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Covert Involvement in Essentially Internal Conflicts: United States Assistance to the Contras Under International Law

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ABSTRACT

This Article examines whether contemporary international law is equipped to address the recurrent phenomenon of covert involvement by a state in internal conflicts of another state. Ms. Michael analyzes this phenomenon in the context of United States assistance to the Contras in collective self-defense on behalf of El Salvador, and Nicaragua's concomitant support of the Salvadoran Rebels' attempts to overthrow the existing El Salvador Government. Ms. Michael summarizes the extensive history of conflict between the United States and Nicaragua culminating in the contemporary dispute existing between the Reagan Administration and the Sandinista Government. Both the Sandinistas and the Reagan Administration charged the other with violating international law through waging an unlawful war of indirect aggression.

In outlining the basic substantive and procedural requirements of international law imposed on any exercise of individual or collective self-defense, Ms. Michael examines governing provisions of the United Nations and Organization of American States Charters. The Article then addresses three substantive requirements under customary international law entitling individual or collective self-defense: 1) a state must exhaust peaceful procedures; 2) the responsive measure of force employed must be necessary; and 3) a defensive use of force must be proportional to the character and magnitude of the attack. Ms. Michael next appraises the merits of the Reagan Administration's position supporting the Contras in light of these governing legal principles. Ms. Michael concludes that the

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factual context underlying the dispute between the Sandinistas and the Reagan Administration indicates that neither government had "clean hands" in Central America, with the United States becoming another aggressor in the conflict.

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I. INTRODUCTION

In 1990, some four years after the Iran-Contra Affair deprived former United States President Ronald Reagan of the domestic political support necessary to continue aiding the Contras' fight against the Sandinista Government of Nicaragua,[1] the election of a new Nicaraguan President,

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1. For discussion of the events surrounding the diversion of funds from Iranian arms sales to the Nicaraguan Contras and the subsequent congressional investigation of the Iran-Contra affair, see generally TOWER COMMISSION, REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD (1987); Zagaris, *Money Laundering Link Exacerbates Iranian-Contra Arms Issues*, 2 INT'L ENFORCEMENT L. REP. 327 (1986).

Even during the period in which President Reagan succeeded in implementing his Contra policy, this policy was perhaps the most heatedly debated foreign policy since the end of the Vietnam War. For a representative sampling of the debate, see generally *United States Policy Toward Nicaragua: Aid to the Nicaraguan Resistance: Hearings Before the Senate Comm. on Foreign Relations*, 99th Cong., 2d Sess. (1986) [hereinafter *Nicaraguan Resistance*]; *National Bipartisan Report on Central America: Hearings Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. (1984) [hereinafter *Bipartisan Report*]; *United States Policy in El Salvador: Hearings Before the Subcomms. on Human Rights and International Organizations and on Western Hemisphere Affairs for the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. (1983) [hereinafter *El Salvador Policy*]; Friedlander, *Mr. Casey's "Covert" War: The United States, Nicaragua, and International Law*, 10 U. DAYTON L. REV. 265 (1985); Gutman, *America's Diplomatic Charade*, 56 FOREIGN POL'Y 3 (1984); Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985); Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986); Reichler & Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder*, 11 YALE J. INT'L L. 462 (1986); Rostow, *Nicaragua and the Law of Self-Defense Revisited*, 11 YALE J. INT'L L. 437 (1986); Ullman, *At War with Nicaragua*, 62 FOREIGN AFF. 39 (1983).

Violetta Chamorro, and the continuing efforts to repatriate the Contras appear to herald the close of yet another troubled chapter in Nicaraguan history.[2] This most recent chapter is the subject of this Article.

The Reagan Administration (Administration) charged Nicaragua with waging an unlawful war of aggression against El Salvador by covertly supporting the Salvadoran Rebels' efforts to overthrow the Salvadoran Government. President Reagan claimed that the United States was entitled, in retaliation, to support the Contras in collective self-defense on behalf of El Salvador.[3] In a 1983 radio address, for example, President Reagan explained:

> We support the elected Government of El Salvador against Communist-backed guerrillas who would take over the country by force. And we oppose the unelected government of Nicaragua, which supports those guerrillas with weapons and ammunition. . . . Our neighbors in the Americas are important to us, and they need our help. . . . [W]e're helping our neighbors to create a defensive shield to protect themselves from Communist intervention.[4]

For its part, the Sandinista Government heatedly denied supporting the Salvadoran Rebels.[5] Castigating the United States as an international outlaw, Nicaragua maintained that the Reagan Administration itself was waging an unlawful war of aggression by covertly supporting the Contras.[6]

The dispute between the Reagan Administration and the Sandinista Government involved a grey area of international law. The classical rules governing intervention in civil wars flatly prohibited any state from aiding an insurgent group, but permitted states to aid the government attacked by the insurgents until the rebels achieved the status of belligerents.[7] Thereafter, all states were under a strict obligation to aid neither

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2. *See, e.g., Contras Agree to Lay Down Their Arms*, Wash. Post, May 6, 1990, at A36, col. 1; Hockstader, *A Sign of Peace Comes to Nicaragua*, Wash. Post, Apr. 29, 1990, at A29, col. 1; Speck, *Sandinistas, Contras Say Truce at Hand*, Wash. Post, Apr. 19, 1990, at A47, col. 6.

3. *See, e.g.*, United States Dep't of State, Bureau of Public Affairs, *Revolution Beyond Our Borders*, Sec. Rep. No. 132, at 1 (1985) [hereinafter *Revolution*].

4. Radio Address to the Nation, 19 WEEKLY COMP. PRES. DOC. 1126-28 (Aug. 13, 1983).

5. *See Revolution*, *supra* note 3, at 68 (reprinting Affidavit of Nicaraguan Foreign Minister Miguel Brockmann, memorial of Nicaragua (Nicar. v. U.S.) (submitted Apr. 30, 1985)).

6. Los Angeles Times, Jan. 19, 1985, at 26, col. 1; *see infra* notes 169-71, 176 and accompanying text.

7. *See* W. HALL, INTERNATIONAL LAW 36 (8th ed. 1924); 2 L. OPPENHEIM, IN-

the insurgency nor the attacked government.[8] Under the classical rules, Nicaragua could not for any reason aid the Salvadoran Rebels, nor could the United States aid the Contras. Thus, the Reagan Administration's only lawful recourse for dealing with Sandinista support of the Salvadoran Rebels under these rules would have been to aid the Salvadoran Government, at least until the Rebels attained belligerency status. In the twentieth century, however, these classical rules have been breached so often—the Central American conflict provides but one example—that they no longer possess a legally binding effect.[9]

Has the deterioration of these classical rules resulted in the existence of a legal vacuum? Resolution of the dispute between the Reagan Administration and the Sandinista Government presents a case study of whether the contemporary international legal order established by the United Nations Charter (Charter) is equipped to deal with the recurrent phenomenon of states' covert involvement in essentially internal conflicts.[10] It is this broad question, in the context of the Reagan Administration's specific claim that United States support of the Contras constituted a lawful exercise of collective self-defense, that will be the focus of this Article.[11]

TERNATIONAL LAW 173 (6th ed. 1944); Luard, *Civil Conflicts in Modern International Law Relations*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 7, 19-21 (E. Luard ed. 1972). To achieve belligerency status, an insurgent group had to satisfy four criteria under classical international law: 1) it had to wage widely spread armed conflict within a state; 2) it had to occupy and administer a substantial geographical area; 3) it had to conduct its hostilities "in accordance with the rules of war and through armed forces responsible to an identifiable authority;" and 4) the circumstances of the conflict must have made it necessary for other states to acknowledge the insurgents' belligerency. Higgins, *International Law and Civil Conflict*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 169, 170-71. *See also* "Prize Cases," 67 U.S. (2 Black) 635, 666-67 (1862) (concluding that the Southern Confederacy had achieved belligerency status during the United States Civil War).

8. *See* Luard, *supra* note 7, at 21.

9. Between 1945 and 1970 alone, Evan Luard counted some 30 instances in which states had become involved in internal conflicts, "without including sporadic disturbances and unorganized guerrilla activities, or cases of *coup d' état*." *Id.*

10. For two thoughtful series of essays on this question, see generally THE INTERNATIONAL REGULATION OF CIVIL WARS, *supra* note 7 and LAW AND CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1974).

11. The right of anticipatory self-defense is subsumed within the general right of self-defense. *See* Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 362 (1962). Because the Reagan Administration did not seek to justify United States conduct in terms of anticipatory self-defense, however, this study will not evaluate whether United States conduct is defensible on this ground.

II. FACTUAL CONTEXT

A. *The Early Developments*[12]

1. The First Three United States Interventions

United States involvement in the internal conflict between the Contras and the Sandinista Government constitutes a small period in Nicaragua's troubled political history.[13] Throughout its life as an independent nation, Nicaragua has been racked by recurrent conflicts between warring political factions,[14] prompting three United States military interventions during the early twentieth century.[15] The United States purportedly at-

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12. While a comprehensive historical examination of United States involvement in Nicaragua is beyond the scope of this Article, some discussion of the prior relations between Nicaragua and the United States is necessary to understand the origins of the contemporary dispute between the Reagan Administration and the Sandinista Government. Because the international legal principles governing aggression and self-defense are highly fact dependent, considerably more discussion of the Reagan Administration's relations with the Sandinista Government is provided.

13. *See* Pandolfe, *The Role of the United States in Nicaragua from 1912-1933*, 9 FLETCHER F. 401, 429 (1985).

14. *See generally id.* (discussing Nicaragua's political history).

15. *Id.* at 402.

Since 1853, the United States has intervened in Nicaraguan affairs 11 times. R. GUTMAN, BANANA DIPLOMACY: THE MAKING OF AMERICAN POLICY IN NICARAGUA 1981-1989 (1988). The 1854 intervention led by the American journalist William Walker marked perhaps the most extreme case. Walker conducted his own coup, seized power, and was recognized as heading a legitimate government by the United States President. Subsequently, Walker was overthrown, and United States forces intervened to prevent his attempt to regain power. *Id.* at 68.

In this century, the United States first intervened in Nicaragua in 1909, following the Conservative Party's revolt against President José Santos Zelaya's liberal administration. Pandolfe, *supra* note 13, at 403-04. The White House notified the Zelaya government that "the United States is convinced that the revolution, led by the Conservatives, represented the ideals and the will of a majority of the Nicaraguan people more faithfully." D. MONROE, INTERVENTION AND DOLLAR DIPLOMACY IN THE CARIBBEAN 174 (1964). The United States then severed diplomatic relations with the Zelaya government and sent a contingent of United States marines to Nicaragua to assist the Conservative forces battling his regime. *See* Pandolfe, *supra* note 13, at 404. With the assistance of these marines, the Conservatives succeeded in overthrowing Zelaya in 1910. United States naval forces then withdrew. *Id.*

On August 4, 1912, the United States again intervened in Nicaraguan affairs. After the Liberal Party staged a retaliatory revolt led by General Luis Mena, the United States sent 2500 marines to Nicaragua to assist the Conservative Government's efforts to defeat Mena's Rebels. *Id.* at 406-07. In the fall of 1912, United States marines attacked and destroyed the last Liberal stronghold. *Id.* at 407.

Although this operation ended the Liberal revolt, the United States maintained a con-

tempted to create the political stability necessary to support democracy during each of these interventions.[16] The dismal failure of each attempt, however, served only to deepen the Nicaraguan distrust of United States intentions.

In 1927, the United States intervened in Nicaragua at the request of Nicaragua's then-ruling Conservative Government, which had become embroiled in a civil war with the Liberal Party when the Liberal Party lost power in the 1924 elections.[17] After sending over 2000 United States marines and sailors to Nicaragua, the United States stabilized the Conservative Government's position.[18] United States Secretary of War Henry L. Stimson helped the Government devise a peace plan to end the bloody stalemate that had developed between the warring Liberal and Conservative factions.[19] The Stimson plan provided the mechanism for the fair elections, set for 1928, through which the Liberal Party could regain power legally.[20] The plan likewise established a nonpartisan Nicaraguan constabulary—the National Guard (Guard)—to monitor the elections,[21] and provided that United States military officers would command, train, and arm the National Guard forces.[22]

Despite the good intentions of the United States, implementation of Stimson's plan ultimately entrenched the National Guard's power and facilitated National Guard Commander Anastasio Somoza Debayle's coup. Thereafter, the subsequent decades of repressive Somoza rule cast a dark shadow upon United States involvement in Nicaragua.

Nicaragua's political fortunes took a downward spiral when the Liberal Party, which had regained power in the 1928 elections, dramatically increased National Guard forces to combat the increasingly bloody guerrilla war being waged by General Augusto Cesar Sandino. Sandino, a leader of the Liberal revolt, had refused to sign the Stimson peace agreement when the Liberal Party regained power.[23] Sandino believed the

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tinuous military presence in Nicaragua from 1912 until 1925. *Id.* at 413. In August 1925, following the 1924 elections, the United States finally withdrew its remaining marines. *Id.*

16. *See* Pandolfe, *supra* note 13, at 428.

17. *Id.* at 413-15. This intervention followed the United States' short-lived military withdrawal from Nicaragua in 1925. *Id.* at 413.

18. *See id.* at 415. Although United States forces remained officially neutral in the conflict, their presence shored up the Conservative Government. *Id.*

19. *See id.* at 415-16.

20. *See id.*

21. *See id.* at 415.

22. *Id.* at 422.

23. *Id.* at 416-17, 420-21.

agreement legitimized United States influence over Nicaragua by authorizing the continued presence of United States military forces in Nicaragua.[24]

At the same time, domestic opposition in Nicaragua to the United States military involvement mounted.[25] United States forces, as a consequence, began transferring National Guard leadership positions assumed under the Stimson plan to Nicaraguans as a prelude to complete withdrawal.[26] In the process, General Somoza assumed command of the Guard.[27] After the newly elected President Juan B. Sacasa was sworn into office on January 1, 1933, the last contingent of United States naval forces left Nicaragua.[28]

Having consolidated control over the Guard, Somoza filled the military vacuum left by the United States departure. Somoza then ordered the Guard to murder Sandino on the day Sandino signed a peace agreement with President-elect Sacasa,[29] thereby undermining Nicaragua's prospects for a stable political future.[30]

2. The Somoza Rule and the Birth of the Sandinista Movement

On May 31, 1936, Somoza seized power and began what was the most stable yet most repressive period in Nicaraguan history.[31] From 1937 to 1979, members of the Somoza family effectively ruled Nicaragua.[32] When General Somoza was assassinated in 1956, his eldest son Luis succeeded him,[33] and in 1967, Luis's younger brother Anastasio assumed power.[34]

The United States provided continuous military and economic aid throughout the 1950s and 1960s despite the Somozas' notorious human rights abuses.[35] Because the Somoza family safeguarded their rule by

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24. *Id.* at 417.
25. *See id.* at 423.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Because the 1932 presidential elections were not marred by the corruption that had typified Nicaragua's previous elections, Sacasa's election marked a real opportunity for Nicaragua to establish a functioning democracy. *See id.*
31. *Id.*
32. Joyner & Grimaldi, *supra* note 1, at 632.
33. *Id.*
34. *Id.*
35. The United States supported the Somozas despite their notorious human rights record because they were staunch anti-communists. *See id.*

employing the National Guard to silence opposition, Nicaraguan citzens' impression of the United States did not improve. During the 1940s and 1950s, Somoza repression sparked a number of student protests from which the Sandinista National Liberation Front (FSLN) was born.[36] The FSLN student movement subsequently organized into a guerrilla force in 1961.[37] The Sandinistas named their movement after General Sandino, regarding him as a martyr who died while opposing United States imperialism.[38] This naming underscores the FSLN's pro-socialist and profoundly anti-American ideology.[39] Further underscoring this ideology, the FSLN anthem included the sentiment "[w]e shall fight the Yankee enemy of humanity."[40]

During the 1970s, the FSLN revolutionary movement began gaining political momentum. Somoza's mismanagement of the relief effort following a massive 1972 earthquake that destroyed the commercial center of Managua greatly aided the Sandinistas' cause.[41] Although a number of countries, including the United States, provided relief aid, the Nicaraguan people received very little of that aid. Rather, Somoza appropriated the money to enlarge his own substantial fortune.[42] The FSLN's popular appeal grew immensely when Somoza's Guard heightened existing tensions by brutally repressing labor unrest caused by economic dislocation in the wake of the earthquake.[43]

Somoza's political fortunes continued to decline over the next five years. In 1977, his regime's infamous human rights abuses induced the Carter Administration to suspend military assistance to Nicaragua.[44] By this time, the FSLN also was exerting substantial pressure on the Somoza regime.[45]

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36. *See id.* at 632 n.57.

37. J. BOOTH, THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION 139 (1982).

38. *See id.* at 139-40.

39. *Id.*

40. Moore, *supra* note 1, at 48.

41. Joyner & Grimaldi, *supra* note 1, at 632-33. The earthquake killed approximately 10,000 people and flattened 600 blocks in the center of Managua. T. WALKER, NICARAGUA: THE LAND OF THE SANDINO 31 (1986).

42. *See* Joyner & Grimaldi, *supra* note 1, at 632-33.

43. *Id.* at 633.

44. *See* D. NOLAN, THE IDEOLOGY OF THE SANDINISTAS AND THE NICARAGUAN REVOLUTION 21 (1985).

45. *See* J. BOOTH, *supra* note 37, at 158-60.

3. The Sandinista Overthrow of the Somoza Government

In 1978, Somoza's National Guard was implicated in the assassination of the editor of *La Prensa*, Nicaragua's leading daily newspaper.[46] The assassination occurred after the paper printed numerous articles criticizing the Somoza Government.[47] To compound matters, the Guard employed savage methods to repress public demonstrations organized in protest of the assassination.[48]

While domestic opposition to Somoza's regime, coupled with the Sandinistas' growing popularity, ensured that the FSLN eventually would have toppled the Somoza regime, foreign support facilitated greatly the Sandinistas' 1979 defeat of the dictator.[49] After uniting the faction-ridden FSLN into an organized fighting force, Cuba began sending substantial arms shipments to the Sandinista resistance.[50] Venezuela also provided the resistance with arms, training, and logistical support.[51] Costa Rica provided its territory as a haven for Sandinista forces and as a conduit for arms shipments.[52]

While the United States did not actively support the FSLN, the Carter Administration did initiate proceedings in the Organization of American States (OAS) that culminated in an unprecedented 1979 resolution supporting the Sandinistas.[53] This resolution called for the "[i]mmediate and definitive replacement of the Somoza regime" and recognized the FSLN as the best representative of the interests of the Nicaraguan people.[54]

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46. *See id.* at 103-04.

47. *See id.* at 103.

48. *See id.* at 104; Joyner & Grimaldi, *supra* note 1, at 633.

49. *See Downfall of a Dictator*, TIME, July 30, 1979, at 20-22.

50. *See* Moore, *supra* note 1, at 45.

51. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 274 (Schwebel, J. dissenting) (Judgment on the Merits).

52. *Id.*

53. Res II, OAS doc. 40/79 rev.2 (June 23, 1979), *reprinted in* DEP'T ST. BULL., Aug. 1979, at 58.

54. As a condition for recognition, the OAS resolution required the Sandinistas to support a democratic and nonaligned government. *See* Moore, *supra* note 1, at 44. In accepting these conditions, some international lawyers have argued that the Sandinistas assumed a legal obligation to implement such a government. *See id.* at 49, 52. Because questions involving the internal structure of a state's government relate to the state's domestic jurisdiction, *see* U.N. CHARTER, art. 2, para. 7, however, such questions are not ordinarily subject to international agreement. Consequently, the assertion that the Sandinistas' acceptance of the OAS conditions imposed an international legal obligation to establish a certain form of government is a dubious one.

