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NOTES

THE LEGITIMACY OF UNITED STATES INTERVENTION IN NICARAGUA*

CONTEMPORARY BACKGROUND OF NICARAGUAN SITUATION

The overthrow of the Somoza regime in Nicaragua in July 1979 brought to an end an era of extreme oppression and civil strife.¹ The Somoza regime survived its final years only by the imposition of a harsh, military reign of terror. The National Guard, Somoza's security force, was the aggressive arm of the oppression.² By mid-June 1979, foreign states and international organizations were calling for the regime to cede power, and to allow for a peaceful and democratic process of governmental change.³

The power base of the rebel Sandinistas was broad and popular.⁴ The Nicaraguan population, many of whom are peasants and farmers,⁵ coalesced in a revolution whose name commemorated an anti-government folk hero from the 1920's and 1930's, Augusto Sandino.⁶ A spirit of change, agrarian reform, redistribution of wealth and resources, and improved health characterized the new era.

* This Note reflects factual developments through May 1985.

1. See Russell, *Nothing Will Stop This Revolution*, TIME, Oct. 17, 1983, at 35. See generally J. TIERNEY, *SOMOZAS AND SANDINISTAS* (1982) (subtitled *The U.S. and Nicaragua in the Twentieth Century*) for a detailed account of Nicaragua's recent political history and its relationship with the United States.

2. N.Y. Times, May 1, 1979, at A7, col. 6; see also Wicker, *Reagan's Big Stick*, id., July 26, 1983, at A21, col. 5.

3. Id., June 24, 1979, at A1, col. 6.

4. See Pastora, *Salvaging Nicaragua*, id., June 8, 1983, at A23, col. 3; id., Aug. 4, 1979, at A2, col. 6; see also Kinzer, *The Beleaguered Revolution*, id., Aug. 28, 1983, § 6 (Magazine), at 22.

5. See Chace, *In Search of a Central American Policy*, id., Nov. 25, 1984, at 49, 51 (Magazine). Nicaragua is an extremely poor country; agriculture and small businesses are the economic stalwarts. Currently agriculture is the major source of foreign exchange (hard currency). See *infra* note 127.

6. Augusto Cesar Sandino organized several hundred Nicaraguan peasants to fight a United States supported regime. The Army to Defend National Sovereignty battled United States Marines for six years, until the Marines withdrew in 1933. Sandino was assassinated after he left a dinner meeting with National Guard Chief Anastasio Somoza Garcia. See Kinzer, *supra* note 4, at 24.

Since the July 1979 overthrow,⁷ gains in literacy and land reform have been made, and the general atmosphere of terror has been all but eliminated, however, overall change has come slowly.⁸ The Sandinistas espouse Marxist principles as the underpinnings of their revolution,⁹ and have received substantial Cuban and Soviet aid.¹⁰ The United States response to the Sandinistas, which initially included large scale economic aid, cooled by 1981 as the Reagan administration became dissatisfied with the Sandinistas' failure to allow a free press and hold elections.¹¹ The difficulties the Sandinistas encountered caused several of the stated objectives of the new regime to be postponed or ignored.¹²

7. For a brief chronology of United States-Nicaraguan relations over the past six years, see N.Y. Times, Feb. 24, 1985, § 4 (Week in Review), at 1, col. 4.

8. Kinzer, *supra* note 4, at 67. One commentator has written that the Sandinistas' policies are damaging the country's economy and creating an agrarian crisis. Leiken, *Nicaragua's Untold Stories*, NEW REPUBLIC, Oct. 8, 1984, at 16. See Cruz, *Nicaragua's Imperiled Revolution*, FOREIGN AFF., Spring 1984. For a brief discussion of Nicaragua's judicial system, see Blodgett, *Et al.*, STUDENT LAW., Feb. 1984, at 10.

For an account of the current state of affairs in Nicaragua by a Peruvian novelist, see Llosa, *In Nicaragua*, N.Y. Times, Apr. 28, 1985, 36, at 36 (Magazine).

9. Kinzer, *supra* note 4, at 22.

10. *Id.* at 73. *Soviet Help to Sandinistas: No Blank Check*, N.Y. Times, Mar. 28, 1984, at A1, col. 2. See also *Sandinistas Forcing Thousands Out of War Zone*, *id.*, Mar. 19, 1985, at A11, col. 1.

11. See President Reagan's address before a joint session of Congress on Apr. 27, 1983, reprinted in DEP'T ST. BULL., June, 1983, at 1, 2 (entitled *Central America: Defending our Vital Interests*) [hereinafter cited as President Reagan's Address].

For further Reagan administration policy statements, see *Saving Freedom in Central America*, (Bur. Pub. Aff.) Current Pol. No. 499 (July 1983) (address of President Reagan to the Int'l Longshoremen's Assoc., Hollywood, FL, July 18, 1983); *Building the Peace in Central America*, (Bur. Pub. Aff.) Current Pol. No. 414 (Aug. 1982) (address of Thomas O. Enders, Asst. Sec. of State for Inter-American Aff., before the Commonwealth Club, San Francisco, Cal., Aug. 20, 1982); *Struggle for Democracy in Central America*, (Bur. Pub. Aff.) Current Pol. No. 478 (Apr. 1983) (address of Sec. of State Schultz before the Dallas World Aff. Council and Chamber of Commerce, Dallas, TX, Apr. 15, 1983); *Nicaragua: Threat to Peace in Central America*, (Bur. Pub. Aff.) Current Pol. No. 476 (Apr. 1983) (address of Asst. Sec. Enders before the Senate Foreign Relations Committee, Apr. 12, 1983).

12. See *Transcript of President's Speech on Central America Policy*, N.Y. Times, May 10, 1984, at A16. According to President Reagan:

[t]he Nicaraguan junta cabled written assurances to the OAS in 1979 that it intended to respect human rights and hold free elections. Two years later, these commitments can be measured by the postponement of elections until 1985; by repression against free trade unions, against the media and minorities; and—in defiance of all international civility—by the continued export of arms and subversion to neighboring countries.

Caribbean Basin Initiative, (Bur. Pub. Aff.) Current Policy No. 370 (Mar. 1982) (address of President Reagan before the O.A.S., Wash., DC, Feb. 24, 1982).

President Reagan recently stated at a news conference that the Sandinistas "vio-

Elections were not held until November 1984,¹³ and censorship has occurred in the press.¹⁴

In the past five years two main counterrevolutionary forces have fought against the Sandinistas.¹⁵ The Contras, among whom are former Somoza national guardsmen, are attacking Nicaragua's northern region.¹⁶ In the south, rebels led by Eden Pastora, also known as Com-

lated their own promise to the [O.A.S.] as a result of which they had received support . . . that their revolutionary goal was for democracy, free press, free speech, free labor unions and elections." *President's News Conference on Foreign and Domestic Issues*, N.Y. Times, Feb. 22, 1985, at A14. See also Chace, *supra* note 5, at 51.

13. See *Nicaragua Installs Elected Assembly*, N.Y. Times, Jan. 10, 1985, at A3, col. 1; *Sandinistas Win 63 Percent of Vote in Final Tally*, *id.*, Nov. 15, 1984, at A9, col. 1; *Sandinistas Hold Their First Elections*, *id.*, Nov. 5, 1984, at A12, col. 1; *Elections in Nicaragua: The Parties and the Candidates*, *id.*, col. 3; *The Nicaraguan Vote*, *id.*, col. 1; *Half-step to democracy*, *ECONOMIST*, Nov. 10, 1984, at 13; *Nicaragua: A Referendum More than an Election*, *id.*, at 46.

14. See Russell, *supra* note 1, at 37. Pedro Joaquin Chamorro, former editor of *La Prensa*, recently left Nicaragua because of his frustration over the political situation and censorship. "The range of news items, international information, editorials and photographs covered by censorship is simply unbelievable . . . [I]f we had a full year at the present number of pages, *La Prensa* could not publish all the material that has been censored during the past three years." *Nicaraguan Urges U.S. to Rein in Rebels*, N.Y. Times, Jan. 4, 1985, at A3, col. 4.

15. See, e.g., *Central America: The Second Spanish Civil War*, *ECONOMIST*, Oct. 29, 1983, at 33. Repeated efforts have been made to consolidate the Nicaraguan opposition. This may occur in the future. See Brinkley, *Leaders of Anti-Sandinistas Form Alliance Urged by U.S.*, N.Y. Times, Mar. 1, 1985, at A8, col. 1.

16. The Nicaraguan Democratic Force is a United States-backed counterrevolutionary group waging war against the Sandinistas from Honduras. See Schlender, *Rebel Rift: Nicaraguan Exile Units Feud With Each Other As Well As Sandinistas*, Wall St. J., July 27, 1983, at 1, col. 1. One report stated: "It is true that around 4,000 members of the abominable ex-President Somoza's national guard have been camped along the border since 1979." *ECONOMIST*, July 28, 1984, at 13.

Nicaraguan Indians also form a large part of the anti-Sandinista guerrillas; most are Miskito Indians. Various groups have been formed, including Misurasata (a group led by Brooklyn Rivera, headquartered in Costa Rica, which claims that its goals are not counterrevolutionary, but merely to secure land rights and autonomy), and Misura (a group led by Steadman Fagoth, based in Honduras, which does seek to replace the Sandinista Government). Kennedy, *Support the Peace Effort of Nicaragua's Indians*, N.Y. Times, Nov. 27, 1984, at A31, col. 1.

According to Senator Kennedy, the Indian groups have good reasons for fighting the Sandinistas; although he does support a recent peace initiative by Rivera:

One reason such negotiations are important is that the Sandinistas' treatment of the Indians continues to be unconscionable. One-third to one-half of the 90,000 Indians on the coast have been displaced. Some 20,000 have fled to Honduras to escape the Sandinistas' scorched-earth policy—the razing of villages along the Rio Coco—and 10,000 are confined in resettlement camps in the central coast area. Most disturbing of all, 3,000 to 5,000 have lived for two years in intolerable conditions in forced-labor camps—which resemble concentration camps—in the

mander Zero, have pressed a separate attack.¹⁷ Both groups seek to destabilize the Sandinistas. The Contras wish to gain power and establish a non-Marxist society, while the rebels of the south seek to oust the ruling Sandinista junta for betraying the democratic principles originally stated as guiding the revolution.¹⁸

International reaction and attempts to influence the development of the Nicaraguan situation are varied. To some observers the conflict is the classic East-West confrontation, a communist inspired uprising in a traditionally capitalistic society.¹⁹ To others the revolution is a local response to an oppressive feudal society, which failed to adequately take care of its peasant population.²⁰

The purpose of this note is to examine the United States actions and policies with respect to Nicaragua, and to determine their legitimacy under principles of international law. Furthermore, the note will examine the actions and policies of Nicaragua in Central America and assess their legitimacy under principles of international law.

CLAIMS AND ACTIONS OF THE PARTIES

The role of the United States in Central America and in Nicaragua raises a wide range of international and domestic legal concerns, and is supported with a variety of foreign policy rationales. The primary

mountainous Matagalpa-Jinotega area, where they pick coffee beans for the state.

Id.

17. *Id.* Eden Pastora was a major figure in the Sandinista revolution and was formerly Deputy Defense Minister. He left Nicaragua in 1981 and publicly declared his opposition to the Sandinista directorate in 1982. See Pastora, *supra* note 4. Pastora now leads the Democratic Revolutionary Alliance (A.R.D.E.). Commander Zero argues that the Sandinista regime has betrayed the democratic ideals of the revolution; he seeks genuine democratic change. *Id.* Pastora was injured in a bomb blast in 1984, and subsequently his leadership role in the Social Democratic Movement was questioned due to his refusal to consolidate with other rebel forces. See N.Y. Times, June 14, 1984, at 4, col. 3; *id.*, June 1, 1984, at A4, col. 3.

18. See Pastora, *supra* note 4. It has also been asserted that A.R.D.E. has sought a settlement in southern Nicaragua for two reasons: "to secure a foothold on the jungle fringes of Nicaraguan territory as the first step toward winning international recognition as a *contra* provisional government, and to win a port of entry for military supply." *Mysterious Help from Offshore?*, TIME, Apr. 23, 1984, at 22. This goal of recognition of the Contras is related to their claim of self-determination rights. See *infra* note 48.

19. See Safire, *Choosing Up Sides*, N.Y. Times, July 24, 1983, at E21, col. 1; see generally President Reagan's Address, *supra* note 11.

20. See Kinzer, *supra* note 4, at 24. For a thorough account of the Sandinista revolution, see G. BLACK, THE TRIUMPH OF THE PEOPLE: THE SANDINISTA REVOLUTION IN NICARAGUA (1981).

claim raised by the United States to support its interventionist role²¹ is that international communism is besieging Central America, and that a response to the Nicaraguan situation is a response to Cuban, Soviet and East European subversion.²² Proponents of this theory perceive dual forces at work in Nicaragua. The first is anti-capitalism. International communism and subversion, under the broad specter of the Brezhnev doctrine,²³ are viewed as expanding without regard to national boundaries.²⁴ The presence of Cuban advisors in Nicaragua, estimated at one time to be roughly 8,000, supports this claim.²⁵ The second force is both social and cultural. Nicaragua's harsh history of poverty and oppressive government has created a situation where internal strife and rebellion are expected.²⁶ It is here, according to the United States claim, that the international Marxist network is ready to exploit local conditions ripe for political and civil change.

A second United States claim is based on collective security.²⁷ The United States believes it must act definitively to protect El Salvador, Guatemala, Honduras and Costa Rica from rebel forces and to help preserve the structures of democracy in Central America.²⁸ This position reflects an underlying belief in the domino theory, which asserts that communist rule in Nicaragua will lead to rebel gains in El Salvador, thereby encouraging rebel forces elsewhere in Central America.²⁹

21. See *infra* notes 134-37 and accompanying text.

22. See President Reagan's Address, *supra* note 11, at 3; see also Enders, *Nicaragua: Threat to Peace in Central America*, 6 DEP'T ST. BULL., June 1983, at 76.

23. The Brezhnev doctrine states that international communism is governed by the laws of the class struggle and social development rather than national sovereignty. See M. McDUGAL & W. REISMAN, *infra* note 57, at 175-79. One columnist has written the following: "The Brezhnev doctrine—holding, in effect, that once a country has gone Communist other Communist countries have a right to keep it that way—was put forward in 1968 after Warsaw Pact nations intervened in Czechoslovakia, where the doctrine could be enforced." Wicker, *A Bone in his Throat*, N.Y. Times, Feb. 22, 1985, at A27, col. 1. See also Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1980-81).

