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U.S. Covert Operations Against Nicaragua and their Legality under Conventional and Customary International Law

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U.S. COVERT OPERATIONS AGAINST NICARAGUA AND THEIR LEGALITY UNDER CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW*

JAMES P. ROWLES**

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I. INTRODUCTION

In his State of the Union Address on February 6, 1985, President Reagan defended his request for additional aid to the *contras* by asserting, "Support for freedom fighters is self-defense and totally consistent with the O.A.S. and U.N. Charters."¹ This statement is incorrect. Behind it lies a U.S. policy of disdain for international law. Such disdain, and the weakening of international law and institutions that it causes, have starkly negative implications for the national security interests of the United States.

At least since 1981, the United States has organized, financed, and coordinated military and paramilitary activities in and against the territory of Nicaragua. These activities have included both support of counter-revolutionary or *contra* forces based in Honduras and within Nicaragua, and direct military action by employees of the United States against the territory of Nicaragua. In April, 1982 and again in April, 1984, Nicaragua sought to have the United Nations Security Council adopt resolutions aimed at bringing such activities to a halt. The resolutions achieved overwhelming support, but were vetoed by the United States.²

1. "State of the Union," Address by President Reagan, Before a Joint Session of the Congress (Feb. 6, 1985), 21 WEEKLY COMP. PRES. DOC. 140, 146 (Feb. 11, 1985).

2. The 1982 draft resolution, which reminded all member states of their obligations under the U.N. Charter and appealed to them "to refrain from the direct, indirect, overt or covert use of force against any country of Central America or the Caribbean," and to seek a peaceful resolution of the problems of the region, was vetoed by the United States. Only the United Kingdom and Zaire abstained. China, France, Guyana, Ireland, Japan, Jordan, Panama, Poland, Spain, Togo, Uganda, and the U.S.S.R. voted in favor of the resolution. See U.N. Doc. S/P.V. 14941 (April 1, 1982) (draft resolution of Panama); U.N. Doc. S/P.V. 2347, at 62 (Apr. 2, 1982).

The 1984 draft resolution condemned the mining of Nicaraguan ports, affirmed the right of free navigation and commerce in international waters, reaffirmed "the right of Nicaragua and of all the countries in the region to . . . determine their own future free from all foreign interference and intervention," and called on all states "to refrain from carrying out, supporting or promoting any type of military action against any State of the region . . ." It also expressed support for the peace efforts of the Contadora Group. Similarly, it was also vetoed by the United States. Only the United Kingdom abstained. See U.N. Doc. S/16263 (Apr. 4, 1984)(draft resolution of Nicaragua); U.N. Doc. S/P.V. 2529, at 111-12 (Apr. 4, 1984)(vote).

After defeat of the second resolution on April 4, 1984, Nicaragua decided to take its case to the International Court of Justice (ICJ). On Friday, April 6, having learned of Nicaragua's plans to file suit, the United States attempted to modify the terms of its 1946 acceptance of the Court's compulsory jurisdiction in order to exclude the case from the Court's consideration.³ Nicaragua filed its application or complaint against the United States on April 9, 1984, requesting at the same time an order of provisional measures or interim protection from the Court.⁴ Following oral arguments on Nicaragua's request, the Court issued its Interim Protection Order on May 10, 1984,⁵ calling upon the United States to halt its mining of Nicaraguan harbors and to observe the basic principles of international law which prohibit the threat or use of force against Nicaragua or intervention in matters within Nicaragua's domestic jurisdiction.

On November 26, 1984, following written and oral arguments, the Court issued a judgment⁶ rejecting U.S. arguments that it lacked jurisdiction and that the claim was not admissible before the Court. On January 18, 1985, the United States announced that it would not participate in further proceedings before the ICJ.⁷ This action, however, has not halted the Court's hearing of the underlying issues in the substantive or merits phase of the proceedings.⁸

These developments raise fundamental questions regarding the international legal policies of the United States. First, what is the strategy of the United States for maintaining and improving international peace and security? Is this objective to be pursued through military, economic and *ad hoc* diplomatic means alone, or

3. See N.Y. Times, Apr. 9, 1984, at 1, col. 2 (nat'l ed.); Washington Post, Apr. 9, 1984, at A1, col. 1.

4. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Application of Nicaragua (Apr. 9, 1984) [hereinafter cited as Application]. References are to the page numbers of the Application as printed and published by the Court (1984 General List No. 70).

5. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 169 (Interim Protection Order of May 10) [hereinafter cited as Interim Protection Order of May 10, 1984].

6. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1984 I.C.J. 392 (Jurisdiction and Admissibility Judgment of Nov. 26) [hereinafter cited as Judgment of Nov. 26, 1984].

7. See U.S. DEP'T OF STATE, U.S. WITHDRAWAL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE INTERNATIONAL COURT OF JUSTICE, Jan. 18, 1985, reprinted in 24 I.L.M. 246 (1985); *infra* notes 121, 299-300 and accompanying text.

8. Oral arguments were held in September, 1985.

is international law also to be used? Second, what is the policy of the United States toward strengthening international law and institutions in general, and, in particular, what is the U.S. policy toward strengthening the legal prohibition against the threat or use of force? Third, what is its policy with respect to the international adjudication of disputes and its former goal of increasing the use and authority of the ICJ?

The present article begins in Part I(A) by addressing the fundamental question of whether international law matters at all. Part I(B) contains an analysis of the origins and details of U.S. covert operations against Nicaragua. Part I(C) concludes Part I with a brief overview of the nature of the proceedings in the ICJ. The substantive legal issues raised by Nicaragua and which are to be determined by the ICJ in its judgment on the merits are examined in Part II. The law prohibiting the threat or use of force is considered in connection with U.S. actions against Nicaragua in Part II(A), together with the U.S. claims of self-defense. Part II(B) and Part II(C) briefly consider the legality of U.S. actions in terms of the prohibition against intervention in the internal affairs of any state, and the principle requiring the peaceful settlement of international disputes.

This article, which was completed in October, 1985, is based on information publicly available through September, 1985. It thus covers the events which are the subject of Nicaragua's claim before the World Court. Among the latest developments is the decision of Congress in July, 1985, to provide some twenty-seven million dollars in "humanitarian" assistance to the *contras* carrying out attacks against and within the territory of Nicaragua. This decision and the upcoming decision of the ICJ on the merits directly raise the question of the importance of international law. Three questions arise. First, should Congress take international law into account in deciding how to vote now or in the future? If it does, the question of whether support of the *contras* is self-defense becomes critical because if it is not legally justified as self-defense such support would directly violate the ICJ's Order of Interim Protection. It is notable that the United States was not sufficiently confident of its self-defense argument to make it before the Court. Second, in view of the determination by the Court that it has jurisdiction in the case of *Nicaragua v. U.S.*, was it wise for the Reagan administration to permit the case to proceed to a final judgment on the merits, by failing to reach a settlement with Nicaragua to withdraw

the case? Third, following the ICJ's final judgment, expected by mid-1986, how should the administration react to what all expect will be a strong condemnation of U.S. actions against Nicaragua, a final order by the ICJ to bring these actions to an immediate halt, and the initiation of special proceedings to establish how much the United States should compensate Nicaragua for the damages it has caused? Should the Reagan administration defy the final judgment of the Court? If it does, should Congress sit idly by?

A. Why International Law Matters: The Imperative of Strengthening International Order

1. The Importance of Strengthening International Order

It is impossible to conceive of an increasingly secure international order without improving the effectiveness of international law and institutions. The very concept of order presupposes law, as orderly and predictable interactions between states cannot exist without such authoritative rules.⁹ Moreover, the maintenance or strengthening of international order requires the control and reduction of the use of force across international frontiers. In a nuclear world where the possibility of global dominance by a single power no longer exists, the very idea of reducing armed conflict presupposes the existence of international legal norms controlling the use of force across borders.¹⁰ Particularly important is the pro-

9. Compare the following:

[T]he creation and maintenance of an ongoing and involved system of relationships, such as exists internationally, requires law. When, therefore, order is used to refer to such a system of relationships, it can truly be said that order is dependent on law. For order cannot exist without understandings about permissible behavior, and the most fundamental as well as the most numerous of these relationships are unavoidably legal in character. Thus the significance of international law is enduring and vital. It does not control the ebb and flow of international politics, but it does provide an indispensable framework for the political process. Without it, relations, if not minimal, could not be other than anarchical in the most drastic meaning of the word. Internationally, as elsewhere, law is a concomitant of ordered relations.

James, *Law and Order in International Society*, in *THE BASES OF INTERNATIONAL ORDER* 60, 63, 83-84 (A. James ed. 1973).

10. Today, armed conflict involves the distinct possibility of nuclear war. The 1973 Arab-Israeli war and the resulting potential nuclear confrontation between the Soviet Union and the United States provides a dramatic case in point. See Blechman & Hart, *The Political Utility of Nuclear Weapons: The 1973 Middle East Crisis*, 7 INT'L SECURITY 132 (1982); Jarber & Kolkowicz, *The Arab-Israeli Wars of 1967 and 1973*, in S. KAPLAN, *DIPLOMACY OF POWER* 412, 38-67 (1981).

Given the increasing destructiveness of modern weapons, even conventional warfare

hibition of the use of force by one state against another except in response to an armed attack.¹¹ Law is a necessary concomitant of order. The inherent interdependence of order and law simply does not stop at the water's edge. In short, international order requires international law, and in particular, the legal prohibition of the threat or use of force by one country against another.¹²

While the avoidance of war remains the principal reason for controlling the use of force across international frontiers, it is also important to appreciate the consequences of a climate of military insecurity fostered by the failure to uphold the legal prohibition against force. Military planners will be forced to divert resources from development to defense. They will be forced to develop their own nuclear-weapons capability,¹³ in order that the military and economic security of their country will not depend on the uncertain responses of self-interested partners in a system of shifting alliances. In such an atmosphere, not only nuclear, but also conventional arms races will be more likely to occur. These, in turn, will have seriously destabilizing effects on the international order. Trade and investment will be inhibited by growing military insecur-

could cause death, famine, and disease on a scale far beyond previous human experience. Recent studies suggest the possibility that virtual annihilation could result at a much lower threshold than heretofore thought, due to the so-called "nuclear winter" which might be produced from a nuclear war. See, e.g., N.Y. Times, Aug. 5, 1984, at 1, col. 5 (nat'l ed.).

11. The importance of the use of force by one state against another is recognized in the U.N. Charter which begins with the following words:

WE THE PEOPLES OF THE UNITED NATIONS,
DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold suffering to mankind . . .

U.N. CHARTER Preamble. Compare the following statement by President Ronald Reagan:

The major objective of my administration, as of every other American administration since World War II, is to prevent nuclear war. Twice in my lifetime, I have seen the world plunge into wars costing millions of lives. Living through those experiences has convinced me that America's highest mission is to encourage the world along the path of peace, and to ensure that our country and all those who share our aspirations of peace and freedom can live in security.

Letter of President Ronald Reagan Responding to Letter of Venezuelan Citizens (Nov. 5, 1982), reprinted in DEP'T ST. BULL., Jan., 1983, at 81.

12. Article 3(g) of the OAS Charter provides as follows: "International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law." Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, as amended by Protocol of Buenos Aires, Feb. 27, 1967, art. 3(g), 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter cited as OAS Charter]. Cf. U.N. CHARTER, Preamble, art. 1 para. 1, art. 2 paras. 1-2.

13. See, e.g., Rowles, *Nuclear Power and Non-proliferation: The View From Brazil*, 14 VAND. J. TRANSNAT'L L. 711, 737-43, 779, 783 (1981).

riety, and by a decreasing confidence in the ability of international law and institutions to effectively regulate conduct in non-military spheres. Increasingly nationalistic attitudes will make effective collaboration among governments increasingly problematic. Such potential developments, only briefly sketched here, deserve the most serious consideration by those who believe that supporting and upholding the legal prohibition of the threat or use of force is in any sense a subordinate concern.¹⁴

Adequate military defense programs must be maintained, but an exclusive emphasis on increasing military power will not strengthen international order. Adversaries will respond in kind. Arms races will ensue with disequilibrating effects. International order requires confidence-building measures;¹⁵ international agreements to limit the development, testing and deployment of destabilizing weapons systems;¹⁶ and the strengthening of commonly-accepted standards of behavior.¹⁷ None of these can be achieved

14. One example of the negative impact of the illegal use of force on international trade is provided by the sharp drop in U.S.-Soviet trade which followed the Soviet Union's invasion of Afghanistan. Another example is the sharp deterioration in trade within the Central American Common Market following El Salvador's invasion of Honduras in July, 1969. A striking example of how increasingly nationalistic attitudes can block or sharply inhibit effective collaboration among governments to meet common problems and future challenges is found in the positions taken by the United States in the final stages of the negotiations for the Law of the Sea Treaty, and the subsequent refusal of the United States to sign the treaty.

15. See, e.g., S. TALBOTT, DEADLY GAMBITS 321-23 (1984). Such measures are an important component of arms control treaties. "SALT was full of CBMs," Talbott observes. *Id.* at 321.

16. See, e.g., Nye, *ReStarting Arms Control*, 47 FOREIGN POL'Y 98 (1982); Lodal, *Finishing Start*, 48 FOREIGN POL'Y 66 (1982); Burroughs, *Ballistic Missile Defense: The Illusion of Security*, 62 FOREIGN AFF. 843 (1984). See also Talbott, *Buildup and Breakdown*, 62 FOREIGN AFF. 587 (1984).

17. The need for such standards and strengthened international institutions has been clearly recognized by leading political scientists in the United States. See, e.g., S. HOFFMAN, PRIMACY OR WORLD ORDER 242-45, 254-55, 287-301 (1978); S. HOFFMAN, DUTIES BEYOND BORDERS 57-73 (1981). Hoffman observes that, "The preservation of the political independence and territorial integrity of states from armed attack is the cornerstone of international society." *Id.* at 61. See also A. GEORGE & R. SMOKE, DETERRENCE IN AMERICAN FOREIGN POLICY 610-11 (1974). Two recent works suggest a renewed awareness on the part of some political scientists of the central importance of international law in establishing and articulating such commonly-accepted standards of international behavior. See T. NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 308, 323-24 (1983); R. MANSBACH & J. VASQUEZ, IN SEARCH OF THEORY: A NEW PARADIGM FOR GLOBAL POLITICS 281-93, 325-28, 331-87, 486-87 (1981). See also R. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 246-47, 257-59 (1984); Kull, *Nuclear Nonsense*, 58 FOREIGN POL'Y 28, 52 (1985). But see Cohen, *Constraints on America's Conduct of Small Wars*, 9 INT'L SECURITY 151 (No. 2, Fall 1984) (international law not considered).

Not surprisingly, international lawyers are generally acutely aware of the importance of

without international law. Each becomes more difficult to achieve as confidence in international law and institutions decreases. Such confidence cannot be maintained or increased without a continuing determination on the part of the United States and other countries to support and uphold the international legal prohibition against the use of force. The maintenance and strengthening of international order, and the enhancement of the effectiveness of international law and institutions, constitute fundamental national security interests of the United States.¹⁸

2. The Fabric of International Order

It is in terms of those interests mentioned above that the response of the United States and other countries to the international "crises" in different parts of the world must be understood. Many ask, for example, how the Soviet invasion of Afghanistan¹⁹ can be compared to U.S. actions in Grenada²⁰ or Nicaragua. The

commonly accepted standards of international behavior. See, e.g., L. HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979); A. CHAYES, *THE CUBAN MISSILE CRISIS* (1974); R. FALK, *THE END OF WORLD ORDER* (1983); J. PERKINS, *THE PRUDENT PEACE: LAW AS FOREIGN POLICY* (1981).

18. Given the risks of miscalculation, of setting in motion forces not easily controlled, and of eventual nuclear conflict which tend to accompany the international use of force, the strengthening of international order, law, and institutions is directly related to national survival and thus constitutes a national security interest second to none. While the long-term nature of these interests tends to obscure their significance from decisionmakers operating within political and bureaucratic environments which focus attention on short-term objectives and pay-offs, this fact in no way relegates them to a second order of importance in terms of reality and its consequences. For varying treatments of U.S. "national interests", see George & Keohane, *The Concept of National Interests: Uses and Limitations*, in A. GEORGE, *PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE* 217-37 (1980); S. BROWN, *THE FACES OF POWER* 7-9 (1983); S. BROWN, *ON THE FRONT BURNER: ISSUES IN U.S. FOREIGN POLICY* 1-14 (1984) (survey of contending views); R. MANSBACH & J. VASQUEZ, *supra* note 17, at 8, 104-05, 186-88, 191-92; L. HENKIN, *supra* note 17, at 36-37, 331-39 (2d ed. 1979). For a provocative consideration of what constitutes "national security," see Ullman, *Redefining Security*, 8 *INT'L SECURITY* 129 (1983).

19. See, e.g., Valenta, *Soviet Decisionmaking on Afghanistan*, in *SOVIET DECISIONMAKING FOR NATIONAL SECURITY* (J. Valenta & W. Potter eds. 1984); S. BROWN, *THE FACES OF POWER* 552-63 (1983); C. ALIBERT, *DU DROIT DE SE FAIRE JUSTICE DANS LA SOCIÉTÉ INTERNATIONALE* DUPUIS 1945, 414-27 (1983).

20. See, e.g., W. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* (1984); Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 *AM. J. INT'L L.* 131 (1984); Gordon, Wilder, Rovine & Wallace, *International Law and the United States Action in Grenada*, 18 *INT'L LAW* 331 (1984); Comment, *The United States Action in Grenada: An Exercise in Realpolitik*, 16 *U. MIAMI INTER-AM. L. REV.* 53 (1984). For a defense of the invasion, see Robinson, *Letter from the Legal Adviser, United States Department of State*, 18 *INT'L LAW* 381 (1984) (collapsing the U.S. justification ultimately to consent); Moore, *Grenada and the International Double Standard*, 78 *AM. J. INT'L L.* 145 (1984). See also Reisman, *Coercion and Self-Determination: Construing*

answer has little to do with the democratic nature of the United States or the totalitarian nature of the Soviet Union. The answer is not that American actions were aimed at furthering Western democratic values while Soviet actions were aimed at defending the communist and egalitarian values of a socialist state. Each superpower has acted for both ideological and geopolitical reasons. Afghanistan is directly comparable to Nicaragua and Grenada because each involved a flagrant violation by a superpower of the most fundamental norms of international law. Each of these actions has torn a hole in the fabric of international order, and weakened community support for, and hence the deterrent force of, the international law prohibiting the use of force across international frontiers. Each, in a fundamental manner, has weakened international security. This in fact has been widely recognized by most other nations, as demonstrated by the overwhelming votes against the transgressors in the United Nations Security Council²¹ and the General Assembly;²² only their most dependent allies have supported their actions.

The larger issues addressed above can be brought into focus by posing a series of questions. Why should the Soviet Union not

Charter Article 2(4), 78 AM. J. INT'L L. 642 (1984). But see Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984) (Professor Schachter delivers a strong rebuttal to Professor Reisman, citing Myres Smith McDougal in the process).

21. In the Security Council, the draft resolution condemning the Soviet invasion of Afghanistan was approved with only the U.S.S.R. (casting a veto) and the German Democratic Republic voting against. 35 U.N. SCOR Supp. (Jan.-Mar. 1980) at 4, U.N. Doc. S/13729 (1980). The draft resolution condemning the invasion of Grenada was approved by 11 votes, with three abstentions (Togo, the United Kingdom, and Zaire). Only the U.S. voted against it (casting a veto). 38 U.N. SCOR Supp. (Oct.-Dec. 1983, U.N. Doc. S/16067; U.N. Doc. S/PV.2491, at 197 (Oct. 28, 1983).

22. The General Assembly approved a resolution condemning the Soviet invasion of Afghanistan by a vote of 104-18, with 18 abstentions. G.A. Res. ES-6/2, U.N. GAOR Supp. (No. 1) at 2, U.N. Doc. A/ES-6/2 & add. 1 & 2 (1980). In the case of Grenada, the corresponding resolution was approved by a vote of 108-9, with 27 abstentions. G.A. Res. 738, U.N. GAOR Supp. (No. —) at 9, U.N. Doc. A/38/L.8 (1983).

In the General Assembly, only Afghanistan, Angola, Bulgaria, Byelorussia, Cuba, Czechoslovakia, Democratic Yemen, Ethiopia, the German Democratic Republic, Grenada, Hungary, the Lao People's Republic, Mongolia, Mozambique, Poland, the Ukrainian Soviet Socialist Republic, and Viet Nam voted with the Soviet Union against the resolution calling for withdrawal of foreign troops from Afghanistan. G.A. Res. ES-6/2, U.N. GAOR Supp. (No. 1) at 2, U.N. Doc. A/ES-6/2 and add. 1 & 2 (1980).

In the vote in the General Assembly on Grenada, the United States was joined only by Antigua and Barbuda, Barbados, Dominica, El Salvador, Israel, Jamaica, St. Lucia, and St. Vincent and the Grenadines in opposing the resolution calling for withdrawal of foreign troops from Grenada. The Western Allies abstained. G.A. Res. 38/738, UN GAOR Supp. (No. —) at 9, U.N. Doc. A/38/L.8 (1983).

have invaded Czechoslovakia in 1968 or Hungary in 1956? Why should the Soviet Union not have invaded Afghanistan in 1979, and why should it withdraw its troops now? Iraq's invasion of Iran in 1980, and the Israeli invasion of Lebanon in 1982 pose similar questions. Why should the Soviet Union not invade Poland if it finds political developments there unacceptably threatening? Why should it not have massed its troops on the Polish frontier in an obvious threat of intervention in 1980 and 1981?²³

The importance of the prohibition against the use of force is not limited to actions by the superpowers or to volatile regions on their borders, as the following questions reveal. Why should Argentina not have invaded the Falklands?²⁴ Why should Venezuela not seize disputed territory from Guyana by using military force?²⁵ Why should the General Assembly not seat the Kampuchean government installed by Vietnamese troops in 1978?²⁶ As these ques-

23. Regarding the Soviet invasions of Czechoslovakia in 1968 and Hungary in 1956, see J. VALENTA, *SOVIET INTERVENTION IN CZECHOSLOVAKIA, 1968: ANATOMY OF A DECISION* (1979); T. FRANCK & E. WEISBAND, *WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS* (1972); Franck & Weisband, *The Johnson and Brezhnev Doctrines: The Law You Make May Be Your Own*, 22 STAN. L. REV. 979 (1970); Wright, *Intervention*, 1956, 51 AM. J. INT'L L. 257 (1957); L. SOHN, *UNITED NATIONS LAW* 634-80 (1967); C. ALIBERT, *supra* note 19, at 365-84 (comparing Hungary and Czechoslovakia).

On the Soviet invasion of Afghanistan in 1979 see Valenta, *Soviet Decisionmaking on Afghanistan, 1979*, in *SOVIET DECISIONMAKING FOR NATIONAL SECURITY* 165-84 (J. Valenta & W. Potter eds. 1984); C. ALIBERT, *supra* note 19, at 415-27; *Legal Responses to the Afghan/Iranian Crises: A Panel*, 74 AM. SOC'Y INT'L L. PROC. 248 (1980).

Regarding Iraq's invasion of Iran in 1980 see Sterner, *The Iran-Iraq War*, 63 FOREIGN AFF. 128 (1984); C. ALIBERT, *supra* note 19, at 106-26.

With respect to the Israeli invasion of Lebanon in 1982 see Ajami, *Crusade in Lebanon: The Shadows of Hell*, 48 FOREIGN POL'Y 94 (1982); Yaniv & Lieber, *Personal Whim or Strategic Imperative: The Israeli Invasion of Lebanon*, 8 INT'L SECURITY 117 (1983); Z. SCHIFF & E. YA'ARI, *ISRAEL'S LEBANON WAR* (1984); Levenfeld, *Israeli Counter-Fedayeen Tactics in Modern Lebanon: Self Defense and Reprisal under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1 (1982); Note, *The Legal Implications of Israel's Invasion into Lebanon*, 13 CAL. W. INT'L L.J. 458 (1983).

On the Soviet Union's massing of its troops on the Polish frontier in an obvious threat of intervention in 1980, see Moreton, *The Soviet Union and Poland's Struggle for Self-Control*, 7 INT'L SECURITY 86 (1982).

24. See, e.g., Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109 (1983); Glover, *International Law in the Falkland Islands*, 1982 N.Z.L.J. 191; THE SUNDAY TIMES OF LONDON INSIGHT TEAM, *WAR IN THE FALKLAND: THE FULL STORY* (1982).

25. See, e.g., N.Y. Times, Nov. 23, 1980, at 5, col. 5 (nat'l ed.).

26. See Warbrick, *Kampuchea: Representation and Recognition*, 30 INT'L & COMP. L.Q. 234 (1981). In a White House statement issued in 1983, the rationale for opposing the seating of the Kampuchean government was stated as follows:

The Heng Samrin regime . . . was installed in Phnom Penh and is maintained there solely by the force of Vietnamese arms. Seating representatives of the

tions suggest, there is a common thread which unites these real or hypothetical events in disparate countries around the globe. The delicate fabric of international order has or would be torn by each of the actual or potential actions mentioned above. That fabric is rent because international law is the thread with which the fabric of international order is woven.²⁷

It is against this background that one must evaluate the wisdom of U.S. covert operations against Nicaragua²⁸ and its attempts to evade an impartial adjudication of the legality of its actions by the ICJ.²⁹ These actions reveal the United States' failure to take into account its fundamental national interests in strengthening international order and the international legal norms prohibiting the use of force. There is evidence to suggest that not only have the decision makers responsible for U.S. covert operations against Nicaragua failed to give adequate weight to these fundamental national interests, but also they have at times failed to address these

Heng Samrin regime would indicate international acceptance of a government imposed by a foreign aggressor in violation of the U.N. Charter and in defiance of the General Assembly. . . .

DEP'T ST. BULL., Nov., 1983, at 37.

27. U.S. Ambassador Jeane J. Kirkpatrick made this essential point in addressing the U.N. General Assembly in 1982, in relation to a draft resolution calling for the withdrawal of foreign troops from Afghanistan:

Of all the issues before this Assembly, none has more far-reaching implications than the issue of Afghanistan. The aggression committed by the Soviet Union in Afghanistan and its proxies elsewhere has had and continues to have a great impact upon the climate and course of East-West relations. Such aggression ominously affects the entire fabric of international relations and the future of the state system based upon respect for the principles of territorial integrity, national independence, and political sovereignty. These actions bear directly upon the capacity of states, especially those most vulnerable, to retain their unique identities and to fulfill their aspirations in peace and security.

The Afghan people are fighting for their own survival, but their struggle has a much broader meaning. If a small, relatively defenseless, nonaligned country like Afghanistan is allowed to be invaded, brutalized, and subjugated, what other similarly vulnerable country can feel secure? . . .

Rejecting Soviet arguments, Ambassador Kirkpatrick also demonstrated the importance of international law as a commonly-accepted standard of international behavior. She stated:

But what, one may legitimately ask, gives the Soviet Union the right to insist that the violent overthrow of a non-aligned government constitutes an "irreversible" revolution? According to what tenet of international law, on the basis of what article of the U.N. Charter, do they base their position?

Address to the General Assembly, Nov. 24, 1983, DEP'T ST. BULL. Jan., 1983, at 78-79. The resolution was adopted on November 29, 1983 by a vote of 114-21, with 13 abstentions and 9 absent or not voting. *Id.* at 80.

