THE SECRET WAR IN CENTRAL AMERICA AND
THE FUTURE OF WORLD ORDER

By John Norton Moore*

I. INTRODUCTION

The core principle of modern world order is that aggressive attack is prohibited in international relations and that necessary and proportional force may be used in response to such an attack. This dual principle is embodied in Articles 2(4) and 51 of the United Nations Charter, Articles 21 and 22 of the revised Charter of the Organization of American States (OAS) and virtually every modern normative statement about the use of force in international relations. Indeed, it is the most important principle to emerge in more than two thousand years of human thought about the prevention of war. In the contemporary world of conflicting ideologies and nuclear threat, no task is more important for international lawyers and statesmen than to maintain the integrity of this principle in both its critical—and reciprocal—dimensions: prohibition of aggression and maintenance of the right of effective defense.¹

Today this core principle faces a fundamental threat. That threat has already contributed to a serious destabilization of world order and, unless arrested, holds potential for the complete collapse of constraints on the use of force. It takes the form of an assault on world order by radical regimes that share an antipathy to democratic values and a "true belief" in the use of force to spread their ideology.² By maintaining that the achievement of

* Of the Board of Editors. The author has served as Counselor on International Law to the Department of State and as a United States Ambassador to the Third United Nations Conference on the Law of the Sea. In connection with the Central American conflict, he has served as a Special Counsel for the United States in the case of Nicaragua v. United States before the International Court of Justice, as a member of the presidential delegation to observe the election in El Salvador and as a consultant to the President's Intelligence Oversight Board.

This article is excerpted from a more detailed monograph to be published in the near future. The author wishes to thank Steven P. Soper and the staff of the Center for Law and National Security of the University of Virginia for their assistance in the research and preparation of footnotes for this article, and Robert F. Turner for his helpful comments on an early draft. The views expressed are those of the author and do not necessarily express the position of the United States Government or any other organization with which the author has been affiliated.

¹ For an excellent discussion of this Charter principle and its contemporary importance, see M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 232 (1961).

² Such assaults by radical regimes are characterized by the use of covert attack and terrorism by a growing network of states, and by a growing specialization of function in these attacks. See S. Hosmer & T. Wolfe, SOVIET POLICY AND PRACTICE TOWARD THIRD WORLD CONFLICTS 102 (1983).

Similarly, Professor Paul Seabury writes, on the basis of the Grenada documents, that "in the 1970s and 1980s new forms of fraternal collaboration evolved in the expansionist strategies
"revolutionary internationalism" justifies the use of force, these regimes simultaneously fight a guerrilla war against the core Charter principle and publicly deny any state-sanctioned use of force so as to gain the protection of the very legal order they are attacking. Thus, their assault undermines both the authority of the prohibition of aggression and the effectiveness of the right of defense. Nowhere has this assault been more threatening—and harmful to the legal order—than in the contemporary Central American conflict.

II. BACKGROUND OF THE CENTRAL AMERICAN CONFLICT

The Nicaraguan Revolution

At the moment of its success, the 1979 revolution that overthrew President Anastasio Somoza in Nicaragua was broad-based and popular. It enjoyed the support of organized labor, professional and business groups, the church, campesinos and most segments of Nicaraguan society. Pursuant to an extraordinary OAS resolution of 1979 that recognized the insurgency against the sitting government of an OAS member, many democratic countries in Latin America, including Mexico, Venezuela, Panama and Costa Rica, supported the insurgents. Somoza had virtually no allies. The United States, for example, terminated military assistance 2 years before he was overthrown, encouraged other nations such as Israel and Guatemala to curtail their assistance and even called the OAS meeting that precipitated his fall.

As a condition of OAS support, the 1979 resolution required the insurgents to support a democratic, pluralist and nonaligned Nicaragua. These conditions were accepted by the Sandinista National Liberation Front (FSLN) of the Soviet Union, its satellites, and Soviet-dominated movements in Asia, Africa, and Latin America." This collaboration consisted of the "intricate interweaving of Soviet, Cuban, Vietnamese, and Eastern European Communist activities of far-reaching scope." The Grenada Papers 5 (P. Seabury & W. McDougall eds. 1984). See also R. Cline & Y. Alexander, Terrorism: The Soviet Connection (1984); C. Sterling, The Terror Network (1981); and Senate Subcomm. on Security and Terrorism, 99th Cong., 1st Sess., State-Sponsored Terrorism (Comm. Print 1985) [hereinafter cited as State-Sponsored Terrorism].

There is an interlinked fact-finding (intelligence) and political-legal (verification) problem not dissimilar to that in arms control in policing compliance with the Charter prohibition on aggressive force. These issues have not been generally addressed on aggressive use of force. For arms control, see DeSutter, Intelligence versus Verification: Distinction, Confusions, and Consequences, in Intelligence: Policy and Process 297 (A. Maurer, M. Tunstall & J. Keogle eds., 1985).

For a detailed description of this "radical regime assault" and its effect on the legal order, see Moore, The Radical Regime Assault on the Legal Order (June 10, 1985) (unpublished paper available from the Center for Law and National Security, the University of Virginia).


in a cable of July 12, 1979 to the OAS. In the immediate aftermath of the revolution, there was great hope—shared by the United States—that this pledge would be kept. Initially, the new Government included prominent Nicaraguans of all political persuasions, received broad public support and embarked on ambitious programs to improve literacy, health care delivery and social security. It was greeted by an outpouring of economic support and good will from all over the world. Sadly, however, as we will see in a subsequent section of this paper, the nine Marxist-Leninist comandantes who had controlled the effective military insurgency progressively assumed power and thus caused a purge of genuine democrats. In addition, the comandantes curtailed civil and political rights, denied free elections, initiated massive militarization of society and, in general, began to move sharply toward Cuban-style totalitarianism.

The Cuban effort to capture the effective military insurgency against Somoza seems to be the principal cause of this failure of the Nicaraguan democratic revolution. Castro had provided some arms and training to the FSLN during the early 1960s. Beginning in 1977–1978, a high official of the Cuban “American Department,” Armando Ulisis Estrada, made repeated secret trips to Nicaragua to unify the three major factions of the FSLN as a condition for receiving stepped-up Cuban aid. Apparently, the Cubans correctly perceived that the Carter administration’s cutoff of aid to Somoza, coupled with the widespread popular opposition to him, set favorable political and military conditions for his ouster and that unification of the three competing Marxist-Leninist guerrilla factions would enable them to control the military insurgency and thus take power.

Pursuant to this effort, the nine comandantes who currently rule Nicaragua were selected, three from each of the three factions, at meetings arranged by the Cubans, and Cuba announced the unification during the XI World Youth Festival in Havana in late July 1978. Subsequently, substantial arms shipments were sent via Panama and Costa Rica to the FSLN and Cuban advisers were dispatched to northern Costa Rica to train and equip that force. The Cuban “American Department” established a secret operations center in San José to monitor and facilitate the assistance effort. In early 1979, Cuba also helped organize and arm an “internationalist brigade”

8 See D. Nolan, The Ideology of the Sandinistas and the Nicaraguan Revolution (1985). For additional discussion of the Marxist-Leninist credentials and background of the comandantes, see the six-part series in the Los Angeles Herald by Marie Linda Wolin on the Sandinista leadership, May 5–10, 1985. On early Sandinista ties to the PLO and training in PLO camps, see Dep’t of State, The Sandinistas and Middle Eastern Radicals (1985) [hereinafter cited as Sandinistas and Middle Eastern Radicals]. This unclassified report describes the participation of the Sandinistas in Middle Eastern aircraft hijacking and terrorism in 1970 and their continuing relations with these groups and states in the 1980s. (On Sept. 4, 1985, the day after the report was released, Tass angrily denounced it as a “new falsehood.”)
9 See D. Nolan, supra note 8, at 97–98. Auguste César Sandino, for whom the Sandinista Party was named, was not only a national hero but an anti-Communist as well. See id. at 16–18.
to fight with the FSLN. Many of its members were drawn from experienced Latin American extremist and terrorist groups.\(^{10}\) When the FSLN final offensive was launched in mid-1979, as many as 50 Cuban military advisers participated and maintained regular radio contact with Havana.

Following the overthrow of Somoza, the chief of the secret Cuban coordinating center in San José was shifted to Managua, as the Cuban ambassador and Cuban "advisers" begin flooding into Nicaragua. An experienced colonel in the Cuban intelligence service took out Nicaraguan citizenship and became instrumental in guiding the Sandinista General Directorate of State Security (DGSE), which was modeled after the Cuban Directorate General of Intelligence (DGI). Today about 400 Cuban and 70 Soviet intelligence advisers work closely with the DGSE, together with East Germans and Bulgarians. The DGSE is being used by the Sandinistas, as is the DGI in Cuba, to infiltrate and keep watch over all segments of society.\(^{11}\)

Thus, from the outset Cuba concentrated on ensuring that a hard-core Marxist-Leninist group was in charge of the effective military insurgency in Nicaragua. It was by far the most important source of assistance to that insurgency. Citing Shirley Christian's latest book, *Nicaragua: A Revolution in the Family*, Judge Stephen Schwebel informed the International Court of Justice that "Costa Rican National Assembly investigators . . . estimated that at least one million pounds of war material entered Costa Rica from Cuba during . . . [the] period of six to eight weeks [before the end of the war in 1979 in Nicaragua], a figure that did not include what had been shipped earlier'\(^{12}\). After the takeover, Cuba provided assistance focused on strengthening the military and intelligence capabilities of the nine commandantes while building an internal security apparatus to consolidate their power, as Fidel Castro had done 20 years earlier. A principal difference from Cuban experience seems to be that, mindful of Western economic support, the Sandinistas have moved more slowly toward a thoroughgoing Marxist-Leninist model. Both governments, however, have sought to hide the true nature of their revolution.

Today the commandantes face substantial and growing internal opposition, as Nicaraguans increasingly perceive the democratic revolution as betrayed. The rapid growth in opposing "contra" forces in Nicaragua and the stream of recent defections, including, since 1979, two Nicaraguan ambassadors to

---

\(^{10}\) See DEP'T OF STATE, SPECIAL REP. NO. 90, CUBA'S RENEWED SUPPORT FOR VIOLENCE 5–6 (1981).

\(^{11}\) See DEP'T OF STATE, BROKEN PROMISES: SANDINISTA REPRESSSION OF HUMAN RIGHTS IN NICARAGUA 2 (1984) [hereinafter cited as BROKEN PROMISES].


During the writing of this article, the ICJ heard oral argument from Nicaragua on the merits phase of the *Nicaragua* case. No final decision had been rendered either on the merits or on the jurisdictional and admissibility issues joined to the merits phase. Under Article 55 of the ICJ Statute, when one of the parties does not appear, the Court must satisfy itself "that it has jurisdiction" and "that the claim is well-founded in fact and law."
the United States, provide dramatic evidence of a shift in popular Nicaraguan feeling about the comandantes.

U.S. Relations with the New Sandinista Government

The United States, concerned about human rights abuses and the need for social change in Nicaragua, cut off military assistance to the Somoza regime in 1977, 2 years before it was overthrown. But U.S. opposition to the regime was not merely passive. Former United States Ambassador to the United Nations Jeane Kirkpatrick writes that “the State Department acted repeatedly and at critical junctures to weaken the government of Anastasio Somoza and to strengthen his opponents.” Washington initiated the 1979 OAS resolution to recognize the insurgents and to isolate Somoza politically, and it used its influence to persuade other nations to withdraw support for his regime and to institute an arms and aid embargo against it. Thus, there should have been no reason for FSLN antagonism toward Washington unless such hostility was in fact rooted in FSLN ideology.

When the Sandinistas came to power, the United States made every effort to establish good relations with the new regime. In part, this special effort resulted from the belief of some members of the Carter administration that Castro might have been forced into the Soviets’ arms by early U.S. hostility to his regime. Whatever the reason, the effort was significant and genuine. President Carter invited Comandante Daniel Ortega to the White House to discuss ways of creating good relations and to underscore the seriousness of the U.S. interest in establishing them. The United States gave $118 million in economic assistance, including over 100,000 tons of food, to the regime during the first 2 years. (This was more aid than was given by any other nation and overwhelmingly more than the United States had given to the Somoza regime at any time.) The first of these shipments of food began arriving in DC-8 stretch jets within 3 days of the Sandinista takeover as part of a general effort to feed the thousands of persons displaced by the war. The United States also supported $292 million in World Bank and Inter-American Development Bank loans to the Sandinistas. The United States offered Peace Corps teachers, but the Sandinistas refused to accept a single one, although they welcomed thousands of Cuban and assorted Soviet-bloc and other radical advisers. The United States also provided immediate medical assistance, but by 1980 such programs as the 15-year-old Partners of the Americas Program between the state of Wisconsin and Nicaragua ran

---


14 This conclusion is, I believe, largely a myth. See, e.g., the contrary evidence, including Fidel Castro’s own rejection of the thesis, in Dept. of State & Dept. of Defense, The Soviet-Cuban Connection in Central America and the Caribbean 5–6 (1985) [hereinafter cited as Soviet-Cuban Connection].

15 This amount may be double the total given the Somoza regime in the preceding 20 years. See Kirkpatrick, This Time We Know What’s Happening, Wash. Post, Apr. 17, 1983, at D8, cols. 2–6.
into severe Sandinista harassment. Even the Salvation Army, well known for its work with the poor, was forced out of Nicaragua by the Sandinistas.

Lawrence E. Harrison, Director of USAID in Nicaragua from 1979 to 1981, has written a detailed account of the U.S. effort to have good relations with the Sandinistas and their vituperative attacks on the United States in response. One vignette is particularly revealing. Harrison writes:

We often expressed our concern to Sandinista officials about the line in the Sandinista anthem, "We shall fight against the Yankee, enemy of humanity." In November 1979, Jaime Wheelock, one of the most influential comandantes and a person with whom I sustained a very frank dialogue throughout my two years in Managua, told me that the word "poverty" was going to be substituted for "the Yankee." Soon thereafter, I was told the same thing by then economic czar (and Stanford MBA) Alfredo Cesar, who has since defected. The change was never made.\(^\text{16}\)

After a careful review, the bipartisan Kissinger Commission concluded that the United States "undertook a patient and concerted effort to build a constructive relationship of mutual trust with the new government."\(^\text{17}\)

The United States was not alone in experiencing Sandinista intransigence. Panama sought to provide military training assistance for the Sandinista army, but this was likewise terminated in favor of thousands of advisers from Cuba, the Soviet bloc and other radical regimes. Similarly, the Sandinistas rebuffed an offer of assistance from Costa Rica.\(^\text{18}\)

While the United States was striving to build good relations with the Sandinistas, the comandantes were secretly concluding military agreements with Soviet-bloc countries, beginning a massive military buildup and joining with the Cubans in launching an intense secret guerrilla war against El Salvador and Guatemala and armed subversion against Costa Rica and Honduras. In its waning weeks in office in late 1980, as intelligence data unmistakably began to show the extent and seriousness of this secret attack, the Carter administration informally suspended economic assistance to the Sandinistas.

The Sandinista Response

The Sandinistas responded to the extraordinary support of the OAS for their insurgency and the outpouring of democratic aid by deliberately and carefully adopting three policies that are the root cause of the threat to world order in Central America. To provide an understanding of the full context of that threat, this article will briefly examine each of these policies.


\(^{17}\) Appendix to the Report of the National Bipartisan Commission on Central America 45 (1984).

It should be emphasized, however, that it is the third of these policies, the secret war against neighboring states, that violates the critical UN and OAS Charter prohibitions against the use of force and gives rise to the right of defense in response. The first two policies, the suppression of democratic pluralism and the massive ideologically aligned military buildup, breach the 1979 FSLN pledge to the OAS, and the Sandinistas' repeated offenses against native populations, organized labor, the Catholic Church and other groups in Nicaraguan society violate important international human rights guarantees. Nevertheless, with respect to the use of force, the ongoing Cuban-Nicaraguan armed aggression is solely determinative.

**Pluralism, Human Rights and Nonalignment.** When the Sandinistas initially came to power, many who were allied with them against Somoza were genuine nationalists and strong supporters of human rights and the traditional Latin values of pluralism and nonalignment. The goals of the pluralist revolution against Somoza were embodied in the National Unity Government Program enacted as the Fundamental Statute of the Republic on the first day after the revolution. As the comandantes began to consolidate power through a Leninist “vanguard” party, however, these moderate elements began leaving voluntarily and under Sandinista pressure.

19 The creeping imposition of totalitarian controls by the comandantes also seems to be inconsistent with Article 3(d) of the revised OAS Charter, which provides: “The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”


21 Although some scholars support a right of humanitarian intervention, I believe that the core issue in the Central American conflict is aggression and defensive response. For a general discussion of the right of humanitarian intervention, see, e.g., Moore, Toward an Applied Theory for the Regulation of Intervention, in LAW AND CIVIL WAR IN THE MODERN WORLD 3, 24-25 (J. Moore ed. 1974); Brownlie, Humanitarian Intervention, in id. at 217; and Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in id. at 229.

22 CONSEJO SUPERIOR DE LA EMPRESA PRIVADA [COSEP], THE NICARAGUAN REVOLUTIONARY PROCESS 1979-1985, at 5-6 (rev. ed. 1985) [hereinafter cited as COSEP].

23 See generally BROKEN PROMISES, supra note 11. The strategy of insurrection presented by the FSLN National Directorate in 1977, 2 years before the overthrow of Somoza, included a directive to “[c]reate a ‘broad anti-Somoza front’ based on the program that includes bourgeois/
On August 30, 1980, the Sandinista Party leadership, as the head of the "vanguard" party, proclaimed itself the highest authority in Nicaragua. Subsequently, the governing junta in charge of the executive branch seems to have been subordinated to the Sandinista Party.24 Even earlier, on April 16, 1980, the comandantes had pushed through Decree No. 374, which, by dramatically increasing the number of seats in the legislative council, secured a substantial majority for the Sandinista Party in the legislative branch. This decree prompted the resignation of junta member Alfonso Robelo, now a leader of one faction of the contras fighting against the comandantes. Robelo and others believed that the governing junta had no authority to modify the Fundamental Statute of the Republic. Similarly, though the Fundamental Statute created an independent judiciary, the comandantes quickly instituted a series of "special courts" outside the regular judicial system, which were politically controlled by the Sandinista "vanguard." These included "Special Courts" established in November 1979, "Military Courts" (December 2, 1980), "Agrarian Courts" (July 19, 1981) and "Anti-Somocista People's Courts" (April 11, 1983).25

As they openly assumed political power, the comandantes began to put in place the familiar apparatus of a totalitarian police state: it was marked by the suppression of labor movements, attacks on the church and religious freedom, attacks on the semi-autonomous Indians of the Atlantic region, attacks on and the clandestine murder of political opponents, press controls and censorship, a Cuban-style internal security system down to the block level, a virtual merger of the Sandinista Party with the state, sham trials by "people's courts" and, ultimately, the suspension of the right of habeas corpus, detention of growing numbers of political prisoners and institution of a massive state propaganda system. Many other violations of human rights and political freedoms under the Sandinistas have been reported, including recurrent accounts of anti-Semitism26 and the formal implementation of democratic opposition groups, but preserves the hegemony of FSLN power.” D. Nolan, supra note 8, at 78.

On the importance of establishing a "vanguard party" in Marxist-Leninist theory, see generally, e.g., V. Lenin, What Is to Be Done? (1907); T. Hammond, The Anatomy of Communist Takeovers (1975); and R. Carew Hunt, The Theory and Practice of Communism (1963). The concept is antithetical to representative democracy.

24 See COSEP, supra note 22, at 8–9. One indication that the comandantes were in control from the first is the report that an early governing junta voted to direct Nicaragua's UN representative to vote to condemn the Soviet invasion of Afghanistan, but that the Sandinista Party leadership simply ignored the junta and instructed the representative to abstain. See Nicaragua: A Revolution Stumbles, Economist, May 10, 1980, at 22.

25 See COSEP, supra note 22, at 8–14. This study offers an instructive comparison between the original goals of the revolution against Somoza, as embodied in the National Unity Government Program of June 18, 1979, and the subsequent performance of the comandantes.

26 See, e.g., Senator Chic Hecht (Nev.), Grim record of Sandinista anti-Semitism, N.Y. Post, June 4, 1985, at 1, cols. 1–7:

My desire to prevent the spread of anti-Semitism leads me to write about a government that so persecuted its Jewish population that the entire community was forced to flee the country it once called home. I speak not of Spain under the Inquisition, nor of Russia
sweeping restrictions on civil liberties announced on October 16, 1985, but space does not permit their full discussion. Although human rights abuses were legend under Somoza, by 1984 at least 120,000 Nicaraguans under the Czar, nor yet of Germany under the Nazis. I speak, rather, of Nicaragua under the Sandinistas. Most Americans—and even most Jews—remain unaware of the campaign of anti-Semitism that preceded the exodus of Nicaragua's Jewish community from that country. But from my position as a member of the Select Intelligence Committee of the U.S. Senate I have had a unique opportunity to learn of their experiences. And as an American and a Jew, I have a duty to do all in my power to tell their story so that what happened to Jews in Nicaragua will not happen to the thousands of other Jews who live elsewhere in Central America.

See also Anderson & Van Atta, Flight from Nicaragua, Wash. Post, Aug. 18, 1985, at B7, cols. 2-5.

The Department of State reported in 1983 as follows:

The 1978–79 insurrection and Government policies since 1979 led virtually all of the approximately 50 members of the Jewish community to leave the country. According to a report from a member of the Jewish community in Nicaragua, five Sandinista guerrillas attempted to set fire to the main door of the Managua synagogue in 1978. Since 1979, the government has expropriated the Managua synagogue and the property of many prominent Jews. . . . Prominent Jewish organizations such as the Anti-Defamation League of the B'nai B'rith charged in 1983 that the Nicaraguan Government was guilty of anti-Semitism.


For further description of Sandinista human rights abuses and social and economic problems, see, e.g., COSEP, supra note 22; and the monthly human rights reports of the Permanent Commission on Human Rights of Nicaragua (CPDH) from June to November of 1984, reprinted in 131 CONG. REC. S1558 (daily ed. Feb. 20, 1985). But see AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: REAGAN, RHETORIC AND REALITY (1985).

In the judgment of this observer, the Americas Watch effort is itself not free of the political bias it charges the administration with in human rights reporting. Human rights organizations serve a valuable function in disseminating hard-hitting (but sometimes overly zealous) exposés of suspect governmental activity. Americas Watch seems to apply this standard in its reporting on El Salvador and the contras but not on Nicaragua and the FMLN. Paradoxically, this low-keyed reporting and propensity to overlook serious Nicaraguan and FMLN violations, and even to defend the Sandinista human rights record, may encourage more abuses. That the Sandinistas regard Americas Watch as largely supportive is suggested by a recent interview with Mateo Guerrero, former executive director of the Nicaraguan National Commission for the Promotion and Protection of Human Rights (CNPPDH). Guerrero said he was instructed in April 1984 by Alejandro Bendana, the Secretary General of the Foreign Ministry, who was responsible for monitoring the CNPPDH, to take charge of a visit by Juan Mendez of Americas Watch, a human rights organization based in the United States which had written favorably about the Nicaraguan government's human rights record. The CNPPDH was ordered to assist Mendez, providing him with a car and arranging his interviews with government entities such as the Supreme Court, the Ministry of Justice and the People's Anti-Somocista Tribunals.
who stayed under Somoza had fled the Sandinista revolution. A former American ambassador to the region has estimated that 10 percent or more of the population may have left the country.\(^\text{29}\)

The Sandinistas have also violated their pledge of nonalignment. Prior to the takeover of power in Nicaragua, on March 6, 1978, the Democratic Front for the Liberation of Palestine and the FSLN issued a joint statement from Havana declaring war against “yankee imperialism, the racist regime of Israel” and the Nicaraguan Government.\(^\text{30}\) As we have seen, the Sandinistas’ foreign advisers and teachers have been selectively chosen from Cuba, the Soviet bloc and other radical states. The rapid Cuban- and Soviet-assisted military buildup and early secret military assistance agreements with Soviet-bloc sources reflect this alignment. In July 1980, Yasir Arafat made a “state visit” to Nicaragua to formalize full diplomatic ties between the Palestine Liberation Organization (PLO) and the Sandinista regime.\(^\text{31}\) The recent trip to Moscow by Daniel Ortega that so embarrassed some members of the U.S. Congress was actually his fifth; his first was made within 9 months of taking power and he went to Cuba only weeks after the takeover. Recently, Daniel and Humberto Ortega have also paid official and state visits to North Korea. The Sandinista regime has been so well integrated into the Soviet orbit that on October 23–25, 1985, representatives from nine nations of the Soviet and Eastern bloc Council for Mutual Economic Assistance, to which Cuba also belongs, held a conference in Managua.

In the United Nations, the Sandinista voting record has been thoroughly aligned with that of the Soviet bloc. For example, in the 38th session of the General Assembly (1983–1984), the Sandinistas voted for a unified Soviet-Cuban position 96 percent of the time. They approved of the Vietnamese

Office of Public Diplomacy for Latin America and the Caribbean, Dep’t of State, Inside the Sandinista Regime: Revelations by the Executive Director of the Government’s Human Rights Commission 2–3 (1985) [hereinafter cited as Inside Sandinista Regime].

According to a prominent Nicaraguan defector, the Inter-American Human Rights Commission and the nongovernmental Nicaraguan Permanent Commission on Human Rights placed repeated pressure on the Nicaraguan Government to provide information on human rights charges. Americas Watch, however, was apparently not perceived by the Government as providing comparable effective pressure on human rights matters. See Information Supplied by Alvaro Baldizon Aviles, at 1, 7 (unpublished paper on file at the Center for Law and National Security, 1985). See also Wright, US Backs Nicaraguan Visitor and His Message, Minneapolis Star & Tribune, Oct. 17, 1985, at 4A, 6A, col. 5.