24. See Podhoretz, *Military Intervention in Central America?*, N.Y. Times, July 24, 1983, at E21, col. 5.

25. See Kissinger Report, *infra* note 168, at 30.

26. See Mercado, *What Nicaragua Wants*, N.Y. Times, July 26, 1983, at A21, col. 1. Sergio Ramirez Mercado, a novelist, was a member of the former Nicaraguan Junta of National Reconstruction. *Id.*

27. See President Reagan's Address, *supra* note 11, at 5; Rostow, *Adhering to World Law*, N.Y. Times, Aug. 26, 1983, at A25, col. 1. See also *Central America at the Crossroads*, DEP'T ST. BULL., Jan. 1980, at 58, 63 (former Assistant Secretary for Inter-American Affairs Vaky's statement before the House Subcommittee on Inter-American Affairs on Sept. 11, 1979).

28. See President Reagan's Address, *supra* note 11, at 5.

29. See Vaky, *supra* note 27, at 58.

It is also a response to requests for aid from the Central American regimes.

Another charge proffered by the United States is that the Nicaraguan Sandinista Government is an illegal government, since it is not an elected democratic government.³⁰ Nicaragua's failure to hold prompt elections was viewed as an authoritarian abuse of power and a denial of the inherent duty to establish democratic government.³¹ Despite the occurrence of elections in November 1984, confirming the present Sandinista leadership, the United States viewed Nicaragua's elections as a sham.³²

A further charge synthesizes the above claims. The United States believes that for reasons of political exigency direct action is required to preserve the present Inter-American system.³³ The United States

30. See President Reagan's Address, *supra* note 11, at 3; see also Rostow, *supra* note 27.

31. See Enders, *U.S. Secretary in Central America*, DEP'T ST. BULL., June 1983, at 75 (statement of Ambassador Enders, then Assistant Secretary for Inter-American Affairs, before the House Subcommittee on Hemisphere Affairs delivered on Mar. 1, 1983). See also Shultz, *Comprehensive Strategy for Central America*, DEP'T ST. BULL., Sept. 1983, at 45 (Secretary of State Shultz's prepared statement before the Senate Foreign Relations Committee on Aug. 4, 1983).

32. See *supra* note 7. The elections have received varied appraisals. One commentator, an election observer project director of the Int'l Human Rights Law Group, stated that despite several flaws, the elections did give Nicaraguans an opportunity to be heard. "Virtually all the independent observers who prepared comprehensive reports of the Nicaraguan elections concluded that the elections represented a positive political development and compared favorably with the 1984 elections in El Salvador." Letter of Larry Garber to the Editor, N.Y. Times, Feb. 22, 1985, at A26, col. 5. See also Letter from L. Whitman to the Editor, *id.*, Nov. 16, 1984, at A30, col. 3. The writer observed the elections as part of the Nicaragua-Honduras Education Project and concluded that they were "free, fair and hotly contested." Whitman wrote that during an interview with M. Joyce, counsel for political affairs in the United States Embassy in Nicaragua, Joyce stated that the elections were flawed because of the lack of meaningful choice. *Id.*

One author has criticized the election process because Auturo Cruz, the opposition candidate who might have posed the greatest challenge to the Sandinistas, didn't participate. This author believes that political maneuvering led to the break in negotiations prior to the election, thereby depriving the opposition of its potent and unifying force. See Chace, *supra* note 5, at 51. For other accounts, see Cooper, *infra* note 38, at 26 (comparing the Nicaraguan and Salvadoran elections); NAT'L LAW. GUILD, *NICARAGUA: AN EYEWITNESS REPORT ON THE ELECTION PROCESS* (1984).

33. See Enders, *supra* note 31, at 75. See also President Reagan's letter to prominent Venezuelan citizens regarding the threats to world peace posed by the Nicaraguans and the current situation in Central America and the Caribbean, *reprinted in World Peace and the Situation in Central America and the Caribbean*, DEP'T ST. BULL., Jan. 1983, at 81. For further amplification of this point in relation to the recent Grenada invasion, see Letter to the Editor from Peter Rashish, N.Y. Times, Nov. 6, 1983, at E20, col. 4 (entitled *Of Grenada and the Right of a Great Nation*).

Secretary of State Shultz said recently in a speech entitled "America and the Strat-

position is that any communist government in the Western Hemisphere is inimical to the Pan-American system. This claim has a broad ideological foundation, reminiscent of the Monroe Doctrine, that no Russian or European interference will be tolerated in the Western Hemisphere.³⁴ Underlying this position is the belief that Nicaragua's revolution is inspired and supported primarily by external rather than internal forces.³⁵

A final United States claim is that Nicaragua is a flow point for arms to Salvadoran and other rebels.³⁶ United States objectives, according to President Reagan, are to stop the flow of arms,³⁷ and to

egy for Freedom”:

Central America's hopes for peace, security, democracy, and economic progress will not be realized unless there is a fundamental change in Nicaraguan behavior in four areas:

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.

Second, Nicaragua must reduce its armed forces, now in excess of 100,000, to a level commensurate with its legitimate security needs—a level comparable to those of its neighbors. The current imbalance is incompatible with the regional stability.

Third, Nicaragua must absolutely and definitively stop its support for insurgents and terrorists in the region. All of Nicaragua's neighbors, and particularly El Salvador, have felt the brunt of Sandinista efforts to destabilize their governments. No country in Central America will be secure as long as this continues.

And fourth, the Sandinistas must live up to their commitments to democratic pluralism made to the O.A.S. in 1979. The internal Nicaraguan opposition groups, armed and unarmed, represent a genuine political force that is entitled to participate in the political processes of the country. It is up to the Government of Nicaragua to provide the political opening that will allow their participation.

N.Y. Times, Feb. 23, 1985, at A4, col. 1.

34. For a discussion of the Monroe Doctrine in the contemporary context, see Note, *The Monroe Doctrine in the 1980's: International Law, Unilateral Policy, or Atavistic Anachronism?*, 13 CASE W. RES. J. INT'L L. 203 (1981). See also *A Revival in Washington for the Monroe Doctrine*, N.Y. Times, Nov. 13, 1984, at A8, col. 1.

35. The difficulty in categorizing a conflict or threat as “internal” or “external” underlies much of the discussion on intervention. For commentary on this theme, see INTERNAL WAR: PROBLEMS AND APPROACHES (H. Eckstein ed. 1980); G. Kelley & L. Miller, *Internal War and International Systems: Perspectives on Method* (1969). See also *Salvador Arms-Aid Charges Detailed*, N.Y. Times, Aug. 9, 1984, at A3, col. 1 (report on disclosure of evidence, including aerial photography, establishing that Salvadoran rebels get “most of their weapons, ammunition and equipment from Soviet-bloc nations through Nicaragua”).

36. See *Salvador Arms-Aid Charges Detailed*, *supra* note 35.

37. See President Reagan's Address, *supra* note 11, at 3. Former Ambassador Kirkpatrick has argued vehemently that Nicaragua supplies arms to Salvadoran rebels. See

pressure the Sandinistas to change their Marxist orientation and implement democratic and capitalist policies.³⁸ To fulfill this objective various military actions have been employed. Training soldiers³⁹ and building bases in Honduras,⁴⁰ mining Nicaraguan harbors,⁴¹ providing

Address by Ambassador Jeane J. Kirkpatrick, United States Permanent Representative to the United Nations, at the Am. Soc. Int'l Law Annual Meeting, Wash., DC, Apr. 12, 1984. This position has been questioned by David MacMichael, a former C.I.A. analyst. *Nicaragua, Pro and Contra*, N.Y. Times, June 18, 1984, at A18, col. 1 (Editorial) (MacMichael claims that Nicaraguan involvement has been systematically misrepresented). See also *In From the Cold and Hot for Truth*, id., June 11, 1984, at B6, col. 3 (quoting MacMichael's assessment of the arms dispute); MacMichael, *Democrats Can Seize Central America Issue*, id., July 17, 1984, at A21, col. 1.

38. President Reagan recently stated in response to a question whether the overthrow of the Sandinistas was his goal: "Well, remove it 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 . . . you wonder sometimes about those who make . . . claims as to its legitimacy." *President's News Conference*, *supra* note 12.

One form of pressure that has been applied by the United States is to send spy planes over Nicaraguan air space and have them break the sound barrier, causing sonic booms. This tactic was used repeatedly in November 1984—it is said to have caused great apprehension in Nicaragua. See Cooper, *Nicaragua: Waiting for Uncle Sam*, *VILLAGE VOICE*, Nov. 27, 1984, at 25.

39. The United States effort has included training soldiers from Honduras, Guatemala and El Salvador, as well as Contras. A recent controversy has erupted over the use of a C.I.A. guerrilla manual, which counseled assassination and efforts to overthrow the Sandinistas. The House Intelligence Committee concluded that the manual for Nicaraguan rebels violated the Boland amendment, which forbids United States personnel to participate in any effort to overthrow the Nicaraguan Government. *House Panel Calls C.I.A. Manual Illegal*, N.Y. Times, Dec. 6, 1984, at A3, col. 4. See *Excerpts From Primer for Insurgents*, id., Oct. 17, 1984, at A12, col. 4 (the C.I.A. manual is entitled, *PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE*); Letter of William Casey (Director of Central Intelligence) to the members of the House and Senate Intelligence Committees, Oct. 25, 1984, *reprinted in* N.Y. Times, Nov. 2, 1984, at A3, col. 1; *C.I.A. Chief Defends Manual for Nicaraguan Rebels*, id., col. 3.

One commentator, Prof. Francis Boyle, wrote that the C.I.A. use of the war manual violated standards long held by the United States Government. He stated that the techniques the C.I.A. approved—e.g., political assassination—violate the law of war. See U.S. ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE*, para. 31 (1956). "According to paragraph 501, any U.S. Government official who had actual knowledge, or should have had knowledge," of "war crimes" (as defined by para. 499) and failed to take measures to ensure compliance with the law of war "is similarly guilty of a war crime." Letter from Francis Boyle to the Editor, N.Y. Times, Nov. 24, 1984, at 22, col. 5.

40. See Gerth, *Ex-U.S. Intelligence and Military Personnel Supply Anti-Nicaragua Rebels*, N.Y. Times, Nov. 8, 1983, at A12, col. 1; see also Smith, *U.S. Presence Provokes Misgivings in Honduras*, id., Feb. 9, 1984, at A18, col. 1.

41. *Officials Say C.I.A. Made Mines With Navy Help*, N.Y. Times, June 1, 1984, at A4, col. 3; *Soviet Tells Details of Sea Blast Off Nicaragua*, id., Mar. 23, 1984, at A6, col. 3; *Rebel Boats Battle Nicaraguans at Port*, id., Mar. 31, 1984, at A4, col. 1; *Nicaraguan in U.N. Protest*, id., col. 3; *Soviet Tanker Damaged by Mine Laid by Rebels in Nicara-*

military hardware to Guatemala and El Salvador,⁴² positioning United States warships off the Nicaraguan coast⁴³ and providing covert aid to Nicaraguan guerrillas are the major actions taken so far.⁴⁴

In contrast to the United States assertions, Nicaraguan claims include an invocation of the time honored, but often ignored, principle of nonintervention,⁴⁵ the right to revolution⁴⁶ and social change, the invi-

guan Port, *id.*, Mar. 21, 1984, at A4, col. 3 (reporting damage to Soviet, Dutch and Panamanian ships); *Nicaraguan Port Thought to be Mined*, *id.*, Mar. 16, 1984, at A3, col. 1 (detailing damage to foreign vessels); *Britain Criticizes Mining of Harbors Around Nicaragua*, *id.*, Apr. 7, 1984, at A1, col. 1 ("Since March 1 vessels from the Soviet Union, Japan, the Netherlands, Panama, Liberia and Nicaragua have been damaged by the mines"); *Senate, 84-12 Acts to Oppose Mining Nicaraguan Ports*, *id.*, Apr. 11, 1984, at A1, col. 5; *Mexico Hits U.S. For Barring Court in Mining Case*, *Wash. Post*, Apr. 14, 1984, at A14, col. 2; *U.S. Reasons for Mining Challenged*, *id.*, col. 3 (discussion of mining in context of international law).

42. See Chavez, *U.S. Envoy Castigates Salvadorans on Terrorism*, *N.Y. Times*, Nov. 26, 1983, at A4, col. 3.

43. *Military Experts Call U.S. Ready for Latin Combat Role if Order is Given*, *id.*, Apr. 23, 1984, at A8, col. 1.

44. See Cohen, *The New Phase in the U.S. War Against Nicaragua*, *Blind Justice*, Oct. 1983, at 5 (*Blind Justice* is the newspaper of the New York Chapter of the National Lawyer's Guild). See also Russell, *supra* note 1, at 35; Kinzer, *supra* note 4, at 5; *Threats by C.I.A. Said to Influence Anti-Sandinistas*, *N.Y. Times*, Apr. 22, 1984, at A1, col. 4; *Key C.I.A. Role Seen in Policies on Nicaragua*, *id.*, Apr. 20, 1984, at A1, col. 5; *C.I.A. and the Rebels: A Tangled History*, *id.*, Mar. 18, 1985, at A8, col. 4.

The extent of United States aid to the Contras between 1981 and 1984 has been estimated at \$80 million. Cody, *Contras Press for Funds*, *Wash. Post*, Feb. 18, 1985, at A1, col. 1.

In addition to aid from public funds, private efforts have been undertaken by American and other donors to aid the Contras. This assistance is estimated at \$5 million. *Id.* According to one account:

A Nicaraguan guerrilla leader has claimed that the rebels are getting about \$1.5m a month, much of it given by individuals and companies in the United States. The money is funnelled through organisations usually registered outside the United States but with resoundingly humanitarian-sounding names and with mailbox addresses in, for instance, Miami.

ECONOMIST, Sept. 22, 1984, at 34.

Critics of the United States policy have stated that private aid may violate the Neutrality Act, 18 U.S.C. § 960 (1982), see *infra* notes 87-89 and accompanying text. Furthermore, reports in the press that the United States has encouraged Asian countries and Israel to serve as conduits for United States aid also may affect the figure of total aid to the Contras, and raise questions regarding the circumvention of Congressional appropriations limitations. See also Taubman, *Letting Citizens Give Rebels Aid was U.S. Policy*, *N.Y. Times*, Sept. 11, 1984, at A1, col. 5.

For a chronological summary of United States claims and actions in the dispute, see *id.*, Apr. 12, 1984, at A10, col. 2.

