

## HAGUE INTERNATIONAL TRIBUNALS

# INTERNATIONAL COURT OF JUSTICE

## SYMPOSIUM: THE NICARAGUA CASE 25 YEARS LATER

### The Notion of ‘Armed Attack’ in the *Nicaragua* Judgment and Its Influence on Subsequent Case Law

JUDGE ABDULQAWI A. YUSUF\*

---

#### Abstract

The notion of ‘armed attack’ is at the heart of the law on the use of force in self-defence. The ICJ first addressed the issue in its judgment in *Nicaragua*; however, its formulation of the legal parameters of ‘armed attack’ has not been without controversy. In particular, the high threshold of force required for an ‘armed attack’ and the consequent distinction between ‘armed attack’ proper and acts of lower intensity (termed ‘frontier incidents’) is said to have reduced the barrier to armed aggression. More recently, the formulation has also been criticized for not being fully applicable to large-scale terrorist attacks such as the events of 11 September 2001. This article examines the Court’s first pronouncement on the concept of armed attack, with a specific focus on the *rationae materiae* aspect of ‘armed attack’, which situates it in the context from which it arose and analyses its development through subsequent case law, particularly the Court’s judgments in *Oil Platforms* and *Armed Activities (Congo v. Uganda)* and the decision of the *Eritrea–Ethiopia Claims Commission*.

#### Key words

armed attack; frontier incidents; *Nicaragua*; self-defence; use of force

## I. INTRODUCTION

When I was asked by the organizers of the conference to speak on the subject of the use of force, I thought that I should limit my remarks to the notion of an ‘armed attack’ as defined by the Court in the *Nicaragua* case,<sup>1</sup> particularly the *rationae materiae* aspect of the concept. The reasons were twofold. First, one of the

---

\* Judge, International Court of Justice [A.Hooft@icj-cij.org]. Speech given at the Conference ‘The Nicaragua Case 25 Years Later: Its Impact on the Law and the Court’, held on 25 June 2011.

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

two instances in which states may lawfully resort to the use of force, under the UN Charter, is for the exercise of self-defence; but this is conditional on an ‘armed attack’ against the state invoking self-defence. So, the notion of ‘armed attack’ is at the heart of the use of force in self-defence. Second, the notion of an ‘armed attack’ – that is, the type of action that constitutes an ‘armed attack’ – still remains the subject of controversy among states.

I will therefore deal in my address with a narrow subject within the wider area of the use of force. I will not deal with the temporal aspects of ‘armed attack’ – in other words, when does an armed attack take place? – nor shall I deal with its *rationae personae* aspect – that is, from whom the attack emanates. But, either of these two aspects may occasionally intrude into the analysis, which will principally focus on the acts that may be considered to constitute an ‘armed attack’ as determined by the Court in *Nicaragua*, and as distinguished from what the Court referred to as ‘mere frontier incidents’.<sup>2</sup> I will then examine the extent to which the definition by the Court of the notion of ‘armed attack’ in *Nicaragua* has impacted the subsequent jurisprudence of the International Court of Justice (ICJ) as well as the case law of other fora for the peaceful settlement of disputes, particularly in the context of the use of force in African conflicts.

It might be argued that, of the three aspects mentioned above, I have decided to address the least controversial one. However, as will be shown in the course of this presentation, the *rationae materiae* aspect of the notion of ‘armed attack’ is far from being devoid of controversy, particularly with regard to the manner in which it was discussed and defined by the Court in *Nicaragua* as well as its application in the subsequent jurisprudence of the Court and by the Eritrea–Ethiopia Claims Commission, which used parameters similar to those of the Court to characterize an ‘armed attack’ in the context of Ethiopia’s *Jus Ad Bellum Claims*.<sup>3</sup>

At the outset, it is worthwhile to note that the definition of the notion of ‘armed attack’ is, in itself, problematic, because the Court’s evaluation of the concept, not just in *Nicaragua*, but in subsequent cases as well, frequently occurs within the broader discussion of self-defence. Thus, the question necessarily tends towards whether self-defence was justified, and not just whether an armed attack occurred in the objective sense of the question. Additionally, the concept is often inextricably linked to the issue of attribution and to the assessment of the legitimacy of the use of force in self-defence. What this means is that the concept of ‘armed attack’ in *Nicaragua*, and in the cases that were subsequently dealt with by the Court on the subject of armed conflict, is always contextually bound.