B. *Contemporary Developments*

1. The Carter Administration's Relations with the Sandinista Government

After the Sandinistas assumed power in July 1979, the Carter Administration made a concerted effort to establish good relations with the new Nicaraguan Government.[55] To underscore its commitment to friendly relations, the United States granted Nicaragua 118 million dollars in economic assistance during the first two years of the Sandinista Government's existence.[56] This assistance far exceeded the total amount of the United States aid the Somoza regime received at any time in the preceding twenty years.[57] As a complimentary gesture, the Administration supported 292 million dollars in World Bank and Inter-American Development Bank loans to the new Sandinista Government.[58]

These conciliatory efforts, however, did little to alleviate the Sandinistas' hostility towards the United States—hostility born of the conviction that United States intervention in Nicaraguan affairs had caused most of the country's woes, including the collective misery of forty years of Somoza rule. The new Nicaraguan Government began cementing its ties with Cuba and other Second Bloc countries.[59] Despite the continuing receipt of United States aid, Sandinista pronouncements during this period confirmed their growing Second Bloc alignment.[60] In June 1980, for example, Sandinista Tomas Borge stated: "[T]he Nicaraguan revolutionaries will not be content until the imperialists have been overthrown in all parts of the world. . . . We stand with the . . . socialist countries."[61]

The Sandinistas' alliance with these countries, which included a commitment to "revolutionary internationalism" and to assisting left-wing insurgencies attempting to overthrow the governments of surrounding Central American countries, disturbed the United States.[62]

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55. *See Bipartisan Report*, *supra* note 1, at 45 (appendix).
56. Moore, *supra* note 1, at 47.
57. *Id.*
58. *Id.*
59. *Id.* at 52-53.
60. Harrison, *We Tried to Accept the Nicaraguans' Revolution*, Wash. Post, June 30, 1983, at A27.
61. Moore, *supra* note 1, at 53 (quoting Pyongyang, 0400 GMT, June 10, 1980, FOREIGN BROADCAST INFORMATION SERVICE, NORTH KOREA, at D16 (June 12, 1980)).
62. Revolutionary internationalism or socialist internationalism is a precept that the Soviets first advanced as an international legal principle. For an analysis of the origins and implications of this principle, see B. RAMUNDO, PEACEFUL COEXISTENCE 111-40 (1967).

During 1979 and 1980, the Carter Administration began receiving intelligence reports suggesting that the Sandinistas were acting upon their ideological commitment to revolutionary internationalism. According to these reports, the Sandinistas were providing arms and other forms of support to rebel groups in El Salvador.[63] By December 1980, intelligence reports indicated that Nicaragua was shipping substantial quantities of arms to the Salvadoran Rebels.[64] Initial arms shipments reportedly totaled more than 700 tons.[65] To conceal the origin of these shipments, the Sandinistas gave the Rebels United States weaponry that had been abandoned during the Vietnam War.[66]

The reports also indicated that Cuba was supporting the Rebels.[67] Cuba and Nicaragua convened meetings in Havana to unify the Salvadoran Rebels under the leadership of the Marxist-Leninist Farabundo Marti National Liberation Front (FMLN).[68] The Cuban-Nicaraguan connection was disturbing particularly because Cuba previously had held meetings to solidify the socialist FSLN's control over the Nicaraguan resistance to Somoza's rule.[69]

The improved organization and military capability of the Salvadoran insurgency reflected the benefits of foreign assistance. Prior to 1980, the rebel forces had been scattered and divided into feuding factions,[70] armed only with pistols, shotguns, and rifles.[71] After 1980, however, the Salvadoran Rebels became a unified fighting force, armed with more modern and much more destructive weapons.[72] These events convinced the Carter Administration to enter a diplomatic protest concerning Nicaragua's assistance to the Rebels in El Salvador.[73] Although the Sandinistas repeatedly denied providing such assistance,[74] President Carter ulti-

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63. *See* Moore, *supra* note 1, at 57.

64. *See id.*

65. *Id.*

66. *See Revolution, supra* note 3, at 6. Nicaragua apparently enlisted Soviet aid in procuring arms and the Soviets, in turn, recommended that the North Vietnamese contribute arms. *See id.*

67. *See* Moore, *supra* note 1, at 56-57.

68. *See id.*

69. *See id.* at 45-46.

70. *Id.*; *see Revolution, supra* note 3, at 5.

71. Moore, *supra* note 1, at 56.

72. *See Revolution, supra* note 3, at 5.

73. Moore, *supra* note 1, at 57. The Carter Administration had received reports of Nicaraguan arms shipments during late 1979 and early 1980, but initially delayed taking action against the Sandinista Government until it received more conclusive information. *See Revolution, supra* note 3, at 20.

74. H.R. REP. No. 122, 98th Cong., 1st Sess., pt. 1, at 5 (1983); Military and

mately suspended all aid to the Sandinista Government in December 1980 during the last days of his presidency.[75]

2. The Reagan Administration's Relations with the Sandinista Government

The United States approach to the Sandinistas changed appreciably when President-elect Reagan took office in January 1981. During the 1980 presidential campaign, Reagan castigated Carter for abandoning Somoza and Reagan unequivocally expressed his opposition to the Sandinista Regime.[76] Consistent with this position, the 1980 Republican Platform stated:

> We deplore the Marxist Sandinista takeover of Nicaragua and the attempts to destabilize El Salvador, Guatemala, and Honduras. . . . We oppose the Carter administration aid program for the government of Nicaragua. However, we will support the efforts of the Nicaraguan people to establish a free and independent government. . . . We will return to the fundamental principle of treating a friend as a friend and self-proclaimed enemies as enemies, without apology.[77]

Despite the warnings, the Sandinistas increased their support of the Salvadoran insurgency, using a hardened airfield outside of Managua built expressly for transporting arms and other provisions to the FMLN.[78] Indeed, Christopher Dickey, a critic of the Reagan Administration's Central American policy conceded:

> [A]s the election results came in, with Reagan and his Republican platform the obvious winners, the Sandinistas opened the floodgates for the Salvadoran rebels. By the middle of November the Salvadorans were complaining they couldn't distribute so much material. You couldn't hide that

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Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, at 401-02 (Schwebel, J. dissenting) (Judgment on Merits).

75. *See* Moore, *supra* note 1, at 57.

76. *See* R. BRODY, CONTRA TERROR IN NICARAGUA 11 (1985)

77. *Id.* In a similar vein, Reagan welcomed home the freed Tehran hostages with the proclamation: "Let terrorists be aware that when the rules of international behavior are violated, our policy will be swift and effective retribution. We hear it said that we live in an era of limit to our powers. Well, let it also be understood there are limits to our patience." Remarks at the Welcoming Ceremony for the Freed American Hostages, PUB. PAPERS: RONALD REAGAN-1981, at 42 (1982).

78. *See Revolution*, *supra* note 3, at 7-8. During the litigation before the International Court of Justice (ICJ), Nicaraguan President Daniel Ortega admitted that the Papalonal airstrip near Managua had been used for transporting arms, but denied that his Government was responsible for the shipments. *See* 1986 I.C.J. 4 at 415-17 (Schwebel, J. dissenting) (Judgment on Merits).

many arms. Some were caught. Others were tracked through radio intercepts.[79]

These massive arms shipments served as a prelude for the Salvadoran Rebels' January 1981 "final offensive" (offensive).[80] On January 10, 1981, the Rebels launched their offensive from a radio station located in Nicaragua, which was used to transmit clandestine broadcasts to El Salvador.[81] In these broadcasts, the Rebels proclaimed: "the decisive hour has come to initiate the decisive military and insurrectional battles for the seizure of power."[82] The Rebels also captured four San Salvador radio stations and spread news of the rebellion.[83] Radio Managua soon announced its support for the offensive. The station reported: "A few hours after the FMLN General Command ordered a final offensive to defeat the regime, established by the military Christian Democratic junta, the first victories by *our forces* began being reported."[84]

Throughout January, the Rebels used the weapons Nicaragua had provided to strike approximately fifty targets in El Salvador.[85] They captured one Salvadoran National Guard post and shot down two government helicopters.[86] Rebel military actions virtually placed San Salvador, Santa Ana, and three other cities under siege.[87] The Rebels also closed both of El Salvador's airports.[88]

The Rebels continued striking various targets during February 1981.[89] The Salvadoran Government, however, ultimately put down the offensive so decisively that the Rebels did not resume significant anti-government activities for more than one year.[90]

During the offensive, Salvadoran President Duarte charged Nicaragua and Cuba with aggressive intervention in El Salvador's internal affairs. On January 13, 1981, *The Washington Post* reported: "Duarte denounced alleged Cuban and Nicaraguan intervention in El Salvador several times during the last few days. . . . He also called upon President-

79. C. DICKEY, WITH THE CONTRAS: A REPORTER IN THE WILDS OF NICARAGUA 75 (1985).
80. *See Revolution*, *supra* note 3, at 9-10.
81. *Id.* at 9.
82. *Id.*
83. *Id.*
84. *Id.* (emphasis added).
85. *Id.*
86. *Id.*
87. *Id. See also El Salvador's Civil War*, NEWSWEEK, Jan. 26, 1983, at 44-50.
88. *Revolution*, *supra* note 3, at 9.
89. *Id.* at 10.
90. *See infra* text accompanying notes 115-22.

elect Ronald Reagan to 'export democracy' to El Salvador and the world and to increase aid to the government here, particularly economic aid."[91]

Although the Reagan Administration did not aid El Salvador during the offensive, the Administration soon took actions demonstrating that its hardline policy for dealing with Sandinista assistance to the Salvadoran Rebels was not empty campaign rhetoric. On March 9, 1981, Reagan approved a plan authorizing the Central Intelligence Agency (CIA) to conduct covert operations in Nicaragua.[92]

Lawrence Pezzullo, the Carter Administration's outgoing Nicaraguan Ambassador, contends that by April 1981 he had persuaded the Sandinistas to reduce the flow of arms to El Salvador in exchange for renewed United States economic aid.[93] In an official statement, the Reagan Administration acknowledged that "it had no hard evidence of arms trafficking, and [that] propaganda and other support activities had been curtailed."[94] Nonetheless, the Reagan Administration ignored the Sandinistas' gesture towards peaceful resolution of the dispute and refused to reinstate United States aid.[95]

Five months later, the Administration sent Assistant Secretary of State Thomas O. Enders to Managua to negotiate a solution to the dispute.[96] In August 1981, Enders renewed Pezzullo's offer to resume United States aid if the Sandinistas stopped assisting the Salvadoran Rebels.[97]

Although defenders of Reagan's Nicaragua policy point out that the Sandinistas failed to respond to Pezzullo's offer, the history of these negotiations indicates that the United States helped derail the talks.[98] As the negotiations progressed, the United States and Nicaragua agreed to exchange proposals in five key areas.[99] Although the United States presented Managua with a joint non-interventionist proposal,[100] the

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91. *Fighting Subsides in El Salvador, 3 Journalists Hurt*, Wash. Post, Jan. 13, 1981, at Al, col. 6, A8, col. 4.

92. Joyner & Grimaldi, *supra* note 1, at 634. This plan was not reported publicly until one year later. *Id. See also* Bonner, *President Approved Policy of Prevention Cuban Model States*, N.Y. Times, April 7, 1982, at A16, col. 1; Taubman, *U.S. Reportedly Sending Millions to Foster Moderates in Nicaragua*, N.Y. Times, Mar. 11, 1982, at Al, col. 4.

93. *See* Gutman, *supra* note 1, at 6-7.

94. *Nicaraguan Resistance, supra* note 1, at 169 (prepared statement of Wayne Smith).

95. *See* Gutman, *supra* note 1, at 6-7.

96. The Administration sent Enders at Pezzullo's request. *Id.* at 5.

97. *Id.* at 6.

98. *Id.* at 3.

99. *Id.* at 7.

100. *See id.* at 3.

United States never formally presented proposals in the other four areas.[101] Most importantly, however, it never provided the Sandinistas with terms for the resumption of United States aid.[102] The United States negotiators, therefore, failed to employ their most important bargaining chip.[103] After the talks foundered during October 1981, Enders withdrew from further negotiations.[104] The hardline position and poor bargaining tactics United States officials employed during the talks led Pezzullo to conclude that the talks failed because "this administration can't negotiate."[105]

The Reagan Administration made no further attempts to negotiate with the Sandinistas until the spring of 1982. Instead, the Administration refined the plan to implement a covert military operation. In December 1981, President Reagan signed National Security Directive 17 (Directive).[106] Although the purported purpose of the Directive was to interdict arms being sent to the Salvadoran Rebels,[107] an accompanying National Security Council Document cast the plan in a different light.[108] This document established that the CIA planned to build a front to oppose the Sandinista Government and would "support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua."[109]

Although the Sandinistas continued to provide the Salvadoran Rebels with decreased levels of support during November and December

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101. *See id.* at 7.

102. *See id.*

103. United States negotiators also sent the Sandinistas extremely mixed messages. On one hand, Enders purportedly told Nicaraguan President Daniel Ortega that "the Nicaraguans could do whatever they wished . . . 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." Moore, *supra* note 1, at 70 (quoting Pastora, *Nicaragua 1983-1985: Two Years' Struggle Against Soviet Intevention*, 8 J. CONTEMP. STUD. 5, 9-10 (1985)). On the other hand, Enders also told the Sandinistas: "You can never forget that the United States is exactly 100 times bigger than you are." Gutman, *supra* note 1, at 5.

104. *See* Gutman, *supra* note 1, at 9.

105. Church, *Explosion Over Nicaragua*, TIME, Apr. 23, 1984, at 16, 18.

106. *See id.* at 18; *see also* Note, *The Legal Implications of United States Policy Toward Nicaragua: A Machiavellian Dilemma*, 22 SAN DIEGO L. REV. 895, 901 (1985) [hereinafter Note, *Dilemma*].

107. Church, *supra* note 105, at 18.

108. Note, *Dilemma*, *supra* note 106, at 901.

109. Church, *supra* note 105, at 18.

1981,[110] the Reagan Administration increased its support for the Contras. At the same time, the CIA-sponsored Contras reportedly began small-scale operations against the Nicaraguan Government,[111] attacking economic targets, such as farm cooperatives, and strategic targets, such as bridges.[112]

In the spring of 1982, the Sandinistas again began providing the Salvadoran Rebels with assistance. During March 1982, the House Permanent Select Committee on Intelligence concluded:

> The [Salvadoran] insurgents are well trained, well equipped with modern weapons and supplies, and rely on the use of 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 persuasive evidence that the Sandinista government 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 operation in Nicaragua. Cuban involvement—especially in providing arms—is also evident.
>
> What this says is that, contrary to the repeated denials of Nicaraguan officials, the country is thoroughly involved in supporting the Salvadoran insurgency. That support is such as to greatly aid the insurgents in their struggle with the government forces in El Salvador.[113]

On March 30, 1982, the Salvadoran representative to the United Nations (UN) protested Nicaragua's support of the Rebels. The representative charged that:

> El Salvador has been the victim of acts of intervention [by the Governments of Cuba and Nicaragua], against the will of the Salvadoran government, which constitute aggressive behavior; but in spite of these interventionist and aggressive acts against our sovereignty, in order to maintain friendly relations with the countries that promote or implement those acts, we have asked that they put a halt to them but have not presented a formal complaint before the competent international bodies.[114]

Meanwhile, the Salvadoran Rebels intensified their anti-government

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110. *See* Wash. Post, Sept. 8, 1985, at A17, col. 1. *Cf.* Moore, *supra* note 1, at 58; *Revolution*, *supra* note 3, at 10 (both conceding that the Sandinistas' assistance to the rebels declined after the Rebels' January 1981 final offensive).

111. R. BRODY, *supra* note 76, at 154; *see also* N.Y. Times, Mar. 14, 1982, at Al, col. 5.; N.Y. Times, Mar. 11, 1982, at Al, col. 4.; N.Y. Times, Nov. 5, 1981, at Al, col. 2, A8, col. 2.

112. *See* R. BRODY, *supra* note 76, at 154.

113. H. R. REP. NO. 122, *supra* note 74, at 5.

114. *See* 1986 I.C.J. at 456-57 (Schwebel, J. dissenting) (Judgment on Merits).

operations, launching three new offensives.[115] During the first offensive in June 1982, the Rebels attacked two provinces.[116] Although they captured several villages, the Salvadoran army forced the Rebels to retreat and to surrender the villages.[117] The second offensive, launched in October 1982, was more successful. The Rebels captured nineteen villages and large quantities of government arms before the Salvadoran army forced them to withdraw.[118] In January 1983, the Rebels launched their third and most successful offensive.[119] One commentator observed that some of the exchanges between Rebel and military forces during this offensive constituted "the closest thing to a conventional battle [between the armed forces of two states] yet to be fought in the war."[120] The Rebels struck El Salvador's key industrial and agricultural regions, and closed highways and rail routes connecting the eastern and western parts of the country.[121] El Salvador's east-west trade was disrupted severely until the army finally forced the Rebels to withdraw.[122]

From April through October 1983, the Administration again made sporadic efforts to deal peacefully with Nicaragua's conduct. The dismal history of these negotiations, however, suggests, at best, that the diplomatic effort was managed incompetently. At worst, this effort suggests that the Administration never intended to achieve a diplomatic solution because it was committed to dealing with the Sandinistas through military force.

In April 1982, the Administration suddenly stiffened its negotiating terms.[123] The United States added to its initial demand that Nicaragua stop supporting the Salvardoran Rebels, the demand that the leftist Sandinista government transform itself into a democracy.[124] Craig Johnstone, then the Director of the State Department's Office of Central American Affairs, explained that the Administration "elevated democratic pluralism to the *sine qua non* of restoring relations" with Nicaragua.[125]

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115. *El Salvador Policy*, *supra* note 1, at 74 (prepared statement of Robert S. Leiken).
116. *Id.*
117. *Id.*
118. *Id.*
119. *See id.* at 74-77.
120. *Id.* at 76.
121. *See id.* at 76-77.
122. *Id.* at 77.
123. *See* Gutman, *supra* note 1, at 11-15.
124. *See id.* at 15.
125. *Id.* at 11. Although what the Reagan Administration meant when it called for

The insistence on democratic pluralism probably doomed the negotiations to failure. During the August 1981 negotiations with Enders, Sandinista leaders had stated emphatically that the one nonnegotiable issue was the structure of Nicaragua's domestic political system: "A state that agrees to negotiate on internal matters wounds its substantive reasons for being a state. It is the only point on which we are intransigent."[126]

While the 1982 negotiations were proceeding, Contra forces were escalating their paramilitary operations in Nicaragua. The United States Defense Intelligence Agency reported that, between March and June 1982, the Contras had attacked eighty-five "military or military-related targets," attacks which included "the assassination of minor government officials and a Cuban adviser."[127]

In October 1982, the United States formalized new terms for a negotiated settlement. These terms were presented in an eight-point proposal, launched as a "democratic initiative."[128] While analysts view this initiative as more balanced than the Reagan Administration's August 1981 proposal, it requires each Central American country to "establish democratic institutions, open to opposition elements,"[129] an issue the Sandinistas insisted was not negotiable.

After rejecting the proposal, the Sandinistas introduced a thirteen-point counterproposal,[130] offering to negotiate a limitation on the arms buildup, to permit oversight by an international organization, and to sever their ties with the Salvadoran Rebels.[131] The Sandinistas further insisted that Mexico participate in the talks.[132] The United States refused to accept Mexican participation and the negotiations again halted.[133]

During the winter of 1982, the Contra forces expanded rapidly and

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democracy in Nicaragua is not free from doubt, one State Department official has stated that "democracy" is a euphemism for overthrow of the Sandinista Government: "For some, to insist on democracy means not to accept a Marxist-Leninist government. Thus it is a code word for overthrow." *Id.* at 14.

126. *Id.* at 11.