Sandinista human rights violations will be discussed further in part IV, “Human Rights and the War of Misinformation.”

\(^\text{29}\) This is a recent estimate made in the author’s presence by former U.S. Ambassador to Honduras John Negroponte, who is now Assistant Secretary of State for Oceans, Environment and Science.

The parallel with Cuban emigration is striking. Since Castro came to power in 1959, over one million Cubans, or almost 10% of the population, have fled, many to the United States. Silva notes that “Nicaraguan refugee children now outnumber refugee children of all other nationalities in [the Dade County, Florida] school system except Cubans.” H. SILVA, THE CHILDREN OF MARIEL 50 (1985).

\(^\text{30}\) SANDINISTAS AND THE MIDDLE EASTERN RADICALS, supra note 8, at 6.

\(^\text{31}\) Id. at 17.
invasion of Kampuchea, supported action on an amendment to oust Israel and have repeatedly refused to condemn the Soviet invasion of Afghanistan while using the debates on Afghanistan as an occasion for vehemently attacking the United States and Israel. Among Latin American states, Cuba and Nicaragua have consistently demonstrated a pattern of voting that is hostile to the West in general and the United States in particular. During the 39th session of the General Assembly, Cuba and Nicaragua were the two most hostile states in the Americas, as measured by lack of coincidence with U.S. votes; respectively, they agreed with the United States on only 4.1 percent and 6.8 percent of the votes. They also were the only states in the Americas to vote to reject Israel's credentials in the General Assembly. On Afghanistan, Cuba was the only American state to vote with the Soviet Union against the withdrawal of foreign troops, and Nicaragua, in abstaining on this vote, was the only other state in the Americas either to vote against or to abstain on this resolution. With respect to the proposal to require the withdrawal of Vietnamese troops from Kampuchea, only Cuba, Guyana and Nicaragua in the Americas voted with the Soviet bloc against the resolution.

On the ten votes judged by the U.S. Mission to the United Nations as the most significant in affecting U.S. interests during the 1984 session of the General Assembly, Nicaragua had a perfect record of opposition to all. Indeed, Nicaragua's voting record was so hostile to the West that it was considerably more so than the voting records of all the Warsaw Pact countries; and of all Eastern European countries, only Albania had a more consistently anti-Western record.

Moreover, the comandantes' rhetoric is even more revealing than their voting record. Sandinista Army Commander in Chief Humberto Ortega told his officers in August of 1981: “We are anti-Yankee, we are against the bourgeoisie, we are guided by the Marxist-Leninist scientific doctrine of the Revolution.” Comandante Tomás Borge told a North Korean audience in June 1980—while the Sandinistas were still receiving massive United States economic assistance—that “the Nicaraguan revolutionaries will not be content until the imperialists have been overthrown in all parts of the world. . . . We stand with the . . . socialist countries.”

Several incidents illustrate the strong Soviet-bloc alignment of the comandantes. In March 1980, while on an official visit to Moscow, four top FSLN leaders signed a joint communiqué with their Soviet hosts which, among other things, attacked the NATO decision to deploy medium-range nuclear missiles in Europe and condemned the “mounting international ten-
sion in connection with the events in Afghanistan, which has been launched by the imperialist and reactionary forces aimed at subverting the inalienable right of the people of the Democratic Republic of Afghanistan and of other peoples. . . . to follow a path of progressive transformation.”

On December 23, 1981, La Prensa reported that the FSLN Department of Propaganda and Political Education had ordered its communication media “to reflect from an objective viewpoint the difficult situation confronted by the Polish revolutionary movement, and to publish only those facts that have been confirmed by TASS [the official news agency of the Soviet Union] and by the Cuban Prensa Latina News Service.” In January 1982, delegates from the Polish labor movement Solidarity who were touring Latin America were denied permission to enter Nicaragua.37

Sandinista rhetoric has also insulted Latin Americans. On October 11, 1985, Ecuador broke diplomatic and consular relations with Nicaragua. In announcing the break, Ecuador’s Foreign Minister Edgar Terán said that Comandante Daniel Ortega had made “gross, inadmissible attacks on the dignity, sovereignty and independence” of Ecuador.38 Apparently underlying the rupture was the discovery that the comandantes had assisted terrorists in a notorious attack in Ecuador.

The Soviet tilt in Nicaraguan foreign policy—as opposed even to a “socialist nations” tilt—has been so pronounced that, as in Grenada before them, the Sandinistas shortly after taking power recognized Taiwan rather than the People’s Republic of China,39 and they have sided with Vietnam in its conflict with the PRC while refusing to condemn Vietnam’s invasion of Kampuchea.40

The Military Buildup. The massive and secret military buildup began even as the United States poured in economic assistance. Before there was any contras threat, the Nicaraguan armed forces had been built up to nearly six times the size of the Somoza National Guard. Today they are nine times that level and still escalating. They now have some 350 tanks and armored vehicles, compared with 5 tanks and 25 antiquated armored cars under Somoza, none in Costa Rica, 16 armored reconnaissance vehicles in Honduras and less than 30 armored personnel carriers in El Salvador—a nation faced with a substantial guerrilla insurgency. A major airfield capable of accommodating the largest aircraft in the Soviet arsenal is being built at Punta Huete, and Nicaraguan pilots are being trained in Bulgaria to fly Soviet-built MiGs.41 Weapons introduced by the Soviets into Nicaragua in-

36 Kirkpatrick, supra note 13, at 349.
37 See COSEP, supra note 22, at 41 and 65 n.4. For other examples of the FSLN’s close alignment with the Soviet bloc, see id. at 42–43.
38 Baltimore Sun, Oct. 13, 1985, at 4, col. 5.
39 See Cruz, The Origins of Sandinista Foreign Policy, in CENTRAL AMERICA: ANATOMY OF CONFLICT 95, 99 (R. Leiken ed. 1984). This recognition pattern has recently been reversed.
40 Id. See also Rosenberg, The Soviets and Central America, in id. at 131; Leiken, The Salvadoran Left, in id. at 111. In a UN speech on Sept. 28, 1979, Comandante Daniel Ortega said: “Chinese troops have attacked Vietnam. But the spirit of the Vietnamese people has been stronger than the murderous instincts of the . . . Chinese divisions. . . .” COSEP, supra note 22, at 40.
41 See generally Dep’t of State & Dep’t of Defense, BACKGROUND PAPER: NICARAGUA’S
include: the world’s fastest, best armed helicopter, the MI-24/Hind D; 12 T-55 medium tanks (for years the Warsaw Pact’s main battle tank); nearly 30 PT-76 light amphibious tanks with river-crossing capability; a few BRDM-2RHK chemical reconnaissance vehicles and ARS-14 decontamination trucks; and other state-of-the-art military equipment.

This Sandinista military buildup is unprecedented in Central America and, with the exception of the Honduran Air Force, its result far outclasses the small armed forces of Nicaragua’s neighbors. It was begun as a deliberate policy well before any contra threat was evident, that is, in 1980, 2 years before there was any significant armed opposition to the regime. In 1980 a first group of Nicaraguans was sent to Eastern Europe for flight training in MiGs. In February 1981, the Sandinistas announced that they would build a 200,000-man militia, but, as the New York Times pointed out, they faced “surprisingly little counter-revolutionary activity” at that time.

The militarization of Nicaraguan society produced by this buildup is similar to that in Cuba. On a per capita basis, Nicaragua now commands a much greater military than any other nation in the region except Cuba. On an absolute basis, it now has the third largest army in Latin America after only Brazil and Cuba. A draft has been introduced for the first time in Nicaraguan history, and schoolbooks teach arithmetic through exercises illustrated with grenades and Soviet AK-47 assault rifles. This militarization of Nicaraguan education seems inconsistent with Article 3(1) of the revised Charter of the OAS, which provides: “The education of peoples should be directed toward justice, freedom and peace.”

---


Nicaragua’s acquisition of Soviet chemical warfare vehicles is particularly alarming in view of the recent Washington Post report that the Soviets may have transferred offensive chemical warfare capability to Egypt (during the 1960s while Egypt was a major Soviet client in the Middle East), Syria, Ethiopia and Vietnam, and persistent reports of use by the Soviets and client states of chemical and toxin weapons in Afghanistan, Laos and Kampuchea. See Oberdorfer, *Chemical Arms Curb Are Sought*, Wash. Post, Sept. 9, 1985, at A7, cols. 3–4. See also Report and Recommendations to the ABA House of Delegates submitted jointly by the Standing Committee on Law and National Security and the Section of International Law and Practice (July 1985) (on the use of chemical and toxin weapons in Kampuchea, Laos and Afghanistan).


See Soviet Military Power, supra note 41, at 121.


In 1977 Nicaragua had an active-duty army of about 7,100—roughly the size of the Salvadoran Army, and half the size of the Guatemalan and Honduran Armies. By 1984, under the Sandinistas, Nicaragua had by far the largest army in Central America with roughly 62,000 active-duty forces, compared with El Salvador at 41,150, Guatemala at 40,000, Honduras at 17,200 and Costa Rica at zero. See Soviet-Cuban Connection, supra note 14, at 26. A recent Gallup poll finds that large majorities in Honduras and Costa Rica feel that the Sandinista buildup is a military threat and destabilizes their governments. Id.

The Secret War. The comandantes came to power with substantial Cuban assistance—although they also rode in on a U.S. cutoff of military assistance to Somoza, a wave of popular sentiment in Nicaragua against Somoza and OAS- and U.S.-assisted international isolation of the Somoza regime.48 The joint statement of goals of the FSLN published in 1969, a decade before it took power, stated its support for "[a] struggle for a ‘true union of the Central American peoples within one country’, beginning with support for national liberation movements in neighboring states."49 Consistent with this statement, the comandantes elected as one of their first orders of business to join their patron, Cuba, in supporting "revolutionary internationalism" in the Central American region. The most serious attacks in the Cuban-Nicaraguan secret war against neighboring states have been directed against El Salvador and Guatemala, although Honduras and, to a lesser extent, Costa Rica have been targets of smaller scale subversion, terrorism and efforts at destabilization.

It should be understood in appraising the armed attacks by Cuba and Nicaragua on their neighbors that these attacks are intended by their perpetrators to be secret and nonattributable to either country. To that end, they have consistently employed all the mechanisms available to a modern and sophisticated intelligence network to conceal the nature of the attacks. And that network—emanating from totalitarian regimes—has not been subject to scrutiny by the national media or other democratic checks.

Before 1980, the Salvadoran guerrillas were few, disorganized and feuding, and were armed only with pistols, hunting rifles and shotguns purchased largely on the world market.50 In December 1979 and May 1980, Fidel Castro hosted meetings in Havana to organize competing Salvadoran insurgent factions into a Unified Revolutionary Directorate (DRU) controlled by Moscow-oriented Marxist-Leninists. In late 1980, the Farabundo Martí National Liberation Front (FMLN) was formed as the coordinating body of the guerrilla organizations and a front organization, the Revolutionary Democratic Front (FDR), was created to attract international political support. As part of the effort at world deception, three small non-Marxist-Leninist political parties were brought into the front but were not given representation in the DRU, which effectively controls the military insurgency. As earlier in Nicaragua51 and subsequently in Guatemala, Castro insisted on a unified guerrilla command controlled by a "vanguard" Marxist-Leninist group as a precondition for substantial assistance. At the Havana meetings, at least two sessions were held with the secret Cuban Directorate of Special Operations to review guerrilla military plans. In April 1980, a meeting was held at the Hungarian Embassy in Mexico City between guerrilla leaders and representatives of the German Democratic Republic, Bulgaria, Poland,

48 See generally D. Nolan, supra note 8. 49 Id. at 37.
50 See Dep't of State, Special Rep. No. 80, Communist Interference in El Salvador 2 (1981) [hereinafter cited as Communist Interference].
51 Nolan writes of the process of unification in the Nicaraguan revolution: "Shadowy negotiations continued, with Cuban leader Fidel Castro playing a key role. Vanguard unification was Castro's main condition for providing the Sandinistas with their first significant amount of material Cuban aid." D. Nolan, supra note 8, at 97.
Vietnam, Hungary, Cuba and the Soviet Union. Following the May 1980 Havana meeting, Shafik Handal, the leader of the Salvadoran Communist Party, left for an extensive trip to the Soviet Union, Vietnam, East Germany, Czechoslovakia, Bulgaria, Hungary and Ethiopia in order to obtain arms and support for the insurgency.\textsuperscript{52} In response, large quantities of arms were transshipped via Cuba and Nicaragua. To conceal the origin of these weapons, captured U.S. weapons from stocks in Vietnam and Ethiopia were used. Initial shipments totaled more than 700 tons.

While Shafik Handal was seeking arms from Soviet-bloc countries, the other Salvadoran guerrilla leaders at the May Havana meeting left for Managua and talks with the Sandinistas. During this meeting in early June, the DRU leaders discussed the creation of a headquarters complex in Nicaragua with "all measures of security," material support from the Sandinistas and international support by the Sandinistas for FMLN operations. In July representatives of the DRU met with the Sandinistas in Managua to iron out details and arrange for an exchange of Soviet-bloc weapons for Western-manufactured arms to assist in concealing the secret attack. Both meetings included conferences with high-level comandantes. On July 27, the guerrillas' general staff left Managua for Havana where the military plans were completed.

From approximately September or October 1980, large shipments of arms and equipment began flowing to the FMLN through Cuba and Nicaragua. Huge quantities of arms and ammunition were "surged in" during this period, so rapidly in fact that guerrilla leaders complained to Managua that they could not absorb them. Apparently, Fidel Castro and Nicaraguan advisers were worried that only a short time for a military overthrow on Nicaraguan lines remained before the newly elected American President Ronald Reagan took office. It was these huge shipments beginning about September 1980 that convinced the Carter administration to protest to Managua—in response, Managua suspended the shipments for one month—and ultimately to resume military assistance to El Salvador and suspend economic assistance to Managua.

As a result of the FMLN-comandante talks the previous June and July, a military headquarters complex was provided to the FMLN insurgents outside Managua with Cuban and Nicaraguan military assistance. From this command and control center, orders were radioed to FMLN forces operating in El Salvador on a daily basis. The Nicaraguans also embarked on a major logistics effort to transport the arms, ammunition and supplies flowing in via Cuba: trucks and other vehicles were modified to transfer concealed arms overland and naval and air supply was organized. The comandantes controlled the warehouses where these FMLN supplies were stored. On December 15, 1980, the revolutionary radio station Radio Liberación began broadcasting from Nicaragua on behalf of the FMLN. In addition, the comandantes serve as the principal focal point for financing the FMLN rebels and transshipping currency to them.\textsuperscript{55}

Since mid-1980 the Sandinistas have played an important role in training

\textsuperscript{52} For details, see \textit{id.} at 4–5.  
\textsuperscript{55} See generally \textit{id.} at 4–7.
FMLN insurgents. There are at least four training camps in Nicaragua used extensively for this purpose and at any one time several hundred guerrillas may be involved. These camps include Ostional in the southern province of Rivas, a former National Guard camp in northwestern Nicaragua close to the River Tamarindo, Tamagas outside Managua, and a new camp that opened in 1984 near Santa Julia on the Consiguina Peninsula. Salvadoran insurgents have also been trained in guerrilla warfare and sabotage at camps in Cuba.54

The January 1981 FMLN “final offensive” in El Salvador did not succeed. A principal factor is that in El Salvador the FMLN, unlike the insurgents against Somoza, has never been able to generate significant popular support. In contrast to Nicaragua, El Salvador had already had a reformist revolution in 1979. Although severe polarization and violence on the far left and far right were endemic, there was no “Somoza.” The subsequent free and democratic elections in 1983 and 1984, culminating in President Duarte’s strongly reformist and democratic leadership, dealt a severe political blow to the FMLN—which, lacking popular support, has consistently refused to participate in elections.55

Despite the political setbacks, Cuban and Nicaraguan support for the secret war against El Salvador has continued. Beginning in 1982–1983, shipments of arms seem to have been reduced, as opposed to the continuing shipments of ammunition and explosives, and the continuing training, command and control, financing and other indices of the secret attack. The reasons for this apparent reduction, but not cessation, in arms shipments include, as we have seen, that the insurgents obtained a surplus of arms and have stockpiled weapons as a result of the previous “surge” shipments; also, the number of FMLN guerrillas has declined from a peak of about nine thousand in 1982 to approximately six to seven thousand today. Moreover, the commandantes have adopted a lower profile during their pending case before the World Court and repeated close congressional votes on assistance to the contras. Finally, contra attacks in Nicaragua are disrupting shipments and requiring the Sandinistas to turn their attention inward.56

At roughly the same time, a major secret war has also been conducted against Guatemala, with the active participation and support of the commandantes as well as Cuba. In April and July 1981, Guatemalan security forces captured large quantities of insurgent arms, again largely traceable to U.S. stocks captured in Vietnam.57 Today, however, following the Con-
tadora talks and contra operations in Nicaragua, the ongoing attack against Guatemala seems to be run primarily from Cuba.58

There have also been attacks on Honduras involving insurgent groups trained in Cuba and Nicaragua and, to a lesser extent, terrorist attacks and subversive efforts against Costa Rica.59 Since early 1981, Nicaragua and Cuba have sought to build an insurgent infrastructure in Honduras by recruiting Hondurans for training in the two countries and infiltrating the recruits back into Honduras as armed insurgents. In two major incidents, the Olancho infiltration of July 1983 and the Paraíso infiltration of July 1984, separate groups of 96 and 19 guerrilla recruits trained in Cuba and Nicaragua were captured by Honduran authorities as a result of defections by returning members of the two groups.60 These attacks and subversive efforts against Honduras are continuing. In April 1985, seven agents of the Nicaraguan DGSE were apprehended in Honduras. They admitted having come from Nicaragua to assist Honduran insurgents.61

Despite Costa Rica's strong tradition of democratic and socially conscious government, as early as 1970 the Sandinista FSLN considered part of its "fundamental mission . . . to aid the revolutionary movements in all of Central America, including bourgeois democratic Costa Rica."62 After taking power in Nicaragua, the FSLN began to make good on its self-imposed mission by sponsoring a recurrent pattern of terrorism in Costa Rica and planning a broader destabilization of Costa Rica through guerrilla insurrection. For example, in January 1982, Costa Rican authorities arrested Salvadoran and Guatemalan terrorists engaged in an effort to kidnap Salvadoran businessman Roberto Palomo. During their trial in 1983, the terrorists testified that they had received logistical support from Nicaragua and military and ideological training there. Similarly, when Costa Rican authorities arrested Germán Pinzón Zora, a member of the Colombian M-19 terrorist group, for the July 3, 1982 bombing of the San José office of the Honduran national airlines, he implicated three Sandinista diplomats in the Nicaraguan Embassy as having directed and assisted in the attack. He also said that the attack was part of a broader Nicaraguan plan of terrorism to discredit Costa Rica internationally.65 Former Sandinista intelligence officer Miguel Bolaños Hunter reported in June 1983:

Since 1979 there has been a plan to neutralize democracy in Costa Rica. They are doing it covertly in Costa Rica. They are training guerrilla groups and infiltrating unions to cause agitation. The idea is to cause clashes with the police and Costa Rican soldiers to cause a break

58 See Federico Fahsen, Ambassador of Guatemala, Address at Symposium on Soviet Involvement in Central America at Georgetown University (Sept. 10, 1984).
63 See CENTRAL AMERICA, supra note 59, at 13.
between the unions and the president. When the economy gets worse they will be able to have an organized popular force aided by the guerrilla forces already there.\textsuperscript{64}

Nicaraguan subversion against Costa Rica is continuing. After nearly a hundred incidents resulting in diplomatic protests, on February 19, 1985, Costa Rica ordered Nicaragua to reduce its embassy personnel from 47 to 10.

Costa Rica's Special Legislative Commission has investigated and documented the clandestine Cuban network set up in Costa Rica to support Sandinista operations against Somoza. According to the commission, after the fall of Somoza the network was reoriented to provide clandestine arms shipments to the FMLN insurgents in El Salvador.\textsuperscript{65}

In short, since mid-1980 Cuba and Nicaragua have been waging a secret war against neighboring Central American states, particularly El Salvador. The attack on El Salvador is neither temporary nor small-time. It fields forces roughly one-sixth the size of the Salvadoran Army and has resulted in thousands of war casualties and over a billion dollars in direct war damage to the Salvadoran economy. Although their figures are likely to be inflated, the FMLN insurgents claim that they have inflicted more than 18,000 casualties on the Salvadoran armed forces to date, and that in the first half of 1985 they continued to kill Salvadorans at a rate of 400 per week.\textsuperscript{66} Cuban and Nicaraguan involvement in this serious attack includes: participation in organizing the effective insurgency; the provision of arms; the laundering of Soviet-bloc for Western arms; transshipment of arms and assistance in covert transport; assistance in military planning; financing; ammunition and explosives supply; logistics assistance; the provision of secure command and control facilities; the training of insurgents; communications assistance; intelligence and code assistance; political, propaganda and international support; and the use of Nicaraguan territory as sanctuary for attack. With the exception of some reduction in arms transport since 1982-1983, these activities are continuing today in a serious effort to overthrow the democratically elected Government of El Salvador.

The evidence of this secret attack comes from many sources, which include highly classified intelligence reviewed by both the Carter and the Reagan administrations; conclusions of the Senate and House intelligence committees after careful review of the intelligence data; conclusions of the bipartisan Kissinger Commission after careful review of the entire record and extensive inquiry in the region; statements and reports of Central American leaders and nations; reports by independent media and scholars; public statements by defectors; publicly available Cuban, Nicaraguan and FMLN positions (though to a lesser extent, for obvious reasons); and, most ironically, testimony of witnesses for Nicaragua in its pending case before the World Court.


\textsuperscript{65} \textit{Cuba's Renewed Support for Violence}, \textit{ supra} note 10, at 8.

\textsuperscript{66} Address by Comandante Fermán Cienfuegos, FBIS, CENTRAL AMERICA, at Q11 (Aug. 5, 1985).
It should be emphasized that both the Carter and the Reagan administrations, after review of the intelligence data and publicly available evidence, concluded that Cuba and Nicaragua were engaged in a secret attack against El Salvador. The U.S. Departments of State and Defense have issued numerous detailed reports on the Cuban and Nicaraguan involvement that document repeated interception of arms and ammunition shipments. These reports, among others, were released in February 1981, March 1982, May 1983, July 1984 and April 1985.67 The most recent and detailed report was issued by the Department of State in September 1985.68 Readers are invited to review these reports and to draw their own conclusions.69

Some of the relevant congressional findings appear in a report of the House Permanent Select Committee on Intelligence, dated May 13, 1983, which stated:

The insurgents are well-trained, well-equipped with modern weapons and supplies and rely on the sites in Nicaragua for command and control and for logistical support. The intelligence supporting these judgments provided to the committee is convincing. There is further evidence that the Sandinista government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further providing the insurgents bases of operations in Nicaragua. Cuban involvement, especially in providing arms, is also evident.70

These findings were made by a committee with a Democratic majority that has been critical of the administration's policy in Central America and that has no incentive to arrive at such findings. Moreover, Congress as a whole found in the Intelligence Authorization Act of 1984: "By providing military support, including arms, training, logistical command and control and communication facilities, to groups seeking to overthrow the government of El

67 They are, respectively, COMMUNIST INTERFERENCE, supra note 50; BUREAU OF PUBLIC AFFAIRS, DEP'T OF STATE, CURRENT POLICY No. 376, CUBAN SUPPORT FOR TERRORISM AND INSURGENCY IN THE WESTERN HEMISPHERE (1982); CENTRAL AMERICA, supra note 59; NICARAGUA'S MILITARY BUILD-UP, supra note 41; and SOVIET-CUBAN CONNECTION, supra note 14.
68 DEP'T OF STATE, REVOLUTION BEYOND OUR BORDERS: SANDINISTA INTERVENTION IN CENTRAL AMERICA (1985) [hereinafter cited as REVOLUTION BEYOND OUR BORDERS].
69 On Dec. 7, a car ferrying ammunition, explosives, funds, and cryptographic and other support materials to the insurgents in El Salvador from Nicaragua was intercepted after an accident in Honduras. The driver, who was trained in Cuba, admitted having made a similar delivery from Nicaragua to the FMLN earlier this year. This was the latest "smoking gun" in a continuing series of interceptions of shipments from Nicaragua to the FMLN. Wash. Post, Dec. 20, 1985, at A49, cols. 3–6.
70 It is fashionable—and, for some, part of a serious disinformation effort—to attack State Department "white papers." Such attacks have been made both on the Vietnam-era white papers and on some Central American white papers. Western scholarship and statements by North Vietnamese leaders involved have now confirmed that reports in the white papers on the attack from North Vietnam were, if anything, understatements. For subsequent scholarly conclusions on the nature of that attack, see, e.g., S. KARNOW, VIETNAM: A HISTORY (1983).
71 H.R. REP. No. 122, 98th Cong., 1st Sess. 5 (1983). The committee also considered, on the basis of the available intelligence, that "[a] major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas." Id. at 6.
Salvador and other Central American governments, the Government of National Reconstruction of Nicaragua has violated Article 18 of the Charter of the Organization of American States.  

Corollary evidence that the Sandinista attack against El Salvador continues to be serious was reported in March 1984 by Democratic Senator Daniel P. Moynihan, then Vice-Chairman of the Senate Select Committee on Intelligence:

> It is the judgment of the Intelligence Committee that Nicaragua's involvement in the affairs of El Salvador and, to a lesser degree, its other neighbors, continues. As such, our duty, or at the very least our right, now as it was [last November,] is to respond to these violations of international law and uphold the Charter of the OAS.