2 Ibid., at 103, para. 195.

3 *Eritrea–Ethiopia, Partial Award, Jus Ad Bellum Ethiopia’s Claims 1–8*, Eritrea–Ethiopia Claims Commission, 19 December 2005, paras. 11–12 (hereafter, *Eritrea–Ethiopia, Jus Ad Bellum*).

## 2. ACTS CONSTITUTING AN 'ARMED ATTACK' IN THE NICARAGUA JUDGMENT

To start with the dictum of the Court regarding the notion of an 'armed attack' in the *Nicaragua* case, it may be recalled that the Court made a distinction between the 'most grave forms of the use of force' (those, in the words of the Court, 'constituting an "armed attack"') and 'other less grave forms' of the use of force.<sup>4</sup> In examining the conditions governing the resort to self-defence, the Court also made a careful distinction between collective self-defence and individual self-defence, while recognizing that the inherent right (or *droit naturel*) that any state possesses in the event of an 'armed attack' covers both collective and individual self-defence.<sup>5</sup>

It is perhaps the manner in which the earlier distinction based on the gravity standard was further pursued and elaborated in the reasoning of the Court that has led, together with the distinction between direct and indirect use of force, to the controversy in the doctrinal domain about the dictum of the Court on the concept of armed attack and made it appear rather ambiguous, vague, and unclear with regard to the determination of what constitutes an 'armed attack'. The Court stated, in paragraph 249 of the *Nicaragua* judgment, that 'While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures invoking the use of force'.<sup>6</sup>

Following this statement, on the one hand, the Court has been criticized for weakening the prohibition of the use of force,<sup>7</sup> while, on the other hand, it has been accused of undermining the right of self-defence.<sup>8</sup> This could have been attributed to a misreading of the Court's judgment if it were not for the influence of the distinction made by the Court in the above-mentioned statement on its own subsequent jurisprudence. However, it is not my intention to take sides on those controversies, but to focus on the impact of the dictum of the Court on subsequent case law regarding the recourse to individual self-defence.

Before examining the impact on the jurisprudence, let me return briefly to what was stated by the Court with respect to the notion of an 'armed attack'. Having made the distinction between individual and collective self-defence, the Court declared that the exercise of individual self-defence is 'subject to the State concerned having been the victim of an armed attack'.<sup>9</sup> According to the Court, there appeared already

4 *Nicaragua*, *supra* note 1, at 101, para. 191.

5 *Ibid.*, at 94, para. 176.

6 *Ibid.*, at 127, para. 249.

7 See M. A. Harry, 'Casenote: The Right of Self-Defense and the Use of Armed Force against States Aiding Insurgency', (1986–87) 11 SIULJ 1289, at 1302–3 ('the Court's concept of "armed attack" effectively reduces rather than raises the barriers to armed aggression' and, as a result of the Court's restrictive interpretation of Art. 51 in the absence of the United Nations' ability to intervene, 'The consequence, assuming that the prohibition is effective, is that no military deterrence will exist to deter states such as Nicaragua, bent on exporting revolution in a manner short of an actual "armed attack" as defined by the Court').

8 See Y. Dinstein, *War, Aggression and Self-Defense*, 4th edn (2005), 193 (*Nicaragua* decision undermines right of self-defence); R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 250 (*Nicaragua* decision may undermine self-defence).

9 *Nicaragua*, *supra* note 1, at 103, para. 195.

at that moment in 1986 ‘to be general agreement on the nature of the acts which can be treated as constituting armed attacks’,<sup>10</sup> this being understood, in the words of the Court, as including 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, (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.<sup>11</sup>

This description of an armed attack by the Court was based, as we all know, on Article 3, paragraph (g) of the definition of aggression under UNGA Resolution 3314 (XXIX), which the Court declared to reflect customary international law. The Court affirmed 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*.<sup>12</sup>

So, by analogy to an armed attack carried out by regular armed forces of a state, which is to be considered as the classical example of an ‘armed attack’ in terms of Article 51 of the Charter, the Court came to the conclusion that the sending of armed bands by a state to the territory of another state would also qualify as an armed attack if ‘its scale and effect’ could be assimilated to an attack carried out by regular armed forces rather than to a mere frontier incident.