28. See *infra* Part I(B).

29. See *supra* note 3 and accompanying text; *infra* notes 121, 187 and accompanying text.

questions.³⁰

3. Problems of Partial Compliance

In a legal system characterized by partial compliance with international legal rules prohibiting the threat or use of force, how should a state act in order to further the fundamental goals of strengthening international order and the effectiveness of international law and institutions? Is it rational to violate the prohibition against the use of force because other nations do so?³¹ Or, conversely, is it more rational in attempting to achieve these fundamental objectives to comply with such legal norms, while mobilizing the political support of other nations to increase the costs incurred by those who violate such basic principles of international law?³² Is it not more rational to attempt to strengthen and increase support for these legal norms and institutions within the international system by foregoing short-term political and military gains, thereby increasing the costs of their violation, and hence their deterrent force?

The question of whether norm observance is a rational strategy in a system of partial compliance is frequently answered in the negative by those skeptical of international law.³³ Such a conclusion is offered, however, without having contemplated its consequences and implications. It is a conclusion used to dismiss the relevance of international law, often as a justification for actions violative of international law's basic prohibitions,³⁴ or as an excuse for refusing to participate in the strengthening of international law and its institutions.³⁵ Yet, those who dismiss international law fail to recognize that in doing so they abandon the goal of increased

30. See, e.g., N.Y. Times, June 6, 1984, at 4, col. 1 (nat'l ed.).

31. See, e.g., Reisman, *supra* note 20.

32. See, e.g., L. HENKIN, *supra* note 17, at 318, 337-39.

33. See, e.g., M. LACHS, *THE TEACHER IN INTERNATIONAL LAW* 13-18 (1982); L. HENKIN, *supra* note 17, at 319-32. See also L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 28-32 (1980).

34. See, e.g., Reisman, *supra* note 20 and accompanying text.

35. The refusal to participate in efforts to strengthen international law and institutions may result from a "unilateralist" outlook according to which national interests can best be pursued and protected in the absence of constraints imposed by international law, relying instead on what tend to be viewed as a nation's "sovereign" prerogatives. This unilateralist perspective may frequently be traced to underlying beliefs about the ineffectiveness of international law and the futility of supporting international legal norms when other nations are viewed as likely to violate them with impunity whenever they wish to do so. See, e.g., Keohane & Nye, *Two Cheers for Multilateralism*, 60 FOREIGN POL'Y 148 (1985).

international order; they ignore the fact that a superpower's violations of fundamental international norms communicate that superpower's view of permissible international behavior, to allies and adversaries alike, much more powerfully than words.

Such conclusions also result in the failure to act in support of these norms when they are violated by other states, particularly when the state is perceived as friendly.³⁶ The net effect is a reduction in the costs imposed upon potential and actual violators and a further weakening of the norm.

While a complete answer to the question of how a state should act to strengthen international order and law in a system of partial compliance cannot be offered here, one should not lose sight of history. Twice, after experiencing the devastation of total war, the leaders of the world, including those of the United States, concluded that a strengthening of international law and institutions was an indispensable means of constructing a more stable international order. Both the League of Nations and the United Nations were created with the principal aim of reducing the use of force. The founders of both institutions established mechanisms through which nations could act to support legal norms in situations of partial compliance. The ultimate failure of the League and the weakening of the United Nations in recent years in no way invalidates the strategy for securing international order adopted in 1919 and 1945. The decisions of these leaders establish a presumption in favor of the observance of law as a rational strategy for constructing international order in a system of partial compliance. The burden of persuasion is on those who would reject international law. If they are to rebut the presumption, they must do so by explaining how violations of basic norms of international law can lead to the strengthening of international order and the increasing effectiveness of international law and institutions. Given the relationship between order and law, it is doubtful that this can be done.

The basic questions regarding U.S. strategy for achieving greater international order and its policy towards strengthening the international law regulating the use of force cannot be avoided

36. Particularly noteworthy examples of U.S. failure to communicate to allies its support of fundamental legal norms prohibiting the use of force include the case of Argentina's invasion of the Falklands in 1982, and the Indonesian invasion of East Timor in 1975. See *supra* note 24 and accompanying text; Clark, *The "Decolonization" of East Timor and the United Nations Norms of Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 2 (1980).

by dismissing the importance of international law because of partial compliance by other states. Rather, these questions must be thoroughly considered not only by experts in international law, but also by the policy-makers, legislators, journalists, leaders of non-governmental organizations, and private citizens whose beliefs and actions ultimately determine the policies adopted by the United States.

International lawyers face a curious dilemma. If they discuss these issues only among themselves, it is not likely that their insights will be shared by those whose decisions ultimately determine state behavior. If, on the other hand, they address policy-makers and others whose understanding of international law shapes national policies and behavior, they run the risk of speaking within a legal paradigm whose arguments and complexities will not be understood. They also run the related risk that highly sophisticated and well-reasoned arguments will be rejected because of the reader's simplistic belief that international law is not "law," is "ineffective," or is not "enforceable,"³⁷ and therefore should not be followed where other important interests are at stake.³⁸

Because of the importance of strengthening international order, law, and institutions, international lawyers must nonetheless induce others to seriously consider the previous questions as well as substantive questions of international law. Ultimately, the strengthening of the international law regulating the use of force, and hence the strengthening of international order, will depend on these phenomena being understood by non-specialists.

International law affects everyone. An important effect is the way in which it may cause domestic public opinion and domestic political forces to focus their attention on the long-term costs and benefits of alternative policies. The most critical decisions — whether to observe the Order of Interim Protection of the Court or to continue the funding of covert operations against Nicaragua;³⁹

37. See, e.g., L. HENKIN, *supra* note 17, at 12-27, 89-98, 322-32.

38. *Id.* at 322-32.

39. Interim Protection Order of May 10, 1984, *supra* note 5, at 184-87. The Court's Order of Interim Protection is legally binding on the parties. See S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* (2d rev. ed. 1985). However, this assertion, while representing the better view, has been the subject of doctrinal dispute. See J. SZTUCKI, *INTERIM MEASURES IN THE HAGUE COURT* 260-94 (1983); J. ELKIND, *INTERIM PROTECTION: A FUNCTIONAL APPROACH* (1981).

In July, 1985, the U.S. Congress approved \$27 million in "humanitarian" aid for the *contras*.

whether to seek a negotiated settlement of the case;⁴⁰ or whether to comply with the final judgement on the merits⁴¹ —will be made within the next several years. One would hope that the considerations discussed above would be taken into account by those who make or influence these decisions.

It is important not only to understand the arguments before the World Court, but also to place these arguments into a broader context. That context should relate U.S. policies and specific legal arguments to the fundamental U.S. national interest in creating a strengthened international order where more effective international law and institutions can be used.

B. United States Covert Operations Against Nicaragua

1. The Origins of the Covert War Against Nicaragua

U.S. opposition to the Sandinista forces in Nicaragua existed well before the overthrow of the corrupt and brutal regime of Anastasio Somoza. From the fall of 1978 until the final collapse of the Somoza regime on July 19, 1979, American policy-makers consistently attempted to achieve a transition to a moderate regime that would not be dominated by the Marxist leaders of the Sandinista movement.⁴² When military collapse appeared imminent in June, 1979, the United States proposed to the Organization of American States (OAS) that an Inter-American Peacekeeping Force be created to supervise the transition. The proposal, however, was summarily rejected by the other members of the OAS.⁴³

40. While the Reagan administration has apparently decided not to pursue this option, which would probably require a general settlement of the dispute with Nicaragua, it remains an attractive alternative as opposed to the expected condemnation of the U.S. by the ICJ in its judgment on the merits. Payment or a negotiated settlement of the damages award will necessarily remain on the agenda of U.S. policymakers until one of these two alternatives is adopted.

41. The initial decision whether or not to comply with the Court's decision will be made by the Reagan administration. Given its recent posture toward the Court, a negative decision would not be surprising. However, if the U.S. does decide not to comply with the adverse decision by the ICJ, the issue will not go away. It would appear likely that some administration, at some point in the future, would end the country's non-compliance with the Court's judgment on the merits.

42. See J. BOOTH, *THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION* 128-54, 161-81 (1982); Sims, *Revolutionary Nicaragua: Dilemmas Confronting Sandinistas and North Americans*, in *CONFRONTATION IN THE CARIBBEAN BASIN* 53, 56-57; W. LAFEBER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* 233-35 (1983).

43. See J. BOOTH, *supra* note 42, at 177; Organization of American States, 17th Meeting of Consultation of Ministers of Foreign Relations, Resolution II, June 23, 1979, OAS Doc.

The Carter administration proposed a seventy-five million dollar aid package with the intent of influencing the revolution's course in a positive direction, but its approval was stalled in Congress for almost a year.⁴⁴ The new administration under President Reagan shifted from the Carter administration's approach of positive inducements, manifesting increasing hostility toward the Sandinista regime; it authorized covert operations against Nicaragua as early as March, 1981,⁴⁵ and expanded such operations in November, 1981, following a National Security Council meeting.⁴⁶ By mid-1984, U.S. hostility toward Nicaragua had led to the creation, funding, and support of a paramilitary force of counter-revolutionaries or *contras* operating in and against Nicaragua, and direct American involvement in military actions such as blowing up oil storage facilities and mining Nicaraguan harbors.

Three factors seem to have been at the root of U.S. policy toward Nicaragua. The dominant factor is a general hostility toward a Marxist government which might become a totalitarian regime similar to that of the Soviet Union, Cuba, and other communist states.⁴⁷ Such a regime, it is believed, will necessarily violate human rights on a massive scale,⁴⁸ cannot be trusted,⁴⁹ and will

OEA/SER. F/II.17, Doc. 40/79; W. LAFEBER, *supra* note 42, at 229-37.

44. See Sims, *supra* note 42, at 239-42.

45. While details of the March decisions remain obscure, having been overshadowed by revelations concerning the decisions taken in November and December, 1981, President Reagan reportedly authorized a \$19.5 million program of covert activities aimed at halting the flow of arms from Nicaragua to El Salvador and other neighboring countries. See Dickey, *Central America: From Quagmire to Cauldron?*, 62 FOREIGN AFF. 659, 668-69 (1984); Application, *supra* note 4, Annex A, at 22.

46. Washington Post, Apr. 29, 1984, at A1, col. 4; Washington Post, Nov. 23, 1983, at A1, col. 4.

First, covert financial assistance to "moderate" elements in Nicaragua was authorized to continue. N.Y. Times, Mar. 11, 1982, at 1, col. 4 (nat'l ed.); N.Y. Times, Nov. 2, 1982, at 6, col. 1 (nat'l ed.); Washington Post, Mar. 10, 1982, at A1, col. 6. Second, authorization was given for the CIA to create and train a 500-man paramilitary force, at a cost of \$19.5 million, with the possibility of its expanding if necessary. Washington Post, Mar. 10, 1982, at A1, col. 5; N.Y. Times, Mar. 17, 1982, at A10, col. 5 (nat'l ed.); Washington Post, Mar. 10, 1982, at A1, col. 6. Third, continued support and coordination with a second paramilitary force being trained in Honduras by Argentina was apparently approved. Newsweek, Nov. 8, 1982, at 42, 44. General Vernon Walters and other officials had discussed possible covert operations with Argentina and Honduras earlier in 1981. For details of U.S.-Argentine collaboration in support of the *contras*, see N.Y. Times, Apr. 8, 1983, at 6, col. 3 (nat'l ed.).

47. See, e.g., Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34-35, reprinted in HUMAN RIGHTS AND U.S. HUMAN RIGHTS POLICY 5-29 (H. Wiarda ed. 1982); Sanchez, *The Communist Threat*, 52 FOREIGN POL'Y 43, 47 (1983).

48. See, e.g., Kirkpatrick, *supra* note 47, in HUMAN RIGHTS AND U.S. FOREIGN POLICY at 27-29.

49. See, e.g., Vaky, *Reagan's Central American Policy: An Isthmus Restored*, in CEN-

inevitably attempt to spread revolution to neighboring countries.⁵⁰

The second factor is the fact that Nicaragua has contributed in various ways to the efforts of the Salvadoran revolutionaries currently attempting to overthrow the U.S. backed government in El Salvador. Large quantities of arms flowed from Nicaragua to the guerrillas in El Salvador, particularly during 1980 and early 1981.⁵¹ While there appears to be little evidence of a significant arms flow since that time,⁵² ammunition and other supplies appear to have gotten through on a much more limited scale.⁵³ The United States also sees Nicaragua as providing other forms of assistance and advice, such as providing a safe haven for the Salvadoran rebels and providing locations for carrying out command and control functions.⁵⁴

The third factor which accounts for U.S. policy is the perception that a Marxist Nicaragua constitutes a grave threat to the

TRAL AMERICA: ANATOMY OF CONFLICT 233, 248-49 (R. Leiken ed. 1984). President Reagan's response to a question about Nicaraguan leaders at a press conference on November 3, 1983, was revealing. "I haven't believed anything they've said since they got in charge," he said, "and you shouldn't either." *Id.* at 249. See also Washington Post, Dec. 17, 1984, at A1, col. 1 (Deputy Defense Secretary Fred C. Iklé and CIA Director William J. Casey said to "think there is little point in talking to communists since any agreement will be violated.").

50. See, e.g., Washington Post, Dec. 17, 1984, at A1, col. 1. A high administration official was quoted as saying, "[N]obody expects that over a long period of time they [the Sandinistas] wouldn't promote external revolution." *Id.*

51. See, e.g., Bolaños Hunter, *Nicaragua: A View From Within*, in CROSOS AND OPPORTUNITY: U.S. POLICY IN CENTRAL AMERICA AND THE CARIBBEAN 383, 393-94 (M. Falcoff & R. Royal eds. 1984).

52. See, e.g., Washington Post, July 8, 1984, at A1, col. 1; Smith, *Dateline Havana: Myopic Diplomacy*, 48 FOREIGN POL'Y 157, 160-62 (1982); Birns & Anderson, *A Contra-Diction*, N.Y. Times, June 6, 1984, at E23, col. 2 (nat'l ed.); Rosenfeld, *Cause for Invasion?*, Washington Post, Nov. 16, 1984, at A23, col. 1. For the "evidence" presented by the Reagan administration, see, e.g., DEPARTMENT OF STATE & DEPARTMENT OF DEFENSE, BACKGROUND PAPER: NICARAGUA'S MILITARY BUILD-UP AND SUPPORT FOR CENTRAL AMERICAN SUBVERSION 18-21, 23-25 (July 18, 1984) [hereinafter cited as Background Paper]. But cf. Washington Post, July 19, 1984, at A17, col. 1 (June draft of Background Paper called flow of supplies only "sporadic").

53. See, e.g., Washington Post, July 8, 1984, at A1, col. 1.

54. See, e.g., BACKGROUND PAPER, *supra* note 32, at 23-25. It should be noted that Nicaragua does not border El Salvador and has not been used as a sanctuary from which rebels launch attacks and to which they may safely retreat. In contrast, the *contras* based in Honduras have used Honduran territory as a sanctuary, behind the shield of U.S. military forces in the area and the threat of their use or the use of other U.S. forces. It appears that Nicaragua has been dissuaded from fully exercising its rights of hot pursuit and self-defense under international law by its realization that any such action would be characterized as Nicaraguan aggression and an armed attack against Honduras, giving the United States the legal right to use military force against Nicaragua in exercise of the right of collective self-defense guaranteed by article 51 of the United Nations Charter.

United States in terms of its strategic and geopolitical interests. This is partly due to the United States' fear that Nicaragua's revolution, whether by example or force of arms,⁵⁵ will result in the fall of neighboring governments to the communists.⁵⁶ The possibility that Nicaragua will forge close military ties with the Soviet Union and Cuba, however, provides the greatest threat.⁵⁷ Such ties might eventually include not only Soviet and Cuban military advisers and supplies of military weapons and equipment,⁵⁸ but also Soviet ground, air, and naval bases and even the stationing of large numbers of Cuban or Soviet troops in Nicaragua.⁵⁹ Were these

55. Critical distinctions are usually submerged in the terminology used by the Reagan administration, such as Nicaragua's perceived penchant for "exporting revolution." These distinctions include the difference between behavior which violates international law and that which does not. There is a great difference, for example, between illegally sending arms to rebels in El Salvador and allowing certain of their leaders to live in Nicaragua. There is a great difference between "exporting revolution" by arms shipments or troops, on the one hand, and doing so by example, propaganda, and providing support of a non-military nature, on the other. See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, *amended* by Protocol of Buenos Aires, art. 20, 21 U.S.T. 607, T.I.A.S. No. 6847; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 1, 62 Stat. 1681, T.I.A.S. No. 1838, 4 Bevans 559 [hereinafter cited as Rio Treaty].

When coupled with the belief that a Marxist government inevitably supports armed revolution in neighboring states, the demand that Nicaragua stop "exporting revolution" easily becomes confused with a demand that it change its internal form of political organization. The use of such inchoate terminology tends to lead to confusion both in defining foreign policy objectives and in understanding the costs and chances of success of pursuing one objective as opposed to another. See, e.g., Vaky, *supra* note 49, at 233-50.

56. See, e.g., Vaky, *supra* note 49, at 239.

57. Considerable military cooperation between Nicaragua and Cuba and the Soviet Union already exists, although its precise nature and extent are subjects of dispute. See, e.g., Bolaños, *supra* note 51, at 390-93.

58. In January, 1984, U.S. administration officials estimated that there were some 2,000 military and security advisers among the 6,000 Cubans in Nicaragua. Washington Post, Jan. 31, 1984, at A10, col. 4. U.S. officials denounced Nicaraguan plans to build a military airport as representing a potential Soviet base. Washington Post, Sept. 7, 1984, at A24, col. 1. Statements by Nicaraguan officials that they are interested in obtaining Soviet MiGs or French Mirages to build up a combat air force have done little to ease U.S. concerns. See, e.g., *id.*

The removal of foreign advisers is a primary goal of U.S. policy toward Nicaragua. Secretary of State George Shultz put the matter bluntly in April, 1985, as follows:

First, Nicaragua must stop playing the role of surrogate for the Soviet Union and Cuba. As long as there are large numbers of Soviet and Cuban security and military personnel in Nicaragua, Central America will be embroiled in the East-West conflict. . . . Central America is West. The East must get out. . . .

Address by Secretary Shultz, in Indianapolis (Apr. 22, 1985), *reprinted* in U.S. DEP'T OF STATE, CURRENT POLICY, No. 691, at 3 (1985).

59. For the views of leading Defense Department officials, see Iklé, *U.S. Policy for Central America: Can We Succeed?*, in THE NICARAGUA READER: DOCUMENTS OF A REVOLUTION UNDER FIRE 21-26 (P. Rosset & J. Vandermeer eds. 1983) (speech originally delivered to the Baltimore Council on Foreign Affairs, Sept. 12, 1983); Sanchez, *The Communist Threat*, 52

events to occur, U.S. strategic interests would be adversely affected in a most serious way.⁶⁰

These three factors have led the United States to set three principal objectives in dealing with Nicaragua. The first objective is an end to the supply of arms, equipment, and other assistance to the Salvadoran guerrillas and also to leftist groups in other neighboring countries.⁶¹ The second objective is a demand that the Nicaraguan Government open up its political processes to prevent it from becoming (or remaining) a totalitarian Marxist state.⁶² The third objective is an assurance from Nicaragua that close military

FOREIGN POL'Y 43 (1983).

60. See, e.g., Hayes, *United States Security Interests in Central America in Global Perspective*, in *CENTRAL AMERICA: INTERNATIONAL DIMENSIONS OF THE CRISIS* 85-102 (R. Feinberg ed. 1982); Cirincione & Hunter, *Military Threats, Actual and Potential*, in *CENTRAL AMERICA: ANATOMY OF CONFLICT* 173-92 (R. Leiken ed. 1984).

61. Secretary Shultz stated this central goal in April, 1985 as follows:

Third, Nicaragua must absolutely and definitively stop its support for insurgents and terrorists in the region. . . .

Address by Secretary Shultz, *supra* note 58, at 3. A somewhat related objective was put as follows:

Second, Nicaragua must reduce its armed forces—now in excess of 100,000 and heavily armed—to a level comparable to those of its neighbors.

Id.

62. Secretary Shultz has reaffirmed this objective in the following terms:

And fourth, the Sandinistas must live up to their commitments to democratic pluralism made to the OAS in 1979. The internal Nicaraguan opposition, armed and unarmed, represents a genuine political force that is entitled to participate in the political processes of the country. The government in Managua must provide the political opening that will allow their participation.

Address by Secretary Shultz, *supra* note 58.

President Reagan has stated this objective in even blunter terms. When asked at a news conference whether his goal was to remove the Sandinistas from power, he replied, "Well, removed in the sense of its present structure, in which it is a communist totalitarian state, and it is not a government chosen by the people." *Washington Post*, Feb. 22, 1985, at A1, col. 6. Those to be invited back into the government included, in particular, the *contras*. *Id.* When asked several weeks later how he could justify "helping to overthrow a government merely because we don't like its political coloration," President Reagan replied:

Well, they call themselves a government. . . . This is one faction of a revolution that overthrew a dictatorship. But then, just as Castro had done in Cuba, one faction got in and muscled the other ones out.

Some of them are jailed, some driven into exile. Some are leading the freedom fighters now. I think we have to ignore this pretense of an election they just held. This is not a government. This is a faction of the revolution that has taken over at the point of a gun.

And under the United Nations Charter and the Charter of the Organization of American States, there is every reason for us to be helping the people that want the original goals of the revolution instituted (emphasis added).

Washington Post, Mar. 6, 1985, at A8, col 1 (remarks in interview with *Business Week* magazine).

and other ties with the Soviet Union will not be forged or allowed to remain in place, so that no Soviet military forces or facilities will be established in that country.⁶³ Achievement of the second objective will help ensure that of the third. While the accuracy of some of the views set forth above may be questioned,⁶⁴ it is submitted that they do represent the views of the Reagan administration.

It is essential, for both analytical and policy purposes, to keep these three objectives separate. One might think that the first objective, halting the arms flow to El Salvador, could be successfully resolved either through negotiations⁶⁵ or through recourse to the OAS under the Inter-American Treaty of Reciprocal Assistance, or "Rio Treaty."⁶⁶ Even the third objective—the assurance that close military ties will not be maintained with the Soviet Union or Cuba, and that no foreign military bases or facilities will be established—might be achieved through negotiations that include a proper mix of positive incentives, particularly access to American markets and economic aid.⁶⁷

The second objective is the problem. The Carter administration sought to solve the problem through positive engagement and the use of aid and other traditional instruments of political persuasion.⁶⁸ Later, and after an increase in the authoritarian nature of

63. See, e.g., *supra* note 58.

64. See, e.g., Ullman, *At War With Nicaragua*, 62 FOREIGN AFF. 39, 52-54 (1983).

65. On September 21, 1984, Nicaragua announced that it would accept a peace plan proposed by the Contadora countries which would largely achieve these objectives. Washington Post, Sept. 23, 1984, at A34, col. 1. The U.S. promptly moved to oppose ratification of the pact by the other Central American countries, at least in its current form, insisting there were verification problems. Washington Post, Sept. 30, 1984, at A1, col. 2. In December, 1984, for example, Langhorne Motley, Assistant Secretary of State for Inter-American Affairs, was reported as saying that the Nicaraguan military build-up meant that verification of any Contadora peace treaty would be "all but impossible." The White House, it was reported, held the view that any serious peace treaty would require hundreds, perhaps thousands of people to verify compliance. Washington Post, Dec. 17, 1984, at A20, col. 1.

In early 1985, Nicaragua offered to forego the introduction of more advanced weapons systems such as MIG aircraft. The Reagan administration's reaction to the proposal, however, was cool. See Washington Post, Mar. 3, 1985, at A1, col. 1. On the course of negotiations with Nicaragua in general, see Gutman, *America's Diplomatic Charade*, 56 FOREIGN POL'Y 3 (1984).

66. The supplying of arms by Nicaragua to guerrillas in El Salvador would constitute a violation of Article 18 of the OAS Charter; see, e.g., Rowles, *The United States, the OAS, and the Dilemma of the Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385, 401-02 (1983).

67. See *supra* note 65.

68. See Sims, *supra* note 42, at 58-62. But c.f. NEWSWEEK, Nov. 8, 1982, at 42, 44 (a secret war for Nicaragua)(non-military covert activities initiated under President Carter).

the Sandinista regime,⁶⁹ the Reagan administration sought to resolve the problem through a combination of negotiations and coercion; coercion came to dominate the two-track policy, particularly after mid-1983.⁷⁰ Nonetheless, sharp divisions have at times existed within the administration over which track should be given priority.⁷¹

2. Key Decisions in Washington

Long before the fall of the Somoza regime, in 1978 President Carter authorized non-military covert aid to moderate and pro-democratic organizations in Nicaragua.⁷² This covert aid seems to have continued through 1980 and early 1981 after the Sandinistas assumed power.⁷³ Within months after President Reagan took office in 1981, actions were taken which reflected both a heightened hostility toward the Nicaraguan regime and an abandonment of attempts to influence internal developments through the offering of positive inducements such as foreign assistance and preferential access to U.S. markets. Nicaraguan involvement in a heavy flow of arms to guerrillas in El Salvador in the fall of 1980 and early 1981,⁷⁴ a major offensive by Salvadoran rebels in January, 1981,⁷⁵

69. See, e.g., Gleijeses, *Nicaragua: Resist Romanticism*, 54 FOREIGN POL'Y 122, 122-38 (1984); Sims, *supra* note 42, at 66-72. Many authors, including the above, suggest a strong relationship between the increasing hostility of the United States, manifested in both covert and overt actions, and the growth in the autocratic nature of the Sandinista regime. See W. LAFEBER, *supra* note 42, at 293-99; J. BOOTH, *supra* note 42, at 222-27; Fagen, *Revolution and Crisis in Nicaragua*, in TROUBLE IN OUR BACKYARD: CENTRAL AMERICA AND THE UNITED STATES IN THE EIGHTIES 125-54 (M. Dishkin ed. 1983); Ullman, *At War With Nicaragua*, 62 FOREIGN AFF. 39-58 (1983); Schoultz, *Nicaragua: The United States Confronts a Revolution*, in FROM GUNBOATS TO DIPLOMACY 116-34 (R. Newfarmer ed. 1984). Compare Radosh, *The Drift Toward Repression*, in CRISIS AND OPPORTUNITY: U.S. POLICY IN CENTRAL AMERICA AND THE CARIBBEAN 407-23 (M. Falcoff & R. Royal eds. 1984); Kirkpatrick, *U.S. Security Interests and Latin America*, in RIFT AND REVOLUTION: THE CENTRAL AMERICAN IMBROGLIO 342-50 (H. Wiarda ed. 1983).

70. See, e.g., Rubin, *Reagan Administration Policymaking and Central America*, in CENTRAL AMERICA: ANATOMY OF CONFLICT 299-335 (R. Leiken ed. 1984).

71. See, e.g., Vaky, *supra* note 49, at 237; Washington Post, Aug. 8, 1984, at A1, col. 4; Washington Post, Apr. 29, 1984, at A1, col. 4; Washington Post, Nov. 23, 1983, at A1, col. 4; N.Y. Times, Dec. 9, 1984, at 8, col. 3 (nat'l ed.); N.Y. Times, Nov. 12, 1984, at 8, col. 1 (nat'l ed.); Washington Post, Dec. 17, 1984, at A1, col. 1.

72. *Supra* note 68.