45. See M. DE VRIES & J. RODRIGUEZ-NOVAS, *THE LAW OF THE AMERICAS* 64 (1965).

46. *Id.* at xi.

olability of state sovereignty,⁴⁷ the right to self-determination free from outside interference,⁴⁸ and a claim of legitimacy based on fundamental improvements in education, the cessation of violence, political stability and popular support as evidenced by elections.⁴⁹

These claims are related in the sense that the Sandinistas believe themselves to be the legitimate government of Nicaragua, entitled to the same rights and freedoms as other national sovereign governments.⁵⁰ Inherent in this position is the understanding that no external government or coalition has the right to interfere with Nicaragua's domestic economic, political and cultural institutions or its right to self-defense.⁵¹

Nicaragua's actions have included building a military establishment,⁵² accepting Cuban and Soviet military and cultural aid, and pro-

47. See Mercado, *supra* note 26.

48. *Id.* In a recent article Daniel Ortega Saavedra, Nicaragua's President, stated that the United States effort to support the Contras is "illegal," "immoral," "futile and unnecessary," and "counterproductive." Saavedra, *Why the U.S. Must End its War*, N.Y. Times, Mar. 13, 1985, at A23, col. 1. He maintained that the United States claim of regional self-defense is without justification in light of the lack of solid evidence produced to support the claim; that the withdrawal from the I.C.J. in the recent case established that the United States ignores international law; that Nicaragua's recent election was fair and points out the role of political pluralism in Nicaraguan politics; and that emergency actions have been taken in response to United States pressures, not for political suppression. *Id.* He stated:

President Reagan calls us "totalitarian" because we imposed a state of emergency that restricts certain rights, including press freedom with regard to military and security matters. The state of emergency was imposed in 1982 in direct response to the covert war. If Mr. Reagan really wants the full restoration of political and civil rights, he need only stop the war. My Government is committed to lifting the state of emergency and restoring full press freedom and other rights as soon as that occurs.

Id.

The principle of self-determination has also been raised by the Contras and Nicaragua's various Indian groups. These anti-Sandinistas claim that Government failure and betrayal with regard to its democratic promises have created a right to dissent. They also claim that abuses by the Sandinistas, especially in regard to the Miskito Indians, see *Letter from F.R. Whittlesey to the Editor*, N.Y. Times, Nov. 20, 1984, at A22, col. 3, legitimate self-determination efforts, including guerrilla warfare, to force the Sandinistas to change course.

49. See Mercado, *supra* note 26.

50. *Id.*

51. *Id.*

52. Brinkley, *Nicaraguan Army: 'War Machine' Or Defender of a Besieged Nation?*, N.Y. Times, Mar. 30, 1985, at A1, col. 2; Rohter, *Sandinistas Pin Hopes on Congress*, *id.*, Mar. 3, 1985, § 4 (Week in Review), at C1, col. 1 ("That Nicaragua has become heavily militarized is not in dispute. The Sandinista People's Army has grown from a ragged guerrilla band of 6,000 to a disciplined force of more than 60,000 soldiers armed with large quantities of weapons and equipment, much of it purchased in Eastern Europe.

viding assistance to rebels in neighboring countries.⁵³ The extent of aid provided by Nicaragua to rebel insurgents in El Salvador, Honduras and Guatemala is disputed, but undoubtedly some aid has been given.⁵⁴

APPLICABLE PRINCIPLES OF INTERNATIONAL LAW

Several major principles of international law are applicable to the United States and Nicaraguan claims and actions. These include intervention and the doctrine of nonintervention,⁵⁵ aggression,⁵⁶ self-de-

More than 40 percent of this year's budget is earmarked for the military"). See Halloran, *U.S. Officers Play Down Moves in Nicaragua*, *id.*, Nov. 10, 1984, at A4, col. 1 (assessing the size, components and capability of Nicaragua's forces).

53. See Kissinger Report, *infra* note 168, at 30, 113.

54. See *supra* note 37.

55. For general discussions on the topic of intervention and nonintervention, see generally R. BARNET, *INTERVENTION AND REVOLUTION* (1968); F. DELIMA, *INTERVENTION IN INTERNATIONAL LAW* (1971); HIGHAM, *INTERVENTION OR ABSTENTION* (1975); LAW AND CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1974); W. PERKINS, *CONSTRAINT OF EMPIRE: THE UNITED STATES AND CARIBBEAN INTERVENTIONS* (1981); Bond, *A Survey of the Normative Rules of Intervention*, 52 *MILITARY L. REV.* 51 (1971); Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 *MICH. L. REV.* 1147 (1967); Douglass, *Counterinsurgency: A Permitted Intervention*, 25 *MILITARY L. REV.* 43 (1964); Editorial Comment, *Has the Specter of Intervention Been Laid in Latin America*, 50 *AM. J. INT'L L.* 636 (1956) (C.G. Fenwick); Editorial Comment, *Intervention and the Inter-American Rule of Law*, 53 *AM. J. INT'L L.* 873 (1959) (C.G. Fenwick); Editorial Comment, *Intervention—At the Caracas Conference*, 48 *AM. J. INT'L L.* 451 (1954) (C.G. Fenwick); Falk, *The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States*, 5 *HOWARD L. J.* 163 (1959); Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 *COLUM. L. REV.* 266 (1967); Friedman, *Intervention, Civil War and the Role of International Law*, 59 *AM. SOC'Y INT'L L. PROC.* 67 (1965); Gilmour, *The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter—An Historical Perspective*, 16 *INT'L & COMP. L.Q.* 330 (1967); Kane, *American Involvement in Latin American Civil Strife*, 61 *AM. SOC'Y INT'L L. PROC.* 58 (1967); Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 *VA. J. INT'L L.* 205 (1969); Puente, *The Doctrines of Recognition and Intervention in Latin America*, 28 *TUL. L. REV.* 313 (1954); Schwenniger, *The 1980s: New Doctrines of Intervention or New Norms of Non-intervention*, 33 *RUTGERS L. REV.* 423 (1981); Thomas, *The Organization of American States and Subversive Intervention*, 55 *AM. SOC'Y INT'L L. PROC.* 19 (1961); Thomas & Thomas, *Non-Intervention and the Spanish Civil War*, 61 *AM. SOC'Y INT'L L. PROC.* 2 (1967); and Wright, *Intervention, 1956*, 51 *AM. J. INT'L L.* 257 (1957).

56. Aggression and acts of aggression have been the subject of attempted definitions for many years. One such attempt occurred in 1933. Following the lead of the Conference for the Reduction of and Limitations of Armaments at Geneva, Maxim Litvinov, the Russian Commissar for Foreign Affairs, raised the issue in two Soviet "Conventions for the Redefinition of Aggression." The Litvinov conventions yielded in part the following text:

[T]he aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be that State which is

fense⁵⁷ and collective security;⁵⁸ customary principles of Inter-American law;⁵⁹ the right to revolution⁶⁰ and self-determination;⁶¹ and the

the first to commit any of the following actions:

1. Declaration of war upon another State;
2. Invasion by its armed forces with or without a declaration of war, of the territory of another State;
3. Attacks by its land, naval or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;
4. Naval blockade of the coasts or ports of another State;
5. Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal . . . to take . . . all the measures in its power to deprive those bands of all assistance or protection.

See R. LANGER, *SEIZURE OF TERRITORY* 73-74 (1947).

The applicable provision of the Rio Treaty regarding aggression is article 9, which provides:

In addition to other acts which the Organ of Consultation may characterize as aggression, the following shall be considered as such:

- a. Unprovoked armed attack by a State against the territory, the people, or the land, sea or air forces of another State;
- b. Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another State.

Rio Treaty, *infra* note 65, art. 9.

57. The doctrine of self-defense is a fundamental principle in any legal system that outlaws acts of aggression. For a general discussion of aggression and self-defense, see M. McDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 964-98 (1981).

58. Collective security is one of the founding principles of the United Nations and the Organization of American States. See generally A. GOLBERT & Y. NUN, *LATIN AMERICAN LAW AND INSTITUTIONS* 111-29 (1982). See also the relevant provisions of the O.A.S. Charter:

Article 24

Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.

Article 25

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra-continental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.

O.A.S. CHARTER, *infra* note 64.

59. See C.G. FENWICK, *THE ORGANIZATION OF AMERICAN STATES* (1963). Fenwick identifies and discusses the following principles underlying the Inter-American system: equal-

60. Footnote 60 appears at p. 147.

61. Footnote 61 appears at p. 147.

United States Neutrality Act.⁶² Furthermore, various treaties and international agreements, e.g., the United Nations Charter,⁶³ the Charter of the Organization of American States,⁶⁴ the Rio Treaty⁶⁵ and the

ity of states, the rule of law, pacific settlement, nonrecognition of territorial conquest, nonintervention, self-determination, the promotion of representative democracy, respect for human rights, an attack against one is an attack against all, and general responsibility for the raising of living standards. *Id.* at 43-67. Other commentators have discussed the Inter-American legal system. *See, e.g.,* Barnes, *Legal Issues in Inter-American Relations*, 11 *TEX. INT'L L. J.* 63 (1976); Godoy, *International Law and the New Political Movement in Latin America*, 54 *AM. SOC'Y INT'L L. PROC.* 96 (1960); Jacobini, *International Law in Latin America*, 7 *LAW. AM.* 605 (1975); Lacarte, *The Latin American System*, 53 *AM. SOC'Y INT'L L. PROC.* 62 (1959); and Valdez, *Legal Development and Social Change in Latin America and the Caribbean*, 62 *A.B.A.L.J.* 485 (1976).

60. *See* Mercado, *supra* note 26; Sumida, *The Right of Revolution: Implications For International Law and Order*, in *POWER AND LAW* 130-67 (Barker ed. 1971), reprinted in M. McDUGAL & W. REISMAN, *supra* note 57, at 167-69. *See also* M. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 45, at xi.

61. *See* C. FENWICK, *supra* note 59, at 4, 295; *see also* O.A.S. CHARTER, *infra* note 64, arts. 1, 5.

62. 18 U.S.C. § 960, 22 U.S.C. §§ 441, 461 (1982).

63. *See generally* U.N. CHARTER.

64. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 [hereinafter cited as O.A.S. CHARTER]. *See also* Amendment to O.A.S. CHARTER, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. Relevant provisions of the O.A.S. Charter follow:

Article 7

Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law.

Article 11

The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State.

Article 12

The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.

Article 13

Each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

Id.

65. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 [hereinafter cited as Rio Treaty]. Relevant provisions of the Rio Treaty follow:

Article 1

The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty.

Article 2

As a consequence of the principle set forth in the preceding Article, the High Contracting Parties undertake to submit every controversy which may arise be-

Pact of Bogota,⁶⁶ are relevant to the dispute.

The doctrine of nonintervention and related theories of intervention often come into conflict. Nonintervention was recognized in the 1830's under the Monroe Doctrine as prohibiting European interference in the Americas.⁶⁷ The Latin American nations have redefined the principle in Inter-American affairs: no American state shall intervene in the internal affairs of a fellow American state.⁶⁸ This principle has become clearly enshrined in numerous treaties and agreements both in

tween them to methods of peaceful settlement and to endeavor to settle any such controversy among themselves by means of the procedures in force in the Inter-American System before referring it to the General Assembly or the Security Council of the United Nations.

Article 3

1. The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

2. On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The Organ of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken.

Article 6

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

Id.

66. See generally American Treaty on Pacific Settlement, reprinted in *THE INTER-AMERICAN SYSTEM*, *infra* note 97, at 387 [hereinafter cited as Pact of Bogota]. The Pact of Bogota is cited here as evidence of customary Inter-American law. The United States never ratified the Pact of Bogota; the United States was not satisfied with its rules regarding diplomatic protection, including the rule of exhaustion of local remedies by aliens. See M. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 45, at 106.

67. See Note, *supra* note 34.

68. See O.A.S. CHARTER, *supra* note 64, art. 15. See also *id.* arts. 16-19:

Article 16

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.

the Americas and in the world community.⁶⁹

Interpretations on the legitimacy of intervention, on the other hand, abound.⁷⁰ If nonintervention is the stated rule, exceptions allowing intervention diminish it. The use of force for collective security measures,⁷¹ self-defense⁷² and humanitarian intervention⁷³ have in some cases been deemed legitimate, if exercised within the framework of necessity and proportionality.⁷⁴ Covert aid, however, provided for

Article 17

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.

Article 18

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.

Article 19

Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 15 and 17.

Id.

69. *Id.* See also U.N. CHARTER art. 2(7); C.G. FENWICK, *supra* note 59, at 61.

70. See J. Moore, *supra* note 55, at 3, 38, 111, 129. Letter from Sidney Hook to the Editor, N.Y. Times, Apr. 25, 1984, at A22, col. 3. Mr. Hook refers to the moral principles set forth by John Stuart Mill in 1859 in his essay on Non-Intervention:

To go to war for an idea, if the war is aggressive not defensive, is as criminal as to go to war for territory or for revenue; for it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect

The doctrine of non-intervention to be a legitimate principle of morality must be accepted by all governments. The despots must consent to be bound by it as the free states. Unless they do, the profession of it by free countries comes but to this miserable issue, that the wrong side may help the wrong side, but the right side may not help the right. Intervention to enforce non-intervention is always right, always moral, if not always prudent.

Id. (quoting Mill on nonintervention).

71. Collective security measures are sanctioned by the U.N. and O.A.S. Charters. See U.N. CHARTER art. 51; O.A.S. CHARTER, *supra* note 64, ch. v.

72. See U.N. CHARTER art. 51; O.A.S. CHARTER, *supra* note 64, art. 102.

73. Humanitarian intervention is a doctrine which justifies reasonable efforts by a nation-state to protect its nationals caught in life threatening and illegal foreign civil strife. Humanitarian intervention has gained gradual recognition in international law. For a collection of viewpoints on the subject, see HUMANITARIAN INTERVENTION AND THE U.N. (R. Lillich ed. 1973). See also Brownlie, *Thoughts on Kind-Hearted Gunmen*, *id.* at 139; Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859 (1981).

