCTION

On the 30th anniversary of the 1986 judgment of the International Court of Justice (ICJ or the Court) in the *Nicaragua* case,<sup>1</sup> it is useful and timely to revisit and reassess its impact on the use of force in international law. The important question is whether the ICJ’s approach has indeed stood the test of time *vis-à-vis* the changing landscape of contemporary international affairs. This article does not touch upon the jurisdictional

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<sup>1</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Rep 1986, p. 14 (*Nicaragua*).

issues resolved in the 1984 judgment of the Court, although it is worth noting here the opposing opinions offered with respect to the judgement. For instance, James Crawford stated that he could not agree with most of the Court's findings on jurisdiction in the *Nicaragua* case,<sup>2</sup> whereas Alain Pellet found that the Court had demonstrated that "sometimes David can triumph over Goliath."<sup>3</sup>

It goes without saying that the *Nicaragua* judgment has been of great significance for international law as a legal system. Both its dictum and its legal justification have been the subject of much controversy among scholars as well as judges themselves, as reflected by the fact that there were three dissenting opinions (Judges Jennings, Oda, Schwebel) and seven separate opinions (Judges Nagendra Singh, Lachs, Ruda, Elias, Ago, Sette-Cama, Ni) filed in the case.

This article discusses the following problems: First, the relationship between customary international law and the United Nations Charter (the UN Charter); second, the concept of an "armed attack"; and third, the exercise of the right of self-defence, in particular its legal conditions and its relationship to forcible counter-measures. While special attention is devoted to these issues in the paper, the use of force against non-State actors as entities allegedly responsible for armed attacks, under the umbrella of right of self-defence, is also examined in the last section of the article.

## 1. CUSTOMARY INTERNATIONAL LAW, TREATY LAW, AND THE LAW ON USE OF FORCE

While this article places emphasis on *jus ad bellum*, one essential issue relating to international law as a whole must be mentioned at the outset; namely the relationship between treaty law and customary international law. The ICJ presented customary law as a background for treaties. The question of the material identity between them did not seem to be decisive for the Court. According to the Court, customary and treaty rules do not need to have the same content and they retain a separate existence. As the ICJ clearly underlined:

There a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if two States in question are bound by these rules both on the level of treaty law and that of customary international law, these norms retain a separate existence. (...) It will therefore be clear that customary international law continues to exist and apply, separately from treaty law, even when the two categories of law have an identical content.<sup>4</sup>

<sup>2</sup> J.R. Crawford, *Jurisdiction and Applicable Law*, 25(2) Leiden Journal of International Law 471 (2012).

<sup>3</sup> A. Pellet, *The Nicaragua Case: 'Mafiosi's' and 'Veterani's' Approaches Combined*, 25(2) Leiden Journal of International Law 484 (2012).

<sup>4</sup> ICJ, *Nicaragua*, pp. 95, 96, para. 178, 179. See also *ibidem*, pp. 93-95, para. 175-178 and ICJ, *Nicaragua, Jurisdiction and Admissibility* (1984), p. 424, para. 73.

The existence of identical rules in treaty law and customary law had been clearly recognized by the Court in the *North Sea Continental Shelf* case.<sup>5</sup> In that decision, as well as in the *Nicaragua* judgment, the ICJ found no basis for holding that rules of customary law needed to be substituted for the applicable rules of treaty law, so that the customary international law had no further autonomous existence of its own in the given situation.<sup>6</sup>

This key issue regarding the relationship between treaty law and customary international law in the *Nicaragua* decision occurred in relation to the use of force. The ICJ considered the relationship between the UN Charter and customary law and underlined the absence of a substantial identity between the two sources as regards *jus ad bellum*.<sup>7</sup> In particular, Article 51 of the UN Charter itself does not encompass all the legal issues regarding the exercise by a State of its “inherent right” to self-defence. According to the ICJ, it is customary international law which primarily does that, and its rules do not have the same content as the UN Charter.<sup>8</sup> The prohibition of the use of force itself – continued the Court – is a part of customary international law confirmed in Article 2(4) of the UN Charter. In this article, the prohibition is recognised not only as a “principle of customary international law but also a fundamental or cardinal principle of such law.”<sup>9</sup> Therefore, to put it briefly, the UN Charter and customary international law should be seen as mutually supplementing each other as far as the use of force is concerned.<sup>10</sup>

The ICJ confirmed its standpoint on the relationship between customary and treaty law in the *Oil Platforms* judgment.<sup>11</sup> In addition the *Institut de droit international* took a similar position in its Resolution on the use of armed force of 27 October 2007.<sup>12</sup>

<sup>5</sup> ICJ, *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Rep 1969, p. 3, 39, para. 63.

<sup>6</sup> ICJ, *Nicaragua*, p. 95, para. 177.

<sup>7</sup> *Ibidem*.

<sup>8</sup> It should be noted that the ICJ also underlined: “This could also be demonstrated for other subjects, in particular for the principle of non-intervention” (*ibidem*, p. 94, para. 176).

<sup>9</sup> *Ibidem*, p. 100, para. 190. In *Armed Activities* the ICJ declared that “the prohibition against the use of force is a cornerstone of the United Nations Charter”, but it did not express its opinion about the peremptory character of this prohibition (ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), ICJ Rep 2005, p. 168, 223, para. 148).