73. *Id.*

74. See *supra* notes 51-53.

75. See, e.g., T. MONTGOMERY, *REVOLUTION IN EL SALVADOR: ORIGINS AND EVOLUTION* 138-39 (1982); W. LAFEBER, *supra* note 42, at 255-56.

and internal developments in Nicaragua⁷⁶ fed and confirmed the fears of the new administration, which was already predisposed to view events in the region in terms of the global struggle against communism.⁷⁷ A thorough analysis of the interaction of these and related factors in producing U.S. decisions is beyond the scope of this study,⁷⁸ although it should be noted that a striking similarity appears to exist between the manner in which U.S. relations with Nicaragua deteriorated after 1980 and the manner in which U.S.-Cuban relations worsened after Fidel Castro assumed power in Cuba in January, 1959.⁷⁹

In the spring of 1981, the Reagan administration halted foreign assistance to Nicaragua, moved to curtail sugar imports from and wheat exports to Nicaragua, and began to oppose the granting of loans to Nicaragua by international financial institutions.⁸⁰ The Reagan administration also authorized a substantial increase in covert intelligence activities in Central America, including Nicaragua.⁸¹

During the summer, Robert MacFarlane, a principal assistant to Secretary of State Alexander Haig, began to develop and coordinate planning for a wide range of military and other options that might be pursued in order to defend against the perceived threat of Soviet, Cuban, and Nicaraguan subversion in Central America.⁸² These options, which included a blockade of Cuba to halt the flow of arms to Nicaragua and El Salvador, were considered by the National Security Council (NSC) on November 16, 1981. While Haig's proposed blockade of Cuba was rejected, President Reagan and the NSC did agree to carry out a program of covert action against and within Nicaragua.⁸³ Finally, it was decided that contingency plans

76. See *supra* note 69.

77. See *supra* note 70; Vaky, *supra* note 49; A. HAIG, CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 27, 117-40 (1984).

78. See generally Sims, *supra* note 42.

79. See Sims, *supra* note 42; C. BLASIER, THE HOVERING GIANT: U.S. RESPONSES TO REVOLUTIONARY CHANGE IN LATIN AMERICA 177-202 (1976); Ullman, *supra* note 64. For a prescient analysis, see LeoGrande, *The Revolution in Nicaragua*, 58 FOREIGN AFF. 28, 49-50 (1979).

80. See, e.g., Sims, *supra* note 42, at 63.

81. See *supra* note 45 and accompanying text.

82. These options, which included a potential blockade of Cuba in order to halt the flow of arms to Nicaragua and El Salvador, were considered by the National Security Council on November 16, 1981. N.Y. Times, Nov. 5, 1981, at 1, col. 2 (nat'l ed.); Washington Post, Nov. 23, 1983, at A1, col. 4; Washington Post, Apr. 29, 1984, at A1, col. 4.

83. N.Y. Times, Nov. 5, 1981, at 1, col. 2 (nat'l ed.). See also *supra* note 46.

should be drawn up for dealing with unspecified "unacceptable military action by Cuba." These plans were to cover "possible use of U.S. forces to deter the introduction of Cuban military forces into Central America," and to consider "possible use of direct pressure against Cuba," including a "petroleum quarantine and/or retaliatory air reaction against Cuban forces and installations."⁸⁴

On December 1, 1981, President Reagan authorized the creation of a 500-man paramilitary force which the CIA was to train. The authorization was subsequently communicated to the Congressional Intelligence Oversight Committees in a "presidential finding."⁸⁵ Formally, at least, it was described as a small commando force aimed at the "Cuban infrastructure" in Nicaragua, and thus at interdicting the flow of arms from Nicaragua to El Salvador.⁸⁶ Speaking off the record, administration officials later said that under the November plan, commandos stationed in camps along the Honduran-Nicaraguan border were to conduct hit-and-run operations against Nicaragua. These operations or attacks were to destroy vital targets—such as power plants and bridges—in order to undermine the economy and divert the attention and resources of the Nicaraguan Government. The CIA was to work primarily through non-Americans, but in some cases would "take unilateral paramilitary action—possibly using U.S. personnel—against special Cuban targets."⁸⁷

Although the stated purpose for the creation of the 500-man commando force was to interdict the arms flow to El Salvador, the 1981 decisions started a broad program of covert political and military activities directed against the Nicaraguan Government. Two aspects of these developments are particularly noteworthy. The first is the close collaboration between the CIA and Argentine officials who began training Nicaragua *contras* as early as May of 1981.⁸⁸ The second aspect is the fact that key decision-makers in

84. Washington Post, Apr. 29, 1984, at A1, col. 4; Washington Post, Nov. 23, 1983, at A1, col. 4.

85. As required by 22 U.S.C. § 2422 (1982); 50 U.S.C. § 413 (1982).

86. Washington Post, Nov. 23, 1983, at A1, col. 4; N.Y. Times, Mar. 14, 1982, at 1, col. 5 (nat'l ed.).

87. Washington Post, Mar. 10, 1982, at A1, col. 6.

88. N.Y. Times, Nov. 2, 1982, at 6, col. 1 (nat'l ed.).

It is clear that the United States and Argentina were working together in the spring of 1982 preparing paramilitary forces which would launch attacks across the Nicaraguan frontier. This factor may have contributed greatly to the miscalculations in Buenos Aires which led to the invasion of the Falklands (Malvinas) on April 2, 1982. See Lebow, *Miscalculation in the South Atlantic: The Origins of the Falklands War*, in R. JERVIS, R.N. LEBOW & J.

the Reagan administration seem to have had a much broader program of action in mind than just merely stopping the flow of arms into El Salvador.⁸⁹ The combination of covert financial assistance to opponents of the regime, the targeting of vital Nicaraguan facilities for destruction, the speed with which the covert paramilitary forces soon began to grow,⁹⁰ and the overt measures directed against the Nicaraguan economy, suggested that the American strategy was one of pressuring the Sandinista regime to not only halt arms shipments to El Salvador, but also to change the Nicaraguan Government's direction and internal policies.⁹¹

By the spring of 1982, public reports of *contra* activities against Nicaragua,⁹² revelations in the press about the NSC's decisions in November, 1981,⁹³ and the increasing size of the paramilitary forces based in Honduras⁹⁴ led to serious Congressional concern that the purpose of the covert military activities might be to overthrow the Sandinista regime, or to provoke an armed conflict between Honduras and Nicaragua which might lead to the direct intervention of U.S. military forces. In April 1982, the House Permanent Select Committee on Intelligence adopted language, in a classified annex to its report on the intelligence authorization bill

STEIN, *PSYCHOLOGY AND DETERRENCE* 89 (1985); Franck, *Dulce et Dulcorum Est: The Strategic Role of Legal Principle in the Falklands War*, 77 AM. J. INT'L L. 109, 111 (1983); Lewis, *Ideology and Ignorance*, N.Y. Times, Apr. 15, 1982, at 27, col. 2 (nat'l ed.) (quoting Ambassador Jeane Kirkpatrick's explanation to a national television audience that Argentina's invasion was not necessarily aggression because Argentina claimed the islands).

89. Quoting highly classified National Security Council records, the Washington Post reported that, "The CIA, in seeking presidential authorization for the \$19 million paramilitary force, emphasized that 'the program should not be confined to that funding level or to the 500-man force described,' the records show." Washington Post, Mar. 10, 1982, at A1, col. 6.

90. See, e.g., N.Y. Times, Nov. 12, 1982, at 6, col. 1 (nat'l ed.); Washington Post, Mar. 10, 1982, at A1, col. 6; Washington Post, Nov. 23, 1983, at A1, col. 4.

91. See *supra* note 68; Vaky, *supra* note 49, at 237, 248-49.

92. For a detailed Nicaraguan chronology and description of these activities, see Application, *supra* note 4, Annex A, at 24-26.

93. See, e.g., Washington Post, Feb. 14, 1982, at A1, col. 5; Washington Post, Mar. 10, 1982, at A1, col. 6; N.Y. Times, Mar. 14, 1982, at 1, col. 5 (nat'l ed.).

94. See Washington Post, Nov. 23, 1983, at A1, col. 4; Application, *supra* note 4, Annex A, at 32-34.

The size of the *contra* force was estimated at 500 in December, 1981; there were reportedly 1,000 *contras* in February and 1,500 in August, 1982. It is unclear whether the August figure merely reflected the inclusion of the 1,000-man force which was previously being trained by Argentina, which curtailed its role in the wake of American support for Britain in the Falklands conflict. See Washington Post, Nov. 23, 1983, at A1, col. 4. The *contra* forces had increased to 4,000 men in December, 1982, 5,500 men in February, 1983, and 7,000 men in May, 1983. By November, 1983, the number was reported to have reached 12,000 men. See, e.g., *id.*; N.Y. Times, Nov. 2, 1982, at 6, col. 1 (nat'l ed.).

for fiscal year 1983, which restricted the purposes for which the funds could be used. It provided that the funds could not be used to overthrow the Nicaraguan Government or to provoke a military exchange between Nicaragua and Honduras.⁹⁵ This language was retained in the Conference Committee report which was approved in August. Subsequently, President Reagan reportedly authorized a large increase in the size of the paramilitary force and an expansion in its activities, with an additional thirty million dollars being allocated to the program.⁹⁶

Following an article in *Newsweek* magazine in early November, 1982,⁹⁷ senior administration officials admitted that the United States was supporting small-scale covert military operations against Nicaragua. They stressed, however, that the activities were not intended to overthrow the Nicaraguan Government, but rather only to harass it. A senior national security official insisted that the operations were limited to hit-and-run raids into Nicaragua by small paramilitary units based in Honduras, skirmishes with Nicaraguan troops along the Honduran border, and financial support for political opponents of the Sandinista regime.⁹⁸

In 1983, several factors led to a major escalation of covert mili-

95. These restrictions were retained in the conference report, which both the House and the Senate approved in August, 1982. House Intelligence Committee Report on H.R. 2670 (Boland-Zablocki bill), reproduced in part in *Center for National Security Studies*, 8 FIRST PRINCIPLES, July-Aug., 1983, at 1-5.

Representative Boland's amendment to the 1983 defense appropriations bill, which was included in a continuing resolution enacted into law in December 1982, adopted the restriction approved by both Houses that previous August, but never enacted into law. The *original* Boland Amendment is found at Pub. L. 97-377, § 793, 96 Stat. 1865 (1982). See Destler, *The Elusive Consensus: Congress and Central America*, in CENTRAL AMERICA: ANATOMY OF CONFLICT 319, 327-28 (R. Leiken ed. 1984). The *original* Boland Amendment applied only to funds authorized for fiscal year 1983, and is no longer in force. Subsequent restrictions on U.S. support of the *contras* have frequently been referred to generically as "the Boland Amendment."

96. See Application, *supra* note 4, Annex A, at 28. This alleged action followed CIA briefings of congressional oversight committees in August, 1981. See *supra* note 95.

97. *NEWSWEEK*, Nov. 8, 1982, at 42-55 (a secret war for Nicaragua). *Newsweek* reported that the constant military pressure was designed to keep the Nicaraguan government "in a jumpy state of alert." It quoted U.S. officials as stressing that the primary objective was cutting off supply routes to El Salvador, but stated further, "[T]hey also hope that a threatened Sandinista government will bring itself down by further repressing its internal opposition, thereby strengthening the determination of moderate forces to resist. If that happens, says one U.S. official in Central America, then the Sandinistas will fall like a house of cards in the wind." *Id.* at 48. The account also described the intentions of the *contras* based in Honduras to overthrow the Nicaraguan government. *Id.*

98. *N.Y. Times*, Nov. 2, 1982, at 6, col. 1 (nat'l ed.). The officials, speaking on a background basis, were not named in this report.

tary operations against Nicaragua. Perhaps the most important was a shift in control of decision-making concerning Nicaragua away from the State Department and toward a group led by CIA Director William Casey, National Security Adviser William Clark, United Nations Ambassador Jeane Kirkpatrick, and high-ranking Defense Department officials.⁹⁹

The second factor was a direct consequence of the first. Deeply skeptical towards successful negotiations with the Sandinistas,¹⁰⁰ the newly dominant group of hard-line decision-makers gained President Reagan's support for a series of steps designed to greatly increase the military pressure on Nicaragua. New decisions were made in June or July 1983 to continue or accelerate an expansion in the size of anti-Sandinista paramilitary forces, and to broaden the scope of their activities inside Nicaragua.¹⁰¹ The size of the *contra* forces had indeed already grown at an extraordinary rate; its size was estimated at 500 men in December, 1981, and by November, 1983, the force was estimated at 12,000.¹⁰² The scope of covert activities was also broadened to include direct attacks on critical strategic and economic targets within Nicaragua, movement of *contra* forces to permanent camps much deeper in Nicaragua, and greater direct involvement of U.S. personnel in these operations.¹⁰³

The decisions made in the summer of 1983 were taken in the face of increasingly stiff Congressional opposition. In early May of 1983, the House Intelligence Committee voted to cut off the funding of all covert operations in Nicaragua, regardless of their stated purpose.¹⁰⁴ On July 28, the House approved a bill that cut off funding of covert operations and prohibited the use of any government funds for this purpose. It also directed the President to seek

99. See Rubin, *supra* note 70, at 303-12; Destler, *supra* note 95, at 328-30. During the high-level review of U.S. policies in early 1983, CIA Director Casey reportedly urged an expansion of the *contras* operations, claiming that the Sandinistas might be overthrown by the end of the year. Rubin, *supra* note 70, at 309-10. Cf. Washington Post, Feb. 24, 1985, at A23, col. 1 (reported CIA plan to oust Sandinistas by end of 1983).

100. See *supra* note 49 and accompanying text.

101. See *supra* note 94.

102. See Washington Post, Nov. 23, 1983, at A1, col. 4. But cf. Washington Post, Dec. 16, 1984, at A1, col. 1 (Congressional doubts about accuracy of figures and suspicions that they were inflated to show growing support for *contras*).

103. See Application, *supra* note 4, Annex A, at 30-40 (compilation of statements from Congressional Record).

104. See House Intelligence Committee Report on H.R. 2670, *supra* note 95, at 6.

a peaceful solution to the Nicaraguan question through the OAS.¹⁰⁵

During the same period, the administration decided, in June, 1983, to hold large scale joint military exercises in Honduras, known as "Big Pine II," which were to last for some six months. These were accompanied by large naval maneuvers off the coasts of Nicaragua. Together, these exercises involved over 4,000 U.S. troops in Honduras and at least nineteen American ships.¹⁰⁶

As the frequency and intensity of the fighting in Nicaragua and armed clashes along the Honduran border grew, the stated justification for the covert operations became virtually untenable. Consequently, President Reagan made a new "presidential finding" which abandoned the arms interdiction rationale and provided a much broader justification for covert military operations against Nicaragua. The new finding was presented to Congressional oversight committees on September 20, 1983, stating the justification in vague and open-ended terms, such as stopping Nicaragua from exporting revolution.¹⁰⁷

Following the spectacular destruction of Nicaraguan oil storage facilities and other bold attacks in early October,¹⁰⁸ the House moved again to cut off funding for the *contras*. The bill approved on July 28th was dead due to continuing Senate support for the covert activities. The House then took action which the Senate could not ignore; the House incorporated into the Intelligence Authorization Act for fiscal year 1984 the same language as was in the July 28th bill. The cut-off of funding and the flat prohibition of U.S. support from any agency was again approved by the House on October 20, 1983, by a vote of 243-171.¹⁰⁹ This forced a House-

105. H.R. 2760, 98th Cong., 1st Sess., 129 CONG. REC. H5721-62 (daily ed. July 27, 1983), 129 CONG. REC. H 5819-5882 (daily ed. July 28, 1983). The bill was approved by a vote of 228-195. *Id.* at H5881-82. The debates on July 27 and July 28 are extremely interesting as they reveal that one of the primary motivations of the proponents of a cut-off of funding was their view that the covert operations violated international law.

106. See Rubin, *supra* note 70, at 312.

107. See, e.g., Destler, *supra* note 95, at 331. Whatever its precise terms, it was inconsistent with the clear prohibition of the Boland Amendment which expired in October along with the continuing resolution in which it had originally been included. See *supra* note 95 (expiration of Boland Amendment).

108. See Application, *supra* note 4, Annex A, at 36-38.

109. See Destler, *supra* note 95, at 331; H.R. 2968, 98th Cong., 1st Sess., 129 CONG. REC. H8359-64 (daily ed. Oct. 19, 1983); 129 CONG. REC. H8389-8433 (daily ed. Oct. 20, 1983). An amendment strengthening the prohibition of covert aid was approved by a vote of 227-194. 129 CONG. REC. H8426. H.R. 2968 itself was approved by a vote of 243-171. 129 CONG. REC. H8432-33.

Senate compromise, which was enacted into law in December, 1983. The compromise provided for the authorization of twenty four million dollars for covert operations against Nicaragua, together with a prohibition of any other direct or indirect support by any U.S. agency.¹¹⁰ This put the administration on a short leash, because at the current rate of expenditure a supplemental appropriation would be needed by the spring of 1984. Opponents of the covert operations also succeeded in halting any back-door funding of covert actions against Nicaragua in the Intelligence Authorization Act, which became law in December.¹¹¹

Despite these prohibitions and limitations, the Reagan administration pressed ahead with its escalation of military and paramilitary actions against Nicaragua. President Reagan approved the mining of Nicaraguan harbors in or before mid-February 1984. The uproar caused by the mining of Nicaraguan ports and harbors from February to March (and perhaps even from January to early April), particularly after direct U.S. complicity became known in early April,¹¹² contributed to the eventual June defeat of the administration's request for twenty-one million dollars in supplemental funding for covert operations against Nicaragua.¹¹³ Consequently, all U.S. funding and support beyond the twenty-four million dollars approved in November was legally prohibited for the remainder of fiscal year 1984.¹¹⁴

In the heat of a Congressional and Presidential election, the issue of funding covert activities came up in the conference committee charged with drafting a continuing appropriations resolu-

110. Department of Defense Appropriations Act, Pub. L. 98-212, § 775, 97 Stat. 1421, 1452 (Dec. 8, 1983). Section 775 provided that,

[N]ot more than \$24 million of funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, *directly or indirectly*, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual (emphasis added).

This prohibition was also contained in the 1984 Intelligence Authorization Act, Pub. L. 98-215, § 108, 97 Stat. 1473, 1475 (Dec. 9, 1983). For an overview of Congressional action regarding the funding of covert activities against Nicaragua, see CONGRESSIONAL RESEARCH SERVICE, CONGRESS AND FOREIGN POLICY, 1983, at 43-54 (Report for House Comm. on Foreign Aff., Comm. print, 1984).

111. See *supra* note 110; Destler, *supra* note 95, at 331.

112. See, e.g., Washington Post, Apr. 10, 1984, at A1, col. 6; Washington Post, Apr. 11, 1984, at A1, col. 5; Washington Post, Apr. 12, 1984, at A1, col. 1.

113. See N.Y. Times, June 26, 1984, at 1, col 6 (nat'l ed.).

114. See *supra* note 110 and accompanying text.

tion for fiscal year 1985. The House obtained a prohibition of all direct or indirect funding of such activities until March, while the Senate achieved agreement that up to fourteen million dollars would be appropriated for covert operations against Nicaragua, provided that a special resolution was adopted by both Houses after February 28, 1985. This compromise was signed into law on October 12, 1984.

The adoption of such a special resolution would not only have authorized the fourteen million dollars in funds, but also would have lifted the prohibition against back-door funding of such activities through the use of contingency funds or other devices. That prohibition provided:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual.¹¹⁵

In order for this prohibition to be lifted, the President would have had to submit a report to the Congress detailing the need for the fourteen million dollars;¹¹⁶ and a joint resolution would have had to be approved¹¹⁷ which in its operative part contained the following language: "that the Congress approves the obligation and expenditure of funds available for fiscal year 1985 for supporting, directly or indirectly, military or paramilitary operations in Nicaragua."¹¹⁸ Special and expedited voting procedures were also included in order to guarantee a prompt vote on the resolution.¹¹⁹

After President Reagan's re-election in 1984, a long and intense policy debate within the administration was triggered by press leaks regarding the possible introduction of Soviet MIG aircraft into Nicaragua.¹²⁰ The outcome was a hardened attitude to-

115. Continuing Appropriations Act for 1985, Pub. L. 98-473, § 8066(a), 98 Stat. 1837, 1935-37 (Oct. 12, 1984).

116. *Id.* § 8066(b)(1) (President's report); *Id.* § 8066(d) (limit of \$14 million).

117. *Id.* § 8066(b)(2).

118. *Id.* § 8066(c)(1).

119. *Id.* § 8066(c).

120. Washington Post, Apr. 27, 1984, at A1, col. 6; N.Y. Times, May 19, 1984, at 5, col. 1 (nat'l ed.); Application, *supra* note 4, Annex A, at 30.

In November, 1984, following President Reagan's reelection, U.S. aircraft overflying Nicaraguan territory produced loud sonic booms. These sonic booms occurred during a pe-

ward Nicaragua and a determination to make an all-out effort to induce Congress to adopt the special resolution lifting the prohibition against funding and appropriating the fourteen million dollars. Consistent with this approach were the administration's decisions, announced on January 18, 1985, not to take part in further proceedings (on the Merits) before the ICJ, and to break off the bilateral talks with Nicaragua in Manzanillo, Mexico.¹²¹

Following an intense public relations campaign by President Reagan and other high officials,¹²² the special resolution came to a vote on April 23, 1985. It was approved in the Senate by a vote of 53-46, but was defeated in the House by a vote of 248-180.¹²³ As a result, the total prohibition of aid to the *contras* or other covert activities against Nicaragua continued in force. It was clear, how-

riod of heightened tensions in connection with possible delivery to Nicaragua of Soviet MIG aircraft. Washington Post, Nov. 10, 1984, at A19, col. 1; N.Y. Times, Nov. 11, 1984, at 1, col. 3 (nat'l ed.); N.Y. Times, Nov. 12, 1984, at 8, col. 6 (nat'l ed.) (no U.S. denial of sonic boom charges); Washington Post, Nov. 14, 1984, at A1, col. 5. In an interview with The New York Times, Otto J. Reich, a top administration spokesman, confirmed that the sonic booms were intended to scare the Nicaraguans. N.Y. Times, Mar. 30, 1985, at 1, col. 2 (nat'l ed.). Together with large-scale military maneuvers in Honduras and off the coasts of Nicaragua, the booms seemed to fit within the administration's "perception management program," in effect at least since 1983, which has aimed at keeping the Nicaraguans concerned that the United States might invade the country. *Id.* See Lewis, *The MIGs are Coming!*, N.Y. Times, Nov. 18, 1984, at 25, col. 1 (nat'l ed.) (focusing on shift in justification from that of flow of arms from Nicaragua to El Salvador, to one of arms flow to Nicaragua); Washington Post, Nov. 14, 1984, at A1, col. 6 (seven separate exercises underway in Honduras); N.Y. Times, Nov. 9, 1984, at 6, col. 4 (nat'l ed.) (25 U.S. warships on maneuvers in Caribbean); N.Y. Times, Nov. 11, 1984, at 1, col. 3 (nat'l ed.) (military options for increasing pressure under consideration, including "quarantine" of Nicaragua); N.Y. Times, Nov. 10, 1984, at 1, col. 5 (nat'l ed.) (options considered include air strikes, quarantine); N.Y. Times, Nov. 12, 1984, at 8, col. 1 (nat'l ed.) (policy struggle within administration); Washington Post, Dec. 17, 1984, at A1, col. 1 (hardened administration stance on Nicaragua as result of policy debate).

121. See Washington Post, Dec. 17, 1984, at A1, col. 1; Washington Post, Jan. 20, 1985, at 19, col. 1.

122. See generally Washington Post, Feb. 24, 1985, at A23, col. 1; Washington Post, Mar. 12, 1985, at A8, col. 1; N.Y. Times, Apr. 16, 1985, at 1, col. 5 (nat'l ed.). In early March, President Reagan said of the *contras* opposing the government of Nicaragua, "They are our brothers, these freedom fighters, and we owe them our help." He continued, "They are the moral equivalent of our Founding Fathers and the brave men and women of the French resistance. We cannot turn away from them. For the struggle is not right versus left, but right versus wrong." Washington Post, Mar. 2, 1985, at A1, col. 2. In a news conference on February 21, President Reagan, when asked if his goal was to remove the Sandinistas government from power, replied, "Well, removed in the sense of its present structure, in which it is a communist totalitarian state, and it is not a government chosen by the people." He said he would change his view "if the present government would turn around and say . . . uncle, all right, and [the *contras* may] come on back into the revolutionary government." Washington Post, Feb. 22, 1985, at A1, col. 6.

123. Washington Post, Apr. 24, 1985, at A1, col. 4; N.Y. Times, Apr. 24, 1985, at 1, col. 6 (nat'l ed.); N.Y. Times, Apr. 25, 1985, at 10, col. 1 (nat'l ed.).

ever, that President Reagan would make renewed efforts to lift the prohibition and resume funding of the *contras* before the fiscal year was out.¹²⁴

The April victory of the opponents to funding was short-lived. This was due to sharp congressional reaction to Nicaraguan President Daniel Ortega's trip to Moscow immediately after the April vote, and to broader fears—particularly among Southern Democrats—of being perceived as “soft on Communism.” These reactions contributed greatly to President Reagan's success in obtaining House approval on June 12th for twenty-seven million dollars in “humanitarian assistance” to the *contras*. The House terms were adopted in a Conference Committee report filed on July 29, and approved by both Houses within the next few days.¹²⁵ On August 15, 1985, President Reagan signed the bill into law.¹²⁶ A decrease in Congressional opposition to funding the *contras* was further revealed by the terms of the 1986 Intelligence Authorization Act, signed into law on December 4, 1985. The new legislation weakened restrictions on the use of the twenty-seven million dollars appropriated in August, while providing for the exchange of intelligence information and “advice” between U.S. officials and the *contras*.¹²⁷

Meanwhile, funds, materiel, and other supplies continued to reach the *contras*, whether through “private” sources,¹²⁸ third governments,¹²⁹ overt U.S. “humanitarian assistance,” or renewed covert aid. The end of the *contras*' war to overthrow the Sandinista Government was not in sight: it appeared that the war of the *contras* might continue indefinitely; the possibility of a sharp escalation in U.S. military and paramilitary activities against Nicaragua could not be ruled out.

124. At a news conference on April 4, 1985, President Reagan emphasized that the administration would support the *contras* even if Congress rejected his request for \$14 million to support them. “We're not going to quit and walk away from them, no matter what happens,” he said. N.Y. Times, Apr. 5, 1985, at 1, col. 4 (nat'l ed.).

125. See N.Y. Times, June 13, 1985, at A1, col. 6 (nat'l ed.); Washington Post, Aug. 17, 1985, at A15, col. 1; 131 CONG. REC. H6671 (daily ed. July 29, 1985)(conference report filed); 131 CONG. REC. H6897-6909 (daily ed. July 31, 1985)(House approval); 131 CONG. REC. S10629-35 (daily ed. Aug. 1, 1985)(Senate approval).

126. 1985 Supplemental Appropriations Act, Pub. L. No. 99-88, ch. 5 and §§ 101-06, 99 Stat. 293, 332-29 (1985).

127. 1986 Intelligence Authorization Act, Pub. L. No. 99-169, §§ 101, 102, 105, 401, Stat. (1985). See CONF. REP. 373, 99th Cong., 1st Sess. at 13-17 (November 14, 1985).

128. See *infra* notes 261-64 and accompanying text.

129. See Application, *supra* note 4, at 38.

3. Principal Activities

While a comprehensive treatment of direct and indirect U.S. military and paramilitary operations against Nicaragua is beyond the scope of this article, it will be useful to provide a brief summary of some of the more important actions carried out against that country. These activities have included both direct U.S. actions against the territory of Nicaragua and indirect actions carried out by the *contra* forces which have been organized, financed, supported, and coordinated by the United States. Given the degree of U.S. involvement in the latter, it is not always possible to draw a clear line separating the two. Nonetheless, it is useful for analytical purposes to attempt to separate the two categories.