74. Necessity and proportionality are traditional components in determining the legitimacy of the use of force and self-defensive measures. These standards of customary

the purpose of overthrowing a legitimate government, violates international law.⁷⁵

Furthermore, aggression, or acts of aggression, are condemned universally in scholarly writings and international agreements.⁷⁶ For example, direct military intervention, as in the case of the Soviet Union's

international law predate the U.N. Charter. On this topic, see Brownlie, *The Use of Force in Self Defense*, 37 BRIT. Y.B. INT'L L. 183 (1961); M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217-18 (1961):

The Requirements of Self-Defense: Necessity and Proportionality

These preliminary distinctions make it possible now to focus more sharply upon the class of claims with which we are immediately concerned—claims to use highly intense coercion in defense against what is claimed to be impermissible initiating coercion. The principal requirements which the "customary law" of self-defense makes prerequisite to the lawful assertion of these claims are commonly summarized in terms of necessity and proportionality. For the protection of the general community against extravagant claims, the standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the *Caroline* case—that there must be shown a "necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." The requirement of proportionality which, as we shall develop below, is but another application of the principle of economy in coercion, is frequently expressed in equally abstract terms. One example is M. de Brouckère's formulation: "Legitimate defense implies the adoption of measures proportionate to the seriousness of the attack and justified by the imminence of the danger." There is, however, increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context. What remains to be stressed is that reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion.

Id.

75. Covert aid, if used for this purpose, violates articles 15-19 of the O.A.S. Charter (see *supra* note 68), as well as customary international law. On the topic of covert intervention, see Fatouros, *Remarks on Covert Intervention and International Law*, 69 AM. SOC'Y INT'L L. PROC. 192 (1975); Falk, *An Alternative to Covert Intervention*, *id.* at 195.

The United States, however, has expressed the view that the realities of political intercourse legitimate the use of covert aid as a foreign policy tool. See Smith, *Shultz and President Defend Aid for Rebels to Sandinistas*, N.Y. Times, Oct. 20, 1983, at A1, col. 3. For commentary on the covert aid policy, see Wicker, *A Policy of Hypocrisy*, *id.*, Oct. 21, 1983, at A35, col. 1; Reston, *Reagan on Subversion*, *id.*, Oct. 23, 1983, at E19, col. 1.

76. The prohibition against acts of aggression was enshrined in the United Nations Charter, which states that "[a]ll Members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." U.N. CHARTER art. 2(4).

invasion of Afghanistan, received nearly unanimous condemnation.⁷⁷

Apart from a doctrinal discussion of intervention, nonintervention and related legal concerns, customary Inter-American law must be taken into account. The self-perception of the American states is that they have developed their own historical system within the United Nations framework.⁷⁸ The norm of nonintervention is propounded to an extent not seen in other regional systems. The stated customary norms treat American states as equals and impart to each a duty not to intervene in the internal affairs of other American states.⁷⁹

The right of revolution and self-determination are further principles of international law applicable to the United States-Nicaragua conflict. The processes of change within nation-states and between nation-states are determined by a myriad of social, political, cultural, religious and economic conditions.⁸⁰ A right recognized under such a historical analysis is the right to revolution.⁸¹ This right is not codified in international law, but it is generally accepted as the right of a nation-state's people to overthrow a repressive government when all peaceful avenues of change are exhausted.⁸² This right to revolution can be manipulated either way if viewed through the East-West prism: the Marxist-Leninist right to revolution (i.e., violent, anti-capitalist, proletarian rebellion) versus the democratic right to revolution, or the right to democratic revolution (i.e., popular revolution followed by representative government).⁸³

An outgrowth of the right to revolution and recognition of the his-

77. See N.Y. Times, Feb. 17, 1983, at B11, col. 6; *id.*, Mar. 10, 1983, at A4, col. 1; Letter to the Editor from David Apter, *id.*, Oct. 23, 1983, at E18, col. 2 (entitled *Central America: U.S. on a Disaster Course*).

78. See generally H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 45; see also O.A.S. CHARTER, *supra* note 64, art. 1.

79. See O.A.S. CHARTER, *supra* note 64, art. 6.

80. See, e.g., Valdez, *Developing the Role of Law in Social Change: Past Endeavors and Future Opportunities in Latin America and the Caribbean*, 7 LAW. AM. 1 (1975).

81. See Mercado, *supra* note 26; see also H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 45, at xi.

82. See Fuentes, *High Noon in Latin America*, VANITY FAIR, Sept. 1983, at 45.

83. See Sumida, *supra* note 60. Marxists view revolution as the outgrowth of the class struggle; such revolutions have been characterized as leading to totalitarian regimes. See President Reagan's Address, *supra* note 11, at 3. Democratic revolution is characterized as placing on the new government the duty to hold free elections and allow for peaceful self-representation. *Id.*

President Reagan's characterization of the Contras as "freedom fighters" and the "moral equal of the founding fathers" expresses his view that they are entitled to revolt to press for democratic, representative government, as opposed to the present pseudo-democratic, pseudo-Marxist government.

torical processes of change is the right to self-determination.⁸⁴ This right is often viewed in the context of history progressing from acceptance of colonialism,⁸⁵ but it also applies to minority groups in situations of internal strife caused by repressive regimes.⁸⁶

One area of United States law with international implications is the Neutrality Act of 1794.⁸⁷ This Act bars the United States from exerting force with the purpose of damaging or toppling foreign governments.⁸⁸ In light of present United States policy in Nicaragua, suits have been instigated against various Reagan administration officials for supporting rebel groups seeking the overthrow of a foreign government.⁸⁹

84. The right of self-determination is generally recognized in international law. The O.A.S. Charter states that "[e]ach State has the right to develop its cultural, political and economic life freely and naturally." O.A.S. CHARTER, *supra* note 64, art. 13.

85. The General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961), states that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

86. For one account of the plight of Nicaragua's Miskito Indians, see Kennedy, *supra* note 16.

87. 18 U.S.C. § 960; 22 U.S.C. §§ 441, 461 (1982). See also Taylor, *War Powers: Back in Court*, N.Y. Times, Jan. 13, 1984, at A9, col. 1. See also generally 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).

88. The law states:

Whoever, within the United States, knowingly begins or sets foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.

18 U.S.C. § 960 (1982).

Another applicable provision in the context of neutrality is found in the Logan Act, 18 U.S.C. § 956 (1982) (relating to conspiracies to injure property of foreign governments), which states:

(a) If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

(b) Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy.

89. See, e.g., *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983); 577 F. Supp. 1449 (N.D. Cal.); 577 F. Supp. 1456 (N.D. Cal. 1984) (Government's argument that the Neu-

In addition to general principles of international law and specific United States law, various international treaties and agreements apply to the United States-Nicaragua conflict. The Charter of the United Nations states in relevant part that the use of force for aggressive purposes is prohibited in international affairs.⁹⁰ Although other provisions in the Charter permit collective security measures and self-defense,⁹¹ whether the Charter can reasonably be interpreted to allow internal interference by one United Nations signatory against another remains in controversy.⁹²

The Charter of the Organization of American States (O.A.S.) is the regional treaty enacted by the member states of the Western Hemisphere to work within the United Nations framework to promote collective regional action, problem solving and development.⁹³ The O.A.S. Charter states that "[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures,"⁹⁴ and condemns wars and acts of aggression.⁹⁵ With respect to intervention, the O.A.S. Charter states:

trality Act does not apply to Government officials, but only to private citizens, rejected; appeal pending); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983) (suit dismissed on political question grounds; appeal pending). The chance of these suits resulting in criminal charges against Administration officials is doubtful, however, because of past Congressional support for covert aid.

The Neutrality Act suits raise the issue whether Congress or the President has the power to engage in warring activities, as well as whether covert aid can be deemed an act of war. See Taylor, *supra* note 87; *Neutrality and Private Adventures*, N.Y. Times, Sept. 12, 1984, at B10, col. 4; *Allowing Civilian Aid to Latin War Efforts: Is it Legal?*, *id.*, Sept. 10, 1984, at A10, col. 3; *Moves to Evade Congress on Aid for Latins Seen*, *id.*, May 18, 1984, at A1, col. 2 ("The Reagan Administration is using a variety of methods to finance military and intelligence activities in Central America that bypass normal Congressional consideration and exceed spending limits set by Congress, according to Administration officials, members of Congress and classified documents").

90. U.N. CHARTER arts. 2(3)-(4).

91. *Id.* arts. 51-52.

92. The controversy centers around the difficulty of defining self-defense and collective security, and specifically whether anticipatory measures can be deemed defensive. Jeane Kirkpatrick, President Reagan's first appointee as the United States Permanent Representative to the United Nations and an ardent supporter of present United States policy, has addressed these policy issues in various speeches. See J. KIRKPATRICK, *THE REAGAN PHENOMENON* 183-212 (1981). For opposing views, see generally J. Moore, *supra* note 55.

93. O.A.S. CHARTER, *supra* note 64, chs. IV-VIII. For a discussion of the O.A.S., see Note, *A Microcosmic View of the O.A.S.: The Honduras-El Salvador Conflict*, 57 VA. L. REV. 291 (1971); Orfila, *At the Turning Point: Freedom and Justice in the Transformation of the Inter-American System*, in *THE INTER-AMERICAN SYSTEM*, *infra* note 97, at 293.

94. O.A.S. CHARTER, *supra* note 64, art. 5(g). With reference to pacific settlement of disputes, see articles 20-22:

95. Footnote 95 appears at p. 154.

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.⁹⁶

Other treaties and agreements which apply to the United States-Nicaragua conflict are the Declaration of Santiago, Chile on Representative Democracy,⁹⁷ the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty)⁹⁸ and the American Treaty on Pacific Settlement.⁹⁹

A final statement of international law with application to United States intervention in Nicaragua can be found in the 1949 decision of the International Court of Justice, in the *Corfu Channel* case, regarding the use of force:

Article 20

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations.

Article 21

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.

Article 22

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 some other peaceful procedure that will enable them to reach a solution.

Id. arts. 20-22.

95. *Id.* arts. 5(f), 15-19.

96. *Id.* art. 15.

97. See INTER-AM. INST. OF INT'L LEGAL STUD., THE INTER-AMERICAN SYSTEM 370-71 (1966). The Declaration of Santiago, Chile on Representative Democracy was announced at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959 (consultation meetings are held pursuant to chapter XI of the O.A.S. Charter). The Declaration states that the governments of the American republics should be the result of free elections; that freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime; and that the American states shall cooperate to strengthen democratic institutions within the framework of law to develop economic structures and achieve just and humane living conditions for their peoples. *Id.*

98. See Rio Treaty, *supra* note 65. Article 1 condemns war and threats or use of force. *Id.* art. 1. Article 9 characterizes aggression as unprovoked armed attack by a state against the territory, the people or the land, sea or air forces of a state; and invasion by the armed forces of a state across recognized boundaries. *Id.* art. 9.

99. See Pact of Bogota, *supra* note 66. The Pact of Bogota imposes a general obligation on American states to settle disputes by pacific means. *Id.* ch. 1.

The Court can only regard the alleged right to intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself.¹⁰⁰

LEGITIMACY OF CLAIMS AND ACTIONS

The application of the foregoing principles to the United States intervention in Nicaragua and to Nicaragua's actions with regard to its neighbors is a difficult task. Furthermore, the analysis may suffer due to the ideological predisposition of the examiner. The issues of intervention and counterintervention, however, must be examined in a principled manner. From a technical standpoint, both United States and Nicaraguan actions ignore treaty imperatives with regard to nonintervention and the settlement of disputes.¹⁰¹ The prohibition against the use of force, except in clearly defined situations, is unequivocal.¹⁰² Yet the analysis cannot end with a simple reverence for textual commandments.

Assuming that the United Nations and the O.A.S. Charters allow for collective actions in furtherance of their overall principles, United States intervention (e.g., efforts to halt the flow of arms) could be justified if it were shown that neighboring countries were in imminent danger of being overthrown due to Nicaraguan support.¹⁰³ First, it would have to be established that Nicaragua was supplying arms and providing a haven for guerrillas for the purpose of overthrowing the Salvadoran Government. The threat would have to be genuine by objective standards, not merely perceived. In addition, the threat to the Government of El Salvador would have to be primarily international rather than internal.¹⁰⁴ If Nicaragua's aid in the form of arms was small or

100. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Merits Judgment of Apr. 9).

101. Rio Treaty, *supra* note 65, arts. 1, 9; Pact of Bogota, *supra* note 66, ch. 1.

102. See *supra* note 101.

103. The threat to the Governments of El Salvador, Honduras and Guatemala posed by Nicaraguan aid to rebels is disputed. Jeane Kirkpatrick argues that Nicaraguan aid is extensive. J. KIRKPATRICK, *supra* note 92, at 186-87. For an opposing view, see Kinzer, *supra* note 4, at 73 (stating that there is no public evidence that the Sandinistas are sending large amounts of weapons to the Salvadoran guerrillas). See also *supra* note 37.

104. This issue is one of the most intensely debated in the Central American crisis. President Reagan asserts that outside influences are a primary cause of the unrest in El

insubstantial, and El Salvador's conflict was primarily an internal political upheaval, a United States response claiming Nicaraguan intervention in El Salvador would ring hollow.

The notion that intervention is justified in furtherance of collective security and to halt communist expansion in Central America depends upon the nature of the threat and the nature of the response.¹⁰⁵ Whether the threat is internal or external is a threshold consideration. The United States asserts that it is providing support to El Salvador, Guatemala and Honduras to help these countries defend themselves against communist guerrilla movements aided by Nicaragua, in other words an external threat.¹⁰⁶ To the extent that arms and aid are being provided for defensive measures against this external threat, they are appropriate. Under this approach, however, aid which goes beyond defensive aid is inappropriate.

To assess the legitimacy of the United States response the criteria of necessity and proportionality must be employed.¹⁰⁷ The necessity and proportionality of United States intervention in Nicaragua and Central America is difficult to gauge without accurate figures in terms of the arms, military advisors and general support Nicaragua is providing to rebel insurgencies.¹⁰⁸ State Department figures indicate that the

Salvador. See President Reagan's Address, *supra* note 11, at 5. This basic approach to Central America has received constant criticism. Carlos Fuentes, a Mexican novelist, argues that the cause of civil strife is primarily internal. See Fuentes, *Force Won't Work in Nicaragua*, N.Y. Times, July 24, 1983, at E21, col. 1.

105. One commentator, Viron P. Vaky, former United States Ambassador to Costa Rica, Columbia and Venezuela, and former Asst. Sec. of State for Inter-American Aff. (1978-79), has written:

[t]his uncertainty about the nature of the threat gives rise to a host of other questions, also unresolved. . . . What about . . . a 'political solution'? . . . What does one mean by 'negotiation'? And what really are our demands? . . . Why can't the White House separate the two—separate an immediate security threat from a long-term political objective? . . . Doesn't the Administration see that it would be more practical to negotiate now about concrete security problems, such as an end to cross-border subversion, and leave aside larger "internal" problems, such as the evolution of democracy, until they can be pursued by more appropriate strategies? Washington's argument has been that you cannot trust the Sandinistas to behave unless they "change their spots." It has therefore been reluctant even to enter negotiations. For the Administration, it is a matter of all or nothing.