127. Omang, *A Historical Background to the CIA's Nicaragua Manual*, in PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE 3, 21 (1985).

128. Gutman, *supra* note 1, at 15.

129. *Id.*

130. *Id.* at 12.

131. *Id.*

132. *Id.*

133. *See id.*

stepped up their activities.[134] In December 1982, the Sandinista Government announced that "it would forego acquisition of MIG aircraft, and . . . hoped this step would improve the atmosphere for negotiations" with the United States.[135] The Reagan Administration ignored this gesture and the Contras began bombing targets in Nicaragua, evidently aware that they could do so with impunity because the Sandinistas had not acquired the aircraft necessary to hinder Contra bombing operations.[136]

The Contras' activities during this period disturbed the United States Congress. Congress became concerned by reports that the CIA-sponsored Contras were seeking to overthrow the Sandinista Government rather than attempting to end its assistance to the Salvadoran Rebels by interdicting arms.[137] Although the Administration adamantly maintained that its policy was not directed towards removing the Sandinistas from power,[138] the United States Congress passed the Boland Amendment to the Omnibus Appropriations Bill of 1983.[139] The Boland Amendment prohibited the use of United States "military equipment, military training or advice, or other support for military activities . . . for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras."[140]

In January 1983, the deteriorating situation in Central America led the Latin American countries of Mexico, Venezuela, Colombia, and Panama to initiate the Contradora process.[141] Through multilateral negotiations, the Contradora Group hoped to break the diplomatic deadlock that had developed between the United States and Nicaragua and to forge a negotiated alternative to the escalating militarization of Central America.[142]

While the Contradora countries were meeting to establish an agenda, the Reagan Administration continued its support program. By April

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134. *See* R. BRODY, *supra* note 76, at 29-38, 154-55.

135. *Nicaraguan Resistance*, *supra* note 1, at 174 (prepared statement of Wayne S. Smith).

136. *Id.*

137. *See* Joyner & Grimaldi, *supra* note 1, at 635.

138. *See* McFadden, *U.S. is Said to Plot Against Sandinistas*, N.Y. Times, Dec. 4, 1982, at A1, col. 2; Taubman, *U.S. Backing Raids Against Nicaragua*, N.Y. Times, Nov. 2, 1982, at A6, col. 1.

139. *See* Boland Amendment, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982).

140. *Id.*

141. *See* Purcell, *Demystifying Contradora*, 64 FOREIGN AFF. 74, 76 (1985).

142. *Id.* at 75.

1983, CIA assistance to the Contras had expanded so significantly that the Nicaraguan Foreign Minister claimed: "[W]e are under invasion by the United States . . . in an undeclared war."[143] Nonetheless, President Reagan maintained that his Administration was complying with the Boland Amendment.[144]

Despite the President's claims, the House Permanent Select Committee on Intelligence issued a report in May 1983 confirming the concerns that had prompted enactment of the Boland Amendment.[145] The Committee concluded that the Contras' purpose undeniably was to overthrow the Sandinista Government:

> [The Contras'] openly acknowledged goal of overthrowing the Sandinistas, the size of their forces and efforts to increase such forces, and finally their activities now and while they were on the Nicaraguan-Honduran border, point not to arms interdiction, but to military confrontation. As the numbers and the equipment of the anti-Sandinista insurgents have increased, the violence of their attacks on targets unrelated to arms interdiction has grown, as has the intensity of the confrontation with Sandinista troops.[146]

The Committee recommended termination of the Administration's Contra assistance program.[147] Concluding that the Administration's policy entailed excessive reliance on military options to resolve the Central American dispute, the Committee recommended replacing the covert Contra support program with an overt operation emphasizing diplomatic efforts and de-emphasizing military solutions.[148]

The Committee also concluded, however, that the Reagan Administration accurately had charged the Sandinistas with supporting the Salvadoran Rebels.[149] Based on intelligence reports, the Committee found that, as of May 1983, Nicaragua was continuing to support the Salvadoran insurgency:

> 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.
>
> The Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-

143. The Blade (Toledo), Apr. 2, 1983, at 3, col. 1.
144. *See, e.g., Situation in Central America*, DEP'T ST. BULL., Oct. 1983, at 32, 33.
145. H. R. REP. NO. 122, *supra* note 74, at 1.
146. *Id.* at 11.
147. *See id.* at 12-13.
148. *See id.* at 13.
149. *See id.* at 6.

> and-control, and for the logistics to conduct their financial, material and propaganda activities.
>
> The Sandinista leadership sanctions and directly facilitates all of the above functions.
>
> Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.
>
> In addition, Nicaragua and Cuba have provided—and appear to continue providing—training to the Salvadoran insurgents.[150]

In July 1983, prospects for a peaceful solution improved slightly when Nicaragua agreed to participate in the Contradora process.[151] Although President Daniel Ortega's willingness to begin multilateral negotiations was a positive development, subsequent events demonstrated that the Reagan Administration's commitment to multilateral Contradora negotiations was as equivocal as had been its commitment to bilateral negotiations with Managua.

On September 9, 1983, the Contradora Group, encouraged by Nicaragua's agreement to participate in multilateral talks, produced the "21-point Document" (Document).[152] The Group believed that the terms contained in the Document constituted a basis for a negotiated settlement.[153] The Document called for democracy and national conciliation, an end to cross-border support for paramilitary forces, reduction of foreign military advisors and troops, and prohibition of foreign military bases.[154]

In October 1983, Nicaragua presented to the United States four draft treaties devised to incorporate the provisions of the Contradora Group's document.[155] Among other things, these treaties prohibited both Nicaragua and the United States from exporting subversion.[156] The Administration, however, dismissed the treaties as a propaganda effort.[157] Moreover, the White House failed to acknowledge and respond formally to Nicaragua's offer until eight months had elapsed.[158]

The United States invasion of Grenada in October 1983[159] disturbed

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150. *Id.*
151. *See* Gutman, *supra* note 1, at 17.
152. Purcell, *supra* note 141, at 77.
153. *See id.*
154. *Id.*
155. *See* Gutman, *supra* note 1, at 17.
156. *See id.*
157. *Id.*
158. *Id.*
159. The legality of the United States invasion of Grenada has been debated by com-

the Sandinistas profoundly and heightened their desire to negotiate to avoid a similar United States invasion of Nicaragua.[160] The Sandinistas, attempting to facilitate renewed negotiations, significantly decreased their assistance to the Salvadoran Rebels.

While the Sandinistas' motives may never be known, evidence demonstrates that, in mid-1983, Nicaragua began withdrawing support for the Salvadoran resistance. Rebel documents captured during this period reveal that the Salvadoran insurgents bitterly protested the Sandinistas' withdrawal of support.[161] For example, in a note to FMLN Commander Roberto Roca, a fellow commander, Schafik Jorge Handel, complained: "The Sandinos [i.e. Sandinistas] have decided to expel us and cut off all logistic support to us."[162] In a subsequent letter, Roca, Handel, and a third senior FMLN commander disparaged the "coercive tactics" and "inappropriate management" of the Sandinista Department of International Relations.[163] Further statements by FMLN defectors corroborate the reports of decreasing assistance contained in these documents. One defector stated that, beginning in 1983, Nicaragua gradually curbed aid to the Salvadoran resistance.[164] Another defector reported that, in mid-1983, the Sandinistas forced the FMLN's General Command to transfer their meetings from Nicaragua to rebel-dominated territory in El Salvador.[165] A third defector, a former FMLN military leader, stated that he knew of only two Sandinista arms shipments in the year following the United States invasion of Grenada.[166]

In November 1983, the Sandinistas made another effort to negotiate with the United States when Nicaragua's Interior Minister offered to request the withdrawal of Cuban military advisors.[167] The Reagan Ad-

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mentators. *Compare* J. MOORE, LAW AND THE GRENADA MISSION (1984) (invasion lawful) *with* Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131 (1984) (invasion unlawful). *See generally* Note, *The Grenada Intervention: "Illegal" in Form, Sound as Policy*, 16 N.Y.U. J. INT'L L. & POL. 1167 (1984).

160. Indeed, the Sandinistas evidently were terrified that the United States invasion of Grenada was a practice session for a United States invasion of Nicaragua. Craig Johnstone, for example, stated: "I will confess I was mildly surprised that they [the Sandinistas] were as frightened after Grenada as they were. I mean, the situations [were] not analogous." R. GUTMAN, *supra* note 15, at 173.

161. 1986 I.C.J. at 448-49 (Schwebel, J., dissenting) (Judgment on Merits).

162. R. GUTMAN, *supra* note 15, at 171.

163. *Id.*

164. 1986 I.C.J. at 448 (Schwebel, J., dissenting) (Judgment on Merits).

165. *Id.* at 449.

166. *Id.* at 448.

167. *See* Gutman, *supra* note 1, at 18.

ministration, however, never responded to this offer.[168] While the Reagan Administration was ignoring Nicaragua's attempts to negotiate, it was intensifying the Contras' paramilitary pressure on the Sandinista Government. Throughout the fall of 1983, Contra forces attacked a series of economic targets in Nicaragua with the assistance of the CIA,[169] including oil facilities, airfields, factories, the Managua airport, and Corinto harbor.[170]

In December 1983, Nicaragua proposed yet another resolution to the Central American conflict. On December 1, the Sandinistas gave the Contradora mediators a paper in which they agreed to negotiate

> a freeze on arms imports, limitation on the size of standing armies, and "measures which will lead to the establishment and, where applicable, the improvement of democratic, representative and pluralist systems which guarantee the effective participation of people in the decisionmaking process and insure the free access of different currents of opinion to honest, periodical elections based on the full observance of civil rights."[171]

This proposal contained most of the criteria the Contradora Group had identified in its "21-point Document" as necessary for a negotiated settlement.[172] Perhaps more importantly, the proposal seemed designed to satisfy the Reagan Administration's August 1981 demand that the Sandinistas permit "opposition elements" to participate in Nicaraguan political institutions.[173] Nonetheless, the Administration ignored Managua's proposal.[174]

The reasons for the Reagan Administration's reaction are difficult to discern. One explanation, however, may be that Managua's proposal too closely followed the Contradora Group's Document. Colombia's Foreign Minister concluded that the Administration objected to the Document because "the United States has not discarded a military solution, and the Group insists that any military solution must be discarded. . . ."[175]

The United States conduct during the early months of 1984 appeared to confirm the Colombian Minister's analysis. Although Nicaraguan assistance to the Salvadoran Rebels had remained at decreased levels since

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168. *See id.*
169. *See* Note, *Dilemma*, *supra* note 106, at 902.
170. *See* Los Angeles Times, Mar. 4, 1985, at 1, col. 1; N.Y. Times, Oct. 13, 1983, at A12, col. 1.
171. Gutman, *supra* note 1, at 18.
172. *See id.* at 20.
173. *See* Gutman, *supra* note 1, at 20.
174. *See id.*
175. *Id.*

mid-1983,[176] the CIA stepped up its clandestine military operations. In January 1984, a United States serviceman was shot down over Nicaraguan airspace.[177] During January and February, CIA agents assisted Contra forces in mining Nicaragua's harbors by directing operations from an offshore ship and later helping to lay the mines.[178]

The purported United States justifications for mining the harbors was to disrupt arms shipments Nicaragua was sending by sea to El Salvador[179] and to force the Sandinistas to negotiate.[180] Given Managua's offer to terminate such shipments in the October 1983 draft treaties it submitted to Washington, the Administration's claim that the Contra mining operation was necessary to induce serious negotiations is suspect. This operation represents one of several instances in which the Administration tried to force the Sandinistas to negotiate issues they already had said they were willing to discuss. This phenomenon led one commentator to conclude that the Reagan Administration's rationale for supporting the Contras was nonsensical:

> [T]he Administration's claim that it needs to aid the Contras in order to pressure the Sandinistas to negotiate is straight out of *Catch 22*. The Sandinistas say they are ready to sit down and negotiate with us and within Contradora. The Administration flatly refuses but then tells Congress it must continue aiding the Contras in order to force the Sandinistas to say they are ready to negotiate—apparently so it can refuse them all over again.[181]

The Administration's claim that the mining operation was necessary to interdict arms is equally suspect. Despite the Contras' attempts to interdict arms, no Nicaraguan arms shipments enroute to El Salvador

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176. *See* Moore, *supra* note 1, at 58; *see also New Sources Describe Aid to Salvadoran Rebels: Defector Captured Documents Indicate that Nicaragua has Withdrawn Some of its Support*, Wash. Post, June 8, 1985, at A12, col. 1.

177. *U.S. Pilot Killed by Hostile Fire on Honduran Trip*, N.Y. Times, Jan. 12, 1984, at Al, col. 3.

178. Omang, *supra* note 127, at 26. The United States initially denied any involvement in the minings. *See id.* However, the CIA's involvement was soon revealed. *See, e.g., Britain Criticizes Mining of Harbors Around Nicaragua*, N.Y. Times, Apr. 7, 1984, at Al, col. 4 [hereinafter *Britain*]; *Moscow Holds U.S. Responsible for Mines Off Nicaragua Ports*, N.Y. Times, Mar. 22, 1984, at Al, col. 3 [hereinafter *Moscow*].

179. Nicaragua apparently had permitted its ports to be used for shipping arms to the Salvadoran rebels. *Base for Ferrying Arms to El Salvador Found in Nicaragua*, Wash. Post, Sept. 21, 1983, at A29, col. 1.

180. *See Nicaraguan Resistance*, *supra* note 1, at 174-75 (prepared statement of Wayne S. Smith).

181. *Id.* at 181.

have been intercepted since 1983.[182] Moreover, United States officials have confirmed that, since 1983, "efforts to find proof of arms flowing into El Salvador from Nicaragua have turned up virtually nothing."[183]

Finally, and perhaps most persuasively, observers confirm that the FMLN noticeably lacked sufficient arms, particularly after 1983. After visiting FMLN troops in 1984, one retired United States Army Colonel, for example, reported:

> When you go out and see the FMLN units, the main combat units, what you are struck by as a military person, is they don't have any direct fire support weapons. They are very light infantry units.
>
> They have M-16's, G-3's, FAL's, all kinds of rifles and various machine guns. They have a few captured 81-millimeter mortars, a couple of very old 120-millimeter mortars, some 60-millimeter mortars, some captured U.S. 90-millimeter mortars, but practically no direct fire weapons for support attacks.
>
> As a result, they take a lot of casualties in the attack. If there were a massive flow of weapons and ammunition from Nicaragua, certainly these FMLN people would have something better for direct fire support and antiaircraft defense than the old worn-out 50 U.S. World War Two caliber machine guns that they use. There are a lot of better weapons in Nicaragua, but none have gotten to El Salvador . . . . You just don't find them with the FMLN units. In infantry terms they fight barehanded, few fire support and antiaircraft weapons. And no air support at all.[184]

Although Nicaragua's support to the Salvadoran Rebels remained at decreased levels during March 1984, Contra forces continued to escalate their paramilitary activities against the Nicaraguan Government.[185] In response, the Sandinistas introduced an April 1984 resolution before the UN Security Council condemning the United States for committing aggression against Nicaragua.[186] All of the Council's other members approved the resolution except the United Kingdom, which abstained.[187]

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182. *Id.* at 220.

183. *Id.*

184. *Developments in El Salvador: Hearing Before the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 53 (1985) (Testimony of Lt. Colonel Edward L. King, U.S. Army (Retired)).

185. *See* Church, *supra* note 105, at 16.

186. U.N. Doc. S/16463 (1984), *reprinted in* 22 INT'L LEGAL MATERIALS 457, 669 (1984).

187. China, Egypt, France, India, Malta, the Netherlands, Nicaragua, Pakistan, Peru, Ukrainian SSR, USSR, Upper Volta, and Zimbabwe voted in favor of the resolution. For an account of the debates that the U.N. entertained on this resolution, see U.N. Chron., vol. XXI, No. 4, at 3 (1984).

The United States, however, vetoed the resolution.[188]

Having blocked Security Council action, the Reagan Administration apparently anticipated that Nicaragua would institute proceedings in the International Court of Justice (ICJ) protesting the mining incidents and other United States-sponsored Contra activities.[189] To prevent the Sandinistas from bringing an ICJ suit, the Administration announced, on April 6, 1984, that it would not accept the Court's jurisdiction over disputes involving Central America for the next two years.[190] Ironically, Secretary of State George Schultz explained in his letter to the ICJ that the United States was undertaking this measure "to foster the continuing regional dispute settlement process."[191]

The Sandinistas, however, filed suit before the ICJ on April 9, 1984, alleging, *inter alia*, that the United States use of force violated Nicaraguan "sovereignty, territorial integrity and political independence."[192] On November 26, 1984, the Court ruled that it had jurisdiction to hear Nicaragua's suit against the United States.[193] The United States then refused to participate in the merits phase of Nicaragua's suit.[194] The Reagan Administration announced that it would boycott further proceedings in the case because Nicaragua was misusing the ICJ "for political and propaganda purposes."[195]

The harbor mining incidents and United States withdrawal from the ICJ proceedings provoked a storm of controversy both domestically and abroad.[196] This controversy was inflamed further by the October 1984

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188. *See id.*

189. *See* R. GUTMAN, *supra* note 15, at 202; *see also U.S. Voids Role of World Court on Latin Policy*, N.Y. Times, Apr. 9, 1984, at A1, col. 2.

190. *See* 23 INT'L LEGAL MATERIALS 670 (1984).

191. *Id.*

192. Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Interim Protection Order of May 10, 1984).

193. Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 215 (Interim Protection Order of Nov. 26, 1984), *reprinted in* 24 INT'L LEGAL MATERIALS 59 (1985). The ICJ's ruling that it had jurisdiction to hear Nicaragua's suit against the United States has been severely criticized by a number of international lawyers. *See, e.g.*, Moore, *supra* note 1, at 93-100.

194. *See* Joyner & Grimaldi, *supra* note 1, at 638.

195. *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ*, DEP'T ST. BULL., Mar. 1985, at 64, *reprinted in* 24 INT'L LEGAL MATERIALS 246, 247 (1985).

196. *See, e.g.*, K. GROSSMAN, NICARAGUA: AMERICA'S NEW VIETNAM 195-206 (1984); Letter from Senator Barry Goldwater to William Casey, Director of the CIA (Apr. 9, 1984), *reprinted in* Wash. Post, April 11, 1984, at A17, col. 2; *Britain*, *supra* note 178, at A1, col.4; *Moscow*, *supra* note 178, at A1, col. 3.

revelation that the CIA had published a manual for Contra use entitled *Psychological Operations in Guerrilla Warfare*.[197] The manual contained no instructions about arms interdiction, but did contain numerous instructions for overthrowing the Sandinista Government.[198] The introductory chapter indicated that the manual would enable the Contras to mount a rebellion against the Nicaraguan Government so that a "*commandante* of ours will literally be able to shake up the Sandinista structure, and replace it."[199] Subsequent chapters provided the Contras with explicit measures for achieving this goal. These chapters contained, among other things, recommendations that the Contras should "*neutralize* carefully selected and planned targets," such as judges and state security officials;[200] recruit doctors, lawyers, businessmen, landholders, and state officials;[201] and take "demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which [would] cause the death of one or more persons."[202] The manual advanced the final recommendation that the Contras should engineer the deaths of some of their followers to create "martyrs" for their cause.[203]

During the fall of 1984, the Contradora Group continued to work towards a negotiated settlement with little success. On September 7, 1984, the Group produced a draft treaty or "Acts," which incorporated the "21-point Document" criteria formulated the preceding year.[204] Nicaragua immediately accepted the "Acts" on the condition that none of its

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197. *See* Brinkley, *Legislators Ask if Reagan Knew of CIA's Role*, N.Y. Times, Oct. 21, 1984, at A1, col. 2; Brinkley, *President Orders 2 Investigations of CIA Manual*, N.Y. Times, Oct. 19, 1984, at A1, col. 4.