The first category of covert activities against that country includes those actions against Nicaragua where direct U.S. participation, direction, and control appear to be clear. On October 2, 1983, oil storage facilities at Benjamin Zeledón on Nicaragua's Atlantic Coast were attacked, causing the loss of 324,000 gallons of fuel.¹³⁰ A combined air and sea attack on October 10, 1983, destroyed oil storage facilities at the Pacific port of Corinto, resulting in the loss of 3.2 million gallons of fuel.¹³¹ The oil pipeline facilities at Puerto Sandino, on the Pacific Coast, were attacked on October 14, 1983 by frogmen using underwater explosive devices.¹³² CIA officers aboard a "mother ship" furnished the speedboats and directed the CIA-trained commandos ("unilaterally controlled Latino assets") raids against Corinto and other targets in the fall of 1983,¹³³ and also in March and early April of 1984.¹³⁴

Beginning in late January or in early February, and continuing through March, 1984, CIA commandos, under the direct supervision of American CIA officials, conducted a mining operation against Nicaraguan ports and harbors. Operating from a mother ship that remained more than 12 miles offshore, commandos using special high-speed boats laid mines reportedly manufactured by

130. See *id.*

131. See *id.*

132. See *id.*

133. Washington Post, Apr. 18, 1984, at A1, col. 4.

134. Washington Post, Mar. 30, 1984, at A1, col. 6; Washington Post, Apr. 1, 1984 at A22, col. 3; Washington Post Apr. 2, 1984, at A1, col. 2. For a summary of the mining operations and sea attacks by the special speedboats, see CENTRAL AMERICAN HISTORICAL INSTITUTE, GEORGETOWN UNIVERSITY, UPDATE, Apr. 5, 1984.

the CIA, with parts supplied by the U.S. Navy,¹³⁵ at the Nicaraguan ports of Corinto and Puerto Sandino on the Pacific, and El Bluff on the Caribbean coast.¹³⁶ A helicopter or helicopters from the mother ship reportedly provided "cover" or support for the minelaying operations.¹³⁷ Administration officials, speaking on a background basis, stated that the mining was intended to disrupt the Nicaraguan economy and, with luck, disrupt military supply lines to that country.¹³⁸

In addition to these actions, it appears that the United States (the CIA and other U.S. agencies) has also been directly involved in air attacks against targets in Nicaragua; supplied and resupplied by air the *contras* operating within that country; and repeated overflights of Nicaraguan territory, including both surveillance flights and flights producing sonic booms aimed at intimidating the population and government officials.¹³⁹ On February 2, 1984, two air attacks against a radio transmitter and a military camp, were reportedly directed by the CIA with the help of specially-trained Latin Americans. The attacks resulted in four Nicaraguan deaths.

135. N.Y. Times, June 6, 1984, at 4, col. 1 (nat'l ed.).

136. Application, *supra* note 4, Annex A, at 42-44; N.Y. Times, Apr. 14, 1984, at 1, col. 5 (nat'l ed.); N.Y. Times, Apr. 13, 1984, at 1, col. 1 (nat'l ed.); N.Y. Times, June 1, 1984, at 4, col. 1 (nat'l ed.) (U.S. Navy assistance in manufacturing mines); N.Y. Times, Apr. 9, 1984, at 1, col. 3 (nat'l ed.).

137. Washington Post, Apr. 10, 1984, at A1, col. 6.

138. N.Y. Times, Apr. 12, 1984, at 1, col. 6 (nat'l ed.); Washington Post, Apr. 10, 1984, at A1, col. 6. When asked during an interview about the purpose of the mining operations, Secretary of State Shultz said, "You have to ask the *contras* about that It looks like the purpose must somehow be to interrupt the commerce of the country." Washington Post, Apr. 7, 1984, at A1, col. 1. Deputy Secretary of State Kenneth W. Dam, however, in testimony before the House Committee on Foreign Affairs, stated that the mining of Nicaraguan harbors could be legally justified as collective self-defense. See *The Mining of Nicaraguan Ports and Harbors, Hearings on H. Con. Res. 290 Before the House Comm. on Foreign Affairs*, 98th Cong., 2d Sess. 7-8 (Apr. 11, 1984) [hereinafter cited as *Mining Hearings*]; N.Y. Times, Apr. 12, 1984, at 1, col. 6 (nat'l ed.).

139. N.Y. Times, May 3, 1984, at 5, col. 1 (nat'l ed.); N.Y. Times, Apr. 12, 1984, at 1, col. 5 (nat'l ed.); Washington Post, Apr. 27, 1984, at A1, col. 6.

In November, 1984, following President Reagan's reelection, U.S. aircraft overflying Nicaraguan territory produced loud sonic booms. These sonic booms occurred during a period of heightened tensions in connection with possible delivery to Nicaragua of Soviet MIG aircraft. Washington Post, Nov. 10, 1984, at A19, col. 1; N.Y. Times, Nov. 11, 1984, at 1, col. 6 (nat'l ed.) (no U.S. denial of sonic boom charges); Washington Post, Nov. 14, 1984, at A1, col. 5. In an interview with the New York Times, Otto J. Reich, a top administration spokesman, confirmed that the sonic booms were intended to scare the Nicaraguans. N.Y. Times, Mar. 30, 1985, at 1, col. 2 (nat'l ed.). Together with the large-scale military maneuvers in Honduras and off the coasts of Nicaragua, the booms seemed to fit within the administration's "perception management program," in effect at least since 1983, which has aimed at keeping the Nicaraguans concerned that the United States might invade the country.

These attacks, part of a larger program, were launched from air bases in El Salvador or Honduras and carried out with bombs and planes provided by the CIA.¹⁴⁰

The possibility of Nicaragua receiving MIGs and potential U.S. military responses to such a development were the subject of intense discussion in November, 1984, both within the administration and in the press.¹⁴¹ These discussions, in which military options such as air strikes or a blockade were apparently considered (a fact openly leaked to the press) became part of a much broader policy debate within the administration regarding policy toward Nicaragua.

It is not easy to distinguish between specific activities conducted directly by U.S. officials or employees (direct involvement) and those carried out by the *contras* where the degree of U.S. involvement in their direction is unclear or more difficult to ascertain (indirect involvement) given the secret nature of covert operations against Nicaragua. U.S. intelligence officials have reportedly stated that

[t]he overall direction of covert action against Nicaragua was dealt with by interagency working groups including State Department, Pentagon, and White House representatives as well as the CIA. But the day-to-day conduct of the paramilitary operation itself, the 'secret war,' belonged mainly to [CIA Director] Casey and his subordinates.¹⁴²

Beginning as early as December, 1981, *contra* forces based in Honduras began conducting cross-border raids into northern Nica-

140. N.Y. Times, May 3, 1984, at 5, col. 1 (nat'l ed.). See also N.Y. Times, Feb. 5, 1984, at 1, col. 4 (nat'l ed.) (dispatch from Nicaragua).

141. See Lewis, *The MIGs are Coming!*, N.Y. Times, Nov. 30, 1984, at 25, col. 1 (nat'l ed.) (focusing on shift in justification from that of flow of arms from Nicaragua to El Salvador, to one of arms flow to Nicaragua); Washington Post, Nov. 14, 1984, at A1, col. 6 (seven separate exercises underway in Honduras); N.Y. Times, Nov. 9, 1984, at 6, col. 4 (nat'l ed.) (25 U.S. warships on maneuvers in Caribbean); N.Y. Times, Nov. 11, 1984, at 1, col. 3 (nat'l ed.) (military options for increasing pressure under consideration, including "quarantine" of Nicaragua); N.Y. Times, Nov. 10, 1984, at 1, col. 5 (nat'l ed.) (options considered include air strikes, quarantine); N.Y. Times, Nov. 12, 1984, at 8, col. 1 (nat'l ed.) (policy struggle within administration); Washington Post, Dec. 17, 1984, at A1, col. 1 (hardened administration stance on Nicaragua as a result of policy debate).

142. Washington Post, Dec. 16, 1984, at A1, col. 1. See N.Y. Times, Apr. 3, 1983 (U.S. ties to anti-Sandinistas reported to be extensive), reprinted in *THE NICARAGUA READER: DOCUMENTS OF A REVOLUTION UNDER FIRE* 215-19 (P. Rosset & J. Vandermeer eds. 1983). See also Application, *supra* note 4, Annex A, at 28.

ragua.¹⁴³ These attacks, which continued through the first half of 1982, included blowing up two vital bridges in the north on March 14, 1982.¹⁴⁴ Larger attacks occurred in the summer of 1982, and, according to Nicaragua, became an almost daily occurrence thereafter.¹⁴⁵

In March, 1984, while the mining operations were fully underway, over 6,000 *contras* launched a major offensive against targets deep inside Nicaragua.¹⁴⁶ *Contra* forces in southern Nicaragua, close to the Costa Rican border, have also carried out a number of attacks against Nicaraguan targets. According to leaders of the group, it has been largely supported by CIA funds.¹⁴⁷ Refusal by Eden Pastora, military leader of the group, to accede to CIA pressures to join with the rebels operating in the north (on the ground that they are led by former officials of the Somoza National Guard) led to a drying up of CIA support for the group.¹⁴⁸ Both in the north and in the south, the *contras'* ability to continue their war against the Nicaraguan Government still appeared in mid-1985 to be highly dependent on CIA backing, despite the assistance they have apparently received from "private" sources and third countries.¹⁴⁹

By April 1985, the United States had provided at least eighty million dollars in support for the *contras* and other covert operations against Nicaragua.¹⁵⁰ This figure is probably an underestimation, given the ability of the United States to indirectly transfer large amounts of weapons and materiel to the *contras* by leaving them behind after conducting military maneuvers in Honduras,¹⁵¹ or by funneling them through military assistance programs to third

143. See Application, *supra* note 4, Annex A, at 24.

144. *Id.* at 26. In its Application, Nicaragua stated that CIA Director William Casey had admitted CIA responsibility for the bridge attacks in briefings to Congressional oversight committees. *Id.*

145. *Id.* at 26.

146. See Application, *supra* note 4, at 42; Washington Post, Apr. 10, 1984, at A14, col. 6.

147. See, e.g., Washington Post, June 20, 1984, at A1, col. 5; Washington Post, July 25, 1985, at A1, col. 5.

148. See, e.g., Washington Post, July 25, 1985, at A1, col. 5; N.Y. Times, Sept. 9, 1985, at A3, col. 1; N.Y. Times, May 31, 1984, at 1, col. 1 (nat'l ed.) (U.S. pressures on southern group threatening cut-off of funding).

149. See, e.g., Washington Post, June 20, 1984, at A1, col. 5 (Pastora charges cut-off of CIA funds; rebels in south near collapse); Washington Post, July 25, 1984, at A1, col. 5.

150. See, e.g., Washington Post, Dec. 17, 1984, at A1, col. 2; N.Y. Times, Feb. 6, 1985, at 4, col. 6 (nat'l ed.).

151. Cf. Washington Post, Jan. 1, 1984, at A1, col. 5.

countries such as El Salvador and Honduras.¹⁵²

Shortly before Congress voted on new assistance to the *contras* on April 23, 1985, a White House document describing administration plans for expanding covert military and paramilitary actions against Nicaragua was leaked to the press. This document, which had been sent to congressional intelligence oversight committees, included the President's "determination," justification, and request for funds to resume aid to the *contras* "at levels sufficient to create real pressure on the Government of Nicaragua (20,000- to 25,000-man force in the north and 5,000- to 10,000-man force in the south)."¹⁵³ The document indicated that while the United States was publicly placing an emphasis on negotiations, the administration believed that only direct pressure from expanded *contra* forces could force Nicaragua to accept U.S. demands. While the "direct application of U.S. military force" had been ruled out for the present, the document warned that such action "must realistically be recognized as an eventual option, given our stakes in the region, if other policy alternatives fail."¹⁵⁴

According to the plans set forth in the document, CIA staff members (permanent personnel) and contract personnel would not enter Nicaragua or "participate in military or paramilitary operations of any kind."¹⁵⁵ Rather, the "U.S. presence will be limited to a small group of CIA advisers outside Nicaragua whose function will be to provide intelligence, limited tactical advice based on that intelligence and logistical guidance."¹⁵⁶ The report went on to say that in order "to keep the U.S. profile as low as possible," the CIA would make "maximum" use of "cooperative arrangements with third countries."¹⁵⁷

Regarding other CIA involvement, the report said that "the CIA procurement mechanism will be used to provide supplies" and that "funds will also be used to cover transportation and administrative costs of both U.S. [personnel] and personnel of the armed opposition."¹⁵⁸ This program was proposed, the report explained, to "help prevent consolidation of the Sandinista regime" in Nica-

152. See, e.g., N.Y. Times, May 13, 1985, at 5, col. 1 (nat'l ed.); Washington Post, Sept. 15, 1984, at A1, col. 2 (transfer of aircraft through Honduras to *contras*).

153. N.Y. Times, Apr. 17, 1985, at 1, col. 5 (nat'l ed.).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

ragua. This offered the best prospects for "achieving a negotiated solution" in which Nicaragua agreed to reduce its armed forces; to send home Soviet and Cuban military advisers; to halt aid to leftist guerrillas in El Salvador; and to accept free elections, a free press and other institutions of a democratic pluralistic society.¹⁵⁹

In April, administration officials estimated that there were 15,000 *contras* fighting in the north of Nicaragua and another 5,000 fighting along that country's border with Costa Rica.¹⁶⁰ It remained to be seen whether their number would grow or decrease, and what the U.S. role would be in the process. In any event, it was announced on April 30, 1985, following the defeat of the administration's request for additional funding for the *contras* on April 23, that the United States would impose a broad range of economic "sanctions" against Nicaragua, including a trade embargo, in order to increase the "pressure" on the Sandinista regime. Whether the real objective of the economic embargo and continued encouragement, if not direct support, of the *contras* was to overthrow the Nicaraguan Government or merely to force it to accept a negotiated settlement which met U.S. demands remained unclear.¹⁶¹

C. Nicaragua's Case in the World Court: An Overview of the Proceedings

1. The International Court of Justice

The ICJ is the successor to the Permanent Court of International Justice (PCIJ), which was founded in 1920 but ceased to function for all practical purposes during World War II.¹⁶² The new Court was created by the United Nations Charter and is "the principal judicial organ of the United Nations."¹⁶³ It is composed of fifteen judges who are elected by an absolute majority of both the General Assembly and the Security Council.¹⁶⁴ No two mem-

159. *Id.*

160. *See, e.g., id. Cf. N.Y. Times*, Feb. 6, 1985, at 4, col. 6 (nat'l ed.) (10,000-15,000 rebels in North and fewer than 5,000 in South).

161. *See N.Y. Times*, May 1, 1985, at 1, col. 6 (nat'l ed.); *infra* notes 208, 347 and accompanying text.

162. *See generally* M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE*, 1920-42 (1943).

163. U.N. CHARTER art. 92.

164. Statute of the International Court of Justice, arts. 4-12, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 (1945) [hereinafter cited as I.C.J. STAT.]. In the Security Council, no

bers of the court may be from the same state,¹⁶⁶ and the selection is to be carried out with a view toward ensuring that the body as a whole will be representative of "the main forms of civilization and of the principal legal systems of the world."¹⁶⁶ Judges serve in an independent capacity,¹⁶⁷ and are bound to exercise their powers "impartially and conscientiously."¹⁶⁸ Judges serve for nine years, may be re-elected,¹⁶⁹ and cannot be removed from office except for cause. Removal is by the unanimous decision of the remaining judges.¹⁷⁰ The work of a judge is a full-time and exclusive occupation.¹⁷¹

The ICJ may render decisions in disputes between states which have accepted the Court's jurisdiction,¹⁷² and also render advisory opinions on any legal question when so requested by the Security Council or the General Assembly, or any other organs authorized by the General Assembly.¹⁷³ The ICJ resolves disputes in accordance with international law,¹⁷⁴ unless the parties request that a decision be made solely on the basis of considerations of fairness and justice.¹⁷⁵

In contentious proceedings, such as the case brought by Nicaragua against the United States, any party which does not have a judge of its nationality sitting on the Court has the right to name an *ad hoc* judge for that particular case or proceeding.¹⁷⁶ At the same time, a judge of the nationality of a party retains the right to sit in the case before the Court.¹⁷⁷ The decisions of the Court are formally binding, but only between the parties and only with respect to the case in question.¹⁷⁸ As in many civil law legal sys-

distinction is made between the votes of permanent and non-permanent members in connection with such elections. *Id.* art. 10, para. 2.

165. *Id.* art. 3, para. 1.

166. *Id.* art. 9.

167. *Id.* art. 2.

168. *Id.* art. 20.

169. *Id.* art. 13.

170. *Id.* art. 18.

171. *Id.* arts. 15, 17, & 23.

172. *Id.* arts. 34 para. 1, 36, 37.

173. U.N. CHARTER art. 96; I.C.J. Stat., *supra* note 164, art. 65.

174. I.C.J. Stat., *supra* note 164, art. 38, para. 1.

175. *Id.* art. 38, para. 2 (authority to decide a case *ex aequo et bono* if parties so agree).

176. *Id.* art. 31, paras. 2-3. Nicaragua did not exercise this right with respect to its request for provisional measures. Interim Protection Order, *supra* note 5, at 4.

177. I.C.J. Stat., *supra* note 164, art. 31, paras. 2-3.

178. *Id.* art. 59.

tems,¹⁷⁹ however, this limitation on the formally binding effect of decisions does not detract in practice from the extremely authoritative nature of the ICJ's decisions.¹⁸⁰ The Court's decision in a specific case is final and not subject to appeal.¹⁸¹ Each member of the United Nations is legally bound to comply with the Court's decision in any case in which it has been a party.¹⁸² If one party fails to comply with a judgment, the other may take the matter to the Security Council, which may if it deems such action necessary, make recommendations or take measures to enforce the judgment.¹⁸³

2. The Three Stages of the Proceedings in Contentious Cases

In a contentious case, such as that brought by Nicaragua against the United States, proceedings before the Court may be divided into as many as three different phases or stages.¹⁸⁴ The first, following the filing of an application with the Court, arises only when a party requests the Court to order provisional measures to protect the parties' rights during the course of the litigation. The second stage involves consideration by the Court of any preliminary objections, particularly as to jurisdiction or admissibility, which the respondent may have raised. If the Court finds that any of the preliminary objections are valid, for example, that it lacks jurisdiction to hear the case, the case is dismissed thereby ending the proceedings. If, on the other hand, the Court decides that the preliminary objections are not meritorious,¹⁸⁵ it proceeds to the third stage, the consideration of the merits or substantive validity of the applicant's claim. The Court's decision on the merits ends the case, except for possible additional proceedings to determine the amount of damages to be assessed against the losing party.

In the present case, the Court will reach all three stages of the proceedings. The first stage concluded on May 10, 1984, when the

179. See, e.g., J. MERRYMAN, *THE CIVIL LAW TRADITION* 47 (2d ed. 1985).

180. See, e.g., M. LACHS, *THE TEACHER IN INTERNATIONAL LAW* 186-87 (1982).

181. I.C.J. Stat., *supra* note 164, art. 60.

182. U.N. CHARTER art. 94, para. 1.

183. *Id.* art. 94, para. 2.

184. In addition, proceedings aimed at establishing the amount of compensation due the winning party may follow the third or merits phase of the proceedings.

185. In certain circumstances, the Court may defer its decision on a question raised as a preliminary objection by joining it to the merits stage of the proceedings. However, this practice has been circumscribed in recent years.

Court issued an Order indicating provisional measures in response to Nicaragua's earlier request.¹⁸⁶ The second stage of the proceedings, dealing with preliminary objections raised by the United States, concluded with the Court's Judgment of November 26, 1984. The third or merits phase of the proceedings is currently in progress, notwithstanding the refusal of the United States to take part, and is expected to end with the final Judgment of the Court on the Merits by mid-1986. In the event of a judgment against the United States, further proceedings to establish the amount of damages are anticipated.¹⁸⁷

II. INTERNATIONAL LAW AND THE LEGALITY OF UNITED STATES COVERT OPERATIONS AGAINST NICARAGUA

It is worth noting that the United States has never effectively denied or refuted the essential factual allegations made by the press and contained in Nicaragua's April 9, 1984 application to the

186. See Interim Protection Order of May 10, 1984, *supra* note 5.

187. See Judgment of Nov. 26, 1984, *supra* note 6.

The above sketch describes the three stages of the proceedings on the applicant's claim. Further and more complicated variations are possible when the respondent files a counterclaim or when a third state seeks to intervene in the proceedings.

One significant development could have delayed the present proceedings. On August 15, 1984, El Salvador filed a request with the Court to intervene in the preliminary proceedings, in order to argue that the Court did not have jurisdiction to decide the case brought by Nicaragua against the United States. See *Washington Post*, Aug. 18, 1984, at A27, col. 1. The text of the Salvadoran request to intervene is reproduced in 24 I.L.M. 38 (1985).

The Statute of the Court provides that a state may make a request to intervene when it considers that it "has an interest of a legal nature" that may be affected by the decision in the case. See I.C.J. Stat., *supra* note 164, art. 62, para. 1.

A request to intervene may also be made by a state when the construction of an international convention to which it is a party is involved in the litigation. See I.C.J. Stat., *supra* note 164, art. 63. Article 63 establishes:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding on it.

The Court itself decides whether to grant or deny such a request. Proceedings relating to a request to intervene are incidental to proceedings in the principle case. The Court set a deadline of September 14, 1984 for receipt of written observations from the interested countries on El Salvador's request. *Washington Post*, Aug. 18, 1984, at A27, col. 1. On October 4, 1984, the Court dismissed El Salvador's request to intervene under article 63 in the preliminary objections stage, holding open the possibility of its intervening in the merits stage of the proceedings. See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.)*, 1984 I.C.J. 215, 215-17 (Order of Oct. 4 Rejecting Intervention of El Salvador in Jurisdictional Stage), *reprinted in* 24 I.L.M. 43, 43-44 (1985).

ICJ.¹⁸⁸ Had the United States in reality taken the view that Nicaragua's substantive charges were inaccurate, it could have achieved an impartial determination of their validity by waiving its preliminary objections to the jurisdiction of the Court and proceeding to an adjudication on the merits. Given the ample documentation in the public record and the failure of the United States to deny the basic facts reported in the press concerning its involvement in covert operations against Nicaragua, these facts are assumed to be true for purposes of the following legal analysis.¹⁸⁹ Whether these

188. President Reagan, for example, when asked about *contra* attacks on Nicaraguan oil storage facilities, replied, "I'm not going to comment . . . But I do believe in the right of a country, when it believes its interests are best served, to practice covert activity . . ." DEP'T ST. BULL., Dec., 1983, at 6. When asked about the administration's response to a House cut-off of funding to the *contras*, Secretary Shultz stated, "We have to see to it—particularly by virtue of supporting those who want to fight for their countries and their principles—that they're able to do so. So we haven't, by any means, accepted the House's verdict as the final verdict." DEP'T ST. BULL., Sept., 1983, at 49.

President Reagan, when asked, following the enactment of the Boland amendment in December, 1982, why the United States did not openly support the *contras* instead of providing covert aid, replied, "Why, because we want to keep on obeying the laws of our country, which we are obeying [laughter]." DEP'T ST. BULL., July, 1985, at 30, 31. In February, 1985, President Reagan affirmed that his goal was the removal of the "present structure" of the Nicaraguan government. See *supra* note 62.

While denials have been made from time to time they have often been discredited by subsequent revelations. See, e.g., Statement of Alan Romberg, State Dep't spokesman on March 21, 1984, N.Y. Times, Mar. 22, 1984, at 1, col. 3 (nat'l ed.) ("We note that the anti-Sandinista forces have widely advertised that certain Nicaraguan ports have been mined. We have no further information on that incident. We have received a protest from the Soviet Union charging U.S. responsibility and we reject that charge.").

189. Two preliminary legal points may be mentioned here, before proceeding to a detailed analysis of the legality of U.S. actions against Nicaragua. The first is the fact that acts of employees of the CIA who are not U.S. citizens (sometimes referred to as "unilaterally controlled Latino assets") are, under international law, acts of the government of the United States. See, e.g., International Law Commission, Draft Articles on State Responsibility, Part I, art. 8(a), [1980] Y.B. INT'L L. COMM'N, Vol. 2 (Pt. 2) at 30. Article 8(a) provides, "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such person or group of persons was in fact acting on behalf of that state. . . ." *Id.*

The second point is that the organization, financing, support, and coordination of covert operations against Nicaragua carried out by the *contras* or by the military forces of another state (such as Honduras or El Salvador), if sufficient direction and control exist, may result in the United States being legally responsible under international law for the actions carried out by these groups or government forces. See, e.g., *id.* arts. 8(a), 9, & 27; Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Principle 1 (Prohibiting the Threat or Use of Force), para. 8, G.A. Res. 2625, 25 GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter cited as *Declaration on Friendly Relations*]; Resolution on Definition of Aggression, G.A. Res. 3314, art. 3(g), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter cited as *Definition of Aggression*]. The two resolutions cited above, which were unanimously adopted by the General Assembly (by consensus), represent

actions of the United States can be justified as undertaken in lawful exercise of the right of individual or collective self-defense is a separate question.

The following analysis considers the legal norms which the community of states has developed over the centuries in order to control the use of force across international frontiers.¹⁹⁰

A. The Threat or Use of Force by the United States Against Nicaragua

1. Direct United States Military Activities Against Nicaragua

a. Action Against the Territorial Integrity and Political Independence of Nicaragua in General

The cornerstone of the United Nations Charter is the prohibition against the threat or use of force across international frontiers. This prohibition, contained in article 2(4) of the United Nations Charter, represents the most important legal restraint against war. Article 2(4) states, "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."¹⁹¹

The United States has violated this prohibition by acts involving the force against the territorial integrity and political independence of Nicaragua. Examples include blowing up oil storage depots at Corinto, mining Nicaraguan harbors, and overflights of Nicaraguan territory.¹⁹² These actions have also violated other treaty commitments of the United States. Article 20 of OAS Charter, for example, provides "The territory of a state is inviolable; it

in the portions cited an authoritative interpretation of U.N. Charter, art. 2 para. 4, which prohibits the threat or use of force against the territorial integrity or political independence of any state. The actions referred to above also constitute direct violations of OAS Charter, arts. 18 & 20. Treaties, it should be stressed, are every bit as binding under international law as are principles of customary international law. I.C.J. Stat., *supra* note 164, art. 38(1); Draft Articles on State Responsibility, *supra* art. 17.

190. See generally I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); 1-2 B. FERENCZ, ENFORCING INTERNATIONAL LAW (1983).

191. U.N. CHARTER art. 2, para. 4.

192. See *supra* note 133 and accompanying text (oil storage depots at Corinto); *supra* notes 135-38 and accompanying text (mining of harbors); *supra* notes 130, 132, 139-40 and accompanying text (other measures and overflights). See generally *supra* notes 130-42 and accompanying text. On the question of whether overflights constitute a use of force, see I. BROWNIE, *supra* note 190, at 363-64.

may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, *directly* or *indirectly*, on any grounds whatever . . ."¹⁹³ (emphasis added). Similarly, these actions violate article 1 of the Rio Treaty, which establishes that "The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty."¹⁹⁴

The United States actions against Nicaragua were not authorized by the United Nations Security Council or by a competent regional agency such as the Organization of American States. Consequently, the only exception to the prohibitions referred to above under which they might be justified is the right to collective self-defense under article 51 of the United Nations Charter.¹⁹⁵ Whether such a justification is legally valid is considered below.

b. The Mining of Nicaraguan Ports and Harbors

The mining of Nicaraguan ports and harbors by the United States in the Spring of 1984 violated not only the legal prohibitions discussed above, but also several other legal obligations to Nicaragua and third states. There can be little doubt that the mining violated the prohibition against "the territorial integrity or political independence of any state" contained in article 2(4) of the United Nations Charter;¹⁹⁶ the prohibition against the use of "measures of force taken by [a] State, directly or indirectly, on any grounds whatever" against the inviolability of the territory of another State, established in article 20 of the OAS Charter;¹⁹⁷ and the prohibition against the threat or use of force contained in article 1 of the Rio Treaty.¹⁹⁸

193. OAS Charter, *supra* note 12, art. 20.

194. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 1, 62 Stat. 1681, T.I.A.S. No. 1838, 4 Bevans 559 [hereinafter cited as Rio Treaty]; Garcia-Amador, *The Rio de Janeiro Treaty: Genesis, Development, and Decline of a Regional System of Collective Security*, 17 U. MIAMI INTER-AM. L. REV. 1 (1985).