<sup>10</sup> For a thorough discussion of this subject, see A. Constantinou, *The Right to Self-Defence under Customary International Law and Article 51 of the UN Charter*, Bruylant, Bruxelles: 2000, *passim*. The ICJ’s view is strongly supported in the Polish scholarship by M. Kowalski, *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego* [The right to self-defence as a means of countering international terrorism], Difin, Warszawa: 2013, pp. 69-76; M. Kowalski, *Ius ad bellum a systemowy charakter prawa międzynarodowego* [Jus ad bellum and the systemic nature of international law], in: R. Kwiecień (ed.), *Państwo a prawo międzynarodowe jako system prawa* [The state and international law as a system of law], Wydawnictwo UMCS, Lublin: 2015, pp. 195-197. In this paper Kowalski also recognizes the right to self-defence as a general principle of law (p. 197). See also M. Kowalski in this volume.

<sup>11</sup> ICJ, *Oil Platforms* (Islamic Republic of Iran v. United States of America), Merits, Judgment, 6 November 2003, ICJ Rep 2003, pp. 161, 186-187, para. 51.

<sup>12</sup> Institut de droit international, Session de Santiago – 2007, *Present Problems of the Use of Armed Force. Self-defence*, available at: [http://www.idi-iil.org/idiE/resolutionsE/2007\\_san\\_02\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2007_san_02_en.pdf) (accessed 30 May 2017).

Paragraph 1 of the Resolution states: “Article 51 of the United Nations Charter, as supplemented by customary international law, adequately governs the exercise of the right of individual and collective self-defence.” However, the evolutionary and flexible nature of customary law needs to be borne in mind, i.e. its susceptibility to changes as a result of a general practice which is accompanied by *opinio iuris*. For this reason, according to Yoram Dinstein “it seems logical to believe that an eventual dissonance between Article 2(4) [of the UN Charter – R.K.] and customary international law can be anticipated.”<sup>13</sup>

## 2. THE CONCEPT OF ARMED ATTACK AND THE ‘GRAVITY’ CRITERION REVISITED

In Article 51 of the UN Charter, the concept of “armed attack” is at the heart of the use of force in self-defence. Therefore, the exercise of the right of self-defence and the understanding of armed attack play an essential role in the *Nicaragua* judgment. This “inherent right” of States has been established in both the UN Charter and in customary international law,<sup>14</sup> which is one of the reasons for the controversies surrounding the judgment, both among States themselves and among scholars. The *Nicaragua* dictum has particularly enhanced the amount of scholarly criticism of the ICJ’s position on the concept of armed attack, both for its claims and omissions. Thus it is no coincidence that another article on the *Nicaragua* judgment published in this volume, by Michał Kowalski, concerns the concept of armed attack.

There are three aspects of the concept of armed attack in the *Nicaragua* judgment, namely: the temporal aspect – *when* does an armed attack take place?; the *rationae personae* aspect – *from whom* does an attack emanate?; and the *rationae materiae* aspect – *what constitutes* an armed attack?<sup>15</sup> The ICJ opined that the right of self-defence, as recognised in Article 51 of the UN Charter, required an armed attack by another State, and based its position with reference to the *rationae materiae* aspect of an armed attack

<sup>13</sup> Y. Dinstein, *War, Aggression and Self-Defence* (3<sup>rd</sup> ed.), Cambridge University Press, Cambridge: 2001, p. 91.

<sup>14</sup> ICJ, *Nicaragua*, pp. 102-104, para. 193-195, esp. p. 103, para. 194, where the ICJ stated: “[T]he existence of the right of collective self-defence is established in customary international law...”. There are, however, doubts whether the right of collective self-defence, unlike the right of individual self-defence, had existed before the UN Charter entered into force. At the time of the proceedings in the *Nicaragua* case this was just historical issue. Nonetheless it was the reason underlying some critical comments by some judges. Judge Oda, in his dissenting opinion, remarked that “the term ‘collective self-defence’, unknown before 1945, was not found in the Dumbarton Oaks proposals”, and at the same time he observed that “there was certainly no discussion whether the right of collective self-defence was inherent or not.” (ICJ, *Nicaragua*, *Dissenting Opinion of Judge Oda*, pp. 253, 256, paras. 91, 94).

<sup>15</sup> A.A. Yusuf, *The Notion of ‘Armed Attack’ in the Nicaragua Judgment and Its Influence on Subsequent Case Law*, 25(2) *Leiden Journal of International Law* 461 (2012), p. 462. Judge Yusuf limits his remarks to the *rationae materiae* aspect of the concept.

on the “gravity” criterion. In a well-known part of the judgment the Court stated: “[i]t will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”<sup>16</sup> Thus in the view of the Court, under international law – both customary and that of the United Nations system – States do not have the right of an armed response to acts which do not constitute an armed attack.<sup>17</sup> It is also worth recalling that according to the Court acts directly or indirectly involving the use of force may constitute a breach of the customary principle of non-intervention.<sup>18</sup> Nonetheless, they cannot as such be equated with an armed attack. Therefore, as the ICJ underlined, the support given to armed bands could not be equated with an armed attack. It may constitute a breach of the principle of the non-use of force, but such support is of a lesser gravity than an armed attack.<sup>19</sup> The Court denied that under customary international law the provision of arms to the opposition in another State constituted an armed attack on that State.<sup>20</sup> At the same time, the Court underlined that the United States could not justify an intervention involving the use of force against a third State in response to an action which did not amount to an armed attack.<sup>21</sup>