198. *See* Tayacan, *Psychological Operations in Guerrilla Warfare*, in PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE, *supra* note 127, at 31-98.

199. *Id.* at 39.

200. *Id.* at 57 (emphasis added). The manual employed ambiguous terms like "neutralize" for the purpose of ensuring plausible deniability. This would enable the CIA to deny that certain terms meant what they appeared to connote. *See* Neier, *The Legal Implications of the CIA's Nicaragua Manual*, in PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE, *supra* note 127, at 99, 104-09.

201. Tayacan, *supra* note 198, at 75.

202. Neier, *supra* note 200, at 107.

203. *See id.* at 107-08.

204. CIA publication of a manual advocating that United States-backed Contras should wantonly violate the international laws of warfare is troubling both from a legal and an ethical standpoint. For an incisive analysis of the international legal implications of the CIA's publication of this manual, see Neier, *supra* note 200, at 99-124.

The fact that the Contras frequently have committed atrocities against the Nicaraguan people makes these concerns even more compelling. For two thorough analyses of the Contras' conduct, see generally AMERICA'S WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA (1985); R. BRODY, *supra* note 76.

terms be changed.[205] Because the Reagan Administration viewed the terms of the "Acts" as unenforceable, it rejected the treaty as a final document.[206] Instead, the Administration endorsed a substitute draft treaty prepared in October 1984.[207] Managua immediately rejected the October draft, repeating that it would accept no substantive changes in the "Acts."[208] Thus, the Contradora talks again foundered.[209]

Given that multilateral talks had failed repeatedly, the Contradora countries arranged January 1985 bilateral talks between the United States and Nicaragua in Manzanillo, Mexico.[210] During the talks, Nicaragua indicated its willingness to make a number of important security concessions that the United States had been pursuing during the previous four years.[211] The Reagan Administration suspended the talks, despite this promising development.[212] The Administration's justification for suspending the talks is curious. The Contradora Group had initiated bilateral negotiations because multilateral talks had been unsuccessful. Nonetheless, the Reagan Administration circularly contended that bilateral talks would subvert a multilateral solution.[213]

In the beginning months of 1985, the Administration adopted a new rationale for its policy of supporting the Contras. For the previous four years, Reagan steadfastly had asserted that the purpose of his Contra policy was to stop the Sandinistas from exporting revolution to surrounding Central American countries, not to overthrow the Sandinista Government.[214] In a February 1985 press conference, the President reversed his position.[215] When asked if the goal of United States policy was to remove the Sandinista regime, the President replied: "Well, remove it in the sense of its present structure, in which it is a Communist totalitarian state and is not a government chosen by the people. . . ."[216] When pressed for clarification regarding whether the United States intended to overthrow the Sandinistas, Reagan answered: "Not if the pre-

205. *See* Purcell, *supra* note 141, at 77.
206. *Id.* at 77-78.
207. *See id.*
208. *Id.* at 78.
209. *See id.*
210. *See id.*
211. *Id.* at 92.
212. *See id.* at 78.
213. *See id.*
214. *See supra* text accompanying notes 138, 157.
215. *See* N.Y. Times, Feb. 22, 1985, at A14, col. 3.
216. *Id.*; *see also* Los Angeles Times, Feb. 22, 1985, at 1, col. 5 (President Reagan stating, "You can say we're trying to oust the Sandinistas. . . .").

sent government would say—all right—if they'd say uncle. . . ."[217]

While the conflict between the Contras and the Sandinista Government continued unabated during the spring of 1985, the Administration pressed Congress to appropriate fourteen million dollars in additional aid for the Contras.[218] To secure approval, Reagan promised to pursue diplomatic rather than military solutions in Nicaragua, but repeated the questionable rationale that the purpose of aiding the Contras was to force the Sandinistas to negotiate.[219]

When Reagan's aid request was defeated in the House,[220] the President retreated from his commitment to negotiate. In July 1985, the Contradora Group requested that Washington and Managua resume bilateral negotiations.[221] While the Sandinistas agreed immediately, the Reagan Administration refused.[222]

The Administration's subsequent conduct also provides ample reason to doubt its commitment to achieving any negotiated settlement with the Sandinistas. In August 1985, Assistant Secretary of State Elliot Abrams said that "it is preposterous to think that we could reach an agreement with the Sandinistas and expect it to be kept."[223] In January 1986, Abrams declared that the United States had only two options for achieving its goals in Nicaragua: 1) backing the Contras; or 2) sending in United States troops.[224] As one commentator acutely observed, Abrams "did not even mention the Contradora process as a poor third."[225]

The Contradora countries, concerned by the increasingly combative United States attitude, attempted in January 1986 to revitalize the Contradora process[226] by convening a meeting in Caraballeda, Venezuela in which Argentina, Uruguay, Peru, and Brazil also participated.[227] After the meetings, this expanded group produced the Caraballeda Declaration (Declaration).[228] The Declaration called, *inter alia*, for "renewal of negotiations, efforts towards national reconciliation, a freeze on the acquisition or distribution of new weapons, the suspension of all international

217. N.Y. Times, Feb. 22, 1985, at A14, col. 3.
218. *See Nicaraguan Resistance*, *supra* note 1, at 175.
219. *See id.*
220. *See* 1986 I.C.J. at 47 (Judgment on Merits).
221. *See Nicaraguan Resistance*, *supra* note 1, at 176-77.
222. *See id.* at 175.
223. *Id.*
224. *Id.* at 176.
225. *Id.*
226. *Id.*
227. *See id.*
228. *See id.*

military maneuvers, the eventual withdrawal of all foreign military personnel and nonaggression pacts among the five Central American countries."[229]

Although Nicaragua, El Salvador, Costa Rica, Guatemala, and Panama quickly accepted the terms of the Declaration,[230] the "revitalized" Contradora process proved to be short-lived. On February 10, 1986, the Caraballeda countries asked Washington to cooperate with the new process.[231] Washington refused because the countries also had called for termination of United States assistance to the Contras.[232] Secretary of State Schultz stated that the United States would stop this aid when the Sandinistas agreed to negotiate directly with the Contras.[233] While the Sandinistas maintained that they were willing to talk with indigenous opposition groups and were prepared to resume both bilateral and multilateral talks with the United States, they refused to negotiate with the United States-sponsored Contras.[234] As a result, negotiations ceased once again.

In the summer of 1986, the Reagan Administration appeared to score a political victory, preserving its Contra support policy at the expense of the Contradora process. Having effectively deprived the Contradora Group of any prospect for success in February 1986 by refusing to participate in the Caraballeda negotiations, the Administration finally succeeded in securing congressional approval of another 100 million dollars of aid for the Contras after a sustained lobbying effort.[235] Though the renewal of Contra aid did hasten the death of the Contradora process,[236] the unraveling of President Reagan's Contra policy soon followed. The

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229. *Id.*

230. *See id.* at 177.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* The Sandinistas regard the United States-backed Contras as traitors because many of the leaders of the largest Contra faction, the FDN, were members of Somoza's hated National Guard. *Id.* at 171. For an analysis of the origins of the Contra movement, see R. BRODY, *supra* note 76, at 3-18 (Introduction by R. Norton). For a discussion of the composition of the Contra movement, see *id.* at 132-51.

235. *See* R. GUTMAN, *supra* note 15, at 334.

236. The suit Nicaragua filed in the ICJ against Costa Rica and Honduras on July 28, 1986, which charged these countries with "cooperating with rebel groups attacking the Nicaraguan Government," also hastened the demise of the Contradora group. *Id.* at 334-35. After this suit was filed, Honduras withdrew from the Contradora negotiations because, according to one high-ranking Honduran official, "[we thought the Sandinistas] were abandoning negotiations," and because the Sandinistas knew "we could not undertake adjudication and negotiation at the same time." *Id.* at 335.

revelations in November 1986 that the Administration had sold arms to Iran to secure the release of hostages, and that the National Security Council staff member Colonel Oliver North had diverted millions of dollars of profits from these sales to the Contras in violation of the Boland Amendment, destroyed the slim congressional majority that had enabled President Reagan to obtain sufficient support for the Contras.[237]

Unable to fund the Contras at levels enabling the Contras to maintain their combat-worthiness, the Reagan Administration nonetheless kept the United States on the diplomatic sidelines when, in 1987, Costa Rican President Oscar Arias initiated a new plan for a negotiated settlement in Central America, which El Salvador, Nicaragua, Guatemala, Panamá, and Honduras quickly embraced.[238] The Reagan Administration's refusal to participate in the Arias peace plan effectively eliminated the United States ability to influence events in Central America. This caused United States negotiator Philip Habib, who resigned in protest, to remark that the only hope in the conflict was that "[t]he Central Americans . . . might save us from our own folly."[239]

III. GOVERNING LAW

The complex factual context underlying the dispute between the Reagan Administration and the Sandinista Government complicates the tasks of identifying and of applying international legal principles to the conflict. As noted at the outset, both the Sandinistas and the Reagan Administration charged the other with violating international law by supporting irregular combatants. The Sandinista Government claimed that the United States was waging an unlawful war of indirect aggression against Nicaragua by supporting the Contras. Conversely, the Reagan Administration claimed that the Sandinistas were waging an unlawful war of indirect aggression against El Salvador by supporting the FMLN Rebels' attempt to overthrow the Salvadoran Government. Further, the Reagan Administration justified United States support of the Contras as a legitimate, retaliatory measure of collective self-defense on behalf of El Salvador. The problem posed by these competing claims is that a state may respond lawfully with armed force in either individual or collective self-defense only when an aggressor state itself has committed sufficiently grave acts of armed force. Thus, the Reagan Administration's claim that the United States was entitled to exercise otherwise prohibited force in

237. *See id.* at 337-43.
238. *See* R. GUTMAN, *supra* note 15, at 343-57.
239. *Id.* at 357.

collective self-defense against Nicaragua necessarily hinges upon whether the Sandinistas' support of the FMLN qualified as a sufficiently grave use of armed force against El Salvador.

A. *The Prohibition on Aggression and the Right to Self-Defense Under the UN and OAS Charters*

Article 2(4) of the UN Charter establishes the cornerstone upon which the post World War II legal order is founded, and is the starting place for an analysis of the law governing aggression and self-defense. Article 2(4) states: "All [UN] 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." Because article 2(4) establishes a peremptory norm of international law, states cannot, by agreement, derogate from the restriction against aggression.[240] Article 2(3) underscores this proscription by requiring that "[a]ll Members shall settle their disputes by peaceful means in such a manner that international peace and security are not endangered."

As a sanction for violations of articles 2(3) and 2(4) and as an exception to the prohibition on the use of force contained therein, article 51 of the UN Charter preserves the right member states possessed under pre-Charter customary international law to employ individual or collective self-defense, providing in part: "Nothing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs" against a member of the United Nations.[241] Taken collectively, articles 2(3), 2(4), and 51 establish a system of minimum world order, protecting only a state's primary interest in being free from aggression. This system stands in contrast to the system of optimum world order, which extends far beyond the protection of the basic interests in national security and self-defense and fosters the enhancement and sharing of all deeply-held human values.[242]

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240. *See* Rowles, *The United States, the OAS, and the Dilemma of the Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385, 395-96 (1983).

241. During the San Francisco Conference in which article 51 was written, the drafting committee explained that "the use of arms in legitimate self-defense remains admitted and unimpaired" under the UN Charter. Report of the Rapporteur of Committee I to Commission I, 6 UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 459 (June 13, 1945), *quoted in* Schachter, *The Right of States to Use Armed Forces*, 82 MICH. L. REV. 1620, 1633-34 (1984).

242. *See* Mallison, *supra* note 11, at 395 n.234; M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 121-23 (1961).

Article 51 preconditions the exercise of the right of self-defense on the occurrence of an "armed attack." In contrast, the French version, which is equally authentic and more accurately reflects the Charter's negotiating history, uses the broader term "*aggression armée*" or armed aggression.[243] Because this negotiating history controls the meaning of the Charter provisions in each language,[244] the following discussion will treat armed attack and armed aggression as synonymous.

Article 2(4) was intended to outlaw war in its classical form, the conventional use of military coercion to acquire territory or other forms of wealth and concessions from another state.[245] Article 2(4), however, does not employ the term "war." The drafters of the UN Charter instead used the phrase "the threat or use of force" to ensure that the applicability of Charter provisions did not depend upon whether a technical state of war existed between the parties to a given conflict.[246] The drafters also intended article 2(4) to proscribe a broad range of hostile activities, including coercive uses of force of lesser intensity and scope than transnational conflicts such as World War I or World War II.[247]

Despite this broad prohibition on armed coercion, the UN Charter provides no definitive guidelines for evaluating the competing claims of the Nicaraguan Government and the Reagan Administration, because the article 2(4) phrase "threat or use of force" does not unequivocally prohibit indirect uses of force.[248] The language of article 51 is equally

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243. W. MALLISON & S. MALLISON, ARMED CONFLICT IN LEBANON. 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING 13-14 (2d ed. 1985). There are six official languages of the UN: French, English, Russian, Chinese, Spanish, and Arabic.

244. *See id.*

245. *See* Schachter, *supra* note 241, at 1624.

246. *See id.* The drafters of the four Geneva Conventions also omitted the term "war" in order "to make each Convention broadly applicable to international conflict situations" not "dependent on a supposed technical 'State of War.' " W. MALLISON & S. MALLISON, *supra* note 243, at 55. Common article 2 provides in part: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, para. 1, Aug. 12, 1949, 6 U.S.T. 3114, 3116, T.I.A.S. No. 3362, 75 U.N.T.S. 31-32; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, para. 1, Aug. 12, 1949, 6 U.S.T. Stat. 3217, 3220, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, art. 2, para. 1, Aug. 12, 1949, 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, para. 1, Aug. 12, 1949, 6 U.S.T. Stat. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

247. M. MCDOUGAL & F. FELICIANO, *supra* note 242, at 121-24.

248. What forms of conduct fall under the rubric of "the threat of force" is particu-

indeterminate of what types of conduct constitute an "armed attack" or "armed aggression" justifying the responsive use of force in self-defense. Thus, the UN Charter does not resolve the threshold question posed by the United States-Nicaragua dispute regarding whether the Sandinistas' support of the FMLN constituted an armed attack against El Salvador entitling the United States to respond with force in collective self-defense.

The Charter of the Organization of American States (OAS), to which both Nicaragua and the United States are parties, is the second important treaty governing the dispute between the United States and Nicaragua. Like the UN Charter, the OAS Charter both prohibits the use of armed force and requires that states resolve their international disputes by peaceful means.[249]

In addition, the OAS Charter establishes a self-defense exception to its prohibition on the uses of armed force. Article 21 provides: "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." Article 22 flushes out the exception contained in article 21, providing: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute violations of Articles 18 and 20." By referring to the exception of "self-defense in accordance with existing treaties," articles 21 and 22 establish that coercive measures adopted in self-defense under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty),[250] which existed when the OAS Charter entered into force, do not constitute prohibited uses of force. The Rio Treaty, in turn, explicitly authorizes states to exercise "the inherent right of individual and collective self-defense" under the UN Charter.[251]

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larly unclear. *See* Schachter, *supra* note 241, at 1625.

249. *See* OAS Charter, arts. 23-26. In addition, the United States and Nicaragua are parties to the Convention to Fulfill Existing Treaties, in which they covenanted "to settle, by pacific means, controversies of an international character that may arise between them." Coordination, Extension, and Fulfillment of Existing Treaties Between the American States, art. 1, Dec. 23, 1936, 51 Stat. 116, 120, T.S. No. 926.

250. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838 (entered into force Dec. 3, 1948) [hereinafter Rio Treaty].

251. *Id.* art. 3, para. 1. Conversely, the UN Charter authorizes regional collective security regimes, such as those established through the OAS Charter and the Rio Treaty. Article 52(1) of the UN Charter provides: "Nothing in the present Charter precludes existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements are consistent with the Purposes and Principles of the United Nations."

In contrast to the UN Charter, the OAS Charter explicitly prohibits both conventional military coercion and indirect forms of coercion. Article 18 provides:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only the use of armed force but also other forms of interference or attempted threat against the personality of the state or against its political, economic, and social elements.[252]

Article 20 complements this provision by categorically prohibiting the use of armed force: "The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or other measures of force taken by another state, directly or indirectly, for any reason whatever."[253]

While the OAS Charter does proscribe indirect uses of force, recall that it also prohibits member states from using force "except in the case of self-defense,"[254] which a state can exercise only after suffering an armed attack. Because the OAS Charter does not indicate what types of indirect armed coercion constitute an armed attack, this Charter, like the UN Charter, fails to establish whether Nicaragua's indirect use of force, achieved by supporting irregular combatants, entitled the United States to employ force in collective self-defense.

B. *Requirements Governing the Exercise of the Right of Self-Defense*

1. Customary International Legal Requirements for Individual and Collective Self-Defense: Resort to Peaceful Procedures, Necessity, and Proportionality

Under customary international law, a state must satisfy three primary, substantive requirements before it is entitled to respond to another state's armed attack with force in either individual or collective self-defense.[255]

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252. OAS Charter, art. 18. The OAS, which was founded in 1948, is an international regional organization comprised of 28 member countries in the Western Hemisphere. G. BAUM, 1981 SAO PAULO CONFERENCE ON THE WORLD (1981). Like the UN, the OAS serves as a forum for socio-economic and political cooperation and for dispute resolution. *See id.*

253. OAS Charter, art. 20.

254. *Id.*

255. Article 51 of the UN Charter incorporates these requirements by reference by preserving the "inherent right of individual and collective self-defense" as it existed under customary international law before enactment of the Charter. *See* Schachter, *supra* note 241, at 1633-34. Article 21 of the OAS Charter also incorporates customary

First, a state must exhaust any existing peaceful procedures.[256] Second, the responsive measures of force a state employs must be necessary, and not pretextual.[257] Third, a defensive use of force must be proportional to the character and magnitude of the attack.[258]

The UN International Law Commission, composed of international law experts the UN charged with codifying these principles of international law,[259] explained the necessity requirement in the following terms:

> The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked . . . must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force.[260]

The necessity requirement tends to overlap the first requirement of resorting to peaceful procedures. Because the necessity requirement is stringent, one of its juridical elements is that the defensive use of force will not be necessary unless a state first unsuccessfully has employed peaceful procedures, or circumstances demonstrate that the employment of such procedures clearly would be futile.[261] Consistent with this juridical element, the necessity principle does not require resorting to peaceful procedures when a state has experienced an armed attack of sufficient gravity.[262]

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international law by reference to the UN Charter by providing that states parties may employ "self-defense in accordance with existing treaties." For further discussion of the right of self-defense as it existed under customary international law, see *infra* notes 373-77 and accompanying text.

256. W. MALLISON & S. MALLISON, *supra* note 243, at 16. Both the UN and OAS Charters embody this requirement by providing that states must resolve their international disputes peacefully. U.N. Charter arts. 2(3)-(4); OAS Charter arts. 23-26.

257. W. MALLISON & S. MALLISON, *supra* note 243, at 16.

258. *See* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 261 (1958); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261-64, 278-79, 434 (1964).

259. *See* UNITED NATIONS, OFFICE OF PUBLIC EVERYMAN'S UNITED NATIONS 425 (7th ed. 1964).

260. *Succession of States in Respect of Matters Other Than Treaties,* 1980 2 Y.B. INT'L L. COMM'N 69, U.N. Doc. A/CN.4/SER.A/ 1980 (emphasis original).

261. Schachter, *supra* note 241, at 1635.

262. *Cf. id.* ("to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defense").