195. See, e.g., Rowles, *supra* note 66, at 388-96.

196. See *supra* note 191 and accompanying text.

197. See *supra* note 193 and accompanying text.

198. See *supra* note 194 and accompanying text. President Reagan and other officials sought to defend the mining operations by stressing that the mines were not of the type that could sink a ship. When asked about the mining in an interview for Irish television, President Reagan explained, "Those were homemade mines that couldn't sink a ship." Washington Post, May 30, 1984, at A1, col. 1. See N.Y. Times, June 1, 1984, at 4, col. 1 (nat'l ed.); Washington Post, Apr. 10, 1984, at A1, col. 6.

The justification offered by the United States was that the mining constituted an exercise of the right of self-defense. The Legal Adviser's Office at the State Department prepared a memorandum which was presented privately to congressional committees on March 28, 1984, apparently justifying the mining operations as collective self-defense.¹⁹⁹ The State Department does not appear to have published the opinion or otherwise made it public.

The mining of Nicaraguan ports and harbors would also appear to violate the norms governing international maritime commerce. Under customary international law, "ships of all States,

It is clear, however, that the violation of the territorial waters of another state is prohibited by these provisions. See I. BROWNIE, *supra* note 190, at 265-68, 361-62; Randelzhofer, *Use of Force*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 265, 267-70 (1982); Cf. Definition of Aggression, *supra* note 189, art. 3, which establishes that the following constitute *prima facie* acts of aggression:

(b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;

(c) The blockade of the ports or coasts of a state by the armed forces of another state;

...
(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein (emphasis added).

While General Assembly resolutions do not *ipso facto* create customary international law, a legal declaration adopted by consensus such as the Definition of Aggression represents strong evidence that the norms enunciated therein represent customary international law. See 2 B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 11, 34-41, 50-53 (1975); A. RIFAAT, *INTERNATIONAL AGGRESSION* 277-80 (1979). But cf. T. BRUHA, *DIE DEFINITION DER AGGRESSION* 277-324 (1980) (skeptical analysis of legal effect of the Definition of Aggression).

In any event, regardless of the status of the U.N. General Assembly's Definition of Aggression, the United States is bound by the terms of 1975 Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (revised Rio Treaty), which it has ratified. See Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance, July 26, 1975, art. I (amendment to art. 9) [hereinafter cited as Protocol of Amendment to Rio Treaty], reprinted in 3 *GENERAL SECRETARIAT, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE: APPLICATIONS*, app. A (1977); Rowles, *supra* note 66, at 392-95. This treaty, not yet in force, specifically incorporates the language of the Definition of Aggression quoted above into article 9 of the text of the revised Rio Treaty. Under the principle of customary international law which requires a state to refrain from acts which would defeat the object and purpose of a treaty it has ratified pending its entry into force, the United States is under a duty not to commit acts such as those referred to above. See Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 63 *AM. J. INT'L L.* 875 (1969). Nicaragua has not ratified the Protocol of Amendment to the Rio Treaty. See Rowles, *supra* note 66, at 392-95. This does not, however, affect the obligations of the United States under the principle of international law set forth in article 18 of the Vienna Convention, which is a codification of or has become customary law.

199. See *supra* note 138.

whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."²⁰⁰

While United States officials have argued that all nations were notified of the mining by announcements made by *contra* leaders,²⁰¹ the fact remains that the United States, which conducted the mining, made no such notification; its failure to notify constituted a violation of international law. In the *Corfu Channel Case*,²⁰² the Court considered issues related to Great Britain's claim to a right of innocent passage through international straits, the mining of the straits, and Great Britain's violation of Albanian territorial waters in order to seize as evidence mines such as those which had damaged its ships. The Court held that,

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based . . . on elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.²⁰³

The Court in the *Corfu Channel Case* stressed that the obligations referred to above were not based on the 1907 Hague Convention on the Laying of Automatic Submarine Contact Mines,²⁰⁴ applicable in times of war. The fact that Albania was apparently not a party to that convention may have led the Court to avoid reli-

200. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 17, 23 I.L.M. 1261 (1982), U.N. Pub. E. 83.V.5. (1983). This provision represents a codification of customary international law. It is virtually identical to article 14 para. 1 of the 1958 Geneva Convention on the Territorial Sea. See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, arts. 1(1), 12(2), 15 U.S.T. 1606, T.I.A.S. No. 5639. See generally NGUYEN QUOC DIHN, P. DALLIER & A. PELLET, *DRIT INTERNATIONAL PUBLIC* 585-86 (2d ed. 1980).

201. See *Mining Hearings*, *supra* note 136, at 31, 40 (statement of Kenneth W. Dam). For an interesting interchange with specific reference to the *Corfu Channel Case*, see *id.* at 39-40. Regarding the notification, Dam stated: "[T]he international shipping community was notified. In fact, the *Contras* talked about it to everybody who would listen, notified Lloyd's of London, and were trying to get people to hear it." *Id.* at 40.

202. *Corfu Channel (U.K. v. Albania) (Merits)*, 1949 I.C.J. 4, 22-23, 36.

203. *Id.* at 22-23.

204. *Id.* at 22.

ance on it. It is, however, worth noting that both Nicaragua and the United States have ratified the Hague Convention, article 2 of which provides: "It is forbidden to lay automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial shipping."²⁰⁵

Finally, the mining of Nicaraguan ports and harbors would appear to violate various provisions contained in the 1956 bilateral Friendship, Commerce and Navigation Treaty between Nicaragua and the United States.²⁰⁶ Article 19(1) of that Treaty provides that, "Between the territories of the two Parties there shall be freedom of commerce and navigation."²⁰⁷ This provision clearly requires each party to allow goods and ships to freely enter and leave the territory of the other; it seems that the requirement applies, *a fortiori*, to the territory of the Nicaragua.²⁰⁸

205. Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, T.S. 541, 1 Bevans 669 [Convention No. 8]. See 1982 Treaties in Force 281 (Nicaragua and U.S. Parties; Albania not a party in 1982). Whether this prohibition is applicable to the present case would depend on whether the United States and Nicaragua can be considered at war or engaged in hostilities, and whether the reference to "automatic contact mines" might be interpreted so as to take into account technological developments since 1907.

206. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024 [hereinafter cited as FCN Treaty].

207. *Id.* art. 19(1).

208. This article is of particular relevance in view of the imposition by the United States of economic sanctions against Nicaragua, for the adoption of such measures would appear to violate article 19(1), at least where the requirements under international law for taking non-forcible reprisals (or "countermeasures") are not met. See generally E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 35-44, 125-38 (1984); Bowett, *Economic Coercion and Reprisals by States*, in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 7, 14-17 (1976).

The classic formulation for the lawful exercise of reprisals is found in *The Naulilaa* arbitration (1928), 2 U.N. Rep. Int'l Arb. Awards 1011. The arbitrators stated the requirements as follows:

Reprisals are acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained undressed after a demand for amends. In consequence of such measures, the observance of this or that rule of international law is temporarily suspended, in the relations between the two States. They are limited by considerations of humanity and the rules of good faith, applicable in the relations between States. They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending state reparation for the offense, the return to legality, and the avoidance of new offenses (emphasis added).

Quoted in J. BRIERLY, THE LAW OF NATIONS 401 (6th ed., H. Waldock ed. 1963). The opinion also makes clear that, in the words of Briery, "the measures adopted must not be excessive, in the sense of being out of all proportion to the provocations received." *Id.* at 401. Since the advent of the U.N. Charter, reprisals may no longer involve the use of force. U.N. CHAR-

Article 17(3) of the Friendship, Commerce, and Navigation Treaty, in article 17(3), also establishes that, "Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party."²⁰⁹ The interpretation of this provision is not free from doubt, but it appears from the Treaty that the mining could have hindered the obtaining of marine insurance on products being shipped to or from Nicaragua.²¹⁰

At the same time, article 10(3) of the treaty establishes that "Neither party shall unreasonably impede nationals and companies of the other party from obtaining on equitable terms, through normal commercial channels, the capital, skills, arts, and technology it needs for its economic development."²¹¹ This provision seems to include mining and other measures which are aimed at interrupting commerce. Under the treaty, questions regarding the interpretation of the preceding articles may be resolved by the ICJ, to which all disputes "as to the interpretation or application" of the treaty are referred by the compromissory clause contained in article 24(2).²¹² Consequently, any questions regarding the applica-

TER, art. 2, para. 4.

In a memorandum prepared at the request of the Senate Foreign Relations Committee, the Legal Adviser of the State Department explained that U.S. sanctions against Iran satisfied the essential requirements for non-forcible reprisals, as follows:

[U]nder the law of nonforcible reprisals, a nation may lawfully take otherwise unlawful nonforcible actions if (1) the actions are in response to prior international delicts by another nation; (2) the aggrieved nation has sought redress unsuccessfully through other means; and (3) the actions are proportional to the prior delict.

Memorandum of the Legal Adviser, Davis Robinson, Application of the Treaty of Amity to Expropriations in Iran, 129 CONG. REC. S16055, S16056 (daily ed. Nov. 14, 1983), reproduced in 22 I.L.M. 1406, 1407 (1983). This memorandum is of particular relevance to the FCN Treaty with Nicaragua, because it deals at length with issues related to the suspension of such a treaty and with non-forcible reprisals or "countermeasures" such as those imposed on Nicaragua by Presidential order on May 1, 1985. With respect to the latter, see, e.g., N.Y. Times, May 1, 1985, at 1, col. 6 (nat'l ed.). For the text of the order, see Exec. Order No. 12, 513, 50 Fed. Reg. 18,629 (issued May 1, 1985). See also Office of Foreign Assets Control, Department of Treasury, Nicaraguan Trade Control Regulations; Final Rule, 31 C.F.R. § 540, published in 50 Fed. Reg. 19,890 (issued May 8; published May 10, 1985).

209. FCN Treaty, *supra* note 206, art. 17(3).

210. As one European diplomat in Managua observed, "What insurance company is going to be willing to cover this sort of thing?" Washington Post, Apr. 2, 1984, at A1, col. 2.

211. FCN Treaty, *supra* note 206, art. 17(3).

212. *Id.* art. 24(2). This article states: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

bility of the FCN treaty to U.S. covert actions against Nicaragua are to be decided by the ICJ.

There can be little doubt that the United States mining of Nicaraguan ports and harbors violated both prohibitions against the use of force and a number of other norms and principles of international law. A fundamental question raised by the mining remains, however, and that is how the United States ever decided upon such a disastrous and ultimately self-defeating course of action. The answer appears to be that the legal implications of the mining operations were never taken into account. This was probably due to the fact that the operation was under the control of the CIA, which does not typically take into consideration the international legal implications of its actions.²¹³ The mining may have been authorized in a general way in December, 1983,²¹⁴ receiving high-level consideration at the National Security Council level and specific authorization by President Reagan in mid-February, 1983;²¹⁵ but by then, it was apparently already under way.²¹⁶

2. United States Support of Contra Activities Involving Armed Attacks Against Nicaragua

We now turn to an examination of the legality of indirect actions in support of the *contras* (and other actors) who have engaged in a continuing, escalating pattern of armed attacks against the territory of Nicaragua since 1981. Actions in this second category—including failures to act—may be broken down into the following sub-categories:

1) the organization, financing, logistical support, supply of

Also worthy of note is the fact that the treaty may be terminated by either party on one year's notice. *Id.* art. 25(3). In view of the Reagan administration's decision to terminate the treaty, communicated to Nicaragua on May 1, 1985, it should be noted that it may be terminated only on one year's notice. Otherwise, suspension is governed by the principles of customary international law embodied in articles 60 and 65 of the Vienna Convention on the Law of Treaties. *Supra* note 198, arts. 60, 65. The FCN Treaty ceased to be in force on May 1, 1986. Information supplied to the author by the Office of the Legal Advisor, Treaty Affairs, Dep't of State.

213. See Washington Post, Apr. 21, 1984, at A1, col. 5; Washington Post, Apr. 13, 1984, at A20, col. 2; N.Y. Times, Apr. 9, 1984, at 1, col. 3 (nat'l ed.).

214. See N.Y. Times, Apr. 12, 1984, at A1, col. 6 (nat'l ed.); Washington Post, Apr. 10, 1984, at A1, col. 6.

215. Washington Post, Apr. 11, 1984, at A1, col. 5.

216. Administration officials pointed out that the leading *contra* group, the Nicaraguan Democratic Force, publicly announced on January 8, 1984, that it had mined Nicaraguan ports. N.Y. Times, Apr. 12, 1984, at 1, col. 6 (nat'l ed.).

weapons and other materiel, and coordination of *contra* activities involving the use of force against Nicaragua;

2) the financing of, or supply of arms and equipment to *contra* forces engaged in activities involving the use of force in and against Nicaragua;

3) the provision of arms, other materiel, and financial assistance to third countries with the knowledge that such resources will be made available to the *contras*; and

4) the encouragement of or failure to prevent the organization and carrying out of private actions in the United States which have as their aim the provision of arms, other materiel, or financial assistance to *contras* engaged in activities involving the use of force against Nicaragua.

A principal objective of covert activities is to hide such facts from view in order to avoid public accountability—both to other nations and to domestic audiences—and public knowledge of the violations of international law which such activities may entail. Consequently, knowledge of the relevant facts is fragmented and incomplete. Nonetheless, enough details regarding U.S. covert operations against Nicaragua have become public, through leaks or otherwise, to allow certain generalizations and conclusions as to their legality.

a. Organization, Financing, Support, and Coordination of Contra Activities Against Nicaragua

Evidence in the public record suggests that U.S. covert actions in organizing, financing, supporting, and coordinating *contra* paramilitary activities against Nicaragua, from December 1981 until at least the spring or summer of 1984, were on such a large scale that the *contras* were in effect acting as agents of the United States under its direct supervision and control. To the extent such control was in fact exercised, the attacks of the *contras* against Nicaragua constitute actions for which the United States is responsible under international law. That is, the actions of the *contras* are, in legal effect, actions of the United States.²¹⁷ The foregoing conclusion is derived from the general principle in international

217. See, e.g., I. BROWNLIE, *supra* note 190, at 278-79, 331; Draft Articles on States Responsibility, *supra* note 189, art. 8(a); Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 RECUEIL DES COURS 411, 458, 482 (1972-II).

law which is analogous to the principle found in municipal law (that is, domestic law) that the principal is responsible for the acts of his agent.²¹⁸ If it is unlawful for a state to commit a certain act, it is equally unlawful for that state to engage others to commit that act on its behalf. This principle has been formulated by the International Law Commission in its Draft Articles on State Responsibility, as follows: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such person or group of persons was in fact acting on behalf of that State"²¹⁹

Article 2(4) of the United Nations Charter prohibits the use of force whether by direct or indirect means.²²⁰ While there has been disagreement in the past among both governments and writers regarding the exact degree of involvement necessary for the actions of insurgents to be imputed to a state supporting them,²²¹ U.S. covert operations against Nicaragua do not represent a borderline case. This conclusion is confirmed by an examination of authoritative interpretations that have been made by the United States, other United Nations Members, and others in the past.

The General Assembly's 1970 Declaration on Friendly Relations, adopted by consensus and with the support of the United States, contained the following language as part of an authoritative interpretation of article 2(4): "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State."²²² This clarification of article 2(4) was reached without a dissenting vote. It now constitutes both an agreed interpretation of article 2(4)²²³ and a rule of customary in-

218. See, e.g., A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 703-55 (1977) (employer's liability in German law).

219. Draft Articles on State Responsibility, *supra* note 189, art. 8(a). The International Law Commission is a specialized body whose 25 members are elected by the General Assembly to assist in the codification and progressive development of international law. Members serve in an individual capacity and are generally among the most eminent scholars in the field. See L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, *supra* note 33; Franck & El Baradei, *The Codification and Progressive Development of International Law: A UNITAR Study of the Role and Use of International Law Commission*, 76 AM. J. INT'L L. 630 (1982).

220. See *supra* note 217.

221. See, e.g., *id.*

222. Declaration on Friendly Relations, *supra* note 189, Principle 1 (Prohibiting Threat or Use of Force), para. 8.

223. See Vienna Convention on the Law of Treaties, *supra* note 198, art. 31(3). The Committee which elaborated the text of the Declaration, beginning in 1963, worked in general on the basis of unanimity. Rosenstock, *The Declaration on Principles of International*

ternational law.²²⁴ The United States has itself repeatedly reaffirmed the principle contained in the paragraph quoted above.²²⁵

Law Concerning Friendly Relations: A Survey, 65 AM. J. INT'L L. 713, 713-14 (1971). Rosenstock characterizes the Declaration as,

the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on these seven principles. . . . The principles involved. . . are acknowledged by all to be principles of the Charter. By accepting the respective texts, states have acknowledged that the principles represent their interpretations of the obligations of the Charter. The use of the word "should" rather than "shall" in those instances in which the Committee believed it was speaking *de lege ferenda* [i.e., in terms of progressive development of law or law-in-the-making, which has not yet crystallized into customary law] or stating mere *desiderata* further supports the view that the states involved intended to assert binding rules of law where they used language of firm obligation.

Id. at 714-15.

224. See Malanczuk, *Countermeasures and Self-Defense as Measures Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 705, 765 (1983) (interpretation of art. 2(4)). See Schwebel, *supra* note 225, at 458-60. See also *infra* note 225. Cf. Rosenstock, *supra* note 223, at 717.

Of particular significance is assessing the legal effect of the Declaration in the following language at its end:

[The General Assembly] . . .

3. Declares further that: The principles of the Charter which are embodied in the Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of strict observance of these principles.

Declaration on Friendly Relations, *supra* note 189, General Part, § 3. This statement, the process by which the Declaration was elaborated, and its adoption by consensus (without a dissenting vote) provide persuasive evidence that the principal provisions of the Declaration represent customary international law.

225. See Schwebel, *supra* note 217, at 456, 458-60, 482; *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 733, 733-34 (1974) (statement of R. Rosenstock to U.N. Special Committee on Defining Aggression). Cf. Memorandum of Acting Legal Adviser, George H. Aldrich, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 5, 7; Memorandum of J. Willis, Attorney Adviser, 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 3, 5 (Non-intervention). The United States joined in proposing inclusion of language to the same effect as that quoted in the text in the Six-Nation Proposal presented to the U.N. Special Committee on Defining Aggression. See Schwebel, *supra* note 217, at 493-95 (text of Six-Nation draft proposal). Article IV(B)(6) of the draft defined as aggression "[o]rganizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State." *Id.* at 495. The Definition of Aggression, *supra* note 189, art. 3(g), defines the following as an act of aggression: "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above . . ." The acts referred to in the last phrase include "the invasion or attack . . . of the territory of another State, or any military occupation, however temporary, resulting from such an invasion or attack . . ." *Id.* art. 3(a). The adoption by consensus of the Definition of Aggression provides additional evidence that the excerpt from the Declaration on Friendly Relations quoted in the text constitutes customary inter-

Had it proceeded to an adjudication on the merits by the ICJ, the United States might have argued, in addition to self-defense, that the degree of its coordination, direction, and control of the *contras*' attacks against Nicaragua was insufficient to establish that the *contras* were acting under its supervision and control. Although this argument would not go far to absolve the United States from legal responsibility, for reasons set forth below, the distinction is an important one. If such control existed, however, the actions of the *contras* constituted acts of the United States.

The United States might have argued that its support, even if it amounted to direction and control over the *contras*, did not violate article 2(4) of the United Nations Charter or article 1 of the Rio Treaty. It might have further argued that these acts did not constitute even "measures of force taken by a State, directly or indirectly" against the territorial inviolability of Nicaragua, and thus did not violate article 20 of the OAS Charter. These propositions are legally untenable however; it is unlikely that the ICJ would embrace them.

Acceptance of such arguments, moreover, would emasculate the legal prohibitions against the use of force. Whether or not the words "directly or indirectly" make the prohibition in article 20 of the OAS Charter even stronger than those in article 2(4) of the United Nations Charter and article 1 of the Rio Treaty,²²⁶ the implications of such arguments are extremely dangerous, in addition to being contrary to previous United States policy. They would permit the Soviet Union or any other state to mount a military assault against another state on the same scale as that conducted by the United States against Nicaragua without violating article 2(4). To adopt such a position would be so self-defeating and damaging to the international order that it is doubtful the United States would have made such an argument before the ICJ had it decided to participate in the merits phase of the proceedings.²²⁷

Finally, while the United States might have argued that it did not exercise direction and control over the *contras*' attacks against Nicaragua, the facts that have been made public suggest that such

national law. See also Protocol of Amendment to the Rio Treaty, *supra* note 198, art. 9(g) as revised.

226. On the combined force of the prohibitions contained in articles 18, 19 & 20 of the OAS Charter, see 1 F. GARCIA-AMADOR, *THE INTER-AMERICAN SYSTEM*, pt. 1, at 97 (1983).

227. At least, one would hope that the international lawyers in the Legal Adviser's Office of the State Department would not have willingly made such an argument.

an argument might not have been sustained before the ICJ. The evidence of United States organization, financing, logistical support, supply of arms and materiel, and coordination and direction of *contra* activities²²⁸ would appear to be strong. If the U.S. actions cannot be justified as collective self-defense, these actions and those of the *contras* which are imputable to the United States constitute the illegal use of force by the United States against the territorial integrity and political independence of Nicaragua in violation of international legal norms.²²⁹

b. Financing of or Supply of Arms and Materiel for Contra Activities Against Nicaragua

Even if the facts were such as to support the argument that support of *contra* activities up to mid-1984 did not involve sufficient coordination, direction and control to make the armed attacks of the *contras* against Nicaragua imputable to, and, therefore, legally actions of the United States. The question remains whether such actions nonetheless violated international law. Moreover, continued efforts by the Reagan administration to secure funding to finance the *contras* (by furnishing money to be paid to individual insurgents, for example) and to provide them with arms and materiel²³⁰ raise the question of whether such military assistance would be permissible under international law.

In its authoritative interpretation of the prohibition of the use of force contained in article 2(4), the General Assembly adopted by consensus the following language in its 1970 Declaration on Friendly Relations: "Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife

228. See *supra* notes 72-157 and accompanying text.

229. United States actions violate article 2(4) of the U.N. Charter, article 1 of the Rio Treaty, and article 20 of the OAS Charter, among other norms. They also violate article 18 of the OAS Charter. If they cannot be justified as measures of collective self-defense under article 51 of the U.N. Charter—and they cannot as we shall see below—they also violate article 21 of the OAS Charter, which provides, "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." OAS Charter, *supra* note 12, art. 21. Even under a liberal interpretation of the provision which would permit the use of force not only in self-defense but also pursuant to decisions by competent regional or United Nations organs, the United States' actions in question are prohibited by article 21. See 1 F. GARCIA-AMADOR, *supra* note 226, pt. 1, at 89.

230. Depending on the degree of United States involvement, resumed funding of the *contras* could well place U.S. actions in subcategory (a), discussed *supra* in the text. On the potential nature of future U.S. involvement, see *supra* notes 153-59 and accompanying text.

or terrorist acts in another State . . . when the acts referred to in this paragraph involve a threat or use of force.”²³¹ The Declaration, in interpreting the duty of non-intervention, also states “[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of another State, or interfere in civil strife in another state.”²³²

There exists some dispute, and not a little confusion, as to whether military assistance to insurgents by itself constitutes a violation of the prohibition against the use of force, or a violation of the duty to refrain from intervention in the internal affairs of another state.²³³ This is not surprising given the fact that the two categories overlap, the first being included within the second. In any event, the important point is that the United States has supported and accepted the norms quoted above.²³⁴

The United States also supported the 1974 General Assembly resolution on the Definition of Aggression, which was adopted by consensus after a long process of elaboration. In providing a non-exhaustive definition of acts which constitute *prima facie* acts of aggression, the definition included the following:

Art. 3(g). The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount

231. Declaration on Friendly Relations, *supra* note 189, Principle 1 (Prohibiting the Threat or Use of Force), para. 9.

232. *Id.* Principle 3 (Duty of Non-Intervention), para. 2.

233. *See, e.g.*, Schwebel, *supra* note 217, at 458-59, 482-83 (Use of force, armed attack); Malanczuk, *supra* note 224, at 765-66.

234. In a memorandum dated October 25, 1974, George H. Aldrich the Acting Legal Adviser of the Department of State, stated the following:

A close reading of the Friendly Relations text suggests that, aside from the threat or use of force, the Declaration clearly prohibits actions designed to coerce a state to secure advantages from it in contravention of its rights. In accepting this language, we were careful to interpret it as avoiding any condemnation of economic or other pressures designed to protect or enforce the rights of the state imposing the pressures

The conclusions of the Acting Legal Adviser as to the legal status of these prohibitions are particularly significant:

In summary, recent developments in international law have provided a principle of non-intervention as part of the legal structure in which sovereign states co-exist The threat or use of force, *assistance to armed revolutionaries*, and coercion designed to secure advantages from a state in contravention of its rights are the only state acts clearly and expressly prohibited by the principle, but it may well be extended further by the practice of states (emphasis added).

1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, *supra* note 225, at 7.

to the acts listed above [in Article 3], or its substantial involvement therein (emphasis added).²³⁵

The acts enumerated in earlier paragraphs of article 3 include, *inter alia*, attacks against the territory of a state or its armed forces.²³⁶ The precise words "or its substantial involvement

235. Definition of Aggression, *supra* note 189, art. 3(g).

236. Article 3 establishes:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) *The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however, temporary, resulting from such invasion or attack;*

(b) *Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State . . .*

(c) *The blockade of the ports or coasts of a State by the armed forces of another State;*

(d) *An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*

. . .

(f) *The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*

(g) *The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein (emphasis added).*

Definition of Aggression, *supra* note 189, art 3. Articles 1 and 2 of the Definition provide as follows:

Article 1. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this Definition . . .

Article 2. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Id. arts. 1, 2. The definition further states that none of its provisions "shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful." *Id.* art. 6.

Two aspects of the Definition of Aggression merit explanation. The first is that the acts enumerated above do not constitute aggression and a violation of article 2(4) of the Charter if they are taken in lawful exercise of the right of self-defense in accordance with article 51 of the Charter. The second aspect is that article 2, in its reference to "the fact that the acts concerned or their consequences are not of sufficient gravity," makes clear that minor border incidents, such as an exchange of gunfire not followed by more serious action, will generally not qualify as an act of aggression or an "armed attack" such as to give rise to the right of self-defense. See A. RIFAAT, *supra* note 198, at 268-69; 2 B. FERENCZ, *supra* note 198, at 32-33. Of course, in accordance with article 2 of the Definition and articles 24 and 39 of the

therein" represented a compromise, reflecting different views as to whether "indirect subversion"—the financing and supply of arms to insurgents, for example—should be included in the definition.²³⁷ The position of the United States throughout the elaborative process of the text was that such acts should be included.²³⁸

Although the United States might theoretically argue that the financing and supplying of arms and materiel to insurgents do not fall within the prohibitions contained in article 2(4) of the United Nations Charter, the Declaration on Friendly Relations, or the Definition of Aggression, such an argument would contradict earlier U.S. positions. More importantly, it could amount to a statement by the United States that it regards such actions as lawful. This would be a dangerous argument indeed. It would also serve no purpose, as the acts in question are prohibited by hemispheric treaties which deal specifically with the conduct in question. Leaving aside the question of whether article 20 of the OAS Charter proscribes the financing of or supply of arms to the *contras*,²³⁹ it is clear that article 18 of the same treaty does prohibit such action. Article 18 establishes:

U.N. Charter, the Security Council has "primary responsibility" for making determinations regarding such matters. This responsibility is not exclusive, however, as the International Court of Justice also has full authority to interpret and apply article 2(4) when required to do so in deciding a case before it.