Vaky, *What Do We Want in Nicaragua*, N.Y. Times, June 18, 1984, at A19, col. 2.

106. See President Reagan's Address, *supra* note 11.

107. See *supra* note 74.

108. See Kinzer, *supra* note 4, at 73. Supporters of the Reagan administration's policy cite to the shipment of arms in Nicaraguan boats across the Gulf of Fonseca, as well as the passage of Soviet and Cuban weapons through the mountains to Salvadoran and Guatemalan rebels, as evidence of Nicaragua's role as a weapons supplier to insurgents in

threat is precipitous; other figures indicate that Nicaraguan aid to Salvadoran rebels is minor.¹⁰⁹ According to these sources, the situation in El Salvador is not one of Nicaragua's or the Soviet's making.¹¹⁰

Military aid and intervention can be considered necessary and proportional if undertaken for defensive purposes and at the request of legitimate governments, although not if undertaken for aggressive purposes.¹¹¹ Given the numerous reports of United States covert aid and support of the Contras, whose known goal is the overthrow of the Sandinista regime and who regularly carry out aggressive and destabilizing military actions,¹¹² it can hardly be argued that such aid is for defensive or non-aggressive purposes.¹¹³ If United States covert aid can be shown to have the purpose of overthrowing a sovereign state government, and the Nicaraguan regime can be shown to be a legitimate government, then United States aid is clearly adverse to international law.¹¹⁴

Related to the issues of the necessity and proportionality of the United States actions, the degree of externality of the threat to El Salvador, and the legitimacy of covert aid in regard to Nicaragua, is the principle of self-determination.¹¹⁵ The sovereignty of the Sandinista regime, whether or not it fulfills the requirements of a democracy, is unquestioned. It is a duly recognized government,¹¹⁶ governing with the apparent support of the people.¹¹⁷ The Nicaraguans claim the inherent right to develop their internal system free from outside interference.¹¹⁸

Central America. See J. KIRKPATRICK, *supra* note 92, at 186-90.

109. See President Reagan's Address, *supra* note 11, at 5. See also Kinzer, *supra* note 4, at 73; *supra* note 37.

110. See Fuentes, *supra* notes 82, 104.

111. See O.A.S. CHARTER, *supra* note 64, chs. IV-VIII. The difficulty of assessing whether the coercive use of force is aggressive or defensive underlies the entire debate on Central America. The O.A.S. Charter proscribes aggressive intervention aimed at legitimate governments. *Id.*

112. See *supra* notes 40, 41, 44. See also *A Rebel Says C.I.A. Pledged Help in War Against Sandinistas*, N.Y. Times, Nov. 1, 1984, at A1, col. 1 (Edgar Chamorro, a former director of the Nicaraguan Democratic Force, disclosed the C.I.A.'s plan to use him in efforts to get additional funding approved by Congress).

113. See Kinzer, *Nicaraguan Rebels Predict Success With U.S. Aid*, N.Y. Times, Jan. 16, 1984, at A10, col. 1 [hereinafter cited as *Rebels*]. See also Gerth, *supra* note 40.

114. See *Rebels*, *supra* note 113. See also Kinzer, *supra* note 4, at 73.

115. See O.A.S. CHARTER, *supra* note 64, art. 16. The principle of self-determination has been invoked on behalf of the Contras as well as the Sandinistas. See Pastora, *supra* note 4. Various components of the Nicaraguan population are dissatisfied with the Sandinista regime, including the Contras of the north and south as well as the Miskito Indians, many of whom have been displaced by Sandinista programs. See *supra* note 16.

116. See President Reagan's Address, *supra* note 11, at 3.

117. See Pastora, *supra* note 4; Kinzer, *supra* note 4.

118. See Mercado, *supra* note 26.

This right is transgressed when foreign governments seek to undermine a popularly supported regime. The right of Nicaragua to supply arms and export subversion is not condoned in international law, but neither is the right of the United States to intervene, even by proxy (e.g., the Contras), with the purpose of affecting adversely the sovereignty of an independent state.¹¹⁹

POLITICAL REALITIES

Many commentators and concerned world citizens question the efficacy of international law when effective enforcement appears to be an unascertainable goal.¹²⁰ The Nicaraguan situation is such that the political realities of effective power guide the situation more than the norms of international law. The history of internal strife, the dense fog of East-West relations and the political necessities of strategic planning often eclipse the pristine realm of legal theories.

The history of fighting in Central America and Nicaragua, the specter of United States intervention¹²¹ and the lingering remembrance of the Somoza era infect the region with warm blood. The Somoza regime came to power in 1933 with the support of the United States, after several years of fighting in which United States Marines battled Nicaraguan rebels.¹²² The Somozas ruled for almost fifty years, and near the end of the last Somoza regime even the O.A.S. was calling for the ouster of General Anastasio Somoza Debayle due to his oppressive rule.¹²³

In addition to its scarred history, the contemporary situation in Central America and Nicaragua is marked by the shadow of the superpowers. The United States views the Marxist-Leninist Sandinista regime as another communist foothold in the hemisphere, while the Sovi-

119. The element of proportionality is raised with respect to the extent of United States involvement in Central America. Providing aid for defensive measures to the region's regimes is a proportional response to Nicaraguan aggression. Proportionality, however, is abused when specific tactics are employed to destabilize a government. See Gerth, *supra* note 40.

120. See Nimetz, *Respect World Law*, N.Y. Times, Apr. 19, 1984, at A19, col. 2. See also Apter, *supra* note 77. Mr. Apter is a Professor of Comparative Political and Social Development at Yale. He argues that direct intervention and destabilizing coercion destroy the balance and perspective necessary for properly functioning internal systems. *Id.* See also Taylor, *Squaring International Law With Political Imperatives*, N.Y. Times, Oct 30, 1983, at E2, col. 2. For a discussion on the relationship between international law and foreign policymaking, see Boyle, *International Law as a Basis for Conducting American Foreign Policy: 1972-1982*, 8 YALE J. WORLD. PUB. ORDER 103 (1981).

121. See Kinzer, *supra* note 4, at 22.

122. *Id.* at 24.

123. See N.Y. Times, June 24, 1979, at A1, col. 6.

ets view the United States actions as an exercise in gunboat policy to quash dialectic change.¹²⁴ Unfortunately for the Nicaraguan people, the East-West cloud will not go away.

In fitting the political realities into an international law framework, four types of strategies are exposed: diplomatic, ideological, economic and military.¹²⁵ It is customary for countries to pursue all four channels in their external policies, yet United States policies toward Nicaragua illustrate that diplomatic and ideological approaches are often deemed of limited efficacy.¹²⁶ In the economic realm, United States measures have been slanted against the Nicaraguans ever since the period following the revolution. Reconstruction aid was provided until 1981, but as the Reagan administration became displeased with the direction the Sandinistas were taking, economic cooperation was reduced.¹²⁷ Sugar imports were cut.¹²⁸ The principle of cooperation to

124. The Soviets view the United States role in Nicaragua as they viewed our role in Grenada; the Grenada invasion was called banditry and terrorism. *See id.*, Oct. 26, 1983, at A17, col. 1.

125. *See* M. McDUGAL & W. REISMAN, *supra* note 57, at 963.

126. *See* Gerth, *supra* note 40.

127. *See* President Reagan's Address, *supra* note 11, at 3. The Administration maintains that despite its initial large scale aid the Sandinistas spurned United States assistance. *Id.* *See* *As Economic Woes Mount, Managua Foresees Shortages*, N.Y. Times, Oct. 22, 1984, at A1, col. 5, for a detailed account of Nicaragua's economy and United States aid over the last ten years. One news report states that the economic relationship between the United States and Nicaragua is inconsistent, if not paradoxical:

Certainly the current relations between Washington and Managua show an unusual mix of truculence and diplomacy. In the last three years, as the Central Intelligence Agency has given money, arms, airplanes and advice to Nicaraguan rebels, in effect sponsoring a war against the Sandinistas, United States citizens and officials have traveled freely to Nicaragua. The State Department has denied visas to several Sandinista leaders, but permitted thousands of other Nicaraguans to travel in this country.

The Administration last year banned the import of most of Nicaragua's sugar crop, a severe economic blow, and has opposed loans to Managua by the World Bank and International Monetary Fund. But it has done nothing to keep out Nicaraguan bananas. While the Voice of America announced last week that it would begin increasing broadcasts into Nicaragua, Nicaragua's national airline, Aeronica, was still flying into Miami and dozens of American corporations continued to do business in Nicaragua.

Nicaragua Is Getting a Mix of Signals, *id.*, Sept. 9, 1984, at E4, col. 3. *See also id.*, Mar. 19, 1985, at A10, col. 4:

Although trade between the two countries has declined from the record high registered in 1981, the United States remains Nicaragua's leading trade partner, supplying about 20 percent of its imports and taking 19 percent of its exports, according to United States Embassy estimates. Virtually the entire Nicaraguan banana crop is sold in the United States and large amounts of Nicaraguan coffee, cotton, meat and shellfish also go to the American market.

128. Footnote 128 appears at p. 160.

strengthen the Inter-American economy was ignored.¹²⁹ Given the nature of the Inter-American situation, where United States aid, or lack thereof, has such a profound effect, economic coercion is a potent method for influencing states.¹³⁰

The United States policy has been described in one report as "2-Track," a diplomatic and military effort to harass the Sandinistas and to stop support of Salvadoran guerrillas.¹³¹ Furthermore, the United States asserts that neighboring governments should not have to fear the Nicaraguan Government.¹³² Apparently, Costa Rica and Honduras are suspicious of the Sandinistas.¹³³ If this element continues to emerge in United States policy, perpetual discord will undoubtedly be perceived in the region.

Further examples of United States military and economic strategy against Nicaragua, which clearly supercede diplomatic and ideological bounds, are the attack on a Nicaraguan oil depot by Contras under Central Intelligence Agency (C.I.A.) control and utilizing C.I.A. weapons,¹³⁴ and the mining of Nicaraguan harbors.¹³⁵ As a result of the oil refinery attack, Nicaragua's oil supply was cut drastically, causing severe shortages and rationing.¹³⁶ The result of the mining incident, beyond inhibiting Nicaragua's maritime trade for a limited period, was increased international tension and condemnation of United States support for the Contras.¹³⁷ These actions went beyond the stated objective of slowing the export of arms. Viewed in terms of proportionality, the oil refinery attack was an overt act with disruptive civil conse-

128. See *Sugar Imports From Central America*, DEP'T ST. BULL., Aug. 1983, at 85.

129. See O.A.S. CHARTER, *supra* note 64, arts. 4(a) & (e), 5(i). For related discussion, see *supra* note 127 and *infra* note 130.

The most recent example of the failure of the two countries to cooperate economically is the current United States trade embargo undertaken in May 1985. For several news articles on the embargo and United States-Nicaraguan trade, as well as the text of President Reagan's Executive Order initiating the embargo and his message to Congress, see N.Y. Times, May 2, 1985, at A1, col. 4 & A1, col. 1.

130. The realities of Nicaragua's troubled economy also suggest that it is susceptible to economic pressure. See Rohter, *Nicaragua Says Its Fiscal Shape is "Hellish,"* N.Y. Times, Feb. 10, 1985, at A9, col. 1 (citing inflation, the lack of economic growth and devaluation of the cordoba). See generally Lillich, *Economic Coercion and the International Legal Order*, 51 INT'L AFF. 358 (1975).

131. See Meislin, *Sandinistas Under Siege*, N.Y. Times, Oct. 17, 1983, at A1, col. 3.

132. *Id.*

133. *Id.*

134. See Gerth, *supra* note 40; *Oct. 10 Assault on Nicaraguans is Laid to C.I.A.*, N.Y. Times, Apr. 18, 1984, at A1, col. 2.

135. See *supra* note 41.

136. See *Nicaragua Tries to Cut Fuel Use*, N.Y. Times, Oct. 25, 1983, at A4, col. 3.

137. See *supra* note 41.

quences, clearly exceeding the realm of reasonable defensive action. The mining incident was an indiscriminate offensive action harming the interests, not only of Nicaragua, but also of several countries, some of whom are friends of the United States.

LEGAL RESPONSE

The two legal fora where the United States-Nicaragua dispute has been litigated are the International Court of Justice (I.C.J.)¹³⁸ and United States courts.¹³⁹ Nicaragua's action against the United States at the I.C.J. involved first an application for a temporary injunction restraining further paramilitary activities against Nicaragua,¹⁴⁰ and second a complaint for damages and a permanent order terminating such military actions.¹⁴¹ At the outset of the case jurisdictional issues were litigated extensively, resulting in a decision favorable to Nicaragua.¹⁴² Subsequently, the United States withdrew from the case, declaring that the I.C.J. should not be used as a propaganda forum for the determination of essentially political questions.¹⁴³ The United States further

138. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1984 I.C.J. 392 (Judgment of Nov. 26) [hereinafter cited as *Nicaragua v. U.S.*]. For a detailed discussion of the case, see Molloy, 6 N.Y.L. SCH. J. INT'L & COMP. L. 55 (1984).

The *Nicaragua* case has generated a plethora of response. See, e.g., *Scorning the World Court*, N.Y. Times, Jan. 20, 1985, § 4 (Week in Review), at E22, col. 1 (Editorial); *Don't Duck Our Day in Court*, *id.*, Nov. 28, 1984, at A26, col. 1 (Editorial); Letter from Allan Gerson to the Editor, *id.*, June 6, 1984, at A26, col. 5 (the writer was special assistant and counsel to Ambassador Kirkpatrick; he argued that the issue was inappropriate for the I.C.J.); Am. Soc. Int'l Law Release, Apr. 12, 1984, Wash., D.C. (the Society "deplores the recent action of the United States Government in attempting to withdraw from the jurisdiction of the [I.C.J.] 'disputes with any Central American state'").

139. See *supra* note 89.

140. *Nicaragua v. U.S.*, *supra* note 138, at 395.

141. *Id.* at 170-71 (Order of May 10).

142. *Id.* at 392 (Judgment of Nov. 26).