The proportionality principle is illustrated by the *Caroline* affair.[263] The *Caroline* was a United States ship used to run guns to Canadian revolutionaries during the 1837 Canadian revolt against British rule.[264] British troops retaliated by entering United States territory and destroying the *Caroline*, killing two people in the process.[265] Daniel Webster, then United States Secretary of State, charged the British with violating international law by employing excessive force.[266] In his official protest to the British Government, Webster articulated the proportionality requirement in the following terms: "Nothing unreasonable or excessive [is permitted], since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it."[267] The proportionality principle does not require strict mathematical correspondence between the responding use of force and the initiating coercion,[268] but does require that the corresponding coercion be reasonable in light of the circumstances surrounding the attack.[269]

Professors McDougal and Feliciano have identified the fundamental principle underlying the requirement of proportionality:

> [T]he principle of proportionality is seen as but one specific form of the more general principle of economy in coercion and as a logical corollary of the fundamental community policy against change by destructive modes. Coercion that is grossly in excess of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of coercive or violent change.[270]

One indicia for determining whether a responding measure of force constitutes a legitimate exercise of self-defense relates to the values the measure serves.[271] If a victim state employs such measures to preserve its existing values, then, assuming it complies with other legal requirements, its conduct will constitute a legitimate exercise of self-defense. Conversely, if the victim state employs such measures to expand its values at the aggressor state's expense, for example, by seeking to overthrow the

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263. *See generally* Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82 (1938).

264. *See id.* at 82-84.

265. *Id.* at 84, 89.

266. *See id.* at 89.

267. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), *reprinted in* 29 BRIT. FOREIGN ST. PAPERS 1129, 1138 (1840-41).

268. G. SCHWARTZENBERGER, 2 INTERNATIONAL LAW 34 (1968).

269. *See* M. MCDOUGAL & F. FELICIANO, *supra* note 242, at 218.

270. *Id.* at 243 (footnote omitted).

271. W. MALLISON & S. MALLISON, *supra* note 243, at 30-31.

government of the aggressor state, then the victim state's own conduct will constitute unlawful aggression rather than legitimate self-defense.

The principle that a proportional use of force must not expand a victim state's values at the aggressor state's expense may, perhaps, be subject to a limited exception. As Nazi and Japanese militarist aggression during World War II demonstrated, there plainly are instances in which the only way for a victim state and its allies to preserve their common values is to overthrow the governments of the state committing the initiating aggression. This fact suggests that the principle of proportionality should not be interpreted flatly to prohibit any responsive use of force designed to overthrow an aggressor state's government, but instead to prohibit such uses of force except in extreme cases in which no less drastic means for ending the aggression are available.

2. Procedural Treaty Requirements for the Exercise of Individual or Collective Self-Defense

In addition to the foregoing substantive requirements, the UN Charter imposes a procedural requirement on the exercise of both individual and collective self-defense. Article 51 requires that "[m]easures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council. . . ." This provision follows the requirement in the first sentence of article 51 that a state may pursue this right only "until the Security Council has taken measures necessary to maintain international peace and security." The reporting requirement ensures that the Security Council receives sufficient information about the initiating and responding coercion in a given situation, enabling it to respond appropriately.[272] Article 51, however, does not require Security Council approval of measures taken in collective self-defense. Rather, the article permits states to employ self-defense measures of their choosing, provided that they are necessary and proportional.[273]

Article 5 of the Rio Treaty also requires that states "shall immediately send to the Security Council of the United Nations, in conformity with Articles 51 and 54 of the Charter of the United Nations, complete information concerning the activities undertaken or in contemplation in the exercise of the right of self-defense. . . . " Article 21 of the OAS charter incorporates this reporting requirement by reference, providing that states may employ "self-defense in accordance with existing treaties."

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272. *See* U.N. CHARTER, arts. 51, 54 ("The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.").

273. Moore, *supra* note 1, at 104; *accord* Rowles, *supra* note 240, at 402.

Some scholars argue that, unlike the UN Charter, the Rio Treaty requires states to procure OAS approval prior to taking measures in collective self-defense.[274] This view is predicated on a misinterpretation of the interplay between articles 3 and 6 of the Rio Treaty.

Article 3 addresses the actions states may take in individual and collective self-defense when "an armed attack by any State against an American State occurs." The Rio Treaty, like the NATO Treaty and other collective security agreements, permits parties to respond to an armed attack immediately, without securing the prior approval of either the OAS or the UN.[275] Article 3(2) accordingly permits states "individually" to take "immediate measures" until "the decision of the [OAS] Organ of Consultation of the Inter-American system." Just as article 3(2) establishes that prior OAS approval of self-defensive actions is not required, article 3(4) establishes that prior Security Council approval of such actions likewise is not required: "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."[276]

In contrast, article 6 addresses the measures states may take in response to conduct not qualifying as an armed attack. Unlike article 3, article 6 does require prior OAS approval of such measures. Article 6 provides:

> If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.[277]

The interpretation that article 3 does not require states to secure OAS approval prior to exercising the right of self-defense also is mandated by article 10 of the Rio Treaty.[278] Article 10 states: "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 Na-

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274. *See, e.g.*, Joyner & Grimaldi, *supra* note 1, at 665-66.
275. *See* Moore, *supra* note 1, at 105.
276. Rio Treaty, *supra* note 250, art. 3(4).
277. *Id.* art. 6.
278. *See* Moore, *supra* note 1, at 105.

tions." Because article 51 of the UN Charter permits states to act in self-defense without securing prior UN approval, article 10 of the Rio Treaty prohibits the interpretation that article 3 of the Treaty requires approval of the OAS before a state party can employ self-defense.[279] The contrary interpretation that article 3 requires prior OAS approval would contravene article 10, because it would "construe" article 3 "as impairing" the right established by the UN Charter to employ self-defense without securing prior approval of any international organization.

Finally, the non-notification interpretation of article 3 is supported by state practice under the Rio Treaty. States parties have employed the article 6 procedure and have convened meetings of the OAS to secure approval of collective sanctions adopted in response to acts of aggression not tantamount to an armed attack.[280] Article 6, for example, was employed to impose an arms embargo on the Dominican Republic in 1960[281] and on Cuba in 1962.[282] OAS member states, however, generally have not employed the article 6 prior approval procedure before exercising self-defense under article 3.[283]

3. Additional Requirements for Exercising Collective Self-Defense

The exercise of collective self-defense is subject to an additional set of substantive requirements. In this regard, the Inter-American system governing collective self-defense differs from the UN system.[284]

Both the UN and OAS Charters recognize the "inherent right" of collective self-defense under international law. Article 51 of the UN

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279. Article 103 of the UN Charter would prohibit this contrary interpretation even in the absence of an article 10 provision in the Rio Treaty. *See* Moore, *supra* note 1, at 105 n.242. Article 103, which is in effect a supremacy clause, provides that members' obligations under the UN Charter shall prevail "[i]n the event of a conflict" between those obligations "and their obligations under any other international agreement." Because imposing a notification requirement on the exercise of self-defense under article 3 of the Rio Treaty would cause a conflict between the Treaty and the UN Charter, which does not impose a notification requirement, the UN Charter would prevail.

280. *See* Rowles, *supra* note 240, at 393-94.

281. J. SLATER, THE UNITED STATES AND THE DOMINICAN INTERVENTION 290-300 (1970).

282. *See* GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE: APPLICATIONS 72-78 (3d ed. 1973).

283. The Cuban Missile Crisis is the only incident involving the use of force that has been authorized under article 6 of the Rio Treaty. *See* 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 1069-73 (1969). For a different analysis of the events surrounding the Cuban Missile Crisis, see generally Mallison, *supra* note 11.

284. *See* Mallison, *supra* note 11, at 366-71.

Charter, however, characterizes collective self-defense as a right to which states are entitled, but not required, to undertake in appropriate circumstances. In contrast, the Rio Treaty—to which the United States, Nicaragua, and El Salvador are parties—imposes an affirmative duty to employ collective self-defense on behalf of the attacked state. Article 3(1) of the Treaty provides:

> 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.[285]

The Rio Treaty limits this obligation by requiring that the attacked state request the assistance of other states. Article 3(2) provides:

> 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 [to exercise collective self-defense] contained in the preceding paragraph . . . .[286]

Customary international law and both the UN and OAS Charters impose a final requirement implicit in the foregoing discussion: That the attacked state have the right to employ individual self-defense. The right of collective self-defense is derived from the right of the state requesting assistance to employ force in response to an act of aggression. Therefore, no state may employ force in collective self-defense unless the state requesting help is entitled to employ force in individual self-defense.[287]

Professor Christopher Joyner and Michael Grimaldi have suggested

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285. Rio Treaty, *supra* note 250, art. 3(1). The Inter-American Doctrine of Collective Self-Defense has its origins in the Act of Chapultepec, Mar. 8, 1945, 60 Stat. 1831, T.I.A.S. No. 1543. For discussion of the history of the Rio Treaty, see *Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro* (1947), *in* 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW: REGIONAL COOPERATION, ORGANIZATIONS AND PROBLEMS 217 (1983). The drafting history indicates that article 51 of the UN Charter was intended to preserve the right of collective self-defense established under treaties such as the Act of Chapultepec. Schachter, *supra* note 241, at 1623. *See* D. BOWETT, *supra* note 258, at 183.

286. Rio Treaty, *supra* note 250, art. 3(2). Article 3(2) does not, however, require that the attacked state approve all the measures the assisting states subsequently employ in collective self-defense. The article expressly authorizes states that have received such a request "individually [to] take" measures in collective self-defense. *Id.*

287. *Cf. id.* at art. 3(1) (providing that, when an "armed attack" on one state party occurs, other state parties will assist the attacked state).

imposing an additional substantive limitation on collective self-defense measures taken in response to indirect aggression such as Nicaragua's support of the Salvadoran FMLN. Joyner and Grimaldi recommended that even if there is proof the Sandinista government was transporting significant amounts of aid to the Rebels in El Salvador, which is patently illegal under international law, any responsive action by the United States, nevertheless, should neither be taken against the Sandinista government, nor conducted in Nicaraguan territory. Instead, the United States should limit its actions to assisting the El Salvador government in cutting down the insurgency in its own state.[288] Joyner and Grimaldi concede that this limitation appears inherently unjust, because it provides opportunities to the instigating culprit, but they justify the limitation on the grounds that "international law sanctions neither the notion that 'might makes right' nor that 'two wrongs make a right.' "[289]

This justification lays the groundwork for a policy argument regarding why the territorial limitation on the exercise of collective self-defense would constitute a desirable rule, but falls short of establishing the limitation as a positive rule of international law. As Professor Moore noted, the only legal support Joyner and Grimaldi marshall for their limitation is an article in which Professor Oscar Schachter expressly discusses the territorial limitation as a proposed rule of law.[290]

Moreover, this territorial limitation does not even clearly constitute a desirable rule of law. There is no readily apparent basis for concluding that the adoption of a flat rule, which insulates an aggressor state fostering civil strife in another state from retaliatory response in the aggressor states' territory, necessarily will serve the minimum world order objective of limiting armed conflict.[291] Logic suggests that an aggressor state experiencing the effects of defensive coercion in its own territory will be far

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288. Joyner & Grimaldi, *supra* note 1, at 681.

289. *Id.*

290. Moore, *supra* note 1, at 105 n.244. Schachter, *supra* note 241, at 1642. *Accord* Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in LAW AND CIVIL WAR IN THE MODERN WORLD, *supra* note 10, at 40 (noting that the decision that "a proportionate response is best restricted to military action within the victim state . . . is essentially a policy decision, not a rule of law").

291. One commentator has noted:

> As a policy matter, the only purpose of such a rule would be 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.

Moore, *supra* note 1, at 106.

more likely to end its aggression than it would be if the only consequences of its unlawful conduct are defensive measures taken in the territory of the victim state. Nor do the principles of necessity and proportionality impose any territorial limitation upon the defensive measures that a victim state and its allies may take. These principles permit the employment of whatever defensive measures are needed, wherever they are needed, provided that such measures are necessary to end the threat and are not disproportionate to the initiating coercion.[292]

C. *The Interrelationship Between Indirect Aggression and Self-Defense*

Since neither the UN nor OAS Charter identifies the types of indirect aggression that functionally are equivalent to an armed attack justifying the responsive use of force in self-defense, analysts must examine other international legal sources to determine whether the United States was entitled to respond to Nicaraguan support of the Salvadoran FMLN with force in collective self-defense. Two key UN General Assembly resolutions, the Declaration on Friendly Relations and the Definition of Aggression,[293] provide further guidance concerning this issue. The legal significance of these resolutions is twofold. First, the resolutions represent authoritative interpretations of UN Charter provisions because the General Assembly is legally empowered to interpret this Charter.[294]

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292. *See* D. BOWETT, *supra* note 258, at 40 (noting in the context of individual self-defense that there is "no reason why the right of self-defense should not justify whatever measures are proportionate and necessary to deal with a particular threat to security and which would otherwise be illegal"); Falk, *Janus Tormented: International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE (J. Rosenau ed. 1968). *See infra* notes 342-52 and accompanying text (discussing instances in which states have employed self-defense within the territory of the state aiding insurgent forces).

293. Many subsidiary General Assembly Resolutions also address the question of indirect aggression. *See, e.g., Declaration on the Inadmissibility of Aggression*, G.A. Res. 2131, U.N. GAOR Supp. (no.14) para. 2, U.N. Doc. A/6014 (1965) (violates the Charter to "organize, assist, foment, incite or tolerate" armed bands intervening in the affairs of another state); *Resolution on Peace through Deeds*, G.A. Res. 380V, 5 U.N. GAOR Supp. (No.20) at 13, U.N. Doc. A/1775 (1950) ("Whatever the weapon used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a Foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world"). The UN International Law Commission also has determined that providing weapons and logistical support to irregular combatants that intervene in another state constitutes aggression. *See, e.g., Draft Code of Offenses Against the Peace and Security of Mankind* arts. 2(4)-2(5), 9 U.N. GAOR Supp. (No.9) at 11, U.N. Doc. A/2693 (1954).

294. *See* G. ARANGIO-RUIZ, THE UNITED NATIONS DECLARATION ON FRIENDLY

Second, the General Assembly resolutions constitute evidence of customary international law.[295]

A principle becomes incorporated into customary international law when it satisfies two criteria: 1) a majority of states regard that principle as embodying a legal obligation;[296] and 2) those states consistently adhere to the principle over a period of time.[297] General Assembly resolutions constitute evidence of customary international law by enunciating principles that satisfy both criteria. First, by promulgating resolutions, states may indicate collectively that the principles contained in these resolutions are legally enforceable.[298] Second, by repeatedly passing resolutions that brand a given principle as legally obligatory, states collectively may manifest consistent adherence to that principle.[299] In this manner, General Assembly resolutions may, over time, establish principles of customary international law.[300]

1. The Declaration on Friendly Relations

The 1970 Declaration on Friendly Relations, Resolution 2625 (Declaration or Resolution 2625), which the General Assembly passed without a negative vote, is the first key resolution that clarifies the scope of the prohibition on indirect aggression.[301] The Declaration particularly is sig-

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RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW 74-75 (1979); U.S. DEP'T OF STATE, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS: SELECTED DOCUMENTS 879-80 (1946). Note, however, that the General Assembly does not have exclusive power to interpret the Charter; it shares this power with the Security Council. G. ARANGIO-RUIZ, *supra* at 74-75.

295. Article 38 of the ICJ Statute, which generally is accepted as providing a legally authoritative delineation of the sources from which international law is derived, Mallison & Mallison, *The Development of International Law by the United Nations,* in THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 142 (1986), identifies "international custom as evidence of general practice accepted as law." Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, [hereinafter ICJ Statute].

296. W. HACKWORTH, 1 DIGEST OF INTERNATIONAL LAW 3-5 (1940).

297. Although states must consistently adhere to a given practice over a period of time, international law does not prescribe a particular period of time that must pass before a principle becomes part of customary international law. *See* Mallison & Mallison, *supra* note 295, at 143.

298. *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 2 (1963).

299. *See id.*

300. *See id.*

301. *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the United Nations,* G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

nificant because it provides that the "principles of the Charter which are embodied in this Declaration constitute basic principles of international law."[302] Therefore, the Declaration both represents an authoritative interpretation of the UN Charter and unequivocally indicates that all states belonging to the UN—an overwhelming majority of states in the world—regard the Resolution as expressing international legal norms.

Resolution 2625 provides, *inter alia*, that article 2(4) proscribes two forms of indirect aggression:[303] 1) "organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state;" and 2) "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts, or acquiescing in activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve the threat or use of force."[304]

2. The Definition of Aggression

Resolution 3314, the Definition of Aggression (the Definition or Resolution 3314),[305] is the second key resolution delineating the scope of the proscription on the threat or use of force. The Definition, passed by consensus in 1974, represents the culmination of twenty-four years of effort devoted to identifying the types of conduct constituting prohibited uses of force.[306] The Definition first establishes the conceptual equivalence between aggression and the use of force under article 2(4) of the UN Charter. Article 1 of the Definition provides that: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations. . . ."[307]

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302. *Id.* at para. 3.

303. The Declaration also proscribes direct uses of force, *id.* at para. 1, cls. 1-6, and intervention not tantamount to the use of armed force. *Id.* at para. 1, cl. 22.

304. *Id.* at para. 1, cls. 8-9.

305. *Definition of Aggression*, G.A. Res. 3314, 29 GAOR Supp. 31, U.N. Doc. A.9631 (1974).

306. The international community made numerous previous attempts to define aggression. *See* A. THOMAS & A. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 3-44 (1973).

307. Article 2 of the Definition then establishes the nexus between aggression and the right to respond to such conduct with force in self-defense. *See* Note, *Framework for Evaluating the Legality of United States Intervention in Nicaragua*, 17 N.Y.U. J. INT'L L. & POL. 155, 162 (1984) [hereinafter Note, *Framework*]. Article 2 provides:

> The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression, although the Security Council

Articles 3(a) through 3(e) then prohibit the direct use of military force.[308] While articles 3(f) and 3(g) both prohibit covert forms of armed coercion, only article 3(g) is germane to the dispute between Nicaragua and the United States.[309] Article 3(a) prohibits "the sending by or on behalf of a State of armed bands, groups or mercenaries, which carry out acts of armed force against a State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

The Definition, unlike the Declaration, does not purport to codify or declare principles of customary international law.[310] The Definition, however, which is legally significant as an interpretation of the UN Charter,[311] provides the most comprehensive criteria the international

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may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant circumstances, including the fact that the acts concerned or their consequences were not of sufficient gravity.

For a discussion of the rationale of the requirement that the aggressive conduct must involve acts of sufficient gravity, see *infra* notes 315-20 and accompanying text.

308. Consistent with customary international law, *see* W. MALLISON & S. MALLISON, 243, at 15, these articles provide that "regardless of a declaration of war," a state commits unlawful aggression when, *inter alia*, it employs its military forces to invade or attack the territory of another state (art. 3(a), 3(d)); to bombard the territory of another state (art. 3(b)); or to blockade the ports or the coast of another state (art. 3(c)).

309. Article 3(f) provides that: "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State" constitutes an act of aggression. Article 3(f) is not relevant to the instant dispute because the rebel forces using the territories of the parties to this dispute are not states. Nicaragua has allowed the Salvadoran Rebels, who do not constitute a state, to use its territory to commit aggression against El Salvador. *See supra* text accompanying notes 81, 114. Conversely, El Salvador has permitted the Contras, who do not constitute a state, to use its territory to commit acts of aggression against Nicaragua. *See supra* note 77 and accompanying text.

310. Note, however, that articles 3(a) through 3(e), which identify direct uses of military force as acts of aggression, clearly embody established customary international legal principles. *See, e.g.*, Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg (1947-1949); Proceedings Before the International Military Tribunal for the Far East (Apr., 1946-Apr. 16, 1948); The Corfu Channel Case (U.K. v. Alb.) 1949 I.C.J. 4 (Judgment on the Merits). Note also that the I.C.J. majority, in its decision on the merits of Nicaragua's suit against the United States, determined that article 3(g) set forth a binding principle of customary international law. *See infra* note 317 and accompanying text. In his dissenting opinion, Judge Schwebel agreed with that determination, but strenuously criticized the majority's interpretation of the article. *See* 1986 I.C.J. at 323-43 (Schwebel, J. dissenting) (Judgment on the Merits).