237. See T. BRUHA, *supra* note 198, at 118, 134, 218-23, 228-39, 265; 2 B. FERENCZ, *supra* note 198, at 39-41; Schwebel, *supra* note 217, at 455-61.

238. See *supra* note 225. Article V(B) of the six-nation draft co-sponsored by the United States defined as acts of aggression the following:

(6) Organizing, *supporting* or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;

(7) Organizing, *supporting* or directing violent civil strife or acts of terrorism in another State;

(8) Organizing, *supporting* or directing subversive activities aimed at the violent overthrow of the Government of another State (emphasis added).

Schwebel, *supra* note 217, at 493-94 (text of six-nation draft).

Regarding Article 3 of the Definition finally adopted, the U.S. Representative stated the following:

Article 3 of the text represents an effort to set forth certain familiar examples of the use of force which the Security Council could reasonably consider, in the manner set forth suggested by Article 2, to qualify as acts of aggression. The scope of the list of acts set forth in the article makes clear that *no distinction is made in terms of the means employed or the directness or indirectness of their use* (emphasis added).

Statement of R. Rosenstock to the Special Committee on Defining Aggression, Apr. 12, 1974, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 733, 734 (1974).

239. See *supra* text accompanying note 193 (text of art. 20); *supra* note 226 and accompanying text.

No State or Group of States has the right to intervene, *directly or indirectly, for any reason whatever*, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force, but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements (emphasis added).²⁴⁰

The provision of money and arms to insurgents attempting to overthrow the Sandinista Government of Nicaragua, or merely to coerce it to adopt certain internal policies, certainly falls within the prohibition of article 18. An important precedent is the imposition in 1964 of OAS diplomatic and economic sanctions against Cuba.²⁴¹ These sanctions, which were applied under article 6 of the Rio Treaty, were largely based on the discovery of a single arms shipment from Cuba to revolutionaries in Venezuela.²⁴²

It is important to note that the origin of article 18 can be found in the 1933 Montevideo Convention on the Rights and Duties of States, which was signed by the United States and the Latin American countries. Article 8 of that convention provides, "No state has the right to intervene in the internal or external affairs of another."²⁴³ This prohibition and one in article 11 of the convention (corresponding to article 20 of the present OAS Charter) reflected the deep resentment of the Latin American states against the numerous military interventions of the United States in preceding decades. While the United States originally attached a reservation to its ratification of the 1933 Convention,²⁴⁴ it accepted these principles without reservation when it signed an additional

240. OAS Charter, *supra* note 12, art. 18.

241. The sanctions included a total break in diplomatic relations with Cuba, a total trade embargo (except for food, medicines, and medical equipment), and the suspension of sea transportation with Cuba except for that which might be necessary for humanitarian reasons. 2 GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE: APPLICATIONS 215-16 (3d ed. 1973).

242. Other actions cited as a basis for the sanctions included the supplying of funds to Venezuelans visiting Cuba, training in Cuba of Venezuelans in subversion, and subversive radio and written propaganda. *Id.* at 242. Article 6 of the Rio Treaty authorizes the imposition of sanctions in cases where no "armed attack" has occurred. The sanctions specified in article 8 may be applied in such a case. *See* Rio Treaty, *supra* note 194, arts. 6, 8. Cases involving armed attack are dealt with in *id.* arts 3, 7.

243. Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 3 Bevans 145, 165 L.N.T.S. 19. *See* 1 F. GARCIA-AMADOR, *supra* note 226, pt. 1, at 80-86 (discussion and text of convention).

244. The ambiguously worded U.S. reservation is reproduced in 1 F. GARCIA-AMADOR, *supra* note 226, pt. 1, at 84-85.

protocol to the convention in 1936, and ratified it in 1937.²⁴⁵

A second hemispheric treaty of particular relevance in judging United States support of *contra* activities against Nicaragua is the 1928 Convention on the Duties and Rights of States in the Event of Civil Strife, to which both the United States and Nicaragua are parties.²⁴⁶ Article 1 of the convention establishes:

The contracting States bind themselves to observe the following rules with regard to civil strife in another one of them:

First: To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife

Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

Fourth: To prevent that within their territory there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favor of the rebellion.²⁴⁷

In view of the foregoing analysis, one must conclude that financing of and supply of weapons and other materiel to the *contras*, even if the actions of the latter are not imputable to the United States, violate a number of fundamental legal obliga-

245. Additional Protocol Relative to Non-Intervention, Dec. 23, 1936, 51 Stat. 41, T.S. No. 923, 3 Bevans 343, 188 L.N.T.S. 31; U.S. DEPARTMENT OF STATE, 1982 TREATIES IN FORCE 268. The text of the Protocol is reproduced in 1 F. GARCIA-AMADOR, *supra* note 226, pt. 1, at 91. Article 1 of the Additional Protocol establishes: "The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties." *Id.* at 91. See S. BEMIS, THE LATIN-AMERICAN POLICY OF THE UNITED STATES 242-94 (1943, 1971) (background to United States acceptance of the principle of non-intervention). On the effect of the Additional Protocol, see specifically *id.* at 289. Nicaragua and the United States are parties to both treaties. 1982 TREATIES IN FORCE, *supra* note 245, at 268, 287. However, they have now probably been superseded in large part, if not entirely, by the OAS Charter. See Vienna Convention on the Law of Treaties, *supra* note 198, arts. 30, 59.

246. Convention on the Duties and Rights of States in the Event of Civil Strife, Feb. 20, 1928, 46 Stat. 2749, T.S. No. 814, 2 Bevans 694, 134 U.N.T.S. 45. See 1982 TREATIES IN FORCE, *supra* note 245, at 287. The text of the convention is reproduced in 1 F. GARCIA-AMADOR, *supra* note 226, pt. 2, at 289-91.

247. Convention on the Duties and Rights of States in the Event of Civil Strife, *supra* note 246, art. 1.

tions,²⁴⁸ including those contained in treaties by which the United States has been bound for over fifty years. Any future military assistance to the *contras* such as that currently proposed by the Reagan administration, would clearly violate these norms of international law.²⁴⁹

c. The Supply of Arms, Materiel, and Financial Assistance to Third Countries Aiding the Contras

There is considerable evidence to suggest that the United States has supplied third countries with arms and equipment which have subsequently become available to the *contras* engaged in armed attacks against Nicaragua.²⁵⁰ It also seems highly possible that military or economic assistance may have been provided to third countries with either the knowledge or the understanding that such funds or equipment would be transferred, whether directly or indirectly, to the *contras*. One way the United States is in a position to make arms and equipment available to the *contras* is by providing new arms to Honduras, and by leaving behind military equipment and supplies following the large-scale maneuvers that United States military forces have been carrying out in Honduras. The old arms and abandoned supplies and equipment find their way into the hands of the *contras*.²⁵¹ Before mid-1984, such practices seemed to be a built-in component of United States policy,²⁵² and a possible way for the Reagan administration to circum-

248. The U.S. counter-arguments, including that of collective self-defense are discussed throughout this paper.

249. See *supra* notes 153-59 and accompanying text; see also *supra* notes 122-27 and accompanying text.

250. See *supra* notes 150-53, 157 and accompanying text. A suggestive example is provided by the transfer of three light planes to a third government. The planes were subsequently used by the *contras* in an attack on Nicaraguan territory on September 1, 1984. The transfer of the planes from the Defense Department to the third government was later acknowledged by the Pentagon. Washington Post, Sept. 19, 1984, at A20, col. 1. It was apparently part of a much larger program involving the transfer of "excess" equipment from the Pentagon to the CIA to the *contras*. See Washington Post, Sept. 15, 1984, at A1, col. 2. Following the end of U.S. funding in 1984, El Salvador and Honduras, among others, increased their assistance to the *contras*. See N.Y. Times, Jan. 13, 1985, at 1, col. 6 (nat'l ed.). Israel was reportedly also among the third countries supplying assistance to the *contras*. *Id.* See also N.Y. Times, Mar. 28, 1985, at 1, col. 5 (nat'l ed.) (foreign aid to El Salvador and Honduras has been used to help *contras*); N.Y. Times, May 18, 1984, at 1, col. 2 (nat'l ed.) (transfers and "bailment" of equipment from Pentagon to CIA).

251. See, e.g., Washington Post, July 31, 1983, at A1, col. 1. Cf. N.Y. Times, Jan. 13, 1985, at 1, col. 6 (nat'l ed.) (transfer of ammunition from Honduras to *contras*).

252. The value of equipment left behind in Honduras after maneuvers has apparently

vent the prohibitions on aid to the *contras*. It is important to understand that the use of such stratagems would make it possible for officials to make the argument—however strained—to Congressional intelligence oversight committees that the administration was not in violation of the prohibition on such aid, because the United States was not itself furnishing any assistance “directly or indirectly” to the *contras*.

It is also possible that the United States has furnished military or financial assistance to third countries with the knowledge that such assistance would be transferred to the *contras* or free resources in the third state so that other resources could be transferred. If such transfers have or are taking place, do they violate international law? A starting point for legal analysis is the general principle adopted by the International Law Commission in article 27 of its Draft Articles on State Responsibility. Article 27 provides:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.²⁵³

This article is an application of the general principle that states may not engage others to commit illegal acts on their behalf without incurring international legal responsibility.²⁵⁴ The difficulty, as noted above, lies in establishing the requisite intent. However, intent can be inferred from the consequences and circumstances, and would appear to be established where the United States is aware that weapons and materiel it has given to a state (Honduras, for example) are being transferred to insurgents such as the *contras*, and then continues to transfer such equipment and materiel to the third state.

Such transfers would appear to violate the prohibition of intervention “directly or indirectly, for any purpose whatever” in the

not been considered by the administration as falling within the \$24 million cap on aid for fiscal year 1985. While information on this point is not easy to acquire, such a practice would help explain the fact that the *contras* have apparently obtained new supplies since the summer of 1984. Transfers of funds or supplies from third countries other than Honduras may also have helped, as well as “private” assistance from the United States such as that considered in the following section.

253. Draft Articles on State Responsibility, *supra* note 189, art. 27.

254. *See id.* art. 8(a), quoted *supra* at text accompanying note 219.

internal affairs of another state contained in article 18 of the OAS Charter.²⁵⁵ In addition, there can exist little doubt that such actions contravene the clear prohibitions contained in article 1 paragraphs (1), (3), and (4) of the Convention on the Duties and Rights of States in the Event of Civil Strife.²⁵⁶ Specifically, article 1(3) provides that the parties agree "To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied."²⁵⁷ This article refers to the state of "belligerency" which had a clear legal status before the advent of the United Nations Charter in 1945.²⁵⁸ The basic obligation remains intact and is directly applicable in the present case. Certainly, the United States has made no formal declaration of belligerency with respect to the *contras* operating in Nicaragua. The convention, which was adopted prior to the prohibition of state intervention contained in article 8 of the 1933 Montevideo Convention on the Rights and Duties of States, must be interpreted as prohibiting conduct by state officials as well as private parties.

With respect to the supply of financial assistance to third states aiding the *contras*, the same questions of intent and inferred intent based on circumstances and consequences arise. Here, the question of proof is likely to be extraordinarily difficult, particularly where financial assistance is used to free other resources of the third state for use in supplying the insurgents. By withdrawing from the merits proceedings before the ICJ, the United States has avoided the potentially embarrassing possibility of having to answer accusations and inquiries regarding any such activities.

However well-concealed and elaborate the disguise, the United States may not legally furnish through third countries financial or military assistance to the *contras* which it cannot itself legally provide. This conclusion is a fortunate one, given the element of reciprocity upon which all law is based. It means, to cite a hypothetical example, that the Soviet Union cannot legally provide arms or financial assistance to Bulgaria if it is aware that such assistance will be used to support insurgent activities in Turkey, Greece, or

255. See *supra* note 240 and accompanying text.

256. See *supra* notes 246-47 and accompanying text.

257. *Id.*

258. See generally Bindschedler, *Neutrality: Concept and General Rules*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 9-14 (R. Bernhardt ed. 1982).

Yugoslavia. Such an example reminds us that the arguments and precedents established by the United States articulate the United States' interpretations of international law. As law, the principles so interpreted are applicable to, and may be invoked by, other states as subjects of the international legal system.²⁵⁹

d. Private Assistance to the Contras by Groups and Individuals in the United States

Funding of *contra* activities in and against Nicaragua officially came to a halt when the twenty-four million dollars authorized for fiscal year 1984 were expended, a point presumably reached sometime during the spring or summer of 1984. A total prohibition of such funding was included in the continuing appropriations resolution for fiscal year 1985 and was to remain in effect until September 30, 1985 unless Congress enacted contrary legislation.²⁶⁰ In view of these direct prohibitions, the Reagan administration has apparently sought other means for getting funds and military supplies to the *contras*.²⁶¹ One such source of funds has been the "private" efforts of non-governmental organizations and groups to collect money and supplies to be transferred to the *contras*.²⁶² At

259. This fundamental proposition is a corollary of the sovereign equality of all states. See U.N. CHARTER, art. 1, para. 1; Declaration on Friendly Relations, *supra* note 189 (Principle 6); OAS Charter, *supra* note 12, art. 9. All states may invoke principles of customary international law. Generally, however, treaty provisions may only be invoked by parties to a treaty, or in support of the argument that the corresponding principles have acquired the status of customary international law.

260. See *supra* notes 109-24 and accompanying text. Legislation authorizing, by way of exception, \$27 million in "humanitarian aid" was enacted in August, 1985. See *supra* notes 125-27 and accompanying text.

261. Administration officials have privately acknowledged that U.S. aid to El Salvador and Honduras has been transferred to the *contras*. Israel reportedly has been furnishing weapons to the *contras* since 1983. See, e.g., N.Y. Times, Jan. 13, 1985, at 1, col. 6. (nat'l ed.); N.Y. Times, Mar. 6, 1985, at 1, col. 1 (nat'l ed.); N.Y. Times, Mar. 28, 1985, at 1, col. 5 (nat'l ed.). The Reagan administration has also considered funneling aid to the *contras* through Asian governments. See, e.g., N.Y. Times, Mar. 6, 1985, at 1, col. 1 (nat'l ed.). In January, 1985, Senator Richard G. Lugar, Republican Chairman of the Senate Foreign Relations Committee, said if the \$14 million could not be obtained from Congress, "then you find a different route." One possibility mentioned was having other countries provide funds. N.Y. Times, Jan. 25, 1985, at 1, col. 6 (nat'l ed.).

Another option, which officials admit has been pursued, is for the administration to encourage "private" contributions to the *contras*. See, e.g., N.Y. Times, June 27, 1984, at 1, col. 2 (nat'l ed.). At least one official of the White House National Security Council, Marine Lt. Col. Oliver L. North, has actively facilitated fund-raising activities by the *contras*. See, e.g., Washington Post, Aug. 11, 1985, at A1, col. 4.

262. See *supra* note 261.

least five million dollars in funds and supplies may have been furnished to the *contras* as a result of these efforts.²⁶³

Such "private" support of insurgents using armed force against and within Nicaragua raises the questions of whether the encouragement or toleration of such private action constitutes a violation of international law by the United States, and whether such "private" actions are imputable to the United States and therefore legally constitute actions of the United States. The answer to the second question depends on the degree of actual involvement by officials in organizing and assisting such "private" efforts to aid the *contras*. Based on the evidence currently available, there is a substantial likelihood of such involvement, particularly in view of the fact that such "private" aid expanded rapidly once government funds for support of the *contras* began to run out.²⁶⁴ In short, the answer depends on the facts, and the facts are not fully known. If substantial government involvement has occurred, however, it seems clear that such private efforts and United States participation in them violates the rules of international law discussed in the second subcategory, above.

Assuming, *arguendo*, that the United States has not instigated and supported such "private" aid to the *contras*, the question as to whether the United States has violated international law by tolerating these private activities within its territory still remains. It should be noted that any such violation would result from the failure to prevent such activities from taking place within its territory, and not directly from the activities themselves.²⁶⁵ To answer the foregoing questions, legal analysis must begin with the general principle of international law as set forth in the *Corfu Channel Case*, in which the ICJ referred unequivocally to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"²⁶⁶ This principle would appear to clearly prohibit the U.S. tolerance of organized private activities aimed at aiding insurgents in Nicaragua from within the United States.²⁶⁷

263. By May, 1985, between \$5 and \$10 million had reportedly been raised from private sources and from non-U.S. "governmental sources." See, e.g., Washington Post, May 2, 1985, at A35, col. 1.

264. See, e.g., N.Y. Times, Jan. 13, 1985, at 1, col. 6 (nat'l ed.); Washington Post, Oct. 21, 1984, at A1, col. 1.

265. See, e.g., NGUYEN QUOC DIHN, P. DALLIER, & A. PELLET, *supra* note 200, at 696.

266. See *supra* note 203 and accompanying text.

267. See, e.g., A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT* 233 (1976).

The duty not to encourage and indeed to prevent activities aimed at providing assistance to insurgents is also expressly endorsed in the Declaration on Friendly Relations. The Declaration provides:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing in organized activities within its territory directed towards the commission of such acts*, when the acts referred to in the present paragraph represent a threat or use of force (emphasis added).²⁶⁸

This general principle of international law imposes a clear duty on the United States to prevent and bring a halt to private efforts within its territory designed to provide money, arms, and materiel to the *contras*. The stringent requirements of the 1928 Convention on the Duties and Rights of States in the Event of Civil Strife make this duty particularly clear, and even stronger in the present case. As parties to the convention, both the United States and Nicaragua have bound themselves to observe the following norm: "*To use all means at their disposal to prevent the inhabitants of their territory, nationals, or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.*" (emphasis added).²⁶⁹ The collection of money and arms and their transfer to the *contras* attacking Nicaragua would appear to fall within the language of "participating in" or "gathering elements . . . for the purpose of starting or promoting civil strife" in Nicaragua.²⁷⁰ Certainly, the quoted language would seem to impose a

268. Declaration on Friendly Relations, *supra* note 189, Principle 1 (Prohibition of Threat or Use of Force), para. 9. See also *supra* notes 223-25, 231 and accompanying text. The Declaration further provides:

No state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another state, or interfere in civil strife in another state (emphasis added).

Declaration on Friendly Relations, *supra* note 189, Principle 3 (Duty of Non-Intervention), para. 2. See also *supra* notes 223-25, 232 and accompanying text.

269. Convention on the Duties and Rights of States in the Event of Civil Strife, *supra* note 243, art. 1(1).

270. This interpretation, it is submitted, is supported by the rules of interpretation set forth in articles 31-32 of the Vienna Convention on the Law of Treaties, which now re-

duty on the United States to prevent its inhabitants from leaving the United States in order to assist the *contras*.²⁷¹

Article 1(3) of the convention also imposes a duty on the United States "To forbid the traffic in arms and war materiel, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which case the rules of neutrality shall be applied."²⁷² The reference to "the traffic in arms and war materiel" would seem to include not only the direct provision of such items, but also the supplying of funds to acquire such items. In any event, the United States is under a duty to prevent its inhabitants from supplying arms and materiel to the *contras*.

By endorsing private organizational efforts to supply the *contras* with funds, arms and materiel,²⁷³ and in particular by failing to prosecute individuals for such actions under domestic legislation known as the Neutrality Act,²⁷⁴ the United States would seem to be clearly violating the terms of article 1 of the convention, as well as the general principle of international law enunciated by the ICJ and given authoritative expression in the 1970 Declaration on Friendly Relations. This conclusion is certainly proper given the difficulties of proving government complicity in "private" efforts to fund and supply insurgents in another state. A contrary rule would make it very easy for a government to secretly encourage large-

present customary international law. See Vienna Convention, *supra* note 198, arts. 31-32. While the interpretation in the text is not free from doubt, it is submitted that in the context of the treaty as a whole [including article 1(3)] and in view of its object and purpose, Article 1(1) should be interpreted as prohibiting the collection and transfer of money and supplies for use by the *contras*.

271. Two Americans aiding the *contras* were killed when their helicopter was shot down in Nicaragua on September 1, 1984. The two belonged to an Alabama-based group known as Civilian Military Assistance. See, e.g., Washington Post, Sept. 5, 1985, at A1, col. 2. CIA officials had been aware that the private U.S. citizens were training rebel pilots. N.Y. Times, Sept. 8, 1984, at 1, col. 2 (nat'l ed.).

272. Convention on the Duties and Rights of States in the Event of Civil Strife, *supra* note 243, art. 1(1).

273. See *supra* note 261. See N.Y. Times, Sept. 11, 1984, at 1, col. 5 (nat'l ed.) (U.S. decision not to discourage private citizens and foreign governments from providing assistance to *contras*); Washington Post, Aug. 11, 1985, at A1, col. 4 (National Security Council official assists *contras* in contacting potential "private" donors). Particularly noteworthy in this regard is the fact that the stringent economic sanctions imposed on Nicaragua specifically exempt "goods . . . exported from the United States, either to or destined for Nicaragua . . . for the organized democratic resistance. . ." Nicaraguan Trade Control Regulations, 50 Fed. Reg. 19890, 19891 (May 8, 1985) (to be codified at 31 C.F.R. § 540.205).

274. See Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955 (1982); Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1 (1983).

scale private actions by its citizens which it itself is prohibited from undertaking by international law.

e. Nicaraguan Violations of International Law: Legal Significance and Appropriate Remedies

Had the United States proceeded to the merits stage before the ICJ, it might have made two counter-arguments in defense of its actions. The first is that even if its support of *contra* activities amounted to supervision and control making it legally responsible for the actions of the latter (that is, if its actions fell within the first subcategory above) those actions were lawfully taken as an exercise of the right of collective self-defense. The United States might also have used this argument in defense of the direct military actions it has undertaken against Nicaragua.

The second argument that it might have made is that U.S. actions in apparent violation of the international legal norms set forth in the second and third subcategories above were legally justified as "non-forcible reprisals" or "counter-measures" in response to prior violations of international law by Nicaragua. In essence, the argument is that these legal prohibitions were temporarily suspended due to Nicaragua's prior violations of relevant legal norms, and that the actions taken by the United States were lawful under the international legal principles permitting "non-forcible reprisals" or "counter-measures."

The distinctions drawn in the four sub-categories are of obvious importance in analyzing not only the actions of the United States, but also in assessing the legality of any Nicaraguan support of guerrilla activities in El Salvador—or in other neighboring countries. These distinctions are equally relevant in determining the legally-permissible actions the United States or other countries might take in response to any such support.

Nicaragua's support of the Salvadoran guerrillas through the shipment of arms and supplies during 1980-81²⁷⁵ appears to constitute a violation of the international legal norms set forth in the second and fourth subcategories above. To the extent it continues to supply arms, ammunition, or other assistance to revolutionaries in El Salvador,²⁷⁶ or fails at present to exercise due diligence in

275. See *supra* notes 51-52 and accompanying text.

276. See *supra* note 53 and accompanying text.

attempting to prevent non-governmental or "private" assistance to Salvadoran guerrillas, such action or inaction violates these international legal provisions, as discussed above.

Only if Nicaragua exercises such direction and control over the Salvadoran guerrillas as to make their actions legally imputable to itself, could such actions justify the use of force against Nicaragua in exercise of the right of individual or collective self-defense. Even in this case, however, the use of force would have to be strictly limited by the principles of necessity and proportionality in order to be lawful.

In short, the legal norms examined above apply not only to the United States, but also to Nicaragua—and to other countries in the region. The fact that Nicaragua may have violated these legal provisions, however, does not justify the use of force by the United States against that country or its support of *contras* carrying out armed attacks in and against Nicaragua, unless Nicaragua's actions fall within the first subcategory and constitute an armed attack, and then only within the inherent limits of the right of self-defense.

Remedies are available for actions by Nicaragua against other nations. El Salvador could modify its terms of acceptance of the compulsory jurisdiction of the ICJ,²⁷⁷ and then immediately bring a claim against Nicaragua,²⁷⁸ or ratify and initiate proceedings under the American Convention on Pacific Settlement,²⁷⁹ which contains a compromissory clause referring disputes not settled by mediation to the ICJ for a mandatory decision.²⁸⁰ Nicaragua is a party to the treaty, as are Honduras and Costa Rica.²⁸¹ The latter,

277. Following its 1969 invasion of and war with Honduras, El Salvador modified the terms of its acceptance of the compulsory jurisdiction of the ICJ, in 1973. Its 1973 Declaration appears to clearly exclude matters involving the use of force or the supply of arms or other assistance to rebels in another country. Consequently, Nicaragua would not be subject to the compulsory jurisdiction of the Court in a case relating to these matters. See *supra* note 172 and accompanying text. The text of the 1973 Salvadoran declaration is reproduced in 1983-84 Y.B.I.C.J. 64-66. On the 1969 war, see J. ROWLES, *EL CONFLICTO HONDURAS-EL SALVADOR* (1969) Y *EL ORDEN JURÍDICO INTERNACIONAL* (1980).

278. This stratagem was successfully followed by Portugal in the case it brought against India. See *Right of Passage Over Indian Territory* (Portugal v. India), 1957 I.C.J. 125 (Preliminary Objections Judgment of Nov. 26).

279. See American Treaty on Pacific Settlement, OAS Doc. OEA/Series A/3 (SEPF), Treaty Series, No. 17 (1961), reproduced in 1 F. GARCIA-AMADOR, *supra* note 226, pt. 2 at 212.

280. American Treaty on Pacific Settlement, *supra* note 279, art. 32.

281. See 1 F. GARCIA-AMADOR, *supra* note 226, pt. 2, at 236.

therefore, may obtain a legal settlement of any claims against Nicaragua at any time, as could El Salvador if it rejoined the treaty regime from which it withdrew in 1973 following its 1969 war with Honduras.²⁸² El Salvador could also invoke the Rio Treaty to halt any ongoing violations by Nicaragua of the principles referred to above,²⁸³ or call upon the OAS to employ the procedures for pacific settlement contained in the OAS Charter.²⁸⁴ El Salvador could also resort to the United Nations Security Council, as Nicaragua has done on several occasions.²⁸⁵ The United States could have brought a claim or counter-claim against Nicaragua in the ICJ, invoked the Rio Treaty, initiated pacific settlement procedures under the OAS Charter, or actively sought resolution through the United Nations Security Council.

Thus, both the United States and Nicaragua are prohibited by international law from organizing and supporting guerrillas or revolutionaries in another country, whether that be Nicaragua or El Salvador. Violation of the norms set forth above permits the use of force in response, however, only in exercise of the right of individual or collective self-defense. Such a right exists only when both (1) the degree of support to guerrilla groups amounts to supervision and control (as in subcategory [a]), and (2) the actions of the guerrillas are on such a scale as to amount to an "armed attack" within the meaning of article 51 of the United Nations Charter.