The “threshold” criterion established by the ICJ is recognised by some scholars as not unreasonable in and of itself. They posit that the ICJ’s aim was not to define an armed attack *per se*, but rather to characterise those acts of force that may justify the exercise of the right to collective self-defence.<sup>22</sup> There is, however, a wide range of scholarly views on the relationship between an armed attack and the use of force under Article 2(4) of the UN Charter, including acts of aggression. One should keep in mind the essential legal controversies surrounding the use of force. The fiercest controversy concerns the *rationae materiae* characterisation of an aggression and an armed attack adopted by the Court. On one hand, there is the view that it does not recognise the concept of armed attack as tantamount to the concept of aggression,<sup>23</sup> but on the other hand one can find a well-established opposite view.<sup>24</sup> At the same time, there are differences of opinion on the relationship between an armed attack and aggression and the prohibition of threat or use of force against the territorial integrity or political independence of any State,

<sup>16</sup> ICJ, *Nicaragua*, p. 101, para. 191. For criticism, see M. Kowalski in this volume, who recognises the ICJ’s view in this respect as “taken *ex cathedra*”.

<sup>17</sup> ICJ, *Nicaragua*, p. 110, para. 211.

<sup>18</sup> *Ibidem*, pp. 109-110, para. 209. Thus they constitute violations of the “principle of State sovereignty”, which for the Court is closely linked with the prohibition of the use of force and of non-intervention (p. 111, para. 212). In consequence, the ICJ stated that the United States violated Nicaragua’s sovereignty.

<sup>19</sup> *Ibidem*, p. 127, para. 247.

<sup>20</sup> *Ibidem*, p. 119, para. 230.

<sup>21</sup> *Ibidem*, p. 127, 134, paras. 249, 269.

<sup>22</sup> Yusuf, *supra* note 15, pp. 465-466; Ch. Gray, *International Law and the Use of Force* (2<sup>nd</sup> ed.), Oxford University Press, Oxford: 2004, pp. 141-158.

<sup>23</sup> E.g. C. Mik, *Agresja* [Aggression], in: D. Pyć, J. Symonides (eds.), *Wielka encyklopedia prawa* [Large encyclopedia of law], vol. IV: *Prawo międzynarodowe publiczne* [Public international law], Fundacja Ubi societas, ibi ius, Warszawa: 2014, p. 22.

<sup>24</sup> E.g. Y. Dinstein, *Aggression*, in: R. Wolfrum *et al.* (eds.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Heidelberg-Oxford: 2013, para. 33.

as enshrined in Article 2(4) of the UN Charter. Thus, either an “armed attack” and/or “aggression” are qualified as *indications* of a violation of the prohibition of the threat or use of force, a view which is supported by the ICJ’s “gravity” criterion; or every act of infringement of the prohibition set forth in Article 2(4) of the UN Charter amounts to an armed attack/aggression.<sup>25</sup> In the former case, only when the “gravity” criterion is met is the victim State entitled to claim the right of self-defence, whereas in the latter case every unlawful act of force triggers this right,<sup>26</sup> although the very threat of the use of force cannot in the latter case be treated as an armed attack triggering the “inherent” right to self-defence.<sup>27</sup> The ICJ refrained from elaborating in its opinion with respect to the lawfulness of a response to an imminent threat of armed attack, stating that “the Court expresses no view on that issue.”<sup>28</sup> This is quite symptomatic omission, and indeed the issue remains very complex.

The view equating an armed attack and an aggression with Article 2(4) of the UN Charter seems to be better justified than the opposite view based on the “gravity” criterion, supported by the ICJ. The former denies a gradation of violations of the prohibition under Article 2(4). Significant arguments in favour of this approach follow from Resolution 3314(XXIX) of the UN General Assembly on Definition of Aggression.<sup>29</sup> Article 1 of the Annex to Resolution 3314 defines an aggression as “the use of 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, as set out in this Definition.” Accordingly, there are no grounds for recognising an armed attack as a special form of an aggression, or an aggression as a special form of the unlawful use of force. This is also confirmed by Article 3 of the Annex and Article 8-bis (1-2) of the Rome Statute of the International Criminal Court of 17 July 1998. Viewed from such a perspective, a peremptory character can be attributed not only to the prohibition of armed attack/aggression, but also to the prohibition contained in Article 2(4) of the UN Charter.

<sup>25</sup> For more on those views generally, see Dinstein, *supra* note 13, pp. 165-183; Gray, *supra* note 22, pp. 108-120; M. Kowalski, *Napaść zbrojna w prawie międzynarodowym – w poszukiwaniu współczesnej definicji* [Armed attack in international law – a quest for a contemporary definition], 3 *Studia Prawnicze* 59 (2008); M. Kowalski, *Armed Attack, Non-state Actors and a Quest for the Attribution Standard*, 30 *Polish Yearbook of International Law* 101 (2010); Kowalski, *supra* note 10, pp. 76-83. Prior to the *Nicaragua* judgment the “gravity” criterion was supported by, e.g., K. Skubiszewski, *The Use of force by States. Collective Security. Law of War and Neutrality*, in: M. Sørensen (ed.), *Manuel of Public International Law*, Palgrave Macmillan, London: 1968, p. 777. See M. Kowalski, *The Use of Force: Contemporary Challenges in Light of Professor Skubiszewski’s Legacy*, 18 *International Community Law Review* 109 (2016), pp. 120-128.

