

The prohibition on the use of force in nicaragua vs united states

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Nicaragua vs United States, tried in 1986 by the ICJ, is arguably a landmark case when it comes to the enforcement of the prohibition of the use of force within international law. The dispute came into the international legal scene on April 1984, when Nicaragua filed an application instituting proceedings against the US in order to make them accountable for “ military and paramilitary activities in and against Nicaragua. ” Such claim was the result of several military and non-military incursions from the US in the early 1980’s, which included training and financing the contra forces in their fight against the Nicaraguan government, as well as direct attacks on Nicaraguan territory, especially ports and naval bases (161).

Furthermore, the US had laid mines in the internal and territorial waters of Nicaragua which, according to Nicaragua, also amounted to unlawful use of force, as well as other international law violations (161). Eventually, the US, who did not take part in the late proceedings leading to the decision, was found liable of breaching it’s responsibility under customary international law to abstain from using force against other states. The ICJ’s sole reliance on international customary law was due to an existing multilateral treaty reservation that the US had in place, which meant that the later was not bound to follow the provisions of the UN charter.

The methods employed by the court in imposing a legal duty in the U. S were unconventional in that the court had to resort to a form of “ law making” in order to apply the principles of international customary law (which are applicable to all states) to the facts of the case and in particular to the existing notion of use of force, which at the time was far from clear. And,

even though the court did manage to reach a decision and produced a landmark judgement in the application of international customary law, the decision has -with reason- received much criticism, as it set down many justifications and rules which cannot be deemed anything other than arbitrary. In this essay, I will focus on how ICJ addressed the prohibition of the use of force in this case, and how it redefined it's scope both in finding the US guilty of it's violations, and in rejecting the later's argument of self defense. Paragraph 4 of article 2 of the UN Charter sets down that " all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. " In the case in question, however, given the existence of a multilateral treaty reservation by the US, the court had to determine whether the prohibition set out in this article amounted to a principle of international customary law. With regards to this, the US claimed that all the customary rules which could be evoked had identical content from that of the provisions to which it had excluded itself from. Nonetheless, the court dissented and claimed that " the divergence between the content of the customary norms and that of treaty law norms is not such that a judgment confined to the field of customary international law would not be susceptible of compliance or execution by the parties. " This meant that customary rules could be applied even to countries that have made reservations against similar principles, which could be said to support the argument that customary rules can be extended to grant the ICJ jurisdiction even beyond state consent.

Thus, the court resolved that statements made by both parties in the past as well as participation in UN resolutions were evidence of state practice and *opinio juris* regarding the parties' view that the prohibition of the use of force established in article II of the UN Charter was also a customary norm, and so the principles established thereof could be enforced against the U. S. Moreover, the Court emphasized that deviations to a customary rules do not undermine its validity, and thus established that the use of force by many states in the past did not entitle the US to do the same. Hence, if the prohibition of the use of force found in the Charter constituted customary international law, and given that the facts of the case showed that the US had used force both directly through selective attacks and indirectly through support of rebel groups, it followed that the US was legally accountable for its acts. However, the US's claim that it had acted under its right to self defense raised a whole other issue, as the court had to determine what kind of intervention in another state entitled a third state to counter-intervene in collective self defense.

Self defense -as defined by article 51 of the Charter- is an inherent right of all states, but one that can only be enforced if an armed attack takes place, under the request of the state under attack, and only as long as the Security Council does not intervene. Moreover, for a state to incur in self defense there must have been both necessity and proportionality. Lastly, self defense can be individual and collective, the later referring mostly to instances where a state temporarily supports another that has been victim of an armed attack. Thus, the US argued that Nicaragua's supply of weapons to rebels in

El Salvador, followed by incursions into Costa Rica and Honduras were sufficient grounds for them to counter-intervene in collective self defense. This raised the question of whether Nicaragua's actions in El Salvador constituted a breach of the country's international obligation to refrain from using force which entitled a third state to intervene. To this, the court answered no, arguing Nicaragua's were "merely actions by regular armed forces across an international border" and could not be amounted to an armed attack.

The distinction between what constituted armed attacks and what didn't in the judgement was a largely arbitrary one and this was supported by Judge Schwebel in his dissenting opinion. He claimed that the arming of forces was equivalent to an armed attack. Similarly, D. O. Jennings argued that the provision of arms in this case was accompanied by logistical support from the Nicaraguan government and that that was not, in his opinion, beyond the scope of an armed attack. Furthermore, going back to the requirements of self defense, art. 51 of the UN Charter imposes a responsibility on the state exercising self-defence to report what it has done to the Security Council. According to the ICJ, the US's failure to do so had to be interpreted as evidence that the state was not convinced that it was acting in self-defense. And to further undermine the US's claim, the court found that at many instances of the US's incursions in Nicaragua it acted in a manner that was not necessary nor proportional.