In sum, the Sandinista support for the insurgency in El Salvador has not appreciatively lessened; nor, therefore, has their violation of the OAS Charter.

On August 2, 1984, the Democratic Chairman of the House Intelligence Committee, Congressman Boland, in a colloquy with Congressman Coleman, made clear for the record that Nicaragua was continuing to provide “military equipment,” “communications, command and control,” “logistics” and “other support activities” to the insurgents in El Salvador.

The Kissinger Commission’s report states that “[t]he guerrilla front [FMLN] has established a unified military command with headquarters near Managua” and that the Sandinistas, together with the Cubans and the Soviets, have given major support to the Salvadoran insurgents.

Central American leaders have reached similar conclusions. Thus, former Salvadoran President Alvaro Magaña told a Spanish newspaper on December 22, 1983 that “armed subversion has but one launching pad: Nicaragua. While Nicaragua draws the attention of the world by saying that for two years they have been on the verge of being invaded, they have not ceased for one instant to invade our country.” President Duarte said in a press conference in San Salvador on July 27, 1984:

> We have a problem of aggression by a nation called Nicaragua against El Salvador, that these gentlemen are sending in weapons, training people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night.

---

75 Id. at 143-45.
76 NICARAGUA'S MILITARY BUILD-UP, supra note 41, at 23.
In view of this situation, El Salvador must stop this somehow. The contras... are creating a sort of barrier that prevents the Nicaraguans from continuing to send arms to El Salvador by land.77

In April 1984, the Foreign Minister of Honduras told the UN Security Council that his "country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population."78

Similarly, the independent media and scholars have repeatedly reported evidence of the Cuban-Nicaraguan secret attack. For example, Alan Riding reported in the New York Times on March 18, 1982 that "the [Salvadoran] guerrillas acknowledge that, in the past, they received arms from Cuba through Nicaragua, as the Reagan Administration maintains."79 On September 21, 1983, the Washington Post carried a major article describing how reporters admitted to Nicaragua by the Sandinistas to see a "fishing cooperative" instead found a base for ferrying arms to El Salvador.80 On April 11, 1984, the New York Times reported from Managua: "Western European and Latin American diplomats here say the Nicaraguan Government is continuing to send military equipment to the Salvadoran insurgents and to operate training camps for them inside Nicaragua."81 In a recent study, Stephen Hosmer and Thomas Wolfe wrote of the Central American conflict: "The
cooperation between members of the Soviet bloc and other radical regimes to aid the revolutionary forces in El Salvador... is an example of a coordinated communist effort to bring about the overthrow of an established government."  
Publicly available reports by defectors have further confirmed the Cuban-Nicaraguan involvement, such as an interview with the Washington Post and the Department of State given by Miguel Bolaños Hunter, a former member of the state security system of the Sandinista regime. He also explained that

[The Sandinistas give total help, advice and direction on how to manage the war and internal politics. The guerrillas are trained in Managua, the Sandinistas help the air force, army and navy get arms through. Some arms come from Cuba via Nicaragua. They use the houses of Nicaraguan officers for safe houses and command posts. There is a heavy influx of communications giving orders. You can say the whole guerrilla effort is managed by Nicaragua.]

Alejandro Montenegro, former commander in chief of the National Central Guerrilla Front of the People's Revolutionary Army in El Salvador who led the major attack against Ilopango airport, also testified to the magnitude of Nicaragua's involvement. He was reported as telling the New York Times "that virtually all of the arms received by the guerrilla units he led came from Nicaragua" and that "in 1981 and 1982 guerrilla units under his command in San Salvador and north of the city received '99.9 percent of [their] arms' from Nicaragua." He said that the attack on the Ilopango airport was carried out by seven of his men who had returned from Nicaragua after 6 months of training in Cuba. And he told a congressional group: "What I want to make very clear is that Managua is where the command center is in every regard."

Similarly, M. López-Ariola, another former high-ranking Salvadoran insurgent, has related that representatives of the DRU from the five Salvadoran insurgent groups live in Managua and each group has a command center there. Alvaro Baldiszón Aviles, the former chief investigator of the Interior

---

82 S. Hosmer & T. Wolfe, supra note 2, at 102–05. See also McGeorge, Tactics and Techniques of Terrorists and Saboteurs, Terrorism: An International Journal, No. 3, Winter 1985, at 297. Describing the attack on the Cuscatlán bridge in El Salvador, McGeorge writes: "This attack was not done by a group of bush-leaguers; it is an example of the use of foreign nationals or mercenaries..." Id. at 301.  
83 See generally Nicaragua's Military Build-up, supra note 41, at 14–15.  
84 Bolaños Transcripts, supra note 64, at 10.  
85 See Nicaragua's Military Build-up, supra note 41, at 16–17.  
86 Smith, A Former Salvadoran Rebel Chief Tells of Arms From Nicaragua, N.Y. Times, July 12, 1984, at 10, cols. 2–6.  
87 See Dep't of State interview with Alejandro Montenegro, Division of Language Services, No. 112,533, at 19.  
88 H.R. Republican Study Committee, Republican Study Committee Task Force on Central America Briefing with Alejandro Montenegro, July 12, 1984, at 5. Montenegro also dated the arrival of the first shipment of arms from Havana via Nicaragua as Dec. 31, 1980. See Dep't of State interview, supra note 87, at 11.
Ministry’s Special Investigation Committee, has recently reported the “training for guerrilla warfare” of groups of the Costa Rican Popular Vanguard Party at a site near El Castillo in southern Nicaragua. Apparently, each group would stay for 6 months of training by the Nicaraguans before returning to Costa Rica and would then be replaced by another group.89 Most tellingly, Edén Pastora Gómez, perhaps the principal national hero of the Sandinista revolution, recently wrote: “When the Managua government, personified by the nine top Communists, was planning the insurrection in El Salvador, I was a participant in the meetings of the National leadership. . . .”90

Claims by the FMLN that it gets its weapons by capturing them from the Government of El Salvador do not square with the public record. Among other discrepancies, the following should be noted. When the insurgents launched their “general offensive” in January 1981, they did so with an impressive array of sophisticated weapons never before used in El Salvador by either the insurgents or the Salvadoran Army, including Belgian FAL rifles, German G-3 rifles, U.S. M-16 and AR-15 rifles, the Israeli Uzi sub-machine gun, the American M-60 machine gun and many other such weapons.91 Serial number studies of captured FMLN weapons of American manufacture show that the great preponderance was sent to Vietnam, not El Salvador.92 Moreover, the substantial losses of arms by the insurgents to the Salvadoran Army are not taken into account.93 Finally, even if the rebels’ exaggerated claims about the captured arms are accepted without considering their substantial losses or other factors, the quantity of their arms still cannot be explained.

The statements of the Sandinistas themselves are strongly suggestive of their secret war—even though they obviously recognize that an ongoing secret war cannot be directly and publicly confirmed. Thus, as we have seen, the FSLN statement of goals called for “support for national liberation movements in neighboring states” for at least a decade before the Sandinistas came to power. More recently, El Salvador informed the International Court of Justice that “Foreign Minister Miguel D’Escoto, when pressed at a meeting of the Foreign Ministers of the Contadora Group in July 1983, . . . on the issue of Nicaraguan materiel support for the subversion in El Salvador, shamelessly and openly admitted such support in front of his colleagues of the Contadora Group.”94

89 Information Supplied by Alvaro Baldizon Aviles, supra note 28, at 19–21.
91 See COMMUNIST INTERFERENCE, supra note 50, at 2.
92 See, e.g., SOVIET-CUBAN CONNECTION, supra note 14, at 33–34.
93 See generally material cited supra notes 45–48.
94 Declaration of Intervention of the Republic of El Salvador, supra note 77, 24 ILM at 40. Also, according to Salvadoran President Duarte, Comandante (and now President) Daniel Ortega acknowledged during a European political trip “that he had helped, is helping, and will continue to help the Salvadoran guerrillas.” Duarte added that Ortega “placed himself in a position that showed . . . that it is he who is openly and directly attacking and intervening in our country. . . . Obviously, he ha[s] declared himself guilty of intervention.” Press Conference of President
Luis Carrión, the Sandinista Vice-Minister of the Interior and a principal witness for Nicaragua before the World Court in the *Nicaragua* case, while reiterating the party line that Nicaragua is not giving support to the insurgents in El Salvador, recently made a statement to a human rights investigating team that indirectly confirmed Nicaraguan involvement: "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time." Interestingly, this statement was reported by a witness for Nicaragua in the World Court case and contradicts the sworn affidavit submitted to the Court by the Nicaraguan Foreign Minister, who testified that Nicaragua never has provided aid to insurgents in El Salvador.

Further testimony of witnesses for Nicaragua before the World Court confirms its involvement in El Salvador despite their best efforts to be helpful. Thus, on direct examination by Abram Chayes, counsel for Nicaragua, David MacMichael, the lead witness for Nicaragua on these issues, participated in the following exchange:

---


Similarly, Comandante Bayardo Arce said:

> Imperialism asks three things of us: to abandon interventionism, to abandon our strategic ties with the Soviet Union and the socialist community, and to be democratic. We cannot cease being internationalists unless we cease being revolutionaries. We cannot discontinue strategic relationships unless we cease being revolutionaries. It is impossible even to consider this.


Department of the Interior testimony of Nicaragua's witness David MacMichael flatly contradicts D'Escoto's above-quoted sworn statement. Note also that D'Escoto's statement is narrowly focused on "arms or other supplies," which conveniently excludes the involvement of Nicaragua in organization; command and control; financing; laundering and storage of arms; intelligence assistance; training, political and propaganda assistance; use of its territory as sanctuary; and other forms of substantial complicity in the FMLN insurgency.
Q: Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA—6 March 1981 to 3 April 1983. Now let me ask you without limit of time: did you see any evidence of arms going to the Salvadoran rebels from Nicaragua at any time?
A: Yes, I did.
Q: When was that?
A: Late 1980 to very early 1981.
Q: And what were the sources of that evidence?
A: There were a variety of sources: there was documentary evidence, which I believe was codable [credible], there were—and this is the most important—actual seizures of arms shipments which could be traced to Nicaragua and there were reports by defectors from Nicaragua that corroborated such shipments.97

Subsequently, Judge Stephen Schwebel questioned Mr. MacMichael about these arms shipments:

Judge Schwebel: . . . My first question is this. You stated that you went on active duty with the CIA on 6 March 1981 and left on 3 April 1983, or about that date. Am I correct in assuming that your testimony essentially relates to the period between March 1981 and April 1983, at least insofar as it benefits from official service?

Mr. MacMichael: That is correct, your honour, and I have not had access since I left to classified materials, and I have not sought access to such material.

Q: Thus, if the Government of Nicaragua had shifted arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El Salvador, you would not be in a position to know that; is that correct?
A: I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

Q: Would you rule it “in”?
A: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling “in” that [sic] “ruling out”.98

Judge Schwebel, returning to the issue, continued:

Q: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the

97 See Verbatim Record, supra note 12, CR 85/21, at 20 (Sept. 16, 1985) [hereinafter the Court's numbered documents of the Verbatim Record will be cited by their identification numbers, which include the year, and the date].
98 Id. at 29.
Salvadoran insurgency. Is that the conclusion I can draw from your remarks?

A: I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion.\footnote{Id. at 41.}

Shifting to other modes of Nicaraguan involvement in support of the FMLN insurgents, Judge Schwebel elicited the following admissions from Mr. MacMichael:

Q: . . . Mr. MacMichael, is it a fact that leaders of the El Salvadoran insurgency are based in Nicaragua and regularly operate without apparent interference from Nicaraguan authorities in Nicaragua?

A: I think the response to that question would have to be a qualified yes, in that political leaders and, from time to time, military leaders, of the Salvadoran insurgency have reported credibly to have operated from Nicaragua, that this was referred to frequently by the United States Government as a command and control headquarters, and that such an action could certainly be defined as one unfriendly toward the Government of El Salvador recognized by the United States. I have confined my testimony to the charge of arms flow.\footnote{Id. at 34–35.}

Q: . . .

A: To the best of my knowledge I think I would say yes, that is the information I have.\footnote{Id. at 39–40.}

In questioning William Hupper, the Nicaraguan Minister of Finance, Judge Schwebel subsequently summed up the factual points he believed established by Nicaragua’s own witnesses:

Q: . . . You were not present during the examination of other witnesses. Let me summarize for you some facts that will be on a question I am about to ask you, which I think can be fairly deduced from the testimony introduced so far.

\begin{itemize}
  \item The Nicaraguan Government has been a source of arms for the insurgency in El Salvador, particularly—possibly exclusively, but certainly, particularly—for the big offensive of the El Salvadoran insurgents.
\end{itemize}
(b) The leadership of the El Salvadoran insurgents freely operates out of Managua and elsewhere in Nicaragua.

(c) A radio station of the El Salvadoran insurgents has broadcast from Nicaraguan territory.

(d) The training of El Salvadoran insurgents may well take place in Nicaragua as well as Cuba.\(^{102}\)

As with Foreign Minister D'Escoto's sworn affidavit to the Court, Nicaragua sought in presenting its case to mislead the Court by focusing solely on arms supply and ignoring all other major forms of Sandinista assistance to the insurgency. Yet even with respect to arms supply, its own lead witness contradicted the sworn affidavit of the Foreign Minister.

Nicaragua's witnesses before the Court also established several other points of importance to a legal appraisal of the Central American conflict. Thus, Vice-Minister of the Interior and former Vice-Minister of Defense Luis Carrión unequivocally dated the first contra attack as from December 1981.\(^{103}\) This was, as we have seen, at least a year to a year and a half after Nicaragua gave major assistance to the FMLN insurgents in El Salvador, which was also confirmed by Nicaragua's witnesses. David MacMichael, questioned on direct examination by Abram Chayes, confirmed that the purpose of assisting the contras was "to interdict" the flow of arms.\(^{104}\)

The record is unmistakable for any serious observer. Cuba and Nicaragua have been participating in a secret war against El Salvador and subversive attacks against other Central American neighbors at least since mid-1980. Those attacks are continuing.

**U.S. Efforts at Peaceful Settlement**

The United States and the attacked nations of the region have made, and continue to make, every effort to resolve the Central American conflict peacefully. The Carter administration's 1980 protest and the one-month suspension of arms shipments by Nicaragua have already been mentioned. Still seeking constructive relations, the Carter administration as late as September 1980 certified to Congress that Nicaragua was not giving assistance to international terrorism, so as to be able to continue American economic aid that would by law be terminated if a finding of such assistance were made. In view of the evidence at that time, this certification was controversial within the administration.\(^{105}\) By December 1980, the intelligence on Sandinista involvement was overwhelming. Shortly thereafter, the Carter administration suspended AID and PL-480 sales to Nicaragua and resumed military assistance to El Salvador.


\(^{103}\) CR 85/19, at 24 (Sept. 12).

\(^{104}\) CR 85/21, at 8 (Sept. 16).

During 1981–1982, the Reagan administration made two major diplomatic efforts to bring about a peaceful end to the secret attacks from Nicaragua. Assistant Secretary of State Thomas O. Enders visited Managua in August 1981 and offered to renew economic assistance in exchange for an end to Sandinista support for the guerrillas. The offer was tied solely and explicitly to an end by the Sandinistas of attacks against El Salvador and neighboring states. Edén Pastora, a participant in the National Leadership of Nicaragua at the time of the Enders visit, recently reported that Daniel Ortega told Fidel Castro that

Enders had confided privately that as a U.S. representative, he has come to Nicaragua not to defend the rights of the democratic opposition, but rather to insist that the FSLN meddling in El Salvador must stop. . . . Enders had told Daniel that the Nicaraguans could do whatever they wished—that they could impose communism, they could take over _La Prensa_, they could expropriate private property, they could suit themselves—but they must not continue meddling in El Salvador.

The Sandinistas never responded to the Enders offer and their ambassador to the United States, Arturo Cruz, resigned shortly thereafter in frustration at these developments. In April 1982, the United States made an eight-point proposal reiterating the August offer and emphasizing international verification of arms limitations and reaffirmation by Nicaragua of its OAS commitments to support pluralism, free elections and a mixed economy.

In October 1982, the United States joined eight democracies of the region in drawing up the San José Declaration, which outlined essential conditions for peace. The Sandinistas refused both to meet with the group’s designated spokesman, Costa Rican Foreign Minister Volio, and to discuss the San José principles.

The United States supported efforts begun by Colombia, Panama, Mexico and Venezuela in January 1983 at Contadora, Panama to mediate a regional settlement. These “Contadora” talks, which were supported by the OAS, produced agreement on a 21-point Document of Objectives whose verifiable implementation would have met U.S. concerns. Since late 1984, the Contadora discussions have focused on resolving differences between a September 21 draft supported by Nicaragua—which Nicaragua insists be accepted without change—and prepared amendments by Honduras, El Salvador and Costa Rica, as well as on efforts to strengthen verification.

106 Pastora, supra note 90, at 10–11.

107 For an excellent description of the Contadora process, see Purcell, _Demystifying Contadora_, 64 FOREIGN AFF. 74 (1985).

108 See generally U.S. Support, supra note 105; DEP’T OF STATE, SPECIAL REP. NO. 115, U.S. EFFORTS TO ACHIEVE PEACE IN CENTRAL AMERICA (1984). According to Susan Purcell, Director of the Latin American Program at the Council on Foreign Relations:

[The United States rejected the [Contadora Draft] Acta [of Sept. 7, 1984] because it was a vague statement of goals without concrete limits on Nicaraguan action. Its provisions for unification and enforcement were totally inadequate, and it deferred negotiation on foreign military and security advisors and arms and troop reductions until after signature.
The Contadora process was interrupted for a 6-month period from late 1984 to early 1985, in part because of a Nicaraguan action in disregard of the Latin American doctrine of asylum. A Nicaraguan resisting the newly imposed draft, Mr. Urbina Lara, took refuge in the Costa Rican Embassy. At a moment when the Costa Rican diplomats had briefly left the embassy, Urbina Lara was forcibly removed from the building by the Sandinistas and was wounded and imprisoned. Costa Rica refused to participate further in the Contadora process until Urbina Lara was allowed to leave Nicaragua.\(^\text{109}\)

On June 1, 1984, Secretary of State George Shultz visited Managua and proposed direct discussions between Nicaragua and the United States. It was made clear that the purpose was to facilitate the Contadora process. Pursuant to this initiative, the United States Special Envoy, Ambassador Harry Shlaudeman, held nine meetings with the Sandinistas between June and December 1984, largely in Manzanillo, Mexico. Those discussions did not lead to a solution.

It has frequently been suggested that the United States resort to the Organization of American States. To date, however, the OAS has clearly preferred not to be involved and has pointedly endorsed the Contadora process. Even more importantly, Nicaragua has viewed the OAS as a hostile forum and has sought to prevent it from considering the issues.\(^\text{110}\) They have been brought before the UN General Assembly and Security Council on numerous occasions, but the United Nations has also tended to defer to the Contadora process.\(^\text{111}\) The United States has further tried through multiple channels with third countries to encourage the Sandinistas to accept a peaceful solution. Those efforts have so far proved unproductive.\(^\text{112}\)

Contra Assistance as a Response

There was no significant military opposition to the Sandinistas until the spring of 1982. That was over a year and a half after the sustained secret attack began on El Salvador in mid-1980 and more than 6 months after Enders’s effort to resolve the attack peacefully—indeed, to resume economic assistance to the Sandinistas if they would simply cease their attack—went of the treaty. On the other hand, it required the United States upon signature to cease military exercises and support for the contras. Further military aid to El-Salvador and Honduras was frozen, while Nicaragua was allowed to maintain its military advantage over these two countries. The provisions for democratization and internal reconciliation were hortatory and unenforceable as drafted.

unanswered. When the Sandinistas announced their intention to build a 200,000-man militia in February 1981, there was "surprisingly little counterrevolutionary activity."\(^1\)

It seems clear from press and first-person accounts that the armed military opposition to the Sandinistas developed spontaneously and independently.\(^2\) These same press reports and open congressional discussion also suggest that, in response to the continuing Sandinista attacks, the United States and some other nations began providing assistance to the opposition.\(^3\) The U.S. objectives have been to assist in interdicting the attacks through direct assaults on weapons shipment points\(^4\) and through the diversion of Nicaraguan resources to internal concerns. Most importantly, the contra policy seems intended to convince Nicaragua to cease the armed attacks on its neighbors.

United States assistance to the groups variously known as "contras" or "democratic resistance forces" has been carefully controlled. Under the Boland amendment, Congress insisted that the U.S. objective not be to overthrow the Government of Nicaragua, despite its secret armed attack on neighboring states, but solely to protect neighboring states from these attacks.\(^5\) By mid-1984 Congress had further hardened its position, and, amidst the controversy over the April 6 letter to withdraw from the jurisdiction of the World Court, terminated remaining assistance to resistance groups in Nicaragua.\(^6\)

In mid-1985 Congress softened its stance following Comandante Daniel Ortega's highly visible trip to Moscow immediately after the vote to cut off aid to the contras. Although, at first, it seemed that the administration would be rebuffed again, Congress now voted to provide "non-lethal humanitarian" aid to the contras, but prohibited the Department of Defense and the CIA from administering it.\(^7\) The Washington Post recently reported that the new State Department office administering this aid plans to use it only for food, medicine and clothing.\(^8\) Earlier, Congress had effectively terminated

---

\(^1\) See supra note 45 and accompanying text.

\(^2\) See, e.g., Pastora, supra note 90, at 7 (on the founding of ARDE). Pastora writes that he "decided to renew the struggle for democracy in Nicaragua, having understood that the ... [FSLN] had turned our revolution over to Soviet interests." Id.


\(^4\) Some early Argentinian assistance to the contras has also been reported. See Joyner & Grimaldi, The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention, 25 VA. J. INT’L L. 621, 634 n.68 (1985).

\(^5\) The contras have successfully attacked such points, for example, the arms transhipment point La Concha in Nicaragua.


any small-scale mining option by passing a sense of the Senate resolution disapproving any such action.\footnote{231}{Roberts, Senators Modify Bill on Rebel Aid, N.Y. Times, June 8, 1985, at 1, 6, col. 5.}

The contrast between the all-out Cuban-Nicaraguan support for the FMLN and the cautious, on-again, off-again United States support for the contras is striking. Even though assistance to the contras is a defensive response to an armed attack, Congress has restricted U.S. actions to make it clear that such support is not to be given for the purpose of overthrowing the Government of Nicaragua and it has prohibited small-scale mining of harbors. For a substantial period, all assistance was terminated, and since its renewal, it has consisted only of nonlethal humanitarian aid that may not be administered by the Department of Defense or the CIA. In contrast, Cuba and Nicaragua have provided unstinting political and military support to the insurgents in El Salvador; the very purpose of their attack is to overthrow the democratically elected Government of El Salvador. No Boland amendment, fund cutoffs or other limitations hamper their attacks. They provide a full range of support services to the insurgents, have stepped up the indiscriminate use of land mines and would certainly regard as laughable any suggestion that their assistance should be limited to nonlethal humanitarian aid.

Despite these differences in kinds and levels of support, the FMLN insurgency has decreased in number from approximately nine thousand to six thousand and, according to Nicaragua’s own testimony before the World Court, the “contra” groups have grown from approximately seven thousand at the end of 1983 to nearly eleven thousand by late 1985.\footnote{232}{See CR 85/20, at 11 (Sept. 13). Note that according to the Washington Post, in 1983, during a period of U.S. assistance to the contras, the U.S. Government provided each contra soldier with a “subsistence fee” of $23 per month. Oberdorfer & Tyler, U.S.-Backed Nicaraguan Rebel Army Swells to 7,000 Men, Wash. Post, May 8, 1988, at 1. Compare this figure with the average monthly salary for a “worker” in Nicaragua in January 1985, which “ranged between $110 and $150.” See Vargas Llosa, In Nicaragua, N.Y. Times, Apr. 28, 1985, §6 (Magazine), at 45.}

It should be noted that during much of the period when this significant growth of the democratic resistance took place, the United States by law provided no assistance. The principal difference seems to be that the FMLN has little political support in El Salvador, as that country has made a successful transition to a reformist democracy, while opposition has been dramatically mounting in Nicaragua as the comandantes move toward totalitarianism.\footnote{233}{On El Salvador, see LeMoyne, Salvador Puts Guerrillas on the Defensive, N.Y. Times, May 19, 1985, at D1; McCartney & Omang, Democracy Gaining in El Salvador, U.S. Believes, Wash. Post, June 2, 1985, at A1, A20, cols. 2–5. On Nicaragua, see, e.g., Ritter, Help the Contras, N.Y. Times, Apr. 11, 1985, at A21 (op-ed.).}

The political platforms of the two insurgent groups reflect this difference. The FMLN has refused to participate in elections and has insisted on a “brokered” power-sharing arrangement.\footnote{234}{One authority has estimated that only about 1.7% of El Salvador's five million people support the FMLN insurgency, which explains why the FMLN consistently rejects participation in elections. See Young, El Salvador: Communist Blueprint for Insurgency in Central America, 5 Conflict: All Warfare Short of War 307, 329 (1985).} In contrast, the contras have asked to par-
ticipate in internationally observed free elections and have even agreed that
the comandantes could continue in power while such elections were held.
On Easter Sunday, 1984, all nine of Nicaragua's Catholic bishops signed a
pastoral letter on reconciliation urging a dialogue between the armed resis-
tance and the Nicaraguan Government. The contras have repeatedly ac-
cepted this call, most recently in their "Document on National Dialogue of
the Nicaraguan Resistance," announced in San José, Costa Rica on March
2, 1985. The comandantes, however, have refused the invitations by both
the bishops and the democratic resistance.