<sup>26</sup> Cf. ICJ, *Separate Opinion of Judge Simma, Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Rep 2003, pp. 331-333, paras. 12-14.

<sup>27</sup> Dinstein, *supra* note 24, para. 16.

<sup>28</sup> ICJ, *Nicaragua*, p. 103, para. 194. However, in its advisory opinion in *Nuclear Weapons* the ICJ underlined that: “The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4 of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal” (ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, pp. 226, 246, para. 47).

<sup>29</sup> UN GA A/Res/3314 (XXIX), 29th Sess., Supp. No. 31 (1974).

However, some authors present a quite different stance and challenge the equation of an armed attack and an aggression, and consequently, they are against the equating an armed attack with every illegal act of the use of force under Article 2(4) of the UN Charter.<sup>30</sup> In this respect they therefore support the *Nicaragua* judgment. The ICJ itself referred to the definition of aggression embodied in the Resolution 3314(XXIX) as reflecting customary international law and equated an armed attack with an aggression.<sup>31</sup> However, as has been mentioned, it refused to acknowledge “less grave forms” of the use of force as an armed attack<sup>32</sup> and clearly confirmed this stance in its *Oil Platforms* judgment.<sup>33</sup> The Eritrea-Ethiopia Claims Commission, in its *Partial Award* of 19 December 2005,<sup>34</sup> and the Institut de droit international in its above-mentioned Resolution on the use of armed force of 2007, reiterated the Court’s stance. Paragraph 5 of the Resolution reads:

An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity, the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.

Some of the problems surrounding this approach will be discussed further in this article.

### 3. THE RIGHT OF SELF-DEFENCE AND THE CONDITIONS OF ITS EXERCISE, INCLUDING FRONTIER INCIDENTS AND FORCIBLE COUNTER-MEASURES

The interdependent concepts of self-defence and an armed attack to a large degree create a self-regulating system. This is why the dictum of the *Nicaragua* judgment remains so important. But one has to keep in mind that the Court referred to the use

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<sup>30</sup> E.g. A. Randelzhofer, *Article 51*, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2<sup>nd</sup> ed.), Berlin: 2002, pp. 795-796; G. Nolte, A. Randelzhofer, *Article 51*, in: B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (3<sup>rd</sup> ed.), vol. II., Oxford University Press, Oxford: 2012, pp. 1401-1403; Mik, *supra* note 23, p. 22.

<sup>31</sup> ICJ, *Nicaragua*, pp. 103-104, para. 195.

<sup>32</sup> Here it is worthwhile to recall once again the following well-known sentence from the judgment: “[I]t will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”. This standpoint was justified by the ICJ by, *inter alia*, the Declaration of the principles of international law of 1970 (UN GA A/Res/2625 (XXV)) (ICJ, *Nicaragua*, p. 101, para. 191). At the end of its judgment the ICJ once again underlined that the illegal use of force could be marked by “lesser gravity than an armed attack” (*Ibidem*, pp. 126-127, para. 247).

<sup>33</sup> ICJ, *Oil Platforms*, pp. 186-187, para. 51, where the ICJ repeated the quoted above sentence from the *Nicaragua* judgment.

<sup>34</sup> Eritrea Ethiopia Claims Commission, *Partial Award, Jus ad Bellum, Ethiopia’s Claims 1-8*, 19 December 2005, para. 11, available at: <https://pcacases.com/web/sendAttach/763> (accessed 30 May 2017). Judge Yusuf who found the ICJ’s stance with reference to armed attack “not, in itself, unreasonable” nevertheless criticized the Eritrea-Ethiopia Commission for its approach. He stated that the “threshold” of an armed attack outlined by the Commission “might be considered too high” (Yusuf, *supra* note 15, p. 470).

of force in the *Nicaragua* decision in the broader context than that of self-defence only, since the ICJ also spoke of the forcible counter-measures and frontier incidents. As “measures short of war”, they often occur in international practice, including the frontier incidents which the Court called “incursions”. They touch the concept of an armed attack and form the “iron triangle”, so to speak, of contemporary *jus ad bellum*: armed attack, forcible counter-measures, and self-defence.

The ICJ deliberated whether “measures which do not constitute an armed attack but may nevertheless involve a use of force”<sup>35</sup> could be forcibly repelled by a target State and a third State acting within collective self-defence. In the Court’s view, States do not have a right of collective armed response to acts which do not constitute an armed attack.<sup>36</sup> In other words, the wrongful act which gives rise to a lawful forcible collective response has to constitute an armed attack. But what about the right of individual self-defence? This “inherent right” cannot have a punitive character, nor be reprisals or counter-measures. The right of self-defence is aimed at halting and repelling an armed attack. Forcible counter-measures are recognised as unlawful in the Declaration on Principles of International Law of 1970, UN Security Council resolutions, and subsequent decisions of the ICJ.<sup>37</sup> The difference between the exercise of the right of self-defence and forcible counter-measures is flexible in practice, and thus it may be difficult to distinguish between them. Frontier incidents depict this very clearly. In the *Nicaragua* decision the ICJ objected to treating each cross-border incursion in isolation as an armed attack. However, when speaking of trans-border incursions into Honduras and Costa Rica it seemed to accept the possibility of an accumulation of events amounting to an armed attack. The absence of their clear characterisation was justified as follows:

Very little information is 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.<sup>38</sup>

Although the support of armed bands may constitute a breach of the principle of non-use of force and non-intervention, it cannot be equated, according to the Court, with an armed attack. It has a “lesser gravity” than an armed attack.<sup>39</sup> Thus the Court

<sup>35</sup> ICJ, *Nicaragua*, p. 110, para. 210.