Judge Schwebel's also argued against this finding. Necessity, he claimed, could be found in the "persistent Nicaraguan failure to cease armed

subversion of El Salvador” whereas proportionality was evident in that all the U. S’s actions followed from similar actions by Nicaragua (Nicaragua funded a rebellion in El Salvador, so did the US in Nicaragua. Nicaragua attacked important economic targets, so did the US). Such argument appears less faulty than that of the court, but this will be discussed more extensively below. Lastly, and this was perhaps the argument with a more sound legal foundation, the court mentioned that “ 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” and therefore, being that El Salvador had not requested the US’s intervention, the argument of self-defence was invalid. Several flaws can be ascribed to the manner in which the court dealt with the question of the use of force in this case. To begin with, when resting in International Customary Law to assert its jurisdiction, it assumed *opinio juris* to be fully dependent on the parties’ acceptance of UN resolutions such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Such approach to the element of *opinio juris* is a superficial one, for the acceptance of UN resolutions does not fully show that a state considers a practice to be binding in nature, which is essentially what *opinio juris* requires. Furthermore, as mentioned by judge Ni in his dissenting opinion, the court could have considered the US’s public statements acknowledging the prohibition of the use of force as waivers of it’s reservation.

Such approach would not only have been justifiable -given the US’s continuous claims acknowledging and supporting the prohibition in the

earlier stages of the trial-, but would also have allowed the court to simply ascribe to article 2 of the Charter as well as other relevant legislation in making it's case, therefore avoiding having to construct a whole, open ended customary norm to fit it to a single case. Nonetheless, the main fault in the court's judgement was it's argumentation in interpreting the figure of self-defence and denying the US's right. In determining whether Nicaragua's actions in El Salvador where, in principle, reason enough for a state to resort to force in self-defence, the court essentially concluded that, although the prohibition of force prohibits all acts involving physical violence, only some of those -those that are defined as armed attacks- can be resisted by force. The court's claim that the provision of arms and logistical support of rebel troops in El Salvador did not constitute an 'armed attack' entitling El Salvador to self defense is both arbitrary and dangerous. Arbitrary because the court isn't an expert commision in security measures and it seems out if it's scope to make such a distinction, and dangerous because it implies that in the future countries suffering from acts of violence not labeled as 'armed attacks by the court' -but potentially equally devastating- will not have the backup of international law to defend themselves.

This contradicts state sovereignty, an underlying principle in international law. It also goes against a political process that had taken place at the UN for decades. As mentioned by JL Hargrove in "The Nicaragua Judgment and the Future of the Law of Force and Self-Defense," the distinction of what are armed attacks had already been discussed and refuted at sister UN organs of the court, and was evident in acts such as The Declaration on Friendly

Relations and the Definition of Aggression, the later being specially relevant considering that the court relied on it when establishing the law of the case. The court also mentioned that in the case of a threat not constituting an armed attack, the state could take “ proportionate countermeasures,” but it failed to expand on what precisely those were. It did, however, establish that such countermeasures could only be taken by the victim state. In doing so, the court once again revealed a lack of understanding of some of the UN’s most fundamental instruments for it conveniently ignored the existence of collective self defense as treated in article 51 of the charter, that is as an equally enforceable form of the right of self defense. Instead, it looked at it as a secondary provision; in Hargrove’s words, “ a sort of special adronment which can be harmelsly removed in special cases”. Consequently, it is reasonable to argue that the disregard displayed by the court in ignoring the notion of collective self defense as a right was no more than a way to give sense to the equally arbitrary distinction made initially that not all acts of force could be defended against.

In conclusion, even though Nicaragua vs US set a positive precedent with regards to the accountability of those states trying to reach their ends by imposing force upon others, the methods employed in the ICJ in reaching it’s judgement were, at the least, questionable. The Court did make a compelling argument - although not fully comprehensive- for why the use of force constituted customary international law, but such an infrequent and potentially controversial approach by the court could have been avoided by

simply referring to the Charter provisions which the US had indirectly accepted as binding it in several declarations.

Furthermore, it acted unwisely in fabricating distinctions between those acts of force that amount to an armed attack and those that do not, as well as in saying that for those threats not constituting armed attacks only the victim state can take countermeasures. In trying to hold the US accountable for an international violation, the Court made a maze out of the notion of self defense and, far from providing the states with a clear guideline for behaving in similar situations, came up with a set of arbitrary distinctions which left on their way more questions than answers.