143. *U.S. Withdrawal From the Proceedings Initiated by Nicaragua in the International Court of Justice*, N.Y. Times, Jan. 19, 1985, at A4, col. 1 (stating that Nicaragua was misusing the Court, that the dispute was political rather than legal and that the evidence clearly supported the United States position):

The United States has decided not to participate in further proceedings in this case

[W]e have acted in the exercise of the inherent right of collective self-defense, enshrined in the United Nations Charter and the Rio Treaty. We have done so in the vital national security interests of the United States and in support of the peace and security of the hemisphere

The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution The [I.C.J.] was never intended to resolve issues of collective security and

stated that the United Nations Security Council and the O.A.S. are the proper fora to consider the dispute with Nicaragua.¹⁴⁴

The other judicial bodies to grapple with the Nicaragua dispute are United States courts. Litigation pursuant to the Neutrality Act has been instigated against several Government officials.¹⁴⁵ The outcome of these suits may not benefit Nicaragua or restrain United States officials, however, because the Act has traditionally been construed not to limit governmental covert aid to foreigners, i.e., the power of the President and the Federal Government to exercise the foreign affairs powers granted to them under the Constitution.¹⁴⁶

In sum, legal adjudication of the Nicaraguan dispute has been insubstantial. Given the United States withdrawal from the I.C.J. in that case and the United States courts' reluctance to construe the Neutrality Act broadly, it is doubtful whether any further legal decision will effectively address the dispute.

POLITICAL RESPONSE

The response of the United States populace to current Central American policy is mixed.¹⁴⁷ Many citizens support efforts to stem the

self-defense and is patently unsuited for such a role

The decision of Nov. 26 [the jurisdictional decision] represents an overreaching of the Court's limits, a departure from its tradition of judicial restraint and a risky venture into treacherous political waters

We are therefore taking steps to clarify our acceptance of the Court's compulsory jurisdiction in order to make explicit what we have understood from the beginning, namely that cases of this nature are not proper for adjudication by the Court.

Id.

One commentator, Prof. A. D'Amato, stated that the 1958 Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, 9 U.S.T. 449, T.I.A.S. No. 4024, 367 U.N.T.S. 3, was relevant to the jurisdictional issue before the I.C.J. He stated that treaty provisions guaranteeing freedom of commerce and navigation might be implicated, and that the United States should have at least remained in the lawsuit to argue the interpretation and applicability of the 1958 treaty. Letter from A. D'Amato to the Editor, N.Y. Times, Feb. 4, 1985, at A18, col. 3.

144. See *supra* note 143. Despite the United States withdrawal, the I.C.J. will hear Nicaragua's case. N.Y. Times, Jan. 25, 1985, at A9, col. 1.

145. See *supra* note 89.

146. U.S. CONST. art. II.

147. According to one source, the United States public does not favor intervention in Nicaragua. See Chaliand, *Central America's Unhappy Prospects*, WORLD PRESS REV., Jan. 1983, at 29-30. This attitude is evidenced by the popular slogan "Stop U.S. Intervention in Central America." In contrast, the State Department maintains that the United States will cease its defensive actions on behalf of other Central American regimes only when Nicaragua stops aiding neighboring insurgencies. This conservative view deems Nicaragua's role in Central America interventionist because Nicaragua supports

growth of Marxism in the hemisphere, and believe that Nicaragua de-

Salvadoran and Honduran rebels. See generally COMMUNISM IN CENTRAL AMERICA AND THE CARIBBEAN (R. Wesson ed. 1982).

News reports and commentary on the Nicaraguan conflict span the political spectrum, and focus on political, economic, social and religious issues more often than on legal issues. For a sampling, see generally Purcell, *The Value of Pressing Nicaragua*, N.Y. Times, Mar. 12, 1985, at A31, col. 2 (United States pressure does force the Sandinistas to make concessions and may bring about a settlement under the Contadora peace process); Lewis, *When Reason Flees*, id., Mar. 10, 1985, § 4 (Week in Review), at E23, col. 1 ("ideological fixation drives Reagan's policy on Nicaragua"); *Nicaragua Soap and Froth*, id., Mar. 3, 1985, § 4, at E20, col. 1 (Editorial); Muravchik, *Topple the Sandinistas*, id., at E21, col. 1 (communist regimes must be undermined); *Reagan Terms Nicaraguan Rebels 'Moral Equal' of Founding Fathers*, id., Mar. 2, 1985, at 1, col. 1; Kornbluh, *The Anti-Nicaragua Drive*, id., Mar. 1, 1985, at A27, col. 1 (citing poll showing 70% of United States citizens opposed to present policy regarding Nicaragua); Keller, *U.S. General Says Nicaragua Rebels Cannot Win Soon*, id., Feb. 28, 1985, at A1, col. 4 (Gen. Paul F. Gorman, former commander of United States military forces in Central America, said that in the "foreseeable future" the Nicaraguan rebels will be incapable of overthrowing the Sandinista Government); Rohter, *Nicaraguan Says it Will Suspend Arms Buildup*, id., col. 5 (Pres. Ortega announced that an indefinite moratorium on the acquisition of new arms systems was planned, and that 100 Cuban military advisers would be sent home); Steel, *Reagan Policy Moscow-Style*, id., Feb. 26, 1985, at A27, col. 1 (calling Reagan's policy one of "manifest destiny" resembling "Brezhnev's doctrine"); *Reagan Hurls the Harshes Broadside Yet at Nicaragua*, id., Feb. 24, 1985, at A27, col. 1; Safire, *Taking the War Private*, id., Feb. 14, 1985, at A3, col. 1; *A Middle Way in Nicaragua*, id., Feb. 13, 1985, at A26, col. 1 (Editorial); Bromwich, *No Aid—Covert or Overt*, id., Feb. 10, 1985, at E21, col. 2; Valenta, *Keep Pressing Managua*, id.; Silber, *Plain Talk Behind Closed Doors in Central America*, Wall St. J., Feb. 8, 1985, at 21, col. 3; Kenworthy, *Seeing Central America Without Blinders*, N.Y. Times, Jan. 17, 1985, at A23, col. 2; Cruz, *Managua's Central Problem*, id., Dec. 6, 1984, at A31, col. 1; Taubman, *U.S. Seeks to Sway Opinion on Nicaraguan Policy*, id., Nov. 14, 1984, at A10, col. 3; Massing, *Accepting the Sandinistas*, id., Oct. 2, 1984, at A31, col. 2; Bonner, *Sandinistas Aren't the Worst*, id., Sept., 14, 1984, at A31, col. 1; *Latin Policies Faulted in Ex-Officer's Report*, id., Sept. 12, 1984, at A9, col. 1; Smith, *Cuba—Time for a Thaw?*, id., July 29, 1984, § 6 (Magazine), at 22, 56 (noting a pledge by Castro to remove all Cuban military personnel provided the United States does the same; the pledge further calls for the imposition of an arms embargo for the region); Purcell, *To Win Liberals and Latins*, id., June 21, 1984, at A23, col. 2; *Democrats Press Nicaragua Issue*, Wall St. J., May 31, 1984, at 60 (citing Gallup Poll showing 49% of United States populace opposed to Reagan's Nicaraguan policy and 39% supportive of granting military aid); Crile, *What Are We Doing With The Contras*, N.Y. Times, May 18, 1984, at A31, col. 2; Ayres, *Study Faults U.S. on Its Latin Policy*, id., at A6, col. 3; *Security Adviser to Reagan Backs Covert Activities*, id., May 14, 1984, at A1, col. 6 (Security Advisor Robert C. McFarlane); Gerson, *U.S. Acts Lawfully*, id., May 4, 1984, at A31, col. 1; *Poll Finds a Lack of Support for Latin Policy*, id., Apr. 29, 1984, at A1, col. 3; *Explosion over Nicaragua*, TIME, Apr. 23, 1984, at 16 ("Congress bitterly rebukes Reagan after reports of CIA-directed minelaying"); *Episcopal Bishop Calls U.S. Latin Policy 'Illegal and Immoral'*, N.Y. Times, Apr. 23, 1984, at A9, col. 2; Getler, *Nicaraguan Minelaying Said to Harm U.S. Goals*, Wash. Post, Apr. 13, 1984, at A20, col. 2; Linowitz, *Support Contadora Diplomacy*, N.Y. Times, Mar. 20, 1984, at A23, col. 2.

stabilizes Central America, justifying retaliatory measures. Criticism of intervention is strong, however, both in public debate and in Congress.¹⁴⁸ In the past three years Congress has voted down continuing appropriations for covert aid to the Contras, with some members stating that the money should go to Central American governments who can legitimately use the money for the purpose of stopping the arms flow to guerrillas, and not to the Contras.¹⁴⁹ Public opinion, presumably a motivating force behind recent congressional action, is against covert aid and intervention, and reflects dissatisfaction with President Reagan's present policy.¹⁵⁰

The response of Nicaraguans to United States intervention is difficult to gauge, due in part to press censorship.¹⁵¹ The one opposition

148. See *Central America's Unhappy Prospects*, *supra* note 147, at 30. The Senate voted for continued aid for covert operations in Nicaragua in November 1983. The House, however, voted against continued support for Nicaraguan rebels. See Tolchin, *Secret U.S. Action Gets Senate Approval*, N.Y. Times, Nov. 4, 1983, at A1, col. 6.

149. See *House Decisively Defeats All Plans By Both Parties To Aid Rebels in Nicaragua*, N.Y. Times, Apr. 25, 1985, at A1, col. 4; Smith, *House Again Votes Against Financing Nicaragua Rebels*, *id.*, Oct. 21, 1983, at A1, col. 6. According to Rep. Michael D. Barnes (D-Md): "Congress has voted four times in opposition to this program, and there is no evidence that that will change . . . public opinion is very strong in opposition to this program." *President Denounces Sandinistas*, Wash. Post, Feb. 17, 1985, at A1, col. 1.

With Congressional resistance to continued funding of the Contras, the Administration has considered other means for providing support. A recent article discussed the possibility of using "friendly Asian countries to help channel aid to the Nicaraguan rebels." Weinraub, *U.S. is Considering Having Asians Aid Nicaragua Rebels*, N.Y. Times, Mar. 6, 1985, at A1, col. 1. See also Taubman, *Nicaragua Rebels Reported to Have New Flow of Arms*, *id.*, Jan. 13, 1985, § 1, at 1, col. 6 (citing Honduran, Salvadoran and Israeli aid to the rebels, as well as Soviet aid to the Sandinistas).

150. A recent Washington Post-ABC News poll indicated that 70% of the American population disapproves of efforts to overthrow the Nicaraguan Government, while only twelve percent favor the idea. Lewis, *supra* note 147.

One result of public sentiment against funding the Contras was the 1983 Boland amendment, which prohibited aid for military purposes. See Intelligence Authorization Act for Fiscal 1984, Pub. L. 98-215, § 108, 97 Stat. 1473 (1983).

151. See Russell, *supra* note 1, at 36-37; *supra* note 14. One Nicaraguan has written: I took part in the Nicaraguan revolution, fighting against the dictator Anastasio Somoza Debayle, and served in the Sandinista Government until May 1982, when I resigned in dissent. I recently returned to Managua after two years of self-imposed exile and met with a large number of leaders from the legitimate opposition—people from independent labor unions, businessmen, farmers, intellectuals, politicians and church leaders. Virtually all of them seek change in the current regime, but through political, not military means—and through a Nicaraguan process, not one driven by foreign interests.

Cesar, *Nicaragua Must Seek Firm Independence*, N.Y. Times, Apr. 23, 1984, at A15, col. 1. See also *Sandinista Government Viewed as Leftist Hybrid*, *id.*, Mar. 23, 1985, at 3, col. 1.

newspaper is the target of continuing political pressure and efforts to curb its opposing voice.¹⁵² In accounts by sources both supportive and critical of the Sandinistas, however, Nicaraguan public support is behind the Government.¹⁵³ The anti-yanqui sentiment which fermented during the Somoza years and mobilized the revolution is still strong, and is presently a source of support for the Sandinistas.

Although the Sandinistas rule with the general support of the masses, many middle and upper class Nicaraguans are dissatisfied.¹⁵⁴ Apparently, people have fled the country, and those who remain recognize the limitations on their capitalist freedoms. Despite the fact that approximately sixty percent of property and business interests are still privately owned, government rationing of basic resources (e.g., oil and paper) and food items (e.g., eggs) is commonplace.¹⁵⁵ Additionally, the plight of many of Nicaragua's Indians has been disastrous.

One contention raised in the United States press is that support for the revolution is strongest among the young, while the older and wiser Nicaraguans realize that the Sandinistas have betrayed the original premises of the revolution.¹⁵⁶ According to this report, older Nicaraguans are for the present resigned to the Sandinistas.¹⁵⁷ This is

152. *Id.*

153. See Vaky, *supra* note 27, at 59-60; Kinzer, *supra* note 4, at 73; Mercado, *supra* note 26; *supra* note 13.

154. See Russell, *supra* note 1, at 35, 40. See also *Central America: The Second Spanish Civil War*, *supra* note 15, at 37-38.

According to Senator Kennedy, Indians have been grossly mistreated by the Sandinistas, and form a large part of the resistance. See *supra* note 16. A contrary assessment of the situation regarding Nicaraguan Indians follows:

Several thousand Miskitos were relocated in resettlement areas—not "detention camps"—from war zones in 1982 and later as a matter of military necessity. But, as an experienced America's [sic] Watch observer says, it is "blatantly false" to suggest that such actions are intended "to wipe out an entire culture." Neither their language, their religion nor their identity is being destroyed. Possibly 25 Miskitos—not "thousands"—were murdered, and some were mistreated and arbitrarily arrested at the height of the tension. A handful are still in jail, following an amnesty last year, when some 300 were released.

Oakes, *Reagan's Version of Truth*, N.Y. Times, July 9, 1984, at A19, col. 2. Mr. Oakes states that President Reagan's charge that there "has been an attempt [by the Sandinistas] to wipe out an entire culture, the Miskito Indians, thousands of whom have been slaughtered or herded into concentration camps" is false. *Id.*

155. See Russell, *supra* note 1, at 34, 37. See also *Central America: The Second Spanish Civil War*, *supra* note 15, at 37.

156. See Russell, *supra* note 1. This situation may have changed with the enactment of the draft law in Nicaragua. Many families are resisting the draft, and youth are hiding in various towns. *Town Battles Military Draft in Nicaragua*, N.Y. Times, Jan. 2, 1985, at A9, col. 1.