It is instructive in understanding the origins, motivation and program of
the democratic resistance groups to look to their own statement of purpose.
For example, the "Document on National Dialogue," mentioned above,
provides:

[T]he national crisis we face did not grow out of a confrontation be-
tween imperialism and the revolution, as the Sandinista Front pretends,
but out of the contradictions which emerge from the clash between
democratic expectations of the Nicaraguan people and the imposition
of a totalitarian system such as that which is being implanted in our
country by the Sandinista Front.

This conflict, which has produced a civil war, today threatens to
destroy the Nicaraguan nation.

The solution to the national crisis can only be found through a gen-
une understanding among all Nicaraguans that might end the civil
war and lead to the reconciliation of the Nicaraguan family.

We wish to emphasize that this initiative is not taken merely to search
for a quota of power, but rather it seeks only to establish in Nicaragua
the rule of law which will permit the people to live in peace and to go
about resolving our problems within a new constitutional order.

We support fully the minimum requirements demanded by the
Democratic Coordinator in order to initiate the National Dialogue. They are: Suspension of armed activities, with a cease-fire in situ; lifting
of the state of emergency; absolute freedom of expression and assembly;
general amnesty and pardon for political crimes and related crimes;
entry into effect of the right of asylum and habeas corpus, adding the
granting of full protection of the physical and moral integrity of those
members of the Resistance who participate in the dialogue, in the event
that it should take place in Nicaragua.

The application of these measures should be carried out under the
supervision of the guarantor governments.

125 Reprinted in 130 CONG. REC. S5158, S5158-59 (daily ed. May 1, 1984).
126 Document on National Dialogue of the Nicaraguan Resistance, signed by the various
leaders and read to members of the Nicaraguan exile community in San José, Costa Rica, Mar.
12, 1985 (on file at the Center for Law and National Security). Edward Cody of the Washington
Post reports that the Democratic Coordinator, "an opposition alliance" and "the Catholic Church
hierarchy" have "joined the Reagan administration in calling for a dialogue between the gov-
ernment and the rebel leadership." See Cody, Nicaraguan Crackdown Seen Aimed at Church, Wash.
If this dialogue is carried out, we commit ourselves to accept that Mr. Daniel Ortega continue acting as head of the Executive Branch until such time as the people pronounce themselves in a plebiscite. During this period, Mr. Ortega should govern in fulfillment of the promises of the Nicaraguan Revolutionary Government Junta contained in the document of July 12, 1979 and directed to the Secretary General of the Organization of American States, and in fulfillment of the Original Program of Government, the Fundamental Statute and the American Human Rights Convention and the Pact of San Jose...

Although it will be up to the Bishops Conference to establish a definitive agenda, by agreement of the parties, we urge it to include as of now the following points:

1) That the legal procedure and actions of the government conform immediately to the American Convention on Human Rights, or the Pact of San Jose, which was ratified by the Nicaraguan Government of National Reconstruction on September 25, 1979, declaring it the law of the land and committing the national honor to its enforcement.

2) The dismantlement and immediate dissolution of all the party repressive organisms such as the CDS (Sandinista Defense Committees) and the other para-military organs.

3) . . . the apolitical nature of the army, an end to the arms race, and the withdrawal of all foreign military troops and advisors and internationalists.

4) Immediate dissolution of the National Constituent Assembly.

5) A new provisional electoral law.

6) A new provisional law for political parties.

7) Re-structuring of the electoral system in accordance with the above provisional laws.

8) Calling of elections for a National Constituent Assembly.

9) Calling of municipal elections.

10) Calling of a plebiscite on the conduct of new presidential elections.

Even this program of the Nicaraguan resistance is not dedicated to forcefully overthrowing the Government of Nicaragua, but rather to pressuring that Government to guarantee human rights and to hold free elections as pledged to the OAS and the people of Nicaragua.

To put the 12,000–15,000 contra level in perspective, in 1978—one year before Somoza was overthrown—Sandinista strength stood at about one thousand in a widely popular revolution. It only took about five thousand guerrillas to topple the regime. Current levels of contra forces thus suggest widespread Nicaraguan opposition to the comandantes. The Nicaraguan bishops explicitly recognized this substantial internal opposition to the San-

---

128 See SOVIET-CUBAN CONNECTION, supra note 14, at 22.
dinistas as a principal cause of the Nicaraguan conflict when they wrote in their Easter pastoral letter: "It is dishonest to constantly blame internal aggression and violence on foreign aggression." 129

Although Sandinista propaganda has sought to paint the contras as former "Somocistas," the reality is quite different. Edén Pastora, the leader of one faction of the Democratic Revolutionary Alliance, or ARDE, was the famous "Commander Zero" who fought with the Sandinistas against Somoza. In fact, he was both commander in chief of the revolutionary army against Somoza and the greatest hero of the revolution. 130 Arturo Cruz, a leading democratic political candidate associated with the democratic opposition alliance, was twice jailed by Somoza and served as president of the Nicaraguan central bank and Ambassador to the United States under the Sandinistas. Adolfo Calero, the commander in chief of the armed forces of the FDN, was a lifelong opponent of Somoza and assisted in the political action that ousted him. Calero's distinguished career included service as dean of the faculty of economics and business administration at the University of Central America. He, too, was jailed by Somoza. Alfonso Robelo, the leader of a faction of ARDE, was one of the five original members of the Sandinista junta. He resigned in 1980 over the Sandinista packing of the Legislative Council in violation of the Fundamental Statute of the Republic, and in 1982 he went into exile in Costa Rica.

In short, the opposition to the Sandinistas is democratic and broad based. 131 It is by no means simply a creation of external support. The evidence also suggests that assistance to the contras is moderating the secret war against El Salvador and neighboring states.

The Worldwide Misinformation Campaign

For the democracies, one of the most dangerous—and puzzling—elements of the current assaults by radical regimes is that their covert nature makes them difficult to accept. 132 To make acceptance more difficult, they are frequently masked by a cloud of misinformation and propaganda. Substantial evidence suggests that attention is concentrated on this political front in such assaults. 133 The secret attack against El Salvador and neighboring Central American states is no exception. As Philip Taubman wrote in the New

129 130 CONG. REC. at S5158.

130 In fact, Pastora's father was killed by Somoza's National Guard. A substantial amount has been written about the famous "Commander Zero." See, e.g., Christian Sci. Monitor, June 22, 1979, at 12, col. 3; Chicago Tribune, June 29, 1979, at 2, col. 1; ECONOMIST, May 10, 1980, at 21; and Arostegui, Revolutionary Violence in Central America, INT'L SECURITY REV., Spring 1979, at 89. See also Pastora, supra note 90, at 5.


132 For a discussion of the reappraisal now taking place in Europe with respect to the Central American conflict, see Ledeen, European Policy Intellectuals and U.S. Central American Policy, WASH. Q., Summer 1985, at 187.

York Times in 1982: “In recent months, with increasing sophistication, the leaders of the guerrilla movement in El Salvador have mounted a public relations campaign directed at world opinion in general, and at American public opinion in particular.”134 Today the FMLN operates more than 60 offices in 35 countries to support its attack against the Government of El Salvador. Nicaragua has worked to create a network of “solidarity committees” within the democracies, particularly the United States, the Western European countries, Canada and Australia. Arturo Cruz has estimated that there are 200 such committees in the United States and 60 in West Germany, just to name two targeted countries.135 Alejandro Montenegro has confirmed that these “solidarity groups” “are instructed from Nicaragua.”136 Moreover, on the basis of his own conversations with defectors from Cuban intelligence organizations, the current editor of the Washington Times and former Newsweek correspondent, Arnaud de Borchegrave, gave the following detailed testimony to the Kissinger Commission:

Documents . . . which I would be happy to make available to the Commission, cast light on one well-organized active measures operation, intended to isolate the Salvadoran government from American sympathy and to mobilize support in the U.S. for the guerrillas through the channel of a “solidarity committee” set up with the help of Cuban intelligence officers operating under the cover of the United Nations in New York City.

CISPES was formed in October 1980 as a direct result of a visit to the U.S. by Farid Handal, brother of the Secretary General of the Salvadoran Communist Party Shafik Handal. His principal adviser in this venture was Alfredo Garcia Almeida, at that time the Station Chief of the Departamento de America of the Cuban Communist Party in New York . . .

CISPES was subsequently set up as a tax-exempt organization with an office in Washington and countrywide chapters, that included 500 college campuses.137

As part of their propaganda effort, the comandantes have encouraged a sophisticated and extensive political campaign in the United States featuring trips for Americans to Nicaragua,138 public appearances by Nicaraguan

---

135 Nicaragua and the Crisis in Central America, Address by Arturo Cruz, at the National Strategy Information Center, Defense Strategy Forum, Washington, D.C. (May 22, 1985). The Sandinistas have also been working assiduously to bring opinion leaders from the United States, and the West in general, on controlled trips to Nicaragua.
136 See H.R. Republican Study Committee, supra note 88, at 4–5.
137 Reported in Young, supra note 124, at 326–27.
138 See, e.g., Report on Travel Seminars Conducted by Center for Global Service and Education, Augsburg College, Minneapolis, MN, reprinted in 131 CONG. REC. H2042 (daily ed. Apr. 16, 1985) (introduced by Rep. Weber). According to Congressman Weber, “One of the things we found down there from the people in Nicaragua, particularly the people in the Catholic Church, was a deep concern about the biased nature of the information given to American church groups visiting Nicaragua.” Id. at H2043. A participant in one such trip concluded: “The travel seminars
spokesmen before American audiences, films and even direct phone lobbying
by Daniel Ortega of individual American congressmen before key congress-
ional votes. The commandantes have hired a Washington law firm to lobby
for them in the United States and to represent them before the World Court.
In addition to lobbying Congress, this firm is said to have been instrumental
in instigating alleged human rights reporting on the contras' activities.139
Similarly, the commandantes have hired a public relations firm, Agenda In-
ternational, to help sway public opinion.140 The following example dem-
strates the sophistication of the Sandinista propaganda effort in the United
States: when it became apparent that Senator David Durenberger of Min-
nesota would become Chairman of the Senate Select Committee on Intel-
ligence, a committee essential to funding the contras, pro-Sandinista activities
increased dramatically in the state of Minnesota.141

Comandante Bayardo Arce, in a May 1984 secret speech before a small
Nicaraguan Moscow-oriented Communist party, talked openly of the delib-
erate deception of the democracies by the commandantes. In his speech—
which began “Good morning, comrades” and talked of “we Communists”142—he said, “We have not declared ourselves Marxist-Leninists pub-
licly...”143 One of his major themes was that the Sandinistas, as Marxist-
Leninists, were maintaining democratic support by professing support for
the OAS conditions. Thus, he said, “We are using an instrument claimed by
the bourgeoisie, which drains the international bourgeoisie, in order to move
ahead in matters that for us are strategic.”144 Comandante Arce repeatedly
confirmed the importance to the Sandinistas of international opinion—and
domestic opinion within the United States—and even bragged that they
were “still achieving some degree of domestic neutralization in the U.S.”145
Above all, he admitted that a principal purpose of the international deception
is to build a Marxist-Leninist state in Nicaragua with Western financial as-

139 The Washington law firm of Reichler & Applebaum is registered under the Foreign
Agents Registration Act as an agent of Nicaragua in the United States (Registration No. 3582).
The firm is reported to have assisted in a widely publicized “human rights investigation” into
alleged contra atrocities (the Reed Brody report of February 1985). See D. Fox & M. Glennon,
supra note 95, at iv.

140 A major strategy of the Sandinista ICJ case, intended to appeal to an American audience
and the Court, has been to maximize use of Americans as counsel and witnesses. See Shaw,
Americans to Testify Against U.S. in Nicaraguan World Court Case, Wash. Post, Sept. 8,
1985, at A17, cols. 1–5.

141 Id. at 6.

142 ARCE'S SECRET SPEECH, supra note 94, at 2.

143 Id. at 5.

144 Id. at 3.

145 Id. at 3.
about this being the first experience of building socialism [Marxism-Leninism] with the dollars of capitalism.146

Recently, the Washington Post carried an account of the defection of Mateo Guerrero, former executive director of Nicaragua’s National Commission for the Promotion and Protection of Human Rights. According to that account, Guerrero defected because the Sandinistas had politicized the Commission in support of their propaganda war:

The commission, established in 1980 to probe human rights abuses, has gradually come under control of the Nicaraguan Foreign Ministry, which has tried to convert the office into a government propaganda arm... .

[The Ministry’s Secretary General] told two commission officials last January that the panel would help the government establish liaisons with foreign human rights groups to draw international attention to abuses by antigovernment rebels.

The commission leaders were told to stop investigating any abuse committed by the government of Nicaragua and to concentrate their efforts on the anti-Sandinistas.147

Similarly, Alvaro Baldizón, a recent high-level defector from the Interior Ministry, has described the bizarre methods by which the FSLN sought to dupe foreign delegations in Nicaragua as part of the war of misinformation.148

146 Id. at 7. Comandante Arce says of elections in Nicaragua:

What a revolution really needs is the power to act. The power to act is precisely what constitutes the essence of the dictatorship of the proletariat—the ability of the [working] class to impose its will by using the means at hand [without] bourgeois formalities. For us, then, the elections, viewed from that perspective, are a nuisance, just as a number of things that make up the reality of our revolution are a nuisance.

Id. at 4.


Bendana stated that, acting on the authority of President Daniel Ortega and Foreign Minister Miguel D’Escoto, he would personally direct the CNPPDH for the purpose of promoting a [sic] international offensive by the Nicaraguan government denouncing abuses allegedly committed by anti-Sandinista forces. He noted that the CNPPDH would help establish a network of foreign human rights organizations to publicize these abuses throughout the world.

Id. at 3.

148 According to Baldizón:

Borge prepares himself for visits from foreign Christian religious organizations or speeches to these groups by studying the Bible and extracting appropriate passages for use in his conversations or address. When the foreign visitors have departed he scoffs at them in front of his subordinates, bragging about his ability to manipulate and exploit the “deluded” religious group...

In January 1985, Tomas Borge ordered Baldizón’s office to seek out and provide him with persons in dire economic straits or with serious health problems who would then be used in staged “shows” before visiting foreign political or religious groups. A quota of six such persons was to be furnished every 15 days... .
Cuba has also played an active role in the propaganda war. Earl Young, an intelligence expert on the Central American conflict, writes: “Recent defectors from various Cuban government departments have stated that this propaganda effort [on behalf of the guerrillas in El Salvador] is conducted by Soviet-trained Cuban specialists with Eastern European support.” The propaganda has focused on denying that insurgents in neighboring states were being assisted, making exaggerated human rights charges against the Government of El Salvador and the contras, supporting the FMLN as a “democratic alternative,” attacking the contras as “Somocistas,” denouncing the U.S. response as ideological anticommunism rather than collective defense, and characterizing the United States withdrawal from the Nicaragua case as “proof” of the illegality of U.S. actions.

III. LEGAL ISSUES IN THE CONFLICT

The Cuban-Nicaraguan Secret War

It is not surprising that the comandantes deny their secret war against neighboring states. There can be no debate that the Cuban-Nicaraguan attacks are in blatant disregard of international law. Important Charter norms and declarations violated by these attacks include:

- Article 2(4) of the United Nations Charter;151
- Articles 3, 18, 20 and 21 of the revised Charter of the Organization of American States;152

In May 1985, such a show was staged for the benefit of a visiting delegation of the West German Christian Democratic Union/Christian Social Union (CDU/CSU). In this show, a blind man who had earlier requested an accordion so he could entertain to earn his living, was presented with an instrument. . . . The instrument was to be repossessed from the blind man after his show appearance. . . .

149 See Young, supra note 124, at 325.
150 When asked about their support for insurgencies in neighboring states, the Sandinistas typically respond by flatly denying the secret war. Thus, Foreign Minister D'Escoto declared in a sworn affidavit to the World Court: “I am aware of the allegations made by the Government of the United States that my Government is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador. Such allegations are false. . . .” Affidavit of Foreign Minister Miguel D'Escoto Brockmann, Memorial of Nicaragua (Nicar. v. U.S.), Ann. B (submitted Apr. 50, 1985), reprinted in Revolution Beyond Our Borders, supra note 68, at 1. The comandantes also have repeatedly and inaccurately predicted a U.S. invasion of Nicaragua; one such prediction coincided with the opening of oral argument in the jurisdictional phase of the Nicaragua case. See id. at 2. See, e.g., Omang, Nicaraguan Leader Says U.S. Planning Invasion Oct. 15, Wash. Post, Oct. 3, 1984, at A1, A24. See also “60 Minutes,” supra note 16.

According to Lawrence Harrison, when he complained about the “inaccuracies and distortions in Barricada . . . and El Nuevo Diario,” the Nicaraguan Minister of Health told him, “You don’t understand revolutionary truth. What is true is what serves the ends of the revolution.” See Harrison, supra note 16, at A27.

151 Article 2(4) provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”
152 OAS CHARTER, done at Bogotá Apr. 50, 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3, as amended, Feb. 27, 1967, 21 UST 607, TIAS No. 6847. These articles of the revised
• Articles 1 and 3 of the hemispheric Rio Defense Treaty;¹⁵³
• Articles 1, 2, 3 and 5 of the United Nations Definition of Aggres-
• Article 3 of the 1949 General Assembly Essentials of Peace Res-
• Article 1 of the 1950 General Assembly Peace through Deeds Resolution;¹⁵⁷
• Article 2 of the International Law Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind;¹⁵⁷
• the 1965 General Assembly Declaration on the Inadmissibility of Intervention;¹⁵⁸ and
• the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.¹⁵⁹

Soviet assistance, direct or indirect, in such attacks violates not only the above Charters and declarations, but also principles intended to promote world order contained in:

• the 1972 declaration on “Basic Principles”;¹⁶⁰
• Principles IV and VI of the 1975 Helsinki Final Act;¹⁶¹ and even
• the Soviet Draft Definition of Aggression.¹⁶²


¹⁵⁵ GA Res. 290, 4 UN GAOR Res. (20 Sept.–10 Dec.) at 13, UN Doc. A/1251 and Corrs. 1 & 2 (1949).
¹⁵⁶ GA Res. 380, 5 UN GAOR Supp. (No. 20) at 13, UN Doc. A/1775 (1950).
¹⁵⁷ 9 UN GAOR Supp. (No. 9) at 11, UN Doc. A/2693 (1954).
¹⁵⁸ GA Res. 2131, 20 UN GAOR Supp. (No. 14) at 11, UN Doc. A/6014 (1965). This declaration was adopted by a vote of 109 to 0. Section 8 makes clear that the declaration does not affect the right of defense under Article 51 and everything else in chapters VI, VII and VIII of the Charter.
¹⁵⁹ GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970). Similarly, this declaration makes clear that it does not affect “the relevant provisions of the Charter relating to the maintenance of international peace and security.”
¹⁶¹ Principle IV prohibits “a threat or use of force against territorial integrity,” and Principle VI prohibits “direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards . . . violent overthrow.” Conference on Security and Cooperation in Europe, Final Act, Aug. 1, 1975, reprinted in 14 ILM 1292 (1975). The “Helsinki Agreement” is signed by 35 nations and technically is regarded as creating political, rather than legal, obligations.
¹⁶² For the Soviet draft definition of the attacking state, see text at note 180 infra. The draft also declares in part:
The United States Response

The Cuban-Nicaraguan secret war against neighboring states constitutes an armed attack justifying the use of force in collective defense under Article 51 of the UN Charter and Article 3 of the Rio Treaty. Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." Article 3 of the Rio Treaty incorporates this right into the inter-American system, declares that an attack against any American state—such as El Salvador—is an attack against all American states, including the United States, and goes beyond the Charter in creating a legal obligation on the United States and all other American state parties to assist in meeting the armed attack. This obligation is parallel to that owed by the United States to NATO under Article 5 of the NATO Treaty in the event of an attack on a NATO member, or under Article 5 of the Mutual Defense Treaty with Japan in the event of an attack on Japan.

The right of individual and collective defense embodied in Article 51 of the Charter applies to secret or "indirect" armed attack as well as to open invasion. Many scholars, including Professors Bowett, McDougal and Stone, take the view that the Charter—and Article 51—was not intended to impair or restrict in any way the preexisting right of defense under customary law. These scholars note that Article 51 was added to the Charter on the

---


Article 27 of the revised OAS Charter also declares that an attack against one American state is "an act of aggression against . . . [all] the American States."


initiative of the Latin American states to protect regional security organizations and that there is absolutely no evidence in the *travaux préparatoires* that it was intended to narrow the customary right of defense. Under this view, the term “armed attack” in the English-language version of Article 51 is merely illustrative of the defensive right, and thus no question even arises whether “armed attack” excludes “indirect aggression.” Given the unquestioned historical basis of the customary right of defense in the drafting of the Charter, the view that it is not impaired by the Charter—absent binding Security Council action—seems correct.

But even if a more restrictive view of the Charter is accepted—that the right of defense is limited as provided by Article 51—there is no doubt that Article 51 applies to secret or “indirect” armed attacks as well as to open invasion. The French version of Article 51 speaks of “*agression armée*” ("armed aggression"). and this version is equally authentic with the English “armed attack.” Moreover, neither “armed attack” nor “armed aggression” is limited by any language such as “direct,” which could have been expected if the draftsmen had intended to exclude indirect attack. Rather, as we have seen, the *travaux* clearly show that Article 51 was designed to accommodate the Latin American interest in protecting the OAS system. Thus, there is no evidence, in either the text or the *travaux*, that the draftsmen of Article 51 intended to narrow the customary right of defense.

As a policy matter, it would be surprising indeed if the draftsmen of the Charter had intended to prohibit states from defending themselves against a serious secret or indirect attack on their political integrity. The insulation of attacking states from a defensive response in such settings would be a formula for the destruction of the Charter. In terms of the important Charter goal of protecting self-determination, a serious covert attack against governmental and political institutions is the functional equivalent of an open invasion. No state can be expected to forgo its defensive right against such an attack aimed at the core of its national sovereignty. Seen in terms of important Charter goals of world order, a norm insulating the aggressors in such settings would encourage these attacks, which already gravely threaten world order, and would doom the victim—and the international system as a whole—to endless war. The seriousness of indirect aggression as a challenge to world order has been clearly flagged by McDougal and Feliciano in perhaps the best scholarly treatment of the use of force under the Charter system. They observe that “[t]he most serious problem confronting adherents to systems of world order . . . may thus be to devise appropriate procedures for identifying and countering unlawful attacks disguised as internal change.”

167 “Aucune disposition de la présente ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un membre des Nations Unies est l'objet d'une agression armée, jusqu'à ce que le Conseil de Sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales.” UN CHARTER art. 51.

168 On the history of Article 51 in relation to Latin America, see Claude, *supra* note 163, at 8.

169 M. McDougal & F. Feliciano, *supra* note 1, at 192 n.164.
Not surprisingly, even under the restrictive view of the right of defense, scholars and state practice have overwhelmingly supported the conclusion that serious and sustained assistance to insurgents is an armed attack and that Article 51 includes a right of defense against such an indirect attack. The abundant scholarly literature and state practice can only be briefly illustrated here. For example, Professor Kelsen writes:

Since the Charter of the UN does not define the term armed attack used in Article 51, the members of the UN exercising this right of individual or collective defense, may interpret armed attack to mean not only an action in which a state uses its own armed forces but also a revolutionary movement which takes place in one state but which is initiated or supported by another state.\textsuperscript{170}

According to Professors Thomas and Thomas, experts on the OAS system:

The force which should comprise “armed attack” would include not only a direct use of force whereby a state operates through regular military units, but also an indirect use of force whereby a state operates through irregular groups or terrorists who are citizens but political dissidents of the victim nation. The Inter-American system has characterized such indirect use of force as internal aggression in that it includes the aiding or influencing by another government of hostile and illegal indirect attack against the established political order or government of another country. . . . Since it is usually an attack against the internal order through an attempt to overthrow or harass the victim government by promoting civil strife and internal upheaval or, once civil strife has commenced, by an attempt to take over the leadership of those in rebellion, it is a vicarious armed attack. . . . The victim state may exercise its right of individual self-defense against the aggressor state, and, of course, may act against the subversive groups within the country.\textsuperscript{171}

Significantly, they add that the OAS has labelled assistance by a state to a revolutionary group in another state for purposes of subversion as being aggression or intervention. If this subversive intervention culminates in an armed attack by the rebel group, it can be said that an armed attack as visualized by Article 3 of the Rio Treaty has occurred.\textsuperscript{172}

Finally, Hull and Novogrod write:

the rapid development of the science of sabotage and terror, as well as the formulation of nationwide revolution, has led to a recognition that such means may be as competent as a military invasion in destroying the political independence of a state. . . . Quite obviously, indirect aggression can undermine the sovereignty of a state as effectively as a traditional armed attack. To argue that a state may not employ force to combat indirect aggression reveals a considerable lack of under-

\textsuperscript{172} Id. at 42.
standing of the purposes of the Charter. The drafters meant only to proscribe the unlawful use of force, not coercion in defense of such basic values as political independence or territorial integrity.\(^{173}\)

During the Greek emergency in 1947, the United States regarded serious assistance to insurgents in Greece from Albania, Bulgaria and Yugoslavia as an armed attack.\(^{174}\) During the Algerian War, France regarded assistance to Algerian insurgents from a Tunisian rebel base at Sakiet-Sidi-Youssef as an armed attack justifying a defensive response against the base.\(^{175}\) During the 1958 Lebanon crises, the Lebanese delegate, in reserving his country's right to take defensive measures against alleged indirect aggression by the United Arab Republic, stressed to the Security Council that:

Article 51 does not speak of a direct armed attack. It speaks of armed attack, direct or indirect, so long as it is an armed attack. . . . Is there any difference from the point of view of the effects between direct armed attack or indirect armed attack if both of them are armed and if both of them are designed to menace the independence of a country?\(^{176}\)

The record of U.S. Senate consideration of the NATO Treaty, which is based on Article 51 of the Charter and parallels the earlier Rio Treaty in its right to defense, reveals that "armed attack" may include external assistance to insurgents and is not limited to open invasion.\(^{177}\) During the 1964


Even Professor Brownlie, who takes one of the most restrictive views on indirect aggression, writes:

[I]t might be argued that "armed attack" in Article 51 of the Charter refers to trespass, a direct invasion, and not to activities described by some jurists as "indirect aggression". But providing there is control by the principal, the aggressor state, and an actual use of force by its agents, there is an armed attack.