One may be tempted to argue that the standards of gravity, scale, and effect specified in the Court’s above-mentioned statements could be read, in the *Nicaragua* judgment, to refer to indirect attacks and are used to qualify such indirect attacks by comparing them to direct attacks by armed forces of a state. One cannot, however, overlook the fact that the Court’s formulation, by comparing varying levels of military action by regular armed forces, albeit to elucidate a gravity standard for acts of force by irregular forces, implicitly lays the foundation for the formal extension of the gravity standard to acts by regular armed forces as well. It is the structure of the Court’s argument that lends itself to this conclusion, and may thus have led to the ensuing confusion. The Court clarified its stance in *Oil Platforms* by expanding the threshold standard to cover acts of force by regular armed forces as well.<sup>13</sup>

Much of the criticism of the Court’s definition of an ‘armed attack’ in *Nicaragua* is directed to the distinction between an ‘armed attack’ and military activity of a lower intensity (e.g., ‘frontier incidents’). It has been argued that this distinction created a gap between permissible self-defence and lower-level attacks by armed

<sup>10</sup> *Ibid.*, para. 195.

<sup>11</sup> *Ibid.*, para. 195 (internal citations omitted).

<sup>12</sup> *Ibid.*, para. 195 (emphasis added).

<sup>13</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, [2003] ICJ Rep. 161 (hereafter, *Oil Platforms*).

bands/irregular forces and served to reduce the barrier to armed aggression because it took away the military deterrent provided by lawful recourse to self-defence.<sup>14</sup> It should, however, be recalled that the Court left open the possibility that cumulative attacks could reach the gravity threshold even in *Nicaragua* when it stated that the alleged incursions by Nicaragua into the territories of Honduras and Costa Rica could have been 'treated for legal purposes as amounting, singly or collectively, to an "armed attack" by Nicaragua'; but the Court did not have sufficient information regarding the circumstances or motivations behind the incursions in order to make such a determination.<sup>15</sup> This stance was further clarified in the Court's subsequent decisions, namely *Oil Platforms* in 2003 and *Armed Activities* in 2005.<sup>16</sup>

The Court's definition of an 'armed attack' was also criticized because it did not clearly elaborate on the required scale and effects necessary to reach the threshold of armed attack and did not provide guidance on what type of response might be appropriate for acts that fall below the threshold. Moreover, the 'scale and effects' standard and the distinction between an 'armed attack' and 'frontier incidents' were found by some authors to be too vague to be useful.<sup>17</sup>

It is my view that the clearest understanding of the Court's definition of an 'armed attack' in *Nicaragua* is to be had by situating it in its context: the Court was presented with a specific task, namely to adjudicate a dispute concerning 'armed bands' acting under the auspices of another state, and to determine the conditions necessary for a justifiable exercise of collective self-defence. Thus, the issue presented was not to define an armed attack proper (i.e., at the hands of regular armed forces of a state), or even an armed attack by unaffiliated irregulars, but rather to characterize acts of force carried out by indirect means and through irregular forces that may justify the exercise of collective self-defence.<sup>18</sup> It is in this context that the Court made a distinction between more and less grave forms of attack (the gravity and effect doctrine) and analogized, for the purpose of creating a standard, to acts of force by regular forces. In the process, it undoubtedly created a high threshold for lawful recourse to collective self-defence. Nonetheless, the Court qualified the hostile activities undertaken by Nicaragua against El Salvador as 'illegal military

14 See, e.g., Harry, *supra* note 7, at 1302–3; Higgins, *supra* note 8, at 250–1.

15 *Nicaragua*, *supra* note 1, para. 231.

16 *Oil Platforms*, *supra* note 13; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Merits, Judgment, [2005] ICJ Rep. 168 (hereafter, *Armed Activities*).

17 See Dinstein, *supra* note 8, at 195 (frontier incidents can be grave enough to justify self-defence and the gravity and scale measure is only useful when the attack in question is mostly *de minimis*); see also Higgins, *supra* note 8, at 250–1 ('When a State has to decide whether it can repel incessant low-level irregular military activity, does it really have to decide whether that activity is the equivalent of an armed attack by a foreign army – and, anyway, is not *any* use of force by a foreign army entitled to be met by sufficient force to require it to withdraw . . . Is the question of *level of violence* by regular forces not really an issue of *proportionality*, rather than a question of determining what is an "armed attack"?).

18 See also C. Gray, *International Law and the Use of Force*, 3rd edn (2008), 180, where she points out that there were 'serious reasons for the Court's distinction between armed attacks and mere frontier incidents. Its concern was with collective self-defence; it wanted to limit *third State* involvement . . . the use of necessity and proportionality alone would not exclude third party involvement, merely limit the scope of their permissible response'.

intervention' and observed that 'the acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts'.<sup>19</sup> Consequently, although the Court said that the possibility of collective self-defence within the meaning of Article 51 does not arise in the case of the use of force of a lesser degree of gravity than an 'armed attack', it did affirm that such low-level irregular military activity could justify proportionate defensive countermeasures by the victim state itself. The Court did not specify the nature of such 'countermeasures', but it could perhaps be reasonably assumed that it was referring to military countermeasures.