311. Article 6 establishes that the Definition was intended to elaborate upon the Charter, providing that "[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning

community has produced for determining when a given state's conduct constitutes a prohibited use of force.[312] Furthermore, both the United States and Nicaragua have recognized the article 3(g) "principle that a nation providing material, logistics support, training and facilities to insurgent forces fighting against a government of another state is engaged in a use of force legally indistinguishable from conventional military operations by regular armed forces."[313] Article 3(g), therefore, is of particular legal relevance to the dispute between Nicaragua and the United States.

The complex language of article 3(g) presents two qualifications, each of which imposes a threshold beyond which a given use of covert force must surpass to constitute an act of aggression, and thereby justifying a resort to force in self-defense. The first qualification in article 3(g) provides that a state commits aggression by supporting irregular combatants—"armed bands, groups or mercenaries"—that employ force against another state only if those acts are of "such gravity" as to amount to acts by a state's conventional military forces proscribed under articles 3(a) through 3(e)—i.e. "attack," "invasion," "bombardment," "blockade," and the like. The drafters of the Definition included the proviso that indirect forms of aggression be of sufficient gravity so that states could not offer minor forms of covert coercion as a legal pretext for the retaliatory use of force.[314]

The second qualification in article 3(g) is not as precise. This qualification is in the last clause of the article, in the phrase "or its substantial involvement therein." This phrase apparently qualifies the first clause of the article, which provides that "the sending [of armed bands] by or on behalf of a state" constitutes aggression. The final, qualifying clause arguably lowers the threshold of control a state must have over the forces it is assisting to commit aggression. This suggests that a state commits aggression both when it is "substantially involved" in supporting irregular forces fighting in a target state and when the coercing state actively "sends" or exercises complete control over those forces.

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cases in which the use of force is lawful."

312. W. MALLISON & S. MALLISON, *supra* note 243, at 15.

313. 1986 I.C.J. at 329 (Schwebel, J. dissenting) (Judgment on the Merits). In addition, as will be more fully discussed below, the article 3(g) proscription of indirect aggression is consistent with state practice, the primary indicator of customary international law.

314. *See Official Records of the General Assembly*, 29th Sess., 29 U.N. GAOR Supp. (No.19), U.N. Doc. A/9619 and Corr. 1, at para. 20 (1974).

3. The ICJ's Conflicting Interpretations of the Definition of Aggression

In its decision on the merits of Nicaragua's suit against the United States,[315] the ICJ rejected the foregoing interpretation as a matter of law. The decision establishes a questionable distinction between the types of conduct constituting both a prohibited use of force and an armed attack, and the types of conduct constituting a prohibited use of force but not an armed attack. The Court ruled that the Definition establishes principles of customary international law and concluded that, under article 3(g), "the despatch by one state of armed bands into the territory of another state" constitutes an armed attack.[316] The Court indicated that "the supply of weapons and other support to such bands" could qualify as a threat or use of force contravening the UN and OAS Charters.[317] The Court determined, however, that because article 3(g) does not identify such conduct as constituting an armed attack, Nicaragua's assistance to the FMLN could not, as a matter of law, constitute an armed attack against El Salvador.[318] Therefore, the ICJ held that El Salvador was not entitled to use force against Nicaragua in self-defense[319] and that the United States correspondingly was barred from employing force in collective self-defense.[320]

In his dissent, Judge Schwebel maintained that "article 3(g) does not confine its definition of acts that qualify as acts of aggression to the sending of armed bands; rather, it specifies as an act of aggression a state's 'substantial involvement' in the sending of armed bands."[321] He also stated that while providing weapons and logistical support is not always

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315. ICJ decisions are a subsidiary source for ascertaining the content of customary international law. *See* I.C.J. Statute, *supra* note 295, art. 38(1)(d) (identifying "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

316. 1986 I.C.J. at 92, 117 (Judgment on Merits).

317. *Id.* at 117 (Judgment on Merits).

318. *Id.* at 116-17 (Judgment on Merits).

319. *See id.* The majority did, however, cryptically state that El Salvador might justifiably employ "proportionate counter-measures against Nicaragua." *Id.* at 127 (Judgment on Merits). In making this statement, the ICJ seemingly formulated a distinction between acts of force to which a state may respond individually and acts of force to which states may respond collectively. Commentators have criticized this distinction as lacking any legal foundation under either the UN Charter or customary international law. *See, e.g.*, Hargrove, *The* Nicaragua *Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 141 (1987).

320. 1986 I.C.J. at 116-17 (Judgment on Merits).

321. *Id.* at 336 (Schwebel, J. dissenting) (Judgment on Merits).

the legal equivalent of an armed attack, pervasive and prolonged provision of such assistance would constitute armed attack.[322] Because he concluded that the Sandinistas had provided the Salvadoran Rebels with substantial assistance over a prolonged period, Judge Schwebel contended that Nicaragua had committed an armed attack against El Salvador that entitled the United States to employ force in collective self-defense.[323]

Three analytical considerations support Judge Schwebel's interpretation of the UN Charter. The first and most important consideration embraces both common sense and the fundamental purpose of the minimum world order system. The second consideration is the preparatory history of article 3(g), and the third is state practice.

The ICJ's majority interpretation of article 3(g) that providing weapons and logistical support can never, as a matter of law, constitute an armed attack, contravenes common sense by ignoring the myriad factual contexts in which this form of support can be provided. A hypothetical illustrates the deficiencies of this rule of law. Imagine a scenario in which the state of "N" provided rebels attempting to overthrow "S" state's government with modern aircraft armed with sophisticated weaponry, which the rebels then employed to bomb S's capital and government installations. Under the ICJ's rule of law, N would not have committed an armed attack on S sufficient to enable S to respond with force in self-defense. The rule would require S to abstain from using force until N actually "dispatched" or "sent" the rebels into S. Conceivably, S's Government would be destroyed before it was justified in using retaliatory force. Nonetheless, S undoubtedly would consider itself attacked, break the rule, and S would respond with force against N after the first bombings occurred. Therefore, such a rule of international law is unworkable because states can adhere to it only by risking self-extinction.[324]

This rule fails to fulfill the objectives that legal standards for coercion control should realize: the objectives of preventing armed conflicts when possible and minimizing the scope of such conflicts when they occur.[325] Legal standards can achieve these objectives by permitting states victim-

322. *See id.* (Schwebel, J. dissenting) (Judgment on Merits).

323. *See id.* (Schwebel, J. dissenting) (Judgment on Merits).

324. *Cf. id.* at 340 (the majority's interpretation "appears to offer—quite gratuitously—a prescription for the overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival") (Schwebel, J. dissenting) (Judgment on Merits).

325. *See* M. MCDOUGAL & F. FELICIANO, *supra* note 242, at 241-44.

ized by aggression to respond with carefully tailored coercive measures, which would prevent escalation of the conflict and further loss of life.[326] In the foregoing hypothetical, the ICJ's rule would require a state attacked by rebel forces that had been armed with sophisticated weaponry by the aiding state to abstain from responding with force against the aiding state until it more directly supported those rebels. The attacked state, therefore, could respond with force only after the conflict had escalated. Adherence to the ICJ's rule would result in increased destruction of human and material values and, potentially, a full-blown international conflict—the very tragedies international standards of coercion control should be designed to prevent. Conversely, the ICJ's rule would encourage aggressor states to employ indirect armed coercion, knowing that the victim state could not retaliate legally with force.

In the post-World War II era, the majority of conflicts have evolved after states supported insurgencies that attacked the de jure governments of other states.[327] The realities of contemporary warfare underscore, therefore, the potentially disastrous consequences of the ICJ's rule.

The second problem with the ICJ's interpretation is that it conflicts with the General Assembly's interpretation of article 3(g).[328] This inconsistency is troublesome, particularly in light of the General Assembly's unanimous adoption of the Definition.[329]

During prolonged debates prior to the General Assembly's final agreement on a definition of aggression, the parties to the debates advanced two essentially different views concerning whether indirect aggression, such as providing weapons and logistical support to irregular combatants, could constitute an armed attack. One group of states maintained that indirect aggression should not constitute an armed attack entitling the victim state to respond with force in self-defense.[330] Another group of states opposed this position. The opposing states contended that, because certain types of indirect aggression were functionally equivalent to direct

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326. *See id.*

327. *See generally* Luard, *supra* note 7, at 7-25 (discussing series of incidents in which states have intervened in other states by supporting anti-government rebels).

328. The ICJ's interpretation also is inconsistent with the General Assembly's view as expressed in a number of other resolutions. *See supra* notes 293-95 and accompanying text.

329. *See* W. MALLISON & S. MALLISON, *supra* note 243, at 15.

330. *See* 25 U.N. GAOR Special Comm. (20th mtg.) at 10, U.N. Doc. A/8719 (1970) [hereinafter *Aggression Meeting*], cited in 1986 I.C.J. at 332 (Schwebel, J. dissenting) (Judgment on Merits).

aggression, both direct and covert aggression justified the responsive use of force in self-defense.[331]

While the General Assembly was exploring possible definitions of aggression, thirteen small and middle power states presented a draft definition that specifically excluded indirect uses of force.[332] The "Thirteen Power" draft also expressly prohibited states from employing self-defense to counteract uses of force achieved by covert means:

> When a state is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer, or armed bands organized or supported by another state, it may take all reasonable and adequate steps to safeguard its existence and institutions, without having recourse to the right of individual or collective self-defense against the other state under Article 51 of the [UN] Charter.[333]

Professor Julius Stone concluded that the purpose of the "Thirteen Power" provision was "to take away the right of individual and collective self-defense" in response to indirect aggression "both by withholding the stigma of aggression, and by express statement."[334]

In contrast, both the Soviet Union and six middle and large powers—Australia, Canada, Italy, Japan, the United Kingdom, and the United States—maintained that indirect aggression could constitute an armed attack.[335] The Soviet Union's draft definition identified as prohibited forms of armed aggression "[t]he use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory

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331. *See Aggression Meeting*, *supra* note 330, at 11-12.

332. *Id.* at 10.

333. *Id.*

334. J. STONE, CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION 89 (1977), *quoted in* 1986 I.C.J. at 342 (Schwebel, J. dissenting) (Judgment on Merits). Professor Stone has criticized the UN's efforts to define aggression, contending that these efforts are fruitless because a workable definition of aggression must be "clear and precise enough for certain and automatic applications to all future situations." J. STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 10 (1958). However, as the Mallisons have observed, Professor Stone misconceives the function of law-making:

> His criticism . . . is based upon a misunderstanding of the function of legal principles, rules and definitions. Their function is not to displace human decision-makers in the Security Council or elsewhere by predetermining particular decisions. It is rather to provide the agreed upon community standards which implement the Charter in a more detailed manner. It should be obvious that the intelligence and integrity of human decision-makers are required to apply any definition to a particular factual situation.

W. MALLISON & S. MALLISON, *supra* note 243, at 14.

335. *See Aggression Meeting*, *supra* note 330, at 10.

of another State and engagement in other forms of subversive activity involving the use of armed force with the aim of promoting an internal upheaval in another State. . . ."[336] The Soviet draft permitted states to respond with force to such acts in self-defense.[337] The "Six Power" draft definition similarly treated some types of covert aggression as tantamount to an armed attack, including: "[o]rganizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate another State; . . .organizing, supporting or directing violent civil strife or acts of terrorism in another state; or . . . organizing, supporting, or directing activities aimed at the violent overthrow of the Government of another State."[338]

The Soviet and Six Power approach towards indirect aggression unanimously prevailed when the General Assembly adopted article 3(g) of Resolution 3314.[339] Article 3(g) makes no distinction between direct and indirect aggression; it treats "substantial involvement" in the "sending" of irregular forces that commit subsequent acts of sufficient gravity as armed aggression or an armed attack. Moreover, article 3(g) does not preclude states from responding to the indirect uses of force, which the article identifies as aggression, with force in self-defense.

In its majority holding, however, the ICJ majority drew a distinction between direct and indirect aggression. It tacitly accepted the Thirteen Power approach that the General Assembly unanimously rejected in adopting article 3(g). The ICJ's interpretation, moreover, is inconsistent with both the United States and Nicaragua's interpretation of article 3(g). In its application to the ICJ, Nicaragua contended, *inter alia*, that the United States had committed aggression in violation of the OAS and UN Charters "in recruiting, training, arming, equipping, financing, supplying, and otherwise encouraging, supporting, aiding and directing military and paramilitary actions in and against Nicaragua . . . ."[340] The United States officially agreed with Nicaragua's characterization of the international legal prohibition on indirect aggression:

> A nation that provides material, logistics support, training, and facilities to insurgent forces fighting against the government of another state is engaged in the use of force legally indistinguishable from conventional military operations by regular armed forces. As with conventional uses of

336. *Id.* at 8.
337. *See id.*
338. *Id.*
339. *See* 1986 I.C.J. at 343 (Schwebel, J. dissenting) (Judgment on Merits).
340. *Id.* at 18 (Judgment on Merits). Nicaragua advanced several other claims against the United States. *See id.* at 18-19.

> force, such military action is permissible under international law if it is undertaken in the exercise of the right of individual or collective self-defense in response to an unlawful use of force. But such action is unlawful when it constitutes unprovoked aggression.[341]

The third flaw of the ICJ's interpretation is that the interpretation conflicts with state practice. A number of states have responded individually to indirect armed coercion in a manner affirming that such conduct does constitute an armed attack. During the Algerian War, for example, France maintained that Tunisia had committed an armed attack by providing Algerian Rebels with a base of operations.[342] In self-defense, France then attacked the Tunisian base.[343]

In 1958, the Lebanese Government similarly maintained that it was entitled to take defensive measures against the United Arab Republic to redress the United Arab Republic's alleged support of irregular combatants, asserting in the UN 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. . . . [I]s 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?[344]

Moreover, the Lebanese Government apparently requested privately that the United States unilaterally employ armed force on its behalf to deal with the externally-supported insurrection.[345]

The actions taken by Egypt relating to the conflict in Yemen in 1963 and 1964 likewise demonstrate that indirect aggression constitutes an armed attack. In 1963, Egypt conducted several military raids into Saudi Arabian territory.[346] In responding to a Saudi Arabian complaint filed with the UN Secretary-General, the Egyptian delegate responded that the raids were justified because of Saudi support for the Yemeni rebels:

> It is no secret that aggression against Yemeni territory emanated from inside Saudi Arabia, huge sums of money were tendered to incite merce-

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341. *Revolution, supra* note 3, at 1.

342. R. HIGGINS, *supra* note 298, at 204 n.73.

343. *See id.*

344. *See* 13 U.N. SCOR (833d mtg.) at 3, U.N. Doc. S/PV.833 (1958) (emphasis added).

345. Kerr, *The Lebanese Civil War*, in THE INTERNATIONAL REGULATION OF CIVIL WARS, *supra* note 7, at 65, 76. The United States subsequently sent military forces to aid the Lebanese Government. *See id.* at 76-78.

346. Schmidt, *The Civil War in Yemen*, in THE INTERNATIONAL REGULATION OF CIVIL WARS, *supra* note 7, at 125, 138.

> naries and provide them with arms to fight the people of Yemen, centers were established in Saudi Arabia to train those mercenaries in sabotage and laying mine fields. Furthermore, a flow of arms and ammunition were sent across the frontier to entice tribes to rise against their Government. . . . Obviously, therefore, the Government of Saudi Arabia should be the last to complain or protest.[347]

The OAS response to Venezuela's 1963 complaint[348] against Cuba unequivocally supports Judge Schwebel's view that indirect aggression achieved by supporting rebel groups may be legally tantamount to an armed attack. Venezuela charged Cuba with "acts of aggression and intervention" because Cuba was providing arms and other support to anti-government rebels attempting to invade Caracas.[349] The OAS Organ of Consultation passed a resolution recognizing that continuing Cuban aggression against Venezuela would entitle OAS members to employ force unilaterally in either collective or individual self-defense. The resolution warned the Cuban Government that:

> if it should persist in carrying out acts that possess the 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 . . . .[350]

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347. *Id.*

348. Request of the Government of Venezuela, 1963-64, 2 INTER-AMERICAN RECIPROCAL ASSISTANCE APPLICATIONS 1960-64, at 181-90 (Pan-American Union 1964).

349. *Id.* at 190.

350. Final Act, Ninth Meeting of Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F./II.9 doc. 48, rev. 2 (1964), *reprinted in* 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 820 (1971). *See* INTER-AMERICAN INSTITUTE OF LEGAL STUDIES, THE INTER-AMERICAN 118, 170, 199 (1966).

Various states also have presented protests to the UN that suggest providing anti-government rebels with weaponry and other forms of aid constitutes aggression. In 1946, for example, Greece brought a complaint before the UN Security Council, alleging that Bulgaria, Albania, and Yugoslavia were committing unlawful aggression by providing arms and other support to anti-government rebels battling the Greek government. *See* 1 U.N. SCOR Supp. (No.10) Annex (No.16) at 169-71, U.N. Doc. S/203 (1946). In 1953, Burma presented a similar complaint to the General Assembly, contending that the Chinese Government of Formosa was committing prohibited aggression by aiding anti-government rebels. *See* 7 U.N. GAOR Annex (Agenda Item 77) at 1-2, U.N. Doc. A/2375 (1953). In 1954, Guatemala also appealed to the Security Council to "put a stop to the aggression in progress against it" after the CIA began supporting rebels based in Honduras who sought to overthrow the leftist government of Jacobo Arbenz. *See* Nanda, *The United States Action in the 1965 Dominican Crisis: Impact on World Order—Part II*, 44 DEN. L. J. 225, 247-48 (1967). *See also* W. KANE, CIVIL STRIFE IN

State practice and the negotiating history of Resolution 3314 support Judge Schwebel's definition of indirect aggression and demonstrate the fallacy of the ICJ majority's rule of law. Commentators, therefore, most likely will follow Judge Schwebel's interpretation in appraising the Reagan Administration's legal justification for assisting the Contras.

While the acts delineated above may be legally tantamount to an armed attack, Resolution 3314 requires these acts to be of "such gravity" to qualify as an attack by that state's conventional military forces.[351] A victim state must satisfy a two-pronged test before an act of indirect armed coercion will constitute an armed attack entitling the victim to respond with force in self-defense. The test provides that: 1) an aggressor state must substantially support rebels attacking the victim state; and 2) the attacks the rebels commit as a result of that support must be of sufficient gravity.[352]

IV. APPRAISAL OF THE MERITS OF THE REAGAN ADMINISTRATION'S POSITION UNDER GOVERNING LEGAL PRINCIPLES

United States support for the Contras and other coercive measures against Nicaragua must satisfy several requirements to constitute a lawful exercise of collective self-defense. First, Nicaragua's support of the FMLN must have constituted an armed attack against El Salvador, as the United States right to employ collective self-defense is contingent upon El Salvador's right to employ individual self-defense.[353] Second, if the first requirement of an armed attack was not satisfied, then the United States, under article 6 of the Rio Treaty, must have obtained prior OAS approval of any coercive measures taken against Nicaragua.[354] Third, assuming satisfaction of the first armed attack requirement, the Rio Treaty requires that El Salvador have requested specifically that the United States come to its aid in collective self-defense.[355] Fourth, assuming that the United States met the first and third requirements, its use of force could constitute lawful collective self-defense only

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LATIN AMERICA: A LEGAL HISTORY OF U.S. INVOLVEMENT 186-97 (1972) (discussing United States conduct towards the Arbenz Government); Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 1967 42 BRIT. Y.B. INT'L L. 175, 181 (detailing the UN Security Council's attempt to condemn United States conduct).