\(^{175}\) See R. HIGGINS, supra note 173, at 204 n.73.

\(^{176}\) 13 UN SCOR (833d mtg.) at 3, UN Doc. S/PV.833 (1958).

\(^{177}\) The following exchange occurred during hearings on the NATO Treaty:

Senator Fulbright: Would an internal revolution, perhaps aided and abetted by an outside state, in which armed force was being used in an attempt to drive the recognized government from power be deemed an "armed attack" within the meaning of article 5? That is a little different from the last question in that I assume an ordinary election which the Communists won. This is in the nature of a coup. Would that come within the definition of an armed attack?

Secretary Acheson: . . . Did you say if there were a revolution supported by outside force would we regard that as an armed attack?

Senator Fulbright: That is right. It is one of those borderline cases.

Secretary Acheson: I think it would be an armed attack.

Venezuelan emergency, the Ministers of Foreign Affairs of the Organization of American States adopted the view that serious indirect aggression could justify the use of force in defense under the United Nations and OAS Charters. In response to a Venezuelan request that they consider measures to be taken against Cuba for supporting subversive activities against Venezuela (activities comparable in kind but considerably less in intensity than those against El Salvador), the Ministers of Foreign Affairs adopted a resolution that concluded by warning the Government of Cuba

that if it should persist in carrying out acts that possess characteristics of aggression and intervention against one or more of the member states of the Organization, the member states shall preserve their essential rights as sovereign states by the use of self-defense in either individual or collective form, which could go so far as resort to armed force.178

Similarly, the United Nations Definition of Aggression unambiguously recognizes that aggression may include indirect aggression. Thus, Article 3(g) characterizes as acts of aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [invasion, military occupation, use of weapons, etc.], or its substantial involvement therein."179

Even the Soviet Draft Definition of Aggression says "that State shall be declared the attacker which first commits . . . [s]upport of armed bands . . . which invade the territory of another State, or refusal, on being requested by the invaded State, to take in its own territory any action within its power to deny such bands any aid or protection."180

As for fundamental community goals underlying the Charter, the requirement of "armed attack" under Article 51, like the requirement of "necessity" under customary law, is largely designed to restrict the right to the defensive use of intense coercion to situations that threaten fundamental values. By such verbal tests, contemporary international law establishes that minor encroachments on sovereignty, political disputes, frontier incidents, the use of noncoercive means of interference and, generally, aggression that does not threaten fundamental values such as territorial and political integrity may not be defended against by a major resort to force against another state.181 But where a major military assault is made against such fundamental values as self-determination and political integrity, it is irrelevant whether that assault is indirect and denied or direct and acknowledged.

The secret Cuban-Nicaraguan attack against four neighboring states is

---

179 GA Res. 3314, supra note 154.
180 B. FERENCZ, supra note 162, at 79 (emphasis added).
181 On the community policies underlying the formulas "armed attack" and "necessity" as requirements of lawful defense, see M. McDOUGAL & F. FELICIANO, supra note 1, at 259.
not a minor border incident or political disagreement. Nor does it consist of overenthusiastic, but minor, assistance to an insurgent faction or even isolated acts of terrorism or subversion. It is an intense and sustained secret war employing sophisticated modern weapons and inflicting thousands of casualties in an all-out assault on governmental institutions and political integrity. It has resulted in over a billion dollars in damage to El Salvador alone and in the creation of refugees and social dislocation on a massive scale. It is being contained—but not yet ended—only by a major military buildup that is stifling the development hopes of states in the region. Its success would mean loss of self-determination for the attacked states and possibly even incorporation into a greater Nicaragua. It is being pursued by an alliance that used the same formulas to take control of Nicaragua and that has openly and repeatedly pledged forcibly to install like-minded governments in neighboring states. To treat such a setting as a non-"armed attack" or one lacking any "necessity" for response would be to ignore what may well be the most serious generic threat to the contemporary Charter system—the deliberate secret or "indirect" war against territorial and political integrity.

Under the Charter, a defensive response must be not only necessary but also proportional. McDougal and Feliciano state this requirement:

Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. . . . [T]hese objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion. 182

The values to be conserved in El Salvador and neighboring Central American states are among the most basic guaranteed to all states by the UN Charter: the rights to territorial integrity, political independence and self-determination. The Charter is not a suicide pact. It does not condemn an attacked state to perpetual attack but, instead, permits reasonable responsive coercion against the attacking state as necessary in defense. In this case, United States assistance to the contras—currently limited to nonlethal humanitarian aid—has been instrumental in reducing the level of that attack. It has certainly not been an unnecessary overreaction since the secret attack against El Salvador and neighboring states is continuing. 183 This defensive option may

182 Id. at 242. The Caroline test, often erroneously employed as a general test for necessity and proportionality, is actually a test for the special case of anticipatory defense. See id. at 217, 231.

183 In addition, the careful use of naval mines in response to an armed attack is not prohibited by general international law and may be a proportional response to assist in interdiction of the attack. Article 2 of the Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (1907), 36 Stat. 2332, TS No. 541, clearly contemplates the use of mines for military objectives. As to proportionality in the Central American conflict, press accounts of the apparently small mines indicate considerably more casualties from a single FMLN attack on a mountain hamlet in El Salvador than from the entire "mining" operation. Compare Ad-
also offer less risk of escalation and a greater chance for negotiated settlement than other direct military responses. As Professor Thomas Franck has recently observed:

In counter-acting an insurgency organized and assisted substantially from another state, the victim state and its allies must respond in a fashion sufficiently effective to deter, yet not exceeding the limits of proportionality. In practical combat terms this may well argue for a strategy of assisted insurgency against the offending state, as an alternative to remedies which are either ineffective or which—as for example, is the case of large scale bombing—purchase effectiveness at a higher cost to innocent parties.\(^{164}\)

Nothing could more quickly doom the Charter to irrelevance than to limit defensive options against serious armed attack solely to those of the least military and political effectiveness. Response solely within the attacked state leaves the military advantage with the attacker. An equivalent response in kind against the attacking state, however, shifts the military multiplier effect against the aggressor, permits direct action against weapons transshipment points and creates a persuasive incentive not to engage in an endless secret war.

Proportionality, correctly perceived, is not so much an exercise in matching levels of force between attacker and defender as, rather, a relation between lawful objectives in using force and the effective pursuit of those objectives in the way least destructive of other values. Nevertheless, a comparison of levels of force provides one contextual feature in assessing the proportionality of the response. In its attack against El Salvador and neighboring states, Nicaragua supplies command and control, training, funding, weapons and logistical assistance. It seeks the overthrow of the democratically elected Government of El Salvador, supports terrorism and efforts to destabilize three other neighboring states and does not suffer from any apparent constraints on its activities, other than a thoroughgoing effort at concealment.

The United States, in contrast, has not responded with bombing or invasion. Its defensive response has been in kind, but currently limited by law to assistance that is not directed to overthrowing the Sandinista Government and is exclusively humanitarian. Earlier, the United States was further constrained by a complete funds cutoff and prohibitions on submarine mining and on activities of defense and intelligence agencies. It is difficult to see how the considerably more restrained U.S. response against Nicaragua can be disproportionate to Nicaragua’s determined and continuing attacks against four Central American states.

There is no prohibition under the Charter—apart from the general requirement of proportionality—against covert action as part of a defensive response to an armed attack. A response in defense may lawfully be overt, covert or—as in virtually every conflict in which the United States has fought in this century—both. In World Wars I and II and the Korean War, no one regarded Allied or UN support for paramilitary forces or covert operations as illegal. Lawrence of Arabia, to mention the most famous example, led a British covert operation in World War I to create an insurgency within the Ottoman Empire as part of the Allies’ overall defensive response against the Central Powers. During World War II, the Allies created and aided insurgent movements in France, Belgium, the Netherlands, Norway, Yugoslavia, Greece and China, among other countries. In Italy support was given to partisans fighting the Germans and Italian Fascists. In Germany weapons and materials were supplied to Germans and foreign workers for acts of sabotage against the Nazi war effort. The UN command itself sponsored guerrilla warfare against North Korea in response to that country’s aggression in 1950–1953. With the approval of the high command, 44 teams of guerrillas were sent into North Korea to disrupt supply lines by attacking trains and truck convoys. All told, twelve hundred men were involved in this 2-year paramilitary effort against North Korea. During Sukarno’s secret war against Malaysia in the 1965 “confrontation,” the United Kingdom

---


provided not only direct assistance to Malaysia but also covert assistance to guerrilla and insurgent forces operating against Sukarno within Indonesia.\footnote{Conversation of the author with William Stevenson, author and expert on the history of intelligence, in Washington, D.C. (1985).}

The use of paramilitary forces as part of a defensive response is not unique to this century. In U.S. practice it dates at least to the presidency of Thomas Jefferson who provided arms, training and financial assistance to support an army of foreign nationals against the Bey of Tripoli as a means of ending attacks on commercial shipping in the Mediterranean. Such activities, when undertaken in defense against armed attack, have never been and are not now "state terrorism" or otherwise illegal. To make such a charge is to undermine the most important distinction in the United Nations and OAS Charters—that between aggression and defense. Moreover, the assistance to resistance forces in Nicaragua, as part of a broader defensive response against the Cuban-Nicaraguan armed attack, has been fully debated within Congress, the media and the UN Security Council and is not truly covert. The intelligence community describes such settings as "overt-covert."\footnote{See Remarks by Senator David Durenberger to the Johns Hopkins University School of Advanced International Studies (Oct. 21, 1985).} As we have seen, efforts to seek the peaceful settlement of disputes and to avoid escalation may make such an "overt-covert" response preferable.

The United States has not violated Articles 18 and 20 of the OAS Charter (revised in 1967) on nonintervention. Article 22 of the Charter specifically states that "measures adopted for the maintenance of peace and security in accordance with existing treaties"—in this case, Article 3 of the Rio Treaty—"do not constitute a violation of the precepts set forth in Articles 18 and 20." Under Article 21, 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." Articles 27, 28 and 137 support the same legal point: that actions in defense under the Rio Treaty and the UN Charter are not illegal. Similarly, states faced with an armed attack are not obliged to invoke the procedural machinery of the OAS before responding. As with Article 51 of the UN Charter, Article 3 of the OAS Charter permits an immediate and continuing response against armed attack until the procedural machinery of the UN or OAS systems concludes otherwise.\footnote{See revised OAS Charter, supra note 152. For the operation of this principle under the UN Charter, see, e.g., D. Bowett, supra note 166, at 195; J. Brierly, The Law of Nations 319–20 (5th ed. 1955); P. Jessup, A Modern Law of Nations 64–65, 202 (1948); H. Kelsen, The Law of the United Nations 800, 804 n.5 (1964); J. Stone, Legal Controls of International Conflict 244 (1954).} Some have confused the pro-
cedural requirements of Article 6 of the Rio Treaty, which apply to settings other than armed attacks, with those of Article 3, which govern here.\(^{190}\)

The United States also has not violated any national law concerning the use of force, such as the War Powers Resolution, the neutrality acts and the Boland amendment. Despite the invocation of these national laws in the usual polemics surrounding any war/peace issue, there is no serious scholarly opinion to the contrary. The War Powers Resolution\(^{191}\) applies to the introduction of U.S. armed forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; ... into the territory, airspace or waters of a foreign nation, while equipped for combat ...; or ... in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."\(^{192}\) It does not apply to assistance to foreign political or military forces, and during debate in the Senate it was recognized that the resolution did not apply to activities of the intelligence community. The neutrality acts\(^{193}\) do not apply to governmentally authorized assistance in collective defense against an armed attack.\(^{194}\) Even if they did, they would be superseded by subsequent statutory authorization for "special activities" in general, and for funding the contras in particular.\(^{195}\) The Boland amendment, which

\[\text{190}\] This issue will be discussed in greater detail in section IV of this paper.


\[\text{192}\] Section 4 of the War Powers Resolution, supra note 191.

\[\text{193}\] 18 U.S.C. §960 (1982). An Act of 1794—growing out of the notorious "Citizen Genêt affair"—was passed at the request of President Washington to prevent unauthorized involvement by private citizens in the war between France and England. Similarly, in 1917 during World War I, a "neutrality" Act was passed that, among other things, prohibits *individual citizens* from engaging in a conspiracy to destroy property situated abroad of a foreign government with which the United States is at peace. 18 U.S.C. §956 (1982). A series of neutrality acts—dealing with such issues as munitions sales and exports—was also passed in the 1930s, as some in Congress sought to avoid the coming global war and, instead, by their isolationism, actually fanned the flames. See, e.g., all by Jessup, *New Neutrality Legislation*, 29 AJIL 665 (1935); *Toward Further Neutrality Legislation*, 30 AJIL 262 (1936); *Neutrality Legislation—1937*, 31 AJIL 306 (1937); and *Reconsideration of the Neutrality Legislation*, 33 AJIL 549 (1939).

\[\text{194}\] The legislative intent and background of the relevant neutrality acts preclude such application. See United States v. Elliott, 266 F.Supp. 318, 324 (S.D.N.Y. 1967) (interpreting the 1917 Act). The Circuit Court case United States v. Smith, 27 F. Cas. 1192 (D.N.Y. 1806) (Nos. 16,342 and 16,342a), much cited for the contrary proposition, is not good authority for that proposition. There, defendants under the 1794 Act sought to rely on imputed presidential knowledge of their actions and presidential silence toward them rather than on presidential authorization of those actions.

\[\text{195}\] Even if the neutrality acts were broad enough to apply to governmentally authorized assistance, under hornbook rules of U.S. constitutional law they would yield to subsequent and inconsistent acts of Congress or treaties. Such acts and treaties would include, as applied to assisting the contras, the National Security Act of 1947, as amended, particularly 50 U.S.C. §403(d)(5) and 50 U.S.C. §413 (1982) (accountability for intelligence activities), 22 U.S.C. §2422 of 1974, as amended October 1980 (Hughes-Ryan amendment), individual intelligence authorization and appropriation measures related to funding the contras, and even Article 3 of the Rio Treaty.
prohibits U.S. assistance to the “democratic resistance” forces for purposes of overthrowing the Sandinista Government, nonetheless permits U.S. assistance to such forces for the collective defense of Central American states. Indeed, the House’s adoption of the Boland amendment followed the rejection of a proposal to deny funds for the purpose of carrying out military activities in or against Nicaragua and a second proposal to deny funds to groups or individuals known by the United States to intend to overthrow the Government of Nicaragua. The clear intent of Congress, like that of the administration, was that the United States should limit its response against Nicaragua to actions necessary and proportional to a hemispheric defense against the ongoing secret attack.

The Peace Palace Goes to War

On April 9, 1984, Nicaragua instituted proceedings before the International Court of Justice alleging that the United States was unlawfully using force against Nicaragua and intervening in its internal affairs. The complaint, which precipitated a highly visible dispute in the United States about providing assistance to the contras for the small-scale mining of Nicaraguan harbors, was a propaganda coup. On May 10, 1984, the Court decided in a provisional order that the United States “should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports” and that “[t]he right to sovereignty and to political...
independence...of Nicaragua...should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law." On November 26, the Court decided that it had jurisdiction on the merits in a decision that, in its most important dimension, was decided by 11 votes to 5. After a careful review, the United States subsequently announced that "[w]ith great reluctance, [it] has decided not to participate in further proceedings in this case."

Once the Court decided to go forward to the merits, I believe the United States would have been better advised to pursue the proceedings. U.S. withdrawal could only hand the Sandinistas a propaganda windfall by further confusing world opinion about the Cuban-Nicaraguan secret war against neighboring states. As a special counsel for the United States in the Nicaragua case, I am convinced that Nicaragua's principal objective in going to the Court was to reap a propaganda victory and to move away from genuine multifaceted regional negotiations. The complaint, for example, was announced at a news conference in Washington shortly before a major congressional vote on funding the contras.

Nevertheless, there are at least three reasons why the Court should dismiss the Nicaragua case. The first one justifies—as a matter of law—the U.S. decision not to go forward on the merits.

That reason is that, in deciding to proceed to the merits, the Court stretched its own jurisdiction beyond the breaking point. Jurisdiction based on the Treaty of Friendship, Commerce and Navigation with Nicaragua is


200 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26), reprinted in 24 ILM 59 (1985). The Court held by 11-5 that it had jurisdiction under the "optional clause" and by 14-2 that it had jurisdiction under the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation, infra note 203.


202 This conclusion specifically does not rely on the following facts: that only 44 nations out of more than 160 UN members have accepted the compulsory jurisdiction of the Court under the "optional clause," and of those many have substantial reservations; that only the United States and the United Kingdom among permanent members of the Security Council have accepted "optional clause" jurisdiction; that only 5 out of 16 judges in the Nicaragua case come from countries that have accepted the compulsory jurisdiction of the Court; that the United States is the only country to have agreed to appear in a hearing on provisional measures when it disputed the jurisdiction of the Court (among others, France, Iran and Iceland did not appear). However, as the United States assesses its acceptance of compulsory jurisdiction in the aftermath of the Nicaragua case, these factors, as well as the obvious deficiencies in the existing U.S. acceptance of the Court's jurisdiction such as the Connally reservation and lack of protection against the "hit-and-run problem," will be relevant. See, e.g., D'Amato, Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court, 79 AJIL 385 (1985). See also the papers and proceedings of the conference on U.S. acceptance of the ICJ's compulsory jurisdiction at the University of Virginia (Aug. 17, 1985) (forthcoming).
simply untenable, given the national security exception in that Treaty and its clear subjection to the UN and OAS Charters' right of defense. In fact, jurisdiction on such a basis is so weak that Nicaragua did not even suggest it during oral argument. One can imagine that a majority of the Court might feel that this bilateral Treaty provides a technical basis for proceeding to the merits phase, but once at the merits phase this basis for jurisdiction clearly disappears because of the national security exception and the Treaty's irrelevance in a use-of-force setting governed by the UN and OAS Charters. Furthermore, if the Court has no jurisdiction to decide the case on the basis of the UN and OAS Charters, the parties' fundamental treaty obligations concerning a use-of-force setting, it would be the height of absurdity to seek to apply a treaty of friendship, commerce and navigation as the normative basis for determining the rights of the parties under international law.

Similarly, there are at least two quite compelling reasons why the Court lacks jurisdiction under the "optional clause." The first of these is the so-called Vandenberg or multilateral treaty reservation to the U.S. acceptance of jurisdiction under that clause. The reservation specifically excludes from the Court's jurisdiction "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." Nothing could have been clearer than that other key and substantially affected parties to the United Nations and OAS Charters, particularly El Salvador, on whose behalf the United States was acting in collective defense, were not "parties to the case before the Court," as required by even the most restrictive interpretation of that reservation. The Court had earlier summarily rejected El Salvador's Application to Intervene at the jurisdictional phase—without even allowing El Salvador a hearing.

Only two thoughtful interpretations of the multilateral treaty reservation had been put forward prior to the Court's decision. The first, a view held contemporaneously with the reservation's adoption by Judge Manley O.

---

203 See Art. XXIV, para. 2, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 UST 449, TIAS No. 4024. Although by its terms disputes arising under the Treaty may be submitted to the ICJ, it is so patent on its face that the Treaty could not form the basis for deciding the Nicaragua case that it is an abuse of discretion to hold that the Treaty provides an independent basis of jurisdiction. The Treaty applies to U.S. actions with respect to Nicaraguans in the United States, not to U.S. actions in Nicaragua. It contains a clear national security exception (Article XXI(1)(d)) that provides: "The present Treaty shall not preclude the application of measures . . . [that are] (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests . . . ." Most importantly, the fundamental right of defense is based on Article 51 of the UN Charter and Article 3 of the OAS Charter, which clearly supersede an FCN treaty for conflict settings.

The Court's extraordinary interpretation of FCN treaties may severely harm international relations—and the Court—by convincing nations that they must modify either all these treaties or their acceptance of ICJ compulsory jurisdiction under them, quite apart from their acceptance of jurisdiction under the optional clause.

204 61 Stat. 1218, TIAS No. 1598.

205 For El Salvador's stake in the case, see El Salvador's Declaration of Intervention, supra note 77.
Hudson, argued that all parties to the applicable convention must also be before the Court to protect the United States from being bound as a party to the case, while under Article 59 of the Statute of the Court, the absent treaty parties would not reciprocally be bound. Patently, under this interpretation the Court lacks jurisdiction since many parties to the UN and OAS Charters are not before it. The second and more restrictive view, argued before the Court by the United States, is that the reservation applies whenever a treaty party not before the Court may be substantially affected by the decision. There can be no doubt that El Salvador and other attacked Central American states are in that category of absent, affected states. Indeed, their very existence as sovereign nations may be at stake.

In actuality, the Court did not definitively resolve the question of the multilateral treaty reservation and presumably has held it open pending interplay on the merits. Possibly, a majority of the Court thought El Salvador might seek to intervene at the merits phase, as it had on jurisdiction. Nevertheless, the critical nature to the proceedings of El Salvador was so clear from the preliminary pleadings—and its absence so indisputable—as to amount to an abuse of power depriving the Court of jurisdiction. Certainly, if such substantially affected states as El Salvador and Honduras—a state charged in Nicaragua's pleadings with attacking Nicaragua when it itself has been the target of Nicaraguan subversion—are not present at the merits stage, then the absence of jurisdiction under the multilateral treaty reservation will become patent. Furthermore, Cuba, Nicaragua's accomplice in the continuing armed aggression in Central America, was also not before the Court.

The second reason why the Court lacks jurisdiction under the optional clause is that a majority of the judges chose to ignore compelling evidence that Nicaragua had never accepted the Court's compulsory jurisdiction. The remarkable assertion by Nicaragua in oral argument that its acceptance of the jurisdiction of the Permanent Court must have been lost at sea in World War II, in the face of no supporting evidence and 40 years of failure to rectify the problem, is an insult to the judicial process. I believe the five judges who dissented on this issue were obviously correct in finding that Nicaragua had not accepted the optional clause in a binding manner. Their language on this point is revealing: the Court's Judgment was "untenable" and "astonishing," and the U.S. position "beyond doubt."

210 Statement on Withdrawal, supra note 201, at 247.
211 Id. at 258 (citing Judge Oda; see 1984 ICJ Rep. at 510).
212 Statement on Withdrawal, supra note 201, at 252 (citing Judge Jennings; see 1984 ICJ Rep. at 536).
That Nicaragua has never accepted the compulsory jurisdiction of the Court under the optional clause is manifest. Nicaragua neither had at any time deposited a declaration of acceptance of the jurisdiction of the International Court of Justice with the Secretary-General of the United Nations as required by Article 36(4) of the Statute of the Court, nor had at any time made a binding acceptance of the jurisdiction of the Permanent Court of International Justice (PCIJ) as required by Article 36(5) of the Statute. Nicaragua sought to argue instead that a declaration of intent to accept the jurisdiction of the PCIJ, admittedly never "in force" as a binding acceptance, somehow made Nicaragua a party to the optional clause under Article 36(5) of the Statute, or that a pattern of ambiguous conduct as to acceptance of the optional clause itself constituted acceptance of the Court's jurisdiction under either Article 36(2) or Article 36(5).

Article 36(4), however, sets out the mandatory procedure, using the language "shall," for the acceptance of compulsory jurisdiction under Article 36(2), a procedure with which Nicaragua admittedly did not comply. Article 36(5) clearly requires that a declaration be "still in force"; its intent is to "grandfather" into the optional clause, without a further declaration under Article 36(4), nations that had previously accepted the PCIJ's jurisdiction and whose acceptances were "still in force." Manifestly, since Nicaragua admittedly had never made a binding acceptance of PCIJ jurisdiction, no such acceptance was "still in force." Both the language and the obvious purposes of Articles 36(4) and 36(5) conclusively demonstrate that Nicaragua had not accepted the Court's compulsory jurisdiction. Thus, for two quite independent and compelling reasons, either one of which alone required dismissal, the Court lacked jurisdiction to take the case.

Certainly, under Article 36(6) of the Statute, the Court decides disputes about its jurisdiction. That paragraph must be given important weight, but it is absurd to believe that it is intended to confer unlimited discretion on the Court to override the preceding five paragraphs. Those five paragraphs, including, most importantly, the principal underpinning of Article 36 as a whole, that the Court's jurisdiction is based on the consent of the parties, must also be accorded important weight. Thus, in a case where the Court manifestly overreaches its jurisdiction under Article 36(1)-(5), it lacks jurisdiction regardless of Article 36(6).

Under the recognized principle in international law of *excès de pouvoir*, decisions of an international tribunal that exceed its jurisdiction are void.\(^{213}\) As Professor Carlston points out: "Most writers have argued that an arbitral award is null in the measure that the tribunal has manifestly and in a sub-

stantial manner passed beyond the terms of submission, express or implied. The legal effect of a void judgment is to absolve the state of any responsibilities dictated by the tribunal’s order.