<sup>36</sup> *Ibidem*, para. 211. But in para. 249 (p. 127) the Court left an “open gate” when it stated that the wrongful forcible acts “could only have justified proportionate counter-measures”. However, they could not be used to justify counter-measures taken by a third State, which is why the Court recognised the US activities against Nicaragua as unlawful.

<sup>37</sup> See Gray, *supra* note 22, pp. 121-125.

<sup>38</sup> ICJ, *Nicaragua*, pp. 119-120, para. 231. In ICJ, *Oil Platforms*, pp. 186-187, para. 51 and in *The Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Rep 2002, p. 303, para. 323, the ICJ seemed to acknowledge an “accumulation of events” as an “armed attack”, but it did not develop then issue of an appropriate forcible response within the right of self-defence with respect to frontier incidents.

<sup>39</sup> ICJ, *Nicaragua*, p. 127, para. 247.

distinguished, based on its “gravity” criterion, between an armed attack and a mere frontier incident. Yoram Dinstein labels the question of frontier incidents as “particularly bothersome”.<sup>40</sup> Indeed, there is no reason in practice, based on the law, to remove small-scale incidents of the use of force from the spectrum of armed attacks. Other eminent scholars have supported this reasoning. Joseph L. Kunz wrote: “If ‘armed attack’ means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident.”<sup>41</sup> To which Gerard Fitzmaurice stated, in a rather ironical way, that: “[T]here are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave.”<sup>42</sup> Indeed, as far as the *material aspect* of armed attack is concerned, the concept elaborated by the ICJ based on the “gravity” criterion may undermine the right of self-defence. Moreover, “strictly necessary policy measures to repel the attack”, which were referred to in the Resolution of the *Institut de droit international*, do not need to be effective enough in a given case. One should remember that every act of use of force is assessed under the legal conditions of necessity and *proportionality*. This also concerns small-scale armed acts. Likewise, forcible responses to wrongful forcible acts are adjudged lawful or unlawful based on these conditions. Otherwise, i.e. in the event the right to forcibly respond to them within the concept of self-defence is denied, a targeted State can turn out to be the real victim State.

However, the legal justification for actions of target States is not obvious. Taking into account the fundamental significance of peace and the alleged preemptory character of the prohibition of threat or use of force, one can argue that acts of armed attacks impose negative obligations on all States, i.e. the prohibition against supporting the aggressor or recognising the territorial acquisitions gained as a result of an armed attack. But does an act of armed attack create *positive* obligations, in particular, a right to *actio popularis*? After all, maintaining international peace and security is the obligation of the ‘international community as a whole’ and embodies a genuine community interest. As far as collective self-defence is concerned, it is worth referring once again to Yoram Dinstein’s opinion. According to him:

an armed attack is like an infectious disease in the body politic of the family of nations. Every State has a demonstrable self-interest in the maintenance of international peace and security, for once the disease starts to spread there is no telling if and where it will stop. (...) As long as the system of collective security within the UN Organization is ineffective (...), collective self-defence constitutes the sole insurance policy against an armed attack.<sup>43</sup>

Nevertheless, the ICJ in the *Nicaragua* judgment established strict conditions on the exercise of the right of collective self-defence. Thus, one has to return *volens volens* to the concept of armed attack.

<sup>40</sup> Dinstein, *supra* note 13, p. 175.

<sup>41</sup> J.L. Kunz, *Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations*, 41 American Journal of International Law 872 (1947), p. 878.

<sup>42</sup> G.G. Fitzmaurice, *The Definition of Aggression*, 1 International & Comparative Law Quarterly 137 (1952), p. 139.

<sup>43</sup> Dinstein, *supra* note 13, p. 225.

The rights to self-defence of El-Salvador, Costa Rica and Honduras were invoked by the United States as a justification for its own actions against Nicaragua. The ICJ confirmed that, in customary international law, the prohibition of armed attacks might apply to the sending by a State of armed bands into the territory of another State, if such an operation, because of its scale and effects, could be classified as an armed attack rather than as a mere frontier incident. But at the same time, the Court denied that the concept of armed attack also included assistance to rebels in the form of the “provision of weapons or logistical or other support”, although such actions might be regarded as a “threat or use of force, or amount to intervention in the internal or external affairs of other States.”<sup>44</sup> Therefore, according to the Court, not every act of the use of force amounts to an armed attack and justifies the exercise of the right of self-defence, including collective self-defence. Moreover, in the same paragraph the ICJ strongly underlined the crucial conditions for the exercise of collective self-defence:

[i]t 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.<sup>45</sup>

Another condition indicated by the Court to the exercise of collective self-defence is a request by the State which regards itself as the victim of an armed attack. The Court found that in customary international law there was no rule permitting the exercise of collective self-defence in the absence of such request on the part of the targeted state. It is an additional requirement to the requirement that the targeted State should have declared itself to have been attacked.<sup>46</sup> The ICJ noted that neither El Salvador, Costa Rica nor Honduras declared themselves as the victims of an armed attack by Nicaragua during the relevant time. None of these States had requested military assistance within collective self-defence prior to the United States’ forcible intervention against Nicaragua. For these reasons the conditions required for the exercise of the right of collective self-defence by the United States were not fulfilled in the *Nicaragua* case.<sup>47</sup> What’s more, the ICJ underlined that “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.”<sup>48</sup> According to the Hague Court, contrary to what the US claimed, there was neither an alleged armed attack nor an alleged right to collective self-defence. Both must be rooted in a direct and clear declaration of a targeted

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<sup>44</sup> ICJ, *Nicaragua*, pp. 103-104, para. 195.