351. Definition of Aggression, art. 3(g).

352. *Accord* Note, *Framework*, *supra* note 307, at 170.

353. *See supra* text accompanying note 288.

354. *See supra* text accompanying note 279.

355. *See supra* text accompanying note 287.

if all coercive measures taken comported with the principles of prior resort to peaceful procedures, necessity, and proportionality.[356] Finally, the United States was required to report immediately all measures taken in collective self-defense to the UN Security Council.[357]

Because the evaluation of whether the United States has satisfied the third and fifth requirements involves a much more discrete set of facts than the other requirements, this Article will discuss this discrete set of facts first.

A. *Evaluation of the Rio Treaty Requirement that El Salvador Must Have Requested United States Assistance*

Article 3(2) of the Rio Treaty prohibited the United States from employing force against Nicaragua unless (and until) El Salvador requested that the United States help respond to the threat posed by Nicaragua's conduct.

The evidence supporting El Salvador's assertion that it did lodge a request with the United States is equivocal at best. While attempting to intervene in the ICJ proceedings brought by Nicaragua against the United States, El Salvador asserted emphatically that it had requested United States assistance in responding to Nicaraguan aggression.[358] This after-the-fact assertion, however, does not satisfy the request requirement. El Salvador filed its Declaration of Intervention on August 15,

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356. *See supra* notes 255-73 and accompanying text.

357. *See supra* text accompanying notes 274-75.

358. In its Declaration on Intervention, El Salvador asserted:

> Our nation cannot, and must not remain indifferent in the face of this manifest aggression and violent destabilization of the Salvadoran society which oblige the State and the Government to legitimately defend themselves. For that reason we have sought and continue to seek assistance from the United States of America and from other democratic nations of the world; we need that assistance both to defend ourselves from this foreign aggression that supports subversive terrorism in El Salvador, and to alleviate and repair the economic damage that this conflict has created for us . . . Faced with this aggression, we have been called upon to defend ourselves, but our economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have therefore, requested support and assistance from abroad. It is our natural inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with U.S. Congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world.

1986 I.C.J. at 353 (Schwebel, J. dissenting) (Judgment on Merits).

1984,[359] more than three years after the United States began supporting the Contras. On January 13, 1981, while the FMLN was waging its "final offensive," Salvadoran President Duarte called upon then President-elect Reagan "to export democracy to El Salvador and the world and to increase aid to the government here, particularly economic aid."[360] This statement, however, hardly qualifies as an unambiguous request for the United States to come to El Salvador's assistance in collective self-defense. Beyond this statement and other equally ambiguous statements,[361] there is no evidence that El Salvador publicly requested United States assistance.[362] Deeming it politically unwise to issue a public request, El Salvador privately may have sought United States assistance through diplomatic or intelligence channels. Nonetheless, this possibility is conjecture, because neither the United States nor the Salvadoran Government has disclosed the existence of such a request.

These ambiguous facts raise two legal questions. First, assuming that El Salvador privately requested United States assistance, would that request satisfy article 3(2) of the Rio Treaty, or must such a request be made publicly and formally? Second, assuming that the United States did not receive a request satisfying article 3(2), what is the legal effect of this violation?

Article 3(2) of the Rio Treaty gives no guidance regarding how the first question should be resolved, providing only that states may employ collective self-defense "[o]n the request of the state or states directly attacked." Likewise, state practice under the Rio Treaty, or otherwise, does not establish the form a victim state's request must take.[363]

In the absence of a definitive answer to this question, the purpose of the request requirement must be considered. The request requirement is designed to prevent an "assisting" state from wrongfully imposing its

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359. 1984 I.C.J. at 215 (Order on Intervention).

360. *See supra* note 91 and accompanying text.

361. *See supra* notes 91, 114 and accompanying text; *see also* 1986 I.C.J. at 455-65 (Schwebel, J. dissenting) (Judgment on the Merits).

362. In his exhaustive review of the facts, Judge Schwebel was unable to point to any instance in which El Salvador clearly made a public request for United States assistance. *See* 1986 I.C.J. at 455-65 (Schwebel, J. dissenting) (Judgment on the Merits).

363. The ICJ majority deduced from the language of article 3(2) of the Rio Treaty that customary international law requires both that a victim state must formally declare itself the object of an armed attack and that the victim state must formally request collective self-defense assistance. 1986 I.C.J. at 104. (Judgment on the Merits). However, the Court pointed to no state practice supporting these requirements, and the language of article 3(2), which calls only for a "request of the State or States directly attacked," does not support the majority's interpretation.

will on a victim state that does not desire aid under the guise of an exercise of collective self-defense.[364] This purpose suggests that a freely given request should satisfy article 3(2), whether that request takes the form of a formal, public declaration or of an informal, private communication.[365]

Formal requirements that mandate victim states to request assistance publicly, moreover, seriously would impair the ability of a victim state and its allies to respond covertly to indirect coercion by placing the aggressor state on notice that defensive measures would soon be undertaken. This result could conflict with the fundamental objective of the minimum world order system of limiting the scope and intensity of armed conflicts when they occur. As such, responding to covert aggression with covert defensive measures may, in many instances, serve as a less destructive alternative to direct military confrontation.[366]

For these reasons, the sounder interpretation seems to be that article 3(2) of the Rio Treaty is satisfied whenever a victim state, of its own free will, either privately or publicly, requests assistance from other states in collective self-defense. Therefore, assuming that El Salvador privately requests United States assistance, this request should satisfy article 3(2). Assuming the Salvadoran Government made such a request, the Rio Treaty imposed an affirmative obligation upon the United States to come to El Salvador's aid in collective self-defense.[367]

Whether the Reagan Administration received a Salvadoran request for

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364. *See* 1986 I.C.J. at 545 (Jennings, J. dissenting) (Judgment on the Merits).

365. *See id.* at 545-46.

366. One commentator has argued:

> 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.

Interview with Professor Thomas Franck, Oct. 30, 1984, *quoted in* Note, *Framework*, *supra* note 307, at 178. *Accord* 1986 I.C.J. at 363 (Schwebel, J. dissenting) (Judgment on the Merits). *See* Falk, *The World Court's Achievement*, 81 AM. J. INT'L L. 106, 111 (1987) (suggesting that Judge Schwebel's position regarding the legitimacy of covert operations provides a prescription for exempting such operations from "legal accountability").

367. The ICJ majority also reached this conclusion, ruling in the alternative that, even assuming the United States could have exercised collective self-defense on behalf of El Salvador, it had vitiated that right by employing force against Nicaragua before it received a Salvadoran request for aid. *See* 1986 I.C.J. at 104-05 (Judgment on Merits).

assistance, however, remains a mystery. This uncertainty leads to the second question posed above: If El Salvador did not request United States assistance, either publicly or privately, prior to filing its Declaration of Intervention in August 1984, what is the legal effect of a United States violation of article 3(2) of the Rio Treaty? Article 3(2) expressly conditions exercise of collective self-defense on receipt of "the request of the State or States directly attacked." This unequivocal language clearly suggests that the United States lawfully could not employ force against Nicaragua until the August 1984 receipt of a Salvadoran request. Moreover, the prophylactic purpose of the request requirement dictates that it must be strictly construed. Otherwise, states too easily could abuse the right to exercise collective self-defense by gratuitously providing a victim state with undesired, unnecessary aid.[368]

B. *Evaluation of the Requirement that Measures Taken in Collective Self-Defense Must Have Been Reported to the UN Security Council*

The UN Charter, the OAS Charter, and the Rio Treaty require the United States to report immediately to the Security Council the measures it purports to take in collective self-defense.[369] Because the Reagan Administration never provided the Security Council with a report about the defensive actions it took against Nicaragua,[370] it continuously breached these treaty obligations by supporting the Contras and employing other coercive measures against the Sandinistas.

Unlike a violation of the requirement that a victim state must request assistance before another state may exercise collective self-defense on the victim's behalf, however, it is questionable whether violating the reporting requirement should alone be sufficient to render United States conduct an unlawful use of force. The UN Charter does not address the legal effect of violating the reporting requirement, and the terms of article 51 suggest this requirement is not strictly construed. Article 51 expressly preserves the right to exercise collective self-defense as it existed under customary international law, stating that the UN Charter shall not "impair the inherent right of individual and collective self-de-

368. Indeed, the right of self-defense has been notoriously subject to abuse. To provide only two examples from the World War II era, Germany purported to invade Poland in 1939 in self-defense, and the Soviet Union made the same claim during its 1939 invasion of Finland. Rostow, *supra* note 1, at 451 n.53.

369. *See* U.N. CHARTER art. 51; Rio Treaty, art. 3; OAS Charter, art. 21.

370. *See* Rowles, *supra* note 240, at 402.

fense."[371] The UN Security Council, of course, was an innovation of the Charter that did not exist under customary international law. Interpreting article 51 as precluding a state from exercising collective self-defense unless it notifies the Security Council, therefore, would impair exercise of the customary international legal right of collective self-defense, contrary to the express terms of article 51.

Article 3(1) of the Rio Treaty also protects states parties' "inherent rights" of individual and collective self-defense pursuant to the UN Charter. In preserving the "inherent rights" of self-defense, the Rio Treaty also appears to prohibit the interpretation that the United States lawfully could not exercise collective self-defense unless it notified the UN Security Council.

Assuming that the United States satisfied the request requirement and the other requirements discussed below, the Reagan Administration's violation of the reporting requirement, therefore, should not have vitiated the United States right to employ collective self-defense on behalf of El Salvador.[372] Nonetheless, the Reagan Administration greatly would have strengthened its claim regarding the lawfulness of United States conduct had it complied with this reporting requirement.

C. *Evaluation of the Remaining Requirements Governing the Lawful Exercise of Collective Self-Defense*

The analysis of United States compliance with the preceding two procedural requirements presupposed that the United States had the right to exercise collective self-defense. The threshold substantive requirement governing whether the United States had such a right, is that Nicaragua have committed an armed attack against El Salvador.

Under the above interpretation of article 3(g) of the Definition of Aggression, the support Nicaragua gave to the Salvadoran Rebels by providing weapons, training, and logistical support constituted prohibited

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371. *See supra* note 241 and accompanying text.

372. It has been noted, however, that:

> The individual Members cannot, on the one hand, delegate primary responsibility for the maintenance of international peace and security to the Security Council (Article 24), and on the other hand, claim this right of unilateral action to support any state which they consider to be acting in self-defence. This sort of freedom of alliance cannot stand together with a system of collective security as centralized as the United Nations Charter. The Charter clearly intends that the prohibition of Article 2(4) will admit of only the minimum exception of self-defence, strictly construed, and subject to the overriding authority of the Security Council.

Bowett, *Collective Self-Defence Under the Charter of the United Nations*, 1955-56 BRIT. Y.B. INT'L L. 130, 139.

aggression.[373] It is irrelevant under this interpretation that Nicaragua did not actually send the FMLN to El Salvador to commit acts of force, because Nicaragua's support of the FMLN constitutes "substantial involvement" in anti-government activities.[374]

Under the operational test formulated to identify the types of indirect aggression that permit the responsive use of force in self-defense, El Salvador could respond to Nicaragua's conduct with force in self-defense only if it satifies a two prong test. Under the first prong, the Sandinistas must have provided the Salvadoran Rebels with substantial support.[375] Under the second prong, the Rebels must have committed acts of sufficient gravity against El Salvador to qualify as an invasion, attack, or analogous acts by Nicaragua's conventional military forces.[376] Both prongs of this test must be satisfied to constitute an armed attack against El Salvador.[377]

This Article will undertake in two parts the discussion of whether Nicaraguan conduct constituted an armed attack against El Salvador. The first part will consider whether Nicaragua committed an armed attack on El Salvador at any time during the period between 1980 and late 1983, and the second part will evaluate whether Nicaragua committed an armed attack against El Salvador at any time between late 1983 and 1986.

1. Appraisal of Nicaraguan and United States Conduct from 1980 to Mid-1983

The facts indicate that from 1980 through January 1981, Nicaragua's aid to the Rebels met the substantial support prong of the operational test, therefore qualifying as an armed attack against El Salvador. During this period, while President-elect Reagan was preparing to enter office,

373. *See supra* notes 328-52 and accompanying text.

374. *See supra* text accompanying notes 351-52.

375. *See supra* note 352 and accompanying text.

376. *Id.*

377. If, for example, Nicaragua had substantially supported the Rebels, but the Rebels did not commit acts of sufficient gravity, then Nicaragua's support of the Rebels would not be tantamount to a direct armed attack by the Nicaraguan military entitling either El Salvador or the United States to respond with force in self-defense. Conversely, if the Rebels had committed acts of sufficient gravity, but the Sandinistas had not provided them with substantial assistance, then Nicaragua's aid to the Rebels again would fail to qualify as an armed attack. In this case, the Rebels' actions against the Salvadoran Government might be functionally equivalent to an armed attack against El Salvador by a state's conventional military forces, but the Rebels' conduct could not be imputed to Nicaragua.

the Sandinistas transported extremely large shipments of arms to the Salvadoran Rebels.[378] The Sandinistas, moreover, facilitated the FMLN's highly destructive "final offensive" in which the Rebels sought to overthrow the Salvadoran Government.[379]

The actions that the Rebels took against the Salvadoran Government during January 1981, in turn, satisfied the second prong of the test, which requires that externally supported irregular combatants commit acts of sufficient gravity. After receiving the necessary arms and other forms of support from Nicaragua, the Rebels committed approximately fifty strikes within El Salvador during the "final offensive" that collectively are analogous to an attack or invasion by Nicaragua's conventional military forces.[380]

After their offensive failed in February 1981, however, the Rebels dramatically decreased their anti-government actions.[381] Concurrently, the Sandinistas reduced their support to the Rebels.[382] Between approximately February 1981 and the spring of 1982, the Rebels remained relatively quiescent and the Sandinistas continued to provide them with decreased levels of support.[383] These facts demonstrate that Nicaragua's support for the Salvadoran Rebels during this period did not satisfy either prong of the test for qualifying as an armed attack against El Salvador. Nicaragua's decreased support for the Rebels may have been insufficient to qualify as substantial aid and the Rebels' anti-government actions were too insignificant to satisfy the gravity requirement. Because both of these requirements must be met, Nicaragua's continuing, albeit decreased, aid to the Rebels arguably was insufficient to constitute an armed attack against El Salvador.

The realities of covert assistance, however, counsel against a mechanical application of this test. Nicaragua admittedly did reduce its support to the Salvadoran Rebels beginning in February 1981, but only after the Rebels had waged their highly destructive final offensive. This offensive was made possible by an infusion of Nicaraguan arms so massive that the FMLN could not conceal the arms shipments from the Salvadoran Government's detection.[384] After the Sandinistas effectively had glutted the FMLN's arms market, a sudden reduction of Nicaraguan aid (the

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378. *See supra* text accompanying notes 78-79.
379. *See supra* text accompanying notes 80-92.
380. *See supra* text accompanying notes 85-88.
381. *See supra* text accompanying notes 89-90.
382. *See supra* text accompanying note 110.
383. *See supra* text accompanying notes 113-22.
384. *See supra* text accompanying note 80.

purpose of which may have been to enable the FMLN to assimilate the previous arms shipments) was insufficient to lessen significantly the threat that the Sandinistas' conduct posed to El Salvador.

Under these circumstances, given the absence of any guarantee that Nicaragua would not resume its previous levels of support to the FMLN, a complete withdrawal of United States aid to the Contras could have permitted the Sandinistas subsequently to redouble arms shipments and other forms of support after the Contras ceased to be a viable counter-force. Therefore, assuming that the Contras had been serving as an effective vehicle for redressing Nicaraguan support of the FMLN, the United States might have deprived itself of the least destructive means for exercising collective self-defense on behalf of El Salvador. The end result of this sequence of events could have been that the only means for United Staes defense of El Salvador was direct military confrontation with Nicaragua and the escalation of armed conflict, a result plainly at odds with the objectives of the minimum world order system.

These considerations, which involve indirect aggression, support a loosening of the juridical requirement that peaceful procedures must be exploited prior to employing any form of force when an armed attack is not actually occurring. There should be some "die-down period" following the occurrence of an armed attack, achieved by support of irregular combatants before a victim state's allies must cease all defensive measures.[385] Accordingly, the United States arguably had the right to continue employing necessary and proportionate coercive measures against Nicaragua to insure that the Sandinistas had reduced their support for the FMLN for a sufficiently prolonged period, which limited the FMLN's ability to exert force against the Salvadoran Government.

Even assuming that the United States had a right to continue employ-

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385. In this regard, ICJ Judge Ago observed in a report to the UN International Law Commission:

> There remains the third requirement, namely that armed resistance to armed attack should take place immediately, i.e. while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier. If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole. At all events, practice and doctrine seem to endorse this requirement fully, which is not surprising in view of its plainly logical link with the whole concept of self-defence.

Addendum to the Eighth Report on State Responsibility, [1980] 2 Y.B. INT'L L. COMM'N 13, 70.

ing force against Nicaragua for some period after Sandinista support of the FMLN last qualified as an armed attack, it is doubtful whether the Reagan Administration was entitled to employ force to the exclusion of other means of redressing Nicaraguan misconduct during the entire period between February 1981 and the spring of 1982. The potential abuse that could flow from broadly asserting the United States right to exercise collective self-defense dictates that the Reagan Administration was under an obligation to pursue peaceful procedures, in addition to coercive measures, during this period.

During the spring of 1982 and continuing through mid-1983, Nicaragua renewed its assistance to the Salvadoran Rebels, providing arms, training, bases of operation, and command and control facilities, some of which were located in Managua.[386] This level of support appears to satisfy the substantial support prong of the operational test.

Beginning in June 1982 and continuing through January 1983, the Rebels again committed sufficiently serious acts to satisfy the gravity prong of this test. With substantial aid from Managua, the Rebels launched three new and progressively more destructive offensives in which they captured villages, repeatedly engaged the Salvadoran military in combat, and ultimately closed El Salvador's east-west transportation routes, severely disrupting the country's trade.[387] Moreover, the Rebels engaged the Salvadoran military in confrontations that one observer analogized to conventional warfare between the armed forces of two states.[388]

Several legal scholars assert that the United States violated the Rio Treaty during this period by failing to procure OAS approval prior to employing force against Nicaragua in collective self-defense.[389] This assertion, however, is inconsistent with article 3(2) of the Rio Treaty, which establishes a state party's responsibilities when an armed attack has occurred, expressly authorizing a party, "[o]n the request of the State or States directly attacked, [to] determine the immediate measures which it may take individually in collective self-defense."[390] Because Nicaragua committed armed attacks against El Salvador during 1981 to mid-1983, the United States was entitled to exercise collective self-defense without consulting the OAS, assuming of course that the Reagan Administration first had received a Salvadoran request for assistance.

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386. *See supra* text accompanying note 113.
387. *See supra* notes 115-22 and accompanying text.
388. *See supra* text accompanying note 120.
389. *See, e.g.*, Joyner & Grimaldi, *supra* note 1, at 665-66.
390. *See supra* notes 280-83 and accompanying text.

A state is under no obligation to exploit peaceful procedures prior to exercising collective self-defense if an armed attack of sufficient gravity is in the process of occurring.[391] Therefore, the Reagan Administration was not required to employ peaceful procedures from late 1980 through the Rebels' unsuccessful final offensive in February 1981, nor again during the spring of 1982 through mid-1983, when Nicaraguan and FMLN conduct constituted a sufficiently grave armed attack on El Salvador. Further, the United States did not aid El Salvador on the first occasion that an armed attack occurred.[392] The Salvadoran Government put down the Rebels' January 1981 offensive by itself.