Some writers have maintained that this rule conflicts with the right of tribunals, as codified for the ICJ in Article 36(6), to decide questions concerning their jurisdiction. Others hold a view that seems to me applicable to the Court if the important first five paragraphs of Article 36 are to have any legal effect. Thus, Simpson and Fox write:

It is sometimes suggested that there is a conflict between the rule that a tribunal has jurisdiction to decide its jurisdiction and the rule that an award given in excess of jurisdiction is void. . . . The rule that a tribunal has jurisdiction to decide its jurisdiction . . . does not mean its decision is conclusive. There is no conflict between the two rules; the first rule has to be read as subject to the second.

To guard against abuse by losing states, the standard for refusing to obey an award on grounds of excès de pouvoir is strict:

The departure from the terms of submission should be clear to justify the disregarding of the decision. Claims of nullity should not captiously be raised. Writers who have given special study to the problem of nullity are agreed that the violation of the compromis should be so manifest as to be readily established.

That standard is clearly met here. As was previously noted, even members of the International Court itself have labeled the Court’s claimed basis of jurisdiction as “untenable” and “astonishing.”

The right to ignore rulings manifestly made in excess of a tribunal’s jurisdiction is an independent right of sovereign states grounded in the important principle that the jurisdiction of international courts is derived from the consent of the parties. As such, it is applicable to rulings of the International Court of Justice, as it would be to those of any other international tribunal. Moreover, nothing could more quickly and thoroughly destroy the Court than the loss by nations of confidence that the Court was strictly adhering to its jurisdiction. A rule that makes a legal reality of the careful observation of jurisdictional limits by the Court seems crucial to its long-term healthy functioning. As Judge Lauterpacht has noted:

The right of States to refuse to submit disputes with other States to judicial settlement is, subject to obligations expressly undertaken, un-

--

214 K. Carlston, supra note 213, at 87.
216 See, e.g., I. Shihata, supra note 213, at 73.
217 I. Simpson & H. Fox, supra note 213, at 252. See also C. Rousseau, supra note 213, at 496–97.
218 K. Carlston, supra note 213, at 87.
219 See supra notes 210 and 211. At least one distinguished law scholar, Professor Michael Reisman of the Yale Law School, has taken the position that the Court’s claimed jurisdiction in the Nicaragua case is an excès de pouvoir. See Has the International Court Exceeded its Jurisdiction?, infra at p. 128.
doubted. They are entitled to regard any deliberate extension of juris-
diction on the part of courts, in excess of the power expressly con-
ferred upon them, as a breach of trust and abuse of powers, justifying
a refusal to recognize the validity of the decision. So long as the juris-
diction of international courts is optional, the confidence of States, not
only in the impartiality of these tribunals as between the disputants,
but also in regard to the use of the powers conferred upon them, is
one of the essential conditions of effective judicial settlement.220

It should also be noted that the doctrine of *excès de pouvoir* developed
simultaneously with another rule of customary law, that an international
tribunal has the power to determine its own jurisdiction even if its constituent
instrument does not specifically confer such power.221 Thus, the International
Court of Justice would have this power even if there were no Article 36(6).222
Codification of this power in the Statute simply made explicit a rule of
customary international law. Neither reasons of policy, nor the *travaux pré-
paratoires* of Article 36(6) nor the language of Article 36 suggests that the
explicit inclusion of this customary power to decide jurisdiction in the Court's
Statute excludes the customary law doctrine of *excès de pouvoir*, which co-
existed with it.

The Court has not dealt directly with *excès de pouvoir* as it applies to the
Court itself.223 An individual opinion in the *UN Administrative Tribunal*
case,

---

220 H. LAUTERPACHT, supra note 213, at 210.
221 As the ICJ has expressed it:

Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently
accepted by general international law in the matter of international arbitration... [It]
has been generally recognized... that, in the absence of any agreement to the contrary,
an international tribunal has the right to determine its own jurisdiction and has the power
to interpret for this purpose the instruments which govern that jurisdiction... This
principle, which is accepted by general international law in the matter of arbitration,
assumes particular force when the international tribunal is... an institution which has
been pre-established by an international instrument defining its jurisdiction and regulating
its operation, and is, in the present case, the principal judicial organ of the United Nations.

*Nottebohm Case* (Liechtenstein v. Guat.), 1953 ICJ REP. 111, 119 (Judgment of Nov. 18). On
the development of this rule, see S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL*
COURT 438-41 (1965); and C. ROUSSEAU, supra note 213, at 496-97.

222 As stated in the *Nottebohm* case:

Article 36, paragraph 6, suffices to invest the [ICJ] with power to adjudicate on its juris-
diction in the present case. But even if this were not the case, the Court "whose function is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid
down by general international law. The judicial character of the Court and the rule of
general international law referred to above [the right of international tribunals to decide
their own jurisdiction] are sufficient to establish that the Court is competent to adjudicate
on its own jurisdiction in the present case.

1953 ICJ REP. at 120.

223 On several occasions, the Court has discussed its competence to determine its own jur-
diction under Article 36(6), the most extensive being in the *Nottebohm* case. See supra notes 221
and 222. There, the Court rejected Guatemala's argument that its powers under Article 36(6)
were limited to determining whether a claim fell within the categories enumerated in Article
however, which dealt with the right of the General Assembly to refuse to give effect to the Administrative Tribunal’s award to a UN employee, did discuss one of the reasons often cited for not applying the doctrine to the Court. Judge Winiarski noted that the lack of a procedure for appealing an award does not block a state from disregarding a void award:

An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. . . . The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law. . . . [T]he absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it.224

It should never be forgotten that decisions about jurisdiction are as crucial a part of the international rule of law as decisions on the merits—perhaps even more so, in terms of the Court’s functioning as a constitutive international legal institution.

One other problem also seems to be a jurisdictional one, at least with respect to the Court’s ability to issue either a provisional or a final order interfering with the right of defense against an ongoing armed attack. Article 51 of the UN Charter provides that “[n]othing in the present Charter shall impair the inherent right of . . . defence if an armed attack occurs.” Charter Article 92 makes the Statute of the Court “an integral part” of the Charter. Thus, nothing in the Statute of the Court, as well as in the rest of the Charter, can lawfully serve as the basis for impairing the inherent right of collective defense against an ongoing armed attack, and the Court cannot lawfully issue an order impairing this right. Moreover, if a final order of the Court interfering with this right would be void, it is particularly puzzling how a provisional order—made under the Court’s Rules without a determination of the facts and thus without the crucial determination of who is attacking and who is defending—could have any but accidental validity. That, however, is precisely how the Court’s provisional order in the Nicaragua case was made.

The second reason why the Nicaragua case should be dismissed is that, whether or not the Court has jurisdiction, it should abstain from exercising jurisdiction under its own doctrine of “admissibility.” As with the multilateral treaty reservation, the Court seems not yet to have definitively resolved the admissibility issue and has joined it to the merits phase.225 The doctrine of admissibility embodies various principles concerned with protecting the rule

---

36(2) and affirmed its power to decide whether the expiration of Guatemala’s acceptance of compulsory jurisdiction deprived it of the power to hear the case. 1953 ICJ REP. at 120. However, while this and other opinions clearly establish the power of the Court to decide its jurisdiction in the first instance, they do not deal with the present proposition, that its determination is not final and binding when states can demonstrate a manifest excès de pouvoir on its part.

of law and the integrity of the judicial role and process. Most importantly in this case, to go forward in the absence of El Salvador and other states attacked by Nicaragua would prejudice the legal rights of those absent states; to go forward in the absence of Cuba, one of the attacking states, would be an exercise in futility; to adjudicate solely the issues of concern to Nicaragua could severely undercut the balanced effort under the Contadora process to address the concerns of all nations in the region; and to adjudicate a use of force while the conflict is continuing would exceed the limits of the Court's ability in fact-finding and the fashioning of appropriate relief.

Judge Nagendra Singh was surely correct when he wrote in the 1973 *Pakistani Prisoners of War* case:

> It is indeed an elementary and basic principle of judicial propriety which governs the exercise of the judicial function, particularly in inter-State disputes, that no court of law can adjudicate on the rights and responsibilities of a third State (a) without giving that State a hearing, and (b) without obtaining its clear consent.

Yet, as with many such problems in the *nicaragua* case, how can the right of the United States to respond in the collective defense of El Salvador and neighboring Central American states possibly be adjudicated without affecting the even more important right of those states to request assistance? To argue that their rights are not involved because this case is simply between Nicaragua and the United States is a legal fiction sufficient even to startle Mr. Bumble.

Similarly, I believe the Court would find it extremely difficult to find adequate facts during ongoing hostilities. The best proof of that proposition is the audacity of Nicaragua in filing a case before the Court to halt a defensive response to its secret and ongoing war against neighboring states. In addition, is it appropriate to decide the facts when the principally attacked states, critical to any serious factual determination, are not before the Court? Even if the facts were determined, how could the Court fashion appropriate relief during an ongoing war? To point out one dilemma: suppose that if...

---


228 See C. Dickens, Oliver Twist, ch. 51 (1837).

229 Among others, Judge Hardy Dillard, formerly of the ICJ, and Lloyd Cutler have recognized the inherent limitations on adjudication by the Court. See Dillard, Reflections of a Professor Turned Judge, 17 Willamette L. Rev. 24 (1980). Cutler made the following points on the Nicaragua case:

> How would the World Court go about making judicial findings of fact in the Nicaragua case? Is it going to subpoena the files of the CIA, or its opposite number in Nicaragua? Is it going to make on-site inspection visits to the guerrilla camps in El Salvador, or Honduras, or Nicaragua itself? I submit that the U.N. Charter had good reason to consign issues like these to the Security Council. They are simply not justiciable.

after a Court order of cessation of assistance to the contras, Cuba and Nicaragua were to escalate their armed attack against neighboring states. Or, as previously discussed, how can the Court issue a preliminary order when one side is acting under its nonimpairable defensive right and in a preliminary hearing no findings of fact have been made? Yet the Court did so in its Order of May 10, 1984, which, I believe, will some day be regarded as one of the greatest failures of adjudication in history: a preliminary judicial order—though ambiguous—that actually gives assistance to a nation engaged in an ongoing armed attack against its neighbors. To the extent that the preliminary order does “impair the inherent right” of defense, under Articles 51 and 92 of the Charter it is void. Nonetheless, the United States seems to have complied with the Order by ending assistance for small-scale mining of Nicaraguan ports despite this substantial doubt as to the Order’s legal efficacy. Ironically, Nicaraguan assistance in the indiscriminate (and undisclosed) mining of roads in El Salvador—which has resulted in far more casualties than the mining of Nicaraguan ports—seems to have been escalated since the Court’s Order.

The third reason for dismissal is that, by undertaking adjudication at the behest of a state that is engaged in an armed attack on its neighbors and in sworn affidavits to the Court seems to be departing from known facts about its activities, even while that conflict continues, the Court is severely risking both its own integrity and the rule of law. Moreover, if the charges of the former chief investigator of the Nicaraguan Interior Ministry are true, Nicaragua’s principal official witness before the Court, Interior Vice-Minister Luis Carrión, may be personally responsible for ordering hundreds of secret assassinations of political opponents of the Sandinista regime.

Former presidential counsel Lloyd Cutler has recently written that “the ICJ’s actions in the Nicaraguan case to date, and its apparent intention to decide the legal and factual merits and to order appropriate relief, are likely to reverse the trend in this century towards greater recourse to law as a means of settling international disputes.” I profoundly hope that Lloyd

---

230 Article 51 of the Charter says, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense,” and under its Article 92 the Statute of the Court forms an integral part of the present Charter.”


232 Scholars, of course, also disagree as to whether provisional measures in general are legally binding or enforceable by the Security Council. See J. Sztucki, INTERIM MEASURES IN THE HAGUE COURT 260–98 (1983).

233 See text infra at note 317.

234 One example of misreporting by counsel for Nicaragua is the statement made to the Court by Abram Chayes on Sept. 18, 1985 that “Ronald F. Lehman, a Special Assistant to the President, and I believe, brother to the Secretary of the Navy, visited FDN leadership in Nicaragua in the spring of 1984. . . .” Ronald Lehman, senior director for arms control on the National Security Council staff and currently an ambassador to the Geneva arms control talks, does not work on Central American issues, has never been to Central America and is not related to Secretary of the Navy John Lehman. This disregard of normal standards of care in making factual assertions to the Court shows a troubling lack of concern for its integrity. See CR 85/24, at 61 (Sept. 18).

235 See Cutler, Reflections, supra note 229, at 446.
Cutler is wrong, but all signs to date suggest that he is right. The comandantes and other radical regimes have little to lose if the rule of law, which they do not respect, loses a great institution. For the democracies, however, which have worked for a century to build up effective international adjudication, any diminishing of the Court is a tragedy.

IV. RECURRENT MISPERCEPTIONS

Quite a few factual and legal misperceptions about the Central American conflict occur with sufficient frequency to deserve separate comment. These can be characterized as: the "invisible attack" syndrome, the anemic right of defense, the comandantes (and FMLN) as "aggrieved plaintiffs," the alleged "American Brezhnev Doctrine" and misrepresentation of human rights issues in the conflict.

The Invisible Attack

One of the most dangerous aspects of clandestine attacks by radical regimes using terrorism and insurgency is that such attacks may be broadly treated internationally as politically nonexistent. Through the use of sophisticated covert means, a major politico-military threat can be created without receiving much more public attention than the everyday global background noise of terrorist incidents and guerrilla activity. The principal sources of information about such secret attacks are the intelligence services of the victimized governments, which are constrained both by the need to protect sources and methods and by the inherent skepticism of democracies toward government pronouncements. Thus, a determined armed attack may in effect be "invisible" to the broad public even if occasional news stories remove the clandestine cloak. The sponsors of such attacks support them through incessant propaganda and effective political action coordinated with a sympathetic network of radical regimes and "solidarity committees." The sponsors thus succeed in focusing attention on alleged (and, in some cases, quite real) political or human rights shortcomings of the attacked entity and on the permissibility of any defensive response. The impact on world order is devastating, as the great principle of the Kellogg-Briand Pact and the UN and OAS Charters is turned upside down. Armed aggression becomes politically invisible; armed response to that aggression is transmogrified into the condemned armed attack. It is as though the immune system of international law had gone haywire and begun methodically to attack defensive response while ignoring the virus of aggression.

The secret war in Central America presents a chilling example. A Sandinista radical leadership that systematically participates in full-scale covert armed attack against one of its neighbors and in terrorism and subversion against at least three others—and does so despite major efforts at good relations and massive economic assistance from the democracies—lies about its covert activities235 and goes to the World Court to seek to halt the defensive response.

235 On the sixth anniversary of the Sandinista overthrow of Somoza, July 19, 1985, and following an FMLN attack on off-duty American Marines and Salvadoran civilians in a downtown San Salvador cafe, Comandante Ortega again denied that Nicaragua was engaged in terrorism...
response. The international community, only vaguely aware of the extent of the attack, reacts with indignation at the highly publicized defensive response. Like the immune system gone haywire, the reaction is vigorous, but the target has been converted from the attack into the response.

Few who have seriously reviewed the evidence—from the attacked Governments of Central America to the congressional intelligence oversight committees and the bipartisan Kissinger Commission—doubt that the root of the world-order problem in Central America is a serious, ongoing secret war directed from Cuba and Nicaragua against neighboring states, particularly El Salvador. The contra response is just that: an effort by the democracies to defend against that attack and to create a meaningful incentive for the perpetrators to stop.

The Anemic Right to Defense

A recurrent misperception that frequently accompanies the "invisible attack" syndrome results from defining the right of defense so narrowly as effectively to destroy it. In this connection, three arguments are most frequently advanced in the Central American context: first, that no defensive response may be undertaken against the attacking state until the Organization of American States has authorized such action; second, that any defensive response must be confined to the territory of the attacked state; and third, against its neighbors and vehemently accused the United States of terrorism on a worldwide basis. See Long, Ortega Marks Sandinista Revolution's Anniversary with Denunciation of U.S., Los Angeles Times, July 20, 1985, at 9, col. 1.

One example, selected because the senior author is a moderate and respected international law scholar, is the recent article by Professor Christopher Joyner and Michael A. Grimaldi, supra note 115. As "Historical Background," the authors spend 11 pages (id. at 631-41) discussing U.S. involvement, with heavy emphasis on contra operations in Nicaragua, but not once do they discuss the secret Cuban-Nicaraguan attack against neighboring states. The only passing reference is a single sentence: "Firmly committed to opposing communist incursion in the Western Hemisphere, the Reagan Administration determined early on that Nicaragua under the Sandinistas was a conduit for aggressive communist activities in Central America." Id. at 634. This sentence seems to imply that the Reagan administration (there is no mention of the Carter administration's equivalent determination) is pursuing an anti-Communist American Brezhnev Doctrine for the hemisphere. Such one-sided historical background from a scholar of Professor Joyner's reputation shows that the "invisible attack" syndrome is indeed a major world-order threat with a unique ability to turn the rule of law against itself.

For a radical attack and reply by the author, see Chomsky, Law and Imperialism in the Central American Conflict: A Reply to John Norton Moore, 8 J. CONTEMP. STUD. 25 (1985); and Moore, Tripping through Wonderland with Noam Chomsky: A Response, id. at 47.

One generic problem may be that the expertise on radical regimes' strategies of terrorism, "indirect aggression" and "wars of national liberation" has largely developed outside the international legal community. See generally J. PUSTAY, COUNTERINSURGENCY WARFARE (1965); R. CLINE & Y. ALEXANDER, supra note 2; W. LAQUEUR, TERRORISM (1977); J. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM (1980); Y. ALEXANDER, D. CARLTON & P. WILKESON, TERRORISM: THEORY AND PRACTICE (1979). For general treatment of such strategies, see, e.g., L. SCHAPIRO, TOTALITARIANISM (1972); E. NOLTE, THREE FACES OF FASCISM: ACTION FRANÇAISE, ITALIAN FASCISM, NATIONAL SOCIALISM (1969); C. JOHNSON, REVOLUTIONARY CHANGE (1966); H. ARENDT, THE ORIGINS OF TOTALITARIANISM (1973); E. HOFER, THE TRUE BELIEVER (1951); and J.-F. REVEL, THE TOTALITARIAN TEMPTATION (1978).
that assistance to insurgents in the attacking state cannot be a proportional response.

A recent article by Professor Christopher Joyner and Michael Grimaldi illustrates the first argument:

For U.S. actions in Central America to qualify as legitimate collective self-defense, the United States needs to invoke the Rio Treaty, thereby activating use of the collective defense features of the regional alliance. The United States would first ascertain whether Nicaragua actually was supplying arms to El Salvador rebels, an action clearly in violation of Article 15 [sic] of the OAS Charter. If indeed illegal Nicaraguan assistance could be demonstrated, then charges could be presented to a convocation of a Meeting of Consultation under Article 6 of the Rio Treaty.238

This is a common misperception of the Rio Treaty, the basic defense treaty of the inter-American system. The Rio Treaty, like the NATO Treaty and every other significant defense agreement,239 was structured to permit immediate response to an attack, as allowed under Article 51 of the UN Charter "until the Security Council has taken measures necessary to maintain international peace and security." The main purpose of the Rio Treaty, like all mutual defense treaties, is to go beyond the UN Charter in creating an obligation to assist in meeting an attack. Article 3 of the Rio Treaty is clear on these points:

(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. . . 240

238 See Joyner & Grimaldi, supra note 115, at 665. Note the reference to the old edition of the OAS Charter; it should be to Article 18 of the revised, post-1967 Charter.


240 Pursuant to paragraph 2, all that is required for collective defense is a general request for assistance and that subsequent to such a request the requested state determines the measures it may individually take. Thus, El Salvador, which has requested general U.S. assistance in meeting the armed attack against it, is not required to approve each U.S. action such as assistance to the contras. Nevertheless, President Duarte has repeatedly and publicly recognized their contribution in reducing the intensity of the attack against El Salvador. See, e.g., Duarte's press conference of July 27, 1984, FBIS, LATIN AMERICA, at P2 (July 30, 1984). In May 1984, then President of El Salvador Magaña personally confirmed to the author that El Salvador had requested U.S. assistance.
(4) Measures of self-defense provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security. 241

To make it absolutely clear that none of the rights of the parties under the UN Charter would be impaired, including the crucial Article 51 right of individual response to attack until the Security Council has taken effective action, the draftsmen of the Rio Treaty added Article 10, which provides: "None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations." 242

The procedure under Article 6 of the Rio Treaty, which Professor Joyner correctly describes as requiring action by the Organ of Consultation, relates to nonarmed attack and does not affect the rights of the parties to take action pursuant to Article 3 in the event of an armed attack. Articles 3 and 6 are thus complementary. In any event, pursuant to Article 10, the right of defense, coextensive with that right in Article 51 of the Charter, would be preserved. It is not only incorrect, it is politically naive in the extreme to suppose that the members of the OAS—or of any other defensive alliance system—would have given up their traditional right of individual or collective defense against armed aggression when the very purpose of such an alliance is to strengthen their defensive capability.

A second argument is that any defensive response to "indirect," as opposed to "direct," aggression must be confined to the territory of the attacked state. This argument was advanced by some critics of American actions in Vietnam 243 and was recently revived in a thoughtful article by Professor Oscar Schachter, although he carefully presents it as a proposed rule. 244

---

241 Art. 3, paras. 1, 2 and 4, Rio Treaty, supra note 153.
242 Id., Art. 10. Since Article 103 of the UN Charter would already have ensured that no obligation under the Charter could be impaired by the Rio Treaty, the real purpose and effect of Article 10 is to protect the rights of the parties under the UN system, including the right of individual and collective defense.
Joyner and Grimaldi assert that this is a rule of positive international law in their recent article, relying solely on Schachter without noting that he carefully describes it as a "proposed" rule and that he discusses it in the broader setting of counter-intervention (which may occur without an armed attack) rather than indirect or covert armed attack. Joyner and Grimaldi’s sole legal and policy argument for this critical assumption is the single sentence "[t]hough this limitation may seem inherently unjust, providing opportunities for the instigating culprit, international law sanctions neither the notion that ‘might makes right’ nor that ‘two wrongs make a right.’" Both notions are entirely unpersuasive in determining the scope of the right of effective defense, which is unquestionably "sanctioned" by international law. Joyner and Grimaldi’s argument suffers from two common logical fallacies, non sequitur and petitio principii: "might (does not) make right" as a premise has no relevance to the scope of the defensive right under the Charter. That is, the authors’ proposed conclusion does not follow from their premise; and "two wrongs do not make a right" begs the question as to whether a defensive response is a "wrong." See Joyner & Grimaldi, supra note 115, at 680–81. See, e.g., S. BARKER, THE ELEMENTS OF LOGIC (1965).
This "proposed rule" is not international law and should not be. As has been seen, most scholars have long supported the proposition that intensive "indirect" aggression is an armed attack permitting a defensive response under Article 51 of the UN Charter and customary international law.\(^{245}\) Since the traditional rule has long been that assistance to a government at its request within its own boundaries is lawful even in the absence of an armed attack,\(^{246}\) the very purpose of the determination of an armed attack is to permit proportional defensive measures against the attacking state. There is no evidence that its draftsmen intended to limit Article 51 as suggested by this proposed rule or that states party to the Charter have adopted any such rule. Contrary to Professor Schachter's suggestion that this proposed limitation "has been observed in nearly all recent civil wars,"\(^{247}\) the United States specifically rejected it in the Vietnam War when the argument was made that it was impermissible to respond against North Vietnam as a defense to its "indirect" aggression against South Vietnam. It seems also to be rejected widely elsewhere, including in French, Soviet, Chinese and Israeli state practice.\(^{248}\)

As a policy matter, the only purpose of such a rule would be to seek to reduce conflict by reducing the potential for territorial expansion. The rule might be more likely, however, to encourage conflict and "indirect" aggression by convincing states that such aggression is free from substantial risk: if it works, they will win; if it fails, there is no significant risk and they can try again. As this possibility suggests, the right of defense under customary international law and the Charter is a right of effective defense; that is, a right to take such actions as are reasonably necessary to end the attack promptly and protect the threatened values. Why should El Salvador and other Central American states be required to accept an endless secret war against them? Does anyone doubt that the United States would respond directly against Cuba and Nicaragua if under the same circumstances they were supporting within its territory an armed insurgency fielding forces one-sixth the size of a rapidly increased U.S. Army? Does anyone doubt that the Soviet Union, France, India, Brazil or Nigeria would so respond in similar circumstances? Just as the Charter is not a suicide pact, so too it is not a

\(^{245}\) See, e.g., Kelsen, supra note 170.  
\(^{246}\) See, e.g., Moore, supra note 21.  
\(^{247}\) Schachter, supra note 244, at 1643.  
\(^{248}\) Subsequently, of course, North Vietnam invaded the South openly with more than 14 regular army divisions in blatant violation of the Paris Accords.

Although in both cases their actions are illegal, because in support of illegal direct invasions, the Soviet response against Pakistan and the Vietnamese response against Thailand are purportedly in response to assistance to insurgents in Afghanistan and Kampuchea, respectively. The factual premise of both the Soviet and the Vietnamese actions is upside down as to who is the attacker and who the defender, but the examples illustrate that the Soviet bloc has not accepted the proposed Schachter "rule." Nor does it have much following in the Middle East. Apparently, one motive for the Iraqi attack on Iran was Iranian support for insurgents in Iraq. Similarly, more than 30 years of contrary practice show that Israel has not accepted Schachter's proposed "rule." Nor has the PRC accepted it in responding to Vietnamese assistance to insurgents in Kampuchea, or France in responding against what it felt to be an FLN rebel garrison at Sakiet-Sidi-Youssef in Tunisia in 1958.
license to perpetual violence. The real check, when the proper scope of the
defensive right is in issue, is the well-established requirement of necessity
and proportionality.