The *Nicaragua* definition of an 'armed attack' by the Court could have been construed as applicable only to indirect uses of force and to collective self-defence if the Court itself did not expand the scope of application of the standard it formulated in *Nicaragua* in its subsequent judgment in *Oil Platforms*, as discussed below.

### 3. THE *OIL PLATFORMS* JUDGMENT

In the *Oil Platforms* case, the Court recalled its dictum in *Nicaragua*, according to which it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms',<sup>20</sup> since, as observed by the Court in *Nicaragua*, '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'.<sup>21</sup>

In *Nicaragua*, the Court refers, as an example of the less grave forms of use of force, to some of the provisions of the Declaration on Friendly Relations, which deal with intervention and with irregular forces and armed bands but not with an armed attack by armed forces of a state. So, when read together, paragraphs 191 and 195 of the *Nicaragua* judgment may give the impression that the distinction between grave and less grave forms covers mainly indirect attacks. As has been noted above, however, the alternative is also supported by a close reading of paragraph 195 of the Judgment, in which, though the analogy is made between indirect and direct use of force, the gravity standard still compares indirect attacks to attacks that, because of their gravity, would be more similar to acts of force by armed forces rather than mere frontier incidents also carried out by state armed forces.

The Court found, however, in the *Oil Platforms* case, that neither the series of incidents involving US vessels and naval escorts nor the two specific attacks against the *Sea Isle City* and the *Samuel B. Roberts*, taken individually or cumulatively, constituted an 'armed attack' under Article 51 of the Charter, as defined by the Court in the *Nicaragua* case.<sup>22</sup> However, the Court's reasoning was based also on a number of other factors such as the existence of a specific intent or targeting by Iran (which it found not to be there in the *Sea Isle* incident), the mining of the waters that harmed

19 *Nicaragua*, *supra* note 1, at 127, para. 249.

20 *Oil Platforms*, *supra* note 13, at 187, para. 51, citing *Nicaragua*, *supra* note 1, at 101, para. 191.

21 *Ibid.*, *Oil Platforms*, *supra* note 13, at 187, para. 51, citing *Nicaragua*, *supra* note 1, at 103, para. 195.

22 *Oil Platforms*, *supra* note 13, at 191, para. 64.

the *Bridgeton*,<sup>23</sup> or the persuasiveness of the evidence placed before the Court with regard to the alleged firing on US helicopters.<sup>24</sup>

With respect to the mining of the USS *Roberts*, the Court acknowledged the fact that the mining of a single military vessel could constitute an 'armed attack' justifying action in self-defence; however, the lack of sufficient evidence of Iran's responsibility in the mining of the USS *Roberts* did not allow the Court to make such a finding.<sup>25</sup> Similarly, with respect to another US vessel (the *Texaco Caribbean*), which was damaged as a result of mining, it was not the specific characteristic of the attack, but the fact that the *Texaco* was not flying a US flag at the time at which it was damaged by mines that the Court found decisive.<sup>26</sup> It appears therefore that the US claims of an 'armed attack' failed in large part not because of the characterization of the acts of force on the basis of the distinction between the most grave forms of use of force and the less grave forms, but because of attribution problems related to the lack of sufficient evidence showing that Iran was responsible for the alleged attacks, as well as other factors.

The Court's reference to its *Nicaragua* dictum to characterize which acts of use of force may amount to an 'armed attack' was criticized by Judge Simma in his separate opinion appended to the *Oil Platforms* judgment. Judge Simma expressed his dissatisfaction with the reasoning of the Court in paragraph 51 of the judgment, which, by following what he considered 'some of the less fortunate statements in the Court's *Nicaragua* Judgment of 1986', created the impression that 'if offensive military actions remain below the – considerably high – threshold of Article 51 of the Charter, the victim of such actions does not have the right to resort to – strictly proportionate – defensive measures equally of a military nature'.<sup>27</sup> For Judge Simma, 'Against such smaller-scale use of force, defensive action – by force also "short of Article 51" – is to be regarded as lawful'.<sup>28</sup> Judge Simma does not appear to disagree with the Court's distinction between the most grave forms of the use of force (constituting an 'armed attack') and other less grave forms, which do not reach the threshold of an 'armed attack'; but he would apparently have liked the Court to elaborate further on the type of permissible defensive action that a state can take against such less grave forms of hostile action.