157. See Russell, *supra* note 1.

similar to the position held by the counterinsurgents in the south, formerly led by Commander Zero, who criticize the Sandinistas for betraying democratic principles in exchange for Marxist-Leninist totalitarian control.¹⁵⁸

International response to the Nicaraguan situation varies.¹⁵⁹ Many

158. See Pastora, *supra* note 4.

159. See, e.g., *Nicaraguan Hailed in Brazil*, N.Y. Times, Mar. 19, 1985, at A11, col. 5.

One element of response to the United States-Nicaragua conflict pertains to human rights. Americas Watch, a private human rights group, criticized in a recent report the American-backed Nicaraguan rebels. "The report, made public today, adds that the largest rebel organization, the Nicaraguan Democratic Force, has systematically executed its prisoners, including wounded Sandinista soldiers." Brinkley, *Rights Report on Nicaragua Cites Recent Rebel Atrocities*, *id.*, Mar. 6, 1985, at A10, col. 1. The report stated that throughout 1984 and as recently as early 1985, "the anti-Government rebels have kidnapped, tortured, raped, mutilated and murdered numerous unarmed civilians, including women and children 'who were fleeing.'" *Id.*

The Americas Watch report also stated that the Nicaraguan Government has been guilty of major human rights abuses, particularly with regard to Miskito Indians (deaths and disappearances), but that since 1982 there has been a sharp decline in such abuses. *Id.* See also *Nicaragua*, AMNESTY ACTION, Mar. 1983, at 8.

Other groups have conducted studies of the human rights situation in Nicaragua. See *Nicaragua Rebels Accused of Abuses*, N.Y. Times, Mar. 7, 1985, at A1, col. 2; *U.S. Groups Conduct Interviews*, *id.*, at A12, col. 6. See also AMNESTY INT'L, *THE HUMAN RIGHTS SITUATION IN NICARAGUA* (1983) (prepared statement presented to the House Subcommittee on Human Rights and Int'l Organizations on Sept. 15, 1983).

The response of foreign governments also varies. One writer who was part of a Scandinavian peace effort represents that several countries (e.g., Norway, Sweden, France, Italy, Greece, Austria and Finland) support the present Nicaraguan Government. See Letter from George Wald to the Editor, N.Y. Times, Mar. 8, 1985, at A34, col. 3. See also Brinkley, *Costa Rica Angry With Nicaraguans*, *id.*, Feb. 28, 1985, at A13, col. 1; Dobbs, *Sandinista Leaders Seek Support from West European Countries*, Wash. Post, Feb. 17, 1985, at A28, col. 1 ("both France and Spain have good financial and commercial relations with the Nicaraguan Government"); Spaniard Sees *Nicaragua on Democratic Path*, N.Y. Times, Jan. 25, 1985, at A7, col. 1; Iran Premier Visits *Nicaragua*, *id.*, Jan. 24, 1985, at A6, col. 2; *Venezuelan Cautions Reagan on Use of Military Force*, *id.*, Dec. 5, 1984, at A3, col. 3; *Russians Accuse U.S. of Seeking to Meddle in Nicaraguan Affairs*, *id.*, Nov. 16, 1984, at A12, col. 4; *Mexico Denies Shifting Its Latin Policy*, *id.*, Aug. 8, 1984, at A3, col. 3; Ferrer, *Save Central America*, *id.*, June 11, 1984, at A19, col. 3 (José Figueres Ferrer, former Costa Rican President (1948-49, 1953-58, 1970-74)); *Nicaragua and Costa Rica Sign Border Pact*, *id.*, May 17, 1984, at A17, col. 1; *Excerpts From Address by Mexican to Congress*, *id.*, at A14, col. 1 ("we therefore reject, without exception, all military plans that would seriously endanger the security and development of the region") (President de la Madrid); *Blunt Talks Mark Reagan's Welcome for Mexico's Chief*, *id.*, May 16, 1984, at A1, col. 6; *Excerpts From Remarks by the Two Presidents*, *id.*, at A4, col. 1 (following are remarks of Mexico's President Miguel de la Madrid:

In peacetime, we must also support the Central Americans in their social and economic development programs and encourage their efforts to build democracy and respect human rights. To that end, let us apply the principles and rules of international law established by the countries of the American continent: self-

in Europe are critical of United States actions, but there is also criticism of the present Sandinista approach to governing.¹⁶⁰ The members of the Contadora group oppose United States intervention and urge a political settlement sponsored by less interested parties.¹⁶¹ The O.A.S. position on the fighting in Central America and United States policy favors the proposals of the Contadora group.¹⁶²

The response of religious institutions to Nicaragua and its dispute with the United States is complex.¹⁶³ For example, the Catholic Church, while reiterating its primary concerns for human dignity, peace and the sanctity of life, has recently ordered priests who hold high level positions in the Sandinista Government to desist from ministerial functions.¹⁶⁴ Archbishop Miguel Obando y Bravo of Managua has been a constant critic of the Marxist direction of the present Government, and as a high ranking Catholic leader presumably speaks for many Nicaraguans.¹⁶⁵ On the other hand, many Catholics, including

determination, non-intervention, equality of states before the law, peaceful solution of conflicts, and international cooperation for development);

Burstin, *Reagan's Salvador Ally*, *id.*, May 15, 1984, at A29, col. 1 (Luis Burstin, Costa Rican Sec. of Information from 1974-78); *Ireland's Premier Chides President*, *id.*, June 4, 1984, at A1, col. 2; Fuentes, *Don't Push Mexico*, *id.*, Apr. 24, 1984, at A27, col. 1; *Costa Rican Aides Said to Get Bribes*, *id.*, Apr. 23, 1984, at A9, col. 1; *Mitterand Advises Congress on Latin America*, *id.*, Mar. 23, 1984, at A6, col. 3.

160. See Kinzer, *Disillusion With Nicaragua Grows in Europe*, N.Y. Times, Nov. 16, 1983, at A1, col. 3.

161. The Contadora group consists of Mexico, Panama, Columbia and Venezuela. The foreign ministers of each country met in 1983 to begin working on a negotiated solution to Central America's conflicts. See Meislin, *Mexican Cautions U.S. on Latin Moves*, *id.*, Feb. 8, 1984, at A3, col. 3.

162. See Smith, *Latin Nations Plan Nonaggression Pact*, *id.*, Nov. 16, 1983, at A3, col. 4 [hereinafter cited as *Latin Nations*]. See also Smith, *U.S. Defending Grenada Actions Before O.A.S.*, *id.*, Nov. 15, 1983, at A1, col. 5.

163. See Novak, *The Case Against Liberation Theology*, *id.*, Oct. 21, 1984, at 41 (Magazine); Lowenstein, *Nicaragua Fights Church's Growing Influence*, Wall St. J., May 7, 1984, at 36 ("the Sandinistas and the church seem to regard themselves as rivals for the moral leadership of Nicaragua"); *Prelate Assails Sandinistas as Conflict Sharpens*, N.Y. Times, May 22, 1984, at A8, col. 2.

164. The Rev. Fernando Cardenal was dismissed by the Jesuit order in Rome for disobeying an edict of Pope John Paul II barring priests from holding public office. Mott, *The Church Cuts off a Sandinista Priest*, N.Y. Times, Dec. 16, 1984, at E5, col. 1. The other priests are Ernesto Cardenal, see *infra* note 167, the Foreign Minister Miguel d'Escoto Brockman and Edgar Parrales, representative to the O.A.S. N.Y. Times, Dec. 11, 1984, at A3, col. 1.

165. See Kinzer, *Nicaragua's Combative Bishop*, N.Y. Times, Nov. 18, 1984, at 75 (Magazine); Rohrer, *Sandinista Meets 5 U.S. Prelates*, *id.*, Feb. 27, 1985, at A6, col. 1. In a meeting with President Ortega American bishops discussed several issues, including "restrictive residency regulations for foreign clerics working in Nicaragua and the restoration of the church's right to broadcast masses and religious instruction on radio and

nuns and priests, are deeply influenced by liberation theology,¹⁶⁶ which focuses on the poor and preaches the gospel of liberation from oppression. Many adherents of liberation theology side with the Sandinista Government as a condemnation of the oppression of the past.¹⁶⁷

A final barometer of political response within the United States to the dispute is the recent report of the President's Commission on Central America.¹⁶⁸ The Kissinger Report calls for massive economic and military aid to friendly Central American regimes, as well as human rights improvements in El Salvador.¹⁶⁹ The Report appears to favor continued covert aid to the Contras, validating President Reagan's anti-Sandinista policy.¹⁷⁰ Furthermore, the Kissinger Report stresses that Nicaraguan aid to Salvadoran and Honduran rebels must be stopped.¹⁷¹

HISTORICAL AND CONTEMPORARY ANALOGIES

Several historical and contemporary examples of prior United States intervention in foreign conflicts are analogous to Nicaragua. None of these examples are directly parallel, but comparison raises similar legal and political issues. Taken chronologically, they are Vietnam, Cuba, the Dominican Republic, Chile and Grenada.

television." *Id.* See also *Leading Nicaraguan Bishop Says Sandinistas Impose 'Oppressions,' id.*, Oct. 25, 1984, at A1, col. 1 (Bishop Pablo Antonio Vega, Pres. of Nicaragua's Conference of Catholic Bishops).

166. See G. GUTIÉRREZ, *THE THEOLOGY OF LIBERATION* (1971). See also Novak, *supra* note 163 ("liberation theology is a method of defining Christian faith in the political context of underdevelopment, in a partisan spirit committed to action, . . . it [cannot] be universally defined as Marxism. Yet it gains its excitement from flirting with Marxist thought and speech, and from its hostility to the 'North'").

For other works on the subject, see J. SEGUNDO, *A THEOLOGY FOR ARTISANS OF A NEW HUMANITY* (1973); J. BONINO, *CHRISTIANS AND MARXISTS: THE MUTUAL CHALLENGE TO REVOLUTION* (1976); H. ASSMANN, *A THEOLOGY FOR A NOMAD CHURCH* (1976); A. FIERRO, *THE MILITANT GOSPEL* (1977); and L. BOFF, *JESUS CHRIST LIBERATOR* (1978).

167. See McKiernan, *Shrines and Slogans: The Divided Church in Nicaragua*, *MOTHER JONES*, Apr. 1984, at 28, for a thorough discussion of the position of Nicaragua's liberation theology adherents, as well as those who follow closely the official church hierarchy.

Father Ernesto Cardenal, a poet and the Minister of Culture of the Sandinista Government, was also ordered to quit the Marxist-inspired Government by Pope John Paul II. See Novak, *supra* note 163. Cardenal's poetry illuminates the fusion of religious and social thought that characterizes many liberation theologians. See generally E. CARDENAL, *APOCALYPSE AND OTHER POEMS* (1977).

168. See Report of the National Bipartisan Commission on Central America (Jan. 1984) [hereinafter cited as Kissinger Report].

169. *Id.* at 53, 103-04.

170. *Id.* at 101, 103.

171. *Id.* at 25-32.

The United States goal in supporting the South Vietnamese was to check North Vietnamese communist aggression, and to inhibit Chinese and Soviet influence from spreading in eastern Asia.¹⁷² Many commentators believe that United States goals in Vietnam were roughly similar to those in Nicaragua, and that Vietnam is both a precedent and a warning with respect to further action in Nicaragua.¹⁷³ Proximity is one major difference between the two conflicts; another difference is the overt versus covert nature of involvement, but the striking parallel is United States support of non-communist forces against what is presumed to be international communism.

Many critics of United States policy toward Nicaragua warn of "another Vietnam."¹⁷⁴ The Reagan administration, sensitive to this criticism, denies any intention to invade Nicaragua.¹⁷⁵ The Vietnam episode, however, illustrates that involvement which at first is considered minor and advisory can gradually escalate into full-scale military involvement. The critics of present United States policy fear a similar trap; small scale preliminary aid and the placement of advisory personnel gradually increasing into a "no return" policy.¹⁷⁶

In the geopolitical sphere, the Vietnam analogy illustrates how the Soviet Union and United States accuse each other of hegemony, expansionism and imperialism, politicizing legal issues. In Nicaragua, the United States wants to prevent "another Cuba," as they wanted to prevent an undivided communist Vietnam. The loss of another domino cannot be tolerated.¹⁷⁷ Critics of this approach warn, however, that the United States must learn to differentiate internal civil strife from aggressive international war, and not become involved in defending or opposing a regime when genuine national interests are absent and international law counsels against such intervention.¹⁷⁸

A second analogy with reference to United States policy toward Nicaragua is Cuba. The Cuban revolution of 1959 and Cuba's subsequent Marxist orientation were feared by the United States and other

172. See *Some Applied History for Central America*, N.Y. Times, Aug. 21, 1983, at E5, col. 1 (subtitled *A Symposium: Vietnam-Era Aides Explore Parallels and Differences*). For a discussion of the Vietnam conflict, see Lobel, *The Legality of the United States Involvement in Vietnam—A Pragmatic Approach*, 23 U. MIAMI L. REV. 808 (1969).

173. *Some Applied History for Central America*, *supra* note 172. See also *supra* note 77; Podhoretz, *supra* note 24.

174. See *Some Applied History for Central America*, *supra* note 172.

175. See President Reagan's Address, *supra* note 11, at 3.

176. See *Some Applied History for Central America*, *supra* note 172.

177. *Id.*

178. See, e.g., Ullman, *World Court Evasion*, N.Y. Times, Apr. 11, 1984, at A27, col. 1; *supra* note 105.

American states as the first Soviet foothold in the Western Hemisphere, precisely what the Inter-American system was supposed to prevent.¹⁷⁹ The United States succeeded in ostracizing Cuba in the Western arena, but Cuba nonetheless became a Soviet satellite state. The United States fears in Nicaragua what has already occurred in Cuba, another Marxist revolution whose leaders look toward Moscow for ideological and economic support.¹⁸⁰ One of the founding principles of the Inter-American system was the elimination of European and communist influence.¹⁸¹ The "loss" of Nicaragua is viewed as a second Soviet stronghold in the Western Hemisphere.¹⁸²

United States policy toward Cuba has included various strategic elements. Diplomatically and economically, the United States has attempted to isolate Cuba, in the process terminating a trade relationship which had lasted for years.¹⁸³ Ideologically, the United States has tried to expose Cuba as a repressed society.¹⁸⁴ Militarily, it has attempted several strategic actions, including the Bay of Pigs invasion and the naval quarantine during the Cuban Missile Crisis.¹⁸⁵ Critics of the policy toward Cuba argue that all the United States will gain by isolating Cuba is a communist Cuba with more resolve, and that if similar policies are continued toward Nicaragua, a stronger Sandinista regime with a legitimate anti-United States orientation will result.¹⁸⁶ According to these critics, present United States policies will force the Sandinistas into the Soviet camp.