A third argument sometimes advanced is that assistance to insurgents in
the attacking state cannot be a proportional response or, specifically, that
any U.S. assistance to the contras would not be proportional in the Central
American conflict. Again, however, there is no such general rule of inter-
national law. As to proportionality (which is a requirement), it is difficult to
understand how a response in kind that is considerably more restrained than
the attack and that has not yet stopped the attack is somehow dispro-
portionate. As we have seen, Cuba and Nicaragua are not bound by any such
constraints as limit the U.S. response. Most importantly, the contras' response
meets the test of proportionality, for it has blunted the attack but not yet
ended it. Militarily, the rationale of their response is impeccable: it permits
retaliation against resupply bases, creates a real incentive to call off the attack
and ties down attacking forces through the classic “multiplier” effect of
initiative and maneuver rather than static defense. In fact, it is a reasonable
defensive measure to encourage Cuba and Nicaragua to cease their secret
war against their neighbors and not to doom El Salvador to a “twenty years
war.” Indeed, given the magnitude of the Cuban-Nicaraguan attack, it can
be argued that a stronger response is required by Article 3 of the Rio
Treaty.

\[249\] See K. CLAUSEWITZ, ON WAR (1852); H. SUMMERS, ON STRATEGY (1983).
\[250\] Professor Chayes recently presented the “invisible attack” and “anemic right to defense”
arguments in classic form:

[I]f some body, like the U.N. or the O.A.S. has not authorized it—you've got a unilateral
decision here—the use of force in self-defense is authorized under international law only
in the face of an armed attack, if an armed attack has been committed on another country.
Then that country can respond by means of self-defense, and its allies can respond with
it. So the first point is that, whatever Nicaragua has done, it has not launched an armed
attack on anybody. The United States may talk about subversion, or exporting revolution,
or whatever, but nobody says that Nicaragua has attacked El Salvador or anybody else.
those, the second point is that self-defense is just what it says. It's designed to protect you
against what the other fellow is doing. You can't overthrow the other fellow's government
in self-defense. That's clearly outside the range of what's permitted in self-defense, and
in fact, once the President began to acknowledge openly that the object of the exercise
was to make the Nicaraguans cry “uncle,” that really solved the most difficult issue in the
case from the Nicaraguans' point of view, because it's clear that you are not entitled, in
self-defense, to overthrow the other guy's government.

Chayes on Funding the Contras, CHI. LAW., July 1985, at 21, 26–27. There are at least five and
possibly six (depending on Chayes's intended meaning) factual and legal errors in this statement.
First, Chayes ignores the overwhelming evidence of the attack by Nicaragua on its neighbors,
particularly El Salvador.

Second, Chayes is in error in arguing that “nobody says that Nicaragua has attacked El
Salvador or anybody else.” The point has repeatedly been made by this author, among others,
including at an open meeting of the American Society of International Law in the presence of
more than a hundred of Professor Chayes's colleagues and his co-counsel in the Nicaragua
case, and in widely published articles. It has been made by both Secretary of State Shultz and the
Government of El Salvador in sworn affidavits in the Nicaragua case, and by President Reagan
in a speech of Jan. 24, 1985. See also STATE-SPONSORED TERRORISM, supra note 2, at 89.

Third, the President's “uncle” statement does not mean that U.S. policy is to overthrow the
In recent years, some authors have responded to the radical regimes' assault on Charter values by proposing a dramatic reinterpretation of the Charter to permit the use of force by the democracies in direct support of human rights and self-determination, or a broader right of defense. The converse of this effort to loosen the Charter standards on the use of force has been the less conscious trend, clearly evident in most of the literature on the Central American conflict, to restrict severely the Charter right of defense. In both cases, it seems preferable to adhere to that great dual principle of the Charter that the aggressive use of force is prohibited no matter how "just" the cause, and that nations have the right of individual and collective defense, which includes the right to take measures reasonably necessary to end the attack promptly. Nothing is more likely to contribute to the present deterioration of world order than the combination of the "invisible attack" and "anemic defense" problems, which together fail to take appropriate measures against aggressive attack and undermine the critical deterrent of effective defense against such attack.

Sandinistas by force, a point that is developed in detail in section IV below and thus will not be elaborated on here.

Fourth, Chayes is in error if he means to imply that there is no right of collective defense until authorized in a specific case by the United Nations or the OAS. See the discussion in section III, "The United States Response," above. To make the inherent right of defense effective, it must not be contingent on a prior Security Council finding of an attack. Chayes is also incorrect if he means to imply that prior OAS— or regional—authorization is required for, or even dispositive of, a legal right of defense against an armed attack. See Arts. 2 and 10 of the Rio Treaty, supra note 153, and Art. 51 of the UN Charter. Moreover, under the Charter the armed attack itself, not any regional determination, gives rise to the right of defense. Chayes's confusion on this point may stem from a peculiar legal theory he espoused about the Cuban missile crisis, that only OAS authorization confers legitimacy. Paradoxically, at that time he argued that lack of action by the Security Council constitutes authorization for regional enforcement action under Charter Article 55, a distinction that is not generally accepted. See, e.g., Moore, supra note 163, at 158-61; J. Moore, LAW AND THE GRENADA MISSION 67 n.4 (1984).

Fifth, Chayes is in error in arguing that the right of defense can never extend to overthrowing the government of an attacking state. The scope of the right of defense is determined by necessity and proportionality. For further discussion of this point, see text at note 285 infra.

Finally, Chayes's view that the scope of the U.S. response, and not the response itself, is "the most difficult issue... from the Nicaraguans' point of view" gives his case away. For if Nicaragua is not attacking its neighbors, the response itself is determinative; and only if it is attacking its neighbors does the scope of the response become "the most difficult issue." Thus, Chayes is implicitly assuming that Nicaragua is attacking its neighbors without noting that even if he were correct in arguing that the U.S. response is not proportional (which he is not), then both Nicaragua and the United States would be violating the Charter. As we have seen, there is no basis even remotely arguable for the Nicaraguan attacks.


252 See, e.g., Wallace, International Law and the Use of Force: Reflections on the Need for Reform, 19 INT'L LAW. 259 (1985). While raising important questions, in some respects this exercise seems prompted by an unduly narrow conception of existing rights of defense and regional peacekeeping under the Charter.

253 This, I believe, remains the Charter standard.
By pursuing their attack on neighboring states secretly, the comandantes have been able to posture before much of the world—except, notably, Central America—as aggrieved plaintiffs. Like the childhood bully, they seek to persuade the world that “it all started when he hit me back.” There are at least six separate reasons why such a posture is not credible.

First, and most importantly, it is the comandantes who initiated the attack. Assistance to the contras is a defensive response that did not begin for well over a year after the most intense phase of the attack against El Salvador and after the Sandinistas were unambiguously offered economic assistance if they would halt their attacks. Nothing can more effectively undermine the restraint on the use of force mandated by the UN Charter than the failure to differentiate between aggression and defense.

Second, even if all the arguments restraining the right of defense were accepted and assistance to the contras were illegal, the comandantes’ assistance to insurgent groups in neighboring states would remain illegal under numerous fundamental international legal principles. To my knowledge, no scholar has seriously urged that these activities are lawful or doubted that they preceded assistance to resistance groups in Nicaragua. In any event, since the comandantes have pursued the secret war under considerably fewer constraints than are adhered to by the United States in response, their responsibility would seem greater. Why, then, should they be regarded as aggrieved plaintiffs when the activities they complain of against their regime are less damaging than their own activities?

The Sandinistas have sought approximately $375 million in alleged damages for attacks by the contras. This amounts to slightly over one-third of the more than $1 billion in direct war damages inflicted on El Salvador to date by the FMLN. There is authority in the practice of the World Court for the proposition that a complainant guilty of violating an identical or reciprocal obligation should not be permitted to recover. At the very least, Nicaragua must be so characterized for its attacks against its neighbors under any interpretation of the facts or the law. As Judge Hudson wrote in his opinion on Diversion of Water from the Meuse:

"Article 38 of the Statute expressly directs the application of "general principles of law recognized by . . . nations", and in more than one nation principles of equity have an established place in the legal system. . . . It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."

254 Polls of public opinion in Central American countries and editorials in leading newspapers consistently show great concern about Sandinista policies. Even the Nicaraguans seem to be split over whether support for the contras will encourage pluralism, free elections and protection of human rights. See, e.g., SOVIET-CUBAN CONNECTION, supra note 14, at 26.

255 See Memorial of Nicaragua, supra note 150, at 3.

256 See SOVIET-CUBAN CONNECTION, supra note 14, at 33.
It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. . . .

In a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.  

Third, the comandantes who are complaining about assistance to insurgent groups against them were themselves insurgents who came to power through massive outside assistance, including external financing, training, weapons supply and coordination of military tactics, and the direct participation of foreign nationals as combatants and military advisers. True, the revolution against Somoza was blessed by an OAS resolution. But it is not at all clear that the OAS is empowered to—or under the UN Charter can lawfully—authorize assistance to insurgent movements against member governments. For even against a clearly repressive regime, external assistance to a favored ideological faction may fundamentally distort the process of internal self-determination. Clearly, there was strong and broad-based popular opposition to the Somoza regime. But is it clear that in the absence of major Cuban assistance to favored representatives of the three Marxist-Leninist factions in Nicaragua, these groups would have come to power? The point is not to argue for a general international legal right of assistance to insurgencies against regimes that have come to power with major foreign assistance. It is rather that a regime whose legitimacy is based solely on a seizure of power with foreign assistance, in seeking as plaintiff to make a case against such assistance, is relying on a principle that it has violated itself.

Fourth, this tenuous case of the regime as plaintiff is made even more tenuous by its failure to adhere to the internationally established conditions for its recognition. The comandantes, contrary to their pledge to the OAS and contrary to the OAS-established conditions for their recognition, have failed to hold free elections (after 6 years) and are moving toward totalitarian controls at home and alignment with aggressive regimes abroad.

Fifth, the comandantes' posture as plaintiff is called into question by the disrespect for international law shown in the discrepancy with known facts in their sworn affidavits and testimony to the World Court.

Finally, it is surely relevant in considering the posture of the comandantes as plaintiff—at least in moral terms—that their regime has denied broadly
accepted international human rights and refused any genuine test of self-
determination through free elections, while the democratic resistance has 
explicitly sought as their objectives human rights guarantees and free elec-
tions under international supervision. Conversely, the FMLN insurgency 
in El Salvador—which they support—has insisted on power sharing, refused 
to participate in free elections, asserted that the Government of El Salvador 
must step down as a precondition to settlement and continued its attacks 
against the Salvadoran political process despite El Salvador’s strong progress 
toward full democracy.

The Alleged “American Brezhnev Doctrine”

A centerpiece of the Sandinistas’ allegations to the World Court is that 
the purpose of the United States is not to respond to armed aggression 
against Nicaragua’s neighbors, but rather to overthrow a government in 
Managua with which it disagrees. Typically, the “proof” offered for this 
argument is found in press conferences in which the U.S. President stressed 
the need for the comandantes to keep their pledge to the OAS and restore 
democratic rule and—on one occasion—stated that the United States would 
persist until the Sandinistas said “uncle.” Statements of individual contras 
are also cited to support the proposition that the contras’ objective is to 
overthrow the Government in Managua rather than to interdict weapons 
supplies to the FMLN insurgents in El Salvador. This argument implies 
that the United States is pursuing a hemispheric “American Brezhnev Doc-
trine” or, more broadly, a global policy of “war of national liberation.”

There are at least five reasons why the argument is erroneous.

First, as has been seen, the United States vigorously sought good relations

---

262 On the other hand, even the contras have not sought the physical overthrow of the 
Sandinistas. See notes 124–127 supra and accompanying text. See also Declaration of the Nica-
raguan Democratic Force of February 21, 1984, in Military and Paramilitary Activities in and 
264 On the Salvadoran elections and international reaction to them, see id., and Dep’t of State, Statements Made after Sandinista Elections (1984). See further notes 294–295 infra and accompanying text.
265 See the Memorial of Nicaragua, supra note 150. See also statement by counsel for Nicaragua 
266 N.Y. Times, Feb. 22, 1985, at A14, col. 3.
267 See Memorial of Nicaragua, supra note 150.

Nonlegal commentators have also fueled the fire of this allegation by supporting such policies 
in the face of the Soviet Union’s support for the “Brezhnev Doctrine” and Marxist-Leninist 
“wars of national liberation,” which are reverse sides of a “heads I win, tails you lose” double 
standard leading to permanent Marxist-Leninist governments. Another reason for the confusion 
is the failure to understand that there is a fundamental distinction under the Charter between, 
on the one hand, providing defensive assistance to resistance forces in an illegally attacked 
nation, as to the Afghan resistance, or assistance to insurgents in an attacking nation, as to the 
Nicaraguan democratic resistance, and, on the other hand, aggressively intervening to overthrow 
a government at peace with its neighbors or to prevent a change of form of such a government.
with the comandantes, even though it was evident that they were Marxist-
Leninists. Only when the intelligence information of the Cuban-Nicaragu-
ian secret war became overwhelming did the United States reluctantly suspend,
and subsequently terminate, economic assistance to the Sandinistas. As the
secret war continued and was accompanied by an unprecedented Central
American arms buildup and failure by the Sandinistas to adhere to pledges
made to the OAS, U.S. diplomatic policy shifted to include concern for these
latter elements as well. There has never been a policy simply to overthrow
the comandantes.

Second, neither presidential press conferences nor other statements by
U.S. officials support the argument of the Sandinistas unless generous in-
nuendo is supplied. Furthermore, snippets taken out of context from pres-
idential press conferences, in which policy statements are customarily sketchy
and incomplete, are not as useful a guide to overall U.S. policy as the complete
record of diplomatic negotiations and contemporaneous presidential
speeches, letters and policy statements. In his speeches and statements, the
President has pointed to the aggression by Nicaragua against its neighbors
as the principal motivating factor in U.S. actions and has repeatedly stressed
that the United States does not seek the overthrow of the Nicaraguan Gov-
ernment. Space permits mention of only a few examples here. In a special
address before a joint session of Congress on April 27, 1983, President
Reagan said:

But let us be clear as to the American attitude toward the Govern-
ment of Nicaragua. We do not seek its overthrow. Our interest is to
ensure that it does not infect its neighbors through the export of sub-
version and violence. Our purpose, in conformity with American and
international law, is to prevent the flow of arms to El Salvador, Hon-
duras, Guatemala, and Costa Rica. We have attempted to have a dia-
logue with the Government of Nicaragua, but it persists in its efforts
to spread violence.

In a speech to Western Hemisphere legislators on January 24, 1985, the
President reiterated that the United States, "by supporting Nicaraguan
freedom fighters is essentially acting in self-defense and is certainly consistent
with the United Nations and OAS Charter provisions for individual and
collective security." In his State of the Union message on February 6,
1985, the President said: "The Sandinista dictatorship of Nicaragua, with
full Cuban-Soviet bloc support, not only persecutes its people, the church
denies free press, but arms and provides bases for communist terrorists
attacking neighboring states. Support for freedom fighters is self-defense
and totally consistent with the OAS and UN Charters." In his report to
Congress on April 10, 1985, he added: "We have not sought to overthrow
the Nicaraguan government nor to force on Nicaragua a specific system of

270 Address by President Ronald Reagan, DEP't ST. BULL., No. 2075, June 1983, at 1, 3.
271 Address by President Ronald Reagan, id., No. 2096, Mar. 1985, at 4-5.
272 Address by President Ronald Reagan, id., No. 2097, Apr. 1985, at 9.
government, 273 a position stated again in a letter to Congressman Bob Michel during the most recent debate on contra funding. 274

Finally, regarding the $27 million in humanitarian assistance to the contras, on August 30, 1985, President Reagan reaffirmed the U.S. commitment to peaceful resolution of the conflict. "In Nicaragua," he said,

we support the united Nicaraguan opposition's call for a church-mediated dialog, accompanied by a cease-fire, to achieve national reconciliation and representative government. We oppose the sharing of power through military force, as the guerrillas in El Salvador have demanded; the Nicaraguan democratic opposition shares our view. They have not demanded the overthrow of the Sandinista Government; they want only the right of free people to compete for power in free elections. By providing this humanitarian assistance we help keep that hope for freedom alive. 275

Observers in the Nicaraguan Government have made similar reports about U.S. objectives in the Central American conflict. Former Sandinista junta member and Ambassador to the United States Arturo Cruz has written:

In August of 1981, the Assistant Secretary of State for Inter-American Affairs, Thomas Enders, met with my superiors in Managua, at the highest level. His message was clear: in exchange for non-importation of insurrection and a reduction in Nicaragua's armed forces, the United States pledged to support Nicaragua through mutual regional security arrangements as well as continuing economic relief. His government did not intend to interfere in our internal affairs... . My perception was that, despite its peremptory nature, the U.S. position vis-à-vis Nicaragua was defined by Mr. Enders with frankness, but also with respect for Nicaragua's right to choose its own destiny. 276

We have already seen that Edén Pastora has confirmed this point about the Enders peace mission.

Third, U.S. policy in Central America and elsewhere is governed by applicable national legal restraints. The Boland amendment, which qualifies any United States assistance and is accepted as binding by the President, provides:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed

273 U.S. Support, supra note 105, at 209.
274 Copy on file at the Center for Law and National Security (undated).
275 21 WEEKLY COMP. PRES. DOC. 1015, 1015 (Sept. 2, 1985). See also text at note 106 supra.
276 Cruz, Nicaragua's Imperiled Revolution, 61 FOREIGN AFF. 1031, 1041-42 (1983). See also Pastora, supra note 90, at 10-11. When the author met privately with Secretary of State Haig early in the Reagan administration, the Secretary was deeply troubled by the intelligence reports on the Sandinistas: the focus of concern was not a government in Managua the United States did not like but its policy of "revolutionary internationalism" and attacks directed against neighboring states.
forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras. 277

This legal condition has remained strictly in force following the recent congressional decision to renew nonlethal humanitarian assistance to the contras. 278 It is hardly consistent with the thesis of an American doctrine of “wars of national liberation” or “Brezhnev Doctrine.”

There is strong evidence that the policy of assistance to resistance groups is, in fact as well as in theory, 279 working more effectively than a policy of direct interdiction and static defense confined to the territory of El Salvador. For example, the resupply base at La Concha in Nicaragua seems to have been taken out of action by resistance attacks. 280 In this connection, it should be remembered that the attack from Nicaragua is against four neighboring states, not just El Salvador. Thus, a response confined to the attacked states would require a separate U.S. response in all four, one of which, Guatemala, the United States has sought not to aid directly because of lingering human rights concerns. Since the policy of assisting the contras began, weapons deliveries to the FMLN in El Salvador have declined and Nicaraguan involvement in the attack on Guatemala appears to have been substantially reduced. The argument that the contras are not engaged in the direct interdiction of weapons is both factually wrong and naive in missing the point that assistance to the contras is a defensive strategy. 281

Fourth, the policy of the contras, or democratic resistance, has not been to seek the forcible overthrow of the Sandinista Government. Despite some personal statements to the contrary, the resistance groups and their leaders have made it clear that they seek a negotiated end to the hostilities and that they seek to participate in internationally observed free elections in accordance with the OAS conditions. 282

Finally, even if the objective of the United States were to overthrow the Government of Nicaragua—which it is not—in a setting of an ongoing armed attack against neighboring states by a government that refuses to cease those attacks and is engaged in a massive military buildup to support them, such an objective would be a lawful defensive objective; that is, it would be both necessary and proportionate to overthrow an attacking government that refused to halt its aggression. No one argued in World War II that the Allies could not legally replace Axis Governments or that such a change of gov-

277 Boland amendment, supra note 117.
278 This legal constraint is policed by a host of oversight mechanisms, including the Attorney General, two congressional select committees, the President’s Intelligence Oversight Board, and the various agency general counsels and inspectors general.
279 See text at notes 249–250 supra.
280 On the importance of La Concha, see Dillon, supra note 80, at A29.
281 Since the peoples of Central America generally have a common language and similar background, it would not be difficult for Nicaragua to infiltrate a substantial number of Nicaraguans into the secret attack on neighboring states. Some Salvadoran Marxist-Leninist groups apparently fought with the Sandinistas against Somoza. The contra policy makes this kind of escalation more difficult.
282 See, e.g., supra note 127 and accompanying text.
ernment was not a permissible defensive war aim. Similarly, it was official UN policy in the Korean War to replace the Government of North Korea and unify the country in response to North Korea's aggression against the South.285

Discussion of the Monroe Doctrine occasioned by the Central American conflict has given rise to a related confusion. No American spokesman—or serious scholar—has invoked the Monroe Doctrine as a legal basis for U.S. actions in Central America.284 Indeed, the Monroe Doctrine has not been invoked by the United States as legal or political doctrine since President Franklin Roosevelt enunciated the “Good Neighbor” policy in the 1930s.

Two points about the Monroe Doctrine deserve comment, however, in view of the charges about an “American Brezhnev Doctrine.” First, what content does the Monroe Doctrine retain since the adoption of the UN and OAS Charters? Second, what policy significance should the doctrine retain today for U.S. foreign policy and world order?

The Monroe Doctrine was first announced by President Monroe in 1823.285 In its central part, Monroe declared it

important to the amicable relations existing between the United States and . . . [European] powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we shall not interfere. But with the governments who have declared their independence and maintain it and whose independence we have on great consideration and on just principles acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.286

As is evident in this excerpt, the original doctrine combined American security concerns and the idealism of a newly independent country determined to prevent the reimposition of colonialism in this hemisphere. As late as 1914, Elihu Root, a distinguished American jurist and a founding member of the American Society of International Law, wrote:

The Monroe Doctrine does not assert or imply or involve any right on the part of the United States to impair or control the independent sovereignty of any American state. . . .

The Monroe Doctrine does not infringe upon that [sovereignty]. It asserts [it]. The declaration of Monroe was that the rights and interests

285 Only the direct intervention of the People’s Republic of China prevented the realization of this policy.

284 The ascription of this view to me by Joyner and Grimaldi is flatly wrong. Compare their statement, Joyner & Grimaldi, supra note 115, at 680, with the author’s discussion cited by them, id. at 680 n.251.

285 The best official summarization of the Monroe Doctrine is R. CLARK, MEMORANDUM ON THE MONROE DOCTRINE (1930).

286 Quoted in N. GRAEBNER, IDEAS AND DIPLOMACY 143 (1964). For a recent discussion of the history of the doctrine, see id. at 215–61.
of the United States were involved in maintaining a condition, and the condition to be maintained was the independence of all the American countries. 287

Nevertheless, the Monroe Doctrine was widely regarded in Latin America, particularly during Theodore Roosevelt's administration—the period of the "Roosevelt corollary"—as inconsistent with national sovereignty and the principle of nonintervention. In reality, the doctrine seems variously to have served U.S. national security interests and Latin American self-determination, or both, as when the United States pressured France to withdraw support for Maximilian's colonial effort in Mexico. 288 Since U.S. ratification of the United Nations and OAS Charters in 1945 and 1948, however, no lawful Monroe Doctrine can be inconsistent with those great Charters, 289 including any sort of "Roosevelt corollary" inconsistent with Latin American sovereignty. It is not surprising, then, that the United States has not asserted any such right in the post-Charter period. Moreover, the second of the two original purposes of the Monroe Doctrine, to prevent the forcible re imposition of colonialism and denial of self-determination in Latin America, is fully consistent with the UN Charter and hemispheric principles of collective defense against armed aggression. That "doctrine" is poles apart from the "Brezhnev Doctrine" asserted by the Soviet Union in the same post-Charter period as an unlimited privilege to prevent any state in its sphere of influence from ever altering its Marxist-Leninist form of government.

As to the policy significance the doctrine should retain today, there seems little point in preserving the title of a doctrine unfavorably remembered from pre-Charter years by our fellow Americans. Nevertheless, the underpinning of the doctrine, embodied in the present OAS system of collective defense against externally assisted efforts to deprive American states of their right of self-determination, should continue to be an important component of U.S.—and Latin American—foreign policy and is directly relevant to the Central American setting. Similarly, the underlying reality of the doctrine, which is that hostile attempts to gain hegemony in the Americas can directly threaten the security of the United States and the hemisphere, has continuing relevance in considering how far the Soviet Union will go to expand its influence in this hemisphere. If the Soviet-assisted effort forcibly to install client governments in an area not even contiguous to the USSR is permitted to succeed, 290 it will spell failure not only for U.S. policy, but also for world

287 Root, The Real Monroe Doctrine, 8 AJIL 427, 433–34 (1914).
288 See N. Graebner, supra note 285, at 251.
289 In an earlier era, the Monroe Doctrine was accorded considerable recognition in international law. Thus, Article 21 of the League Covenant said: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace." See M. Hudson, INTERNATIONAL LEGISLATION 1 (1931). See also the statement by the British negotiator on the right of defense retained under the Kellogg-Briand Pact. Wright, The Meaning of the Pact of Paris, 27 AJIL 39, 42 (1933).
290 On the threat to world order posed by activism of major powers in areas of traditional sensitivity to opposing powers, see Moore, supra note 21, at 30.
order, Latin American nations, the OAS, and the fundamental principles underlying hemispheric solidarity, including self-determination and nonintervention.

**Human Rights and the War of Misinformation**

Modern international law rightly attaches great importance to the maintenance by states of internationally established standards of human rights. 291 It has traditionally prescribed minimum standards for the conduct of hostilities that in critical respects reflect standards applicable to armed conflict. 292 Examination of the Central American conflict with these standards in mind reveals abuses on all sides. 293 Nevertheless, it also shows substantial differences among governments and military forces in their commitment to human rights and in the use of human rights for propaganda and disinformation. A comparison between the current Duarte Government of El Salvador and the Sandinista Government of Nicaragua illustrates both problems and differences in their commitment to human rights.