23 Ibid., at 191, para. 64 (stating with respect to the *Sea Isle City* 'that a Silkworm missile fired from (it is alleged) more than 100km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters' and, regarding the *Bridgeton*, that 'it has not been established that the mine struck by the *Bridgeton* was laid with the specific intention of harming that ship').

24 Ibid., at 191, para. 64 ('as regards the alleged firing on United States helicopters from Iranian gunboats and from the Reshadat oil platform, no persuasive evidence has been supplied to support this allegation').

25 Ibid., at 195, para. 72 ('The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS *Samuel B. Roberts*, the Court is unable to hold that the attacks . . . have been shown to have been justifiably made in response to an "armed attack" on the United States by Iran').

26 Ibid., at 191, para. 64 ('the *Texaco Caribbean*, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State').

27 Ibid., Separate Opinion, Judge Simma, at 331, para. 12.

28 Ibid.

#### 4. ARMED ACTIVITIES IN THE TERRITORY OF THE CONGO

The Court took up the issue of ‘armed attack’ again in the case of *Armed Activities in the Territory of the Congo (Congo v. Uganda)*.<sup>29</sup> Factually, the case between Congo and Uganda more closely paralleled the situation in *Nicaragua*, as Uganda argued that armed bands sent or supported by the Democratic Republic of the Congo (DRC) had conducted armed attacks on its territory, thereby justifying its own use of force against the DRC. However, Uganda’s argument failed, in part because the Court could not find conclusive evidence of actual support on the part of the DRC.<sup>30</sup>

The Court does not discuss its characterization of an ‘armed attack’ in any detail in this case. The attacks in question are listed in paragraph 132 of the judgment and include a series of attacks on civilian objects (such as schools, villages, and a seminary), each involving some loss of civilian life and/or abductions and injuries. The Court, however, left open the possibility that these attacks could be analysed cumulatively, though it observed that ‘even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC’.<sup>31</sup> Thus, in the view of the Court, Uganda’s claims to have acted in self-defence failed not because of the scale and effects of the attacks, but because of their non-attributability to the DRC. Consequently, although the *Nicaragua* dictum on what constitutes an ‘armed attack’ for the purposes of self-defence, and its high threshold, appear to have been further confirmed by the Court in the *Armed Activities (Congo v. Uganda)* case of 2005, it was not the principal reason for the Court’s decision not to uphold Uganda’s self-defence arguments.

#### 5. THE ERITREA–ETHIOPIA COMMISSION

The Eritrea–Ethiopia Commission, in addressing the *jus ad bellum* claims of the states, also made a distinction between the most grave and less grave acts of force that appears to build upon the clarification in *Oil Platforms* that extended the gravity standard to acts by regular armed forces of a state.<sup>32</sup> The Ethiopia–Eritrea War (1998–2000) gave rise to a multitude of claims decided by the commission, among them *jus ad bellum* claims.<sup>33</sup> The war started on 12 May 1998, when Eritrean troops began a border-wide offensive against Ethiopia.<sup>34</sup> Eritrea claimed that, in 1998, Ethiopian troops occupied the town of Badme and surrounding areas.<sup>35</sup> As a justification for its actions, Eritrea claimed that incidents had occurred between Ethiopian and Eritrean troops in early May 1998. Eritrea also contended that, on 6 and 7 May 1998, eight Eritrean soldiers were killed when a contingent of the Eritrean army was allegedly

29 *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Merits, Judgment, [2005] ICJ Rep. 168 (hereafter, *Armed Activities*).

30 *Ibid.*, at 223, para. 146.

31 *Ibid.*, at 223, para. 146.

32 *Eritrea–Ethiopia, Jus Ad Bellum*, *supra* note 3, para. 12.

33 *Ibid.*, para. 6.

34 *Ibid.*, para. 14.