During the period between February 1981 and spring 1982, in which Sandinista support of the FMLN and the FMLN's antigovernment activities decreased to levels not qualifying as an armed attack on El Salvador, some analysts suggested that the United States may have had a right to continue employing necessary and proportionate coercive measures against Nicaragua, but only if the Reagan Administration also exploited peaceful procedures. Requiring a resort to peaceful procedures imposes a duty upon states to pursue good faith negotiations.[393] The Reagan Administration, however, never attempted to secure a negotiated solution through the OAS.[394] The United States failure to exploit the OAS procedures for peaceful dispute resolution in favor of a unilateral policy supporting the Contras casts doubt upon the sincerity of the Administration's commitment to negotiate with the Sandinistas.

The Administration's conduct of bilateral negotiations with Nicaragua likewise is susceptible to the charge of bad faith. President Reagan made no effort to explore diplomatic channels before laying the foundation for responding with force to the Sandinistas' conduct by authorizing the CIA in March 1981 to conduct covert operations against Nicaragua.[395] Then, in April 1981, the Reagan Administration ignored the Sandinista Government's attempt to initiate negotiations.[396] For the remainder of 1981, despite its own admission that Nicaragua had reduced aid to the FMLN significantly,[397] the Administration made only one attempt to negotiate with the Sandinistas.[398] Moreover, the Administration withdrew from those talks in October 1981 after Nicaragua balked at the United States

391. *See supra* text accompanying note 255.
392. *See supra* text accompanying note 91.
393. *See* W. MALLISON & S. MALLISON, *supra* note 243, at 21.
394. *See* Rowles, *supra* note 240, at 401-02.
395. *See supra* text accompanying note 92.
396. *See supra* text accompanying notes 95, 98.
397. *See supra* text accompanying note 95.
398. *See supra* notes 96-103 and accompanying text.

failure to follow through with the agreed course of negotiations.[399] Thereafter, the Administration made no further diplomatic efforts, implementing instead, in December 1981, its plan for supporting the Contras,[400] who then began anti-government operations within Nicaragua.[401]

Successful negotiations are not a prerequisite for compliance with the principle of resort to peaceful procedures, but the Reagan Administration's conduct between February 1981 and spring 1982 reveals a consistent tactical preference for employing coercion rather than negotiation to deal with Nicaraguan conduct. That preference, particularly in the face of viable opportunities to negotiate, strongly suggests that the United States did not resort to peaceful procedures, and correspondingly undermines the Administration's claim that the United States lawfully exercised collective self-defense on behalf of El Salvador during this period.

In addition to the obligation to resort to peaceful procedures during the period between February 1981 and spring 1982, the United States was obligated to comply with the principle of necessity throughout the entire period beginning in 1981 and ending in mid-1983. This principle requires that the Reagan Administration have taken only those measures actually necessary to end the threat Nicaragua's conduct posed to El Salvador.[402]

The Reagan Administration, at least colorably, complied with the necessity principle during this period. Nicaragua's provision of weapons and other forms of support to the FMLN during this period unquestionably posed a serious threat to the de jure government of El Salvador and coalesced with the FMLN's paramilitary activities against El Salvador, qualifying as an armed attack by Nicaragua's conventional military forces. Taking the Reagan Administration's purported objective in supporting the Contras at face value, use of the Contras as a means for interdicting the Nicaraguan arms shipments that were enabling the FMLN to wage their highly destructive offensives in El Salvador appears necessary to respond to Nicaraguan aggression.

It furthermore was not unlawful for the United States-supported Contras to operate inside Nicaraguan territory if those operations were necessary to lessen the threat posed to El Salvador.[403] Taking the Contras' purported purpose at face value, factual considerations suggest that operations within Nicaragua were necessary. Interdicting arms at their Nica-

399. *See supra* text accompanying note 104.
400. *See supra* text accompanying notes 106-09.
401. *See supra* text accompanying notes 111-12.
402. *See supra* text accompanying notes 259-60.
403. *See supra* notes 288-91 and accompanying text.

raguan source presumably would have been far more effective in reducing the number of arms reaching the FMLN than would interdiction efforts aimed at locating the shipments once they had been divided into small caches in El Salvador for distribution to FMLN forces located throughout the country.

The Reagan Administration's apparent failure to negotiate in good faith in the period between 1981 and mid-1983, however, suggests that its support of the Contras may have violated the necessity principle. Recall that the principle of necessity overlaps with the principle of resort to peaceful procedures because the necessity principle precludes states from using force in self-defense unless there are no other means for dealing with the initiating coercion,[404] and because one indication that such a use of force was necessary is that peaceful means for resolving the threat posed by another state's conduct were unavailable.[405] It follows that the Reagan Administration's failure to exploit peaceful means of dispute resolution, despite the Sandinistas' willingness to negotiate, casts doubt upon whether such extensive support of the Contras actually was necessary to halt Sandinista aggression against El Salvador.

Whether the Reagan Administration complied with the principle of proportionality between 1981 and mid-1983 is debatable. The principle of proportionality prohibits a victim state and its allies from responding with defensive measures that expand the values of the responding states at the expense of the values of the aggressor state. The principle prohibits defensive measures designed to overthrow the aggressor state's government except in extraordinary instances in which no less drastic means for halting the aggressor state's conduct are available.[406] The opportunities the Sandinistas presented for negotiations indicate that the Reagan Administration plainly had less drastic means for ending Nicaragua's aggression against El Salvador. Accordingly, the principle of proportionality prohibited the United States from pursuing defensive measures seeking the overthrow of the Sandinista Government.

The Contras openly admitted that their objective always has been to topple the Sandinista Government,[407] and their conduct from the very beginning was consistent with that objective. When the Contras first be-

404. *See supra* text accompanying note 261.

405. *See supra* text accompanying note 262.

406. *See supra* text accompanying note 273.

407. *See supra* text accompanying note 146, Sept. 5, 1985 Affidavit of Edgar Chamorro, (Nicar. v. U.S.) 1985 I.C.J. Pleadings 11 (Contra leader stating that "our goal, and that of the CIA as well (as we were repeatedly assured in private), was to overthrow the Government of Nicaragua, and to replace the Sandinistas as a government."), *quoted in* Reichler & Wippman, *supra* note 1, at 470.

gan their anti-government operations, they directed their actions not at interdicting arms, but at disrupting Nicaragua's economy and political system.[408] As the Contras gained strength in 1982 and 1983, the escalated actions they took against economic and political targets unrelated to interrupting arms shipments reaffirmed that objective.[409]

The most unequivocal proof that the Reagan Administration shared the Contras' objective occurred after 1983. In 1984, it was revealed that the CIA had published the manual *Psychological Operations in Guerrilla Warfare*, which advised the Contras how to "shake up the Sandinista structure, and replace it."[410] Then, in 1985, President Reagan himself admitted that the purpose of supporting the Contras was to "remove" the Sandinista Government "in the sense of its present structure."[411]

Nonetheless, evidence suggests that the Reagan Administration shared the Contras' objective from the outset. The National Security Council document accompanying the December 1981 National Security Directive 17 in which President Reagan authorized the CIA to support the Contras made no mention of arms interdiction. Instead, the document stated that the CIA would support the Contras to enable "the opposition front . . . [to] engage in paramilitary and political operations in Nicaragua."[412] This document, composed at the formative stage of the President's Contra policy, strongly suggests that the Administration and the Contras always shared the objective of toppling the Sandinista Government. Congress' 1983 enactment of the Boland Amendment likewise supports this interpretation. After concluding that the Contras were intent on overthrowing the Sandinista Government, Congress passed this amendment to prevent the Reagan Administration from facilitating the Contras' efforts.[413]

Even assuming that the Reagan Administration did not come to share the Contras' objective until some time after 1983, it is highly unlikely that the Administration was unaware of their objective. The concept of indirect aggression under article 3(g) of the Definition on Aggression is predicated upon a form of vicarious liability: a state commits aggression when it provides irregular combatants with substantial support enabling them to commit prohibited acts of force in another state, regardless of

408. *See supra* text accompanying notes 111-12.
409. *See supra* text accompanying notes 134-36.
410. *See supra* text accompanying note 199.
411. *See supra* notes 216-17 and accompanying text.
412. *See supra* text accompanying note 109.
413. *See supra* text accompanying notes 137, 139-40.

whether the violating state actually directed or exercised command control over the Rebels taking the unlawful actions.[414] Similarly, the theory underlying the concept of indirect aggression would seem to entail imputing the Contras' unlawful objective to the United States, particularly given the Reagan Administration's almost certain knowledge of the Contras' objective. Thus, the Administration's active support and encouragement of the Contras' efforts in battling the Nicaraguan Government constituted a disproportionate use of force regardless of whether it shared the Contras' goal of overthrowing the Sandinistas.[415]

2. Appraisal of Nicaraguan and United States Conduct from Late 1983 to 1986

The evidence regarding Sandinista support of the FMLN after mid-1983 paints a picture radically different from the evidence prior to mid-1983. This evidence unequivocally suggests that the Sandinistas provided levels of support insufficient to qualify as an armed attack on El Salvador.

Whether the result of a conscious policy or an unanticipated benefit, the 1983 United States invasion of Grenada apparently convinced the Sandinistas that providing substantial support to the FMLN posed the unacceptable risk of a United States invasion of Nicaragua. After the Grenada invasion, the evidence uniformly indicates that the Sandinistas drastically curbed their support of the Salvadoran Rebels.[416] Even the United States Department of State conceded that the Sandinistas' aid to the Rebels evidenced a "notable decline" following the Grenada invasion.[417] Furthermore, in the period between the Grenada invasion and late 1986, the evidence uniformly suggests that the Sandinistas never resumed providing the Rebels with substantial support.[418]

This evidence plainly fails to satisfy the first prong of the operational test that Nicaragua substantially have supported the FMLN to justify an armed attack on El Salvador. Any acts of aggression committed by the FMLN against El Salvador consequently could not be imputed to Nica-

414. *See supra* notes 342-50 and accompanying text.

415. *Cf. Draft Articles on State Responsibility*, art. 8(a), [1978] 2 Y.B. INT'L L. COMM'N 78, U.N. Doc. A/CN.4/SERV.A/1978/Add. 1 (Part 2) (providing that "[t]he conduct of a person or group of persons shall also be considered an act of the State under international law if . . . it is established that such person or group of persons was in fact acting on behalf of that state.").

416. *See supra* notes 159-66 and accompanying text.

417. *Revolution*, *supra* note 3, at 10.

418. *See supra* text accompanying notes 183-84.

ragua.[419] Therefore, the Salvadoran Government had no right to employ force against Nicaragua in individual self-defense between late 1983 and late 1986. As a result, since late 1983, the Reagan Administration violated international law by continuing to employ force against Nicaragua when the United States had no right to exercise collective self-defense on behalf of El Salvador.

Because Nicaragua at no time between late 1983 and late 1986 committed an armed attack on El Salvador, article 6 rather than article 3 governed United States obligations under the Rio Treaty during this period.[420] Article 6 requires the United States to obtain OAS approval prior to responding with force against Nicaragua.[421] By continuing to resort unilaterally to supporting the Contras, and to using other forms of force throughout this period, the Reagan Administration continuously breached United States obligations under the Rio Treaty.

The Reagan Administration's compliance with the necessity principle also may be appraised summarily: the actions the United States took against Nicaragua violated the necessity principle. Because Nicaragua did not commit an armed attack on El Salvador from late 1983 to late 1986, there was no actual necessity for the United States to employ force against Nicaragua on El Salvador's behalf.

In the absence of an armed attack against El Salvador, peaceful procedures were the Reagan Administration's sole lawful means for redressing Nicaraguan support of the FMLN.[422] The Reagan Administration, however, violated the requirement of resort to peaceful procedures both by failing to pursue negotiations in good faith and by continuing to employ force against Nicaragua.

In the face of the Sandinstas' drastic reduction in aid to the FMLN in late 1983, the Administration rebuffed several Nicaraguan attempts to initiate talks, even though the Sandinistas had offered to discuss virtually all of the issues—including complete withdrawal of support to the

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419. *See supra* text accompanying notes 378-90. Despite decreased assistance from Nicaragua, the Salvadoran rebels continued to launch attacks against the Salvadoran Government. *See, e.g., The Air War and Political Developments in El Salvador: Hearings Before the House Subcomm. on Western Hemisphere Affairs for the House Comm. on Foreign Relations*, 99th Cong., 2d Sess. 104-05 (1986) (Prepared Statement of former Salvadoran Ambassador to the United States Ernesto Rivas-Gallont); *Seized Papers Said to Reveal Salvadoran Rebel Plan*, Wash. Post, July 11, 1987, at A16, cols. 2-3; *Salvadoran War Will Widen Rebel Warns*, Los Angeles Times, July 7, 1985, at A12, col. 1; *Salvador Puts Guerrillas on the Defensive*, N.Y. Times, May 19, 1985, at D1.

420. *See supra* text accompanying notes 277-83.

421. *See supra* text accompanying note 277.

422. *See supra* notes 256, 261-62 and accompanying text.

FMLN—about which the Administration previously had voiced concern.[423] In 1984, the Administration missed another opportunity to resolve the dispute peacefully when it refused to participate in the proceedings Nicaragua brought against it before the ICJ.[424]

The Reagan Administration, moreover, repeatedly frustrated the Contradora Group's efforts to forge a negotiated solution to the Central American conflict.[425] First, the Administration simply ignored the Nicaraguan proposal which provided most of the criteria the Contradora Group had identified as necessary to achieve a negotiated settlement.[426] Then, the Administration rebuffed the Contradora Group's efforts to initiate bilateral negotiations in January 1985.[427] When the Group attempted to revitalize the multilateral process in February 1986, the Administration ensured that the process would be short-lived, insisting that the United States would not negotiate with the Sandinistas until they agreed to negotiate with the Contras.[428] Although they agreed to negotiate on every other issue of United States concern, the Sandinistas consistently had maintained that they would not entertain direct negotiations with the Contras, and thus, they predictably rejected this demand.[429]

Even after the 1986 Iran-Contra affair deprived the Reagan Administration of the congressional majority necessary to maintain its Contra support policy, the Administration impeded a negotiated solution to the Central American conflict. The United States stubbornly refused to participate in the Arias peace plan, which was born from the ashes of Contradora.[430]

The events following late 1983 demonstrate that, by any objective measure, the Reagan Administration had achieved its self-professed goal of supporting the Contras to force the Sandinistas to negotiate. The Sandinistas severely reduced their support to the FMLN and returned to the bargaining table in earnest. Having achieved that lawful goal, the

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423. *See supra* text accompanying notes 157, 172-75.

424. *See supra* text accompanying notes 167-75, 195-96.

425. The Sandinistas, however, shared equal blame for derailing the September 1984 round of Contradora talks by intransigently accepting the Group's draft treaty as a final document, and by subsequently refusing to discuss any modifications of this treaty. *See supra* text accompanying notes 205-10. Because Nicaraguan conduct did not qualify as an armed attack on El Salvador, Sandinista intransigence at the negotiating table, nonetheless, did not entitle the Reagan Administration to resort to force.

426. *See supra* text accompanying note 175.

427. *See supra* text accompanying notes 210-12.

428. *See supra* text accompanying notes 230-34.

429. *See* Gutman, *supra* note 1, at 23.

430. *See supra* text accompanying note 239.

Administration continuously violated international law by eschewing peaceful procedures for dispute resolution in favor of the single-sighted pursuit of a Contra military defeat of the Nicaraguan Government.

Since late 1983, the Reagan Administration also has repeatedly violated the proportionality principle. These violations fall into two categories.

First, the Administration violated this principle by redoubling its support of the Contras after the Sandinistas reduced support to the Salvadoran Rebels. The Contras' mining of Nicaragua's harbors with the CIA's assistance constituted the most palpable example of the Administration's excessive use of force in response to the threat posed by the Sandinistas' reduced support of the Salvadoran Rebels.[431]

Second, the Administration committed a profound violation of this principle by supporting the Contras' efforts to overthrow the Sandinista Government. As noted earlier, the 1984 revelation of the CIA Contra manual prescribing means for overthrowing the Sandinistas and President Reagan's own 1985 admission that his Contra support policy sought to "remove" the Nicaraguan Government in "its present structure" left no doubt about the Reagan Administration's objective in assisting the Contras.[432]

V. CONCLUSION

The complex factual context of the dispute between the Sandinistas and the Reagan Administration underscores the accuracy of the observation that neither of these governments had "clean hands" in the Central American conflict.[433] For its part, Nicaragua intermittently provided the Salvadoran Rebels with substantial aid that greatly facilitated the Rebels' efforts to destabilize the Salvadoran Government, at the cost of countless lives and the virtual destruction of the Salvadoran economy.[434] On the other hand, the Reagan Administration responded to Nicaragua's aggression against El Salvador with coercive measures that progressively exceeded the threat posed by Nicaragua's conduct, prompting the Sandinista Government to militarize Nicaraguan society pervasively at the expense of the Nicaraguan people's civil liberties and their economic

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431. *See supra* text accompanying notes 177-88.

432. *See supra* notes 410-11 and accompanying text.

433. This remark was made by Ronald Scheman, who served as the ranking United States official on the OAS staff from 1975-1983. *See* Scheman, *The Nicaraguan Balance Sheet: A Pragmatic Appraisal*, 8 FLETCHER F. 18, 19 (1984)

434. *See supra* note 419 and accompanying text.

well-being.[435] In short, both states violated international law.

During a number of periods between 1980 and mid-1983, the Sandinistas' aggression against El Salvador did entitle the United States to respond with force in collective self-defense on El Salvador's behalf. The absence of any evidence that El Salvador ever requested assistance during this period nonetheless raises disturbing questions about United States compliance with the Rio Treaty requirement that no state party may employ force in collective self-defense until receipt of a request from the state directly attacked. Even assuming that the Reagan Administration did receive a Salvadoran request for aid, the Administration abused the right to use force against Nicaragua by employing coercive measures to the exclusion of all other means, particularly when the Sandinistas offered several opportunities for a negotiated settlement. Finally, the evidence inescapably suggests that, despite the availability of considerably less drastic means of dealing with Nicaraguan conduct, the Administration either actively encouraged or tacitly accepted the Contras' goal of overthrowing the Sandinista Government. This evidence casts profound doubt upon whether the United States complied with the principle of proportionality.

While the actions that the Administration took against the Sandinistas from 1980 until mid-1983 had at least a colorable claim to legality, the actions it took thereafter were indefensible under international law. By October 1983, the United States armed coercion against the Sandinista Government had achieved the Administration's lawful end of reducing the threat that the Sandinista government was posing to El Salvador. Rather than correspondingly reducing the United States-sponsored military pressure exerted by the Contras and vigorously pursuing negotiations, however, the Administration intensified its support of the Contras and eschewed peaceful procedures to resolve its dispute with Nicaragua. These actions violated the customary international legal constraints of resort to peaceful procedures, necessity, and proportionality with which any legitimate exercise of collective self-defense must conform, and violated the United States Rio Treaty obligation to obtain OAS approval of coercive measures not taken in response to an armed attack. The Reagan

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435. *See, e.g.*, R. GUTMAN, *supra* note 15, at 189, 233-34, 299-303, 334; *Tracking the Arms Pipeline*, TIME, Aug. 20, 1984, at 41; *Nicaraguans Polarized for Limited Elections*, The Blade (Toledo), Sept. 2, 1984, § 3, at 3, col. 1; Wall St. J., Aug. 10, 1984, at 25, col. 3. Moreover, the United States-sponsored Contras compounded the Nicaraguan people's plight by intermittantly committing profound human rights abuses. *See* R. GUTMAN, *supra* note 15, at 154-55, 285-86. *See generally* R. BRODY, *supra* note 76 (discussing Contras' human rights violations).

Administration's failure to observe these constraints turned the United States into another aggressor in the Central American conflict.