<sup>45</sup> *Ibidem*, p. 104, para. 195.

<sup>46</sup> *Ibidem*, p. 105, para. 199. This position has been supported by the Institut de droit international in its resolution of 2007 on the use of force. Paragraph 8 of the resolution states: “Collective self-defence may be exercised only at the request of the target State”.

<sup>47</sup> ICJ, *Nicaragua*, pp. 120-122, paras. 232-236.

<sup>48</sup> *Ibidem*, p. 122, para. 237.

State. One may note that such a stance on the part of the Court restricts to some extent the freedom of action in exercise of the right of collective self-defence by a non-target State within *actio popularis*. It may be supposed that for this reason Judge Jennings, in his Dissenting Opinion, as well as some scholars criticised the Court's requirements of a declaration and a request by the victim State.<sup>49</sup> Consequently, opinions have been expressed that the *Nicaragua* judgment may undermine the right of self-defence,<sup>50</sup> and even that it constitutes a limitation on the right to collective self-defence.<sup>51</sup>

An alternative explanation of the ICJ's position has also been presented. Christine Gray argues that the Court in the end took a more relaxed approach toward the requirement of a declaration and a request than in its earlier discussion of the applicable law. She states:

In fact it is clear that the Court did not *require* a declaration and a request. Nor did it intend the declaration and request to be *decisive* as to legality. (...) The Court thus apparently took the absence of a declaration, a request for assistance (and of a report to the Security Council) simply as *confirmation* that there had been no armed attack.<sup>52</sup>

This view seems to be justified to the extent it underlines the existence of an objective factor, i.e. an act of armed attack. But one should bear in mind that a declaration and an express request for assistance by the target State are not of secondary importance, because they themselves seem to form an essential part of the concept of armed attack. In this sense their absence prohibits a third State from exercising of the right of collective self-defence. Moreover, a report to the Security Council is necessary, as provided in Article 51.<sup>53</sup> In this light the legal framework of the right of self-defence, following from both customary international law and the UN Charter, establishes a barrier to the realisation of political interests by forcible measures, which had been underlined by the Court in the *Corfu Channel* case. It is worth recalling the ICJ's assessment in that judgment:

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

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<sup>49</sup> In his Dissenting Opinion Judge Jennings doubted whether the requirement of declaration and request was realistic in all instances (ICJ, *Nicaragua, Dissenting Opinion of Judge Jennings*, pp. 544-545. Cf. also D.W. Bowett, *Self-Defence in International Law*, Manchester University Press, Manchester: 1958, p. 216; B. Simma in: B. Simma (ed.), *supra* note 30, p. 803.

<sup>50</sup> E.g. R. Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford: 1994, p. 250.

<sup>51</sup> Dinstein, *supra* note 13, pp. 238-239; R.St.J. MacDonald, *The Nicaragua Case: New Answers to Old Questions?*, 24 *Canadian Yearbook of International Law* 127 (1986), p. 150.

<sup>52</sup> Gray, *supra* note 22, p. 153.

<sup>53</sup> This was strongly underlined in the Partial Award by the Eritrea Ethiopia Claims Commission (Eritrea Ethiopia Claims Commission, Partial Award, *Jus ad Bellum, Ethiopia's Claims 1-8*, para. 11).

powerful States, and might easily lead to perverting the administration of international justice itself.<sup>54</sup>

Taking into account these remarks, one may offer the following interpretation of this aspect of the *Nicaragua* judgment: the absence of a declaration and a request of the target State prove that there was no act of armed attack, since the declaration and request are not so much a confirmation of an armed attack as an essential element thereof. It is these factors – supplemented by a report to the Security Council, as the institution vested by the UN Charter with a virtually unlimited discretion to determine in what exact circumstances “any threat to the peace, breach of the peace, or act of aggression” has occurred<sup>55</sup> – that are the criteria to be used in assessing the lawfulness of actions taken in collective self-defence. Paradoxically enough, despite the well-known highly politicised nature of the decision-making process in the Security Council, which is responsible for a number of the reprehensible abandonments, the Security Council nevertheless seems to be the institution deemed to ensure the objectiveness of the “administration of justice” in the field of the use of force, including the right to collective self-defence.

The exercise of the right of collective self-defence should be distinguished from so-called “intervention by invitation”. Both actions involve different goals in practice. The former seeks to stop an armed attack, and the latter is aimed at supporting an internationally recognised government of a State which is under the threat of or subject to the use of external military force. However, the difference between them is not always clear, since States quite often invoke in practice a broad “margin of appreciation” in this respect, which can put the lawfulness of the use of force into question. For instance, the USSR did not invoke the right of self-defence during its intervention in Hungary in 1956, but did so in Czechoslovakia in 1968 and in Afghanistan in 1979.<sup>56</sup> Interesting enough, the ICJ in the *Nicaragua* decision did not comment widely on the relationship between the United States and Costa Rica, Honduras and Salvador, which could have been quite interesting in this context. The judgement did not question, however, the exercise of the right of collective self-defence on the territory of a non-target State. What’s more, it seems to justify the exercise of this right on the territory of the alleged aggressor, i.e. Nicaragua, in the case at hand. Earlier as well as subsequent practice have

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<sup>54</sup> ICJ, *Corfu Channel*, Merits, ICJ Rep 1949, pp. 4, 35.