35 *Ibid.*, para. 9.



fired upon by Ethiopian troops.<sup>36</sup> According to Eritrea, subsequent clashes between small units were set off by these incidents.<sup>37</sup>

The commission rejected Eritrea's arguments. It held that these incidents did not rise to the level of an 'armed attack'. For the commission, 'Localized border encounters between small infantry units, even those involving loss of life, do not constitute an armed attack for purposes of the Charter'.<sup>38</sup> The commission did not refer either to *Nicaragua* or to the *Oil Platforms*, but the language employed by the commission is very similar to the language used by the Court, particularly in the *Nicaragua* and *Oil Platforms* cases: for instance, the commission's reference to 'border encounters'<sup>39</sup> and the Court's mention of 'frontier incidents'.<sup>40</sup>

The commission appears to have employed reasoning similar to that of the Court in *Nicaragua* when considering the magnitude of the use of force that preceded the Eritrean offensive of 12 May 1998. In describing the incidents, it stated that:

... these incidents involved geographically limited clashes between small Eritrean and Ethiopian patrols ... these relatively *minor incidents* were not of a *magnitude* to constitute an armed attack by either State against the other within the meaning of Article 51 of the UN Charter.<sup>41</sup>

The idea of 'geographically limited clashes' is similar to the Court's conception of 'frontier incidents' and arguably provides a more measurable standard, and the commission's distinction between 'relatively minor incidents', on the one hand, and incidents 'of a [greater] magnitude', on the other, also conforms to the Court's distinction between 'most grave' and 'less grave' uses of force in *Nicaragua*. For the commission, these minor incidents were to be contrasted with Eritrea's 'attack' of 12 May, during which two brigade-sized units carried out a concerted attack around 'the town of Badme and several border areas'.<sup>42</sup> In its view, the latter attacks were neither localized nor sporadic, but involved important units of the Eritrean army.

The Eritrea–Ethiopia Claims Commission applied the Court's dictum in *Nicaragua* with one difference. The commission applied this standard to actions by the regular armed forces of the state, namely the Eritrean and Ethiopian troops. In *Nicaragua*, it was the actions of irregulars aided by one state to mount attack against another state that were at issue. This may therefore be characterized as a 'second-degree' impact using the reasoning of *Nicaragua*, but based on the expanded scope of the standard as classified in *Oil Platforms*.

It is, however, difficult to imagine how the alleged killing by the armed forces of one state of six members of the armed forces of another state, if proven, fails to rise to the threshold of an 'armed attack', unless it was an unfortunate accident. It is also not clear whether the commission's decision can be said to conform to the standards laid down by the Court in *Nicaragua*, particularly in view of the fact that

36 *Ibid.*, para. 9.

37 *Ibid.*, para. 9.

38 *Ibid.*, para. 11.

39 *Ibid.*, para. 11.

40 *Nicaragua*, *supra* note 1, at 103, para. 195.

41 *Eritrea–Ethiopia, Jus Ad Bellum*, *supra* note 3, para. 12 (emphasis added).

42 *Ibid.*, para. 14.

the commission did not address the requirements of necessity and proportionality when evaluating Eritrea's actions in response to the 'border incidents' that took place on 6–7 May 1998.

## 6. CONCLUSION

The Court broke new ground with its *Nicaragua* dictum on the notion of an 'armed attack' by circumscribing and clearly identifying a concept that is at the heart of Article 51 of the UN Charter and the lawful use of force in international law, in general. While, as mentioned before, there are other factors that must also be evaluated when determining whether a state legitimately used force in self-defence (e.g., assessment of its own situation as that of being under armed attack, prompt notification to the Security Council, attribution, necessity, and proportionality, etc.), the definition of an 'armed attack' continues to loom large in the discourse on the use of force, and the gravity standard laid down by the Court in *Nicaragua* appears to have continued to retain its validity. It is true that the Court's judgment in *Nicaragua* was contextually specific and may well have been limited to an evaluation of the facts that were presented to the Court (i.e., the right to collective self-defence in the case of armed attack by irregular armed bands being aided by a foreign state); however, it has had much influence in the subsequent jurisprudence of the Court as well as in the case law of other fora such as the Eritrea–Ethiopia Commission.

The threshold established by the Court in *Nicaragua* is not, in itself, unreasonable, particularly in view of the flexibility it offers with regard to the possibility of considering attacks not only individually, but also cumulatively to evaluate their scale and effects. However, if interpreted and applied in the manner in which the Eritrea–Ethiopia Claims Commission appears to have understood it, it might be considered too high.

There is no doubt that the notion of an 'armed attack' has evolved since the decision in *Nicaragua* and in light of the UN Security Council Resolutions 1368 (2001), 1373 (2001), and 1377 (2001) adopted in the aftermath of the 11 September terrorist attacks in the United States, particularly with respect to its *ratione personae* aspects; but the Court's *Nicaragua* dictum, despite scholarly criticism, will continue to serve as a basic standard for evaluating what constitutes an 'armed attack', and any further elaboration and fine-tuning of the concept of 'armed attack' will necessarily have to be undertaken on the basis of the gravity standard specified by the Court.