President Duarte was elected in 1984 in a free election observed by delegations from all over the world. 294 His Christian Democrat Party is social democratic by European and world standards. He has supported the sweeping land reform begun in El Salvador’s 1979 social revolution. 295 As Professor Alberto Coll has written:

> Throughout his political career he [President Duarte] has endured death threats from the right and the left for promoting, in the not too fertile soil of El Salvador’s political culture, Christian Democratic ideals of political pluralism, land distribution, and freedom of association for labor unions. In 1984, when told that Fidel Castro had dispatched an assassination squad to eliminate him, he replied without fanfare that he was willing to give his own life for what was best for his country. 296


295 El Salvador’s land reform has made real progress in the past several years. See, e.g., Dep’t of State, Background Notes: El Salvador 6–7 (1985).

Under Duarte the judicial system particularly has been strengthened to bring to justice those guilty of "death squad" killings, and army officers even suspected of complicity in such activities have been transferred. A Revisory Commission has been established to examine the entire legal system, beginning with the criminal justice system. Arrest procedures have been tightened and strict rules of engagement adopted for military forces. Despite the ongoing armed attack against it, El Salvador boasts freedom of religion, a free and vigorous press, a work force free to organize and bargain collectively, a mixed economy with a healthy private sector, a strong political opposition and improving maintenance of civil, political and judicial guarantees. President Duarte's commitment to democratic pluralism, human rights and social justice is long-standing and well known. He has also moved to open a dialogue with the FMLN and has offered its members general amnesty as well as an opportunity to participate in free elections with political and security guarantees.

It should be recalled that prior to 1979, El Salvador, like much of Central America, was largely controlled by a traditional oligarchy. In 1979 El Salvador underwent a genuine social revolution that began a rapid transition to democratic pluralism. Since that revolution, El Salvador has been victimized by a small, violent right and a violent left that is externally organized, financed and assisted. Until recent years, killings by the far right may have been the principal human rights problem in El Salvador. At least since the election of President Duarte, however, such killings have dramatically declined. Today terrorism by the externally supported far left seems to be the principal human rights problem. The great majority of the people support neither the violent right nor the violent left, as the election of President Duarte showed. The success of President Duarte's reformist administration and the increasing political extremism of the FMLN are demonstrated by Mexico's recent decision, after a 6-year break, to reestablish diplomatic relations with El Salvador.

The Sandinista Government of Nicaragua came to power in the revolution of July 19, 1979. During and in the immediate aftermath of the revolution,

---

299 The author participated in vigorous questioning of then presidential candidate Duarte on these issues while serving as a member of the U.S. presidential delegation to observe the elections. Our questions focused heavily on the need to strengthen human rights and the judicial system, to control the small, violent right, and to pursue social justice. We were impressed with the depth of Duarte's commitments on these issues.
300 On this initiative, announced in a speech on Oct. 8, 1984 to the UN General Assembly, see 1985 Elections, supra note 294, at 6. Discussions with the FMLN have been held on at least two occasions, but progress has been blocked by the refusal of the FMLN to participate in free elections and its insistence on forced power sharing. See id.
301 See Dep't of State, Sustaining a Consistent Policy in Central America: One Year After the National Bipartisan Commission Report 7 (1985).
302 See Coll, supra note 296, at 29.
the nine comandantes de-emphasized their Marxism-Leninism and included a number of well-known democratic leaders in the Sandinista movement. It was widely hoped in the West and in Latin America that as a result of their pledges to the OAS, the broad-based support for the revolution and the presence of leading democrats in the Government that the Sandinista revolution would evolve into democratic pluralism.

Almost immediately, however, the revolution began to drift toward totalitarianism. The promised elections were repeatedly postponed, and when held more than 5 years after the revolution, were far from free. Democratic opposition parties were denied the means to conduct a fair election, and when Arturo Cruz still bravely opted to participate, he was denied access to the media and stoned by "turbas" using classical Somoza tactics. The Sandinista Party was virtually merged with the state and the army was placed under the control of the party. A pervasive Cuban-style internal security apparatus was installed under the guidance of a former colonel in the Cuban intelligence service. Labor unions were taken over by the Sandinista "front" and those which refused to be co-opted were systematically harassed and attacked. The Sandinistas confiscated property of some Protestant churches, such as the Mennonites, the Church of Jesus Christ of Latter Day Saints, the Jehovah's Witnesses and the Seventh Day Adventists, after accusations that they were "counterrevolutionary."

Opposition to the regime from within the traditional Roman Catholic Church was harassed and a "people's church" was encouraged in opposition to Rome. Harassment of the church itself has continued. In September 1985, despite an informal agreement that seminarians would be exempt from the draft, the Sandinistas began inducting them. In September and October, the Sandinista DGSE raided Radio Católica, the radio station of the church, and refused to allow broadcasts of liturgical services delivered by Cardinal Obando y Bravo. On October 12, the Ministry of the Interior seized all copies of the first printing of the church newspaper La Iglesia. On October 15, DGSE officials, led by Comandante Lenin Cerna, raided the Curia Social Services Office. Monsignor Bismarck Carballo, the Curia

503 Such as Arturo Cruz, Alfredo César, former head of Nicaragua's central bank, and Violeta Chamorro.
504 For an analysis of the Nicaraguan election, see Colburn, Nicaragua under Siege, 84 CURRENT HISTORY 105 (1985); see also DEP'T OF STATE, RESOURCE BOOK, SANDINISTA ELECTIONS IN NICARAGUA (1984).
505 See SOVIET-CUBAN CONNECTION, supra note 14, at 20.
506 See BROKEN PROMISES, supra note 11, at 2.
507 See Leiken, Sandinista Corruption and Violence Breed Bitter Opposition: Nicaragua's Untold Stories, NEW REPUBLIC, Oct. 8, 1984, at 28; see also BROKEN PROMISES, supra note 11, at 11-16.
508 See DEP'T OF STATE, COUNTRY REPORTS FOR 1983, supra note 26, at 643.
509 See id. The Grenada documents are particularly revealing on efforts to control the church in Cuba and Grenada and the "people's church" strategy. These documents also illustrate especial paranoia toward the "Socialist International" and consistent efforts to penetrate and frustrate this independent and non-Communist world socialist movement. See generally DEP'T OF STATE, GRENADA DOCUMENTS: AN OVERVIEW AND SELECTION (1984).
spokesman and church Director of Information, was forcibly removed and threatened with death.  

Mass organizations of women, youth and other groups tightly controlled by the Sandinistas were established on lines reminiscent of the Cuban model for dominating society’s infrastructure. The media were taken over by the Sandinistas and the only remaining independent paper, La Prensa, which had strongly opposed Somoza, was censored on a daily basis. Indeed, shortly after the November elections, Pedro Chamorro, then editor of La Prensa, left Nicaragua and "announced that he would stay in voluntary exile until full press freedom is granted."  

The Sandinistas established “special tribunals” to try their political opponents outside the normal judicial process. In addition, most observers agree that a substantial number of persons were murdered immediately after the revolution. Alvaro Baldizón, who describes his role as the chief investigator of alleged human rights violations for Interior Minister Tomás Borge from 1982 to July 1985, is reported by the Washington Post as having said that the “Sandinista government of Nicaragua has covered up thousands of cases of human rights violations and murder,” including “the execution by firing squad of more than 150 Miskito Indians during the summer of 1982.” A summary of information supplied by Baldizón contains this description of massive human rights abuses in Sandinista Nicaragua, together with many other, more graphic examples.  

The special investigations committee [of the Nicaraguan Ministry of the Interior] began operations in January 1983 and soon concluded that 90 percent of the IAHRC [Inter-American Human Rights Commission] denunciations [on human rights] were correct.

During the course of Baldizon’s investigations for the Interior Ministry he discovered that the GON had adopted, as a matter of policy, the state sanctioned assassination of political opponents to the Sandinista regime. These assassinations were personally ordered by such people as Interior Minister Tomas Borge and Interior Vice Minister Luis Carrion. Baldizon investigated cases that showed that hundreds of people had been killed by GON authorities.

510 See Dep’t of State, Chronology of Church-State Confrontations and State of Emergency (1985), and Recent Developments in Nicaragua (1985).
511 See Colburn, supra note 304, at 105.
513 Id.
514 See IACHR, REPORT ON THE SITUATION, supra note 293, at 74–86.
515 The COSEP study reports that “Jose Esteban Gonzalez, head of the Permanent Human Rights Commission before, during and after the revolution that overthrew Somoza, attests that: ‘during the first months, from July 1979 until February 1980, the Sandinistas executed in jail no less than two thousand prisoners’.” See COSEP, supra note 22, at 21. See also the quotation from Ismael Reyes, head of the Nicaraguan Red Cross, id. at 23.
The investigators found evidence that the EPS [Sandinista Army] and the DGSE had killed many Indians after they were captured, had taken many others captured in combat for interrogation and then killed them, and had taken hundreds of other prisoners in the towns and removed them from their houses. The investigators also found that the Ministers of Interior and Defense had established a special commission to determine the fate of the Miskito prisoners. According to one report the commission ordered the execution of more than 100. The investigators also found a copy of an October 1982 report from Sub-Comandante Gonzales to Vice Minister Luis Carrion in which Gonzales reported that 40 Miskitos had been killed in combat, 200 imprisoned and 150 executed by the EPS and DGSE as a result of the commission's decisions.

The investigators reported in June 1984 that more than 300 farmers had been executed and that in 80 percent of the cases the execution was proposed by the MINT [Ministry of the Interior] Delegate in Region VI, who asked for and received permission to apply "special measures" from Vice Minister Luis Carrion.317

Independent human rights organizations in Nicaragua have reported continual political killings, disappearances and torture and a substantial number of political prisoners. In response, the Sandinistas have harassed these organizations and established a government-controlled commission to rebut their work and to use human rights for propaganda purposes.318 Normal judicial guarantees such as habeas corpus have been modified and criminal penalties for political crimes have been applied retroactively and extended to family members.319 Detained foreign nationals have been denied access to consular officials as required by the Vienna Convention on Consular Relations.320 Education is heavily politicized.321 Emigration has been controlled by new restrictions on passports.322 The Miskito, Sumo and Rama Indians of the Atlantic region were in large part forcibly relocated from their traditional lands.323 In the process, many were killed or fled the country, over half of their villages were destroyed and roughly a quarter of the remaining Indians were sent to government "relocation camps."324

---

317 Information Supplied by Alvaro Baldizon Aviles, supra note 28, at 1, 7 and 9.
319 See BROKEN PROMISES, supra note 11, at 6–10.
320 See Department of State diplomatic notes from the United States to Nicaragua regarding the arrest on their yacht Wahine on Aug. 6, 1985 and detention of U.S. citizens Leo and Dolores Lajeunesse.
321 See BROKEN PROMISES, supra note 11, at 19.
322 Id.
323 Id.
324 Id. at 19–22. See also IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE SEGMENT OF THE NICARAGUAN POPULATION OF MISKITO ORIGINS (1983). Professor Bernard Nietschmann declared on Oct. 3, 1983:
These problems have impelled most of the democratic leaders who initially aligned themselves with the Sandinistas against Somoza to leave the Government or even the country. Some of them, such as Adolfo Calero, Arturo Cruz, Edén Pastora and Alfonso Robelo, have shifted support to the growing democratic resistance. Most recently, on October 16, 1985, Nicaragua's ruling Sandinistas formally implemented sweeping restrictions on remaining civil liberties, including the right of assembly, the right to travel within Nicaragua, the right to habeas corpus, the right to a trial, the right to judicial appeal, the right to strike, the right to private mail and the right to form political groups. This Sandinista pattern of denial of human rights is of serious concern and certainly violates important international guarantees.

A comparison of human rights issues under the law of war also illustrates

In several villages I talked to people who had witnessed the arbitrary killing of Miskito civilians by Sandinista military forces. Many of these killings occurred during one of several Sandinista military invasions and occupations of Indian villages. Some of the villagers were arbitrarily shot when the government soldiers first invaded the villages; others were killed during the weeks of occupation, confinement, torture and interrogation. For example, it was reported to me by several different first-hand sources that one man was nailed through his hands and ankles to a wall and told he would remain there until he either confessed to being a “contra” or died. He died. His widow, dressed in black, and others in that traumatized village were filled with grief and anger over this and other atrocities committed during their forced confinement under a reign of terror by several hundred Sandinista soldiers. Other Miskitos were killed by forcing their heads under water to extract confessions of “counterrevolutionary” activities. Two older men, 60 and 63 years of age, were threatened with death unless they confessed to involvement with “contras.” They too were finally killed in the course of these same events.

Throughout my notes and tape recordings are descriptions of such killings in village after village in the Atlantic Coast Indian region. Descriptions were given to me by wives, daughters, mothers, and other relatives and villagers. The occurrence of arbitrary killings of Miskito civilians appears to be widespread. A pattern is readily seen. Miskito men and women are accused of being contras, tortured or threatened with death unless they confess, killed, and then reported as having been contras, if indeed, there is any report at all.


525 See BROKEN PROMISES, supra note 11, at 23. See also Wash. Post, Oct. 28, 1985, at A18, col. 5.
526 See section II, “Contra Assistance as a Response,” supra.
527 See Cody, Nicaraguan Crackdown Seen Aimed at Church, Wash. Post, Oct. 17, 1985, at A1, A33, cols. 2–4. See also Dep’t of State, Suspension of Civil Rights in Nicaragua (1985). The following rights and guarantees provided for in Decree No. 52 of Aug. 21, 1979 were suspended: Article 8 (right of individual liberties and personal security); Article 11 (right to be presumed innocent until proven guilty and right to appeal); Article 15 (right to a trial); Article 15 (freedom of movement); Article 18 (freedom from arbitrary interference in personal life, family, home and correspondence); Article 20 (freedom of information); Article 21 (freedom of expression); Article 23 (right of peaceful assembly); Article 24 (freedom of association); Article 31 (right to organize unions); and Article 32 (right to strike).
528 For a minimal list, see supra note 20. Repeated charges of U.S. “genocide” by the Sandinistas may reflect a concern that their policies toward the Indians of the Atlantic region could be challenged as genocide under the Genocide Convention, supra note 20. For such charges against the United States, see, e.g., Comandante Ortega’s statement to the UN General Assembly, Wash. Post, Oct. 3, 1984, at A24, cols. 1–2.
common regional problems and differences. The deliberate killing of Miskito Indian prisoners by the Sandinista military forces during anticontra operations, as reported by Alvaro Baldiviz, Professor Nietschmann and others, is a direct—and massive—violation of the minimum guarantees applicable to the conflict in Nicaragua under common Article 3 of the Geneva Conventions. Similarly, the shooting of wounded contras with their hands tied behind their backs at El Corozo, as charged by Eden Pastora, is, if true, a blatant violation of Article 3.

There also have been persistent reports of contra attacks in violation of Article 3, and it seems likely that some have taken place. All such violations should be condemned. The most important issue, however, is whether these democratic resistance forces have adopted a policy of intentional terror and attacks on civilians or have sought to comply with international human rights standards. There seems to be little credible evidence—but there is some—that these groups are employing terrorism or attacks on civilians as deliberate policy.

See Americas Watch, Violations of the Laws of War by Both Sides in Nicaragua 1981–85 (March 1985); and id. (1st Supp. June 1985). Americas Watch is particularly weak on law of war issues: e.g., it condemns the contras' small-scale mining of harbors as indiscriminate without analyzing whether it met the standards established by the Hague Convention, supra note 183, and fails completely to discuss the charges of widespread indiscriminate use of land mines by FMLN insurgents in El Salvador. On the submarine mine issue, see supra note 183.

Common Article 3 of the 1949 Geneva Conventions for the Protection of Victims of War applies to conflicts "not of an international character." See, e.g., Art. 3, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287. Of course, if the conflict is considered an international conflict, then the full guarantees of the Conventions apply.


See, e.g., the two Americas Watch reports, supra note 329. See also D. Fox & M. Glennon, supra note 95. Although the authors are clearly sincere, their use of a Sandinista governmental car and driver, and the procedures employed, e.g., in selecting and interviewing persons and reporting the results, significantly flawed the report. On designing social science research, see generally D. Campbell & J. Stanley, Experimental and Quasi-Experimental Designs for Research (1969).

The difference is that between U.S. conduct in Vietnam, which had its Lt. Calleys, and North Vietnam's deliberate strategy of terrorism against the civilian population and mistreatment of prisoners of war. See, e.g., G. Lewy, America in Vietnam, chs. 7, 8, 9 and 10 (1977).

But Americas Watch—which of human rights groups seems to be the most sympathetic toward the Sandinistas—does conclude that the contras "practice terror as a deliberate policy." See the Americas Watch report of March 1985, supra note 329, at vi.
rights and they point out that individuals found guilty of violations have been dealt with severely. Moreover, the largest such group, the Nicaraguan Democratic Force (FDN), has publicly called for an investigation by the Inter-American Commission on Human Rights of violations on both sides of the Nicaraguan conflict and has said it would welcome an investigation by Nicaragua's Permanent Commission on Human Rights.\footnote{336 See Los Angeles Times, Mar. 16, 1985, at 14, cols. 1–3.}

As with human rights allegations against the Duarte Government in El Salvador, there is evidence that real and alleged violations by the contras are being used as part of an organized campaign of misinformation. A much publicized forum on Capitol Hill presided over by Senator Edward Kennedy—whose human rights efforts were in good faith—turned into an embarrassment when it was discovered that staffers had accepted witnesses handpicked by the Sandinistas.\footnote{337 See Muravchik, Manipulating the Miskitos, \textit{New Republic}, Aug. 6, 1984, at 21–25.} More recently, it turned out that a highly publicized report on alleged human rights violations by the contras—timed to coincide with a congressional vote on funding them—had been prepared with the assistance of the Washington law firm that serves as the registered agent of Nicaragua in the United States and had been funded by the Nicaraguan Government.\footnote{338 This refers to the Reed Brody report, \textit{supra} note 139. Mateo Guerrero, former executive director of the Nicaraguan Human Rights Commission, describes the evolution of the report as follows:}

In September 1984, Bendana ordered the CNPPDH to provide full support to American lawyers Reed Brody and James Bordelon who were preparing a report on human rights abuses allegedly committed by the armed opposition—a report to be used in the United States by groups opposed to U.S. policy. The CNPPDH provided Brody and Bordelon with an office at its headquarters in Managua, lodging in an FSLN-owned hotel managed by commission member Zulema Baltodano, and transportation. It also paid all the bills incurred during their visit, totaling some 50,000 cordobas, which Bendana agreed to reimburse out of Foreign Ministry funds. Sister Mary Hartman, an American nun who works for the CNPPDH, arranged the interviews and sent Brody and Bordelon to investigate cases she believed would have most impact on the lawyers and the public.\footnote{339 See Inside Sandinista Regime, \textit{supra} note 28, at 3.}

The “contra manual” controversy also seems to have erroneously fueled human rights charges against the contras. In an early version, this training manual for contra forces did use several ambiguous translations and phrases that could have been interpreted as supporting violations of the law of war. Even ambiguity in such a setting, of course, is wrong. After the manual had been locally corrected and erroneous versions withdrawn, a controversy arose about the original manual. An independent investigation by the House Permanent Select Committee on Intelligence and the President’s Intelligence Oversight Board, among others, turned up no evidence that the original manual had been instrumental in any law of war violations or had been so intended. Indeed, the investigations revealed that a principal purpose of the manual was to train in humane principles and that it and the accompanying training were filled with references to the need to protect civilians and persons under the insurgents’ control. Moreover, it had been so interpreted by those who used it. See \textit{Psychological Operations in Guerrilla Warfare} 48 (1985).

Paradoxically, David Nolan has pointed out that it was Sandinista strategy during the revolution “to eliminate the government presence through the assassination of the jueces de mesta” (defined by Nolan as “local constabulary”). D. Nolan, \textit{supra} note 8, at 46.
Human rights are too important to be casualties of a war of misinformation. There is urgent need for improvement on all sides in the Central American conflict. Nevertheless, there seems to be a difference in magnitude between the general levels of human rights compliance in El Salvador following the election of President Duarte and in Nicaragua during the drift toward totalitarianism under the Sandinistas.

V. Strengthening World Order

The secret war in Central America illustrates the danger to world order—and to the legal order itself—posed by the assaults of radical regimes. In Nicaragua three small and unrepresentative Marxist-Leninist factions came to power through focused Cuban economic and military assistance during a genuine and broad-based revolution against Somoza. Subsequently, the nine leaders of these factions joined with Cuba in a secret war against neighboring states. That war is conducted through assistance in organizing Marxist-Leninist-controlled insurgencies; the financing of such insurgencies; the provision and transshipment to them of arms and ammunition; training the insurgents; assistance in command and control, intelligence, military and logistics activities; and extensive political support. It also includes terrorist attacks and subversive activities preliminary to and supportive of an all-out covert attack.

Arrayed in support of this secret war is a diverse conglomeration of radical regimes and insurgent movements from the Soviet Union and Soviet-bloc nations such as East Germany, Bulgaria, Czechoslovakia, Cuba, Vietnam, Ethiopia and North Korea, to Libya, Iraq, Iran and the PLO. The nine commandantes have also made Nicaragua available as a more generalized sanctuary for radical terrorist attacks. Non-Central American groups cur-
rently operating from Nicaragua include: Colombia’s M-19 (the terrorist group that recently took hostage the Colombian Supreme Court, which resulted in the death of 11 members of the Court), the Argentine Montoneros, the Uruguayan Tupamaros, the Basque ETA, the Palestine Liberation Organization, Italy’s Red Brigades, West Germany’s Baader-Meinhof gang and the Irish Republican Army.\(^4\)

The strategy of covert and combined political-military attack that undergirds this secret war is a particularly grave threat to world order. By denying the attack, the aggressors create doubts as to its existence; and by shielding the attack with a cloud of propaganda and misinformation, they focus world attention on alleged (and sometimes real) shortcomings of the victimized state and the permissibility of defensive response. The result is a politically “invisible attack” that avoids the normal political and legal condemnation of aggressive attack and instead diverts that moral energy to condemning the defensive response. In a real sense, the international immune system against aggressive attack becomes misdirected instead to defensive response.

Aggressive attack—particularly in its more frequent contemporary manifestation of secret guerrilla war, terrorism and low-intensity conflict—is a grave threat to world order wherever undertaken. That threat is intensified, however, when it is a form of cross-bloc attack in an area of traditional concern to an opposing alliance system. That is exactly the kind of threat presented by an activist Soviet-bloc intervention in the OAS area.\(^5\)

The FSLN government has issued Nicaraguan passports to radicals and terrorists of other nationalities, including radicals from the Middle East, Latin America, and Europe, thus enabling them to travel in Western countries without their true identities being known. PLO agents working in Central America and Panama use Nicaragua as their base of operation. The Sandinistas’ willingness to provide new documentation and a base from which to travel is undoubtedly one reason why Nicaragua has become a haven for terrorists and radicals from Europe as well as Latin America.

Id. at 13.

\(^4\) See 21 WEEKLY COMP. PRES. DOC. 876–82 (July 15, 1985) (remarks by President Reagan to ABA).

\(^5\) The political and security interests of the United States and Japan, and of the other NATO, Anzus and Rio Treaty states with respect to aggressive Soviet-bloc interventions in Central America are real and substantial. They include the following considerations:

- The strategically important Panama Canal is within MiG-23 range of airfields being built in Nicaragua. The Canal is vital to regional and global trade. One-quarter of United States seaborne imports transit the Canal. In a Far East defense emergency, as much as 40% of reinforcements and defense supplies would be moved westward through the Canal. In a NATO defense emergency, western based reinforcement divisions would be moved eastward through the Canal and the Caribbean to Europe.

- Caribbean sea lanes would be more vulnerable to air and sea attack from sophisticated airfields and naval bases now being built in Nicaragua with East-bloc assistance. A substantial amount of Latin American seaborne trade and two-thirds of all U.S. seaborne trade pass through the sea lanes of the Caribbean and the Gulf of Mexico. These Caribbean sea routes carry three-quarters of U.S. oil imports and over half of U.S. strategic mineral imports. (In World War II, a mere handful of German submarines without bases in the area sank more tonnage in the Caribbean than the entire German fleet in the North Atlantic.)
The remedy for strengthening world order is clear: return to the great vision of the founders of the UN and OAS Charters. Aggressive attack, whether covert or overt, is illegal and must be vigorously condemned by the world community, which must also join in assisting in defense against such attack. At a minimum, it must be understood that an attacked state and those acting on its behalf are entitled to a right of effective defense to end the attack promptly and protect self-determination.

World order—and the Charter system—is not an equilibrium mechanism like global climate. It can be preserved only if governments and international institutions, and the men and women behind them, have the vision to understand its importance and the courage and tenacity to fight for its survival.

- Critical refineries and oil transshipment points important to all the Americas are located throughout the Caribbean and the Gulf of Mexico.

- In a NATO defense emergency, over 50% of NATO resupplies and a substantial number of NATO reinforcements would originate from Gulf Coast ports with enhanced vulnerability to air and sea attack. The United States and NATO can ill afford a second front in the Caribbean, which could require force levels approximating those planned for NATO reinforcement.

- The Punta Huete airfield in Nicaragua can land nuclear-capable Soviet Backfire bombers and, for the first time, can make it possible to fly TU-95 "Bear" intelligence flights down the West Coast of the United States, as have been flown from Cuba on the East Coast.

- The Nicaraguan military buildup is seriously destabilizing the traditional Central American military balance. Should Nicaragua add high-performance fixed-wing aircraft to its substantial army buildup (its pilots have been training in Bulgaria for such aircraft), as has Cuba, it would be able to overwhelm any of its neighbors in a conventional attack. Even now, it poses a major problem for nations such as Costa Rica, which has maintained no military forces. Why should Nicaragua's neighbors be forced to divert resources from social goals to maintaining a regional military balance?