<sup>55</sup> Dinstein, *supra* note 24, para. 11.

<sup>56</sup> It would be hard to indicate a State that had committed acts of an armed attack against either Czechoslovakia or Afghanistan. Another reason for questioning the lawfulness of Soviet actions against those States was the political dependence of the Czechoslovak and Afghan governments on the USSR. See L. Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 British Yearbook of International Law 189 (1985). She also maintained that State practice since the 1950s had limited the legal power to issue such an invitation to the case of a counter-intervention (pp. 242-252). Today this view seems to be shared by e.g. C. Kreß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force*, 1 Journal of the Use of Force and International Law 11 (2014), pp. 17-18.

confirmed this standpoint, which was proved by, e.g. the military action within the collective self-defence against Afghanistan of 2001, and it seems to be well-established also today.

Based on the *Caroline* incident and *Webster's* formulation there are three conditions of legality of actions within the right self-defence: necessity, proportionality, and immediacy. They have been regarded as the “hard core” of the exercise of self-defence, and have been called “canons” by the Court. The last one in practice is absorbed the first two, i.e. necessity and proportionality. Necessity itself is recognised as a primary condition of the legality of self-defence, but that does not mean it is of secondary importance to proportionality. They function together as a self-regulating system. Under the necessity condition the defending State is obligated to verify that a reasonable settlement of the conflict via non-forcible means is non-attainable,<sup>57</sup> that is, that self-defence is the *ultima ratio*, whereas the proportionality condition means that the (planned) actions must be proportionate to their aims and, consequently, not extend beyond the legitimate aims.<sup>58</sup> In other words, the proportionality condition points toward a symmetry or an approximation, in terms of scale and effects, of a forcible response. In the *Nicaragua* judgment the importance of the proportionality condition is obvious throughout the entire area of the use of force. The Court underlined that every intervention involving the use of force could be only legally justified if it met the proportionality condition.<sup>59</sup> Nonetheless there is some confusion over the meaning of the term in this context. Two competing tests of proportionality are mentioned in the legal scholarship, namely, the “tit for tat” and the “means-end” tests.<sup>60</sup> In any case both conditions – necessity and proportionality – should be investigated together and *ad casum*.

Necessity is discussed by scholars both together with proportionality<sup>61</sup> and separately.<sup>62</sup> It is mainly the principle of necessity that excludes the illegality of actions in self-defence and, at the same time, imposes international legal responsibility on States. Article 21 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts states: “[t]he wrongfulness of an act of a State is precluded if the act constitutes

<sup>57</sup> Cf. Dinstein, *supra*, note 13, p. 208.

<sup>58</sup> Cf. S. Etezazian, *The Nature of the Self-defence Proportionality Requirement*, 3(2) *Journal of the Use of Force and International Law* 260 (2016).

<sup>59</sup> ICJ, *Nicaragua*, p. 127, para. 249.

<sup>60</sup> See D. Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24(1) *European Journal of International Law* 235 (2013); G. Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24(1) *European Journal of International Law* 283 (2013); T. Christodoulidou, K. Chainoglou, *The Principle of Proportionality from a Jus Ad Bellum Perspective* in: M. Weller (ed.), *The Use of Force in International Law*, Oxford University Press, Oxford: 2014, pp. 1187, 1192-1195.

<sup>61</sup> E.g., Gray, *supra* note 22, pp. 120-126.

<sup>62</sup> E.g. O. Corten, *Necessity*, in: M. Weller (ed.), *supra* note 60, p. 861; Dinstein, *supra* note 13, pp. 207-208; J. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, Cambridge: 2004, *passim*, esp. pp. 4-18, 148-185; Kowalski, *supra* note 10, pp. 93-103; J. Kranz, *Wojna, pokój czy uspokajanie? Współczesne dylematy użycia siły zbrojnej* [War, peace, or appeasement? Contemporary controversies on the use of force], Centrum Stosunków Międzynarodowych, Warszawa: 2006, pp. 82-87.

a lawful measure of self-defence taken in conformity with the Charter of the United Nations.”<sup>63</sup> The comments on this rule directly combine a legally justified self-defence with necessity and proportionality.<sup>64</sup> This shows the dual-dimensionality of the right of self-defence. As a primary rule, the right of self-defence justifies a given use of force, while as a secondary rule it precludes its illegality and violations of Articles 2(4) and 51 of the UN Charter. This is exactly the dimension where the conditions of necessity and proportionality fulfil a crucial role. In the *Nicaragua* case the ICJ decided that the violations committed by the United States could not be justified by collective self-defence because, as the Court recognized, “the necessary circumstances are lacking.”<sup>65</sup> It added that the principle that “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond it” was “a rule well established in customary international law.”<sup>66</sup> This was even more distinctly underlined by the Court in its advisory opinion on *Nuclear Weapons*<sup>67</sup> and in the *Oil Platforms* judgment.<sup>68</sup>

#### 4. NON-STATE ACTORS AND THE RIGHT OF SELF-DEFENCE: A BRIEF SKETCH

The last issue discussed in this article directly concerns the *rationae personae* aspect of an armed attack, namely, whether an act of armed attack can only be attributed to States. In the *Nicaragua* decision the ICJ did not consider this problem broadly enough. It was inclined to attribute the armed activities in El Salvador, Honduras, Costa Rica and Nicaragua only to Nicaragua and the United States, respectively.<sup>69</sup> Nonetheless, the problem has special significance for the right of self-defence in the current state of international affairs. In the UN General Assembly Definition of Aggression, an armed attack/aggression has been situated within inter-State relations. It follows that the exercise of the right of self-defence implies the attribution of armed attacks committed

<sup>63</sup> UN Doc. A/Res/56/83.