A third comparative example of United States intervention in foreign civil strife is the Dominican Republic crisis of 1965.¹⁸⁷ The Dominican Government, while undergoing a communist insurgency declared that it could no longer guarantee the safety of United States nationals, and requested United States assistance in quelling the coup.¹⁸⁸ An intervention by United States Marines ensued and the re-

179. See Kissinger Report, *supra* note 168, at 25. Professor Falk addressed the United States-Cuba conflict in Falk, *American Intervention in Cuba and the Rule of Law*, 22 OHIO ST. L. J. 546 (1961), determining that the United States conduct was "awkward and lawless." *Id.* at 584.

180. Kissinger Report, *supra* note 168, at 120.

181. *Id.* at 13 (referring to the hemispheric commitment to independence and liberty).

182. *Id.* at 93.

183. See Falk, *supra* note 179.

184. *Id.*

185. *Id.*

186. See Fuentes, *supra* note 104.

187. See generally THE DOMINICAN REPUBLIC CRISIS 1965 (J. Carey ed. 1967).

188. *Id.* at 7.

bellion was stopped.¹⁸⁹ The protection of United States nationals was the primary legal rationale given,¹⁹⁰ but subsequently it was admitted that suppressing the communist uprising and avoiding another Cuba were important factors in the decision to intervene.¹⁹¹

A major difference between the Dominican Republic crisis and the present Nicaraguan conflict is that in the former an existing government asked for United States assistance, while in the latter the United States is supporting a rebel force seeking to overthrow a target government. The motive, however, is similar. The purpose of arming Nicaraguan rebels who wish to depose the Sandinista regime is to eliminate a communist government.¹⁹² Overt United States intervention in Nicaragua could not proceed on a rationale similar to the Dominican intervention because there is no regime asking for assistance. In the Dominican Republic the United States succeeded in stopping an attempted coup; it feared another regime fashioned after Castro's Cuba. In Nicaragua the revolution has already occurred, it is too late for preventive measures, so the effort now is to harass the supposedly destabilizing regime.

The assassination of Salvador Allende in Chile in 1973 and the military coup disposing of the democratically elected communist regime, provide the fourth analogous situation to United States intervention in Nicaragua.¹⁹³ No formal proof that the United States engineered the fall of Allende has been raised, yet a covert role is plainly acknowledged.¹⁹⁴ The allegation asserts that the C.I.A. was involved in agitation and that United States companies gave money to support the anti-communist press.¹⁹⁵ In Nicaragua, as in Chile, United States efforts to exacerbate internal political strife to the detriment of a legitimate government raise serious legal questions.¹⁹⁶ Political necessity is

189. *Id.*

190. *Id.*

191. *Id.* Then Secretary of State Dean Rusk stated:

[w]hat began . . . as a democratic revolution was taken over by Communist conspirators who had been trained for and had carefully planned the operation. Had they succeeded in establishing a government, the Communist seizure of power would, in all likelihood, have been irreversible, thus frustrating the declared purposes of the OAS.

Id.

192. See Gerth, *supra* note 40. The fact that the United States is providing substantial aid to a group of rebels who seek the overthrow of the Sandinistas, and use every means at their disposal to do so, makes President Reagan's argument that we do not seek to overthrow the Sandinistas untenable. *Id.*

193. See M. McDUGAL & W. REISMAN, *supra* note 57, at 1022-26.

194. *Id.*

195. *Id.*

196. See Gerth, *supra* note 40.

always available as a policy rationale, but the legality of intervention through covert aid and destabilizing tactics is questionable under customary standards of behavior as well as applicable treaties.¹⁹⁷

A final analogy to United States intervention in Nicaragua is the contemporary situation in Grenada.¹⁹⁸ The invasion of Grenada was waged with the stated purpose of protecting American nationals¹⁹⁹ (in other words humanitarian intervention),²⁰⁰ and as an affirmative response to the plea of the nations of the Organization of Eastern Caribbean States for protection from a dangerous neighbor.²⁰¹ Another rationale was to halt the consolidation of a radical leftist government that seized power in a bloody coup.²⁰² As news of the invasion slowly surfaced, however, additional reasons were revealed.²⁰³ Halting the build-up of Cuban and Soviet military installations,²⁰⁴ foreclosing the possibility of another hostage crisis and protecting against the loss of life to United States nationals abroad, as had recently occurred due to the bombings in Beirut, were major factors in the United States decision.²⁰⁵

Factual differences exist between the United States intervention in Grenada and Nicaragua, but the anti-Cuban and anti-Soviet motive is identical.²⁰⁶ The fundamental foreign policy concern is to halt commu-

197. See M. McDUGAL & W. REISMAN, *supra* note 57, at 1022. Former President Ford, in responding to a question about the United States role in Chile, stated in a news conference that "[i]t's a recognized fact that historically as well as presently, such actions are taken in the best interests of the countries involved." *Id.*

198. See *U.S. Defending Grenada Action Before O.A.S.*, *supra* note 162.

199. See Letter to the Editor from Representative Edward Boland, N.Y. Times, Nov. 17, 1983, at A26, col. 3 (subtitled *Grenada Invasion: A Legitimate Rescue Mission*; Representative Boland is Chairman of the House Permanent Select Committee on Intelligence). For a discussion of the issue of protection of nationals abroad, see Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, 21 VA. J. INT'L L. 485 (1981).

200. See *supra* note 73.

201. Among the members of the Organization of Eastern Caribbean States are Grenada, St. Kitts-Nevis, Montserrat, Antigua, St. Lucia, Dominica and St. Vincent. These nations requested United States aid in responding to the Grenada coup. See *Text of Reagan's Announcement of Invasion*, N.Y. Times, Oct. 26, 1983, at A16, col. 1. See also Taylor, *Legality of Grenada Attack Disputed*, *id.*, at A19, col. 1. It is noteworthy that another reason for the Grenada invasion was that Grenada's Governor General, Paul Scoon, requested United States aid. See *U.S. Acts Lawfully*, *id.*, May 4, 1984, at A31, col. 1.

202. See *Text of Reagan's Announcement of Invasion*, *supra* note 201.

203. See Gwertzman, *Steps to the Invasion: No More 'Paper Tiger'*, N.Y. Times, Oct. 30, 1983, at A1, col. 2.

204. *Id.*

205. See Steel, *Reveling in Military Power*, *id.*, Oct. 30, 1983, at E19, col. 1.

206. See Gwertzman, *supra* note 203.

nist expansion in the Western Hemisphere.²⁰⁷ Grenada illustrates that at times United States adherence to the doctrine of nonintervention is diminished due to perceived political imperatives. Many commentators believe that the effect on the international legal system is detrimental.²⁰⁸

These examples of United States intervention in foreign civil strife raise various standards for an assessment of foreign intervention. In the Dominican Republic and Vietnam, the United States acted at the request of target states. In Cuba, Grenada and Chile, the United States acted in response to perceived threats to national and regional interests. The Grenadian situation raises questions with regard to the sufficiency of evidence needed to justify a claim of necessity in protecting the lives of United States nationals, and whether invasion of a target state is justified even at the request of neighboring states.²⁰⁹ If United States intervention can be justified by regional fear and apprehension of a particular regime, a similar rationale could be used to justify United States intervention in Nicaragua at the request of Honduras, Guatemala, El Salvador and Costa Rica.

Argument by analogy in international law is limited by deviating factual situations. The protection of nationals abroad and the necessity of providing aid to nation-states for self-defense and regional security are rationales which have been raised to justify United States intervention in internal strife, perhaps legally.²¹⁰ On the other hand, intervention in foreign civil strife for the purpose of promoting United States interests is often without legitimate legal justification.²¹¹

ALTERNATIVE SETTLEMENT POSSIBILITIES

International dispute resolution imposes on all parties a duty to negotiate in good faith and to seek a fair settlement. Given varying ideological cross-purposes, difficulties abound. In Central America, United States offers to negotiate have been met by Nicaraguan mis-

207. See *The Grenada High*, N.Y. Times, Nov. 2, 1983, at A30, col. 1 (Editorial).

208. See Wicker, *Is Nicaragua Next?*, *id.*, Oct. 31, 1983, at A14, col. 1. See also Lewis, *President Pyrrhus*, *id.*, Oct. 27, 1983, at A31, col. 1.

209. See Boland, *supra* note 199.

210. *Id.*; see also J. Carey, *supra* note 187.

211. The Grenada invasion is an example of intervention with a plausible legal justification. See Boland, *supra* note 199. United States intervention in Central America, however, lacks the clear legal basis (i.e., humanitarian intervention) that Grenada had. At a recent O.A.S. meeting Mexico's Foreign Minister, Bernardo Sepulveda Amov, stated that "Grenada cannot become a precedent under any circumstances." See *Latin Nations*, *supra* note 162.

trust, and vice versa.²¹²

The Contadora group has attempted to mediate the Central American conflict.²¹³ Their proposals have included eliminating outside interference, stopping support of rebel factions and promoting a regional settlement.²¹⁴ Although the Sandinistas and the United States have agreed in principle to support the Contadora process, neither has exhibited the willingness to follow through.²¹⁵ The United States has offered its own set of working conditions, as have the Nicaraguans, but no genuine effort to resolve the conflict has emerged.²¹⁶

212. See Smith, *Washington Wary of Peace Feelers From Sandinistas*, N.Y. Times, Nov. 26, 1983, at A1, col. 4. See also Kinzer, *Nicaragua's Critics Sense New Air of Give and Take*, *id.*, Nov. 28, 1983, at A17, col. 1 [hereinafter cited as *Nicaragua's Critics*]. But see Boyd, *White House Scorns Peace Offer From Nicaragua*, *id.*, Mar. 1, 1985, at A8, col. 1.

213. See *Latin Nations*, *supra* note 162. The group would attempt to mediate in the following manner:

The plan that is being considered is an elaboration of a 21-point peace program put forward by the Contadora Group last September.

It would commit the five Central American countries—Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua—to establish democratic systems of government and to take a number of steps designed to reduce the danger of military conflict. These steps would include halting imports of new types of armaments into the region and beginning negotiations on arms reductions, barring new foreign military installations in the region and dismantling existing installations within a year, gradually eliminating foreign military advisers, and abstaining from supporting groups hostile to the Governments of other countries in the area.

The agreement would be monitored by a Commission of Verification and Control composed of four impartial countries, as well as representatives of the United Nations and the Organization of American States, plus an executive director.

Latins Offer a Salvador Mediation Plan, N.Y. Times, July 24, 1984, at A3, col. 4.

214. *Id.*

215. See *Nicaragua's Critics*, *supra* note 212.

216. *Id.* See also Kinzer, *Pro-Sandinista Press Spurns Talks*, N.Y. Times, Jan. 15, 1984, at A3, col. 1. Offers and counteroffers regarding negotiations have been plentiful, but no mutually agreeable positions have yet been proffered. See generally *New Peace Effort by Latin Nations Backed by Shultz*, *id.*, Mar. 3, 1985, § 1, at 1, col. 6; *Anti-Sandinistas Call for a Dialogue*, *id.*, at 14, col. 3; *Nicaraguan Says Further Concessions are Possible*, *id.*, at 13, col. 1; *Nicaraguan Says Reagan Threats Killed Peace Bid*, *id.*, Feb. 26, 1985, at A6, col. 1; *Amendments May Imperil Latin Pact*, *id.*, Nov. 16, 1984, at A12, col. 1; *Latin Peace Plan Will be Revised*, *id.*, Oct. 18, 1984, at A1, col. 3; *Latin Peace Plan*, *id.*, Oct. 3, 1984, at A3, col. 1 (according to L. Craig Johnston, Deputy Asst. Sec. of State for Central America, "[t]he draft of the treaty as it stands right now contains all of the right categories of issues, but quite frankly it does not have adequate verification mechanisms to ensure Nicaraguan compliance"). See Gleijeses, *Contadora's Focus Has 'a Pernicious And Soporific Effect'*, *id.*, Apr. 30, 1984, at A15, col. 1.

In a surprise move in September 1984, the Nicaraguan Government agreed to sign

The proposals of the Kissinger Commission, while offering bipartisan recommendations, largely support President Reagan's policies and encourage large scale military aid, as well as general economic aid.²¹⁷ The Kissinger Report was received negatively by the Sandinistas, as well as by church groups in Central America.²¹⁸ It is doubtful whether it can provide the necessary framework for a multilateral solution.

CONCLUSION

The issue of the legitimacy of United States intervention in Nicaragua is difficult to resolve. The United States asserts that it is not intervening in Nicaragua, but merely supporting regional self-protection efforts and seeking to promote the establishment of democratic institutions in Nicaragua.²¹⁹ The Nicaraguans assert that United States aid to the Contras causes war and civil strife in Nicaragua's northern and southern regions.²²⁰ Applying objective standards of international law to present United States measures leads this author to the conclusion that efforts to aid in the defense of legitimate governments, such as El Salvador, Guatemala and Honduras, are justifiable under international law as long as they remain protective measures. Offensive measures, such as efforts to destabilize the Nicaraguan regime by aid to rebels whose major purpose is to overthrow the regime,²²¹ are illegal under international law.

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the Contadora treaty as it was then proposed. The Nicaraguans said they "accepted all the provisions of a treaty proposed by the Contadora group The Reagan administration, which had supported the treaty," thereafter expressed reservations to the treaty. See *Latin Peace Plan*, *supra*; *Shaping them up*, *ECONOMIST*, Oct. 6, 1984, at 20.

"The draft treaty calls for mutual reductions in arms, troops and foreign advisers among Central American nations, as well as the establishment of fair judicial systems and the guarantee of civil liberties, including free elections." *Treaty Impasse Viewed as Omen of New U.S.-Nicaragua Tensions*, *N.Y. Times*, Oct. 12, 1984, at A1, col. 1.

217. See generally Pastor & Feinberg, *Redesign Kissinger Economic Proposal*, *N.Y. Times*, Jan. 18, 1984, at A23, col. 2; Diaz-Alejandro, *Kissinger Report: Insider's View*, *id.*

218. See Perlez, *Latin Panel's Soviet Finding Is Challenged by Moynihan*, *N.Y. Times*, Jan. 13, 1984 at A8, col. 5. See also Schlesinger, *Failings of the Kissinger Report*, *id.*, Jan. 17, 1984, at A25, col. 2.

219. See President Reagan's Address, *supra* note 11.

220. See Mercado, *supra* note 26; see also Schlender, *supra* note 16.

221. See *Rebels*, *supra* note 113.