3. The Asserted Justification of Collective Self-Defense

After failing for almost three years to offer any public legal justification for its covert operations against Nicaragua,²⁸⁶ since April, 1984 the United States has argued that its actions are justified as lawful self-defense under article 51 of the United Nations Charter.²⁸⁷ Article 51 provides:

Nothing in the present Charter shall impair the inherent right of self-defense *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken

282. *Id.*

283. See *supra* note 194 and accompanying text.

284. See, e.g., *infra* note 311 and accompanying text.

285. See *supra* note 2 and accompanying text; *infra* notes 313-15 and accompanying text.

286. See *supra* notes 1, 138, 199 and accompanying text.

287. See *supra* notes 1, 138 and accompanying text.

measures necessary to maintain international peace and security. *Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council* and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).²⁸⁸

There are three essential prerequisites for the lawful exercise of the right of self-defense. First, the state exercising the right must either be the victim of "an armed attack" by the state against whom measures of self-defense are taken, or be responding to a request for assistance by a state which is a victim of an armed attack.²⁸⁹ Second, the exercise must be both necessary to halt the attack in question and proportionate to the threat such an attack represents.²⁹⁰ These limitations are inherent in the very concept of self-defense,²⁹¹ and correspond to similar requirements found in domestic law.²⁹² The requirements of necessity and proportionality were fully developed in customary international law prior to the advent of the United Nations Charter.²⁹³ An authoritative statement of these principles was made, for example, in diplomatic correspondence in the *Caroline Case*²⁹⁴ in 1841 and 1842. U.S. Secretary of State Daniel Webster stated that Great Britain could justify its actions in U.S. territory only if it could show

[the] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even *supposing the necessity of the moment* authorized them to enter the territories of the United States at all, did *nothing unreasonable or excessive; since the act justified by the necessity of self-defense must be limited by that necessity, and kept clearly within*

288. U.N. CHARTER art. 51.

289. The argument that collective self-defense is permissible only pursuant to a pre-existing collective security agreement is rejected by most writers. See, e.g., Malanczuk, *supra* note 224, at 769-70, 794-95.

290. See, e.g., I. BROWNIE, *supra* note 190, at 261-64; Malanczuk, *supra* note 224, at 767-69.

291. Cf. note 294 and accompanying text.

292. Cf. NGUYEN QUOC DINH, P. DALLIER & A. PELLET, *supra* note 200, at 882-84.

293. See, e.g., I. BROWNIE, *supra* note 198, at 262-63, 274-75; Malanczuk, *supra* note 224, at 768-69.

294. 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906).

it (emphasis added).²⁹⁵

The final requirement is that any measures or action of self-defense "be immediately reported to the Security Council."²⁹⁶ This requirement is of critical importance: only if it is satisfied can the Security Council identify violations of article 2(4), assess the appropriateness of measures taken in alleged self-defense, and adopt measures necessary to restore international peace and security.²⁹⁷

The first condition is not satisfied because Nicaragua has not launched an "armed attack" against El Salvador or Honduras, within the meaning of that term as used in article 51 of the United Nations Charter.²⁹⁸ While the U.S. claims such an armed attack has been launched by Nicaragua,²⁹⁹ the evidence in the public record does not substantiate such a claim.³⁰⁰ There are no Nicaraguan

295. Quoted in I. BROWNLIE, *supra* note 198, at 42-43.

296. U.N. CHARTER art. 51. See *supra* note 228 and accompanying text.

297. See *infra* note 313 and accompanying text. Cf. Rio Treaty, *supra* note 198, art. 5. Article 5 establishes an even more stringent requirement for reporting to the Security Council of "complete information concerning the activities undertaken or in contemplation in the exercise of the right of self-defense or for the purpose of maintaining Inter-American peace and security." Measures of self-defense taken by a state party to the Rio Treaty are to be considered by the Organ of Consultation (i.e., the parties to the treaty), which "shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken." *Id.* art. 3(2). Both this provision and articles 51 and 54 of the U.N. Charter serve the essential function of bringing cases involving the use of force to the attention of international institutions so that they may make collective judgments regarding the lawfulness of actions taken and then take whatever collective action may be necessary to bring the illegal use of force to a halt.

298. See, e.g., I. BROWNLIE, *supra* note 198, at 373; Malanczuk, *supra* note 224, at 765-66. The shipment of arms does not constitute an armed attack, at least when the state shipping arms does not exercise such control over the activities of the recipients as to make them, in effect, its agents.

299. See N.Y. Times, Sept. 14, 1985, at 3, col. 1. Public statements by U.S. officials seem to have been limited to the argument that Nicaragua has committed an armed attack against El Salvador. In a statement issued upon its withdrawal from further proceedings before the ICJ, the United States noted that El Salvador had stated it was under armed attack and had requested assistance from the U.S. The statement did not address the issue of the proportionality of its actions to the purported "attack," nor did it address the failure of the U.S. to report its actions to the Security Council as required by article 51 of the U.N. Charter. See Statement of the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reproduced in 24 I.L.M. 246 (1985) (hereinafter cited as U.S. Statement of Jan. 18, 1985).

300. See *supra* notes 51-54 and accompanying text. The statements of David C. MacMichael, a CIA contract employee from 1981 to 1983, are particularly significant. Affirming that he had had access to the most sensitive intelligence on Nicaragua, including that relating to the flow of arms to El Salvador, MacMichael declared:

The whole picture that the Administration has presented of Salvadoran insurgent operations being planned, directed and supplied from Nicaragua is simply not true. There has not been a successful interdiction, or a verified report, of

troops in El Salvador;³⁰¹ the level of Nicaraguan assistance to the rebels in El Salvador does not at present,³⁰² even according to U.S. claims, extend beyond the furnishing of ammunition and some equipment.³⁰³ Such assistance to rebel groups does not amount to an "armed attack" within the meaning of the term as defined in article 51 of the United Nations Charter.³⁰⁴

The term "armed attack" as used in article 51 has a clear and specific core meaning in international law.³⁰⁵ It is clear, particularly in the light of preparatory work which led to the General Assembly's adoption of the Definition of Aggression resolution,³⁰⁶ that the right of self-defense is a narrowly circumscribed exception to the general prohibition of the threat or use of force contained in article 2(4) of the Charter.³⁰⁷ It is a right which may be exercised only in response to the illegal use of armed force by one state

arms moving from Nicaragua to El Salvador since April, 1981.

N.Y. Times, June 11, 1984, B6, at col. 3; see also Washington Post, June 13, 1984 at A 28, col. 4. The Reagan Administration does not appear to have effectively refuted this statement with persuasive evidence, despite several attempts. A recent position paper, based largely on the accounts of Salvadoran rebels who had been captured or who had defected, said to be corroborated by undisclosed intelligence information, quotes one captured rebel as saying his faction still receives approximately three-fourths of its ammunition and all of its explosives from Managua, which directly controls the distribution of such supplies. N.Y. Times, Sept. 14, 1985, at 3, col. 1.

Significantly, the United States has declined the opportunity to make its case to the ICJ by withdrawing from further participation in the merits phase of the proceedings. One reason given for its non-participation was that proof of its case would require the disclosure of "evidence . . . of a highly sensitive intelligence character." See Statement of Jan. 18, 1985, *supra* note 299, at 24 I.L.M. 248.

301. While Nicaraguan forces may have entered Honduran territory on various occasions, in each case they appear to have been pursuing *contras* to their home base camps or attempting to destroy the bases from which *contras* were conducting ongoing attacks against the territory of Nicaragua. Such Nicaraguan actions would appear to be fully justified as undertaken in lawful exercise of the right of self-defense guaranteed by article 51 of the U.N. Charter. See, e.g., Malanczuk, *supra* note 224, at 769. For a recent example of such an incident, see N.Y. Times, Sept. 15, 1985, at 3, col. 4.

302. See *supra* notes 52-53, 300 and accompanying text. Force may be used in exercise of the right of self-defense only in response to an ongoing armed attack. This results from the requirements of necessity and proportionality. The use of force against a state which has committed an armed attack and thereafter brought it to a halt (withdrawing to its own territory) constitutes a forcible reprisal. Such actions are illegal. See, e.g., Malanczuk, *supra* note 224, at 741, 773-74, 798.

303. See, e.g., *supra* note 300.

304. See, e.g., I. BROWNLIE, *supra* note 198, at 278-79, 365-68; Malanczuk, *supra* note 224, at 765-66.

305. See, e.g., I. BROWNLIE, *supra* note 198, at 278-79; Malanczuk, *supra* note 224, at 757, 785-92.

306. See *supra* note 225.

307. See, e.g., Malanczuk, *supra* note 224, at 757-59, 773-74, 785-86, 792.

against another.³⁰⁸ It is important to understand, moreover, that any interpretation that equated "armed attack" as used in article 51 with the furnishing of arms would have the effect of greatly relaxing the prohibition of force contained in article 2(4).³⁰⁹ The drafters of the Definition of Aggression resolution were fully aware of this fact, which accounts for the careful wording of article 3(g) of the Definition that was finally adopted.³¹⁰

The second condition has not been satisfied by U.S. military and other covert actions against Nicaragua. The United States has had available the procedures for peaceful settlement available under both the OAS Charter and the Rio Treaty,³¹¹ yet has resorted to neither to halt any arms shipments from Nicaragua to the rebels in El Salvador.³¹² In the April, 1982 debates on a draft Security Council resolution calling on members to observe the principles of the United Nations Charter, the United States vetoed the corresponding resolution.³¹³ Similarly, on April 4, 1984, the U.S. vetoed a draft resolution condemning the mining of Nicaraguan harbors and calling on all States "to refrain from carrying out, supporting or promoting any type of military action against any State of the region."³¹⁴ It is therefore questionable whether any necessity for the use of force in collective self-defense exists given that neither El Salvador nor the United States has sought

308. See *id.* at 779, 782, 785-86.

309. See *id.* at 757-59. Any relaxation of the "armed attack" requirement in article 51 would have the necessary consequence of reducing the range of activities that are prohibited by article 2(4), as actions permitted by the former are excluded by way of exception from the prohibition of the latter. The "armed attack" requirement represents a "bright line" which in most cases allows disinterested states to readily identify illegal uses of force giving rise to the right to use force in lawful self-defense. To relax the "armed attack" requirement in order to include the provision of money and arms to rebels where control is not exercised by the providing state, for example, would both eliminate the "bright line" and greatly expand the number of situations in which the use of force is deemed lawful.

310. See A. RIFAAT, *supra* note 198, at 273-74 (1979); 2 B. FERENCZ, *supra* note 198, at 39-40.

311. See Rio Treaty, *supra* note 194, arts. 2, 3(2), 6, 7, 8, 10-21; OAS Charter, *supra* note 12, arts. 23-28, 59-67, 60-90.

312. While recourse to these formal OAS procedures for pacific settlement has occasionally been considered by the United States, it has not been undertaken. The principal reason appears to be that the United States would probably not be able to muster the necessary votes to take any action, while the legality and wisdom of its current policies would very likely be subjected to intense criticism. On the reactions of Latin American states to U.S. policies toward Nicaragua, see, e.g., N.Y. Times, Apr. 17, 1985, at 6, col. 5 (nat'l ed.).

313. *Supra* note 2. The vote was twelve in favor, one against (U.S.), and two abstentions (U.K. and Zaire). *Id.*

314. *Supra* note 2. The vote was thirteen in favor, one against (U.S.), and one abstention (U.K.). *Id.*

appropriate action by the OAS,³¹⁵ while the United States blocked through its veto the Security Council's efforts to deal with the situation.³¹⁶

Even if we were to assume, *arguendo*, that Nicaraguan arms shipments constituted an "armed attack," and that the requisite necessity for measures of self-defense existed, it is clear that U.S. actions against Nicaragua have violated the principle of proportionality which is an inherent limitation on the right of self-defense.³¹⁷ The mining of Nicaraguan harbors,³¹⁸ the massive destruction of oil storage facilities,³¹⁹ and the organization, financing, support and direction of ten to fifteen thousand *contras* operating against and within Nicaragua with the avowed purpose of overthrowing the government,³²⁰ or of forcing it to change its internal policies,³²¹ is in no sense proportional to any "attack" which might be represented by the shipment of arms by Nicaragua.³²² Moreover, the use of armed force by the *contras* operating in Nicaragua has not been related to the objective of halting arms shipments.³²³ That is, the actions of the *contras* bear no rational or proportionate relation to the objective of halting arms shipments to El Salvador, and hence cannot be justified as actions taken in self-defense.

Here, facts, and not Presidential or other administration declarations,³²⁴ are determinative of U.S. legal responsibility under international law. The facts, as amply reported in the American and international press,³²⁵ show that the necessity for the use of force by the United States against Nicaragua is doubtful,³²⁶ while the disproportionate nature of the actions taken is clear.³²⁷

The third condition for exercise of the right of self-defense, immediate notification to the security counsel, has not been satis-

315. See *supra* notes 277-85, 312 and accompanying text.

316. See, e.g., *supra* notes 2, 313-14 and accompanying text.

317. See *supra* notes 290-95 and accompanying text.

318. See *supra* notes 135-38 and accompanying text.

319. See *supra* notes 130-34 and accompanying text.

320. See *supra* notes 45-50, 62, 88-94, 97-103, 153-59 and accompanying text.

321. The United States has unequivocally stated that a primary objective of its policy toward Nicaragua is to "pressure" that country's government into making changes in its internal policies. See, e.g., *supra* note 62 and accompanying text.

322. See *supra* notes 51-54, 300 and accompanying text.

323. See generally Part I(B), *supra*.

324. See, e.g., *supra* notes 1, 62, 86 and accompanying text.

325. See generally Part I(B), *supra*.

326. See *supra* notes 51-54, 300, 311-16 and accompanying text.

327. See *supra* notes 317-23 and accompanying text.

fied by the United States.³²⁸ The United States carefully refused to comment on its military actions against Nicaragua for over two and a half years. To this date, it has not provided the Security Council with specific information regarding the measures which it has taken in alleged exercise of the right of collective self-defense.³²⁹ Failure to satisfy this requirement is of fundamental importance because it is only through notification of self-defense measures that the Security Council is able to consider a dispute in a timely manner and discharge its "primary responsibility" for the maintenance of international peace and security.³³⁰

In short, the United States has failed to satisfy any of the three conditions necessary for lawful exercise of the right of self-defense under article 51 of the U.N. Charter. Its actions, therefore,

328. This policy became untenable after clear evidence of U.S. responsibility for the mining of Nicaraguan ports and harbors became public in April, 1984. See *supra* notes 112, 134-38 and accompanying text.

329. See Washington Post, Feb. 23, 1985, at A13, col. 4. In February, 1985, the State Department stated, "[T]he situation in Nicaragua has been brought to the attention of the Security Council on numerous occasions and the United States has clearly informed the Council of our view that Nicaragua has committed an armed attack against its neighbors and that we have been acting in self-defense with them." (emphasis added). Washington Post, Feb. 23, 1985, at A13, col. 4.

However, simply stating to the Security Council that one's government is acting in self-defense does not satisfy the reporting requirement of article 51. That article specifically provides,

... Measures taken by Members in exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).

U.N. CHARTER art. 51. Nor is the difference merely one of form. The *purpose* of the reporting requirement is to bring to the attention of the Security Council the details of all actions undertaken in alleged exercise of the right of self-defense, so that it may make a collective judgment as to the legality of such actions and take collective measures to bring to a halt the illegal use of force by *any party* to a dispute. The reporting requirement is therefore an essential component of the United Nations system which has as its principal aim the maintenance of international peace and security through the exercise of *collective* judgments and the taking of *collective* action where appropriate.

The importance of the reporting requirement is suggested by the fact that one or more governments might have voted differently on the Security Council resolutions vetoed by the United States in 1982 and 1984, had the United States furnished the council with details regarding all of the actions it was taking against Nicaragua at that time. It is even conceivable that the U.S. might have abstained from casting its veto in one or both instances had the debates in the council been informed by knowledge of the relevant facts, as mandated by article 51. It should be noted, moreover, that in cases not involving action by a permanent member possessing the power of veto, compliance with the reporting requirement of article 51 is likely to have an even more decisive impact on the council's deliberations.

330. See *supra* notes 299, 329 and accompanying text.

cannot be justified under the rubric of self-defense. Of particular importance in assessing the validity of the U.S. claim of self-defense, is the fact that on April 4, 1984, the Security Council rejected this claim, as shown by its vote on a resolution condemning the United States' actions.³³¹ As the Security Council has primary (though not exclusive) authority to determine the validity of unilateral claims of self-defense, its vote on the above resolution has great significance in assessing the U.S. claim, despite the fact that the resolution was not adopted due to a U.S. veto.³³² Also important is the fact that the United States has attempted to evade the compulsory jurisdiction of the ICJ in order to avoid an impartial judicial determination of the validity of its self-defense justification.³³³

4. The Possible Justification of Non-Forcible Reprisals or Counter-Measures

As the preceding section makes clear, the United States cannot justify its actions involving the use of force against Nicaragua as taken in lawful exercise of the right of individual or collective self-defense. This statement applies both to direct United States military action against Nicaragua, and to United States actions in organizing and supporting *contra* activities against Nicaragua where the degree of its supervision and control makes it legally responsible for both its own actions and those of the *contras* acting as its agents.

Nonetheless, had it proceeded to the merits phase of the proceedings before the International Court of Justice, the United States might have argued that it did not exercise such supervision and control over the *contras* as to make it responsible for their actions. This is essentially a factual issue. Even if it were able to sustain such an argument, however, United States actions from 1981 to mid-1984, unless otherwise justified, would violate the prohibitions against supporting revolutionary groups operating against and within Nicaragua. Any resumption of such assistance to the *contras* after mid-1985 would similarly violate those legal norms. Moreover, whether before or after mid-1984, the supply of economic and other assistance to the *contras* through third coun-

331. See *supra* notes 2, 314 and accompanying text.

332. See *supra* note 2 and accompanying text.

333. See *supra* notes 7, 121, 299-300 and accompanying text.

tries, or the encouragement or tolerance of private efforts in the United States to supply financial and other assistance to the *contras*, would also violate international law.

There is, however, one argument the United States might have made before the ICJ in order to justify the taking of such apparently unlawful actions. That argument would be based on the principle permitting the taking of non-forcible reprisals under certain conditions. Within the last ten years the principle has been increasingly referred to as one permitting the taking of "counter-measures" precluding the wrongfulness of otherwise illegal actions under certain conditions, reflecting the adoption of this terminology by the International Law Commission (ILC) in its ongoing work on the preparation of Draft Articles on State Responsibility.

It is now generally agreed that reprisals involving the use of force are prohibited by article 2(4) of the United Nations Charter.³³⁴ Non-forcible reprisals are still permissible, however, provided they satisfy certain stringent conditions. The classic formulation of these principles was set forth in the 1928 *Naulilaa* arbitration between Germany and Portugal. In that case, the arbitrators set forth the following rules:

Reprisals are acts of self-help by the injured State, acts in *retaliation for acts contrary to international law* on the part of the offending State, which have remained *unredressed after a demand for amends*. In consequence of such measures, the observance of this or that rule of international law is temporarily suspended, in the relations between the two States. They are limited by considerations of humanity and the rules of good faith, applicable in the relations between States. They are illegal unless they are based on a previous act contrary to international law. *They seek to impose on the offending state, reparation for the offense, the return to legality, and the avoidance of new offenses* (emphasis added).³³⁵

The opinion also made clear that, in the words of Brierly, "the measures adopted must not be excessive, in the sense of being out of all proportion to the offense received."³³⁶

A contemporary restatement of these rules is found in the

334. See, e.g., Malanczuk, *supra* note 224, at 727.

335. Quoted in J. BRIERLY, *supra* note 208, at 401. See *supra* note 208 and accompanying text.

336. J. BRIERLY, *supra* note 208, at 401.

Commentary of the International Law Commission on article 30 of its Draft Articles on State Responsibility. Article 30 provides that,

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of the other State.³³⁷

In its commentary on article 30, the ILC, after stressing the proportionality requirement set forth in the *Naulilaa* arbitration, states that reprisals involving the use of force are now illegal.³³⁸ It then explicitly recognizes that reprisals not involving the use of force are legal "*if the necessary conditions are fulfilled*" (emphasis added). Those conditions are spelled out in a footnote as follows:

[T]hat the offence to which the reprisals are intended to be a response must not be such as to entail any consequence other than to give rise to the right of the injured party to obtain reparation; that if such is the case, the injured party must have made a prior attempt to obtain reparation; and that in any event, the reaction must not have been disproportionate to the offense. An additional condition is that there must not be any procedures for peaceful settlement previously agreed upon by the parties.³³⁹

The essential requirement for the taking of a non-forcible reprisal by one state against another is that the latter has committed an internationally wrongful act violating the legal rights of and thus causing injury to the former. This bilateral relationship was the *sine qua non* for the taking of any reprisal under traditional law. It remains so today, despite the fact that certain fundamental legal obligations, considered to be binding with respect to all states (*erga omnes*), has resulted in a certain amount of confusion among some writers and others. If these legal obligations are owed to all states, it might be argued, does not the violation of such a fundamental norm give *any* state the right to take non-forcible reprisals against the state violating the norm?

The ILC, as well as certain leading writers, have provided a

337. Draft Articles on State Responsibility, *supra* note 189, art. 30.

338. International Law Commission, Commentary on Draft Articles on State Responsibility, Art. 30, [1979] Y.B. Int'l L. Comm'n, Vol. II, pt. 2, at 118 [hereinafter cited as ILC Commentary].

339. *Id.* at 116, 118 & n.595.

clear response to this question. The Commission in its commentary to article 30 stresses that, with respect to legal obligations binding *erga omnes*, the international community has turned

towards a system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented.³⁴⁰

The necessary conditions for the lawful taking of non-forcible reprisals or "counter-measures" may be summarized as follows:

1) There must exist a prior violation of an international legal obligation owed by the violating state to the state taking non-forcible reprisals or counter-measures;³⁴¹

2) An attempt to obtain reparation must be made by the injured state, without success, before non-forcible reprisals may be taken;³⁴²

3) The purpose of the non-forcible reprisals must be limited to restoration of compliance with the international obligation which has been violated, reparation, and ensuring that the violation will not recur;³⁴³

4) The non-forcible reprisal or counter-measure must not be disproportionate to the offense, i.e., the original violation of international law causing injury to the responding state;³⁴⁴

5) There must not exist any means, agreed upon by the two states concerned, for peaceful settlement of the claims resulting from the original violation of international law;³⁴⁵ and

6) The non-forcible reprisals or counter-measures may be taken only by: a) the state which has been directly injured, in its bilateral relations, by the original act in violation of international law; or b) in the case of fundamental legal obligations binding *erga*

340. *Id.* at 19. See Malanczuk, *supra* note 224, at 742-47.

341. See *supra* notes 335, 337 and accompanying text.

342. See *supra* note 339 and accompanying text. This requirement may be interpreted as not requiring such an attempt when it is wholly inappropriate or impossible in the circumstances. See Malanczuk, *supra* note 224, at 725-56. Cf. *id.* at 737.

343. See *supra* note 335 and accompanying text; Malanczuk, *supra* note 224, at 726.

344. See *supra* notes 335-39 and accompanying text; Malanczuk, *supra* note 224, at 726.

345. See *supra* note 339 and accompanying text.

omnes, pursuant to the corresponding decision of a competent international institution.³⁴⁶

These requirements have not been met by the United States in the present case. Even if Nicaragua has violated the legal rights of El Salvador by furnishing arms to guerrillas within the latter's borders, only El Salvador would be legally entitled to take non-forcible reprisals, by suspending compliance with treaty obligations regarding trade, for example, or arguably even observance of international legal prohibitions against furnishing financial and other support to revolutionaries in Nicaragua. In any event, such measures would have to be proportionate in nature. Absent an appropriate decision by a competent international institution, no third state may undertake non-forcible reprisals or counter-measures against Nicaragua due to the latter's violation of legal obligations causing direct injury to El Salvador.

Even assuming, *arguendo*, the obligation not to support guerrillas is owed not only to El Salvador but also to the international community as a whole, no competent international institution has either determined that Nicaragua violated its legal obligations by its actions with respect to El Salvador, or authorized the taking of counter-measures against Nicaragua by third states. Neither the Security Council nor the OAS acting under the Rio Treaty has authorized any such action by the United States or any other state. On the contrary, on several occasions when the question of United States military and paramilitary actions against Nicaragua has come before the Security Council, an overwhelming majority of its members have voted in favor of resolutions wholly inconsistent with any such authorization.³⁴⁷

Whether third states may take non-forcible reprisals or counter-measures against a state which has violated a fundamental legal norm binding *erga omnes*, absent authorization by a competent international institution, is a question which is central to the very existence and functioning of the international legal system. On the one hand, there is appeal in the notion that all states should be free to take counter-measures against any state violating a fundamental norm with *erga omnes* effect—as in the case of humanitarian norms protecting the right to life, freedom from torture, and freedom from arbitrary detention, or in the case of ag-

346. See *supra* notes 335, 337, 339-40 and accompanying text.

347. See *supra* notes 2, 313-14 and accompanying text.

gression, piracy, or the slave trade. Theoretically, such action would help deter violations of norms of fundamental importance for all states, thereby strengthening the international community and the governing influence of international law in its affairs.

Against this consideration, however, must be weighed the stark reality of the decentralized nature of the existing international legal system, and the probable consequences of permitting third states—and blocks of states—to decide unilaterally both that a fundamental norm has been violated and what counter-measures may be taken in response. Since the effect of non-forcible reprisals or counter-measures is to suspend legal obligations between the states involved, the net effect would be to allow third states to avoid their legal obligations toward the state which has allegedly violated international law. Any such determinations made unilaterally are quite likely to be shaped by political and other considerations rather than by an impartial consideration of the facts and relevant law. Other states, more friendly to the alleged violator of international law, may view those counter-measures taken by third states as constituting illegal acts in response to which non-forcible reprisals or counter-measures may be taken. Consequently, to permit third states to take counter-measures on a unilateral basis is likely to lead to an escalating series of actions in derogation of governing principles of international law.³⁴⁸ Such a development would undercut the decision-making authority of existing international institutions, further distracting attention from the urgent necessity of strengthening their capacity to collectively coordinate the direction of international affairs.

Despite the apparent appeal of allowing third states to take counter-measures, this alternative must be rejected because it would undermine the very foundations of international law and institutions. These are based on universal values and collective processes of decision. The adoption of counter-measures by third states on the basis of their own unilateral and subjective determinations of facts and law would introduce centrifugal forces into the international system which are hardly needed, given the current weakness of international authority.³⁴⁹

Fortunately, these policy considerations are fully reflected in

348. See, e.g., Malanczuk, *supra* note 224, at 738.

349. See generally *id.* at 742-47; Dupuy, *Observations sur la pratique récente des "sanctions" de l'illicite*, 87 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 505, 526-48 (1983).

the current law. Under customary international law, only the state directly injured by a violation of international law may take non-forcible reprisals or counter-measures against the offending state, unless a competent international organization has decided otherwise. In its work on the Draft Articles on International Responsibility, the ILC has not deviated from the traditional position with respect to violations of legal obligations valid *erga omnes*. In any event, as evidenced by the ILC commentary on article 30, it is clear that no customary rule of international law has come into existence which authorizes non-forcible reprisals or counter-measures by third states in the absence of authorizations by a competent international institution.³⁵⁰ This is the current law, and, despite ongoing discussions in the ILC regarding the text of other provisions in Part II of its Draft Articles,³⁵¹ there fortunately appears to be little chance that a new customary rule will ever be established that would permit such third-state counter-measures.³⁵² The one possible exception to this conclusion might be the development of a customary norm permitting the taking of such counter-measures against states guilty of a persistent pattern of massive violations of fundamental human rights. Even here, however, the considerations set forth above are directly relevant.

Such a new rule generally permitting the adoption of counter-measures by third states in response to violations of legal norms with *erga omnes* effect, it should be noted, would also tend to undermine the entire body of international law governing the duty to refrain from intervention in the internal affairs of any state. Such a new rule would undermine the law governing non-forcible acts of intervention because a group or block of states would be able to impose economic and other sanctions having an extremely coercive effect on the target state, while justifying their actions as lawful counter-measures permitted as exceptions to the law of non-inter-

350. See, e.g., Malanczuk, *supra* note 224, at 747.

351. See, e.g., Malanczuk, *Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit*, 45 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 293 (1985) [hereinafter cited as Malanczuk, *Zur Repressalie*]; McCaffrey, *The Thirty-sixth Session of the International Law Commission*, 79 AM. J. INT'L L. 755 (1985).