<sup>64</sup> E.g., J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, p. 167; J.-M. Thouvenin, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence*, in: J. Crawford, A. Pellett, S. Ollenson (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford: 2010, pp. 462-463.

<sup>65</sup> ICJ, *Nicaragua*, p. 128, para. 252.

<sup>66</sup> *Ibidem*, p. 94, para. 176.

<sup>67</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Rep 1996 (I), p. 226, 245, para. 41. There the ICJ stated: “The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law”.

<sup>68</sup> ICJ, *Oil Platforms*, pp. 198-199, para. 76-77, where the ICJ underlined that these conditions for the exercise of the right of self-defence in international law were well settled. In its judgment the ICJ was unable to find, due to the non-fulfilment of these conditions, that the attacks made on the oil platforms by the US could have been justified as acts of self-defence.

<sup>69</sup> ICJ, *Nicaragua*, p. 128, para. 252.

by non-State actors, *e.g.* terrorist organizations, to a State.<sup>70</sup> However, this view seems to be hard to justify in contemporary reality, both under international practice and in the *opinio juris* of many States. Hence an opposite approach is reasonable enough to be supported, *i.e.* one which condones the exercise of individual and collective self-defence by States against non-State actors.<sup>71</sup> Security Council resolution 2249 of 20 November 2015 should be mentioned in this context.<sup>72</sup> In paragraph 5 it calls upon Member States that “have the capacity to do so to take all necessary measures, in compliance with international law” to “eradicate the safe haven” established over significant parts of Iraq and Syria by ISIL (Da’esh). These acts of force seem to be justified by the right of collective self-defence of Iraq.<sup>73</sup> Last but not least, Article 51 of the Charter itself is worth evoking in this context. It speaks only of an armed attack against a State, but does not refer to the perpetrators committing it, *i.e.* *from whom* such an attack emanates.<sup>74</sup> Owing to new tendencies with respect to the use of force, this open formula of Article 51 is turning out to be its virtue, thus, making it possible to treat the Charter as a “living instrument”.

## FINAL REMARKS

It is obvious, even a cliché, to say that the *Nicaragua* judgment touches upon crucial problems of *jus ad bellum*. However, one should bear in mind that the judgment was issued in the context of a certain factual background, and it has binding force “between the parties and in respect of that particular case”. These limitations and res-

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<sup>70</sup> In the Polish scholarship this view is supported by Kowalski, *supra* note 10, pp. 188-202; Kowalski, *supra* note 25, p. 101 and in this volume.

<sup>71</sup> This is also the stance taken by the Institut de droit international. Paragraph 10 of its Resolution of 2007 states: “In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle. [...] (ii) If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defence in that area against those non-State actors.” See also Dinstein, *supra* note 24, para. 31.

<sup>72</sup> S/RES/2249 (2015), 20 November 2015. The resolution has been a source of controversy among scholars. See *e.g.* R. Kwiecień, *Czy “wojna z terroryzmem” to bellum iustum? O związkach etyki i prawa w świetle rezolucji Rady Bezpieczeństwa 2249* (Is the “war on terror” bellum iustum? The relationship between ethics and law in Security Council Resolution 2249), in: B. Krzan (ed.), *Ubi ius, ibi remedium*, BECK, Warszawa: 2016, p. 323; M. Wood, *The Use of Force in 2015 with Particular Reference to Syria*, Hebrew University of Jerusalem Legal Studies Research Paper Series, 2015 No. 16-05, p. 6.

<sup>73</sup> Cf. Wood, *supra* note 72, pp. 6-11.

<sup>74</sup> This omission has been raised as an argument by a few judges in other judgments of the ICJ. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, *Separate Opinion of Judge Higgins*, ICJ Rep 2004, pp. 207, 215, para. 33 and *ibidem*, *Separate Opinion of Judge Kooijmans*, pp. 219, 229-230, para. 35; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Separate Opinion of Judge Simma*, ICJ Rep 2005, pp. 334, 336-337, paras. 8-11.

ervations are recognised by most scholars as the source of the Court's omissions and controversial statements. But those circumstances should not be used as justification of the entire judgment. Some important problems were simply omitted, including the *rationae personae* aspect of an armed attack. And insofar as the *rationae materiae* aspect is concerned, the "gravity" criterion elaborated and used by the Court can be seen as highly controversial and doubtful. At the same time however, the Court's stance has revived the debate among States and scholars, which is its great virtue.

The legal framework for the exercise of collective self-defence constitutes another significant aspect of the judgment. A declaration by the victim State that it is under attack, its request for forcible assistance, the filing of a report to the Security Council, as well as the conditions of necessity and proportionality seem to enhance and clarify the legal criteria for the exercise of the right of self-defence. As such, the judgment has established a strong barrier against the realisation of arbitrary political interests by militarily powerful States. This is the *Nicaragua* judgment's long-lasting legacy and provides the foundation for making a serious argument that the Court's approach has stood the test of time.