352. The requirements laid down in the *Naulilaa* arbitration are generally accepted as representing customary international law. See *supra* notes 208, 335-36 and accompanying text. The customary rule applies only to bilateral situations. For a new rule of customary law to emerge, it must become "a general practice accepted as law" by an overwhelming majority of states. Cf. I.C.J. Stat., *supra* note 164, art. 38(1)(b). This has not occurred with respect to countermeasures taken by third states. Nor is it likely to.

vention. Given the decentralized nature of the international legal system and the unilateral character of decisions to adopt counter-measures, great latitude for abuse of the new norm would necessarily exist. This is not a result that would be acceptable to the overwhelming majority of developing and other states in the world today.

It is clear that the United States cannot justify its violation of the legal norms prohibiting its financing and supplying of *contras* under the rubric of non-forcible reprisals or counter-measures. This conclusion does not mean that the international community must stand idly by when a state is the victim of an armed attack or invasion by another state and the Security Council is unable to act. In such a case, any state, as an exercise of the right of collective self defense, may come to the aid of the victim if assistance is requested. The measures it may take include, but are not limited to, actions involving the use of force. In other cases in which a fundamental legal obligation has been violated, third states remain free to take a number of economic and other measures against the offending state in accordance with the customary law permitting actions, known as retorsions, which do not involve the violation of existing international legal obligations.³⁵³

Returning to the question of whether United States financing and support of the *contras* can be justified as non-forcible reprisals or counter-measures, it should be noted that even assuming, *arguendo*, that such counter-measures may be taken by third states, the United States has failed to satisfy a number of the remaining requirements for the lawful taking of such actions.

The failure to satisfy three of these requirements is particularly clear. First, the purpose of U.S. actions in support of the *contras* and in imposing economic sanctions on Nicaragua is not lim-

353. See, e.g., NGUYEN QUOC DINH, P. DALLIER & A. PELLET, *supra* note 200, at 853. Although economic and other measures not involving the use of force which constitute *prima facie* violations of existing legal obligations may not be justified as third-state counter-measures, it nonetheless appears that they may be taken in exercise of the right of collective self-defense, when they are directed against a state which has committed an armed attack against a state requesting assistance in exercise of the right of self-defense. See, e.g., Bowett, *International Law and Economic Coercion*, in *INTERNATIONAL COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* 87, 93-95 (1976). If this were not so, a third state would be entitled to use force but prohibited from taking lesser measures, a result which is inconsistent with the objective of limiting the use of force and with the requirements of necessity and proportionality which are inherent limitations on the exercise of the right of self-defense. Economic measures of self-defense are, of course, subject to the same conditions and requirements of self-defense measures involving the use of force.

ited to securing Nicaraguan compliance with its international legal obligations, as revealed by U.S. demands that Nicaragua change the internal structure of its government, secure the withdrawal of foreign military advisers, and reduce the size of its defense forces.³⁵⁴ Second, the non-forcible measures the United States has taken in support of the *contras* are not proportionate to the injury Nicaragua may have inflicted on El Salvador by providing arms to the Salvadoran guerrillas in 1980-81, and perhaps minor levels of arms and supplies since that time.³⁵⁵ Even if these two conclusions might be disputed, it is clear that the United States and Nicaragua have available the means for the peaceful settlement of any claims which may have arisen as a result of Nicaragua's violations of international law. Such means are provided by the compulsory jurisdiction of the ICJ, where the United States has had every opportunity to bring any counterclaim it might have against Nicaragua. Instead, it has withdrawn from the case. Thus, even if we were to assume that the United States could undertake non-forcible reprisals against Nicaragua in response to the latter's violations of its obligations toward El Salvador, it is evident that it has not satisfied the legal requirements for the taking of such measures.

B. United States Intervention in the Internal Affairs of Nicaragua

We now turn to the principle of international law that establishes the duty of all states to refrain from intervening in the internal affairs of any other state. This principle is broader than the prohibition against the threat or use of force and the other legal norms prohibiting the support of rebels or revolutionaries attempting to overthrow or alter the structure of an established government by force. The categories of proscribed activities overlap, with the direct use of force and the support of revolutionary groups merely constituting the most egregious forms of intervention. But there are other forms, particularly the use of economic power to coerce another state to forego the exercise of sovereign rights to which it is entitled under international law.

The principle of non-intervention had its genesis in the Western Hemisphere as a reaction against the military interventions of certain European powers and the United States in the latter half

354. See *supra* notes 58-63 and accompanying text.

355. See *supra* notes 51-53, 300-02 and accompanying text.

of the 19th century and the first third of this century. United States intervention in, and military occupation of, a number of countries in Central America and the Caribbean, including in particular Nicaragua,³⁵⁶ was a frequent occurrence in this century up until 1933. Franklin D. Roosevelt's Good Neighbor Policy and the adoption of the 1933 Montevideo Convention on the Rights and Duties of States brought the practice to a halt.³⁵⁷ Articles 8 and 11 of the Montevideo Convention,³⁵⁸ and a subsequent protocol ratified by the United States,³⁵⁹ ended whatever legal validity the Monroe Doctrine may have had prior to 1933. In 1948, the new OAS Charter broadened and reaffirmed these prohibitions against intervention, which are now embodied in articles 18-20 of the revised OAS Charter.³⁶⁰

The principle of non-intervention is a basic and necessary corollary to one of the most fundamental principles of international law: the sovereign equality of all states. If the sovereignty of all states is to be maintained, each state must respect the sovereignty of other states, including their personality, territorial integrity, political independence, and the right to freely choose and develop their political, economic, social, and cultural systems.³⁶¹

Outside the hemisphere, the principle of non-intervention has gradually achieved recognition, particularly since the United Nations General Assembly adopted the Declaration on the Inadmissibility of Intervention Into the Domestic Affairs of States in 1965, following the United States military intervention in the Dominican Republic earlier that year.³⁶² The principle has been solemnly reaffirmed in the 1970 Declaration on Friendly Relations and in a number of other General Assembly Declarations.³⁶³ It has acquired

356. See J. BOOTH, *THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION* 27-50 (2d ed. 1985).

357. See *supra* notes 243-45 and accompanying text.

358. See *supra* notes 243-44 and accompanying text.

359. See *supra* note 245 and accompanying text.

360. See OAS Charter, *supra* note 12, arts. 18-20.

361. See, e.g., Declaration on Friendly Relations, *supra* note 189, Principle 6, (Sovereign Equality of States). The free development of their political, economic, social, and cultural systems may, of course, be subject to certain international legal obligations, particularly in the area of human rights.

362. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 33, at 920-22.

363. See Declaration on Friendly Relations, *supra* note 189, Principle 3 (Duty Not to Intervene in Matters Within the Domestic Jurisdiction of Another State). Other resolutions which reaffirm the Declaration on Friendly Relations include the 1974 Definition of Aggression. See Definition of Aggression, *supra* note 189, Preamble.

the status of customary international law.³⁶⁴

The general principle prohibiting intervention frequently has been formulated in broad terms. While there is considerable controversy over the outer limits of the prohibition, its core meaning is clear, encompassing (1) the adoption of measures of a highly coercive nature; and (2) doing so for the purpose of forcing another state to forego the enjoyment or exercise of its sovereign rights under international law.³⁶⁵ Thus, measures which are in and of themselves lawful may lose that character if they are adopted for an illegitimate purpose and are highly coercive in nature. The principle of non-intervention is, in certain respects, analogous to the doctrine prohibiting the abuse of rights (*abus des droits*) found in a number of civil law jurisdictions such as that of France.³⁶⁶

In terms of customary international law, the formulation of the principle in the 1974 Declaration on Friendly Relations is authoritative. It provides that:

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

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State, or interfere in civil strife in another State.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in

364. See, e.g., *supra* note 234 and accompanying text. Cf. B. DOHNE, DIE GRUNDPRINZIPIEN DES VÖLKERRECHTS ÜBER DIE FREUNDSCHAFTLICHEN BEZIEHUNGEN UND DIE ZUSAMMENARBEIT ZWISCHEN DEN STAATEN 134 (1973).

365. See, e.g., A. VERDROSS & B. SIMMA, *supra* note 267, at 248-49. As noted above, coercive measures not involving the use of force may be adopted in response to a prior violation of international law, provided certain conditions are met including the requirement that the state taking such non-forceful reprisals or counter-measures be directly injured by the illegal act of the target state.

366. See, e.g., R. SCHLESINGER, COMPARATIVE LAW 695-701 (4th ed. 1980).

any form by another State.³⁶⁷

These prohibitions reproduce, almost verbatim, the prohibitions contained in the OAS Charter, particularly articles 18, 19, and 20. The latter, of course, represent treaty obligations which are directly binding on the United States, Nicaragua, and other countries in the region. Article 18 provides:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.³⁶⁸

These provisions clearly prohibit the direct use of force by the United States against Nicaragua and its support of the *contras* conducting armed attacks against that country. With respect to United States assistance to the *contras*, it should be noted that even if the activities referred to above are viewed as not representing a use of force in violation of article 2(4) of the United Nations Charter and other prohibitions, they nonetheless constitute violations of the customary law principle of non-intervention and the corresponding prohibition contained in article 18 of the OAS Charter. Of particular significance is the fact that the United States provision of financial and other assistance—even that labeled “humanitarian” aid and that involving the exchange of intelligence information³⁶⁹—is clearly aimed at maintaining the effectiveness of the *contras*’ paramilitary activities in and against Nicaragua in order to coerce Nicaragua to modify its internal policies and the

367. Declaration on Friendly Relations, *supra* note 189, Principle 3 (Duty not to Intervene in Matters within the Domestic Jurisdiction of Another State).

368. OAS Charter, *supra* note 12, art. 18. Article 19 provides:

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Id. art. 19. Article 20, it will be recalled, establishes the following:

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Id. art. 20. See *supra* notes 193, 240 and accompanying text.

369. In July, 1985, Congress approved \$27 million in “humanitarian assistance” to the *contras*, and also authorized the sharing of intelligence information between *contras* and U.S. officials. See *supra* notes 125-27 and accompanying text.

structure of its government.³⁷⁰

Other United States actions, not involving the use of force or the support of anti-Sandinista guerrillas, also appear to violate the principle of non-intervention. First, the imposition of economic sanctions by the United States against Nicaragua in early May, 1985, clearly violates articles 18 and 19 of the OAS Charter as well as the rule of customary international law prohibiting intervention in the internal affairs of another state.³⁷¹

A second possible example is the use of unprecedented economic and political pressure on the Inter-American Development Bank (IADB), a multilateral lending institution, to block a fifty-three million dollar loan to Nicaragua. U.S. opposition has not been limited to the potential use of its vote within the International Development Bank's (IDB) formal decision-making processes. In a January 30, 1985 letter to the president of the IDB, Secretary of State Schultz expressed his strong opposition to the loan and his "hope that the Bank's management will be able to defer the release of the documentation" prepared by the Bank's staff in its support. Among the reasons given for his request was the fact that the loan would "*relieve financial pressures (on Nicaragua) and free up other monies that could be used to help consolidate the Marxist regime and finance Nicaragua's aggression against its neighbors . . .*"³⁷² (emphasis added). Speaking on a background basis, a State Department official later stated with respect to the loan, "Our pressure on Nicaragua, of course, is mul-

370. See, e.g., *supra* notes 58, 61-62, 122 and accompanying text.

371. The economic embargo against Nicaragua was adopted as a part of a strategy to "pressure" the Nicaraguan government into changing its internal policies, modifying its governmental structure, and making concessions in bilateral negotiations with the United States and multilateral negotiations with its Central American neighbors carried out within what has come to be known as the "Contadora process." The coercive intent of the sanctions is apparent not only from the statements of United States officials, but also—and revealingly—from the fact that the trade embargo specifically exempts exports to the *contras* or so-called "democratic resistance in Nicaragua." Given the size and proximity of the United States market, traditional trade relationships between the United States and Nicaragua, and the high degree of dependence of the latter on certain items such as spare parts from the former, the coercive nature of the trade embargo is readily apparent. See *supra* notes 58-62, 122, 153-60, 273 and accompanying text; Washington Post, May 1, 1985, at A1, col. 5; Washington Post, May 2, 1985, at A1, col. 2; Washington Post, May 8, 1985, at A1, col. 6.

372. The letter further stated that approval of the loan would make administration efforts to provide additional financial contributions "even more difficult" and would undercut more general efforts to broaden the Bank's financial base. Washington Post, Mar. 8, 1985, at A1, col. 1. See also Washington Post, Jan. 20, 1985, at A19, col. 4.

tifaceted. It is not devoted to any particular area."³⁷³ This statement would seem to apply equally to the economic embargo imposed on Nicaragua by the United States. In the examples cited it appears that both requirements for an illegal act of intervention have been met: (1) the measure adopted was highly coercive in nature; and (2) it was adopted in order to "pressure" Nicaragua to forego the exercise of its sovereign rights and to achieve advantages which it would not willingly grant in the absence of such coercion.

These actions cannot be legally justified either as lawful measures of collective self-defense, or as non-forcible reprisals or counter-measures. Consequently, they contravene the international legal norms prohibiting intervention in the internal affairs of another state. At the same time they also appear to constitute rather clear violations of several provisions of the 1956 U.S.-Nicaragua Treaty of Friendship, Commerce, and Navigation.³⁷⁴

C. United States Actions and the Principle Requiring the Peaceful Settlement of International Disputes

Since the turn of the century, a fundamental objective of those who have sought to create and strengthen international law and institutions that regulate the use of force has been to establish the

373. *Id.* Washington Post, Mar. 8, 1985, at A1, col. 1.

374. See *supra* notes 206-11 and accompanying text. The imposition of an economic embargo and other sanctions against Nicaragua appears to violate many of the FCN Treaty's provisions. The United States has argued, however, that any actions it may have taken against Nicaragua are exempted from the provisions of the Treaty by virtue of article 21. Article 21 provides:

1. The present Treaty shall not preclude the application of measures:

...
(d) necessary to fulfill the obligations of a party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests;
...

FCN Treaty, *supra* note 64, art. 21. This provision, however, must be interpreted in the context of the treaty as a whole in the light of its object and purpose. So interpreted, it is highly doubtful that the parties intended to create an escape clause that leaves such a determination to the unilateral discretion of one party. Nor does it appear that article 21 can be stretched to encompass an economic embargo. On the applicability of the FCN Treaty and article 21, see U.S. Department of State, Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the case of *Nicaragua v. United States of America*, reproduced in 79 AM. J. INT'L L. 423, 428-29 (1985). See also Washington Post, May 8, 1985, at A1, col. 6 (Justice Department officials "unable" to offer opinion on legality of sanctions, suggesting opinion of illegality).

principle requiring the peaceful settlement of international disputes.³⁷⁵ This goal was achieved in 1928 due to United States and French efforts when the Treaty Providing for the Renunciation of War as an Instrument of National Policy, popularly known as the Kellogg-Briand Pact, was signed. In article I of the Treaty, the contracting parties declared "that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."³⁷⁶ The corollary of article I, the peaceful settlement of disputes, was established as an obligation in article II. Article II provides, "The High Contracting Parties agree that the settlement or solution of all disputes of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by peaceful means."³⁷⁷ Both the United States and Nicaragua are parties to the treaty, which remains in force.³⁷⁸

The principle was subsequently incorporated into the United Nations Charter and represents a fundamental pillar of the international legal system. In a statement to a United Nations committee prior to the adoption of a General Assembly resolution in 1976, the U.S. representative reaffirmed the inherent interrelationship between the prohibition contained in article 2(4) and the principle requiring the peaceful settlement of disputes established in article 2(3) of the United Nations Charter. He stated "[t]he Charter wisely listed the obligation to 'settle international disputes by peaceful means' ahead of the prohibition of the use of force because disputes must be settled if we are to avoid violence. *The two norms are part of an inseparable whole*"(emphasis added).³⁷⁹

Article 2(3) of the Charter itself establishes that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."³⁸⁰

Article 33 of the United Nations Charter also establishes the duty of peaceful settlement in explicit terms. It provides

375. See, e.g., B. DOHNE, *supra* note 364, at 134-35.

376. Treaty Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, art. I, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57 [hereinafter cited as Kellogg-Briand Pact].

377. *Id.* art. II.

378. U.S. DEP'T OF STATE, 1981 TREATIES IN FORCE 335-36.

379. Statement of Representative Albert W. Sherer, Jr., in U.S. DEPARTMENT OF STATE, 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 684, 685.

380. U.N. CHARTER art. 2, para. 3.

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.³⁸¹

The obligations contained in article 2(3) and article 33 must be fulfilled in good faith.³⁸²

The principle requiring peaceful settlement of disputes has been explicitly reaffirmed by the General Assembly in its 1970 Declaration on Friendly Relations. The Declaration reproduces the language of articles 2(3) and 33, adding the following clarifications:

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means (i.e., those enumerated in Article 33), to continue to seek a settlement by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.³⁸³

The foregoing provisions represent not only an authoritative interpretation of the charter, but also a statement of customary international law.³⁸⁴ The Charter of the OAS also contains provisions requiring the peaceful settlement of international disputes. Article 3(g) reaffirms the principle that, "Controversies of an international character arising between two or more American States shall be settled by peaceful procedures."³⁸⁵ Article 25 establishes the duty to seek a peaceful settlement of any dispute, as follows: "In the event that a dispute arises between two or more American States, which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on

381. *Id.* art. 33.

382. *See, e.g., id.* art. 2, para. 2.

383. Declaration on Friendly Relations, *supra* note 189, Principle 2, paras. 3-4 (Settlement of International Disputes by Peaceful Means).

384. *See, e.g., B. DOHNE, supra* note 364, at 158.

385. OAS Charter, *supra* note 12, art. 3(g).

some other peaceful procedure that will enable them to reach a solution."³⁸⁶ Articles 63, 82 and 83-90 also establish mechanisms for the peaceful settlement of international disputes between OAS members, as does the Rio Treaty.³⁸⁷

The United States has clearly violated its legal obligations to settle its dispute with Nicaragua by peaceful means. Together with its failure to provide the Security Council with the information it is required to report concerning "measures taken" in alleged exercise of the right of collective self-defense, it has frustrated the Security Council's efforts to peacefully settle its dispute with Nicaragua by vetoing draft resolutions in 1982 and 1984 which aimed at resolving differences between the two countries. Its veto of the 1982 resolution, which simply called for observance of basic norms of the Charter while calling on the parties to resolve their differences by peaceful settlement, is particularly revealing in this regard.³⁸⁸

Moreover, the United States has refused to pursue judicial settlement of its dispute with Nicaragua by withdrawing from the proceedings on the merits before the ICJ, in effect defying the Court's determination that both Nicaragua and the United States are bound by the compulsory jurisdiction of the Court.³⁸⁹ It has also failed to invoke the formal procedures established for the settlement of international disputes under the Rio Treaty,³⁹⁰ and under the OAS Charter.³⁹¹

Most importantly, by continuing to support the *contras*, the United States has violated its obligation, set forth with clarity in the Declaration on Friendly Relations "to refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security." Since May 10, 1984, it has done so in direct violation of the ICJ's Order of Interim Protection.³⁹²

Finally, the United States has broken off bilateral negotiations

386. *Id.* art. 25.

387. *See supra* note 311 and accompanying text.

388. *See supra* notes 2, 313 and accompanying text.

389. *See supra* note 6, 7, 121, 299-300 and accompanying text.

390. *See supra* note 311 and accompanying text.

391. *See id.*

392. *See supra* notes 383-84 and accompanying text; Interim Protection Order of May 10, 1984, *supra* note 5, at 187.

with Nicaragua,³⁹³ and seems to have acted to block the successful conclusion of a Central American peace treaty adopted within the framework of the *Contadora* process.³⁹⁴

Viewing United States actions against Nicaragua - in support of the *contras* since 1981 - one cannot escape the conclusion that it has repeatedly and continuously violated article II of the Kellogg-Briand Pact, articles 2(3) and 33 of the United Nations Charter, various provisions of the OAS Charter, and its duties under customary international law to resolve its differences with Nicaragua exclusively by peaceful means.

III. POSTSCRIPT

After the foregoing article was written, the ICJ handed down its Judgment on the Merits on June 27, 1986.³⁹⁵ The dispositive clauses of the Court's decision are reproduced in the appendix following this article. Two points merit special mention here. First, the Court held that the "multilateral treaty reservation" (Vandenberg Amendment) contained in the 1946 U.S. declaration accepting compulsory jurisdiction under article 36(2) of the Court's Statute required it to decide all of Nicaragua's claims, other than those for breach of the 1956 U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation (FCN Treaty), on the basis of customary international law and general principles of law accepted by civilized nations.³⁹⁶ Consequently, although the Court agreed in general with the foregoing analysis in applying customary international law, it was unable to apply the multilateral treaties referred to above.

393. See *supra* note 121 and accompanying text.

394. See, e.g., Washington Post, Sept. 23, 1984 at A24, col. 1 (Nicaragua announced it would sign without modification draft Central American peace treaty in *Contadora* talks); Washington Post, Sept. 30, 1984, at A1, col. 2 (U.S. urges Central American allies to reject treaty); N.Y. Times, Nov. 14, 1984 (National Security Council memo regarding success in blocking of agreement). For details regarding internal divisions within the administration over whether or not to actively pursue negotiations, see Washington Post, July 7, 1984 at A1, col. 4.

395. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14 (Merits Judgment of June 27), reprinted in 25 I.L.M. 1023 (1986) [hereinafter cited as Judgment of June 27, 1986].

396. *Id.* at paras. 42-56, 172-82, 292. The Court referred explicitly to "the other treaties or the other sources of law enumerated in Article 38 of the Statute." *Id.* at para. 172. See also *id.* at paras. 56, 220. This reference is equivalent to the statement in the text. See I.C.J. Stat., *supra* note 164, art. 38(1).

It should be noted, however, that despite the Court's inability to apply these multilateral treaties, they have been, and remain, immediately binding on both the United States and Nicaragua. The fact that the terms by which the United States agreed to the jurisdiction of the ICJ precluded their application in *Nicaragua v. U.S.* in no way deprives the United Nations Charter, the OAS Charter, and other multilateral treaties not superceded by the former of their legally binding force. The legal analysis in Part II of this article is therefore of continuing relevance in any attempt to assess the legality of U.S. actions against Nicaragua under international law.

In applying customary international law to the case at hand, the ICJ, establishing a high standard of proof, held that on the basis of the evidence presented to the Court, it was unable to conclude that the United States had exercised sufficient control and direction over the *contras* to make their actions generally imputable to the United States.³⁹⁷ It did find that certain direct attacks by the United States and the mining of Nicaraguan ports and harbors violated the prohibition against the use of force, as did the supply of weapons, training, and other military aid,³⁹⁸ while financing and other forms of assistance to the *contras* violated the principle of non-intervention in the domestic affairs of another state.³⁹⁹

A second development of major importance was the approval by the House on June 25⁴⁰⁰ and by the Senate in mid-August, 1986⁴⁰¹ of seventy million dollars in military aid and thirty million dollars in so-called "humanitarian assistance" for the *contras*.⁴⁰² Final adoption of the measure appeared virtually assured, despite the fact that such action would place the United States in the posi-

397. Judgment of June 27, 1986, *supra* note 394, at paras. 93-116. However, the Court did suggest that such direction and control over specific operations might be established by the presentation of additional evidence. *Id.* at para. 115. This may occur in further proceedings to establish the amount of reparation or damages owed by the United States to Nicaragua.

398. *Id.* at paras. 80-81, 86, 227, 292.

399. *Id.* at para. 228. For a detailed examination of the Court's decisions relating to provisional measures of interim protection, jurisdiction and admissibility, and the merits, as well as an analysis of U.S. covert actions against Nicaragua and U.S. responses to the Court's decisions, see J. ROWLES, CONTEMPT OF COURT: THE UNITED STATES, NICARAGUA AND INTERNATIONAL LAW (Princeton University Press, forthcoming).

400. N.Y. Times, June 26, 1986, at A1, col. 5.

401. N.Y. Times, Aug. 15, 1986, at A2, col. 3.

402. For details of President Reagan's original request, see N.Y. Times, Feb. 26, 1986, at A21, col. 1; Washington Post, Feb. 19, 1986, at A1, col. 5.

tion of defying the ICJ's decision on the merits. Such a posture was suggested, however, by the initial response of the Reagan administration to the June 27 decision, and by the U.S. veto on July 31, 1986 of a U.N. Security Council draft resolution calling for full compliance with the Court's decision.⁴⁰³ Such defiance of the June 27 decision constitutes a clear violation of article 94, paragraph 1 of the U.N. Charter, which provides, "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."⁴⁰⁴

Thus, by the end of August, 1986, the question was no longer whether U.S. actions toward Nicaragua were in conformity with international law,⁴⁰⁵ but rather whether and when the United States might return to its more traditional role of supporting international law and institutions. To do so, it will have to abandon a policy and course of action based on open and flagrant violation of the most fundamental legal norms of the international community.

403. For the initial and negative reaction by the United States to the Court's judgment on the merits, see Washington Post, June 28, 1986, at A14, col. 2. In support of the U.S. veto in the Security Council, U.S. Ambassador Vernon Walters stated that adoption of the draft resolution would have been a disservice to international law, a cover for Nicaraguan actions violating U.N. principles, and would not have contributed to peace in Central America. The vote was 11-1, with Britain, France, and Thailand abstaining. Washington Post, Aug. 1, 1986, at A18, col. 4. See N.Y. Times, Aug. 1, 1986, at A3, col. 1.

404. U.N. CHARTER art. 94, para. 1.

405. It is now likely that the legality of alleged actions by Costa Rica and Honduras in support of the *contras* will also be determined by the Court. On July 28, 1986, Nicaragua filed an application in the ICJ initiating proceedings against these states. Washington Post, July 29, 1986, at A8, col. 3; see also N.Y. Times, July 29, 1986, at A3, col. 4. The text of the applications are reprinted in 25 I.L.M. 1290, 1293 (1986).

APPENDIX

JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE IN CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA V. UNITED STATES OF AMERICA)*

THE COURT

(1) By eleven votes to four,

Decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the "multilateral treaty reservation" contained in proviso (c) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Ruda, Elias, Sette-Camara and Ni.

(2) By twelve votes to three,

Rejects the justification of collective self-defense maintained

* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.) 1986 I.C.J. 14 (Judgment on the Merits of June 27, 1986), *reprinted in* 25 I.L.M. 1023 (1986) (operative part of Court's Judgment). The court was composed of the following members: President Nagendra Singh (Republic of India), Vice-President de Lacharrière (French Republic), Lachs (Polish People's Republic), Ruda (Argentine Republic), Elias (Federal Republic of Nigeria), Oda (Japan), Ago (Italian Republic), Sette-Camara (Federative Republic of Brazil), Schwebel (United States of America), Sir Robert Jennings (United Kingdom), Mbaye (Republic of Senegal), Bedjaoui (Democratic and Popular Republic of Algeria), Ni (People's Republic of China), Evensen (Kingdom of Norway), and Colliard (French Republic), special *ad hoc* judge appointed by Nicaragua in accordance with art. 31, para. 2 of the statute of the Court.

by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(3) By twelve votes to three,

Decides that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(4) By twelve votes to three,

Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosí Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings,

(5) By twelve votes to three,

Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4)

hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(6) By twelve votes to three,

Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(7) By fourteen votes to one,

Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judge* Schwebel.

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph (6) hereof, has acted in breach of its obligations under customary international law in this respect;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara,

Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc Colliard*;

AGAINST: *Judge Oda*.

(9) By fourteen votes to one,

Finds that the United States of America, by producing in 1983 a manual entitled "Operaciones psicológicas en guerra de guerrillas", and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc Colliard*;

AGAINST: *Judge Oda*.

(10) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc Colliard*;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc Colliard*;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Schwebel.

(15) By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

IN FAVOR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Schwebel.

(16) Unanimously,

Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.